(8 Edw. VII, cap. 65), sec. 75, afforded no ground for suspension. Further, they occasioned no prejudice to the accused —*Ogilvy* v. *Mitchell*, June 16, 1903, 4 Ad. 237, 5 F. (J.) 92, 40 S.L.R. 841. In any event the proceeding for sending the boy to an industrial school was a new proceeding initiated on 22nd September, and was not affected by any errors in the prior proceedings which were superseded.

LORD JUSTICE-CLERK — We are called upon to deal with two cases here. The first is that of the girl Annie White, and the second that of the boy Gilbert.

In the case of the girl I think it is clear that there is no ground for suspension. The complainer's whole case depends on the form of the proceedings which took place in the Court below, and however good her objections might have been if timeously taken, the delay of nine months which has taken place in bringing the matter up bars her from insisting in them now.

If there had not been the delay, I think there would have been a serious question for our consideration in her case. The unauthenticated erasure and change of dates appearing in the record of proceedings constitute serious irregularities, and I think erasures, as distinguished from mere alterations, are always to be looked upon with suspicion as being intended to conceal something.

The case of the boy Gilbert is also open to the same criticism as regards delay in bringing the suspension, and I should have been inclined to hold that it supplied a sufficient ground for refusing to interfere in his case. But in the boy's case the facts supply no good reason for altering the order pronounced in the proceedings taken with a view to sending him to an industrial school. These were new proceedings instituted on September 22nd in order to avoid the necessity of convicting him of a crime, and these are not affected by any defects there may have been in the prior proceedings, which were abandoned. I see nothing irregular as regards these new proceedings.

It is said for the complainers that the father ought to have been judicially cited to appear with the children at the Court. There is no reason, however, why there should have been any formal citation of the father so long as he was given due notice. On the facts as stated here we must take it that the father was in communication with the authorities about the matter, and sent his wife to attend the Court with the children, stating that he could not leave his work.

I think the proceedings in this case were quite regular, and see no ground for interference. In any case, I should have held that it was too late to bring a suspension on the grounds stated.

LORD DUNDAS—I also am for refusing this bill of suspension, and agree with all your Lordship has said.

LORD SALVESEN—I concur. I shall only add that it would have been very unfortunate if we had been obliged to sustain the objections to these proceedings.

In the case of the girl it is clear that it was for her advantage, in spite of a plea of guilty having been recorded in what I hold to be a properly authenticated interlocutor, the Magistrate saw fit to dismiss her with an admonition instead of passing sentence. In the case of the boy I concur with what your Lordship in the chair has said.

The Court refused the bill of suspension.

Counsel for the Complainers—M. Mackay. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondent — Lippe. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Saturday, June 17.

FIRST DIVISION.

[Sheriff Court at Kirkcaldy.

ARNOTT *v.* FIFE COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Sched. I, secs.* 15 *and* 16—*Termination of Compensation—Remit to Medical Referee —Earning Capacity—Proof.*

The employer of a workman who had lost an eye, and who had been in receipt, first of full, and subsequently of partial compensation, having proposed to terminate the weekly payments, a remit was made to a medical referee under sec. 15 of the First Schedule annexed to the Workmen's Compensation Act 1906. The medical referee having reported that the workman was as fit as any other one-eyed man to resume work underground, his employers lodged a minute craving the Sheriff-Substitute to end the compensation as from the date of the medical referee's report. The workman lodged answers, in which he denied that he had completely recovered, and at the hearing on the minute and answers asked for a proof as to earning capacity. In reply to the Sheriff-Substitute his agent stated that he was not in a position to maintain that the earning capacity of a one-eyed miner was less than that of a two-eyed miner, whereupon the Sheriff-Substitute refused to allow a proof and declared the compensation ended.

Held that the claimant was entitled to a proof as to his wage-earning capacity, and appeal *sustained.*

This was a Stated Case on appeal in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), between William Arnott, miner, Denside Cottage, Kirkcaldy, *appellant,* and The

Fife Coal Company, Limited, Bowhill Colliery, Cardenden, *respondents.*

The Case stated—"This is an arbitration in an application for review of compensation under the Workmen's Compensation Act 1906, Schedule 1, section 16. The *facts* of the case are as follows—1. On 8th September 1908 William Arnott, the appellant, was a miner in the respondents' employment at their Bowhill Colliery, Cardenden. On said date his left eye was injured, and it was removed on 23rd September 1908. 2. From the date of the accident until he started work above ground in the month of September 1909 the appellant was paid full compensation at the rate of £1 per week. 3. In the month of September 1909 the appellant started work above ground in the employment of the respondents. His partial compensation was fixed at 13s. 4d. per week, and he was paid at that rate until 13th January 1911. He has received no compensation since that date. 4. On said 13th January 1911 the appellant was examined by Dr George Mackay, 20 Drumsheugh Gardens, Edinburgh, medical referee in ophthalmic cases under the Workmen's Compensation Act 1906, on a remit under section 15 of Schedule 1 of said Act. 5. The report of said medical referee, lodged on 18th January 1911, is in the following terms —'The said William Arnott had his left eye removed on 23rd September 1908, following upon the accident for which compensation is claimed. The socket is at present slightly inflamed as the result of wearing an artificial eye too freely. That, however, should soon yield to appropriate treatment. The right eye has a very slight error of refraction, but otherwise is quite a sound one. Though he complains of some subjective sensations of occasional headache, there does not appear to be any obvious cause for these which could be assigned to the injury, and his condition is such that, having for the past fifteen months been engaged in work at the pithead, he is now in my opinion as fit as any other one-eyed man to resume his work under ground.' 6. Following upon said report, the respondents lodged in process in the Sheriff Court at Kirkcaldy a minute craving the Court to end the appellant's compensation as at 13th January 1911. The appellant lodged answers to said minute, stating, *inter alia*, that he had not recovered from the injuries which he had sustained, and that he had not recovered his earning capacity following upon said injuries; that he was still under medical treatment; that since the date of the accident the socket of the left eye, which had been removed, had been in an inflamed condition, painful and suppurating; that he suffered from headaches during his shift and after; that these headaches were brought about through his having to stoop or bend, and were a result of the injuries which he had sustained; that they interfered with his capacity for work and his earning ability; and further, that the sight of the remaining eye was weak and became dim and fagged by the end of the shift. The appellant further stated, that while his earning capacity had been and was at that time much reduced as a result of the injuries which he had sustained, he was quite prepared to try work below ground so that his earning capacity might be properly tested. He averred, further, that a certain period at least should elapse to enable him to accustom himself to his altered condition. 7. At a hearing on the minute and answers the appellant's agent asked for a proof as to the appellant's earning capacity. I asked him whether he was in a position to maintain that the earning capacity of a one-eyed miner was less than that of a two-eyed miner, and he stated that he was not. I held that the report of the medical referee being conclusive as to the appellant's condition at its date meant that his incapacity for work, so far as due to the said accident, was at an end, and therefore repelled the answers for the claimant as irrelevant, and terminated his compensation from the date of the medical referee's report, namely, 13th January 1911."

The *question of law* for the opinion of the Court is—"In the circumstances above stated, was I entitled to end the compensation payable to the appellant?"

Counsel for appellant moved for a proof. The respondents' counsel opposed the motion, and argued that as the appellant's agent had said he was not going to prove that his (the appellant's) earning capacity was less than that of a two-eyed miner (which was the only fact relevant), the Sheriff-Substitute had rightly terminated the appellant's compensation.

LORD PRESIDENT—In this case the workman had an eye injured, the effect of which injury was that the eye had subsequently to be removed. During the period of total incapacity he was paid compensation. He then resumed work of another character above ground and was paid partial compensation. But after that the employers considered that he had recovered, and of consent there was a remit to a medical referee. Now under section 15 of the first schedule of the Act the medical referee is final upon the matters remitted to him. The report of the medical referee, after dealing with slight temporary troubles which would shortly disappear, says—"His condition is such that, having for the past fifteen months been engaged in work at the pithead, he is now, in my opinion, as fit as any other one-eyed man to resume his work underground."

So far as physical condition is concerned that is final, and I think it would be quite improper to have any proof to contradict or modify that report. But following upon the report, the appellant's agent asked for a proof as to the appellant's earning capacity. Now that, I think, on the authorities, he was clearly entitled to do. The Sheriff-Substitute then asked him whether he was in a position to maintain that the earning capacity of a one-eyed miner was less than that of a two-eyed miner, and the agent said that he was not.

On that answer being given, the Sheriff-Substitute refused to allow a proof and declared the compensation ended.

I am very far from saying that the ending of compensation may not be the proper end of this case; but I think that the learned Sheriff-Substitute, in the procedure he followed, really took too short-hand a way when he put to the agent what he considered the crucial point in the case, and then, upon the agent's making a certain answer, treated the case as if that crucial point had been proved in the proceedings. I think that as long as the applicant through his agent asked for a proof of his earning capacity he was entitled to get it, although it might very well be that the Sheriff-Substitute should come to the same conclusion as that which he has now reached.

I think, therefore, that the case must go back to the Sheriff-Substitute in order that he may allow proof as to the wage-earning capacity.

LORD KINNEAR—I am of the same opinion.

LORD MACKENZIE—I agree.

LORD JOHNSTON was absent.

The Court answered the question of law in the negative; *in hoc statu* recalled the determination of the Sheriff-Substitute as arbitrator, and remitted to him to allow parties a proof of their averments and to proceed as accords.

Counsel for Appellant—Wilson, K.C.—Wilton. Agent—D. R. Tullo, S.S.C.

Counsel for Respondents—Horne, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Saturday, June 17.

FIRST DIVISION.

(SINGLE BILLS.)

NEILL, PETITIONER.

Process—Divorce—Oath de Calumnia—Commission.

A ship steward, the pursuer in an action of divorce, before the action was called in Court had to start on a voyage which would necessitate his absence for at least a year. In an application at his instance the Court granted commission to take his oath *de calumnia* (and also his evidence) to lie *in retentis*—previous notice of the commission being given to the defender and proof thereof exhibited to the commissioner.

On 17th June William Watson Neill, ship steward, Partick, presented a petition to the First Division in which he craved the Court to grant commission to take his oath *de calumnia*, and also his evidence, in an action of divorce at his instance to lie *in retentis* till the case had been called.

The petition stated—"That the petitioner has raised in the Court of Session an action of divorce against Mary Ann Murray or Neill his wife, as set forth in the summons herewith produced. The said summons was signeted on 14th June 1911, and was served on the defender personally on the same day. That the petitioner is in the employment of Messrs Weir & Company, of Glasgow and Liverpool, as a ship steward, and is absent from this country on long sea voyages. That he returned to this country recently, when he became aware of the circumstances in respect of which he has raised the said action of divorce. That the petitioner is to accompany his ship, which is to sail from the port of Jarrow-on-Tyne, on Friday the 23rd, or Saturday the 24th June 1911, on a voyage to San Francisco, and he will be absent from this country for at least one year. That in these circumstances it will be necessary that the oath *de calumnia*, and also the evidence of the petitioner, should be taken on commission before his departure from this country on said 23rd or 24th June 1911. That as said action of divorce has not been called in Court, the petitioner is unable to move the Lord Ordinary, before whom the action may come to depend, for commission and diligence to take the oath *de calumnia*, and also the evidence of the petitioner as pursuer in the said cause. May it therefore please your Lordships to grant commission and diligence to take the oath *de calumnia* of the petitioner, and also his evidence on oath, and to receive his exhibits and productions, if any, and to direct the commissioner to be appointed by your Lordships to seal up the oath, deposition, and productions, and to transmit the same to the Clerk of Court, there to lie *in retentis* subject to the orders of the Court, or of the said Lord Ordinary in the cause; or to do further or otherwise as to your Lordships shall seem proper."

On the petition appearing in the Single Bills counsel for the petitioner moved the Court to grant the prayer of the petition. He referred to *Scott, Petitioner*, July 20, 1866, 4 Macph. 1103, 2 S.L.R. 217.

The LORD PRESIDENT intimated that the prayer of the petition ought to have contained a clause providing for previous notice of the commission being given to the defender and proof thereof being exhibited to the commissioner, as was done in the case of *Scott* (*cit.*), but that in order to avoid the necessity of amending the prayer the Court would insert such a clause in the interlocutor.

The interlocutor pronounced was—

"Grant commission to Mr R. A. Lee, Advocate, to take the petitioner's oath *de calumnia*, to lie *in retentis* until the action has been called in Court and enrolled before a Lord Ordinary, previous notice being always given to the defender and proof thereof exhibited to the commissioner before the oath is taken: Further, grant diligence, at the instance of the petitioner—the pursuer