in the petition, and suspended him from the office of a law agent in Scotland for the period of one year.

Counsel for the Petitioners — D. P. Fleming, K.C. — Normand. Agent — J. H. Jameson, W.S.

Counsel for the Respondent—MacRobert, K.C.—Duffes. Agent—R. F. Calder, Solicitor.

Tuesday, June 17.

FIRST DIVISION.

GILHOOLEY *v.* JOHN WATSON LIMITED.

Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 8 (1) (*f*) *as amended by Workmen's Compensation Act* 1923 (13 *and* 14 *Geo. V, cap.* 42), *sec.* 11 (2)—*Industrial Disease—Certificate of Certifying Surgeon and Medical Referee—"Condition of the Workman."*

A medical referee, when dismissing an appeal from a certifying surgeon, certified that the workman was suffering from miners' nystagmus and was thereby disabled from earning full wages in his employment. The employers moved that the case should be sent back to the medical referee on the ground that it was his duty to have reported as to the extent of the disablement, *i.e.*, whether partial or total. The Court *refused* the motion *holding* that neither under the Workmen's Compensation Act 1906 nor under the Workmen's Compensation Act 1923 was a certifying surgeon or a medical referee required to certify as to the extent of the disablement.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Section 8 (1) (*f*)—"If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purpose of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final."

The Workmen's Compensation Act 1923 (13 and 14 Geo. V, cap. 42) enacts—Section 11 (2)—"Where a matter is referred to a medical referee under paragraph (*f*) of subsection (1) of section 8 of the principal Act, the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by the medical referee, and such certificate by the medical referee shall be conclusive."

John Gilhooley, miner, 54 Hall Street, Blantyre, having claimed compensation for injury under the Workmen's Compensation Acts 1906 to 1923, from John Watson Limited, coalmasters, Earnock Colliery, Hamilton, obtained a certificate from a certifying surgeon that owing to miners' nystagmus he was disabled from earning full wage. The employers appealed to the medical referee who dismissed the appeal. Thereafter the employers moved the Sheriff-Substitute of Lanarkshire, at Hamilton (SHENNAN) as arbitrator to send the case back to the medical referee on the ground that he had not exhausted the remit made to him. The arbitrator refused the motion, and at the request of the appellants stated a Case for appeal, which set forth, *inter alia*—"This is an arbitration instituted on 26th February 1924 in which the respondent claims compensation in respect of incapacity due to miners' nystagmus under the following circumstances:—On 24th December 1923 the respondent who was a miner in the appellants' employment obtained a certificate from a certifying surgeon certifying that he was disabled from earning full wages at his work as a result of miners' nystagmus. The appellants appealed against this certificate to the medical referee. On 9th January 1924 the medical referee dismissed the appeal, adding a certificate under section 11 (2) of the Workmen's Compensation Act 1923 in these terms—'And I hereby certify that the present condition of the workman as ascertained by my examination is as follows — He is suffering from miners' nystagmus and is thereby disabled from earning full wages at the work at which he was employed.' On 18th March 1924 the appellants moved that I should send back the case to the medical referee on the ground that he had not exhausted the remit made to him, meaning really that the referee had not fully discharged his functions in disposing of the appeal from the certifying surgeon. I heard parties on the appellants' motion, and on 21st March 1924 I issued an interlocutor refusing the appellants' motion to remit to the medical referee. Section 11, sub-section (2), of the Workmen's Compensation Act 1923 requires that a medical referee when disposing of an appeal from a certifying surgeon's certificate 'shall also certify as to the condition of the workman at the time when he is examined by the medical referee.' The appellants contended that under this provision the medical referee's duty was to report as to the workman's fitness for work, *i.e.*, whether he was wholly or only partially disabled. I was of opinion that in the present case the medical referee had done all that the section prescribes by certifying the workman's actual physical condition at the time of his examination, in addition to dealing with the question of whether the certifying surgeon at the date of his examination, was warranted in granting a certificate. I drew attention to the contrast in the terms of paragraph 15 of Schedule I of the Workmen's Compensation Act 1906 under which a medical referee is required to report 'as to the condition of the workman and his fitness for employment,' these being treated as two separate things. It is to be observed further that neither under the Act of 1906 nor under the Act of 1923 has a certifying surgeon power to certify as to fitness for employment. His sole duty is to find whether the workman is disabled from earning full wages, and he is not called on to give an opinion as to extent of the disability, *i.e.*,

whether it is total or partial. If the appellants' contention is sound, a medical referee on appeal is required to deal with matters with which the certifying surgeon was not competent to deal."

The *question of law* for the opinion of the Court was—"In the circumstances set forth, was I entitled to refuse the appellants' motion for a remit to the medical referee?"

The arbitrator appended the following *note* to his award:—"This case raises a question as to the interpretation of section 11, sub-section (2), of the Workmen's Compensation Act 1923, which provides—'Where a matter is referred to a medical referee under paragraph (*f*) of sub-section (1) of section 8 of the principal Act, the medical referee when deciding the matter shall also certify as to the condition of the workman at the time when he is examined by the medical referee, and such certificate by the medical referee shall be conclusive.'

"Under section 8 of the Workmen's Compensation Act 1906 a workman is entitled to recover compensation if he produces a certificate granted by a certifying surgeon setting forth that he is suffering from an industrial disease, 'and is thereby disabled from earning full wages at the work at which he was employed.'

"This certificate is subject to appeal to a medical referee. There is no provision that either the certifying surgeon or the medical referee shall report as to the extent of the disability, *i.e.*, whether it is total or only partial, or as to the workman's fitness for work. The only matter decided is that the workman is suffering from an industrial disease to such an extent that he is unable to earn full wages. Under the 1906 Act when a medical referee refused an appeal against the granting of a certificate, he simply affirmed that the certifying surgeon was warranted at the date of the examination in granting the certificate. He did not find what was the workman's condition at the time of his (the medical referee's) examination. I am informed that the reason for the enactment of section 11, sub-section (2), of the 1923 Act was that cases occurred in which a workman, though disabled at the time of the certifying surgeon's examination, had recovered by the date of the medical referee's examination or conversely. Obviously the sub-section meets such cases. But the employers argue that, whatever the intention might be, the effect of the enactment is wider, and that it requires the medical referee to report on the workman's fitness for work.

"It would probably be very helpful if the certifying surgeon and the medical referee were required to report as to the extent of the incapacity. But I cannot find that they are so required. The words of section 8 of the 1906 Act are specific, and assistance in the matter is obtained by referring to Schedule I, paragraph 15, of the 1906 Act, under which the medical referee is required to report 'as to the condition of the workman and his fitness for employment, specifying where necessary the kind of employment for which he is fit.' There 'the condition of the workman' plainly means his physical condition, and is regarded as a different thing from 'his fitness for employment.' In section 11, sub-section (2), of the 1923 Act only 'the condition of the workman' is referred to. That, I take it, has the same meaning as in Schedule I, paragraph 15, of the 1906 Act. I cannot construe it as embracing also the workman's fitness for work.

"Accordingly in my opinion the medical referee has in this case done all that is required of him by certifying as he has done 'that the present condition of the workman as ascertained by my examination is as follows:—He is suffering from miners' nystagmus, and is thereby disabled from earning full wages at the work at which he was employed."

Argued for the appellants—The medical referee had not exhausted the remit made to him. He should have reported as to the workman's fitness for work in terms of Schedule I, paragraph 15, of the 1906 Act. There was no distinction, such as was suggested by the arbitrator, between "condition" and "fitness for employment." The old form of certificate had been criticised in *Frost* v. *Clanway Colliery Company*, [1920] 1 K.B. 423, *per* Warrington, L.J., at p. 432, and Atkin, L.J., at p. 432—*cf.* Adshead Elliot's Workmen's Compensation Act (7th ed.), pp. 646 and 655, and Willis's Workmen's Compensation (22nd ed.), pp. 605 and 607. There was no obligation, nor was it desirable, to follow the forms rigidly—*Turton* v. *East Barnsley Colliery, Limited*, [1921] 1 K.B. 369, Scrutton, L.J., at p. 376. Further, the medical referee might vary the certificate of the certifying surgeon—*M'Ginn* v. *Udston Coal Company, Limited*, 1912 S.C. 668.

Argued for respondent—The duties of the medical referee under Schedule I, paragraph 15, which was founded on by the appellants, had nothing to do with his duties under section 8. In the present case the medical referee had done all that the section prescribed.

LORD PRESIDENT (CLYDE)—The learned arbitrator has stated in his note the grounds upon which he has proceeded in giving his award. I entirely agree with his reasoning and have nothing to add.

LORD SKERRINGTON, LORD CULLEN, and LORD SANDS concurred.

The Court answered the question of law in the affirmative.

Counsel for the Appellants — Dean of Faculty (Sandeman, K.C.) — Marshall. Agents—W. & J. Burness, W.S.

Counsel for the Respondent — Solicitor-General (Fenton, K.C.)—Keith. Agents—Simpson & Marwick, W.S.