

gories. In my opinion this category is plainly inapplicable for two reasons—(1) the lorry in question is not a tractor, nor an agricultural tractor, nor an agricultural engine; (2) it is not used for haulage. The other suggested category in this section is that set forth under the head of "Road locomotive." It is said that this lorry is a "road locomotive," and that may be so. It is also a vehicle of the kind referred to in the opening words of the section, namely, one "used solely in the course of trade or in agriculture." But the section imposes, in my opinion, a further qualification by the clause "used for haulage solely in connection with agriculture." It is difficult to harmonise the language of this part of the clause with the rules of grammar and with the other parts of the section, but it seems to me that the section as a whole applies only to vehicles which are engaged in haulage. If this be so, then the provisions of section 4 do not apply to the lorry in question, which carries but does not haul. There remains section 5, under which in my opinion the lorry falls to be taxed. The language of this section seems to be apt to describe the lorry and the use to which it is put. The lorry is "adapted for use" as a vehicle for the conveyance of goods. Again, on the facts set forth in the Case the lorry seems to me in point of fact to be used for the conveyance of goods in the "course of trade." The goods which it carries are milk, feeding stuffs, and manures. As to the two former, I have no difficulty in holding that they are carried in the course of trade—the milk to be sold, the feeding stuffs to fatten the cows which give the milk. There is more difficulty as to manures, which might be used for arable ground as well as pasture. The statutory words, however, are not "in trade" but "in the course of trade," the latter phrase having a wider significance than the former, and the statutory phrase seems to warrant us in holding that the lorry was employed solely for trading purposes. I am therefore of opinion that the lorry falls to be taxed under section 5, and that the appropriate duty is £16. The questions of law should therefore be answered as suggested by Lord Ormidale.

The Court answered the third question of law in the affirmative, and the first, second, and fourth questions in the negative.

Counsel for the First Party—Lord Advocate (Hon. W. Watson, K.C.)—Patrick. Agents—Connell & Campbell, S.S.C.

Counsel for the Second Party—Duffes. Agents—Ketchen & Stevens, W.S.

Saturday, May 26.

SECOND DIVISION.

[Sheriff Court at Hamilton.

PURDIE v. DAVID COLVILLE & SONS,
LIMITED.

Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), First Schedule (3)—Total or Partial Incapacity—Workman Fit for Light Work—Failure to Obtain Employment—Onus of Proving that Earning Capacity was Nil—"Odd Lot"—Failure of Workman to Test the Market.

In an arbitration under the Workmen's Compensation Act 1906, on an application by a workman for a continuing award of compensation in respect of total incapacity, the arbitrator found that the workman was still suffering from the effects of the accident; that he was unable to resume his occupation of a steel smelter or of a bricklayer's labourer; that such inability was likely to be permanent; that he was fit for light work, such as storekeeping, gatekeeping, or watching; that work suitable for the workman was not very easy to obtain at any time; that owing to the depression in the steel trade very few such posts were then in existence; that the workman had not tried to get any work; and that it was not proved that in normal times there would be absolutely no market for the workman's labour in the condition in which he then was. *Held* that the arbitrator was entitled on the foregoing facts to find that the pursuer was not totally incapacitated for work.

Carlin v. Stephen & Sons, Limited, 1911 S.C. 901, 48 S.L.R. 862; and *Pearson v. Archibald Russell, Limited*, 1916 S.C. 536, 53 S.L.R. 377, followed.

Proctor & Sons v. Robinson, [1911] 1 K.B. 1004, considered.

In an arbitration under the Workmen's Compensation Act 1906 between Thomas Purdie, 16 Regent Street, Rutherglen, appellant, and David Colville & Sons, Limited, Clyde Bridge Steel Works, Cambuslang, respondents, the Sheriff-Substitute (SHENNAN) found that the claimant was not totally incapacitated for work, and at his request stated a Case for appeal.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, on an application presented by the appellant on 25th November 1922 for a continuing award of compensation in respect of total incapacity due to injury by accident received in the respondents' employment.

"Proof was led before me on 23rd January 1923, when the following facts were admitted or proved:—(1) On 21st November 1921 the appellant was working with the respondents at bricklaying when he fell from a scaffold and sustained injuries which totally incapacitated him. The respondents admitted liability and paid him full compensation in respect of total

incapacity to 8th September 1922. (2) In August 1922 the parties agreed to refer the question of the appellant's capacity for work to Dr G. H. Edington, Glasgow. On 8th September 1922 Dr Edington reported that the appellant 'is still suffering from the effects of the accident; that he is unable to resume his occupation of a steel smelter, or of a bricklayer's labourer, and that such inability is likely to be permanent; that he is fit for light work such as storekeeping, gatekeeping, or watching.' (3) The appellant stated in evidence, 'I have not tried to get any work because I am not fit.' Work suitable for the appellant is not very easy to obtain at any time. At present, owing to the depression in the steel trade, very few such posts exist. In normal times the respondents employ about a dozen men at work of this description. At the date of the proof their works were shut down, but their manager expressed readiness to endeavour to find the appellant a suitable job when the works start. He stated that like other employers they gave a preference for such posts to men injured in their own employment. The manager did in fact offer the appellant light labouring work, but it is doubtful if he is fit for this. It was not proved that in normal times there would be absolutely no market for the appellant's labour in his present condition.

"On these facts the appellant contended that he was entitled to compensation in respect of total incapacity. The respondents submitted that compensation should be awarded only in respect of partial incapacity and tendered the maximum amount therefor.

"On 26th January 1923 I issued my award finding the appellant entitled to the maximum amount of weekly compensation in respect of partial incapacity. I was of opinion (1) that the appellant possessed some degree of physical capacity; (2) that the onus lay on him to prove that this physical capacity had no earning value in the labour market; (3) that he had failed to prove this, not having done anything to test the market; and (4) that accordingly he could not be held to be totally incapacitated within the meaning of the Workmen's Compensation Act 1906."

The question of law for the opinion of the Court was—"On the foregoing facts was I entitled to find that the pursuer was not totally incapacitated for work?"

The Sheriff-Substitute appended the following note to this award—"The parties agreed to refer the question of the workman's capacity to Dr Edington, whose finding is—'that he is unable to resume his occupation of a steel smelter or of a bricklayer's labourer, and that such inability is likely to be permanent; that he is fit for light work, such as storekeeping, gatekeeping, or watching.'

"This is a finding that the workman has partially regained his physical capacity, and the immediate presumption is that he shall receive compensation only in respect of partial incapacity. But this presumption may be redargued. It may be shown

that although the workman has some physical capacity, this has no earning value, and it has been clearly laid down by the House of Lords that the incapacity dealt with in the Workmen's Compensation Acts is incapacity to earn wages. The onus, however, of proving that he has no earning value lies in the first instance on the workman. He must show that he has put his capacity on the labour market and has found that there is no demand for it. Here the workmen stated in evidence, 'I have not tried to get any work because I am not fit for it.' There was evidence by one witness to the effect that even if the workman did try for work he could not get it. That hypothetical evidence is valueless. Without a trial it is impossible to say that no work is available. Further, the workman must show that his inability to get work is due to his injury. If it is due to economic causes only he cannot recover. The respondents state that in normal times they have about a dozen posts which would suit the workman, and that as soon as their works start they are willing to employ him. I cannot find on the evidence that Purdie is totally incapacitated from earning wages on account of the accident alone.

"The respondents submitted a further argument to the effect that the 'total incapacity' referred to in the Workmen's Compensation (War Additions) Acts 1917 and 1919 means only total physical incapacity. In my opinion the words 'total incapacity' have the same meaning in these Acts as they have in the Workmen's Compensation Act 1906, and include the case of total incapacity to earn wages on account of the accident.

"The workman's agent relied on the case of *Kear v. Shelton Iron and Steel Company*, 14 B.W.C.C. 123. That was a special case, and I refer to the explanation of it given in *Foster v. Wharnclyffe Woodmoor Colliery Company*, 15 B.W.C.C. 136; and the immediately following cases of *Gaffney v. Chorley Colliery Company, Limited*, and *Middleton v. Wharnclyffe & Company*."

At the hearing of the appeal the following cases were referred to—*Murray v. Portland Colliery Company*, 1923 S.C. 60, 60 S.L.R. 56; *Foster v. Wharnclyffe Woodmoor Colliery Company, Limited*, [1922] 2 K.B. 701; *Middleton v. Wharnclyffe Woodmoor Colliery Company, Limited*, (1922) 15 B.W.C.C. 166; *Gaffney v. Chorley Colliery Company, Limited*, (1922) 15 B.W.C.C. 158; *Kear v. Shelton Iron, Steel, and Coal Company*, (1921) 14 B.W.C.C. 121; *Espie v. British Basket Company*, 1920 S.C. 655, 57 S.L.R. 529; *Ball v. Coulthard (F.) & Company, Limited*, (1919) 12 B.W.C.C. 312; *Pearson v. Archibald Russell, Limited*, 1916 S.C. 536, 53 S.L.R. 377; *Silcock & Sons v. Golightly*, [1915] 1 K.B. 748; *George Taylor & Company v. Clark*, (1914) 7 B.W.C.C. 871; *Williams v. Ruabon Coal and Coke Company, Limited*, (1914) 1 B.W.C.C. 202; *Ball v. William Hunt & Sons, Limited*, [1912] A.C. 496, 1912 S.C. (H.L.) 77, 49 S.L.R. 711; *Duris v. Wilsons and Clyde Coal Company, Limited*, 1912 S.C. (H.L.) 74, 49 S.L.R. 708, [1912] A.C. 513; *Carlin v. Stephen*

& Sons, Limited, 1911 S.C. 901, 48 S.L.R. 862; *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009; *Anglo-Australian Steam Navigation Company, Limited v. Richards*, (1911) 4 B.W.C.C. 247; *Proctor & Sons v. Robinson*, [1911] 1 K.B. 1004; *Radeliffe v. Pacific Steam Navigation Company*, [1910] 1 K.B. 685.

At advising—

LORD JUSTICE-CLERK—The appellant, a workman employed by the respondents, was injured on 21st November 1921 by an accident arising out of and in the course of his employment. He was totally incapacitated thereby, and the respondents paid him compensation on that footing till 8th September 1922. On that date a certificate was issued by Dr Edington, Glasgow, to whom the parties had agreed to refer the question of the appellant's capacity for work, in these terms:—That the appellant "is still suffering from the effects of the accident, that he is unable to resume his occupation of a steel smelter or of a bricklayer's labourer, and that such inability is likely to be permanent, that he is fit for light work such as storekeeping, gatekeeping, or watching." The learned arbitrator finds that work suitable for the appellant is not very easy to get at any time, and is still more difficult to obtain at a time of depression in the steel trade such as the present. The respondents at ordinary times employ about a dozen men at work of the kind for which the appellant is fitted, but at the date of the proof their works were closed down. Their manager, however, expressed readiness to endeavour to find suitable work for the appellant when the works re-opened. The arbitrator considers it doubtful if the appellant is fit for light labouring work, which in point of fact had been offered to him by the respondents' manager. Finally, the arbitrator states that the appellant in evidence said—"I have not tried to get any work, because I am not fit."

On these findings the arbitrator has held that the appellant possessed some degree of physical capacity, that the onus lay on him to prove that his physical capacity had no earning value in the labour market, that he had failed to prove this, not having done anything to test the market, and that accordingly he could not be held to be totally incapacitated within the meaning of the Workmen's Compensation Act 1906.

The question for the Court is whether the arbitrator was entitled so to hold.

I think that question admits of one answer only, and that is an answer in the affirmative. Looking at the matter apart from decision, I should have thought that the opinion of the arbitrator is in accord not only with the statute but with good sense. The view I take is an exceedingly simple one. I ventured to suggest it at an early stage of the debate. The respondents were paying the appellant compensation as for total incapacity. They stopped that payment. They must justify this course. The onus is on them to do so. They point to a medical certificate, which by consent of

the parties is conclusive as to the physical capacity of the appellant. It discloses that he is now fit for certain forms of work. The presumption, I think, immediately arises that with the partial restoration of his physical capacity there is also partial restoration of earning capacity. Of course that may not be so, and it is open to the appellant to show that it is not so. The onus, however, in my judgment is shifted by the medical certificate from the respondents to the appellant. Has he then shown that his earning capacity remains nil though his physical capacity has improved? He has not taken the first step in that direction, for he has made no attempt to test the market. How can one say that a man cannot obtain work if he omits to try to obtain it? If he had proved that he had made attempts to obtain work such as the arbitrator names, and had failed to find it, then I think that he would have discharged the onus that lies upon him and that his claim would succeed. As it is I think it fails. His case is that he is entitled to sit with folded hands till his employers fetch him a job. I do not consider that a reasonable view, and I am for rejecting it.

It appears to me that the light of reason unaided by copious citation of authorities leads straight to this result. I cannot help thinking that in this class of case where the decision must turn on the particular circumstances proved, cases decided in other circumstances merely tend to bemuse one's mind and to cloud one's judgment. As, however, we were favoured with a very elaborate and able argument based on cases decided in various countries and in various courts I take leave to say that having carefully considered these cases I find among them no authoritative decision which is inconsistent with the view which I suggest that your Lordships should adopt.

On the contrary, the cases decided in Scotland go far to affirm the respondents' contention. In particular, I refer to *Carlin*, 1911 S.C. 901, and *Pearson*, 1916 S.C. 536. In entire conformity with these Scottish decisions are the cases of *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009, and the *Anglo-Australian Steam Navigation Company*, (1911) 4 B.W.C.C. 247. Two English cases were referred to by the appellant in support of his contention—*Proctor & Sons*, [1911] 1 K.B. 1004, and *Kear*, (1921) 14 B.W.C.C. 121. The decision in the former case has not been followed in England, and indeed its authority is impaired if not destroyed by the decisions in *Cardiff*, *Foster* ([1922] 2 K.B. 701), and *Duris* (1912 S.C. (H.L.) 74), while it is inconsistent with the principle upon which *Carlin* and *Pearson* were decided in this country. The case of *Kear*, as explained in *Foster*, is so special that it throws little if any light upon the subject.

I therefore think that there is ample ground to justify the learned arbitrator in reaching the conclusion which he did, and I suggest that, as I indicated at an earlier stage, the question put by him should be answered in the affirmative.

LORD ORMDALE—On 21st November 1921 the appellant was working at bricklaying when he fell from a scaffold and sustained injuries which totally incapacitated him. The respondents admitted liability and paid him full compensation in respect of total incapacity down to 8th September 1922.

In August 1922 the parties had agreed to refer the question of the appellant's capacity for work to a medical man, and on 8th September the doctor reported that the appellant "is still suffering from the effects of the accident; that he is unable to resume his occupation of a steel smelter or of a bricklayer's labourer, and that such inability is likely to be permanent; that he is fit for light work such as storekeeping, gatekeeping, or watching."

Thereafter on 25th November 1922 the appellant presented an application for a continuing award of compensation in respect of total incapacity, but while the application is thus at the appellant's instance, I think that his counsel were warranted in saying that the burden of proving that total incapacity had ceased was on the respondents. The latter maintain that they have discharged this burden, founding specially on the doctor's report which was brought before the arbitrator. On the other hand the appellant maintains that the report does no more than ascertain that he has recovered some physical capacity for work, but does not ascertain that that physical capacity has any earning value. Now it has been conclusively determined that the statutory "incapacity to work" means "incapacity to earn wages" (*Ball v. William Hunt & Sons*, 1912 A.C. 496; *Duris v. Wilsons and Clyde Coal Company*, 1912 S.C. (H.L.) 74, overruling *Boag v. Lochwood Collieries*, 1910 S.C. 51), and what the arbitrator had to determine was whether such capacity for work as had been restored to the appellant had any marketable value, and that the appellant had ceased therefore to be totally incapacitated in the sense of the statute.

The appellant has not tried to get any work; he has not tested the market; but he says that in the circumstances he was not bound to do so; that his capacity for work is so impaired that it was for the respondents to show not only what work he is able to perform but also to show that he can get such work—that there is a customer who is willing to take and pay for it. In other words he maintains that his labour has now become an "odd lot" in the labour market, as the expression is used by Lord Justice Fletcher-Moulton in *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009, at p. 1021—"There can therefore be no general principle, i.e., a principle true in all cases, that in the case of partial incapacity the employer is required not only to show what work the workman can do, but also to show that he can get such work. But on the other hand I am also of opinion that there are cases in which the onus of showing that suitable work can in fact be obtained does fall upon the employer who claims that the incapacity of the workman is only partial. If the accident has left the

workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labour market—if in other words the capacities for work left to him fit him only for special uses, and do not, so to speak, make his powers of labour a merchantable article in some of the well-known lines of the labour market, I think it is incumbent on the employer to show that such special employment can in fact be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labour in the position of an 'odd lot' in the labour market the employer must show that a customer can be found who will take it."

The arbitrator has not given effect to this contention. He has held that it was for the appellant himself to test the market and to show that there was no sale for his labour.

The question is whether the arbitrator was justified in so doing. The case appears to me to be on the border line, and the question therefore a difficult one, but on a consideration of the many cases which were cited to us I think the arbitrator was right. The cases referred to do not develop the principles enunciated by Lord Justice Fletcher-Moulton. They are recognised to be sound, but in most of the cases the application of the principles was rejected; in very few they were given effect to. In *Cardiff Corporation v. Hall* itself they were by the majority of the Court, including Fletcher-Moulton, L.J., held not to be applicable. *Proctor & Sons v. Robinson*, [1911] 1 K.B. 1004, is a case which at first sight most closely, perhaps, resembles the present, but as explained in subsequent cases—*Silcock & Sons v. Golightly*, [1915] 1 K.B. 748 (Phillimore, L.J., at p. 754); *Foster*, [1922] 2 K.B. 701—and indeed by Lord Justice Fletcher-Moulton in *Cardiff Corporation v. Hall* (who himself was one of the Judges who decided *Proctor's* case), it appears to me to have been of a special character. I cannot think that the appellant here can be described as the workman in *Proctor's* case was by Lord Justice Fletcher-Moulton as a nondescript in the labour market. *Proctor's* case has not in our Courts been regarded with favour—*Carlin*, 1911 S.C. 901; *Pearson*, 1916 S.C. 536, at 540.

The doctor's report indicates that a fairly wide field of employment is open to the appellant. It mentions some of the kinds of light work which he is physically fit for, but I do not read it as meaning that there are no others. Storekeeping, gatekeeping, or watching are only specimens of the work he can do. The other facts found to be admitted or proved by the arbitrator may not incline one to think that the appellant's chances of success are very great, but I cannot hold on a survey of the whole facts that it was not competent to the arbitrator to come to the conclusion he did, and that being so his award must stand.

LORD HUNTER—The only question put to us in this Stated Case is whether the arbitrator on the facts stated to us was entitled to find that the appellant was not

totally incapacitated for work. On 21st November 1921 the appellant when working with the respondents at bricklaying sustained certain injuries which totally incapacitated him for work. The respondents admitted liability and paid him full compensation in respect of total incapacity to 8th September 1922.

In August 1922 the parties agreed to refer the question of the appellant's capacity for work to Dr Edington, who on 8th September 1922 reported that the appellant "is still suffering from the effects of the accident; that he is unable to resume his occupation of a steel smelter or of a bricklayer's labourer, and that such inability is likely to be permanent; that he is fit for light work, such as storekeeping, gatekeeping or watching."

The report of Dr Edington was before the arbitrator, and I do not think that he had any alternative but to accept the conclusion there reached. That shows that the appellant had partially regained his physical capacity, and I think raises a presumption that he is only entitled to receive compensation as for partial incapacity, the exact amount to which he is entitled being left to the discretion of the arbitrator. The appellant might have redargued this presumption by showing that his physical capacity had no earning value. The arbitrator has, however, found that the appellant has not redargued this presumption.

The case for the appellant is based upon the decision of *Proctor & Sons v. Robinson*, [1911] 1 K.B. 1004. The head-note in that case is to the following effect:—"Where, upon an application by employers to reduce the weekly compensation payable to a workman under the Workmen's Compensation Act 1906 on the footing of total incapacity, it was proved that the man was prevented by the accident from doing the full work of an ordinary labourer, but that he could do some light work if he could obtain it, and there was no evidence that he could obtain any suitable employment, held that it was incumbent on the employers to show what particular light work the workman could do, and to give some evidence that he had a chance of obtaining that particular kind of work, and that in the absence of that evidence reduction ought to be refused."

If the above statement of the law had remained unexplained and been accepted as an authoritative pronouncement of the law binding upon us, I think that the appellant would be entitled to succeed. The respondents, who were maintaining that the appellant's total incapacity had been reduced to partial incapacity, did not lead any evidence to the effect that any particular form of light work was in fact available to him. On the other hand, the appellant had made no attempt to get such light work as Dr Edington indicated he was now qualified to undertake, and the arbitrator, while stating that work suitable for the appellant is not very easy to obtain at any time, indicates that owing to the depression in the steel trade very few such posts exist.

The decision in the case of *Proctor* has been explained and, as I think, qualified in a number of English cases subsequent thereto. It is not necessary to examine these cases which were brought fully under our notice. I refer in particular to the two cases of *Cardiff Corporation v. Hall* ([1911] 1 K.B. 1009) and *Foster v. Wharnccliffe Woodmoor Colliery Company*, [1922] 2 K.B. 701.

It appears to me, however, that we could not give effect to the appellant's contention without disagreeing with the reasoning of the Second Division in the case of *Carlin v. Stephen & Sons* (1911 S.C. 901), and of the First Division in the case of *Pearson v. Archibald Russell, Limited*, 1916 S.C. 536. As I am not prepared to take this course, I agree that the question should be answered in the affirmative.

LORD ANDERSON—This Stated Case seems to me to raise no question save one of fact, as to which the arbitrator is final if there is evidence to support his award. Even if it be the case, as the appellant alleges, that the arbitrator in the course of his ratiocination as to the facts has misdirected himself on a matter of law, the award would not thereby be vitiated if it were justified by the facts found proved (*per* Lord Dunedin in *Taylor*, (1914) 7 B.W.C.C. 871, at p. 873).

Where an employer in a process of review of compensation alleges that total incapacity has ceased, completely or partially, the onus is on him to prove this allegation. The respondents maintain that they have discharged that onus and proved that the appellant is now only partially incapacitated, and the arbitrator by his award has given effect to this contention. The crucial facts which seem to me to support this conclusion are these—(1) the medical certificate, which finds that the appellant is fit for light work of the nature of storekeeping, gatekeeping, or watching, these being illustrative and not taxative of his market; (2) the finding that there is a market, albeit a restricted one, for the labour of which the appellant is capable; and (3) the admitted circumstance that the appellant is not specially handicapped, as by mutilation, from competing in that limited market. His strength, it is true, remains impaired as the result of the accident, so that he is fit only for light work. He seems, however, in this respect to be on the same footing as most of those who compete in the light labour market, and therefore he appears to be physically qualified to compete on equal terms with other competitors in that market. This being so, it is plain that he is not an "odd lot" in the sense in which that phrase was used by Fletcher-Moulton, L.J., in the case of *Cardiff Corporation v. Hall*, [1911] 1 K.B. 1009. This phrase is designed to indicate a workman who is so handicapped by the nature of his injuries that he is unable to compete on anything like equal terms with other competitors in any labour market. It applies to a workman whose physical condition is such as to raise a presumption that his labour is unsaleable. In such a case, but only in a case

so exceptional, the onus is on the employer to show that the workman's labour is saleable. The practical result in this exceptional case is that the employer must find the man a job or continue to pay him compensation as for total incapacity. As the facts of the present case plainly show that the appellant is not an "odd lot" in this sense, there was no onus on the respondents to prove that he could obtain employment. The main contention urged in support of the appeal is therefore not well founded.

The arbitrator has perhaps laid undue stress on the circumstance that the appellant failed to test the market. On the authorities this circumstance does not seem to be determinative one way or another. On the one hand, an award may be reduced where no attempt to get work has been made by the workman (*Anglo-Australian Steam Navigation Company v. Richards*, (1911) 4 B.W.C.C. 247; *Williams*, (1914) 7 B.W.C.C. 202). On the other hand, it is open to the arbitrator to reduce the award although the market has been unsuccessfully tested—(*Cardiff Corporation, supra; Gaffney*, (1922) 15 B.W.C.C. 158). Reduction of compensation as for total incapacity will be refused only if the facts show that improved physical capacity does not import improved earning capacity. The way in which the arbitrator has regarded the question of onus seems, however, to be supported by the case of *Duris*—(1912) S.C. (H.L.) 74, [1912] A.C. 513. The view of the arbitrator appears to be this—that where the proved facts point to improved earning capacity it is for the workman to show that nevertheless his labour is unsaleable in point of fact.

The question of whether or not an injured workman is an "odd lot" is always one of fact depending upon the particular circumstances of each case, and no general rule as to this matter can be formulated. We were referred to cases in which it was held that the workman was an "odd lot" (*Proctor*, [1911] 1 K.B. 1004; *Ball*, (1919) 12 B.W.C.C. 312; *Kirkby*, (1920) 13 B.W.C.C. 168; *Yates*, (1921) 14 B.W.C.C. 80; *Kear*, (1921) 14 B.W.C.C. 121), and to decisions in which it was held that the workman was not an "odd lot" (*Richards, supra; Cardiff Corporation, supra; Carlin*, 1911 S.C. 901; *Williams, supra; Silcock*, [1915] 1 K.B. 748; *Pearson*, 1916 S.C. 536; *Gaffney, supra; Middleton*, (1922) 15 B.W.C.C. 166).

But each case falls to be decided on its own facts, and the findings in the present case satisfy me that the arbitrator was right in holding in effect that the appellant was not an "odd lot," and that there was therefore no onus on the employers to show that work was available for him. I therefore agree that the question of law should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for the Appellant—Mackay, K.C.—D. Jamieson. Agents—Carmichael & Miller, W.S.

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

Friday, June 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

BUCHANAN v. GLASGOW CORPORATION.

Reparation—Negligence—Burgh—Street—Defect in Pavement—Injury to Child when at Play—Averments—Relevancy—Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxxiii).

In an action of damages against the Corporation of Glasgow at the instance of the mother of a child of seven, who was injured while playing in a public street, the pursuer averred that the child's foot caught in a broken part of the corner of the pavement, which formed a triangular depression between four and six inches in length and over an inch in depth, with the result that she fell, sustaining a compound fracture of the leg. The pursuer further averred that the defect had existed for a considerable time. The defenders admitted that it was their duty to inspect the pavement, and in the event of its being dangerous to have it repaired. *Held (diss. Lord Hunter)* that the pursuer had stated a relevant case for inquiry, and issue allowed.

Mrs Nathalie Keegans or Kennedy or Buchanan, Glasgow, as tutrix and administratrix-in-law of her pupil daughter Annie Kennedy, aged seven years, residing with her, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for payment of £250 as damages for personal injuries sustained by her daughter through falling on a pavement in Wemyss Place, Glasgow.

The pursuer, *inter alia*, averred—“(Cond. 2) On or about 12th April 1922, at 9:30 p.m., while pursuer's said pupil daughter Annie was playing in Wemyss Place near No. 4, her foot caught in a broken part of the pavement there, whereby she fell with her left leg under her, sustaining a compound fracture of the left femur. The said pavement was and is in the possession and under the control of the defenders. (Cond. 3) The said pavement is of Caithness flags, one of which is broken at the corner, forming an irregular triangular depression in said pavement between four and six inches in length on each of its sides and over an inch in depth. The said pavement had been in the dangerous state of disrepair mentioned for a considerable time prior to the accident, and it is believed and averred that the defenders have since done nothing to repair it. (Cond. 4) The said injuries to the pursuer's said pupil daughter were due to the fault and negligence of the defenders or of those for whom they are responsible, in allowing the said pavement to be and to remain in such a state of disrepair that its condition was highly dangerous to foot-passengers. It was the duty of the defenders to inspect the said pavement at reasonable intervals, and if such was found to be