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-

pacitated thereby and paid compensation on account thereof up to 12th February 1917; that on said last-mentioned date he resumed work with them, and since then had earned an average weekly wage greater than or at least equal to the wage he was making prior to said accident, and that he had recovered from the incapacity due to said accident. The accident, payment of compensation, and resumption of work were all admitted by respondent. He also admitted that since resuming work he had been making an average weekly wage at least equal to what he had been doing prior to the accident, but he alleged that he had not recovered from the effects of the accident.

"The case called before me on 26th September 1917, when the agents for the parties intimated that in order to avoid the expense of a proof they had agreed, subject to my consent, to remit to the medical referee to decide whether there was any chance of respondent's incapacity recurring. I approved of a remit being made under section 15 of the First Schedule to the Act, and the case was continued to allow of this being done.

"The remit to the medical referee was duly made. The question before the parties was stated in the minute of reference as follows:—The respondents, *i.e.*, the appellants, aver that the applicant, *i.e.*, the respondent, has entirely recovered from the incapacity due to said accident and that there is no danger of recurrence, which contention applicant denies, and avers that although he has since resuming work on 12th February 1917 been earning an average weekly wage equal to or greater than he was earning prior to the accident, he has not yet recovered from the effects thereof.

"Following upon said remit the medical referee duly examined respondent on 10th October 1917, and on 12th October 1917 issued a certificate in the following terms:—'1. The said James Dingwall is in a good state of physical health and quite able for work, and his condition is such that he is fit for his ordinary or other work where the full power of a right-handed man is not required. There is still some risk of recurrence of incapacity to work owing to the condition of his right arm 2. The condition of the said James Dingwall is due to a bruise of the right arm in front of the elbow joint on 29th January 1917.'

"The case again came before me on 17th October 1917, when appellants' agent moved me to end respondent's right to compensation as at 12th February 1917 for the time being, *i.e.*, to grant a suspensory award, and to find neither party entitled to expenses. This motion was opposed by the agent for respondent, who moved that the application should be dismissed with expenses in favour of his client. After hearing the parties' agents on the minute of reference and the medical referee's report and considering the terms thereof, I dismissed the application by the appellants, and found them liable to the respondent in £2, 2s. of modified expenses."

The *questions of law* for the opinion of the Court were—"1. On the foregoing facts should I, as requested by appellants, have granted a suspensory award? 2. In the circumstances was I justified in dismissing the application and finding appellants liable in expenses?"

Argued for the appellants—This was a competent application, and the arbitrator should have given a decision under it and not merely dismissed it. The present application was similar to those in *M'Ghie* v. *United Collieries, Limited*, 1910 S.C. 927, 47 S.L.R. 751, and in *Weir* v. *North British Railway Company*, 1912 S.C. 1073, 49 S.L.R. 772. The award, no doubt, craved was not final, and merely suspended the payment of compensation until the further orders of the Court, but still it should have been granted. The case of *Taylor* v. *London and North-Western Railway Company*, 1912 A.C. 242, where a suspensory order had been held to be competent, overruled the case of *Rosie* v. *Mackay*, 1910 S.C. 714, 47 S.L.R. 654—*Dempsey* v. *Caldwell & Company, Limited*, 1914 S.C. 28, 51 S.L.R. 16.

Argued for the respondent—Neither the First Schedule, section 15, nor the Second Schedule, section 15, of the Workmen's Compensation Act 1906 applied to the proceedings here. The application for a suspensory award could only be made by a minute, and this had not been done. There was no prior medical examination of the respondent, and so the remit to the medical referee could not have been under the First Schedule (15). The form that should have been used for the medical reference there was that set forth in the Codifying Act of Sederunt (C.A.S., L, xiii, Form 4). It was the workman and not the employers who had the interest and right to make an application for a suspensory award, as there was nothing on which the employers could be charged. The second question should be answered in the affirmative.

LORD JUSTICE-CLERK—In this case I had some difficulty in understanding what the controversy between the parties was. When the case was opened we were informed that instead of there having been a remit under paragraph (15) of the First Schedule as the case bears, it was really a remit under the 15th paragraph of the Second Schedule. Mr Wilton referred us to authorities to show that the proper procedure had not been followed, and that apparently the arbitrator was not entitled to pronounce any judgment, or at anyrate that any judgment which he pronounced was not subject to review by way of a stated case. That was not a question which was raised by this Stated Case at all or even suggested by it. But then when Mr Macgregor Mitchell addressed us it was found that the case as stated was perfectly right and that there was no misprint, because the document making the remit was produced, and it bore to be a remit under paragraph (15) of the First Schedule to the Act as the case bears. The authority which was cited by the appellants was the case of *Taylor* v. *London and North-Western Railway Company*, (1912) A.C. 242, which shows that in an application of this kind, although the appli-

cant asks that there should be an order finally ending compensation, it is not only competent, but it is the duty of the arbitrator if the circumstances in his opinion warrant it to pronounce a suspensory judgment. The question whether that was right or wrong was really not disputed in view of the case of *Taylor*.

We were referred to objections as to the procedure in respect of the provisions of the 15th paragraph of the First Schedule, which it was said had not been followed out. I do not think we are entitled to consider these questions of procedure at all, because the Stated Case bears that when the case was called before the arbitrator on 26th September 1917 "the agents for the parties intimated that in order to avoid the expense of a proof they had agreed, subject to my consent, to remit to the medical referee to decide whether there was any chance of respondent's incapacity recurring." The arbitrator says that he approved of the remit, and accordingly the terms of the remit were adjusted and the medical referee made his report.

It seems to me that in that state of the facts, and having regard to the form of the Stated Case, there is no room whatever for raising the question as to whether the proper statutory procedure was followed out. We must take it that it was followed out, with the result that the medical referee made a report upon which the arbitrator was asked to proceed, and on which he ought to have proceeded in accordance with the law. That report bore that the workman was "in a good state of physical health and quite able for work, and his condition is such that he is fit for his ordinary or other work where the full power of a right-handed man is not required. There is still some risk of recurrence of incapacity to work owing to the condition of his right arm." It appears from the case that his capacity to work was such that he was making an average weekly wage at least equal to what he had been making prior to the accident.

In that state of matters it is quite plain that the compensation, which had been in fact paid for only a fortnight after the accident, which took place on 27th January 1917, and had been in abeyance for several months, was quite properly in abeyance, and that there was no occasion whatever for it being again brought into operation at present, but that on the other hand there was a liability of recurrence of incapacity for work owing to the condition of the respondent's right arm due to the accident.

In these circumstances it seems to me that the proper course for the arbitrator was to have followed the rule laid down in *Taylor's* case, and to have pronounced a suspensory award so that if the recurrence does take place the parties can then come to the arbitrator, and by the necessary procedure get the question reopened and the amount of compensation due to the recurring incapacity determined.

I am therefore of opinion that we should answer the first question to this effect, that on the foregoing facts the arbitrator should have granted a suspensory award, and it follows from that that it is unnecessary to answer the second question.

LORD DUNDAS—It was competent to the learned arbitrator, instead of dismissing the application as he did, to keep it alive by means of a suspensory order, and I am of opinion that he ought to have done so. Whether or not the case of *Taylor* v. *London and North-Western Railway Company*, [1912] A.C. 242, was brought to his notice I do not know, but however that may be, I think the course he ought to have pursued is that which I have indicated. I am of opinion that we ought to answer the question in the way your Lordship suggests.

LORD SALVESEN—I concur. The case as presented to the arbitrator was one in which the appellants sought to terminate entirely their liability in respect of the accident which happened to this miner on the 27th January 1917. The course which the proceedings took before the arbitrator was this —The parties being agreed on all the facts except the medical condition of the workman, who alleged that he had not fully recovered from the effects of the accident, and that he might become disabled later in consequence of the accident, agreed to refer that question to a medical referee instead of leading evidence by doctors on either side, and then possibly having to invoke a medical referee to settle the difference between them. It seems to me that that was very proper procedure with a view to saving unnecessary expense.

Then when the medical referee reported he negatived the extreme contention of the appellants, but his report otherwise indicated that the respondent was now quite able to work, that he was in a good state of physical health and fitted for his ordinary work or other work. It further appears from the admissions of parties that he had actually been in receipt for eight months or thereby of the full wages that he had earned before the accident.

I think that but for the case of *Taylor* the course which the learned arbitrator took would have seemed *prima facie* to be the right one; but in view of that case I think it was his duty to pronounce the suspensory award which he was asked by the appellants to pronounce, and that he ought not to have dismissed this application, leaving the parties at some future stage to bring up the question again, and so have made all this procedure of no avail.

I agree therefore with your Lordship in thinking that we ought to answer the first question in the affirmative.

LORD GUTHRIE—At first I thought the appellants had no interest to pursue this case, because it appears that the respondent was willing to have the arbitrator's dismissal of the appellants' application turned into the suspensory order, which the appellants maintain the arbitrator should have awarded. But this would not have met the appellants' interest, which was to have a judicial decision, which will be a guide to other arbitrators in similar circumstances. The respondent's willingness to have the award

altered would, I presume, have involved a statement that the alteration was by consent, which would, of course, have had no force as a decision.

The Court answered the first question of law in the affirmative.

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

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

Friday, January 11.

FIRST DIVISION.

POTTER'S TRUSTEES *v.* ALLAN AND OTHERS.

Succession—Trust—Construction—Revocation—Powers of Apportionment—Proper Objects — Payment — Authorisation of Donees of Powers to Delegate Execution of Powers to Persons Nominated by them.

By a codicil a testator gave a share of residue to one of his daughters, Mrs A. "declaring that the share of [my] daughter [Mrs A.] shall in the event of her and her daughter [M.] surviving me suffer deduction of the sum of [£500], which sum my trustees shall pay to [her daughter M.]." A later codicil provided "with reference to the share of the residue of my estate bequeathed to my daughter [Mrs A.] [I] do alter and vary the said bequest," and thereafter the testator directed his trustees to hold and apply or pay the share of residue and the income thereof to or for behoof of the "daughter and her children or any of them in such portions and at such times as my trustees may think most for the advantage of them or any of them, or otherwise in their option to pay and convey the said share or any portion thereof remaining unpaid to such person or persons as shall be named by my trustees," to be held and apportioned by him or them in the same way. The testator was survived by Mrs A. and her daughter M., who predeceased her mother. Mrs A. had two children at the date of the testator's death, 6th May 1890; thereafter other two were born to her. In September 1905 the testamentary trustees, who had made no apportionment of the share of residue in question, executed a deed of nomination in exercise of their option and assigned and conveyed to their nominees the share of residue. Their nominees continued thereafter to hold the share of residue without making any apportionment of the capital. *Held* in a special case, to which the trustees' nominees Mrs A. and her surviving children were parties, (1) that the bequest of £500 was not revoked by the second codicil, and that it vested *a morte* in the legatee; (2) that the children born to the testator's daughter after the testator's death were included with the other children among the proper objects of the power of apportionment; and (3) that those beneficiaries were not entitled to demand payment of the share of the residue.

Question whether the power given to the trustees to delegate to their nominees the exercise of the power of apportionment was valid.

William Smith Storie and another, as trustees acting under a deed of nomination and conveyance by the testamentary trustees of James Potter of Glenfuir, Falkirk, *first parties;* Mrs Janet Wilson Potter or Allan, widow of the deceased Andrew Allan, solicitor, Falkirk, and a daughter of James Potter, *second party;* and Robert Andrew Craig Allan, Elizabeth Craig Allan, and Janet Evelyn Allan, the surviving children of the second party, *third parties*, brought a Special Case to determine questions relating to the rights of the parties under the testamentary writings of James Potter, who died on 6th May 1890, leaving a trust-disposition and settlement and three codicils.

The *trust-disposition and settlement*, dated 1st November 1887, disponed and conveyed the testator's whole means and estate to William Snell Anderson, Andrew Allan, and the Rev. William Smith Storie as trustees for various purposes.

The *first codicil*, dated 5th April 1899, directed the trustees to pay to the testator's widow the profits of his shares in a certain coal company in order to increase her provision.

The *second codicil*, dated 4th November 1899, revoked the testator's directions in his trust-disposition and settlement as to the disposal of the residue of his estate, and in lieu thereof directed his trustees, in the first place, to pay at the first term after his death, to his son James Thomas Potter, whom failing his issue, the sum of £750, and further provided—"And in the second place I direct that my trustees shall hold, pay, or convey the residue of my said means and estate, including the funds employed in and free proceeds of any business or interest in any business continued as mentioned in the foregoing trust-disposition and settlement, together with the annual profits or income thereof, and any funds that may have been set apart to meet the annuity before mentioned as the said funds, proceeds, and profits are realised and set free, to or for behoof of my other lawful children, Mary Henderson Potter, Janet Wilson Potter or Allan, and Christina Isabella Potter or Storie, equally among them, the lawful issue of any of said children predeceasing me being entitled equally among them to the share which would have fallen to their parent if alive; declaring that the share of my daughter Janet Wilson Potter or Allan shall in the event of her and her daughter Mary Wordie Allan surviving me suffer deduction of the sum of Five hundred pounds sterling, which sum my trustees shall pay to the said Mary Wordie Allan; notwithstanding what is before written I empower my trustees to retain in their own