to her non-residence with her husband which is contained in the father's provision, and also the possibility, if the pending proceedings at the instance of her husband for divorce on the ground of desertion should result in a decree, of a claim being thereby created either on the provision or on the legitim.

"I also met the respondent alone and heard his views. He informed me that if the petitioner desires to take her father's provision he does not wish to oppose, but he regrets that she does not see her way, even at some pecuniary sacrifice, to return to her married life and position.

"I am prepared as curator to give consent to the election by the petitioner of her conventional provision in lieu of her legal rights should your Lordships so direct me and think such a course necessary. I would, however, venture to suggest for your Lordships' consideration whether it would not be sufficient for your Lordships to approve of this report, and in respect thereof to grant the prayer of the petition."

On July 14 the Court approved of the report and granted the prayer of the petition.

Counsel for the Petitioner—Macmillan. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent—Hon. Wm. Watson. Agents — Dove, Lockhart, & Smart, S.S.C.

Friday, June 9.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CARLIN *v.* ALEXANDER STEPHEN & SONS, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, sec.* 16—*Review of Weekly Payment—Finding that Workman Fit for Light Work, and that Employers had Offered such Light Work—No Finding as to Wages that could be so Earned—Diminution of Weekly Payment.*

In an arbitration under the Workmen's Compensation Act 1906, in which the employers craved a review of the weekly payment payable by them to an injured workman, in respect of total incapacity, the arbitrator found in fact (1) that the workman was able for certain specified light work, (2) that the employers had offered him such light work, and (3) that there was no evidence to show how much the workman might earn by such light work.

Held that to found an award diminishing the weekly payment, a finding that the workman was able to earn a specific weekly wage at work which he was able to do was not necessary, and that such an award might proceed on (1) the finding as to the workman's capacity, and (2) the offer of light work by the employers.

Per Lord Salvesen—"I must not be understood as holding that the diminution of the compensation might not well have proceeded on the first finding alone. The moment it is established as a matter of fact that total incapacity has ceased, and that only partial incapacity is present, the employer has made out a *prima facie* case for having the award as for total incapacity diminished.

Cardiff Corporation v. *Hall*, [1911] 1 K.B. 1009, and *Proctor & Sons* v. *Robinson*, [1911] 1 K.B. 1004, *considered.*

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in the Sheriff Court at Glasgow, between Hugh Carlin, *appellant*, and Alexander Stephen & Sons, Limited, *respondents*, the interim Sheriff-Substitute (WELSH) diminished the weekly payment payable by Stephen & Sons to Carlin, and at the request of the latter stated a Case for appeal.

The Case set forth:—"The following *facts* were admitted or proved—(1) That on or about 13th August 1909 the appellant, while in the employment of the respondents at Govan Graving Dock as a labourer, suffered injury to his left ankle through strain by accident arising out of and in the course of his employment, caused by his having turned round while his foot was caught between two planks of wood. (2) That he was then totally incapacitated for work as a result of said accident. . . . (9) That the appellant is no longer totally incapacitated for work, but is able for light work such as that of a messenger or light porter or other occupation where he would not require to do the heavy work of a labourer. (10) That the appellant was on 31st May 1910 offered on behalf of the respondents light work as a labourer, which he refused, on the allegation that he was not then fit to undertake such work. (11) That at that time the condition of his ankle was such that he was able to undertake light work, if he had endeavoured to do so. (12) That no evidence was led at the proof to show how much the appellant was capable of earning as a messenger or light porter, or in any other occupation where he would not require to do the heavy work of a labourer; that the respondents founded on their offer of 31st May, and their law agent on being asked by me at the diet of debate whether said offer was still open, stated that it was, and that a minute would be lodged in process repeating said offer. (13) That the respondents accordingly, on 27th December 1910, lodged in process a minute repeating said offer of light work made to the appellant as aforesaid, said minute being in the following terms—'The respondents hereby repeat the offer made to the claimant in May last (which offer is referred to in process) of employment in their repair works at light labouring work, the wages applicable to such work being 20s. 3d. per week.' (14) That the respondents agreed to pay,

and the appellant to accept, the sum of 12s. weekly as compensation, in terms of agreement made on 31st August 1909, a memorandum of said agreement having been recorded in the Special Register of the Sheriff Court of Lanarkshire at Glasgow on 13th January 1910. I was of *opinion*, on the evidence, that the appellant's partial incapacity for work is to a considerable extent due to his failure to carry out the medical advice given to him, that he should persistently and actively exercise his foot, that being the only method by which he can expect to recover the use thereof. I was further of opinion on the evidence, that if the appellant had accepted the offer of 31st May 1910 his capacity at the date of the proof would have been to a great extent restored. I regarded the respondent's minute, lodged on 27th December 1910, as being merely a record of the statement made by their law agent at the diet of debate that the offer of 31st May 1910 was still open for the acceptance of the appellant. I left out of consideration the amount of wages therein stated to be applicable to the work offered, on the ground that such wages had not before the lodging of the minute been offered by the respondents to the appellant. In the whole circumstances it appeared to me to be proper to diminish, and I therefore diminished, the weekly payments of compensation by the respondents to the appellant by the sum of four shillings weekly, and accordingly awarded the appellant the sum of eight shillings weekly from the date of my judgment until the further orders of Court."

The *questions of law* for the opinion of the Court were—"1. Whether the arbitrator was right in diminishing the appellant's compensation without finding in fact that the appellant is able to earn a specific weekly wage at any employment which he is able to perform. 2. Whether the arbitrator was entitled to take into consideration the minute lodged in process by the respondents on 27th December 1910, the said minute having been lodged subsequent both to the proof and to the debate, and without the appellant having any intimation or knowledge thereof beyond his being represented at the debate by his law agent, when it was intimated that said minute would be lodged. 3. Whether the arbitrator, having found in fact that the appellant at the date of the award was able to do light work such as that of a messenger or light porter, or in some other occupation, was right in diminishing compensation in respect of an offer by the respondents to the appellant of light work as a labourer."

Argued for the appellant—Before the weekly payment could be diminished it must be shown (1) that the workman was capable of doing work by which he could earn a specific weekly wage; and (2) that he could obtain such work—*Proctor & Sons* v. *Robinson*, 1909 1 K.B. 1004; *Clark* v. *The Gas Light and Coke Company*, 1905, 21 T.L.R. 184. The minute lodged by the respondents could not be taken into consideration, and apart from it there was no such evidence as would justify diminution of the weekly payment, for even if the offer of work by the respondents was evidence (which was more than doubtful—*Fraser* v. *Great North of Scotland Railway Company*, June 11, 1901, 3 F. 908, 38 S.L.R. 563) it was evidence only of the circumstances at 31st May 1910, and there was no evidence as to the wages the appellant might earn. In any event, the award could not stand, because the arbitrator had taken the minute into consideration.

Argued for the respondents—The Sheriff had found in fact (1) that the appellant was able for certain specified work; and (2) that he had been offered such work by the respondents. On these facts the Sheriff was bound to diminish the compensation, and it did not matter that it had not been shown that the appellant could obtain elsewhere such work as he was fit for, or that he could so earn a certain specified sum—*Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009; *Proctor & Sons* v. *Robinson* (*cit.*). If it was necessary to find what wages the appellant might earn, then the minute might be looked at for that purpose.

At advising—

LORD SALVESEN—In this case the arbitrator has stated under fourteen heads the facts which he found to be admitted or proved. They may be summarised as follows:—The appellant on or about 13th August 1909 met with an accident to his left ankle arising out of and in the course of his employment. Liability to pay him compensation was admitted, and an agreement was come to that he should receive compensation at the rate of 12s. weekly. A memorandum of this agreement was recorded on 13th January 1910. The injury was long in healing, and for a time totally incapacitated the appellant for work. On 31st May the respondents offered him light work as a labourer, which he refused, on the allegation that he was not then fit to undertake such work; but the arbitrator finds that "at that time the condition of his ankle was such that he was able to undertake light work if he had endeavoured to do so." Towards the end of the year an application was made by the respondents to end or diminish the payments of compensation, and after proof had been led the arbitrator found "that the appellant is no longer totally incapacitated for work, but is able for light work such as that of a messenger or light porter, or other occupation where he would not require to do the heavy work of a labourer;" and also "that no evidence was led at the proof to show how much the appellant was capable of earning as a messenger or light porter or in any other occupation where he would not require to do the heavy work of a labourer," but that the respondents founded on their offer of 31st May, which at the diet of debate they stated was still open, and which they embodied in a minute lodged in process on 27th December 1910, offering the appellant employment at light labour-

ing work, "the wages applicable to such work being twenty shillings and threepence per week." The arbitrator in the whole circumstances came to the conclusion that he ought to diminish the weekly payment by 4s; and he "awarded the appellant the sum of 8s. weekly from the date of his judgment until the further orders of Court."

The first question of law which is stated for our opinion is expressed in these terms—"(1st) Whether the arbitrator was right in diminishing the appellant's compensation without finding in fact that the appellant is able to earn a specific weekly wage at any employment which he is able to perform?" It is evident that an important legal point is involved in this question, which, if answered in the way that the appellant desires, would have far-reaching consequences. On that assumption it would be the duty of every employer who sought to diminish the weekly compensation of a former employee who had been injured in his service, not merely to show that he had ceased to be incapacitated for work, but to discover some person who was willing to give him work at a specified weekly wage. In other words, it would be the duty of the employer to continue to pay compensation as for total incapacity although total incapacity had ceased, unless he were able to satisfy the Court that only the workman's refusal to work prevented him from obtaining such employment as his physical condition then fitted him to undertake.

Amongst the numerous cases which have been decided in Scotland we were not referred to any which supports this proposition, but towards the close of the debate several cases were cited which are reported in the May issue of the Law Reports (K.B.) for 1911. The most favourable of these for the appellant seems to be that of *Proctor & Sons* v. *Robinson*, [1911] 1 K.B. 1004. There the County Court Judge, in refusing an application to have compensation diminished, found that the workman was still suffering from bad flat-foot, that this prevented him from following his ordinary employment or from doing the full work of an ordinary labourer or able-bodied man, but that he could do some light work if he could obtain it; but in the absence of any evidence that he could obtain such light work as he could do the arbitrator did not consider he ought to find as a fact that he could obtain it. The employers appealed, but the appeal was refused. Cozens-Hardy, M.R., said—"There was not a particle of evidence on the part of the employers as to the chance which the man had of obtaining suitable employment or as to the amount of wages which he could earn in any kind of employment. There were no materials before the County Court Judge to enable him to make any diminution. . . . I think the employers here have struck too soon. They must first establish what particular kind of light work the workman is able to perform, and must follow that up either by proving that they have offered him that particular kind of light work or by giving some evidence that there is a chance of his obtaining that particular kind of work in the district if he applies for it."

The passages which I have quoted seem to contain the grounds of judgment; and if so, the present case is quite distinguishable. The arbitrator here has found the particular kind of light work for which the appellant is suited, to wit, the work of a messenger or light porter; and he has also found that the respondents have offered the appellant light work as a labourer—an offer which they repeated after the proof had been closed, and recorded in a minute lodged in process. The evidence which was thus lacking in *Proctor's* case is present here; and I think it is fair to assume that, had the County Court Judge in *Proctor's* case found similar facts proved and reduced the compensation accordingly, the Appeal Court would not have interfered with his decision. In particular, it may be noted that there is no hint in the judgment of the Master of the Rolls that it was necessary for the employers to prove that the workman could earn a specific weekly wage. It was held to be enough if they had not themselves offered him employment that they established there was a chance of his obtaining the particular kind of work for which he was suited if he applied for it.

A somewhat similar question arose in the case of *Cardiff Corporation* v. *Hall*, [1911] 1 K.B. 1009. There in an application by employers for a reduction of the compensation awarded to a driver in their employ on the footing of total incapacity it was proved (1) that the workman, though unable to resume his occupation as driver, was able to do any form of light work; (2) that he had applied for various forms of light work without success. The County Court Judge having reduced the compensation from 9s. 4d. to 8s. per week, the Court of Appeal held (Cozens-Hardy, M.R., dissenting) that it was competent for the County Court Judge to find that the circumstances had so altered as to justify the reduction which he made.

It is not easy to reconcile this decision with that in *Proctor's* case, for as the Master of the Rolls pointed out, not only had the employers failed to adduce any evidence that light work could be obtained by the workman, but the workman had given affirmative evidence that his reasonable and repeated efforts to obtain such work had been unsuccessful. The Judges, however, who formed the majority found themselves able to distinguish and explain the previous decision to which one of them—Fletcher Moulton, L.J.—had been a party, and thought that there was abundant evidence justifying a review of the former award. There, as here, there was no evidence whatever tendered by the employer that the workman was able to earn a specific weekly wage, and therefore the *Cardiff* case may be taken as affirming the right of the arbitrator to diminish the compensation without making a finding in fact to that effect. In an elaborate

judgment, in which he reviews the previous cases, Fletcher Moulton, L.J., negatived the principle of law for which the appellant contended—"That where partial incapacity has been caused by an accident the employers are bound to show not only that the workman is capable of doing other work, but that he is able to obtain it, and that otherwise he is entitled to an award as for total incapacity." The judgment is not binding on us, but has the weight which attaches to the considered opinions of two such eminent Judges as Fletcher Moulton and Buckley, L.JJ. I have no difficulty in agreeing with the result at which they arrived. My only doubt is as to whether the Court of Appeal had not gone too far in the earlier cases. In my opinion incapacity for the purposes of the Workmen's Compensation Act is primarily physical incapacity, in which may well be included such personal disfigurement as may lessen the sphere of employment although the power to work remains as good as before. It does not, in my opinion, include inability to get employment which arises from something not personal to the workman. If it were otherwise the injured workman would be in the position, until he had wholly recovered from the effects of an accident, of drawing half-pay until the employer either found him a job which he was willing to take or proved that such a job could be obtained if he chose to apply for it. For the purposes of this case, however, the two decisions which I have quoted support the arbitrator in diminishing the appellant's compensation without finding in fact that he was able to earn a specific weekly wage at any employment which he was able to perform; and accordingly I propose that we should answer the first question in the affirmative.

The second question raises no matter of general application. It was argued that the arbitrator was not entitled to take into consideration the minute of 27th December 1910, and as it must be assumed that he did so, that his award could not stand. When, however, attention is directed to what the arbitrator elsewhere says on the subject, I think the question may be regarded as academic. The arbitrator says that he regarded the minute as being merely a record of the statement made by the respondents' law agent at the diet of debate, that the offer of 31st May 1910 was still open, and that he left out of consideration the amount of wages therein stated to be applicable to the work offered. To this extent I think it is plain that the arbitrator was entitled to consider the minute, and that we ought to answer the second question accordingly.

The third question is perhaps not happily stated; but as I understand it the arbitrator asks us whether he was right in diminishing the appellant's compensation, having regard (1) to his finding in fact as to the appellant's capacity for work, and (2) to the offer by the respondents to give him light work. I entertain no doubt that he was right, although I must not be understood as holding that the diminution of the compensation might not well have proceeded on the first finding alone. The moment it is established as matter of fact that total incapacity has ceased and that only partial incapacity is present, the employer has made out a *prima facie* case for having the award as for total incapacity diminished. Perhaps this may be rebutted by the workman proving that his partial incapacity affects his earning power just as seriously as total incapacity, but a special case would require to be made out on his behalf. The policy of the Act is to encourage workmen who have met with accidents to resume work of some kind as soon as they are fit for it; and this would in many cases be defeated if the workman could draw his half pay until the employer demonstrated either his complete recovery or in substance found him a new job suited to his then physical state. It must not be left out of view that the arbitrator here considered that the workman ought to have accepted the employment offered on 31st May, and that if he had done so his capacity at the date of the proof would have been to a great extent restored. I am therefore of opinion that the arbitrator here was amply justified in diminishing the weekly payments; and as the appropriate amount of the diminution cannot be reviewed in the case before us, we must sustain the judgment at which he has arrived.

LORD DUNDAS—I agree in the opinion which your Lordship has delivered, and I have nothing to add.

LORD GUTHRIE concurred.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court answered the first and third questions in the affirmative, and the second by finding that the arbitrator was entitled to take into consideration the minute lodged in process by the respondents to the extent that he did.

Counsel for Appellant—A. M. Mackay. Agents—St Clair Swanson & Manson, W.S.

Counsel for Respondents—Horne, K.C.—J. H. Henderson. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Wednesday, June 14.

FIRST DIVISION.

[Sheriff Court at Glasgow.

THE "ABCHURCH" STEAMSHIP COMPANY, LIMITED *v.* STINNES.

Ship—Charter-Party—Lay-Days—Demurrage—Exceptions—Detention by Cranes or any Other Unavoidable Cause—Ejusdem generis.

A clause in a charter-party stipulating for demurrage excepted from the hours named for loading and discharging,