*Saturday, July* 19.

## FIRST DIVISION.

[Sheriff Court at Lanark.

## PARK *v.* COLTNESS IRON COMPANY, LIMITED.

*Master and Servant—Sheriff—Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *Second Schedule, sec.* 17 (*b*)—*Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 50, *and First Schedule—C.A.S., L, xiii,* 17 (*g*)—*Power of Sheriff to Take Further Evidence on Remit to Amend Stated Case.*

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, after hearing proof, refused compensation to an injured workman on the ground that he had failed to give timeous notice of the accident. The workman having appealed by way of stated case, the Court after consideration thereof remitted to the arbitrator to find whether notice of the accident had been given as soon as practicable. The arbitrator thereupon re-examined the doctor who had attended the appellant during the illness caused by the accident, and thereafter reported to the Court that notice must be held to have been given as soon as practicable. The appellant having moved the Court to dispose of the case on the stated case and the arbitrator's report, the respondents opposed the motion on the ground that the report was vitiated in respect that it proceeded upon evidence which had been led after the proof was closed.

*Held* that it was competent for the arbitrator to hear further proof, and the objection *repelled.*

*Observed* by the Lord President—"I think it is perfectly clear that the rules with regard to proof appended to the Sheriff Courts Act are rules for regulating procedure in the ordinary Court and have no application to summary causes."

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Sched., sec. 17 (6), enacts—"Any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876, [now section 50 of the Act of 1907 *infra*] . . . subject to the declaration that it shall be competent to either party . . . to require the Sheriff to state a Case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same and remit to the Sheriff with instruction as to the judgment to be pronounced."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 50, enacts—"In summary applications . . . the Sheriff shall appoint the application to be heard at a diet to be fixed by him, and at that or any subsequent diet (without record of evidence unless the Sheriff shall order a record) shall summarily dispose of the matter and give his judgment in writing. . . . Provided also that nothing contained in this Act shall affect any right of appeal provided by any Act of Parliament under which a summary application is brought." The First Schedule gives "Rules for Regulating Procedure in the Ordinary Court."

The Codifying Act of Sederunt, L, xiii, 17 (*g*) enacts—"The Court shall have power when determining a case to make such order arising out of the answer . . . given by them to the question put as they shall think necessary. . . . They may also, before giving their determination, send back the case to the Sheriff for amendment."

Robert Park, oncostman, 30 Houldsworth Street, Douglas Water, *appellant,* claimed compensation under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) from the Coltness Iron Company, Limited, coalmasters, Ponfeigh Colliery, Ponfeigh, by Lanark, *respondents.* The Sheriff-Substitute (SCOTT-MONCRIEFF), after a proof, refused compensation, on the ground that the respondents had been prejudiced in their defence by the delay in giving notice of the accident, the delay not having been occasioned by mistake or other reasonable cause, and stated a Case for appeal.

The Case, after stating the facts, for which see the immediately following opinion of the Lord President, set forth the following *questions of law*—"1. In the circumstances above stated was there evidence upon which I was entitled to find that the respondents were prejudiced in their defence so as to bar the appellant from recovering compensation? 2. In the circumstances stated should I have refused compensation to the appellant?"

The Court on 10th June 1913, after hearing counsel for the parties on the case as stated, pronounced the following interlocutor—"Remit to the Sheriff-Substitute as arbitrator to find whether the statutory notice was given by the appellant as soon as practicable and to report," and pronounced these opinions—

LORD PRESIDENT—This is a stated case under the Workmen's Compensation Act, and the facts that give rise to it are these:—On 12th November 1912 the appellant while engaged in repairing the shaft of a colliery met with a slight accident to his leg in consequence of a wooden platform falling upon it, causing merely an abrasion of the skin. The injury, as is found by the Sheriff-Substitute, appeared so trivial that the appellant made no formal report of it at the time. He continued at his work until 15th November, when he fell ill and was incapacitated from work until 6th January 1913. The doctor was called in to attend him on 18th November, that is three days after he fell ill. He found the appellant suffering from erysipelas, which three days after his first visit on 18th November the doctor was able to attribute to the said injury. Then

the learned Sheriff-Substitute goes on to find, in his fifth finding, "That the appellant's condition shortly after ceasing work was such as to preclude him from personally attending to his affairs or giving notice of his accident." On 30th November the appellant's father spoke to the manager about his son's illness, and obtained a form of application for compensation which was filled up on 2nd December and sent to the respondents. The learned Sheriff-Substitute then goes on to say that the medical evidence was to the effect that upon 2nd December, the earliest date upon which the respondents could have examined the appellant, it would have been impossible to say from such examination that his condition was attributable to the accident. He then finds that the appellant's delay in not giving notice was not occasioned by mistake or other reasonable cause. He goes on to say: "I found in law that the respondents had been prejudiced in their defence by the appellant's delay in giving notice of the accident, which delay was not occasioned by mistake or other reasonable cause, and accordingly refused the appellant's claim for compensation." The questions of law which he puts to the Court are:— . . . [*quotes*] . . .

This case is I am afraid one of those cases that must go back to the Sheriff-Substitute, because the case as stated leaves me in this position, that I cannot be sure as to whether the learned Sheriff-Substitute has really applied his mind to the whole questions which necessarily arise under the Act. If he has, I do not think it is a case where we could possibly overturn his decision. But I would like to make that a little clearer, and first of all by examining what the Act provides. The section which deals with the matter is section 2, and section 2 enacts that "Proceedings for the recovery under this Act of compensation for injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment." Then there is a proviso that the want of or any defect in such notice shall not be a bar if it is found—I am leaving out words—"that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause." Your Lordships will see that the peculiarity of the Sheriff-Substitute's decision here is that he has given a finding that the delay was not occasioned by mistake or other reasonable cause, but he has made no pronouncement as to whether the notice was given as soon as practicable.

What were the facts here? The man was injured by a slight abrasion of the skin but it is admitted that the injury was of such a trivial character that it did not occur to him that anything was wrong, and therefore in those circumstances he had not any duty cast upon him at that time to give notice of the accident. It was not in his contemplation that he was going to claim. Well then he falls ill, and he does not know precisely what is wrong with him. He is ill for three days, from the 15th to the 18th November, probably without knowing what was wrong. He calls in the doctor on the 18th who then tells him that he is suffering from erysipelas, but he did not say any more. But on the 21st, three days after that, the doctor tells him, for the first time, that the erysipelas from which he is suffering is the result of the accident which occurred to him upon the 12th. Now, if one knew no more than that—that he was told that upon the 21st, and that he never gave any notice at all, but that a notice was given on his behalf, although not until the 2nd December, one would be inclined to say that there was evidence on which the Sheriff-Substitute could competently find that the notice had not been given as soon as practicable. But then we do not know whether that is the case, because one's judgment on this matter is obscured by the finding which is put in by the Sheriff-Substitute "That the appellant's condition shortly after ceasing work was such as to preclude him from personally attending to his affairs or giving notice of his accident."

It is quite clear that the giving notice of the accident as soon as practicable is a duty which is cast upon the workman himself, and that that duty cannot be at all affected by what other people did. I do not mean to say that a workman cannot give a perfectly good notice through the medium of other people. But he cannot be condemned because his relatives were not quite as quick as they might have been—he can only be condemned for not being as quick as he might be himself.

I think, therefore, that here the duty to give notice only arose upon 21st November. But then I do not think it would do to send this case back to the Sheriff-Substitute simply to ask him whether on 21st November the workman was in a condition in which he might have given notice or not, because that would seem to determine the question—if for an hour on 21st November after the doctor came, he was in a condition to give notice—that then his failure to do so was a failure to do it as soon as practicable. I do not think that anyone could hold that; but then what shall we say as time goes on? Still, I do not think that I am entitled to say anything upon that, because I think, after all, any question of degree is a question of fact, is a question for the arbiter to decide and not for me. And therefore when I am left in doubt as to when the appellant's condition became such as to preclude him from paying attention to his affairs, after he was told by the doctor of the seriousness of the accident—when I am not told whether there was really sufficient time for him to give notice so as to make it possible for his employers to say that his failure to give notice (for he never gave notice himself) was a failure to give notice as soon as was reasonably practicable—that seems to me to be a question which must be determined by the arbiter and not by myself.

On these grounds, it seems to me that this case ought to go back to the Sheriff-Substitute in order that he should find, as

arbiter, whether notice was here given as soon as practicable. He has given a finding upon the delay not being due to mistake or other reasonable cause, but has given no finding whatsoever as to whether the notice was given as soon as practicable. I hope that, in the light of the observations I have made, he will be able to decide this question. I cannot decide as to whether a day or two days or three days is sufficient. A great deal depends upon what was proved as to the man's particular condition. If by 21st November he was in a condition approaching delirium, I do not suppose that anyone could say that he failed to give notice as soon as was reasonably practicable. On the other hand, if he was quite clear headed and there were several days which elapsed, the decision might be quite the other way. The whole of that is under a mist of obscurity owing to the particular form of finding 5 and to the fact that the Sheriff-Substitute has no pronouncement as to whether he gave notice as soon as practicable.

LORD KINNEAR—I concur.

LORD JOHNSTON—I should have been prepared to go further; but as your Lordships think that the case should go back to the Sheriff-Substitute, I have only to say that in my view one thing is wanting in the Sheriff-Substitute's judgment to enable us to consider whether it is contrary to evidence on the principle with which we deal with these cases. While he tells us that the accident occurred on 12th November, that the appellant left his work on 15th November, that the doctor was called in on 18th November and diagnosed erysipelas, and that, on the 21st, the doctor attributed that erysipelas to injury—that is nine days after the accident, the Sheriff-Substitute then tells us that the man's condition—necessarily from the erysipelas—precluded his acting for himself shortly after the date when he left work, that is, shortly after the 15th. Now, what the Sheriff-Substitute means by "shortly" of course I cannot tell; but I think I should be justified on the statement in assuming that he meant at or about the time when the erysipelas was attributed by the doctor to the injury. If so, I should be prepared to hold that it was contrary to the evidence submitted to the Sheriff-Substitute to come to the conclusion that the delay which on his own showing—and I think he is probably right—has prejudiced the employer, was not attributable to reasonable cause.

Your Lordships think it right to remit the case to him, and I do not dissent.

LORD MACKENZIE—I agree with your Lordship in the chair.

The Sheriff-Substitute, under the remit, re-examined the doctor who had attended the pursuer while he was suffering from the illness which resulted from the accident. Thereafter the Sheriff-Substitute reported to the Court, *inter alia*, as follows—"Having reconsidered the case in respect of the remit to him . . ., and having himself re-examined the doctor who attended the appellant during his illness, finds . . . that notice . . . must be held to have been given as soon as practicable. The re-examination of the doctor was objected to by the agent for the respondents upon the following grounds—(1) That there was no warrant for taking proof, (2) that proof had already been taken and closed, and (3) that the doctor's evidence had already been taken."

The pursuer presented a note to the Court setting forth the remit and the Sheriff-Substitute's report, and concluding with the crave "to dispose of the case on the Stated Case and the arbitrator's report."

The defenders opposed this motion, and argued—The Court did not intend the arbitrator to take additional proof, but to make a further statement of the facts already proved. The effect of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Sched. 17 (*b*), taken along with the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 50, was to provide the same procedure in arbitrations under the Workmen's Compensation Act as in summary applications in the Sheriff Court. Summary applications, and consequently arbitrations, were governed by the rules appended to the Sheriff Courts (Scotland) Act 1907, and these rules, particularly rule 75, recognised the closing of proofs. The general rule applicable to proofs in the Sheriff Court, as to proofs in the Court of Session, was that after a proof had been closed it was incompetent to hear further evidence.

Counsel for the appellant were not called on.

LORD PRESIDENT—In this case I need not repeat what was said at the former advising, when we remitted to the Sheriff-Substitute to find whether the notice was given by the appellants as soon as practicable and to report. The learned Sheriff in order to qualify himself to give that report thought it necessary to re-examine the doctor, and it has been argued to us to-day that that vitiates the report, upon the ground that the proof being closed the Sheriff had no power to hear any further proof in respect of certain rules appended to the Sheriff Courts Act 1907. It is true that section 17 (*b*) of the Second Schedule to the Workmen's Compensation Act 1906 provides that "any application to the Sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section 52 of the Sheriff Courts (Scotland) Act 1876." It is also true that section 50 of the Sheriff Courts Act 1907, which deals with summary applications, is substituted for section 52 of the Act of 1876, and that arbitrations under the Workmen's Compensation Act are accordingly to be dealt with in the same way as summary applications in the Sheriff Court. I think, however, the objection fails for two reasons, either of which would be sufficient for the disposal of the case. In the first place, I think it is perfectly clear that the rules

with regard to proof appended to the Sheriff Courts Act are rules for regulating procedure in the ordinary court and have no application to summary causes, in which no procedure is prescribed, and in which the Sheriff is to order such procedure as he thinks requisite. Accordingly these rules have no application to arbitrations under the Workmen's Compensation Act, which under section 17 (*b*) of the Second Schedule to that Act fall to be treated as summary causes.

There is another reason why this objection is bad. The appeal which is taken here is specifically given by section 17 (*b*) of the Second Schedule to the Workmen's Compensation Act, which allows parties to appeal by way of stated case. Under section 17 (*g*) of the Act of Sederunt of 26th June 1907 this Court has power to send back the case to the Sheriff for amendment. I am clearly of opinion that that power of remitting includes a power of remitting to the Sheriff to do anything he thinks necessary, and as a matter of fact we have again and again remitted to the Sheriff to take further proof. It is quite true that in this case we did not say in so many words that the Sheriff was to take further proof, but I think he correctly interpreted the spirit of the remit, and I think it would be quite futile to hold that his report is vitiated because he has taken such additional proof as he deemed necessary for the determination of the matter remitted to him.

Upon the merits the learned Sheriff has returned an answer which enables us to deal with the whole of the case, and our judgment will be that the second question of law should be answered in the negative and the case remitted to the learned Sheriff to find the compensation which he thinks due.

LORD KINNEAR and LORD MACKENZIE concurred.

LORD JOHNSTON did not hear the case.

The Court pronounced this interlocutor—

". . . Having resumed consideration of the Stated Case and also considered the finding by the Sheriff-Substitute as arbitrator . . ., and having heard counsel for respondents, Answer the second question stated in the negative: Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to award compensation and proceed as accords. . . ."

Counsel for the Pursuer (Appellant)—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—Horn, K.C.—Strain. Agents—W. & J. Burness, W.S.

*Thursday, July* 17.

## FIRST DIVISION.

(Along with Three Judges of the Second Division.)

[Railway and Canal Commissioners.

## NEWBURGH AND NORTH FIFE RAILWAY COMPANY *v.* THE NORTH BRITISH RAILWAY COMPANY.

*Railway—Contract—Share Capital—"Paid up"—Contractors' Line—Shares Issued as Paid-up to Nominees of Construction Syndicate in Payment for Construction of Railway—Railway and Canal Commissioners.*

Scheduled to the Act of Parliament which authorised the construction of the Newburgh and North Fife Railway Company, and by the Act made binding on the parties, was an agreement between the promoters of the Newburgh Company and the North British Railway Company, under which the North British Railway undertook to make up, if necessary, out of certain specified funds, a sum sufficient to pay a dividend of 4 per cent. on the "paid-up share capital" of the Newburgh Company. The share capital authorised by the Act was £180,000, and the loan capital £60,000. The Newburgh Company being themselves unable to raise sufficient capital from the public, entered into an agreement with a construction syndicate whereby the syndicate bound themselves to construct the line to the satisfaction of the engineer of the North British Railway, and undertook generally the obligations and risks of the promoters in obtaining the Act and completing the line, and on the other hand the Newburgh Company agreed to "pay" for the construction to the extent of £10,600 in cash raised by the issue of shares and by issuing the balance of the share capital, viz., £169,400, and the whole loan capital to the nominees of the syndicate in blocks or instalments as the railway was constructed. The syndicate disposed of these shares at considerably less than par.

The Court (*reversing* the Railway and Canal Commissioners sitting in place of arbiters), by a majority, viz., Lord Johnston, Lord Salvesen, Lord Guthrie, and Lord Skerrington (*dissenting* the Lord President, Lord Kinnear, and Lord Dundas), *held* that the amount of the "paid-up share capital" of the Newburgh Company towards payment of dividend on which the North British Railway were bound to contribute was not the whole £180,000; and, giving effect to the opinions of Lord Salvesen, Lord Guthrie, and Lord Skerrington (*dissenting* Lord Johnston) in the majority, that they were only liable under their agreement to contribute