lished by the company alone or in conjunction with others, or which shall otherwise purchase or take over the undertaking of the company or part thereof, or entering into any other obligations or liabilities on behalf of such company on such terms and for such period as the company shall see fit.'"

On 8th July 1914 the Court remitted to Sir George M. Paul, C.S., to report on the petition.

Sir George M. Paul reported that the procedure had been regular and that the proposed alteration might be confirmed, subject to the following restrictions:—(*a*) the variation of sub-head (12) so as to restrict the power of amalgamation to the purchase of the undertaking of another company; (*b*) the deletion of sub-head (18); (*c*) the variation of sub-head (19) by deletion of the words importing the power to promote or concur in promoting any other company to purchase or take over the undertaking of the company; (*d*) the variation of sub-head (20) by the deletion of the words importing the power of sale of the company's undertaking.

The petition came before the First Division on December 3, 1914.

Argued for the petitioners—The proposed alterations were all reasonable with the possible exception of sub-head (18), which it was agreed might be abandoned. The power of amalgamation was already contained in the memorandum of the company, art. 4, and the proposed alterations merely expressed the same power in a more modern form. In this the case was distinguishable from *John Walker & Sons, Limited, Petitioners*, 1914 S.C. 280, Lord Skerrington at 289, 51 S.L.R. 246, where no such power was contained in the memorandum. The alterations were within the objects of the company—*King Line Limited, Petitioners*, January 25, 1902, 4 F. 504, 39 S.L.R. 337; *Wall* v. *London and Northern Assets Corporation*, [1898] 2 Ch. 469, Lord Lindley, M.R., at 478, Chitty, L.J., at 482.

The Court (the LORD PRESIDENT, LORD MACKENZIE, and LORD SKERRINGTON) pronounced this interlocutor:—

"The Lords . . . refuse confirmation of sub-head 18 of the alteration of clause III of the memorandum of association with respect to the objects of the company set forth in the special resolution of the company passed on 28th April and confirmed on 26th May 1914, and *quoad ultra* confirm said alteration, subject to the following modifications, viz.—Alter sub-head 12 so that it shall read as follows: 'Amalgamating with any other company whose objects are within the objects of the company, and that either by sale of the undertaking of the company subject to its liabilities, or by purchase of the undertaking of such other company, and that with or without winding up either company, or by sale or purchase of all the shares, stock, or securities of the company or any such other company as aforesaid, or by partnership or any arrangement of the nature of partnership, or in any other manner': Appoint registration of this order to be made by the Registrar of Joint-Stock Companies in Scotland, and on the same being registered along with the memorandum of association as now altered and confirmed, appoint advertisement of such registration to be made once in the *Edinburgh Gazette* and once in each of the *Scotsman* and *Glasgow Herald* newspapers; and decern."

Counsel for the Petitioners—Solicitor-General (Morison, K.C.)—Wark. Agents—J. & J. Galletly, S.S.C.

Friday, December 4.

FIRST DIVISION.

[Sheriff Court at Dunfermline.

DYER *v.* WILSONS AND CLYDE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, Art.* 15—*Incapacity for Work—Inability to Get Work—Exclusion of Evidence by Arbiter Relying on his Own Knowledge.*

A workman having been injured by accident, his employers, admitting liability, for some months paid him compensation, and then discontinued payment on the ground that he was then fit for light work. The capacity of the workman was by consent submitted to a medical referee, who certified that he was fit for light work. The workman thereafter applied for an award of compensation on the basis of total incapacity, and offered to prove that he had tried, and was in fact unable, to get light work. The arbiter dismissed the application as irrelevant, on the ground that the efforts of the workman to get work, as disclosed on condescendence, were in his own knowledge not sufficient test of the market for light work, and that there was in fact a market for such work. *Held* that the arbiter was not entitled to rely on his own knowledge to the exclusion of facts which the workman offered to prove, and accordingly that the workman had stated a relevant case for inquiry.

Duris v. *Wilsons and Clyde Coal Company, Limited,* 1912 S.C. (H.L.) 74, 49 S.L.R. 708, *followed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I, Art. 15—" . . . In the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the sheriff-clerk, on application being made to the court by both parties, may . . . refer the matter to a medical referee. The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate

as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matter so certified."

Robert Dyer, miner, 69 South Glencraig, Glencraig, *appellant*, brought an application in the Sheriff Court at Dunfermline against the Wilsons & Clyde Coal Company, Limited, coalmasters, Glencraig, *respondents*, for an award of compensation on the footing of total incapacity in respect of injuries received by him by accident arising out of and in the course of his employment as a miner with the respondents at their No. 1 Pit, Glencraig, on or about 17th January 1913. The Sheriff-Substitute (UMPHERSTON), dismissed the application as irrelevant, and at the request of the applicant stated a Case for the opinion of the Court of Session.

The Case, *inter alia*, stated—"The condescendence lodged by the appellant is in the following terms:—'The pursuer is a miner and resides at 69 South Glencraig, Glencraig. The defenders are coalmasters and carry on business in Glencraig, and own and work No. 1 Pit, Glencraig. 2. On or about 17th January 1913 the pursuer was engaged in the ordinary course of his employment with the defenders at their said No. 1 Pit, Glencraig, when he sustained a fracture of the left thigh as the result of a fall of coal from the face. The said accident to the pursuer arose out of and in the course of his employment with the defenders. 3. In respect of said accident and the consequent injury sustained by him the defenders admitted liability, and paid to the pursuer compensation at the rate of 17s. 7d. per week till 13th January 1914, when the defenders stopped payment of compensation at the rate foresaid, on the ground that the pursuer was fit for light work. This contention the pursuer maintained was unwarranted, and in terms of section 15 of the First Schedule of the Workmen's Compensation Act 1906 the parties agreed to refer the matter to the medical referee. 4. On 20th February 1914 the medical referee (Dr J. Finlayson Fleming) issued a report finding that the pursuer was in such a condition that he was fit to do light work, such as looking after a motor or light labouring work on the surface. The pursuer has since applied for work in the district in which he was employed, but on account of his incapacity has been unable to procure the work indicated in the medical referee's report, and he now claims from the defenders full compensation at the rate of 17s. 7d. per week from said 13th January 1914 until such period as he shall have obtained employment as set forth in the said medical referee's report, or until it can be ascertained that he has an earning capacity. With reference to the defenders' statement in answer, the pursuer applied to John Clark, manager, No. 1 Pit, Glencraig, being the pit in which he was employed; George Penman and James Dawson, both under managers, Nellie Pit, Lochgelly; Robert Hunter, under manager, Mary Pit, Lochgelly; James Wilson, oversman, No. 1 Minto Pit, Lochgelly; and Robert Young, No. 2 Minto Pit, Lochgelly, for light work, and same has on account of his infirmity following on said accident been refused. Said applications more than cover the whole pits in the district in which pursuer was employed. This information was communicated to defenders' agents by letters dated 24th March and 17th and 21st April 1914. Said letters are referred to for their terms. 5. The defenders have been called on to continue payment of pursuer's compensation from said 13th January 1914, but they refuse or delay to do so, and the present proceedings have thus been rendered necessary.'

"After hearing parties' procurators, I, on said 5th May 1914, dismissed the application for the following reasons:—1. The application was presented exactly six weeks after the medical referee's certificate. 2. It was admitted at the bar that the claimant's condition—physically—had not become worse. 3. While the medical referee certified the claimant to be fit for light work, the kinds of light work mentioned in his certificate were merely given as examples and not as limiting the claimant's capacity to certain forms of light work for which there might be no market. 4. The claimant had only applied for work at five pits, and nowhere else. It is within my knowledge, from constant experience of arbitrations under this Act in the Western District of Fife, that that is not a sufficient test of the market in the Lochgelly district for such work as the claimant was certified to be fit for. There is a market for such work. 5. Even if the claimant had proved the alleged applications for work and failure to obtain it, I should not have felt justified in awarding compensation on the footing of total incapacity. 6. The application is in effect an attempt to review the certificate of the medical referee.

"I found the respondents entitled to expenses."

The *question of law* for the opinion of the Court was—"Whether on the above facts the arbiter was right in dismissing the application as irrelevant?"

Argued for the appellant—The workman had been totally incapacitated. It was now a well-settled proposition in law that in capacity, beyond physical capacity there was the element of the ability of a workman to get a market for his labour. The certificate of the medical referee was final merely as regards the workman's physical capacity. In the present case the appellant had offered to prove that he was in fact unable to secure the only kind of work for which the medical referee had certified that he was fit. Such evidence was perfectly competent—*Sharman* v. *Holliday & Greenwood, Limited*, [1904] 1 K.B. 235; *Rosie* v. *Mackay*, 1910 S.C. 714, Lord President at 720, Lord Johnston at 726, 47 S.L.R. 654; *Duris* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708; *Ball* v. *William Hunt & Sons, Limited*, 1912 S.C. (H.L.) 77, 49 S.L.R. 711; *Boag* v. *Lochwood Collieries, Limited*, 1910 S.C. 51, 47 S.L.R. 47 (cases there cited); *Arnott* v. *Fife Coal Company, Limited*, 1911 S.C. 1029,

48 S.L.R. 828; *Cruden* v. *Wemyss Coal Company, Limited*, 1913 S.C. 534, 50 S.L.R. 344. Even were the Court to hold that the appellant's incapacity had partially ceased, that did not necessarily imply that his compensation should be diminished—*Bryson* v. *Dunn & Stephen, Limited*, December 14. 1905, 8 F. 226, 43 S.L.R. 236; *Osborne* v. *Tralee and Dingle Railway*, 6 Butterworth's W.C.C. 913, Cherry, L.J., at 916.

Argued for the respondents—The workman here claimed entirely on the basis of total incapacity. It had been proved that he was not totally incapacitated, and it was not the duty of the arbiter to consider whether he was partially incapacitated or not. In any event he was unable to determine how much compensation was due, since there was no statement by the workman of the amount of his weekly earnings, which was necessary to enable the arbiter to arrive at a decision—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Schedule I, art. 1 (*b*). The arbiter was not bound by the evidence put before him if he had reason to form another opinion from facts within his knowledge—*M'Millan* v. *Singer's Sewing Machine Company, Limited*, 1913 S.C. 346, 50 S.L.R. 220; *Roberts & Ruthven, Limited* v. *Hall*, 5 Butterworth's W.C.C. 331, Cozens Hardy, M.R., at 332, Fletcher Moulton, L.J., at 333; *Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009, Fletcher Moulton, L.J., at 1023. The contrary view as set forth by Lord Kinnear in *Rankine* v. *Alloa Coal Company, Limited*, July 16, 1903, 5 F. 1164 at 1169, 40 S.L.R. 828, was not now sound law.

At advising—

LORD PRESIDENT—I cannot help thinking that the arbitrator in this case has proceeded upon a complete misconception of his statutory duty. He has dismissed the workman's claim as irrelevant, but I cannot discover—and the ingenuity of counsel has not enabled us to discover—any irrelevant statement in the workman's claim. He sets out that on 17th January 1913 an accident befell him arising out of and in the course of his employment, that his employers admitted liability, that they paid him compensation for the best part of a year—until 13th January 1914—that they then discontinued the payment of compensation, but, be it observed, not on the ground that he had completely recovered his wage-earning capacity, but on the ground that he was fit for light work—in other words, the employers then admitted that partial incapacity due to the accident still continued,

The appropriate course was then followed—a remit was made to a medical referee to ascertain what was the man's physical condition; and acting under the statute the medical referee gave a certificate as to the condition of the workman and his fitness for employment, specifying the kind of employment for which he was fit. The report is summarised in the fourth statement of the workman's condescendence thus—it found that the pursuer "was in such a condition that he was fit to do light work, such as looking after a motor or light labouring work on the surface." So far as relates to the man's physical capacity, it is agreed that the medical report is final. But it was not conclusive of the workman's claim, because he undertook to show—and I am not quite certain that in doing so he was not assuming a heavier burden than the statute lays upon him, but at all events he undertook to show—that he was unable to obtain light work on account of his incapacity—that is to say, he alleged that, not because of any temporary condition of the labour market, but on account of his damaged condition due to the accident, he was unable to obtain the light work for which the medical referee said he was fit. He did more—he set out in detail the efforts which he had made to obtain light work and asked that his case should be considered.

Now although the workman claimed as for total incapacity, and although his employers may, no doubt, have maintained that total incapacity had ceased and perfect capacity to earn the same wage as he had been formerly earning had been restored, it was obviously a question for the arbitrator to consider not only whether either of these extreme views could be successfully maintained, but whether or no a middle course might not be taken—whether the capacity had not been partially restored, and accordingly whether the workman was entitled to compensation, applying the standard of his former wage-earning capacity as against the standard of his present wage-earning capacity. That was a question of fact which it was the statutory duty of the arbitrator to investigate, and so far as I have gone it appears to me that the workman's averments were relevant to entitle him to have these facts investigated. The arbitrator, however, at this stage refused to investigate the workman's claim upon a series of grounds which are set out in detail at the close of the case. "(1)" He says, "The application was presented exactly six weeks after the medical referee's certificate." As I am unable to understand that statement, and counsel was not able to explain it, I forbear to criticise it. "(2) It was admitted at the bar that the claimant's condition—physically—had not become worse." No doubt both parties agreed that, so far as the medical referee's report was concerned, the question was finally concluded. "(3) While the medical referee certified the claimant to be fit for light work, the kinds of light work mentioned in his certificate were merely given as examples, and not as limiting the claimant's capacity to certain forms of light work for which there might be no market." This is true, but I think it irrelevant. "(4) The claimant had only applied for work at five pits and nowhere else. It is within my knowledge from constant experience of arbitrations under this Act in the Western District of Fife that that is not a sufficient test of the market in the Lochgelly district for such work as the claimant was certified to be fit for. There is a market for such work." That may be very true, but nevertheless it may be also perfectly true that application at these five pits afforded a perfectly adequate test of the labour mar-

ket so far as this workman was concerned. And it is nothing to the purpose to add, as the learned arbitrator does, that, according to his impression, application at five pits did not adequately test the labour market. That is a question of fact which required investigation.

I do not, for my part, dispute the law which is laid down in the case cited to us, that of *Roberts & Ruthven, Limited* v. *Hall*, 5 Butterworth, 331, where the Master of the Rolls is reported to have said that "the arbitrator is entitled to act upon his general knowledge of the labour market and the conditions of the trade, and so on." The learned arbiter is undoubtedly entitled to have before him his own knowledge of the labour market in the district, but, according to my view, he is bound, if evidence is tendered, to hear that evidence, to consider that evidence and to act upon it if he thinks fit, or to reject it if he thinks fit. His finding upon the question of fact will be conclusive. But certainly these considerations do not warrant the arbitrator in throwing out the application as irrelevant.

The arbitrator says—"Even if the claimant had proved the alleged applications for work and failure to obtain it, I should not have felt justified in awarding compensation on the footing of total incapacity." Well, perhaps not; but if not, why should the learned arbitrator not have awarded compensation on the footing of partial incapacity due to the accident?

In my opinion this case is covered by authority. I refer to the case of *Davis* v. *Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, where the facts were almost identical with the facts in the present case as set out in the workman's condescendence, and where I observe the Lord Chancellor pointed out in very distinct terms what the statutory duty of the arbitrator was. The arbitrator, says the Lord Chancellor, "must say what a man can be fairly asked to do in order to obtain employment and so maintain himself wholly or in part in order not to be a burden upon others." I agree with that expression of opinion, and only add that in order to enable him to discharge that statutory duty the arbitrator must take the evidence which is tendered—no doubt along with his own local knowledge of the condition of the labour market.

I therefore come without hesitation to the conclusion that we ought to answer the question put to us in the negative and remit to the arbitrator to proceed with the arbitration.

LORD MACKENZIE—I am of the same opinion. I think this is a case in which the arbitrator should have allowed a proof before pronouncing any judgment in the case.

LORD SKERRINGTON—I agree with your Lordships. There has been a grave miscarriage of justice, and it is easy to trace how it was brought about. It came from the arbitrator allowing himself to be induced—or I should rather say seduced—by the respondents to listen to a debate upon relevancy. The result was that the arbitrator, under the guise of a judgment on relevancy, pronounced a decision upon the merits based not on evidence but on his own local knowledge. I do not say that such local knowledge could not be used as an element in the proof, but the arbitrator used his local knowledge as the sole evidence in the case.

I do not doubt that an application by a workman might be so glaringly irrelevant that an arbitrator would be entitled to dismiss it as irrelevant. The case of *M'Millan* v. *Singer Sewing Machine Company, Ltd.*, 1913 S.C. 346, is an authority for that proposition. I am, however, very clearly of opinion that unless in very exceptional circumstances that procedure ought not to be followed, and I adopt respectfully the opinions of Lord Adam, Lord M'Laren, and Lord Kinnear in the case of *Rankine* v. *Alloa Coal Company*, 1903, 5 F. 1164. In that case Lord M'Laren said—"I think there is no such procedure contemplated in the Act as a dispute upon relevancy before the facts have been ascertained. The parties are to come before the arbitrator with their witnesses to prove their case as far as they can, and then an exhaustive judgment is to be pronounced subject to review, and if the Act is properly worked there ought never to be a possibility of two appeals in the same case." Thanks to the procedure which the learned arbitrator has adopted in the present case the application will go back to him for proof, and will in all probability come back to us upon a second appeal. That is a method of procedure which is highly objectionable and most unjust to the workman.

The Court answered the question of law in the negative, and remitted to the arbitrator to proceed with the arbitration.

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

Counsel for the Respondents—Horne, K.C.—Carmont. Agents—Wallace & Begg, W.S.

VALUATION APPEAL COURT.

Thursday, December 3.

(Before Lord Johnston, Lord Salvesen, and Lord Cullen.)

MAXWELL *v.* GALASHIELS ASSESSOR.

Valuation Cases—Value—Public-House—Change of Circumstances—Statutory Curtailment of Hours of Business—Temperance (Scotland) Act 1913 (3 and 4 Geo. V, cap. 33), sec. 7.

In a question as to the annual value of a public-house the licence-holder claimed a reduction from the figure at which the subject stood in the valuation roll for the previous year, on the ground that the hours of business had been curtailed by the Temperance (Scotland)