without telling him in the complaint what the crime is with which he is charged. I cannot assent to the proposition that a man can be charged in a criminal court on a complaint which merely tells him that he did something unreasonable.

Now all that is said in the body of this complaint is that the accused did something which was unreasonable. He is not told what constitutes the offence, or according to what standard of reason he is to be charged. Before you could have a relevant complaint here some figure would have to be put in—¼d. or ½d., or ¾d. or 1d.—but the man must be told what is the reasonable additional charge. Where the matter halts at present is this, that no machinery has been set up by which the reasonable additional charge can be fixed. In my judgment it would be necessary in the first place that some competent authority should be armed with the power to fix a scale which is to be held to be reasonable. Then when that scale was duly published the material would be available for charging anyone who infringed that scale. But until what is to be considered reasonable is fixed by a competent authority I am unable to see how anyone can be brought before a criminal court.

I am of opinion that in this case it is quite sufficient to answer the third question of law and hold the complaint to be irrelevant.

The Court answered the third question of law in the negative.

Counsel for the Appellant—Sandeman, K.C. — A. M. Mackay. Agent — R. S. Rutherford, Solicitor.

Counsel for the Respondent—The Solicitor-General (Morison, K.C.)—W. Mitchell, A.-D. Agent—W. J. Dundas, W.S., Crown Agent.

COURT OF SESSION.

Saturday, February 23.

SECOND DIVISION.

[Sheriff Court at Glasgow.

JAMES NIMMO & COMPANY, LIMITED, *v.* M'ALINDEN.

Master and Servant—Workmen's Compensation — Compensation — Partial Incapacity—Inability to Find Suitable Work —Increased Weekly Payment.

In an arbitration under the Workmen's Compensation Act 1906 a workman was found entitled to a weekly payment in respect of partial incapacity. His attempts to obtain light work having proved unsuccessful owing to the state of the labour market, the arbitrator found the workman entitled to have his weekly payment of compensation increased. *Held* (*dis.* the Lord Justice-Clerk), in the circumstances, viz., that there was no change in the workman's physical condition but that he had failed, after several attempts, to obtain suitable employment but had not exhausted all chances of obtaining such employment; that there was no evidence upon which the arbitrator could competently increase the weekly payment.

James Nimmo & Company, Limited, Auchengeich Colliery, Chryston, *appellants*, presented a Stated Case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) against a decision of the Sheriff-Substitute (MACKENZIE) at Glasgow granting an application by Patrick C. M'Alinden, miner, 64 Annathill Terrace, Glenboig, *respondent*, for an increased rate of weekly payment as compensation for injuries sustained in an accident arising out of and in the course of his employment. The arbitrator had increased the weekly payment of compensation from 10s. 3d. to 15s.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906 brought in the Sheriff Court of Lanarkshire at Glasgow, the *circumstances* of which are as follows:—Arbitration proceedings were brought in said Court by the respondent for the purpose of obtaining an award of compensation under said Act in respect of an accident to the fingers of his right hand. On 17th November 1916 the application was heard by me and proof was led before me along with the medical assessor, when I found the following facts to have been established:—(1) That the respondent is a miner and resides at 64 Annathill Terrace, Glenboig, and that the appellants are coalmasters carrying on business at 21 Bothwell Street, Glasgow, and owning and working Auchengeich Colliery, Chryston. (2) That the respondent on 24th June 1915, while in the employment of the appellants sustained injury by accident arising out of and in the course of his said employment by having three fingers of his right hand crushed between a hutch and the roof, by which accident he was incapacitated from work. (3) That the appellants admitted liability for said accident and paid to the respondent in respect thereof compensation under the Workmen's Compensation Act 1906 at the rate of 19s. per week up to 4th November 1915. (4) That at the last-mentioned date the respondent endeavoured to resume work of a lighter kind, and was put by the appellants to work in a timber yard, where he worked eight shifts, but that the appellants' foreman, on the allegation that he was not working sufficiently with his right hand, dismissed him from their employment; that he again in February 1916 tried to work in the bricklaying department, but found that he was unable to continue; that during this period the respondent would have been able to do work of a light kind not requiring grasping power in the right hand, but that such work was not offered him by the appellants, although it might have been obtained. (5) That the respondent was paid compensation at the rate of 10s. 3d. per week from 4th November 1915 till 29th January 1916, when the compensation was stopped. (6) That the respondent remained in practically the same con-

dition until 24th June 1916, when he was examined by Dr M'Gregor, who recommended an operation on the injured fingers; that this operation was carried out on 1st September 1916, and that during that period the respondent was not in a condition to work and did not recover his capacity for light work until about the 15th of October 1916; that since then the respondent has been capable of light work or such as a one-armed man may perform. (7) That during the period from 29th January 1916 until 24th June 1916 the respondent was in the condition of being able for light work; that from 24th June 1916 until 15th October 1916 he was unfit for any kind of work; and that from 15th October 1916 he had been able for light work or such as a one-armed man might perform.

"I found in law that compensation at the rate of 10s. 3d. per week was due by the appellants to the respondent from 29th January 1916 until 24th June 1916, and at the rate of 19s. per week from 24th June 1916 until 15th October 1916, and thereafter at the rate of 10s. 3d. per week.

"I accordingly on 7th December 1916 awarded said compensation until the further orders of the Court, and found the appellants liable in expenses. . . .

"On 14th February 1917 an application for review of said award of 7th December 1916, herein before narrated, was brought by respondent. Said application for review craved the Court—To review as at 5th January 1917, or such other date as to the Court might seem fit, the award of the arbitrator of date 7th December 1916, and to increase the compensation payable to respondent under and in terms of said award by such amount as to the Court might seem fit in respect that since said 5th January 1917 the appellants had refused or delayed to give the respondent suitable employment, and although he had endeavoured to obtain suitable employment in the district in which he was employed, had failed to find same owing to the condition of his right hand, and in particular that the respondent had applied for and failed to obtain suitable work in view of his said condition at the following places:—(1) Auchengeich Colliery, Chryston; (2) Bedlay Colliery, Glenboig; (3) Avenue Sand Works, Glenboig; (4) Glenboig Union Fireclay Works, Glenboig; and (5) Hurll's Garliston Works, Glenboig. The case was heard and proof led on this date May 9, 1917. At the close of the proof respondent's agent restricted respondent's claim to a claim for review as at the date of proof instead of as at 5th January 1917. I found, under reference to the findings herein before narrated in my said award of 7th December 1916, that there had been no change of the physical condition of the respondent (whose right thumb, ring and little fingers are normal), but that since the date of said award he had made various applications to the appellants and to other employers for work such as could be done by him in his then condition; that these applications were made on the following dates, viz.—At Auchengeich Colliery on 5th January, 16th February, and 20th April; at Bedlay Colliery on 9th February; and at Avenue Sand Works, Glenboig Union Fireclay Works, and Hurll's Garliston Works on 14th or 15th February 1917; that none of these applications had been successful, for the reasons either that there was no such vacancy open at the time, that the condition of his hand prevented him being employed at heavy work which he might have obtained at Avenue Sand Works, or that a preference would be given, in the case of injured men, to men who had been injured in the works to which application was made; that it was not proved that the respondent had completely exhausted his chances of employment, or that it was impossible for men in his physical condition to obtain employment; that an offer was made by the appellants on the day on which proof was led to employ the respondent, but that it was not proved that the work proposed, which was of a temporary kind, was such as the respondent could perform.

"I *found in law* that the respondent was not entitled to the full measure of compensation as for total incapacity, but that in view of the difficulty of his finding employment, which is attributable to the nature of his personal injury, he was entitled to an increase in the rate of compensation for partial incapacity formerly allowed. I therefore on 6th June 1917 increased the said weekly payment of compensation as from said date to the sum of 15s., and found the appellants liable to the respondent in the expenses of process subject to modification."

The arbitrator appended the following *note* to his award of 6th June 1917:—"This application is somewhat difficult to deal with in view of the fact that a comparatively short time has elapsed since the last finding of the Court, and there has been no change of the pursuer's (respondent's) physical condition. It is, however, competent to take into account facts which may be proved in the way of showing that that physical condition is such that after repeated and genuine efforts to obtain employment the pursuer (respondent) has been unsuccessful. There is more here than the condition of the labour market, which, indeed, at the present time may be said to be favourable to his chances. His injury is undoubtedly in some cases directly the cause of his non-success, and in the same cases indirectly through restricting the kind of jobs which he could undertake. That such employment may possibly be found is, I think, quite clear, but no vacancy has occurred, except, apparently, the somewhat belated offer made on the day of the proof, and the suitability of which is an open question. I do not think the pursuer (respondent) has yet exhausted all his chances, but I am satisfied that the difficulties in his case have proved exceptional, and that these are attributable to his injury. I therefore think an increase may be allowed in the circumstances."

The *question of law* was—"Whether there was evidence upon which the arbitrator could competently increase respondent's

compensation from 10s. 3d. per week to 15s. per week as from 6th June 1917?"

Argued for the appellants—The question of law ought to be answered in the negative. The import of the Sheriff-Substitute's findings was that, there being no change in the respondent's physical condition, it was clear to the arbitrator that the respondent had not, in the limited course of his inquiries, exhausted all the possibilities for obtaining employment that were open to him. He had only made inquiries for work at five places, and these were places at which he was least likely to find employment suitable to his physical capacity. To "get work" meant to get "suitable work" for a man according to the extent of his injuries or the degree of his incapacity. There was a great difference between a mere difficulty in finding work and an absolute inability to do so. It was a question of degree. The arbitrator was not justified in making the increased award. The *onus* was laid upon the respondent of proving his inability to obtain work and this *onus* had not been discharged. The arbitrator had stated no finding to this effect or that such inability was due to the respondent's physical incapacity. In the case of *Duris* v. *Wilsons and Clyde Coal Company, Limited*, 1912, S.C. (H.L.) 74, 49 S.L.R. 708, the workman could, in consequence of his injuries, get no work at all. Counsel also referred to *Sharman* v. *Holliday*, [1904] 1 K.B. 235; *Ball* v. *Hunt*, [1912] A.C. 496, 1912 S.C. (H.L.) 77, 49 S.L.R. 711; and *Crossfield & Sons* v. *Tanian*, [1900] 2 Q.B. 629.

Argued for the respondent—The question of law ought to be answered in the affirmative. The arbitrator had, after proof, been satisfied that the respondent had made genuine efforts to obtain suitable employment without success. If a workman's earning capacity had been diminished he had a relevant ground for obtaining compensation, and the Sheriff-Substitute had in the present case found such a relevant change of circumstances. Counsel cited the cases of *Sharman* v. *Holliday* (*cit.*); *Ball* v. *Hunt* (*cit.*); and *Dyer* v. *Wilsons & Clyde Coal Company*, 1915 S.C. 199, 52 S.L.R. 114.

At advising—

LORD JUSTICE-CLERK—In my opinion this case does not raise any general question but is a special case turning on its own particular circumstances.

The respondent was injured on 24th June 1915. On 7th December 1916 the arbitrator found that he was entitled to 10s. 3d. per week, in respect of partial incapacity, from 29th January 1916 to 24th June 1916; to 19s. per week in respect of total incapacity from 24th June to 15th October 1916; and thereafter to 10s. 3d. per week in respect of partial incapacity.

On 14th February 1917 the respondent applied for a review of this award as at 15th January 1917, or such other date as the Court might think fit. Evidence was led on 9th May 1917, and the arbitrator, in respect of the evidence, increased the award to 15s. per week as from 6th June 1917. The arbitrator made this award "in view of the difficulty of his finding employment, which is attributable to the nature of his personal injury."

The question which the arbitrator had to consider was a question of fact. The question of law put to us is—"Whether there was evidence upon which the arbitrator could competently increase respondent's compensation from 10s. 3d. per week to 15s. per week as from 6th June 1917?"

From the facts found proved it appears that in 1917 the respondent had made seven applications for employment and that these had all failed through no fault of his. Some of them failed because there was no vacancy for one who could do such work as the respondent could do in his then condition, others failed because any such vacancies were being kept for men who had been injured in the works to which application was made.

I am not prepared to say that there was no evidence on which the arbitrator could find that the difficulty of the respondent finding work was greater than he had contemplated when he fixed the amount of the weekly payment at 10s. 3d., and that this greater difficulty was due to the nature of his personal injury and not to the state of the labour market, and was established by what had taken place after the award of 10s. 3d. was made.

I am therefore of opinion that the question put to us should be answered in the affirmative.

LORD DUNDAS—At the conclusion of the debate my impression was that the matter of this case was one of fact and of degree, and that we should not be entitled to interfere with the learned arbitrator's conclusion, even though it appeared to be one at which we should not ourselves have arrived. The case is not very well framed, but I think we must treat it as if the arbitrator had found in fact—what (as it stands) can only be gathered from a so-called finding in law, and from a passage at the end of his note dated 6th June 1917—that the respondent's difficulty in finding employment was attributable to the nature of his injury. Even on this footing, however, we must consider whether, upon the facts before him, the arbiter was entitled to increase the compensation. The question of law put to us is whether there was evidence upon which he could competently increase it. That being the question which the parties ask us to determine, we are, I think, bound to assume that they have disclosed for our consideration in the Stated Case the whole facts upon which the arbitrator proceeded. He was, no doubt, entitled to take into account, though not to have exclusive regard to, his own knowledge of local conditions (*Dyer*, 1915 S.C. 199), but it is not stated that he did so. I am prepared, though not, I confess, without great hesitation, to concur with my brother Lord Salvesen in the view that the facts disclosed in the case do not present evidence upon which it was competent for the arbiter to arrive at the conclusion which he reached. The reasons which lead to this view are

stated in Lord Salvesen's opinion, which I have had an opportunity of studying, and I need not repeat them. If they are correct it follows that we should answer the question in the negative and sustain the appeal.

LORD SALVESEN—On 24th June 1915 the respondent, while in the employment of the appellants, sustained injury by accident arising out of and in the course of his employment. Three of the fingers of his right hand were crushed. On 1st September 1916 an operation was performed on the injured fingers and two of them were removed, namely, the index finger and the middle finger. A dispute having arisen as to the extent to which the accident had affected his earning capacity, an application was brought at the instance of the respondent for an award of compensation. Compensation was accordingly fixed by an award of the arbitrator on 7th December 1916 at varying rates until 15th October 1916; thereafter at the rate of 10s. 3d. per week.

On 14th February 1917, a little more than two months later, the respondent presented an application for review of this award, craving the Court to increase the compensation payable to him. The averments he made in support of his application were that the appellants had refused or delayed to give the respondent suitable employment, and although he had endeavoured to obtain suitable employment in the district in which he was employed he had failed to find same owing to the condition of his right hand. On 6th June 1917 the same arbitrator, having heard evidence, increased the weekly payment of compensation as from 9th June 1917 to the sum of 15s. The question of law for the opinion of the Court is whether there was evidence upon which the arbitrator could competently increase the respondent's compensation from 10s. 3d. per week to 15s. per week as from 6th June 1917.

A summary of the evidence is contained in the findings in fact, and they are as follows: —(1) There had been no change in the physical condition of the respondent between 7th December 1916 and 9th May 1917, the date of the proof. His right thumb, ring and little finger, were normal, but owing to the absence of the two other fingers his grasping power is considerably affected. (2) On one occasion in January and four separate occasions in February (the dates being 9th, 14th, 15th, and 16th February) he had applied unsuccessfully for work at neighbouring collieries. (3) None of these applications were successful, for the reasons either that there was no vacancy open at the time, or that the condition of his hand prevented him from being employed at heavy work, or that a preference would be given in the case of injured men to men who had been injured in the works to which application was made. (4) That it is not proved that the respondent had completely exhausted his chances of employment, or that it was impossible for him in his physical condition to obtain employment. There is no express finding in fact that his failure to obtain light employment was attributable to the nature of his personal injury, although that is the inference in law which the learned arbitrator has deduced from the foregoing facts.

In the case of *Ball* v. *William Hunt & Sons, Limited*, [1912] A.C. 496, Lord Shaw makes the following observations—"It is necessary to keep clearly in view in such cases the distinction between inability to obtain work arising as the result of the injured or disfigured condition of the workman, and inability to obtain work arising from the state of the labour market. It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes. The non-employment, as I say, must be connected with the injury which has been received, and with the incapacity for work which has been thereby produced. Even treating that incapacity as inclusive of the case of the impossibility or improbability of obtaining work, as well as of doing it, that impossibility or improbability must be attributable to the thing which has differentiated this workman from his other able-bodied comrades, namely, the injury received." These remarks were made in a case in which the workman's capacity for work had not been affected by the accident which had resulted in his left eye being removed, for he had previously lost the sight of this eye, and had nevertheless been able to obtain work at his old rate of wages. The consequence, however, of his being manifestly a one-eyed man was that he was unable to obtain work at all (at least so it was averred), and all that was decided was that this disfigurement, if it had the effect of diminishing his earning capacity, was a ground on which the arbitrator was entitled to award such compensation as he might think the facts warranted.

Here we are dealing with a different set of facts. The respondent is admittedly unable to do the work which he was able to do before and his inability is the result of the accident. The arbitrator, however, found on 7th December 1916 that he was able for light work, or such as a one-armed man might perform (which latter view seems to be an overstatement of the injury seeing that the respondent only wants two fingers of his right hand, and the arm and remaining fingers are quite normal). On this basis the arbitrator fixed the rate of compensation at 10s. 3d. per week as from and after 15th October 1916. The question we have to decide is whether there are any other new facts which have emerged which entitled the arbitrator, on an application for review, to increase this compensation. The *onus* here was on the respondent, and I do not think he has discharged it. The fact that he made four applications in January and February for light work at various collieries and did not succeed in obtaining it would have been of some importance but for the reasons which the arbitrator assigns for these applications being unsuccessful. To apply for work with an employer who has no vacancy does not appear to me to be a mode of testing the market—it may be a limited one—in which the labour of the

partially disabled man may be employed. A perfectly able-bodied man might be refused work in exactly the same way. To test the market for light work a man who is in search of it ought to go to people who require the services of a partially-disabled man, not to employers who have no vacancy at all or who reserve such vacancies as may from time to time arise for the benefit of their own injured workmen. The arbitrator has indeed given partial effect to this view by holding that it was not proved that the respondent had completely exhausted his chances of employment or that it was impossible for him in his physical condition to obtain employment. I think he ought to hold, on the facts as stated, that no reasons had been adduced for altering his previous award. For all that appears, the respondent's inability to obtain employment arose from economic conditions prevailing at the particular works to which he applied, and it appears to me to be very difficult to assume that because there was no employment available at these works therefore there was no market for such light work as the respondent was physically fit to perform. I am unable to understand on what materials the learned arbitrator proceeded in increasing the compensation from 10s. 3d. to 15s. per week, nor can I understand why unsuccessful applications made in January and February for light work, and not subsequently repeated prior to 9th May, when the proof was taken, could justify the arbitrator in making an increase in the compensation as from 6th June. On the whole, therefore, although I admit the difficulty of dealing with the matter except on the footing of trying it as a jury question, I think it would be unfortunate if isolated applications for light work to employers who had no vacancy available, or who reserved all their light work for their own injured employees, constituted a sufficient ground on which to increase an award already made and acquiesced in. The arbitrator here seems to me really to have proceeded to review his own award of 7th December 1916 in the light of the same facts as were then before him, for I regard the new facts narrated as having no relevant bearing on the amount of compensation to which the respondent was entitled. I am therefore for answering the question of law in the negative.

LORD GUTHRIE — I concur in the result arrived at by Lord Dundas and Lord Salvesen. The arbitrator's increase of compensation under an application for review can only be justified if the facts as found by him can lead legitimately to the conclusion in law that since the date of his award on 7th December 1916 there had been a change of circumstances warranting an increase of compensation. The change is said to consist in this, that after several applications for employment the respondent was unable to get work which he was able to do. That case, if it is to warrant increase, involves two findings in fact—(first) that the respondent reasonably tested the market, and (second) that his failure to get work was due to the injury caused by the accident. Both elements are necessary, and, like Lord Salvesen, I cannot find either found expressly in the case as stated. But I think that the first condition, although not expressly stated, and although the applications for employment seem very few and very intermittent, may be fairly gathered from the Stated Case, keeping in view that the arbitrator has local knowledge of the industrial conditions of the neighbourhood. As to the second I agree with Lord Salvesen. Had the arbitrator not stated the reasons in each case for the respondent's failure to get work it might have been possible to justify his finding in law. But he has set out these reasons, and it appears that in each case when the respondent was refused work which he would have been able to undertake it was on grounds depending on the state of the labour market, and not on account of the injury caused by the accident. I therefore think that the arbitrator, having expressly proceeded on the facts which are disclosed in the case stated by him, which facts could not entitle him to come to the legal result at which he has arrived, we must hold that he has misdirected himself and that his award cannot stand.

The Court (*dis.* the Lord Justice-Clerk) answered the question of law in the negative.

Counsel for the Appellants — Hon. W. Watson, K.C. — Gentles. Agents — W. B. Rankin & Nimmo, W.S.

Counsel for the Respondent—Maclaren —Forbes. Agent — R. D. C. M'Kechnie, Solicitor.

Tuesday, February 26.

SECOND DIVISION.

SYMMERS' TRUSTEES *v.* SYMMERS.

Succession — Trust — Uncertainty — Charitable Bequest — "Such Charitable Institutions or Deserving Agencies in Aberdeen and Stonehaven as they may Select."

A testator directed his trustees to realise and divide the residue of his estate "amongst such charitable institutions or deserving agencies in Aberdeen and Stonehaven as they may select, and in such proportions and at such times as they may think proper." *Held* that the bequest was void by reason of uncertainty.

Succession—Discharge—Legitim—Intestacy —Partial Intestacy Eventuating after a Discharge Granted by Next-of-Kin of all Claims—Personal Bar.

The testator's only child, on the narrative that he had decided to claim his legal rights thus rejecting the provisions in his favour, that the legitim fund had been calculated, amounted to a certain sum, and that sum paid to him, granted a discharge in favour of the