tomed to exercise, and it must be observed that a judge of this Court is not at liberty to adopt of his own authority a new form of procedure, however useful in itself, and however it may be justified by English practice. Trial by jury in civil causes is introduced into our system by comparatively recent statutes, and the procedure is fixed by statutory enactments which the Court is bound to follow." His Lordship then proceeded to emphasise the point that at the adjustment of issues a Scots judge must say whether, if the facts averred by the pursuer and no more are proved, there is any case to go to a jury. In the present case there is no such initial act of negligence averred as is involved in leaving a machine unattended in the public street or in a place where it may be tampered with, or in allowing children to have access to a shrub with poisonous berries of an apparently innocent and alluring appearance. What danger there was from climbing the walls of the building was as obvious to a boy of ten, if not more so, than to the defenders. On the whole matter I think that the Lord Ordinary took a right course in dismissing the action, and that his interlocutor should be affirmed.

LORD ANDERSON — I have reached the conclusion that the pursuer's averments are relevant, and that he is entitled to an issue. The owner of heritable property owes a duty of care towards those whom he invites to his property or whose presence he tolerates thereon. In both cases he is bound to protect the visitor from concealed dangers — that is, from dangers which are not manifest to the visitor, but which are or ought to be known to the owner. In a case like the present it is suggested that this duty of care presses harshly on the heritable proprietor. Why should the owner of a building, it was said, be under obligation to make it safe for children engaged in birdnesting? The rejoinder is that this obligation need not be undertaken. In the present case the licence need not have been granted or it might have been revoked. In my view the owners of a dangerous ruin which is becoming daily more dangerous—a ruin situated in a populous district and in close proximity to a public highway—ought never to have licensed it for the use of children for the purpose of birdnesting or for any other purpose. The object of the user is immaterial if user is tolerated. It is in my opinion the plain duty of the defenders to pull down this ruin and so render it innocuous or to fence it. It is true that mischievous children may climb a fence, but if the defenders erect a fence they do their best to exclude children, they negative the plea of tolerance, and they provide themselves with a complete answer to an action like the present. A child who climbs a fence is a trespasser to whom the owner of heritable property owes no duty of care — *Latham*, [1913] 1 K.B. 398.

This, then, being the duty owed to licencees, the pursuer's leading averment is that his son was on the ruin as a licencee. The pursuer avers in effect that this ruin was an allurement and attraction to children. It invited them to climb, and there was the added fascination that birds' nests might be discovered in its crevices. The pursuer further avers that this enticing ruin contained concealed dangers, one of which was that a stone seemingly securely embedded in a wall and apparently safe was in reality dangerous, as the whole ruin was in a state of disrepair. He goes on to allege that these two circumstances were known to the defenders, namely, that the ruin was frequented by climbing children, and that it was in a state of disrepair. He avers, on a reasonable reading of his averments, that the defenders knew or ought to have known of the particular defect which caused the boy's death, and that they should have made it safe.

The error of the Lord Ordinary seems to me to consist in this, that he has decided against the pursuer the two points as to which the parties are at issue, to wit, whether or not the danger was obvious, and whether or not the deceased was guilty of contributory negligence. In my opinion these issues are for the jury. The pursuer alleges that the danger inherent in the stone was concealed, and I am unable to hold that the state of danger was so obvious that this should be so held now. Again, it was urged that a boy of ten was equally qualified with any representative of the defenders to discover that the state of the stone was dangerous. The same contention might have been urged in such cases as *Finlay*, 14 R. 312, and *M'Kinlay*, 1923 S.C. (H.L.) 34. It is in my opinion for the jury and not the Court to say whether the intelligence of a boy of ten was sufficiently mature to appreciate the danger which existed.

On the whole matter I am of opinion that the Lord Ordinary's interlocutor should be recalled and the proposed issue allowed.

The Court recalled the interlocutor reclaimed against, and approved of an issue for the trial of the cause.

Counsel for the Reclaimer (Pursuer) — Morton, K.C.—Macgregor Mitchell. Agents —Ross & Ross, S.S.C.

Counsel for the Respondents (Defenders) —D. Jamieson—G. R. Thomson. Agents— Drummond & Reid, S.S.C.

Saturday, May 26.

SECOND DIVISION.

AYRSHIRE COUNTY COUNCIL *v.* LINDSAY.

Revenue—Customs and Excise—Duties on Mechanically-Propelled Vehicles—Rate of Tax—Finance Act 1920 (10 *and* 11 *Geo. V, cap.* 18), *sec.* 13, *and Second Schedule — Roads Act* 1920 (10 *and* 11 *Geo. V, cap.* 72), *sec.* 5 (1).

The owner of a Chevrolet motor lorry in applying for a licence therefor made a declaration in accordance with the provisions of the Roads Act 1920, sec. 5

(1), in which he described the vehicle as an agricultural engine to be used as a milk van. Questions having subsequently arisen as to whether the motor lorry should be classed (1) as a road locomotive or agricultural engine, in respect of which an excise duty of £25 was payable; (2) as a vehicle used solely for the conveyance of goods in the course of trade, in respect of which a duty of £16 was payable; (3) as a vehicle in respect of which a duty of £1 was payable for each unit or part of a unit of horse-power; or (4) as a tractor used for haulage solely in connection with agriculture, in respect of which a duty of £6 was payable. *Held* that the motor lorry fell to be classed as a vehicle used solely for the conveyance of goods in the course of trade, and that a duty of £16 was exigible.

The County Council of the county of Ayr, *first party*, and Thomas Cunningham Lindsay, farmer, Aitkenbrae, Monkton, *second party*, presented a Special Case for the determination of certain questions as to the amount of excise duty payable for the year 1922 under the Finance Act 1920 and the Roads Act 1920 in respect of a Chevrolet motor lorry belonging to the second party.

The Case stated — "5. On 4th January 1922 the second party applied for a licence to 31st December 1922 for a Chevrolet motor lorry, Number S.D. 5415, and he made a declaration and furnished particulars under section 5 (1) of the Roads Act 1920. In the said application he described the said vehicle as an agricultural engine to be used as a milk van, and applied for a licence for it as a tractor, agricultural tractor or agricultural engine (other than those in respect of which a duty of five shillings is chargeable) used for haulage solely in connection with agriculture, and proposed to pay a duty of £6 for the year 1922. 6. On 30th January a licence for the year 1922 was issued by the first party to the second party in respect of S.D. 5415 as a tractor, agricultural tractor or agricultural engine, other than such tractors or engines in respect of which a duty of five shillings is chargeable, used for haulage solely in connection with agriculture, and that upon payment by the second party to the first party of an excise duty of £6. 7. S.D. 5415 is a Chevrolet motor lorry, weight unladen, 16 cwts. Its horse-power exceeds 6 h.-p. Mounted on the chassis is a lorry body constructed to carry goods. It has no attachments specially adapted for towing non-power driven vehicles. During the period in respect of which the said licence was issued it has been used solely for the carriage of goods placed on the said lorry body. It has mainly been used for conveying milk daily from Aitkenbrae Farm over the public roads to Troon Railway Station, a distance of 3 miles, and for the carriage of feeding stuffs and manures from the station to the farm. 1. Under the Roads Act 1920 (10 and 11 Geo. V, c. 72), the County Council of the county of Ayr, the first party, are charged with the duty of levying the duties on licences for mechanically propelled vehicles imposed by section 13 of the Finance Act 1920 (10 and 11 Geo. V, c. 18), as amended by the said Roads Act. 2. By section 13 of the Finance Act 1920 it is provided, *inter alia*, that 'there shall be charged, levied, and paid in Great Britain and Ireland in respect of mechanically propelled vehicles used on public roads duties of excise at the rates specified in the second schedule to this Act.' 3. The rates specified in the second schedule to the Finance Act are—'SECOND SCHEDULE (S. 13)—*Duties on Mechanically Propelled Vehicles.*— . . . (4) Vehicles of the following descriptions used solely in the course of trade or in agriculture (that is to say)—Locomotive ploughing engines, tractors, agricultural tractors, and other agricultural engines, not being engines or tractors used for hauling on roads any objects except their own necessary gear, threshing appliances, farming implements, or supplies of fuel or water required for the purposes of the vehicle or for agricultural purposes, 5s. Road locomotives and agricultural engines, other than such engines in respect of which a duty of 5s. is chargeable, or which are used for haulage solely in connection with agriculture — Not exceeding 8 tons in weight unladen, £25; exceeding 8 tons but not exceeding 12 tons in weight unladen, £28; exceeding 12 tons in weight unladen, £30. Tractors, agricultural tractors, and agricultural engines, other than such tractors or engines in respect of which a duty of 5s. is chargeable, used for haulage solely in connection with agriculture—Not exceeding 5 tons in weight unladen, £6; exceeding 5 tons in weight unladen, £10; tractors of any other description, £21. (5) Vehicles (including tricycles weighing more than 8 cwts. unladen) constructed or adapted for use, and used solely for the conveyance of goods in the course of trade—Being vehicles which are electrically propelled and which do not exceed 25 cwts. in weight unladen, £6. Being vehicles other than such electrically-propelled vehicles as aforesaid—Not exceeding 12 cwts. in weight unladen, £10; exceeding 12 cwts. but not exceeding 1 ton in weight unladen, £16. . . . (6) Any vehicles other than those charged with duty under the foregoing provisions of this schedule:—Not exceeding 6 horse-power or electrically propelled, £6; exceeding 6 horse-power, £1 for each unit or part of a unit of horse-power.' By section 5 (1) of the Roads Act 1920 every person applying for a licence under section 13 of the Finance Act 1920, as amended by the said Roads Act, is required to make such a declaration and furnish such particulars with respect to the vehicle or carriage for which the licence is to be taken out or otherwise as may be prescribed."

The *questions of law* as amended were—"1. Is the said vehicle a road locomotive or agricultural engine in respect of which an excise duty of £25 is payable for the year 1922, in terms of paragraph 4 of said schedule? or 2. Is the said vehicle a vehicle, other than those chargeable with duty

under paragraphs 1 to 5 of the said schedule, in respect of which an excise duty of £1 for each unit or part of a unit of horse-power is payable for the year 1922, in terms of paragraph 6 of said schedule? or 3. Is the Chevrolet motor lorry a vehicle constructed or adapted for use, and used solely for the conveyance of goods in the course of trade, exceeding 12 cwts, but not exceeding 1 ton in weight unladen, in respect of which an excise duty of £16 is payable for the year 1922, in terms of paragraph 5 of the second schedule to the Finance Act 1920? or 4. Is the said vehicle a tractor, agricultural tractor or agricultural engine, used for haulage solely in connection with agriculture in respect of which an excise duty of £6 is payable for the year 1922, in terms of paragraph 4 of the said schedule?"

The contentions of the parties as amended were—"8. . . . The first party contends that S.D. 5415 is a road locomotive or agricultural engine not exceeding 8 tons in weight unladen, and that the excise duty payable in respect of it for the year 1922 is £25, in terms of paragraph 4 of said schedule; or, alternatively, the first party contends that S.D. 5415 does not fall within the provisions of paragraphs 1 to 5 of the said second schedule, and that accordingly the excise duty payable in respect of it for the year 1922 is at the rate of £1 for each unit or part of a unit of horse-power, in terms of paragraph 6 of the said schedule; or, alternatively, to the foregoing contentions, the first party contends that S.D. 5415 is a vehicle constructed or adapted for use, and used solely for the conveyance of goods in the course of trade, exceeding 12 cwts. but not exceeding 1 ton in weight unladen, and that the excise duty payable in respect of it for the year 1922 is £16, according to paragraph 5 of the second schedule to the Finance Act of 1920. The second party contends that S.D. 5415 is a tractor, or agricultural tractor, or agricultural engine, other than such tractors or engines in respect of which a duty of 5s. is chargeable, used for haulage solely in connection with agriculture, and that as it does not exceed 5 tons in weight unladen, the excise duty payable in respect of it for the year 1922 is £6. If that contention is not upheld the second party adopts the last, or, alternatively, the second alternative contention of the first party."

At advising—

LORD JUSTICE-CLERK — The question raised in this Special Case is the amount of excise duty payable on a Chevrolet motor lorry which the second party owns. On the first party a statutory obligation is imposed to collect that duty, whatever it may be. The answer to the question depends upon the construction of the Second Schedule of the Finance Act 1920. Let me say at once that that schedule appears to me to be a veritable triumph of obscure and indeed mystifying draftsmanship, and that it is difficult to reach any certain conclusion regarding the intention of the Legislature regarding the matters with which it deals.

The contention of parties *hinc inde* appear in the amended Special Case. I will merely say that the unamended Case appeared to the Court to be unsatisfactory in several particulars, and that its defects have been remedied in the amended Case which is now before us.

The first party maintains three alternative contentions, which are set out in paragraph 8 of the Case. The second party also maintains alternative contentions, his leading contention being that his motor lorry falls within that part of section 4 which is set out under the head of "tractors, agricultural tractors, and agricultural engines."

I now proceed to deal with the contentions of the first party in the order in which they are stated. He first of all maintains that he is entitled to exact a duty of £25 from the second party, in respect that the motor lorry belonging to the latter falls within the description contained in section 4 of the schedule under the head of "road locomotives . . . not exceeding 8 tons in weight unladen." That section is in these terms:—. . . "Road locomotives and agricultural engines, other than such engines, in respect of which a duty of 5s. is chargeable, or which are used for haulage solely in connection with agriculture, not exceeding 8 tons in weight unladen, £25." Now, it will be observed that the class there described, whatever it may include—a matter to which I shall presently advert—is subject to two exceptions—(1) agricultural engines other than such engines in respect of which a duty of 5s. is chargeable, or (2) such engines as are used for haulage solely in connection with agriculture. In my opinion the first exception points back to the first class dealt with under section 4, and the second exception points forward to those engines which are dealt with under the heading of "tractors, agricultural tractors, and agricultural engines." I consider that this motor lorry does not fall within either of these exceptions. It is therefore not excluded from the ambit of the sub-section. But the question remains, does it fall within the description contained in the words "road locomotives and agricultural engines" which usher in the section? I think not. A motor lorry is certainly not an agricultural engine. Moreover, to describe a motor lorry, which hauls but does not carry, as a road locomotive seems to me to be inapt, far fetched, and unnatural. A motor lorry would not in ordinary parlance be so described. The language is much more apt to describe, say, a threshing machine or a traction engine. I therefore think, though without undue confidence, having regard to the puzzling and overlapping character of the section, that the motor lorry which belongs to the second party is not caught in the meshes of this section.

The next contention of the first party is that the lorry falls under what may conveniently be termed the "gathering up" section at the end of the schedule, viz., section 6. That section functions only with regard to a vehicle which is not included in any of the preceding descriptions which the

schedule contains. As I have formed the opinion that this vehicle falls under section 5, I need not further consider section 6.

Section 5 is in these terms—"Vehicles (including tricycles weighing more than 8 cwts. unladen) constructed or adapted for use, and used solely for the conveyance of goods in the course of trade." I am of opinion that this motor lorry is a vehicle constructed or adapted for use and used solely for the conveyance of goods in the course of trade. In confirmation of this view I refer to the statements in paragraph 7 of the Case. The second party trades in milk, and the fact that on its return journey from the station the lorry conveys feeding stuffs and manures in no way, I think, dissociates its use from trade uses. These things are, in fact, the raw materials which aid in the production of the milk in which the second party trades. In short, I think that the words of section 5 appropriately describe the lorry in question, and also the use to which it is put.

It only remains to consider the second party's contention that his lorry falls within that part of section 4 which imposes a duty of £6. That section is in these terms—"Tractors, agricultural tractors, and agricultural engines, other than such tractors or engines in respect of which a duty of 5s. is chargeable, used for haulage solely in connection with agriculture." Now, assuming that this lorry is used solely in connection with agriculture, I am of opinion, *first*, that it is not a tractor, an agricultural tractor, or an agricultural engine, and *second*, that it is excluded from the ambit of the sub-section by the fact that it does not haul but carries. In this connection I refer to paragraph 7 of the Case.

I suggest to your Lordships that we should find that the second party's lorry falls within section 5 of the schedule, and that inasmuch as it exceeds 12 cwt. but does not exceed a ton in weight unladen it should pay a duty of £16.

LORD ORMIDALE—In this case we are asked to say what in our opinion and judgment is the excise duty payable in respect of a mechanically propelled vehicle owned and used by the second party. The vehicle is described in the Case as "a Chevrolet motor lorry, weight unladen 16 cwts. Its horse-power exceeds 16 h.-p. Mounted on the chassis is a lorry body constructed to carry goods. It has no attachments specially adapted for towing non-power-driven vehicles. During" the year 1922 "it has been used solely for the carriage of goods placed on the said lorry body. It has mainly been used for conveying milk daily from Aitkenbrae Farm over the public roads to Troon Railway Station, a distance of three miles, and for the carriage of feeding stuffs and manures from the station to the farm."

The duties payable in respect of mechanically propelled vehicles are set out in the second schedule of the Finance Act 1920.

Effect cannot be given to the second party's first contention. The duty payable by the second party is to my mind clearly not the £6 duty referred to in section 4 of the schedule as payable in respect of "tractors, agricultural tractors," and so on, and "used for haulage solely in connection with agriculture." The motor lorry in question is not used for haulage in any connection.

Whether or not the vehicle falls within the second class of section 4 commencing "road locomotives and agricultural engines" is a more difficult question. The language of the statute here is singularly obscure and confused. The provisions deal apparently with a heavy type of vehicle, very much heavier than the motor lorry in question, but that consideration does not help much. I did not understand it to be maintained that the motor lorry was an agricultural engine. No words could be less apt to describe it, and I do not consider that the words in the opening clause of the article "used solely . . . in agriculture" are applicable. They appear to me to connote a much more intimate relation between a vehicle and the cultivation or tillage of or other work on a farm than the conveyance along the public roads of the products of the farm or of requisites for the farm.

What the first party maintained was that the motor lorry was a "road locomotive." I do not see my way to affirm that. The ordinary conception of a locomotive is a mechanically propelled vehicle used for haulage. The most familiar example is perhaps a railway locomotive, which is an engine employed to draw carriages or waggons on a railway; and it seems to me that a "road locomotive" is an engine which serves the same purpose but runs not on rails but on the road. This meaning is confirmed, or at anyrate not contradicted, by the language in which the conceptions are expressed, whatever be the correct grammar of them. There are two conceptions, the one looking back as it were to the five-shilling class, the other looking forward possibly, and I think probably, to that clause of section 4 which deals with tractors, &c., used solely in connection with agriculture. Both the excepted classes consist of haulage vehicles, and it is not forcing the construction overmuch to infer that the wider class to which they are exceptions are also haulage vehicles. However that may be, I find nothing in section 4 sufficiently definite and clear to warrant the inclusion in the class of road locomotives of the second party's lorry.

If it is not a road locomotive, the first party's alternative contention is that it falls under section 6 of the schedule, which gives the rate of duty for "any vehicles other than those charged with duty under the foregoing provisions of this schedule—Not exceeding 6 horse-power or electrically propelled, £6; exceeding 6 horse-power, £1 for each unit or part of a unit of horse-power."

The second party on the other hand maintains that if his own first contention is wrong, the first party's last alternative contention is correct, viz., that the motor lorry belongs to the class of vehicles described under section 5 of the schedule.

In my judgment this contention is well founded.

The lorry is constructed for use, and is used solely for the conveyance of goods. It is adapted for no other purpose. It appears also to be used in trade in the sense of the section. Trade is referred to generally and is not contrasted with agriculture, and what is said about the use of the lorry in the Case demonstrates that it is used by the second party in the course of his trade as a dairy farmer.

Accordingly in my opinion the first question of law in the amended Case falls to be answered in the negative, the second in the negative, the third in the affirmative, and the fourth in the negative.

LORD HUNTER—In my opinion the duty payable under the Finance Act of 1920 in respect of this vehicle is £16 and not £25, or £6, or the indefinite amount if the tax payable were at the rate of £1 per each unit of horse-power.

I agree with your Lordship that the phraseology of the schedule is extraordinarily unsatisfactory. If the intention of the draughtsman had been by the use of obscure and redundant language and the misplacing of sentences to conceal the real meaning and intention of the Legislature, he could not have been more successful than he has been. The question as regards a somewhat similar vehicle appears to have been before a Divisional Court in England. That Court gave a decision that would support the view that a £25 duty was payable and not a £16 duty. But the Lord Advocate in the course of his argument did not disguise his preference for the £16, although in order to make this Special Case competent he had, at all events formally, to maintain his claim to a £25 duty. So far as I can see from the opinions given in the Divisional Court, the argument that was presented on behalf of the Crown was a different argument from the argument presented to us; and I am bound to say that if it had been presented upon the same lines to us, I think I should have reached the same conclusion as was reached by the Divisional Court in England.

Now in considering this question the way I have approached the matter is this — I have looked first at the description of the vehicle in question as that is found in paragraph 7 of the Case. It "is a Chevrolet motor lorry, weight unladen 16 cwts. Its horse-power exceeds 6 h.-p. Mounted on the chassis is a lorry body constructed to carry goods. It has no attachments specially adapted for towing non-power-driven vehicles. During the period in respect of which the said licence was issued it has been used solely for the carriage of goods placed on the said lorry body. It has mainly been used for conveying milk daily from Aitkenbrae Farm over the public roads to Troon Railway Station, a distance of three miles, and for the carriage of feeding stuffs and manures from the station to the farm." Armed with that description of the vehicle, I proceed to consider the different parts of the schedule that would warrant the different contentions as regards duty. The first I come to is section 4, the second subsection — that is, as regards road locomotives. I confess that I am inclined to despair of giving a reasonable and intelligible meaning to the phraseology used in that part of the section. It is, however, in my opinion not necessary to do so. I should only hold that this vehicle was a locomotive if I were absolutely driven to do it by the rest of the context. I do not think in this particular case I am so driven. I proceed to the other parts of the schedule. The next I come to is that as regards the £6 duty. That duty is leviable upon tractors, agricultural tractors, and agricultural engines other than certain tractors already described used for haulage solely in connection with agriculture. It would in my opinion be fantastic to hold that such a description as that applied to this Chevrolet lorry. Next comes the provision in subsection 5. What is provided for there is the case of "vehicles (including tricycles weighing more than 8 cwts. unladen) constructed or adapted for use, and used solely for the conveyance of goods in the course of trade." If that part of the schedule had not been encumbered by preceding language, I should have felt fairly confident that that was a description that covered the Chevrolet lorry in question, because it is manifest that this is a lorry used for conveyance of goods, and is therefore properly described as a vehicle in terms of section 5, and is inaccurately described as a vehicle used for haulage purposes. If that be the proper category under which to bring this vehicle, then in view of the particular weight of the vehicle it is admitted that it should pay a £16 duty.

I do not say that I have great confidence —any more than your Lordships—in holding that this is a right conclusion, but at all events it appears to me to be a conclusion in accordance with common-sense, and it has the unique distinction of satisfying both litigants in the case. If it is correct, it is unnecessary that we consider the extent and scope of the last provision dealing with taxation at the rate of £1 per unit of horse-power.

LORD ANDERSON — The contentions of parties suggest that there are no fewer than four categories of vehicle referred to in the last three sections of the schedule, under any one of which the motor lorry of the second party might be taxed. Two of these categories are in section 4, one in section 5, and one in section 6. The general provisions of section 6 obviously apply, but this section may only be invoked if the lorry can be taxed neither under section 4 nor under section 5. It is therefore necessary to consider whether or not either of those last-named sections applies. If it be that both apply, then I am of opinion that the taxpayer is entitled to claim that he should be taxed under that section which is most favourable to him. Section 4, as I have said, embraces two of the suggested categories. The second party has been taxed under the second of those cate-

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