

safely at their destination there would be a total loss on the whole of them for the purpose of insurance law. In another part of his opinion he says—"There is no authority nor sound reason for saying that the goods of several persons which are accidentally mixed together thereby absolutely cease to be the property of their several owners and become *bona vacantia*." Applying this principle to the present case, and on the assumption of the facts above referred to, the just way of distributing the unmarked bales to each consignee is in proportion to the total shortage. Parties are agreed as to the way in which this works out in the case of the present defenders, and the sum to which they are entitled in respect of the six bales of which they have not meanwhile taken possession. If the ship had to make good the value of these bales, the sum would work out, as the Sheriff-Substitute has fixed it, at £15. 5s. 4d., but on the assumption that the defenders are bound to take their proportion of the eleven bales this sum is reduced to £8. 11s., which will form a deduction from the admitted freight. I propose, therefore, that we should recal the Sheriff-Substitute's interlocutor, and make appropriate findings in fact consistent with the views above expressed; and should grant decree for the sum of £175. 1s. 6d., under deduction of £8. 11s., with interest, as concluded for. As the whole controversy has turned on the obligation of the defenders to take their proportion of the eleven unmarked bales, they must be found liable in expenses both here and in the Court below.

An argument based upon the decisions in the two cases of the *British Shipowners Company v. Crimond* (July 4, 1876, 3 R. 968, 13 S.L.R. 623), and the *Knight S.S. Company* (July 1, 1898, 25 R. 1070, 35 S.L.R. 834) I only notice in case it might be thought that it had been overlooked. I have no doubt these two cases were well decided, and in any event they are binding upon us; but except in so far as it appears from them that the customary method of discharging jute cargoes at Dundee was followed in the present case they appear to me to have no application. The mere fact that the harbour porters took delivery of certain bales from the ship's side on the instructions of the general body of consignees has, in my opinion, no bearing on the question whether any particular consignee is bound to pay freight on these bales if they turned out not to form part of the parcel for which he held a bill of lading. The question would still be open whether the tender of these bales by the shipowners to any particular consignee or consignees was a tender which they were bound to accept. If, for instance, it had been established that the bales in question had been substituted by the shipowners for other bales which were in fact consigned under one or more of the bills of lading, the provisional delivery to the harbour porters would not affect the right of the consignees in question to reject the bales. According to the recognised method of discharge at Dundee it would be quite impracticable to

ascertain during the course of unloading, and before the bales were delivered across the ship's rail, whether they formed part of the consignment which the harbour porters were authorised by their constituents to receive. The decisions quoted are merely to the effect that where bales so received do form part of the cargo belonging to consignees who have instructed the harbour porters to attend to their interests, the risk of damage from exposure on the quay or otherwise falls to be borne by the receivers whose property they *ex hypothesi* were, but delivery *per se* could not in the circumstances effect a transfer of property of goods which were not in fact shipped by any of the merchants from whom the holders of the bill of lading derived their rights.

The LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

The Court postponed issuing an interlocutor to allow its terms to be adjusted.

Counsel for Pursuers and Appellants—Horne, K.C.—Watson. Agents—Alexander Morison & Co., W.S.

Counsel for Defenders and Respondents—Dean of Faculty (Dickson, K.C.)—A. R. Brown. Agents—Elder & Aikman, W.S.

Friday, July 12.

#### FIRST DIVISION.

[Sheriff Court at Kirkcaldy.]

#### ARNOTT v. FIFE COAL COMPANY, LIMITED.

(*Ante*, June 17, 1911 S.C. 1029, 48 S.L.R. 828.)

*Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), First Schedule (15)—Remit to Medical Referee—Finality of Referee's Report—Wage-earning Capacity—Appeal—Competency.*

A miner who had sustained an injury to his eye was paid compensation down to a certain date, when, on the report of the medical referee that he was as fit as any other one-eyed man to resume his work underground, the arbiter terminated the compensation. On appeal the Court recalled the determination of the arbiter and allowed a proof. Thereafter the arbiter found in fact that the claimant had not since the date of the accident worked underground, that he had made various applications for such work without success, that whereas before the accident his wages were upwards of £2 a-week, he was now able to earn only 18s. a-week, and dismissed the application for review.

In an appeal at the instance of the employers the Court *refused* to disturb the arbiter's decision, *holding* that the question as to the workman's wage-earning capacity was one of fact on which his decision was final.

(The case is reported *ante ut supra*.)

This was an appeal against a decision of the Sheriff-Substitute at Kirkcaldy (UMPHERSTON), in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between William Arnott, miner, Kirkcaldy, *claimant and respondent*, and the Fife Coal Company, Limited, *appellants*.

The facts as set forth in the Stated Case were as follows—"1. On 8th September 1908 William Arnott, the claimant, was a miner in the appellants' employment at their Bowhill Colliery, Cardenden. On said date his left eye was injured, and it was removed on 23rd September 1908.

"2. From the date of the accident until he started work above ground in the month of September 1909 the claimant was paid the maximum compensation at the rate of £1 per week.

"3. In the month of September 1909 the claimant started work above ground in the employment of the appellants. His partial compensation was fixed at 13s. 4d. per week, and he was paid at that rate until 13th January 1911. He has received no compensation since that date.

"4. On said 13th January 1911 the claimant was examined by Dr George Mackay, 20 Drumsheugh Gardens, Edinburgh, medical referee in ophthalmic cases under the Workmen's Compensation Act 1906, on a remit under section 15 of Schedule I of said Act.

"5. The report of said medical referee lodged on 18th January 1911 is in the following terms:—"The said William Arnott had his left eye removed on 23rd September 1908, following upon the accident for which compensation is claimed. The socket is at present slightly inflamed as the result of wearing an artificial eye too freely. That, however, should soon yield to appropriate treatment. The right eye has a very slight error of refraction, but otherwise is quite a sound one. Though he complains of some subjective sensations of occasional headache, there does not appear to be any obvious cause for these which could be assigned to the injury, and his condition is such that, having for the past fifteen months been engaged in work at the pithead, he is now, in my opinion, as fit as any other one-eyed man to resume his work underground."

"6. Following upon said report the appellants lodged in process in the Sheriff Court at Kirkcaldy a minute craving the Court to end the claimant's compensation as at 13th January 1911. The claimant lodged answers to said minute, stating, *inter alia*, that he had not recovered from the injuries which he had sustained, and that he had not recovered his earning capacity following upon said injuries; that he was still under medical treatment; that since the date of the accident the socket of the left eye, which had been removed, had been in an inflamed condition, painful and suppurating; that he suffered from headaches during his shift and after; that these headaches were brought about through his having to stoop or bend, and were a result

of the injuries which he had sustained; that they interfered with his capacity for work and his earning ability; and further, that the sight of the remaining eye was weak and became dim and fagged by the end of the shift. The claimant further stated that while his earning capacity had been and was at that time much reduced as a result of the injuries which he had sustained, he was quite prepared to try work below ground so that his earning capacity might be properly tested. He averred, further, that a certain period at least should elapse to enable him to accustom himself to his altered condition.

"7. After hearing parties' agents on the minute and answers, I repelled the answers for the claimant as irrelevant, and terminated his compensation from the date of the medical referee's report, namely, 13th January 1911.

"8. Against this decision the claimant appealed by Stated Case to the First Division of the Court of Session, when the following question of law was submitted for the opinion of the Court—"In the circumstances above stated was I entitled to end the compensation payable to the appellant (now respondent)?"

"9. On 17th June 1911 the Court issued the following interlocutor—"The Lords having considered the Stated Case on appeal, and heard counsel for the parties, answer the question of law in the case in the negative *in hoc statu*; Recal the determination of the Sheriff-Substitute as arbitrator, and remit to him to allow parties a proof of their averments, and to proceed as accords."

"10. I thereupon appointed proof to be led on 21st July 1911, when the following facts were proved, viz.—(a) That the claimant since the date of the accident had not worked underground, but that he had made various applications for work underground without success. (b) That it was impossible to say whether, if the claimant had returned to work underground in January 1911 he would have regained his former earning capacity by 21st July. (c) That there is no standard of earning capacity for one-eyed miners who are able to work at the face. Each individual must have a standard for himself. The power of the sound eye, the inherent capacity of the individual to adjust himself to altered conditions of work, and the degree of self-confidence which enables a miner to overcome a natural, perhaps nervous, timidity which is engendered by a sense of augmented danger in his occupation, are all elements personal to the injured man which affect his earning capacity when he returns to his former occupation. Some men after the loss of an eye are able to return to work at the face, and after a time to earn as much as formerly. Others are unable to adapt themselves to the new conditions and to continue work underground. (d) That the claimant is presently working on the surface, and is only able on account of his injuries to earn 18s. a-week. There was no evidence before me as to his earn-

ings prior to the accident except that they were more than £2 per week. (e) It was not proved that the claimant, if he had been working at the coal face, would have been earning more than he was earning on the pithead.

"I accordingly dismissed the appellants' application for review."

The question of law was—"Was I entitled to dismiss the application of the appellants?"

Argued for appellants—Where, as here, the claimant's "physical capacity" was as good as ever, there was no need to inquire as to his "wage-earning capacity," for what the statute contemplated was "physical capacity"—*Carlin v. Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862. *Esto*, however, that it was competent for the workman to tender evidence that his wage-earning capacity was less—*Rosie v. Mackay*, 1910 S.C. 714, 47 S.L.R. 654—the *onus* of proving that it was so lay upon him—*M'Ghie v. Summerlee Iron Company, Limited*, 1911 S.C. 870, 48 S.L.R. 807. This *onus* he had failed to discharge, and the arbiter therefore was in error in dismissing the application to vary. The amount a workman was earning after an accident was not conclusive as to his wage-earning capacity—*Clelland v. Singer Manufacturing Company*, July 18, 1905, 7 F. 975, 42 S.L.R. 757. Nor was an unsuccessful application for work a criterion of total incapacity—*Boag v. Lochwood Collieries, Limited*, 1910 S.C. 51, 47 S.L.R. 47; *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009 (*per* Fletcher Moulton, L.J., at p. 1020). The workman had not discharged it, and therefore the compensation should be ended. Alternatively, a remitt should be made to ascertain whether there had been any diminution of the claimant's wage-earning capacity.

Argued for respondent—Incapacity for work was not limited to cases of diminished "physical" capacity; it included cases of diminished "wage-earning" capacity—*Ball v. William Hunt & Sons, Limited*, [1911] 1 K.B. 1048 (*per* Fletcher Moulton, L.J., at p. 1054). Where, as here, the employers had not proved the kind of work the claimant could do, and that he had a chance of obtaining that particular kind of work, the application should be refused—*Proctor & Sons v. Robinson*, [1911] 1 K.B. 1004; *Cardiff Corporation (cit.)*, at p. 1013. Wage-earning capacity and not physical capacity was the true test—*Clelland (cit. sup.)*. The appellants' contention that the *onus* lay on the workman to show that his wage-earning capacity had diminished rested on a fallacy, for there was no finding of complete recovery. The report of the medical referee was that the claimant was as fit "as any other one-eyed man." That meant less fit than a two-eyed man. The *onus* therefore lay on the appellants.

At advising—

LORD PRESIDENT—This is an appeal in a stated case between a miner and the Fife Coal Company. On a date in September 1908 the claimant received an injury while

in the employment of the appellants, in respect of which his left eye had to be removed. He was paid the maximum compensation of £1 per week for a considerable period—till he started again to work in the month of September 1909. His partial compensation was then fixed at 13s. 4d. per week, and he was paid at that rate until 13th January 1911. After that the appellants refused to pay compensation. They agreed to remit, under section 15 of the first schedule of the Act, to a medical referee. The medical referee gave a report which set forth the removal of the left eye; that there was nothing practically the matter with the socket of the eye which had been removed; that the right eye had a slight error of refraction, but otherwise was quite sound; that although there were certain suspicions of headaches there was nothing serious in them; and the report finished up with these words—"His condition is such that, having for the past fifteen months been engaged in work at the pithead, he is now, in my opinion, as fit as any other one-eyed man to resume his work underground."

Following upon that report the appellants lodged a minute craving the Sheriff to end the compensation. To that minute the claimant lodged answers saying that he had not entirely recovered, and that his one-eyed condition interfered with his capacity for work and his earning ability. Upon that the learned Sheriff ended the compensation, and an appeal was taken to your Lordships, and in June 1911 your Lordships recalled the determination of the Sheriff-Substitute as arbitrator and remitted to him to allow parties a proof of their averments and proceed with the case. Your Lordships did that, I take it, because you considered that the report of the medical referee did not disclose complete recovery from the accident. The case had disclosed that the man was a one-eyed man, and it did not disclose complete capacity for his old employment underground, because it did not say that he was fit to resume his old employment, but that he was as fit as any other one-eyed man to resume. The case had also disclosed that there was a good averment of the workman that his earning capacity was interfered with by his present condition, which present condition was attributable to the accident.

Now upon that the learned Sheriff-Substitute allowed a proof, and he sets forth the facts. The first fact that he sets forth is that the claimant since the date of the accident had not worked underground, but that he had made various applications for work underground without success. He then goes on to say that there is no standard of earning capacity of one-eyed miners, that some one-eyed men get on better than others, and then he finishes up with the following finding—"That the claimant is presently working on the surface, and is only able on account of his injuries to earn 18s. a week." Upon that he dismissed the appellants' application for review, that is to say, he continued the old compensation.

I think it is impossible to disturb that finding, because I think the Sheriff-Substitute has found as a matter of fact that the claimant is only able on account of his injuries to earn 18s. a-week. We had already held that the medical report as it stood was not conclusive in the circumstances of this case as to the man's capacity to resume work; and I think the matter is ended when the proof which was taken on that judgment discloses facts upon which the Sheriff-Substitute has arrived at the finding—a finding upon fact with which we have no right to interfere—that the applicant has not worked underground, that he has not been able to secure work underground, and that he is only able on account of his injuries to earn 18s. a-week, which, of course, is much less than his old wages were.

I am therefore for answering the question of law in the affirmative, and saying that the learned Sheriff-Substitute was right.

LORD KINNEAR—I agree with your Lordship. The Court considered that the report of the medical referee was not exhaustive of the question put to him, because, although he had given a report of the man's condition, the result to which he came was, not that the workman was fit for his former work, but that he was as fit as any one-eyed man to resume his work underground. He did not tell us whether every one-eyed man is as fit to work underground as the man with two eyes, and his finding as to the present workman's fitness left it a matter of doubt whether he was still as able to work after having lost his eye as before the accident. Accordingly your Lordships remitted to the Sheriff-Substitute to proceed to take proof, and upon that the question for him was obviously a pure question of fact—it was to ascertain whether this man was as fit or was not as fit for his work as before, notwithstanding his having lost an eye.

Well, then, he makes an answer in fact which appears to me to establish two propositions. In the first place, that the claimant has been working on the surface, and has not been able to work underground because he has not been able to obtain work. He has made various applications for work underground without success. And, secondly, it establishes that on account of his injuries he can only earn 18s. a-week, that is, by working on the surface.

The Sheriff-Substitute also gives a finding with reference to the general question raised by the medical referee's report as to the ability of one-eyed men to work, and that shows that he had considered whether as matter of experience it had been found that a man who had lost his eye was as good for work underground as if he had two eyes, and the conclusion is that some men are able to work at the face although they are labouring under that misfortune and others are not. But that only shows that the arbitrator has fairly considered all the questions, and as the result of his considerations has reached a decision on

the question of fact which I do not think your Lordships can disturb.

I therefore agree that the question should be answered as your Lordship proposes, and that the Sheriff-Substitute's decision is final.

LORD JOHNSTON—I have great difficulty in this case owing to the way in which the learned Sheriff-Substitute has stated the result of the proof before him; but as your Lordships are satisfied I do not think it necessary or desirable that I should criticise further these statements. I agree in the judgment your Lordship proposes.

LORD MACKENZIE—I agree with your Lordships. It was argued to us that the facts stated as proved did not conclusively show that the inability to get work was due to the injury, and that was based on a criticism of sub-head (a), in which the Sheriff-Substitute says—"That the claimant since the date of the accident had not worked underground, but that he had made various applications for work underground without success." It was contended that that did not exclude the idea that his want of success in getting employment was due to the conditions of the labour market.

Then sub-head (d) was criticised, where the first clause was "That the claimant is presently working on the surface," and it was said that that might, taken along with sub-head (a), be consistent with this view that the reason he was working on the surface was that he was unable to get work underground in consequence of the conditions of the labour market. But then I think it is impossible to construe the findings as a whole upon that view, because the arbitrator goes on to find in express terms that the workman is only able to earn on account of his injuries 18s. a-week. I think that excludes altogether any idea of not finding employment because there was no work to get, and affirms that the workman's incapacity to earn wages is solely because of his maimed condition. The result is, the Sheriff-Substitute finds that whereas his earnings prior to the accident were more than £2 per week, his earning capacity had been so reduced by the injuries he had sustained that his wages now were only 18s. a-week.

On that statement I have come to the conclusion that the Sheriff-Substitute was right.

The Court answered the question of law in the affirmative and dismissed the appeal.

Counsel for Appellants—Horne, K.C.—Russell. Agents—W. & J. Burness, W.S.  
Counsel for Respondent—Constable, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.