abbreviate to be transmitted as suggested in the alternative crave of the petition.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

"... Refuse the first of the alternative craves in the prayer of the petition: Grant the second alternative thereof, that is to say, authorise the petitioners to transmit within two days from this date to the Keeper of the Registers of Inhibitions and Adjudications at Edinburgh an abbreviate of the petition for sequestration and first deliverance thereon mentioned in this petition, and grant warrant to and authorise the said Keeper to receive and record in said Registers the said abbreviate, and to write and subscribe a certificate thereof on said abbreviate in the prescribed form: Reserve all objections to parties interested against the validity of the sequestration referred to in this petition and all answers to such objections, and declare that no part of the expenses of this present application and proceedings shall be chargeable against said sequestration, and decern: Dispense with the reading hereof in the minute book and authorise the issue of immediate extract."

Counsel for the Petitioners—J. Stevenson. Agents—Auld & Macdonald, W.S.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff Court at Hamilton.

O'NEILL *v.* GIFFNOCK COLLIERIES, LIMITED.

Workmen's Compensation—Expenses—Discretion of Arbitrator—Successful Party Refused Expenses—Absence of Material Facts Justifying Refusal—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Second Schedule* (7).

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

In an arbitration under the Workmen's Compensation Act 1906 the arbitrator, having found that the workman was partially incapacitated and that the incapacity was due in part to the workman's failure to exercise his back, made an award as for partial incapacity, but found no expenses due to or by either party. No reason was assigned for refusing the claimant his expenses.

Held that there were no materials to justify the arbitrator in exercising his discretion as he had done, and that the workman was entitled to his expenses.

In an arbitration under the Workmen's Compensation Act 1906, in the Sheriff Court at Hamilton, between Charles O'Neill, drawer, 134 King Street, Pollokshaws, *appellant*, and the Giffnock Collieries, Limited, coalmasters, Giffnock Collieries, Thornliebank, Glasgow, *respondents*, the Sheriff-Substitute (HAMILTON) found no expenses due to or by either party.

The appellant appealed by a Stated Case, which set forth—"This is an arbitration in which the appellant claims compensation as for partial incapacity from 7th April 1923, in respect of an accident for which compensation had for some time been paid to him by the respondents as for total incapacity without any agreement or award.

"Proof was allowed and led before me on 17th October 1923, and I found that the following *facts* were admitted or proved:—1. That on 31st May 1922 the appellant, while in the employment of the respondents, received personal injury by an accident arising out of and in the course of his employment. 2. That the said injury consisted of his straining his back through falling while endeavouring to replace a hutch upon an underground set of rails. 3. That prior to his accident the appellant's average weekly wage was £3. 4. That the respondents paid compensation to the appellant as for total incapacity at the rate of £1, 15s. per week—the sum of 15s. being payable under the Workmen's Compensation (War Additions) Acts 1917 and 1919—up to 7th April 1923. 5. That at the last-mentioned date they refused to pay further compensation on the ground that the appellant had recovered from the said injury and was fit for his former employment. 6. That the appellant on 7th April 1923 had, and now has, partially recovered from the said injury, and that he then was, and now is, fit for light work. 7. That he has not yet fully recovered from the said injury and is not fit for his former employment. 8. That his present state of partial incapacity is due in part to the said injury and in part to his failure duly to exercise his back by light work or otherwise. 9. That the appellant is at present unemployed and earned nothing. 10. That it was not proved that there was any employment available to the appellant for which he was at the present time capable, and 11. That 10s. per week is, in the circumstances, a reasonable amount of compensation to be paid by the respondents to the appellant.

"I therefore awarded to the appellant the sum of 10s. weekly in name of compensation for partial incapacity for the period from 7th April 1923 until the further orders of Court, and found no expenses due to or by either party."

The *question of law* for the opinion of the Court was—"On the foregoing facts was I bound to award expenses to the pursuer?"

The Sheriff-Substitute appended the following *note* to the Stated Case:—"After considering this case along with the medical assessor I have come to the conclusion that the claimant's condition is, and has since at least 7th April last been, one of partial disability due in part to the accident and in part to lack of proper treatment. I think that for some time past regular exercise for

his back would have been beneficial to the claimant, but I cannot say that but for his neglect of such exercise his incapacity due to the accident would have ceased. I therefore think that he is entitled to compensation for partial incapacity—*Devlin* v. *Chapel Coal Company, Limited*, 1915 S.C. 71, 52 S.L.R. 83."

Argued for the appellant—The arbitrator was bound to award expenses to the appellant. The general rule that expenses followed success applied in the present case, and the Stated Case disclosed no materials which entitled the arbitrator to depart from the general rule. The appellant's neglect to take exercise was not a relevant ground for varying the general rule. In any event the arbitrator had already taken into account the appellant's self-neglect by awarding the appellant a reduced amount of compensation, and to refuse expenses in addition to making a reduced award of compensation amounted to the imposition of a double penalty on the appellant. Since the arbitrator had not stated in the Case any material which warranted him in refusing expenses to the appellant, the Court must assume that none existed—*Murphy* v. *William Baird & Company*, 1921 S.C. 891, 58 S.L.R. 611; *Murphy* v. *Farme Coal Company*, 1918 S.C. 659, 55 S.L.R. 557, *per* Lord Justice-Clerk (Scott Dickson) at 1918 S.C. 661, 55 S.L.R. 559; *Feeney* v. *Fife Coal Company*, 1918 S.C. 197, 55 S.L.R. 223, *per* Lord Justice-Clerk (Scott Dickson) at 1918 S.C. 200, 55 S.L.R. 255; *Finlayson* v. *s.s. "Clinton" (Owners of)*, 1914, 7 B.W.C.C. 710; Adshead Elliott, Workmen's Compensation Act (7th ed.), pp. 433, 434, and 435. The case of *Breslin* v. *Barr & Thornton*, 1923 S.C. 90, 60 S.L.R. 66, was also referred to.

Argued for the respondents—The rule that expenses followed success was not an absolute rule. The arbitrator was entitled to take into consideration any material fact. The personal relationship of the appellant to the circumstances at issue was the true ground on which to determine the question of expenses, and as the appellant had been in fault he was not entitled to his expenses—*Cant* v. *Fife Coal Company, Limited*, 1921 S.C. (H.L.) 15, 58 S.L.R. 74; *Feeney* v. *Fife Coal Company* (*cit.*), *per* Lord Salvesen at 1918 S.C. 201, 55 S.L.R. 225.

LORD JUSTICE-CLERK (ALNESS)—In this case the respondents were paying compensation to the appellant as for total incapacity up till 7th April 1923. On that date the respondents ceased paying compensation. Upon an application by the appellant for partial compensation the arbitrator held that the respondents were not entitled to cease to pay compensation, and awarded the appellant 10s. a-week as for partial incapacity. In these circumstances it is obvious that the respondents were entirely in the wrong in stopping payment of compensation and the arbitrator has so held. In other words, the appellant was obliged to convene them before the arbitrator in order to get the compensation to which he was entitled. He has succeeded in his claim, and in these circumstances *prima facie* expenses should follow the result.

Are there any materials in the case before us upon which the arbitrator was entitled to exercise a judicial discretion as he did, *i.e.*, by refusing expenses to the appellant? I am of opinion that there are not. The only reason suggested which can be found, and that only by groping through the case, is in statement 8, where it is stated that the condition of the appellant was partly due to his failure to exercise his back and partly to the accident which he sustained. That does not *prima facie* appear to me to be a good reason for refusing him his expenses. I am far from laying down, or suggesting that the Court should lay down, any general rule with regard to expenses, but treating this case in the light of the specific facts found by the arbitrator, I am of opinion that he has set forth no facts upon which he was entitled to pronounce the award as to expenses which he did. My only doubt in the matter is due to the fact that in all the cases cited to us the ground upon which the learned arbitrator had proceeded in refusing or granting expenses, as the case may be, was plainly before the Court of Appeal. In this case the ground upon which the learned arbitrator proceeded can only at the best be conjectured. But in view of two considerations—(first) that the learned arbitrator has not thought it worth while to set forth clearly and distinctly the ground upon which he proceeded in this case in disposing of expenses, and (second) that neither party has asked for a remit to clear up that matter in what after all is a very small case—I suggest to your Lordships that the case may be disposed of on the present findings, and that we should hold that the arbitrator was not entitled to take the course he did.

I therefore propose to your Lordships that the question put to us, varied in the manner I ventured to suggest in the course of the discussion so as to run—"Whether on the foregoing facts I was entitled to find no expenses due to or by either party?"—should be answered in the negative.

LORD ORMIDALE—I concur, and have nothing to add.

LORD ANDERSON—I agree. The present trouble between these parties began on 7th April 1923, when the employers refused to pay the injured workman any compensation at all. Now that attitude on the part of the employers compelled the workman to seek arbitration. He did so, the issue therein being whether or not the workman was fit for work. On that issue the workman was completely successful, because the arbitrator found in fact that he was not fit for work and he awarded compensation.

Miss Kidd, in the excellent argument which she submitted, contended that the arbitrator was justified in dealing with expenses as he did because there was divided success. I am quite unable to hold that there was divided success. It cannot be said that there was divided success merely because the workman got 10s., having asked £1. It was urged, however, that there was divided success in this sense, that incapacity was proved to be due in part to the

appellant's own self-neglect. I gather from paragraph 11 that the arbitrator has taken that circumstance into account in awarding compensation of 10s. It was suggested that he could not competently do so, because compensation is awarded for injury by accident while in service, but if incapacity was due in part to the workman's own neglect I think the arbitrator was entitled to take that fact into consideration in fixing the compensation. Accordingly I suggested that there was here a double penalty, which will not do at all.

We are not told by the arbitrator why he has refused expenses. We must assume that he has stated all the material facts upon which he reached his conclusion. On the facts so stated I am of opinion that there are no materials to justify the arbitrator in exercising his discretion as he did, and that therefore the workman having been successful in the *lis* is entitled to his costs.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

"... Answer the question of law stated in the Case by finding that on the facts as stated the arbitrator was not entitled to find no expenses due to or by either party: Therefore sustain the appeal, reverse the determination of the Sheriff-Substitute as arbitrator on the matter of expenses, and remit to him to award expenses to the applicant and to proceed as accords; and decern. ..."

Counsel for the Appellant—Fenton, K.C. —Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondents—Dean of Faculty (Sandeman, K.C.)—Kidd. Agents—W. & J. Burness, W.S.

Saturday, February 23.

SECOND DIVISION.

[Lord Constable, Ordinary.

DISTILLERS COMPANY, LIMITED *v.* COUNTY COUNCIL OF THE COUNTY OF FIFE.

Rates and Assessments — Domestic Water Rate — Extent of Liability — Subjects Entered as a Unum quid in the Valuation Roll—Only One Building Supplied with Water—Physical Discontiguity of Building — Entry in Valuation Roll as Basis for Assessment — Lands Valuation Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 41—*Kirkcaldy District Water Order Confirmation Act* 1913 (2 *and* 3 *Geo. V, cap. clxix.*), *sec.* 59.

A distillery company had obtained from a body of water trustees a supply of water for an excise office which they owned and which was used by them in connection with their distillery. The building which housed the excise office and which was let to and occupied by the Excise authorities was of small value, and was discontiguous from the other distillery buildings, which had a private water supply of their own. The County Council having taken over the duty of supplying water within the area where the distillery was situated, proceeded to assess the company in respect of the water used by the excise office, on the value of the distillery premises as a whole, these being entered in the valuation roll as a *unum quid*, maintaining that the entry in the roll was conclusive as to the unit of assessment. *Held* (*rev.* judgment of Lord Constable, Ordinary) that the entry in the roll though conclusive as to value was not conclusive as to liability for assessment, that the complainers were liable to assessment for water rate in respect of the excise office only, and reclaiming note *sustained.*

The Distillers Company, Limited, incorporated under the Companies Acts 1862 and 1867, and having their registered office at No. 12 Torphichen Street, Edinburgh, *complainers*, presented a note of suspension and interdict in which they craved the Court to suspend *simpliciter* a notice for payment of the sum of £1063, 19s. 6d., being assessments alleged to be due by them to the County Council of the county of Fife, constituted under the Local Government (Scotland) Act 1889, *respondents*, for the year from Whitsunday 1922 to Whitsunday 1923, in respect of a distillery belonging to and occupied by the complainers at Cameron Bridge in the parish of Markinch and county of Fife; and to interdict, prohibit, and discharge the respondents from executing any poinding or other diligence against and from selling the property of the complainers in respect of the said assessment.

The complainers pleaded, *inter alia* — "2. The respondents not being entitled in respect of the supply of water to the excise office to levy the domestic water rate on the distillery buildings and mills, the complainers are entitled to have the notice, pretended warrant, and whole proceedings suspended and interdict granted. 3. There being no pipe of the District Committee through which the District Committee are entitled to give a supply of water within 100 yards of the premises in question, the complainers are entitled to suspension and interdict as craved. 4. An undertaking having been given to the complainers that in the event of the domestic water rate being levied in respect of the water supply to the excise office it would be levied on the excise office alone, the respondents are barred from levying it on the whole distillery buildings."

The respondents, *inter alia*, pleaded — "2. The assessment complained of having been validly levied in accordance with the respondents' statutory powers and duties, the note should be refused. 3. The respondents being entitled and bound to assess the said distillery buildings and mills as a *unum quid* upon the annual value thereof as entered in the valuation roll, the note