for the jury to hold that the representation made in the circular was false. Apart from that, no facts or circumstances have been proved which infer malice, and the case must be taken to be a case of privilege. The word "maliciously" being in the issue, it matters little how it came to be there. But I may say that while the word was not in the issue as proposed by the pursuer on the defenders maintaining that it should go in, counsel for the pursuer ultimately stated that he had no objection. There is no evidence which in any reasonable view can be said to instruct that the defenders were actuated by an oblique motive. The weight of the evidence is entirely against the idea that they were actuated by a determination to destroy the reputation of the pursuer and so prevent him competing with them in business. The contention that they took action without due deliberation or inquiry is also negatived, for their investigations in fact led to the discovery of everything that was to be found out. It is idle to say that they could have ascertained that the charge was really fabricated by Harris out of ill-will to the pursuer, for the dispute about the lamps, which it was said created for the first time an ill-feeling on his part, occurred long after Harris' suspicions had been aroused and had been communicated to the partners of Burt Brothers, and it was not suggested that these gentlemen were actuated by anything but a *bona fide* belief that something was wrong.

I agree that it is not necessary to deal with the counter issue.

I agree also that the whole evidence that can reasonably be expected to be obtained relevant to the cause is now before the Court, and that judgment should therefore be entered for the defenders.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"The Lords (including Lord Ormidale, who presided at the trial) having heard counsel for the parties on the rule, make the rule absolute, set aside the verdict, and, being unanimously of opinion that the verdict is contrary to evidence, and further, that they have before them all the evidence that could be reasonably expected to be obtained relevant to the cause, assoilzie the defenders from the conclusions of the action and decern: Find the defenders entitled to expenses, and remit," &c.

Counsel for Pursuers—Morison, K.C.—C. H. Brown. Agents—Carmichael & Miller, W.S.

Counsel for Defenders—Clyde, K.C.—Sandeman, K.C.—Lippe. Agents—Alex. Morison & Company, W.S.

Tuesday, January 21.

SECOND DIVISION.

[Sheriff Court at Cupar.

WEMYSS COAL COMPANY LIMITED *v.* CRUDEN.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (15)—*Remit to Medical Referee—Finality of Referee's Report as to Physical Condition and Physical Fitness for Work—Inquiry as to Wage-earning Capacity.*

The Workmen's Compensation Act 1906, First Schedule (15), enacts that the medical referee to whom the matter of a workman's condition or fitness for employment is referred shall "give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matter so certified."

In an application for review of the compensation paid to a miner who had received an injury to an eye, a remit was made to a medical referee in terms of the above quoted paragraph (15). The referee reported that the miner's "condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground." Following on the report, the company lodged a minute craving the Court to end the compensation, to which the miner lodged answers, and the arbitrator allowed a proof of all the miner's averments in answer, not only those relating to his wage-earning capacity but also those relating to his physical condition and physical fitness for work.

In an appeal, *held* that the medical referee's report was final as to his physical condition and physical fitness for work, and case remitted to arbitrator to allow a proof restricted to the question of his wage-earning capacity.

Arnott v. *Fife Coal Company, Limited*, 1911 S.C. 1029, 48 S.L.R. 828, *followed*, but interlocutor therein *disapproved*.

In an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), in the Sheriff Court at Cupar, between Stewart Cruden, miner, Coaltown of Wemyss, Fife (*respondent*), and the Wemyss Coal Company, Limited, East Wemyss (*appellants*), the Sheriff-Substitute (HANNAY), at the request of the company, stated the following Case for appeal:—"This is an arbitration in an application to end the compensation, under the Workmen's Compensation Act 1906, Schedule I, section 16. The *facts* of the case are as follows—(1) On 9th August 1910 Stewart Cruden, the claimant, who was working as a miner underground, sustained injury to his left eye as the result of an accident while in the course of his employment

with the appellants at their Lochhead Colliery, East Wemyss. . . . (3) On 12th June 1911 the claimant 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 I of said Act. (4) The report of said medical referee, lodged on 13th June 1911, is in the following terms—'The said Stewart Cruden has a scar upon the cornea of his left eye, due to a septic ulcer which followed upon an abrasion by a piece of coal accidentally striking his eye while at work on August 9th, 1910. The direct vision of this eye is thereby reduced to about one-fourth of normal for distance, but the eye is now free from inflammation, has a fair field of vision, and though impaired is still capable of doing useful service. The other eye is practically normal, only requiring reading glasses suited to his age. Cruden has a good judgment of distance and direction even in subdued light. He has been already engaged for three months in surface work; and his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground.' (5) Following upon said report, the appellants lodged in process in the Sheriff Court at Cupar a minute craving the Court to end the claimant's compensation as at 12th June 1911. The claimant 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 as the result of the injuries which he had sustained he was suffering from giddiness and headaches, both during his shift and after; that these headaches, &c., were most frequent when he had 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; that his eyesight was weak as a result of the accident and became dim and fagged by the end of the shift; and further, that he was unable to work in the flare of a naked light or in strong sunlight. The claimant also 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 prepared to try work below ground so that his earning capacity at mining work might be properly tested. He averred, further, that it was necessary for a certain period to elapse to enable him to accustom himself to his altered conditions. (6) I heard parties on the minute and answers, and allowed the parties a proof of their respective averments and to the claimant a conjunct probation. The question argued before me was whether the proof should be limited to the question of the workman's earning capacity. Following *Arnott* v. *Fife Coal Company, Limited*, June 17, 1911, 48 S.L.R. 828, I allowed an open proof on the footing that certain questions as to the claimant's physical capacity might be necessary and competent, although in a general way evidence on this subject was clearly incompetent."

The *questions of law* for the opinion of the Court were—"1. Was I right in allowing parties a proof of their respective averments, and to the claimant a conjunct probation. 2. Should I have restricted the proof to the wage-earning capacity of a one-eyed miner?"

Argued for the appellants—The Sheriff erred in allowing an unrestricted proof of respondent's averments. It should be restricted to a proof of the earning capacity of a miner whose eyesight was in the condition of that of the respondent as described in the report—*Ball* v. *William Hunt & Son, Limited*, [1912] A.C. 496, *per* Lord Shaw at p. 511, 49 S.L.R. 711, at p. 715. The respondent's averments in stat. 5 as to his physical condition and physical fitness for employment were inadmissible, because by paragraph (15) of Sched. I of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) the medical referee's report was final on these points—*Gray* v. *Shotts Iron Company, Limited*, 1912 S.C. 1267, 49 S.L.R. 906; *Arnott* v. *Fife Coal Company, Limited*, 1911 S.C. 1029, 1912 S.C. 1262, 48 S.L.R. 828, 49 S.L.R. 902. By rule 10 of the Statutory Rules, dated 27th June 1907, applicable to medical referees in Scotland, the medical referee was bound to hear any statement the workman had to make with regard to his condition for work, and it must be assumed that he had done so here. But the medical referee's report was to the effect that he was fit for work. In an unreported case—*Walker* v. *Fife Coal Company, Limited*, July 18, 1911—a report to the effect that an injured limb "should be quite as strong as the sound one" was held to be conclusive as to the workman's fitness for work. The interlocutor in *Arnott* v. *Fife Coal Company, Limited* (*cit.*), 1911 S.C. at p. 1031, 48 S.L.R. at p. 830, allowed a proof at large *per incuriam*, such a proof being inconsistent with the opinions in the case. *Carlin* v. *Stephen & Sons, Limited*, 1911 S.C. 901, 48 S.L.R. 862, was referred to.

Argued for the respondent—The Sheriff was right in allowing an unrestricted proof. The medical referee's report was only final as to a workman's fitness for work where it was conclusive on the point—*Gray* v. *Shotts Iron Company, Limited*, *cit.*, *per* Lord President (Dunedin), 1912 S.C., at p. 1272, 49 S.L.R., at p. 908—but the report here only said that the respondent "ought now to be fit" to resume work. Moreover, it showed that the respondent's condition was now different from what it had been before the accident, and therefore the respondent ought to have an opportunity of leading proof with regard to his physical condition in order to show that his wage-earning capacity had been diminished. The interlocutor here should be in the same form as that in *Arnott* v. *Fife Coal Company, Limited*, *cit.*

Lord Justice-Clerk—I am very clearly of opinion that the first question which is

put to us ought to be answered in the negative. I do not think this is a case in which a general proof should have been allowed of the respective averments of parties. The medical report here is given as a judgment, and that judgment, so far as it relates to the physical capacity of the applicant, is final. No doubt in one of the cases quoted to us—*Arnott* v. *Fife Coal Company, Limited*—a general proof was allowed in circumstances somewhat similar to though not quite the same as those here. I cannot help thinking that there must have been some mistake in that case, and that the proof was not intended to be as extensive as was allowed, and I am not satisfied that we are bound in any way by what was done in that case.

Dealing with this particular case, I think the second question should not be set aside altogether, but I think it may be better stated. It is a pity that the Sheriff-Substitute put into the question the words "the capacity of a one-eyed miner." I think the proper course would be to supersede consideration of the second question and to remit to the arbitrator to allow the respondent a proof relating to his wage-earning capacity, excluding therefrom all evidence with regard to his physical condition and his physical fitness for his ordinary work as a miner below ground.

LORD SALVESEN — I am of the same opinion. I am not surprised that the Sheriff-Substitute should have allowed an open proof here, following as he did the interlocutor which was pronounced in the case of *Arnott* v. *Fife Coal Company, Limited.* I agree with your Lordship, however, in thinking that it is difficult to reconcile the form of the interlocutor with the opinions of the judges who decided that case, and I am disposed to think that if the matter had been noticed and brought before their Lordships of the First Division the interlocutor would have been in somewhat more qualified terms.

But it is obvious that the Sheriff-Substitute himself contemplates that certain matters are foreclosed by the report of the medical referee, for he says that he allows a proof only on the footing "that certain questions as to the claimant's physical capacity might be necessary and competent, although in a general way evidence on this subject was clearly incompetent." Now I do not think it is satisfactory, where the Sheriff-Substitute is of opinion that a general proof would be incompetent, that he should nevertheless allow a proof at large on the footing that there might be certain questions which might be competent.

It is admitted by Mr MacRobert that the medical referee's report is conclusive as to the matters which he finds. It is his duty under the Act to find amongst other things whether the claimant is fit to resume his work, and although the referee's report is not very accurately expressed I take him as meaning that it is his opinion that the claimant was at the date of his report fit to resume his ordinary work as a miner below ground. He has therefore decided that matter, so that it is now concluded and there can be no further inquiry with regard to it.

I agree with your Lordship that we must restrict the proof substantially as the Sheriff-Substitute has himself indicated, but I think we must define that in the interlocutor, and I am quite satisfied with the terms of the interlocutor which your Lordship in the chair proposes.

LORD GUTHRIE—I am of the same opinion. The medical referee has found that the claimant ought now to be fit to resume his ordinary work as a miner below ground. I think, with Lord Salvesen, that we must take it that he means that he is fit to resume his ordinary work, although it is rather ambiguously expressed.

In the end it was not denied, on the one side, that the referee is final in regard to the three matters specified in section 15 of the First Schedule, namely, the condition of the workman, his fitness for employment, and the kind of employment for which he is fit. On the other side it is not denied that, although the medical referee is final in these three matters, there is another question which is involved in all these cases, and on which he is not final, namely, wage-earning capacity. It is certainly necessary that we should make it distinct that the proof of wage-earning capacity does not include evidence of the three matters to which I have just referred. I think the interlocutor which your Lordship proposes makes that quite clear.

LORD DUNDAS was absent, being engaged in the First Division.

The Court pronounced this interlocutor—

"Answer the first question of law therein stated in the negative, and supersede consideration of the second question; remit the cause to the arbitrator to allow the respondent in the appeal a proof relating to his wage-earning capacity, excluding therefrom all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, and to proceed as accords."

Counsel for Appellant—Horne, K.C.—Russell. Agents—W. & J. Burness, W.S.

Counsel for Respondent — MacRobert. Agent—D. R. Tullo, S.S.C.