LORD MACKENZIE—I concur.

LORD SKERRINGTON, who had been absent at the hearing but was present at the advising, gave no opinion.

The Court affirmed the determination of the Commissioners.

Counsel for Appellant—Christie, K.C.—A. M. Mackay. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Respondent—Blackburn, K.C.—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

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*Saturday, December 4.*

## FIRST DIVISION.

[Sheriff Court at Hamilton.

## MIKUTA *v.* WILLIAM BAIRD & COMPANY, LIMITED.

*Master and Servant—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *Schedule ii* (7)—*Expenses—Tender.*

In an arbitration under the Workmen's Compensation Act 1906, after proof was ordered the employers lodged a minute admitting liability in respect of the accident, and tendering £14, 10s. as compensation in respect of the incapacity, which they stated ceased on 10th July 1915, but not mentioning expenses. A proof was proceeded with, and the arbitrator awarded compensation at £1 per week for twelve weeks and 12s. 6d. per week for three weeks down to 10th July 1915 (£13, 17s. 6d. in all), and ended the compensation as from that date. He found the employers entitled to their expenses since the lodging of the minute. *Held* (*diss.* Lord Skerrington) that the arbitrator was entitled to make the award of expenses referred to.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), as applied to Scotland, enacts, Schedule ii (7)—"The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the . . . Sheriff."

Joseph Mikuta, miner, 46 Baird's Rows, Stonefield, Blantyre, *appellant*, having claimed compensation under the Workmen's Compensation Act 1906 in the Sheriff Court at Hamilton against William Baird & Company, Limited, coalmasters, 168 West George Street, Glasgow, *respondents*, the Sheriff-Substitute (SHENNAN) on 29th July 1915 awarded compensation, found the employers entitled to the expenses incurred since the lodging of a minute by them, and at the request of the workman stated a Case for appeal.

The Case stated—"1. The appellant was a miner, and on 29th March 1915, and for some time previously, he worked in the respondents' employment at their Craighead Colliery. 2. On said 29th March 1915 the appellant, in the course of his work in said colliery, received injuries to his right leg by a fall of debris from the roof. 3. In consequence of said injuries the appellant was totally incapacitated down to 19th June 1815, and thereafter partially incapacitated till 10th July 1915, at which date his incapacity ceased. 4. On 20th July 1915 the respondents lodged a minute in the following terms—'Craig, for the defenders, intimated that they admitted liability in respect of pursuer's said accident, and tendered payment of the sum of £14, 10s., being the compensation due to pursuer in respect of his incapacity following thereon, the period of which did not extend beyond 10th July 1915.' 5. The appellant's average weekly earnings prior to the accident were 45s. 4d.

"On 29th July 1915 I issued my award, finding the appellant entitled to £1 per week from and after 29th March 1915 to 19th June 1915, and thereafter to 12s. 6d. per week to 10th July 1915, at which date I declared the compensation ended. I found the appellant entitled to expenses down to the lodging of respondents' minute on 20th July 1915, and I found the respondents entitled to expenses thereafter—in both cases on the lower scale. The amount tendered as compensation exceeded the amount actually awarded, and the expense of proof was caused by the appellant's refusal of the tender."

The *question of law* for the opinion of the Court was—"On the foregoing facts was I entitled to award expenses to the respondents subsequent to the date of lodging their minute of tender?"

The Sheriff-Substitute added a *note* in the following terms—"The only question of law raised was as to the effect of the defenders' minute of 20th July 1915, admitting liability down to 10th July 1915, and tendering £14, 10s. of compensation. Strictly speaking, I agree that the tender ought to have been of so many weeks' compensation at a certain rate. But in fact the sum of £14, 10s. is rather more than I have awarded. No difficulty arises because of the minute making no reference to expenses. The tender is not one of a lump sum to cover all liability. The £14, 10s. is explicitly described as compensation. If the workman had accepted it he would of necessity have been allowed expenses down to the date of tender, just in the same way as if the tender of compensation had been stated in the defences. Indeed, the minute may be regarded as an amendment of the defences. Accordingly, as the expense of the proof was caused by the workman refusing to accept the employers' offer, the proper course is to allow him expenses to the date of tender, and to award expenses thereafter to the employers."

Argued for the appellant — Expenses were in the discretion of the arbitrator—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule ii (7). He must exercise a judicial discretion with regard to expenses, and, if not, his finding might be reversed—*Evans* v. *Gwauncaegurwen Colliery Company, Limited*, 1912, 5 B.W.C.C. 441; Workmen's Compensation Act 1906, Elliot (7th ed.), at pp. 433-435 and p. 588.

Here a judicial discretion had not been exercised, for the tender not having included expenses might be ignored by the appellant —*Gunn* v. *Hunter*, 1886, 13 R. 573, 23 S.L.R. 395.

Argued for the respondents—The technical rules of ordinary judicial procedure did not apply to the peculiar statutory arbitration procedure of the Workmen's Compensation Act 1906. *Gunn* v. *Hunter* (*cit.*) did not apply. In England the rule as to tenders in ordinary actions was the same as in Scotland—the Law of Tender, Harris, at p. 75—but it was not applied to arbitrations under this Act—the Consolidated Workmen's Compensation Rules, Nos. 19 (7) and (8), 61, and 76 (5), quoted in Elliot (*op. cit.*) at pp. 519, 541, and 549. In an arbitration the arbiter was final unless he acted corruptly, capriciously, or contrary to law. He had not so acted here — *Thomas* v. *Cory Brothers & Company, Limited*, 1911, 5 B.W.C.C. 5; *Hillin* v. *Walker*, 1867, 5 Macph. 969, 4 S.L.R. 160. In any event the minute included expenses by implication.

LORD PRESIDENT—We must keep steadily in view that the proceedings raised by a workman against his employers to recover compensation under the recent statute are arbitration proceedings and not actions at law, aud that by the express terms of the statute the question of expenses is left entirely within the discretion of the arbitrator.

The question before us is whether on the facts found to have been proved by the arbitrator he dealt rightly with the question of expenses when he awarded the workman his expenses up to a certain date and from that date awarded expenses against him. Now I cannot find in the statement of facts any fact which would warrant me in coming to the conclusion that the arbitrator had acted capriciously, arbitrarily, oppressively, or unjustly. Nor can I discover that any question of law is raised, for it appears that before the proof which was allowed in order that the case might be investigated the employers offered, as it so chanced, in a minute but it might have been verbally, not only to acknowledge liability under the statute, but offered payment of a sum of £14, 10s., which as it turned out was larger than the amount which the arbitrator ultimately awarded.

Under these circumstances the arbitrator, exercising, as I think, his discretion, came to the conclusion that the workman, whom he found had completely recovered ten days before the offer was made, was entitled to have his expenses down to the date when the offer was made, and found him liable in expenses subsequent to the date of the offer.

Now it is said that the offer was not a judicial tender. Neither was it, neither could it be. There cannot be a judicial tender except in a lawsuit, and this was not a lawsuit. Undeniably the rule of process is finally fixed that a judicial tender must be accompanied with an offer of expenses to date, otherwise it is of no avail. But in this case, as I read this offer made in this arbitration, it was a sum of money down and expenses left in the discretion of the arbitrator. And I ask why not? The arbitrator, it is said, exercised his discretion not judicially but illegally, because he says that "if the workman had accepted this offer he would of necessity have been allowed expenses down to the date of the tender or offer, just as if the offer had been stated in the defences." As I read that sentence it does not mean that in all cases and under all circumstances an offer would carry expenses to the workman down to date, but that in the circumstances of this case as fully disclosed to and known by the arbitrator he would have given this workman his expenses. These circumstances were, of course, known to the appellant at the date when the offer was made. And indeed I do not see that if the arbitrator had denied the appellant expenses the inference might not have been that he had not acted judicially in the sense explained in the English decisions brought under our notice.

All the facts found in this case seem to me to show that the arbitrator in exercising his discretion did act judicially as arbitrator between the parties, and accordingly that the question put to us ought to be answered in the affirmative.

LORD MACKENZIE — I am of the same opinion. I see nothing in this case to warrant one in reaching the conclusion that the arbitrator did not exercise a judicial discretion in dealing with expenses in the way he did, and therefore if I did not agree with his conclusion I should not feel warranted in interfering with it. What was the view that he took? Before the proof the workman was offered £14, 10s. He did not accept that but went on with the proof, and he got less. Therefore the money spent on the proof was money entirely wasted. Why should the employers pay that? The arbitrator took, it seems to me, a sensible view of the case.

LORD SKERRINGTON—I regret that I cannot concur with your Lordships, because I think that in this case substantial injustice has been done to the workman, and that in deciding as he did the learned arbitrator committed an error in determining a question of law within the meaning of the 2nd Schedule, paragraph 7, of the Workmen's Compensation Act. In the circumstances the arbitrator might as a matter of discretion have awarded no expenses to the pursuer, although the pursuer was successful in establishing his claim for compensation, because he was unsuccessful in proving that the incapacity was of a continuous character.

Where I disagree with your Lordships is in thinking that the arbitrator was entitled to find the employers entitled to expenses. According to my view the arbitrator misapprehended the meaning of the tender, and erroneously treated the defenders exactly as if they had admitted liability for and had tendered expenses to the date of the tender.

I am far from suggesting that in arbitrations under this Act of Parliament the technical rules of the Court of Session are impliedly imported, and that the arbitra-

tor's duty is to observe those rules. But the law as to tender depends on considerations of substantial justice. The tender in this case was silent as to expenses. Accordingly, both on principle and on authority, it must be read as if it had expressly stated that the tenderer did not admit liability for expenses, but, on the contrary, left the question of expenses to be decided by the arbitrator according to his discretion but without a proof.

The question therefore is whether that was a tender which the workman was bound to accept under the penalty of being found liable to the employers in the expenses subsequently incurred. I think that even if there had been no question on the merits between the parties the pursuer would have been entitled to say that he objected to the question whether he was to get his expenses down to the date of the tender being decided by the arbitrator upon a partial view of the facts and without inquiry, and that the pursuer's solicitor would have acted according to his duty if he had said that he rejected the tender, and insisted on examining his client in Court for the purpose of showing that he was entitled to the thing which the defenders denied him, namely, expenses up to the date of the tender.

What has the arbitrator done? On the 29th July, after a proof had been led which made it clear among other things that the workman was entitled to his expenses down to the date of tender, and that the employers were wrong in disputing his right to those expenses, the arbitrator found the workman liable in the subsequent expenses for the following reason as explained in the note to his award—"If the workman had accepted it, he would of necessity have been allowed expenses down to the date of tender." No such necessity existed. *Prima facie*, no doubt, the workman would have been entitled to an award of expenses from the arbitrator up to the date when the employers judicially admitted their liability to pay compensation; but if the workman had accepted the tender it would have been open to the employers to ask the arbitrator to award no expenses in respect of some unreasonable conduct on the part of the workman—for example, in refusing an extrajudicial offer which he ought to have accepted. If the employers desired their tender to be construed as necessarily entitling the workman to expenses down to its date, they ought in fairness to the workman to have stated this in their tender, and not to have reserved to themselves the right to maintain the very opposite in the event of the tender being accepted.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—Crabb Watt, K.C.—Cooper. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Horne, K.C. —Walker. Agents—W. & J. Burness, W.S.

*Tuesday, December 7.*

## SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

## RALSTON *v.* DENNISTOUN SAUSAGE WORKS.

*Expenses—Printing—Motion to Dispense with Printing.*

A litigant who is ultimately successful and gets a decree for expenses is not entitled to recover from his opponent the expense of a motion to dispense with printing.

Robert Ralston, auctioneer's porter, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against the Dennistoun Sausage Works, Glasgow, *defenders*, to recover damages for personal injury. The Sheriff-Substitute (CRAIGIE) having assoilzied the defenders, and the Sheriff (MILLAR) on appeal having adhered, the pursuer appealed to the Court of Session and applied for and obtained leave to dispense with printing. The pursuer was ultimately successful and the Auditor at the taxation of his account allowed certain items in connection with the motion to dispense with printing. The defenders presented a note of objections to the allowance of these items.

At the calling of the case in Single Bills, counsel for the pursuer cited the case of *Barron* v. *Black*, 1908, 16 S.L.T. 180.

LORD JUSTICE-CLERK—This is admittedly a point which has not been disposed of before. There is no precedent for taking the course which the Auditor has taken, and in my view we should not make a precedent. If a litigant finds himself in such circumstances as to apply to the Court for the indulgence of being excused from printing, he must make the motion at his own cost and charges and must not debit his opponent with them. Therefore this objection should be sustained.

LORD DUNDAS—I agree. I think these expenses represent a step which was not truly a necessity but was of the nature of a privilege, and I do not think the other side should bear the expense.

LORD SALVESEN—I am of the same opinion.

LORD GUTHRIE—So am I.

The Court sustained the objection.

Counsel for the Pursuer — Dunbar. Agents—Ross & Ross, S.S.C.

Counsel for the Defenders — Lippe. Agents — Martin, Milligan, & Macdonald, W.S.