Wednesday, January 30.

SECOND DIVISION.

[Sheriff Court at Dunfermline.

FIFE COAL COMPANY *v.* FEENEY.

Workmen's Compensation — Expenses — Discretion of Arbitrator — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Sched.* (7).

The discretion as to the expenses of an arbitration under the Workmen's Compensation Act 1906, conferred upon the arbitrator by the Second Schedule (7) of that Act, must be exercised judicially, and consequently the arbitrator should follow the general rule of awarding expenses to the successful party in the application unless there are facts found which he considers justify a deviation from the rule.

Circumstances in which the Court found, in the absence of any facts being set forth in the stated case as justifying a deviation from the general rule, that the arbitrator was not entitled to find no expenses due to or by either party, the applicant having been entirely successful.

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

In an arbitration under the Workmen's Compensation Act 1906 in the Sheriff Court at Dunfermline the Fife Coal Company, Limited, Leven, *appellants*, craved review of the weekly payment of compensation being made to Peter Feeney, drawer, 5 Preston Crescent, Valleyfield, *respondent*, in respect of an accident sustained by the latter arising out of and in the course of his employment. The appellants asked that it should be found that the respondent's incapacity came to an end on 24th February 1917, and that his right to compensation should be ended as at that date, and that the respondent should be found liable in expenses.

On 15th October 1917 the Sheriff-Substitute (UMPHERSTON) ended the respondent's right to compensation, and found no expenses due to or by either party, and at the request of the appellants stated a Case for appeal on the question of expenses.

The Case stated—"1. On 4th January 1917 the respondent sustained personal injury by accident arising out of and in the course of his employment with the appellants at their Valleyfield Colliery. He was totally incapacitated thereby. 2. At the time of the accident respondent was earning a weekly wage of 40s. 6d. The appellants admitted liability, and paid compensation at 20s. per week up to Saturday 24th February 1917. 3. On Monday, 26th February 1917, the respondent resumed work with the appellants, and since that date had been earning an average weekly wage equal to that which he was making prior to the accident.

"The appellants (pursuers) stated in condescendence 5 of their initial writ—'Pursuers on 29th May 1917, through their agent Mr J. M. Davidson, solicitor, Dunfermline, requested defender, through Mr James Robertson, compensation secretary of the Fife and Kinross Miners' Association, to enter into an agreement with them that his incapacity resulting from said accident came to an end at or prior to 24th February 1917, and that he is not entitled to further compensation in respect thereof. By letter from the said Mr James Robertson, of date 11th June 1917, defender refused to enter into said agreement upon the ground that he is not yet recovered from said injury, and the present application has accordingly been rendered necessary.'

"The respondent (defender) stated in answer 5—'Admitted that pursuers on 29th May 1917 requested defender to acknowledge or agree that he was not entitled to further compensation in respect of his accident, and that the defender on 11th June declined to do so. Explained that the defender was thereafter asked by the pursuers to submit to medical examination, and he was examined by a doctor on behalf of the pursuers on 18th June 1917. After that date no further communication was sent by pursuers to defender or his agents until the service of the writ in this action. Denied that the present action is necessary. Explained that since 26th February 1917 defender has made no claim for compensation against pursuers. Defender is willing and hereby consents to an award terminating his right to compensation as at 24th February 1917.' . . .

"The initial writ was presented in Court, and warrant to cite was granted on 12th July 1917.

"After hearing the agents for the parties on the matter of expenses, I on 15th October 1917 ended the respondent's right to compensation as craved, and *found* no expenses due to or by either party."

The *questions of law* were—"1. On the foregoing facts was I entitled to find no expenses due to or by either party? 2. On the foregoing facts was I bound to award expenses to pursuers?"

This *Note* was appended—"Having considered the opinion I expressed in *Fife Coal Company, Limited* v. *Burden* on 20th February last, I think this case and the two which were debated along with it are in the same position, and I see no reason to change the rule which I then laid down for my own guidance.

"2. *Note by Sheriff-Substitute Umpherston i.c. The Fife Coal Company, Limited* v. *David Burden referred to.*

Note.—"Three different cases have arisen during recent weeks in which employers have made application to have a workman's compensation ended, have been successful, and have asked for an award of expenses against the workman. In the first case the application was opposed by the workman and I awarded expenses. In the second case the application followed on a remit to the medical referee who certified that the workman was no longer incapacitated; the workman did not oppose the crave of the application, and I refused to find him liable in expenses. This is the third case. The workman has

resumed work and for seventeen weeks has been earning more than he did before the accident. At the first calling of the application his agent admitted that he had recovered and assented to the compensation being terminated as craved.

"If there had been no appearance for the workman I could not have terminated the compensation *de plano*. A proof would have been necessary, because this is an arbitration and not an action at law. In these circumstances the question of expenses might have assumed a different aspect.

"The motion for an award of expenses was pressed on the ground that the workman had been repeatedly asked to 'sign off' or to grant an acknowledgment that his incapacity had come to an end. This statement by the employers was also admitted on behalf of the workman.

"The statute provides, s. 1 (3), that if any question arises in the course of the proceedings, it is, if not settled by agreement, to be settled by arbitration. And by Schedule 1 (16) any weekly payment may be reviewed, and on such review may be ended, diminished, or increased, and the amount of payment shall, in default of agreement, be settled by arbitration. These are the only provisions, apart from the power given to award expenses, which seem to me to be relevant to the present question.

"Now a refusal on the part of a workman to give a written discharge in the circumstances of this case may be churlish and unreasonable. And the employers may be wise in their own interests in refusing to accept a verbal agreement. But nowhere in the Act can I find any obligation on the workman to grant such an acknowledgment as was asked. He is entitled to say 'I will make no agreement.' And if on the application being brought into Court he appears and says 'I cannot resist the crave, I admit I have "recovered,"' it does not seem to me that his conduct is necessarily so obstructing that he ought to be mulcted in expenses. Otherwise it is not difficult to figure cases in which a real feeling of the coercion to 'sign off' might be the result.

"I am fully conscious that as the awarding of expenses is a matter of discretion, the practice in such cases may vary in different sheriffdoms. But I was not informed as to any other practice or the reasons for it, if other practice does exist. My reasons have been stated on a consideration of the policy previsaged by the Act of Parliament as I understand it; and I have stated them at length in order that the practice in this sheriffdom may be uniform in future."

Argued for the appellants—A condition-precedent to an arbitration was that parties should have failed to agree. Accordingly the losing party having been responsible for the expense of an arbitration ought to bear the burden of it. An arbitrator ought to exercise his discretion as to expenses judicially, and if he failed to do so his order would not be allowed to stand—Adshead Elliot on Workmen's Compensation (7th ed), p. 434, and cases there cited. In the present case the learned arbitrator in his discretion was not entitled to give no expenses to or by either party as he had given no good reason for pursuing this course. The first question of law ought to be answered in the negative and the second question in the affirmative. Counsel referred to *Mikuta* v. *Baird & Company*, 1916 S.C. 194, 53 S.L.R. 160; *Higgins* v. *Higgins & Company*, [1916] 1 K.B. 640, *per* Bankes, L.J.; *Derbishire* v. *Hetherington & Sons*, 7 B.W.C.C. 677.

Argued for the respondent — The first question of law ought to be answered in the affirmative and the second question in the negative. Although the case as stated did not contain any findings in fact, the arbitrator had set forth certain facts contained in condescendence 5 of the pursuers' initial writ and in the answers thereto, which had been admitted by both parties at the Bar. The argument presented by the appellants did not fit these facts at all. With these facts as his materials the arbitrator was quite entitled to exercise his discretion by allowing no expenses. The case of the *Fife Coal Company* v. *Burden*, referred to in the arbitrator's note, only differed from the present one inasmuch as in that case there had been no request for a medical examination of the injured employee.

LORD JUSTICE-CLERK—This case has been argued as if it raised a general question. In my opinion the facts stated are not sufficient to raise any general question. I am not able to extract from the arbitrator's note what the rule is that he is said to have laid down. As at present advised it seems to me it would be almost impossible to devise any rule which would be of general application in determining whether expenses were to be given on one side or the other in applications under the Workmen's Compensation Act, because the arbitrator must exercise his discretion in view of the particular facts of each individual case.

But then the question as put to us is—On the foregoing facts was I entitled to find no expenses due to or by either party? The facts are that there was certain correspondence in which the employers asked the workman's agent whether he would agree that his incapacity from the accident came to an end on a specified date and that he was not entitled to further compensation. The reply was that the workman took up the position that he had not yet recovered from his injury and could not see his way to agree that his right to compensation was at an end. Thereupon the employers asked that the workman should submit to medical examination.

It is said in the answers, which are quoted in the Stated Case, that the workman was examined. I think that was admitted; but there is no statement in the case that the result of the examination was communicated to him except in so far as can be derived from this fact that it was averred in the respondent's answers that after the date of the examination (18th June) no further communication was sent by the

pursuers to the defender or his agents until the service of the writ in this action. What took place was — the writ being served, decree was granted exactly as the applicants desired, the defender having stated in his answers that he was "willing and hereby consents to an award terminating his right to compensation." It should be the aim of all parties to avoid expense in connection with such claims, and I think there should have been no legal proceedings at all in this case.

The result therefore is that, on the facts as stated, the applicants got exactly the remedy they asked. There are no other facts stated which tend to explain as to why the arbitrator refused what seems naturally to follow, namely, that the successful litigant should get his expenses, except so far as we can extract from the opinion that the arbitrator has laid down some rule for his own guidance. We are asked whether on the foregoing facts he was entitled to find no expenses due to or by either party. The only material foregoing facts, it seems to me, are that the appellants made a demand, that they had previously asked whether the workman admitted that he had recovered, and he answered that he had not recovered and could not see his way to agree that his compensation was at an end. Therefore it appears to me that we have a case here where an application is quite properly made for the purpose set out in the prayer of the application; that the prayer was granted although the workman had refused to agree to that before the application was made; and that accordingly the applicant was completely successful.

It may have been that there were circumstances which would have deprived the applicant, though successful, of his expenses. But in my judgment these should have been set out in order to justify that result. They are not set out, and therefore on the foregoing facts I think the arbitrator was not entitled to find no expenses due to or by either party, but that, on the contrary, on the facts as stated, the applicants ought to have received their expenses.

I do not think this is a case that requires us to lay down any general rule at all. I decide the case upon the specific facts stated in this case, and on these specific facts alone, and I express no further opinion except, as I have already indicated, that I think it would be very difficult for any arbitrator to lay down any general rule on the question of expenses which would apply to all cases brought before him.

LORD DUNDAS—Whatever may have been the intention of parties, I think it is plain that this case has not been framed and stated so as to raise any question of general interest or importance, such as that to which the bulk of the argument of the learned counsel was directed.

It would, in my judgment, be most regrettable if any arbitrator should lay down general rules about expenses which should supersede the exercise of his discretion in each particular case that came before him. If that were done it would appear to me, as at present advised, to be a thing which for my own part I should endeavour to put a stop to.

But whether any such rules had been framed by the learned arbitrator here or what they are I do not know; still less do I know how he applied them or intended to apply them. Therefore I think there is no general question here to be considered or decided.

As to the answers to the particular questions here, I had some doubts as to whether the facts were sufficiently before us to enable us to answer them directly. But I assent to the answer which your Lordship has proposed.

LORD SALVESEN — The question of expenses in an arbitration as in any other legal proceeding is to a certain extent in the discretion of the judge before whom the proceedings depend. He must exercise that discretion judicially, and he must have materials upon which, if he does not follow the usual course of awarding expenses to the successful party, he can take any other line of action.

If all that appears is that the one party was entirely successful in the proceedings which he initiated, then the arbitrator ought I think always to grant expenses to that party, unless there was something in his conduct to disentitle him to expenses, or unless there is some other ground which is capable of statement which rendered a departure from the ordinary rule desirable. If there is a proper exercise of judicial discretion in the matter of expenses the Court will not consider whether they would have exercised the discretion in the same way as the arbitrator. They may think that he had wrongly exercised his discretion, but if there were materials upon which to exercise a discretion and he has come to a given result the Court will not interfere so long as they see that he has really applied his mind judicially to that matter.

Now in this case it appears to me that the facts as stated do not furnish any materials for the exercise of a judicial discretion. I assume that the arbitrator has told us all the facts that he thought material. These are—That an accident having occurred to a workman, by which he was disabled for a short time, six months later, after the workman had been in receipt of full wages for nearly the whole of that period, the employers through their agents wrote asking him whether he would agree that his right to compensation had ceased. They received a letter from the agent of the workman saying that he had not recovered from his injury and could not see his way to agree that compensation should be at an end. There follows a letter asking, in view of the statement that he had not recovered, that he should submit himself to a medical gentleman chosen by the employers for examination. And that is all that the arbitrator states. He cannot have regarded it as important whether the examination took place or not, or whether the result of the examination was communicated to the

workman or not. He does not seem to have asked the parties for an admission or a statement of their views on that subject.

Now these being the facts I think there were no materials on which the arbitrator could exercise a judicial discretion by refusing the successful parties their expenses. But the arbitrator has really afforded us the key to his decision, because he says in his note that he sees no reason to deviate from the rule which he has laid down for his own guidance in a previous case. And when the note in that case is examined it discloses that the general rule upon which he will act is that if there is nothing more in a case than that a workman has been asked, and has refused to agree that his compensation be ended, and an application is thereafter brought, and the workman, when it is brought, says he cannot resist decree being granted, under these circumstances, which must be very frequent, the arbitrator will not grant expenses to the employer. I think that is the rule which he applied here, and that explains apparently why he did not think it necessary to apply his mind judicially to the question of expenses as between the parties to this particular case.

I can only say that I entirely agree with what your Lordships have indicated—that the question of expenses is a question that the judge must determine upon the facts of each case, and that he is not entitled to lay down any rule for his own guidance, or for the guidance of parties who may be litigating before him, of the nature of the rule above expressed. Where a party has been completely successful an arbiter ought always to award expenses unless he has some materials before him upon which he can judicially pronounce that in his opinion the usual rule should not be followed.

LORD GUTHRIE — The appellants maintained that the case raised a very important general question. I do not think it raises any general question. They said that the arbitrator in disposing of expenses had proceeded upon the rule that where a workman refuses to agree that he is not entitled to further compensation, and in an application by the employers under the First Schedule, paragraph (16), admits that the compensation must be ended, the arbitrator is not entitled in any circumstances to award expenses against the workman. I am unable to say whether the arbitrator proceeded upon any such rule. He certainly does not say so in the Stated Case, and in the note, while there are passages consistent with that view, there are other passages which I cannot reconcile with it. But it is enough to say that if the arbitrator did act on any such rule the respondent did not attempt to justify such a rule.

If the arbitrator had before him, and proceeded on the fact, which was not denied at the Bar, that although a medical report was obtained it was not communicated to the respondent, but after the lapse of about a month the appellants launched their application without further notice, then I should not have interfered with his discretion. But that fact is not stated in the case, and we therefore cannot consider it.

The Court answered the first question of law in the negative and the second question in the affirmative.

Counsel for Appellants—Sandeman, K.C. —Macgregor Mitchell. Agents—Wallace & Begg, W.S.

Counsel for Respondent—Watt, K.C.—Wilton. Agents — Macbeth, MacBain, Currie, & Company, S.S.C.

Wednesday, January 30.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

FIFE COAL COMPANY, LIMITED *v.* DINGWALL.

Master and Servant—Workmen's Compensation — Review — Award — Suspensory Award — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (15) (16).

A workman, having been incapacitated by an accident arising out of and in the course of his employment, was paid compensation by his employers. On resuming work he earned a wage at least as high as the wage he was making prior to the accident. His employers ceased paying compensation, and subsequently applied for an order finding that the workman's right to compensation had come to an end, but before the case was heard the parties agreed to a remit under the Workmen's Compensation Act 1906, First Schedule (15), to a medical referee to decide whether there was any chance of the workman's incapacity recurring. The medical referee having found that although the workman was able to work there was a risk of his incapacity recurring, the arbitrator, refusing the employers' crave for a suspensory award, dismissed the application. *Held* that the arbitrator should have followed *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242, and granted a suspensory award.

In an application under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) by the Fife Coal Company, Limited, Leven, *appellants*, for review of the weekly payments made by them to James Dingwall, miner, 11 Lady Wynd, Buckhaven, *respondent*, and for a finding that his right to compensation had come to an end as at February 12, 1917, in respect that the respondent's incapacity for work had ceased, the Sheriff-Substitute at Kirkcaldy (ARMOUR HANNAY), sitting as arbitrator, dismissed the application, and at the request of the appellants stated a Case for appeal.

The Case stated — "Appellants averred that on 27th January 1917 respondent sustained injury to his right arm by accident arising out of and in course of his employment with them; that he was inca-