incapacity a discretion is given to the arbitrator under the Workmen's Compensation Act 1906, but he has to exercise that discretion within certain limitations. These limitations take the form of maximum amounts beyond which he cannot go. He cannot, for instance, give a partially incapacitated workman more than fifty per cent. of what he was earning at the time of the accident, nor can he give him a larger sum than £1 per week. Then in considering the amount which is to be given under section 3 of Schedule I he is further limited by this, that he cannot give more than the difference between the amount of the workman's average weekly earnings before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident. Subject to that, however, he is entitled to take the circumstances into consideration. That appears very clearly by the introduction of the new words at the end of this section which are that the amount "shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

These words were made the subject of specific consideration in the English Court, and the Judges there were quite clearly of opinion that the rise and fall in wages was one of the circumstances that the arbitrator might take into account. In the case of *Bevan*, [1912] 1 K.B. 63, the Master of the Rolls said this—"If wages are going up, that is a provision which may tend very much to the benefit of the workman; if wages are going down it may be for the benefit of the employer, but whichever way it happens I think it is not competent to the learned County Court judge to say 'I have nothing to do with that.'"

In this case had the Sheriff-Substitute taken a different course from that adopted he would, I take it, have been going contrary to the view of the Master of the Rolls of what was the duty of the arbitrator. I therefore concur in holding that this case is entirely covered by the decision in *Bevan's* case, and that *Bevan's* case was rightly decided.

The Court answered the question in the affirmative.

Counsel for the Appellants—Hon. W. Watson, K.C.—W. T. Watson. Agents—W. & J. Burness, W.S.

Counsel for the Respondent—Moncreiff, K.C. — D. R. Scott. Agents — Weir & M'Gregor, S.S.C.

Thursday, October 26.

SECOND DIVISION.

(SINGLE BILLS.)

[Sheriff Court at Glasgow.

MONAGHAN *v.* UNITED CO-OPERATIVE BAKING SOCIETY LIMITED.

Process — Sheriff — Reparation — Remit to Court of Session for Jury Trial—Damages over £50*—Averment—Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 30.

"It is not too much to expect that a pursuer who wishes to have his case tried by jury should set forth the special circumstances upon which he intends to rely as showing that a sum of more than £50 would not be an unreasonable award. If he does not choose to do this it seems only fair as regards this mere question of procedure to apply the maxim *de non apparentibus et non existentibus eadem est ratio*"—*per* Lord Skerrington in *Greer* v. *Glasgow Corporation*, 1915 S.C. 171, at p. 174-5, 52 S.L.R. 109, at p. 111.

Application of this test to an action, raised a year after the alleged accident, to recover damages for personal injuries to the pursuer's pupil child through being run down by a motor car, assessed at £200.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, enacts—"In cases originating in the Sheriff Court . . . where the claim is in amount or value above £50, and an order has been pronounced allowing proof . . . it shall, within six days thereafter, be competent to either of the parties, who may conceive that the case ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, when it shall be so tried: Provided, however, that the Court of Session shall, if it thinks the case unsuitable for jury trial, have power to remit the case back to the Sheriff. . . ."

Joseph Monaghan, steel dresser, Glasgow, *pursuer*, on behalf of his pupil son Robert Wyllie Monaghan, aged eight years, brought on 27th June 1916 an action in the Sheriff Court of Glasgow against the United Co-operative Baking Society Ltd., Glasgow, *defenders*, for payment of £200 as damages in respect of injuries sustained by his son through having been knocked down and run over by a motor van belonging to the defenders on 16th July 1915.

The pursuer *averred*—"(Cond. 3) On the afternoon of Friday 16th July 1915, and as the said Robert Wyllie Monaghan was crossing from the north-east to the south-west side of London Road, Glasgow, at an angle and at a point opposite Belvidere Hospital there, he was knocked down and run over by a motor car belonging to the defenders, which was proceeding in a south-easterly direction along London Road aforesaid, and which was being driven by Michael Hanlon, a motor-man in the defenders' employment, for whom they are, and were at the time of the accident

above condescended on, responsible. . . . (Cond. 5) The said Robert Wyllie Monaghan was thrown to the ground with great force and run over by said motor car, and he sustained concussion of the brain, and was badly cut, bruised, and injured, particularly about the head, elbows, and knees. He was rendered unconscious and was carried into Belvidere Hospital aforesaid, where he received first aid, after which he was removed in a dazed condition to the Royal Infirmary, Glasgow, where he remained for medical and surgical treatment for about three weeks, when, owing to an outbreak of fever in the ward, he had to be removed to his own home, after which he continued to attend said infirmary as an out-patient till the end of September or beginning of October 1915. In consequence of said accident the said Robert Wyllie Monaghan suffered great pain, his nervous system sustained a severe shock, his general health has been much impaired, and he has been seriously and permanently injured and disfigured."

The Sheriff-Substitute (DODS) having allowed a proof, the pursuer required the cause to be remitted to the Second Division of the Court of Session for jury trial.

In the Single Bills counsel for the defenders moved that the cause be remitted back to the Sheriff Court, and *argued*—There was no evidence to justify a reasonable jury awarding £50 in damages. Only a claim for solatium had been made, but none for patrimonial loss. The boy had only spent three weeks in hospital and had lost nothing while there. The scalp wounds which were alleged had not resulted in any disfigurement of the boy's face, nor could the shock to his nervous system be shown to have been severe. The pursuer had delayed for nearly a year in bringing the action. The averments rendered it improbable that a jury could possibly award £50 of damages, and the case was therefore unsuitable for jury trial—*Greer* v. *The Corporation of Glasgow*, 1915 S.C. 171, *per* Lord Skerrington at p. 174, 52 S.L.R. 109. *Mackie* v. *Davidson*, 1913 S.C. 675, 50 S.L.R. 461; *Barclay* v. *Smith & Company*, 1913 S.C. 473, 50 S.L.R. 308; *Smellies* v. *Whitelaw*, 1907, 44 S.L.R. 586; *M'Laughlan* v. *Clyde Valley Electrical Power Co.*, 1905, 8 F. 131, 43 S.L.R. 25; *Sharples* v. *Yuill*, 1905, 7 F. 657, 42 S.L.R. 538; *M'Nab* v. *Fyfe*, 1904, 6 F. 925, 41 S.L.R. 736, were also referred to.

The pursuer argued:—The pursuer did not feel obliged to enter into details of the permanent impairment of health suffered by the boy. It was all the symptoms taken together which went to make up the total impression of ill-health resulting from the accident. The child experienced a great fright, sustained several cuts, and was in a wretched state of health for a year. In the case of *Sharples* (*cit.*) Lord Dunedin's utterance on amount of damages was very short and must be strictly construed. The cause was one suitable for trial by jury in the Court of Session.

At advising—

LORD JUSTICE-CLERK — I think this is a very small case, and I do not agree with the suggestion that in the kind of question we are now considering "want of specification" means want of specification such as would prevent proof being led with regard to the averments. To my mind the true conception has been very correctly expressed in the passage to which we were referred in Lord Skerrington's opinion in the case of *Greer* v. *Corporation of Glasgow*, 1915 S.C. 171, at pp. 174-5. I am prepared to accept that passage absolutely, and I think it applies in the present case, with the result that the averments of the pursuer are not such as to entitle him to have this case treated as suitable for jury trial, and the proper course is to send the case back for proof before the Sheriff.

LORD DUNDAS — I agree. As the Lord Justice-Clerk said in the case of *Mackie* v. *Davidson*, 1913 S.C. 675—"It is a question of circumstances in each case whether an action shall be sent back to the Sheriff Court for disposal or shall be continued in this Court; and it is impossible to draw any sharp line between those cases which should be sent back and those which should not." I agree with your Lordship that this case falls on the side of the line indicating that it ought to be sent back. I further consider that Lord Skerrington's observations in the case of *Greer*, 1915 S.C. 171, at pp. 174-5, were most sensible and timely, though apparently they have not been regarded in this case. There is also the point of the totally unexplained delay of a year in bringing the case. That comes in as a make-weight, although without it I should agree in the result. I think this case will be quite satisfactorily dealt with in the Sheriff Court.

LORD SALVESEN—I am of the same opinion. The personal injuries which this child suffered were obviously of a trifling nature. I do not think it is sufficient for the pursuer to aver mere general impairment of health to entitle him to a jury trial. If there has been impairment of health the symptoms of that impairment might quite well have been set forth upon record, in view of the circumstance that the action was not raised until nearly a year after the accident. As the matter stands we do not know what meaning to attach to the vague general statements; and I think that the *onus* is upon the pursuer to show that the case is one suitable for jury trial where the actual accident was not of a serious description.

LORD GUTHRIE—I am of the same opinion. It is not enough for the pursuer to name a large sum to entitle him to a jury trial; nor is it enough to aver in general terms that the injuries are serious or even that they are permanent. The pursuer here if he could have given details was bound to have done so, and if he has chosen not to do so (whether because he cannot do so, or because the agent has been oblivious to the difference between relevancy in a question of obtaining inquiry and relevancy in a question as between the case remaining in the Sheriff Court or being tried here before a jury) he must take the consequences.

The Court remitted the cause back to the Sheriff Court for proof.

Counsel for Pursuer—Gentles. Agents—Manson & Turner MacFarlane, W.S.

Counsel for Defenders—Hamilton. Agents—L. & J. M'Laren, W.S.

Wednesday, January 10.

FIRST DIVISION.

[Sheriff Court at Glasgow.

GRAHAM *v.* R. & S. PATON, LIMITED.

Master and Servant—Dismissal—Servant whose Service was about to Terminate Making Arrangements to Come into Operation after Service Terminated Involving Him in Competition with His Masters.

One of three employees of a firm of potato merchants brought an action against his employers concluding, *inter alia*, for his remuneration for the year from 1st June 1913 to 31st May 1914. The employees were notified on 22nd April that their employment was to terminate on 31st May 1914, and they arranged to start thereafter as potato merchants. On 7th May one of them purchased growing potatoes from a farmer who had sold potatoes regularly to their employers. The potatoes were to be delivered after 31st May. The pursuer was not at its date aware of that transaction, but he became aware of it shortly after the purchase was made for the rival business about to be set up, and the employers learning of the transaction dismissed the three employees summarily on 14th May. *Held* that the pursuer had committed no breach of his contract with his employers, because he had not while in his employers' service entered into any contract bringing him into competition with his employers while he was still in their employment; that his dismissal was consequently not justifiable, and he was entitled to his remuneration up to 31st May; and case *remitted* to the Sheriff Court for an accounting, for the purpose of ascertaining the remuneration due.

Opinion per Lord Mackenzie that the servant purchasing the potatoes was justifiably dismissed; *question* if the pursuer could take any profit arising from the purchase.

Samuel William Graham, potato merchant, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against R. & S. Paton, Limited, potato merchants, Glasgow, *defenders*, concluding for decree ordaining the defenders to produce an account showing the profits of the dissolved firm of R. & S. Paton and of the defenders for the period from 1st June 1913 to 31st May 1914, and the pursuer's interest therein, in order that the true share of the profits in the two firms due to the pursuer might be ascertained and also for decree for his share in the said profits. The pursuer had been employed by the firm of R. & S. Paton for the year from 1st June 1913 to 31st May 1914 at a salary of £4 a week plus 18 per cent. of three-sixteenths of the nett profits after deduction of £500. R. & S. Paton formed themselves into a limited liability company on 3rd February 1914 as from 1st January 1914. That company was called as defenders, it having taken over the debts and obligations of the old firm, and the pursuer and the other employees of the old firm having continued to act for it in the same capacities as under the old firm and without any new contract of service. Three employees of the company had agreed to form a new firm and start business for themselves, viz., the pursuer, Reid, and M'Robbie. On 7th May 1914 Reid purchased from a farmer, Hannah, who had been in use to sell to the company, two fields of potatoes. Arising out of this came the summary dismissal of the pursuer on 15th May 1914 for breach of contract, followed by a refusal to account for his share of the profits of the company.

The *facts* of the case as regards the dismissal appear from the following narrative which is taken from the opinion of Lord Mackenzie — "[The defenders'] complaint against Graham is embodied in the letter of 11th May 1914, written by their law agent, which says—'We need hardly point out that none of the employees so long as they are in the firm's employment are entitled to enter into any contracts for their own behoof.' A request was made that so long as Graham's engagement lasted he would not do any business on his own account or approach any of the firm's customers with a view to doing future business. In this letter to Graham was enclosed one written by the law agents to Reid charging him with the concealment of information with regard to Hannah's movements. There was no suggestion, however, at any time that Graham was a party to what Reid did before he entered into the contract, nor was any charge brought against him that he knew the circumstances under which Reid made the contract. The facts are that Graham only came to know of the purchase the day after it was made. It was then arranged that the purchase was to be for the three of them. The answer to the letter of the defenders' law-agents was dated 12th May. It was written by the agent employed by Reid, but it sets out the position of the three employees. It contains this passage —'My client was quite entitled to purchase the two fields of potatoes, and I have advised him that the fact of his being a servant of your clients did not prevent him in his own time entering into contracts to enable him to start business on his own account.' It is also worthy of note as bearing on Graham's position that this letter contained a denial that Reid withheld from Paton any information regarding Hannah's movements. On receipt of this letter the defenders summarily dismissed Graham for breach of his engagement."