

Friday, January 17.

FIRST DIVISION.

[Lord Ormidale and a Jury.

MILLS v. KELVIN & JAMES WHITE,  
 LIMITED.

(*Ante* May 28, 1912 S.C. 995, 49 S.L.R.  
 725.)

*Reparation—Slander—Want of Probable Cause—Lodging Complaint with Criminal Authorities.*

In an action of damages for maliciously lodging a complaint with the criminal authorities, the *onus* of proving malice and want of probable cause lies on the pursuer. It is for him to prove that there was a want of reasonable and probable cause for giving the information complained of, or, in other words, that the circumstances of the case were such as to be in the eyes of the jury inconsistent with the existence of reasonable and probable cause, and that the proceedings of which he complains were initiated in a malicious spirit, *i.e.*, from an indirect and improper motive, and not in furtherance of justice.

*Circumstances* in which held that the pursuer of an action of damages for maliciously lodging information with the criminal authorities had failed to prove malice and want of probable cause.

*Dictum* of Bowen, L.J., in *Abrath v. North-Eastern Railway Company*, (1883) L.R., 11 Q.B.D. 440, at p. 455, approved and applied.

*Reparation—Slander—Privilege—Malice—Statements in Circular.*

The directors of a company, after lodging a complaint with the criminal authorities against a former employee, and after being informed that they (the criminal authorities) did not intend to proceed further in the matter, issued a circular to members of the trade, in which they stated that the pursuer had been guilty of gross irregularities. *Circumstances* in which held that the circular had not been issued in a malicious spirit and from an indirect and improper motive, and defenders *assouliéz*.

*Process—Jury Trial—Verdict Set Aside and Judgment Entered for Opposite Party—Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), sec. 2.*

The Jury Trials Amendment (Scotland) Act 1910, enacts, sec. 2—“If after hearing parties upon (a) a rule to show cause why a new trial should not be granted in terms of section 6 of the Jury Trials (Scotland) Act 1815, on the ground that the verdict is contrary to evidence, or (b) . . . the Court are unanimously of opinion that the verdict under review 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, they shall be entitled to set aside the verdict and, in place of granting a new trial, to enter judgment for the party unsuccessful at the trial.”

In an action of damages at the instance of an employee who had been dismissed, the jury found for the pursuer and awarded damages. The Court set aside the verdict and *assouliéz* the defenders, holding (1) that the jury were not entitled on any reasonable view of the evidence to find for the pursuer; and (2) that the whole evidence that could reasonably be expected to be obtained had been adduced.

The case is reported *ante ut supra*.

On 28th December 1911 Robert K. Mills, instrument maker, Clarkston, *pursuer*, brought an action against Kelvin & James White, Limited, nautical and scientific instrument makers, Glasgow, *defenders*, in which he claimed £5000 damages, in respect (1) that the defenders had, as he alleged, falsely, maliciously, and without probable cause, lodged with the Procurator-Fiscal at Glasgow charges of theft and fraud against him; and (2) that they had afterwards (the Crown authorities having declined to proceed further in the matter) issued a circular to members of the trade, in which they had, as he alleged, falsely and maliciously stated that he (the pursuer) had been guilty of serious irregularities, in consequence of which he had been dismissed.

On 8th March 1912 the Lord Ordinary (ORMIDALE) approved of the following issues and counter-issue—

*Issues for Pursuer.*

“1. Whether the defenders, in or about the months of November and December 1911 and January 1912, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the Procurator-Fiscal at Glasgow, a charge or charges of the theft by pursuer of certain gauges, jigs, or other articles, which were the property of the defenders, to the loss, injury, and damage of the pursuer? 2. Whether the defenders, in or about said months, falsely, maliciously, and without probable cause, lodged, or caused to be lodged, with the Procurator-Fiscal at Glasgow or the Crown Agent at Edinburgh, a charge or charges of fraud against the pursuer, to his loss, injury, and damage? 3. It being admitted that on or about the 18th day of November 1911 the defenders printed and circulated, or caused to be printed and circulated, among various firms in their own line of business and others in the city of Glasgow and elsewhere, and, *inter alios*, among the following parties, *viz.*— . . . a circular in the terms set forth in the schedule hereto annexed, or in similar terms, and whether the said circular or part thereof is of and concerning the pursuer, and falsely, calumniously, and maliciously represents that the pursuer

had been guilty of fraudulent practices, or contains representations to that effect, to the loss, injury, and damage of the pursuer?"

"Schedule.

"KELVIN & JAMES WHITE, LIMITED,  
"Nautical and Scientific Instru-  
ment Makers,

"16-20 Cambridge Street,  
"Glasgow, 18th November 1911.

"Dear Sir or Sirs—We beg to inform you that in consequence of the discovery of serious irregularities, Robert K. Mills, then our works manager, was dismissed from our service on the 8th inst. On the same day Mr Francis Wood Clark, then our managing director, tendered his resignation as such, to take effect as at the end of the year, which, on being altered at the request of the directors so as to take immediate effect, was accepted. You will doubtless take note that neither of these persons has now any authority to act for or represent us in any way whatever.—We are, yours faithfully,

"KELVIN & JAMES WHITE, LIMITED,  
"C. W. WAINWRIGHT, Secy."

*Counter-Issue for the Defenders.*

"1. Whether during the period between 1st January 1911 and 21st September 1911, the pursuer, while in the service of the defenders, fraudulently caused to be made for himself by the defenders' employees, and at the defenders' cost, duplicates of the tools, gauges, patterns, and other articles employed in the manufacture of the defenders' instruments, and also caused to be delivered to himself a complete azimuth mirror, the property of the defenders, and further fraudulently caused the said duplicates and other articles and the said mirror to be forwarded to Birmingham on various dates during said period, for his own purposes, and to await his further instructions?"

The case was heard before his Lordship and a jury on 2nd and subsequent days of July 1912. The *import of the evidence* appears from their Lordships' opinions (*infra*). The jury found for the pursuer on all the issues, and assessed the damages at £1000.

On 19th July the Court granted a rule to show cause why the verdict should not be set aside and a new trial granted.

At the hearing on the rule:—

Argued for pursuer—*Esto* that there was some evidence against the pursuer, the jury were entitled to hold, as they had done, that the weight of the evidence was in his favour, and that the defenders had acted maliciously and without probable cause. Assuming that the defenders were entitled to complain to the procurator-fiscal, they were not entitled to assume that the pursuer had been guilty of theft or fraud, and they must therefore take the consequences of having acted recklessly and without due inquiry. Such recklessness amounted to malice—*McDonald v. Ferguson*, March 10, 1853, 15 D. 545, *per* Lord Fullerton at p. 548; *Milne v. Bauchope*, July 19, 1867, 5 Macph. 1114, 3 S.L.R. 372;

*Denholm v. Thomson*, October 22, 1880, 8 R. 31, 18 S.L.R. 11. The case of *Lightbody v. Gordon*, June 15, 1882, 9 R. 934, 19 S.L.R. 703, was distinguishable, for all that the defender there did was to give information to the authorities, and that after due inquiry. It was for the jury to say whether the defenders had acted without reasonable and probable cause—*Lister v. Perryman*, (1870) L.R., 4 E. and I. App. 521, *per* Lord Colonsay at p. 539. Where, as here, a jury had found that they had, the Court would not disturb the verdict unless it was so flagrantly wrong that no reasonable jury would have given it—*Campbell v. Scottish Educational News Company, Limited*, March 15, 1906, 8 F. 691, 43 S.L.R. 487.

Argued for defenders—It was clear from the evidence that the defenders had neither acted maliciously nor without probable cause. The *onus* of proving want of probable cause lay upon the pursuer—*Abrath v. North Eastern Railway Company* (1883), L.R., 11 Q.B.D. 440, *per* Bowen, L.J., at pp. 455 and 457, *aff.* (1886), L.R., 11 A.C. 247, and approved in *Cox v. English, Scottish, and Australian Bank*, [1905] A.C. 168, *per* Lord Davey at p. 170. The fact that the defenders had insisted in the charges after the Crown authorities had declined to take proceedings was not in itself proof of malice, for (1) malice could not be proved *ex post facto*, and (2) the defenders had a duty to the public as well as to themselves. It was enough that the defenders honestly believed the charges to be true and that they had *prima facie* good grounds for making them. That being so the defenders were entitled, where, as here, all the evidence that could be reasonably expected to be adduced had been led, to be assoizied—Jury Trials Amendment (Scotland) Act 1910 (10 Edw. VII and 1 Geo. V, cap. 31), sec. 2.

At advising—

LORD PRESIDENT—The defenders in this case are a limited company of nautical and scientific instrument makers in Glasgow. A large branch of their business consists of compass work, for which they have been for many years famous. The firm was originally founded in the lifetime of Lord Kelvin, who had some very valuable practical patents for compasses. But the type of compass which was regulated by Lord Kelvin's patents is not the only type of compass, and in particular it has been, for certain purposes, one might almost say superseded by another class of compass known as the liquid compass. There is a certain form of liquid compass in the construction of which there are utilised certain patents which belong to Captain Chetwynd and Mr Clark—Mr Clark being one of the directors of the defenders' firm. This liquid compass has been very much used by the Admiralty. The Admiralty requirements necessitate a compass of great steadiness, inasmuch as the compass which they use may be subjected not only to the disturbing influences which come from the sea but also from the excessive

vibration which is the necessary concomitant of the firing of big guns. There are many sizes of this liquid compass—I think about seven or eight in all—which have been for some years made by the defenders' firm.

The compass as made for the Admiralty requirements is necessarily an expensive compass. No money is spared in turning it out, and in particular its metal parts are all, or almost all, made of castings. There are certain smaller portions connected with the compass itself and a larger portion connected with the binnacle head which are not made of castings but which are made by what are known as stampings and spinnings. It is necessary at once to explain what is the difference between a casting and a stamping and spinning. A casting probably needs no explanation; the word is one of common use, and everyone knows what it means. But "stamping" and "spinning" are not so common. The words are used to describe the formation of a metal design out of a plate. The metal plate is cut and is then introduced between two shaped chucks upon a lathe, and the flat metal is, by the rotation of the lathe and the pressure of the chucks, pressed into the desired shape. When this can be done the result is achieved at a less expense than is the case when each casting has to be made in the ordinary way.

Now Messrs Kelvin & White, Limited, while they in the ordinary commercial sense made the compass, that is to say, while they got all the parts and assembled all the parts when got, yet, not being a firm of founders or spinners, did not actually make all the parts themselves, and for such things as were spun they were in use to deal with the firm of Burt Brothers in Birmingham, with whom they had dealt for some time—in fact the relations between the two firms may be described as of an intimate commercial kind.

On 1st November 1911 a Mr Wynn, who was one of the partners of Burt Brothers, came to Glasgow and requested to see Dr Bottomley, who is the chairman of the directors of Kelvin & James White, Limited. The other directors are his son Dr Frank Bottomley, Mr Baird, Mr Warren, who is a lawyer and a member of the firm that attends to the interest of the widow of Lord Kelvin, and Mr Clark, whom I have already mentioned. Mr Clark was the director who had the practical conduct of the works, but Dr Bottomley, who was a gentleman of great scientific attainments, and who, being Lord Kelvin's nephew, was associated with Lord Kelvin from the very inception of this business, took a general supervision of everything which went on.

Now when Mr Wynn saw Dr Bottomley he communicated to him that there was a matter which had given him and his partner at Birmingham considerable cause for anxiety, and he then told Dr Bottomley the story that within the last few months, viz., from the month of May onwards, certain boxes of articles had been sent to their firm in Birmingham from Glasgow. They had been sent by Mr Mills, who is

the pursuer in this action, and who was the works manager of Kelvin & White, Limited. They had been sent with instructions that the articles contained in the boxes should be kept until further orders. Without going into detail at this moment the effect upon the mind of the partners of Burt Brothers had been that there was something wrong and something curious about these consignments. They were consignments of things which Burt Brothers said they had never had before, and for which they imagined they could have no use. Following upon that conversation it was arranged to send some of the practical persons from Kelvin & White, Limited, to Birmingham to see those articles and to take an inventory of them and discover what they were. That was done, and it was then found that there had been sent from the defenders' works to Burt Brothers first of all a complete Admiralty compass, and secondly, an absolutely complete set of gauges and jigs for the whole of the current patterns of the Admiralty compass. I shall explain later exactly what jigs are. "Gauges" is an ordinary term which I think everyone understands.

In consequence of this report from their representatives the directors of Kelvin & White held a meeting on 8th November, at which their lawyer Mr Alexander attended, and summoned Mr Mills before them. He was then subjected to an examination as to what reason he could give for having sent these boxes with their somewhat mysterious contents to Burt Brothers. The account given by Mr Mills, in the view of the directors, was so unsatisfactory that they dismissed him upon the spot. Having dismissed him upon the spot, and being within the next few days in possession of a little more information, they then upon the 11th November informed the procurator-fiscal, with a view of having Mills prosecuted for either theft or fraud, and upon the 18th November they sent out a certain circular.

Before calling your Lordships' attention to the actual terms of the circular it is as well to say this, that Clark had, upon the very morning of the meeting, handed in his resignation. After the meeting with Mills the directors had a meeting with Clark, at which they accepted his resignation, but only upon the condition that he re-wrote the resignation which had arrived that morning, and which was a resignation as from 31st December, which was still to come; they accepted the resignation which he then re-wrote, dating it from the day of its arrival, that is, 8th November, the day of the meeting.

The circular which they sent out on 18th November was sent to their trade connection, and was in these words—" . . . quotes, v. sup. . . ."

On 28th December Mills raised the present action, which is an action concluding for £5000 damages, and is based, first, upon the complaint of information having been given to the procurator-fiscal, that is to say, in other words, of attempted prosecution; and, secondly, upon the terms of

the circular. Four issues were presented to the jury. The first and second issues have to do with the lodging of the charge. There are two issues instead of one, because one is put as a charge of theft and the other is put as a charge of fraud. Both of these issues necessarily have in them the words "falsely, maliciously, and without probable cause." The third issue is based upon the circular. It also contains the word "maliciously," which is tantamount to an admission by the pursuer that the occasion was privileged—it contains the word "maliciously," but, of course, not the words "without probable cause." The defenders took a counter issue, which was the fourth issue, which put the question whether the pursuer, while in the service of the defenders, for his own purposes fraudulently caused to be made for himself duplicates of the articles that were in the boxes.

The matter was tried, and the jury by a majority—by a varying majority in the various issues—found for the pursuer upon the whole issues, and the present application to your Lordship is an application for a new trial upon the ground that the verdict was contrary to evidence.

The first matter that has to be considered is what is the *onus* which the pursuer must discharge in order to succeed upon the first two issues? There is a passage in a judgment of Lord Justice Bowen in the case of *Abrath v. North-Eastern Railway Company* (1883, 11 Q.B.D. 440), which I respectfully think expresses with great terseness and correctness the law upon this matter. It needs a little altering in the phraseology in order to fit it to our Scots practice, but the gist of it, I venture to say, is just as good law in Scotland as it is in England. I say "as it is in England" because the case of *Abrath* has been again and again recognised as an authority and has been approved of in the House of Lords. Lord Justice Bowen in that case said this—"This is an action for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." Now, so far as the first of these three propositions is concerned, namely, that the plaintiff has to prove that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made, his Lordship is there dealing with an actual prosecution. Your Lordships remember perfectly well that private prosecution in England is the ordinary form of prosecution. Naturally with our system the matter is not quite

the same. The person who practically decides, except in a very few rare cases, whether there is to be actual prosecution or not is the Lord Advocate. And the *gravamen* accordingly in Scotland is not in any cases the prosecution itself, but is the giving to the procurator-fiscal, who is the representative of the Lord Advocate, the information with the view to a prosecution. When it is stated, then, that the plaintiff has to prove that he is innocent, that is the case in England; whereas here the pursuer is entitled to have his innocence presumed. No prosecution did, as a matter of fact, follow in this case, and that is the reason why the defenders thought it necessary to take a counter issue, as they were entitled to do. Without a counter issue it would be held proved that the pursuer was actually innocent of what he did.

As regards the second proposition, where his Lordship says that the circumstances of the case must be such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause, there, in Scotland, you would substitute for the word "judge" the word "jury," because probable cause itself, in our practice, is for the jury and not for the judge. But the last proposition as to malice is applicable in terms to our own law.

Now when I come to consider what want of probable cause is I am met with the difficulty of giving an actual definition of a negative. But one may say, I think, without fear of being far wrong, that a man has probable cause if, in giving the information, he is acting in a way in which a reasonable man, swayed by no illegitimate motives, would act. Naturally when I speak of illegitimate motives, that trenches upon the domain of the third proposition, namely, malice; but there is no doubt that the two provinces of want of probable cause and malice rather overlap. You cannot deal with the two as entirely separate. But now, when one speaks of the way in which a reasonable man would act, one must add, I think, that the test of what a reasonable man would do must be taken according to the state of his knowledge when he gives the information; and accordingly the first inquiry in this branch of the subject is to see what the defenders knew when they gave this information to the procurator-fiscal.

Now when I come to look at what the defenders knew, I think that the salient points are these—First of all, by this time they knew what the things were that had been sent to Birmingham. They knew they were an absolutely complete set of articles which would enable anybody skilled in the trade at once to commence the manufacture of compasses that would suit the Admiralty. The second thing they knew was that these things had been sent with instructions that they should be kept secret, and should not be given up, but should await some further directions that were coming. The next thing they knew was that the class of things that had been sent and the way in which they had been

sent had created a most uncomfortable feeling in the minds of the partners of Burt Brothers, who, while they did not know exactly what was wrong, had a very strong suspicion, which had been in their minds for some time, that something was wrong. The next thing they knew was that on the eve of the day on which they had summoned Mills to give them an explanation, Mills and Clark had both written letters to Burt Brothers with a request that everything that Burt Brothers had belonging to Kelvin & James White, Limited, including the articles in this case, should be sent back. In other words, there had been an obvious attempt on Mills and Clark's part to get back the contents of these mysterious boxes. The next thing they knew was that it had come to their knowledge that Mills had been throwing out feelers to various people as to setting up in business by himself; and finally, they knew that before they had given any note of warning to either Mills or Clark, Clark had handed in his resignation.

Now all those circumstances were what I may call extraneous of any explanation of Mills himself. But then they also had the meeting with Mills upon the 8th. I have already stated to your Lordships how Mills was sent for and was confronted by the five directors. The learned counsel for the pursuer characterised that as a harsh proceeding. I am bound to say that I cannot see anything harsh in it. I cannot see that the board of directors were not absolutely entitled where, as here, the circumstances were full of suspicion, to send for the man who was implicated and ask him what explanation he had to give.

Now there are various sources of information as to what happened at this meeting. As a matter of fact the defenders made arrangements for having what was said at the meeting taken down in shorthand, and we have got a transcript of what was said so far as the shorthand writer can reproduce it. If you take what is said literally as you see it in the shorthand notes extended, there is an absolute admission on Mills' part that these articles had been sent to Birmingham, not for the proper purposes of the firm of Kelvin & James White, Limited, but for purposes connected with Mills' possible future business, because, as the shorthand notes run, Mills says—"I anticipated that when the day came that I left Kelvin & James White I should be able to get work done by them" that is, by Burt Brothers—"the same as they did for Kelvin & James White. That was the reason. I was looking to my future."

Now it is the case that the shorthand notes have been subjected to a certain criticism by an expert shorthand writer, and he suggests that the sentence which I have just read is in answer to a question which has been omitted, and that if you framed the question in a certain way the sentence which I have read might not have the precise shade of meaning which it obviously has if you read it as I have read it. I do not think that very much

matters, because you have also the story of the various people who were at the meeting, and they one and all—I shall not take up your Lordships' time by reading bits of the evidence—they one and all were left after the meeting with the distinct impression that Mills had practically admitted that these articles were sent for a purpose of his own and not for the purposes of the firm; and I think we have what may be called contemporaneous evidence of that being the case, because after Mills had been then and there dismissed, when the directors met Clark, Mr Alexander, who was the mouthpiece of the directors, made a speech to Clark, and in that speech he says this—"We have heard from Mr Mills just now an account of it, and he has openly confessed that they"—that is, the articles—"were sent to be useful to him when he was in a position to start for himself with Dents' people." That seems to me to be an absolute confirmation of what all these gentlemen say in the witness-box, namely, that the effect upon them of the interview was that they had no doubt whatsoever that Mills had reluctantly admitted that he had sent the articles for his own purposes.

Now if Mills did make that admission, and if that was the state of knowledge at the time of these persons, there can be no doubt that in their view, and indeed in anybody's view, not only a grave breach of duty had been committed by Mills, but that something had been done by him which put him within the reach of the criminal law. I do not think it is at all necessary to consider whether, in the technical sense of the word, there was theft—whether there had been that *animus* which makes theft in the strict sense of the word—and when the complaint came to be made to the authorities what is complained of is "theft or fraud." The truth is that the question whether the *nomen juris* was theft or fraud was really a matter for the Lord Advocate and not for the private informant at all; but that it is fraudulent to take your employers' goods without their leave and to send them away to a place where they are eventually to be used for your purpose and not for your employers' purpose I have no doubt. There is a good deal of fencing on Mr Mills' part as to the word used—that is to say, with the words of a question put to him, namely, whether he proposed to "use" the articles himself. Well, that obviously is neither here nor there. If a man took a violin which did not belong to him and sent it away to someone else, it would be no answer to a criminal charge against him to say that he could not play the violin and could never use it himself. If Mills meant Burt Brothers to use these things which did not belong to him for the purposes of his eventual business, undoubtedly that was a fraud. I do not think it is necessary to decide whether, technically speaking, it is a theft or a fraud.

I now come to a great peculiarity of the case, and that is this, that in the summons the attitude that is taken as regards the

sending of these things is not only not an admission of such a thing as I have put—which of course would have been fatal—but is the putting forward of an entirely different story; and there is this further peculiarity, that that entirely different story, which if it is a true story could easily have been told at the meeting of the 8th, is never breathed at that meeting. The story which is put forward in the summons is this—The Admiralty compass, as I have already said, is a very expensive compass, and there is an opening in the trade for the introduction of a liquid compass which will have the advantages of the liquid compass and yet be made at such a figure as will allow it to be bought by the mercantile marine and by that large class of persons who cannot afford to pay the price which the Admiralty are prepared to pay. The theory which is put forward in the summons, then, is that all these articles were sent to Burt Brothers in order to allow of their making spinnings for a cheap liquid compass. I have already mentioned that where you can spin instead of cast it is cheaper to do so.

If I were inclined to deal with the matter very strictly, or indeed if I had been sitting as a jurymen, I would be of opinion that, whatever was in the summons, the fact that Mills did not say that at the meeting of the 8th November would be enough to justify the position of the defenders at that time. But I do not propose to do that, because although the result of Mills' examination is as I have said, there is a part of his examination where, though he falls far short of putting the case as I have put it now, and as it is put in the summons, still there is a sort of hint which might have been developed into the case as it stands in the summons. When he is asked at the beginning of the examination what he had sent the things for, he says this—"All those things you mention were sent with the express purpose of having them stamped." The particular person who was examining him at the time, Mr Alexander, did not really understand the meaning of the word "stamped," and took it—as a layman would do—as meaning the impression of a name or a mark upon them, and consequently did not press the answer in a way that a person who did understand stamping would have done. Dr Bottomley did, because he asked if they were going to stamp circular plate glass, &c., and certain other parts of the compass which were perfectly unfit to be stamped, and no answer was made to that perfectly pertinent question. But still I am content to take it that this mention of the stamping was a sort of indication—a sort of embryo—of the story that is now told, and seeing that we are not here trying the case, but considering an application for a new trial, and to set aside the verdict of the jury as being contrary to evidence, if I could find that there is any substance for what I may call the innocent view, so that the jury had a possible choice between the one view and the other, then I should not, however much I thought they were wrong,

think myself entitled to disturb their verdict. But if, on the other hand, the allegation as now made is preposterous and upon the face of it false, then the mere fact that it is given and sworn to by the two interested parties, Clark and Mills, does not really create evidence upon which the jury were entitled to go.

Now I have used the word "preposterous." Preposterous, of course, must be preposterous not to anybody but to the judgment of the man who understands the subject. The persons to whom that explanation was made—assuming that it was made—were the directors of Kelvin & James White, Limited, who, or at least some of whom—certainly the two Bottomleys—perfectly understood the subject they were dealing with. And accordingly, in order to examine whether this was a preposterous suggestion or not, one must put oneself into the position of those persons. And that is all the more necessary, because to an entirely uninstructed person the proposition would seem really reasonable enough. You want a cheap compass, and spinning is cheaper than casting; well, then, send a set of patterns, jigs, and gauges to a firm of brass-spinners with a view of having a cheap compass made. That seems a perfectly reasonable proposition until you know a little more. The directors of Kelvin & James White, Limited, did know a great deal more, and your Lordships in the light of the evidence now know a great deal more, although I do not think probably that it casts any reflection upon any of us to admit that at the beginning of the case we did not know enough.

But now let us judge by what the directors of Kelvin & James White, Limited, knew of that matter. The first thing they knew was this, that so far from the idea of substituting spun for cast parts being a new idea and a new departure, they had been at it for, I think, two years. It had occurred long ago to various persons that there was a good market for a cheap liquid compass, and it was quite obvious that one of the ways of cheapening the compass was to substitute spun parts for its cast parts. They had been at it for two years, and they had practically come to what they thought was an absolute conclusion. The cause of success or failure, the moment it is explained, is simple enough. I have already mentioned to your Lordships what spinning really is. Now it is perfectly clear that if you take a section which represents a simple convolution, you can easily have two chucks shaped which will give that convolution when they are pressed together upon the flat plate. But it is equally evident that where you have a convolution of a more composite character and with re-entrant angles set near together, you may get a class of section that it is impossible to reproduce by the process of putting metal between two chucks. All this had been found out by practical experiment, and, put in a sentence, what they had found by this time was, that whereas by spinning they could make

good bowls, they practically could not make the class of ring that was necessary for several parts of the compass. Now seeing that that had been going on for two years, and was known to the whole of the directors, the first thing that would naturally strike one of the directors of Kelvin & James White, Limited, is this—would it be likely that after these experiments had gone on, with their partial measure of success and partial measure of failure, that a whole new set of experiments should be initiated in Burt Brothers' works, and that without any communication by Clark and Mills to the other directors that any such thing was to be done and without any indication to Burt Brothers? The natural thing of course would be, if these experiments had been going on, to say—“While you have failed with so and so, we think you should make another attempt, and for that reason we send you these.” But to send this mass of articles with sealed instructions, so to speak, was, to say the least of it, a very curious way of conducting experiments which had already been going on for two years.

But another thing the directors knew was this—According to the evidence given in the case by Clark and Mills, their object in sending the whole range of Admiralty compasses was that they wanted Burt Brothers to be able to do everything—in fact they expressed it that nothing should be left for Kelvin & James White, Limited, to do except simply to fill the bowls with liquid and to paint them. Now we had ample evidence here, namely, the evidence of the whole of the people from Burt Brothers' place, particularly the two partners and Harris, their representative, to the effect that Burt Brothers were perfectly incapable of doing any such thing. They had no men who could put a compass together. They had no men who could even have assembled a compass if you had given them the parts. They were spinners and nothing else, and the idea of turning them into compass makers meant that they would have had to have got new men and new premises. That also is a startling fact.

But then, lastly—and this really is the most cogent fact of all, and is the one which needs, to the uninitiated, most explanation—they had sent not only gauges for all these parts, but they had also sent jigs. Now what are jigs? Jigs vary, and among the articles in the case there are a great many jigs. Many of those which were sent may be described as fitting frames—that is to say, contrivances which hold the various bits of the part of a compass which is to be assembled, hold them together temporarily to demonstrate the fact that they are of the proper size—because if they were not they would not get into the jig—determine the proper place where a hole for a screw has to be drilled, and how far the drilling is to go, and eventually, when the drillings and fixings by screws and other means are made, turn out the parts in the proper condition. Well, it is quite obvious that

such an instrument can only be of use where you are dealing with exactly the thing meant to fit the jig. Now one of the great reasons for substituting a spinning for a casting, and one of the reasons which makes a spinning, when successful, cheaper than a casting is that you get a part of different dimensions. Not only that, but for the reason I have already given about the difficulty of dealing with certain sections of convolution, you may have a cast part which it is possible in essence to spin, and which yet cannot be spun with the precise outline that is in the casting—in other words, the precise section may have to be modified in order that it may be made suitable for spinning. This means that there may be a difference of thickness, and also very often a difference in outline. The moment that you have such a difference in the class of work that you are dealing with here, even if it be one sixty-fourth of an inch, the jig would be perfectly useless; it never could be used for anything at all, because the first necessity in using a jig is that the parts that you are going to put into that jig should be precisely of a shape and of a size to fit the recesses of the jig into which they are to be placed. And therefore the idea that a set of jigs appropriate and necessary for the making of an Admiralty compass out of castings should be of the slightest use to enable a person to make a compass of which the major parts should be spun instead of cast is an idea which, as soon as you come really to appreciate it, is absolute and entire nonsense.

A very good illustration—it is nothing more—but an illustration of the absolute truth of what I have just said is this—I have already mentioned that the Burts had during the last two years been experimenting as to what they could spin. In order to do that they had never been provided with a complete set of jigs appropriate to the Admiralty compass. Yet, of course, if that were necessary, such a set of jigs is one of the first things Kelvin & James White, Limited, themselves would have sent, with the approbation of all the directors, when they began the series of experiments which had been going on for two years.

Now that is the one side—an explanation which, on the face of it, as soon as you come to understand it, is preposterous and ridiculous, and which no man who knew the business at all would accept for a moment. What is the other? A man who has admitted that he is planning to start a new business, admits to sending behind the backs of his directors such a complete set of jigs and gauges, together with a complete Admiralty compass, that with that stock-in-trade he can go into a good shop, like that of one of the London manufacturers which has been mentioned here, and the very next day begin to construct compasses of the Admiralty pattern.

Some of these jigs we are told, and it is quite evident, are the result of years of experiment. It is not entirely a question

of design; they represent a great deal of empirical achievement. One improvement follows another until you get the contrivance, I do not say in the most perfect form, there are probably better jigs yet to be made, but still you get it in very perfect form. All that trouble and labour is abbreviated to the person who has these things.

I have just referred to the London manufacturers whose names have been brought before your Lordships in the debate, and although they have nothing to do with this case, I say at once that there is not the remotest suggestion of either Messrs Dent or Captain Chetwynd having the slightest knowledge of this matter.

Now when you have those two sides of the matter as they presented themselves to the directors, really the case seems to end. On the one hand you have very obvious reasons for the action of the directors, the circumstance of secrecy and the whole circumstances of the case all pointing the one way. On the other hand you have an explanation, not made at the time, but made now, which will not hold water for one moment, and really can only hold water if it is presented to a sufficiently ignorant or uninstructed person. I am afraid the question of instruction in such matters as these is sometimes a little difficult, and it is certainly one of those cases where one regrets very much that in our practice we do not have the advantage, as they have in England, of the services of a special jury, because I cannot disguise from myself that probably the majority of the jury who tried this case never came to a proper understanding as to what a jig really was, and as to the deduction that must necessarily be drawn from the nature of it. But as the evidence stands, I say there is no evidence whatsoever here of want of probable cause, because, as I have already said, the mere fact that two people swear to an inherently preposterous story does not create evidence at all.

That, to my mind, settles the first two issues. I have already said that I think the question of theft or fraud was for the Crown Office, and not for the defenders. And when you have settled the first two issues you have, I think, practically settled the third, because, as regards the third, you have, applying the words of Lord Justice Bowen, to find that the sending out of the circular was done in a malicious spirit and from an indirect and improper motive. If I am right in all I have already said, it is impossible to find any malice in sending out the circular. The directors were perfectly entitled to say what they did, and to tell their customers that neither Mills nor Clark would ever in the future be their representative.

The only point in this connection which was urged before us, and, I dare say, urged with great effect before the jury, was that malice might be inferred from the fact that after information was lodged, and after a communication had been received

from the procurator-fiscal that he did not propose to take proceedings, the directors would not take "No" for an answer, and went back and requested a meeting with Crown counsel. I do not think that is a matter from which it is allowable to extract malice. A person is entitled to call upon the Crown authorities to do what he thinks is their duty. But in this case they were more than ever entitled, for the reasons that I have already given, to secure a thoroughly informed opinion upon the facts of the case. It is absolutely necessary in this case to become sufficiently acquainted with what the compass is, and how it is constructed, in order to appreciate what was really meant by sending all those things to Burt Brothers. I do not think that the understanding of compass work is within the ordinary training of the Crown office, even including the advocates-depute, and I think it was perfectly natural that the defenders here should wish to explain thoroughly to the Crown authorities exactly how the matter stood. And that, really, is practically the only matter that can be appealed to in the question of malice.

It follows that, in my opinion, there is no evidence whatsoever to support the verdict of the jury upon the first, second, and third issues. I need scarcely add that it also follows from what I have said that I think there ought to have been a verdict for the defenders upon the fourth issue. But I do not think it necessary that your Lordships should deal with that, because if there is no evidence in support of the pursuer's case under the first, second, and third issues, the verdict necessarily goes.

There is another fact which I have not mentioned as regards the first, second, and third issues, because I have necessarily dealt with the knowledge of the defenders at the time that they took these steps, and this particular thing was not known to them at that time, but I refer to it in connection with the fourth issue. It is this, that in addition to the other facts it is proved that Mills had a complete set of drawings of all these Admiralty compasses made out for him and delivered to him, and that those drawings are now nowhere to be found. That set of drawings would have added the final touch to the equipment of a person who had made available to himself the set of patterns and jigs in the case, and would have enabled him to start the construction of Admiralty compasses at once. But I do not think it necessary to go further into that, because I think it is perfectly unnecessary that we should deal with the fourth issue at all. As regards the first, second, and third issues, as I understand the opinion which I have just delivered is shared by all your Lordships, including, of course, the very valuable opinion of the learned Judge who presided at the trial, it is, I think, a clear case for entering a verdict for the defenders.

LORD JOHNSTON—I experience no doubt in coming to the conclusion which your Lordship has announced, that this verdict



must be quashed, and that instead of a new trial being granted a verdict should be entered for the defenders. The only difficulty which I have experienced is not so much in weighing the evidence as in sifting it and applying it properly to the real point on which the case turns.

The defenders, in November 1911, laid a criminal information against the pursuer with the police and the procurator-fiscal at Glasgow. The actual information is in accordance with practice not produced, but it is admitted that its gist was to charge with dishonest appropriation of property with intent to fraudulent use. This may or may not amount, strictly speaking, to a charge of theft or to a charge of fraud, or to some other charge, but it was for the Crown, if they determined to prosecute, to specify the offence which the *species facti* as disclosed to them fitted. It is enough that such criminal information was laid by the defenders against the pursuer. In such a case, looking to the defenders' admission and the privilege, the real point on which the case necessarily turns is the question of malice and want of probable cause. The pursuer has got to establish that the charge was made maliciously and without probable cause.

It is convenient to regard the question of probable cause first and separately. The point of time at which that must be judged of is, I think, without doubt the date at which the charge is preferred; and the reason why I have said it is necessary to sift the evidence is that the case has been, I do not say intentionally and for the purpose of confusing the issue, but rather from its circumstances unavoidably overlaid by a mass of evidence which has to do with matters which did not affect the state of mind of the defenders at the date in question, and my endeavour has been to put these matters in the right perspective in relation to the real issue.

These matters are not of the nature of circumstances which make for *ex post facto* probable cause. If they were, a different question would arise. They are rather of the nature of facts adduced by the pursuer to counter the *prima facie* case of probable cause, with which he cannot deny with any effect that he is faced.

The *prima facie* situation is this. The directors of Kelvin & James White, Limited, are no figureheads. They are men giving close attention to their business and thoroughly versed in its details. They are really a private firm, though trading as a registered company, who, *inter alia*, manufacture nautical compasses and largely for the Admiralty. For producing certain of the parts of their compasses, which can be made by processes known as stamping and spinning, they employ a firm of metal workers, Burt Brothers of Birmingham, and have done so with complete confidence for many years. In the course of the six months prior to November 1911 the pursuer, who was the defenders' works manager, sent at different times cases containing sets of gauges and jigs, being the tools necessary for making to exact size and

assembling or marshalling the parts of the whole range, eight in number, of the current patterns of Admiralty compasses. The sets were complete, wanting only certain parts which were in course of making at the defenders' works. These were sent, not for use, but to be laid aside under directions which, to say the least, were somewhat mysterious. The two partners of Burt Brothers, Messrs Wynn and Southall, were so much perturbed by this action of the pursuer, particularly when read in the light of information conveyed to them by their own works foreman Harris, that they took legal advice as to their position, and ultimately Mr Wynn went to Glasgow and communicated the facts to the directors of Kelvin & James White, Limited. With the knowledge of their own respective businesses possessed by Messrs Wynn and Southall on the one side and the directors of Kelvin & James White, Limited, on the other, there could be little or no doubt in the minds of either that the articles in question had been sent to Burt Brothers by the pursuer in pursuance of a dishonest purpose, and to further his own ends in starting business for himself, either alone or in association with certain rivals in trade of Kelvin & James White, Limited. And they had, moreover, every reason to conclude that F. W. Clark, the managing director of Kelvin & James White, Limited, was deeply concerned with the pursuer in his scheme, whatever that scheme was. It is immaterial that no one even now can have any exact conception of the course which the pursuer intended to follow.

Such was the state of the personal knowledge and of the information which the defenders had on the morning of 8th November, when they summoned the pursuer to an interview. But on the same morning, before they saw him, they learned by telephone from Burt Brothers the additional fact that both the pursuer and Clark had the day before written independently, instructing the return of the articles in question. At the interview referred to the pursuer was certainly pretty severely handled, but the incidents of the interview must be read in the light of the knowledge and information which the directors of Kelvin & James White, Limited, and their solicitor already had. The pursuer, if he did not, as I think, make a complete admission, certainly gave no explanation which tended in any way to clear himself.

At this stage the charge was made, and I do not think there can be any doubt that it was made with ample probable cause. It is, I think, a sufficient criterion of the sufficiency that men in the position of Messrs Wynn and Southall should have entertained such anxiety as to their being themselves compromised in some dishonest transaction as to take legal advice as to their position, and, after acting for some months with great care and circumspection, have felt themselves compelled to confide the circumstances to their employers, the directors of Kelvin & James White, Limited.

Now one must keep in view that the *onus* is on the pursuer of proving want of probable cause, and as matters stand on the above statement, not only has he done nothing to show want of probable cause, but there is a very clear positive case of probable cause against him.

He attempts to meet this by maintaining that his employers and Burt Brothers were under an entire misapprehension—that the fraudulent intent in sending up the articles in question to Burt Brothers was an entire delusion, because the real truth of the matter was that the said articles had been prepared and sent up by instructions of Clark, the managing director, with a view to the future manufacture of a cheap form of floating compass much called for on the market, at the getting out of which Clark and the pursuer had been for a long time working. Assuming the truth of the allegation, I am unable to see how it countervails the proof of probable cause, which I have already detailed, unless it can be shown that at and prior to the laying of the charge the directors of Kelvin & James White, Limited, had been made aware of the facts alleged. It is not for a moment suggested that Clark and the pursuer were acting in pursuance of instructions from their board, and even if they were acting on their own initiative, and, as they believed, in the interest of the company, it is fully proved that they neither of them had any power or authority to act on their own initiative in the matter. But what is more important is that it is neither alleged nor suggested, and far less proved, that Clark and the pursuer at any time communicated their design and their actings to the defenders. It appears to me, therefore, that a matter which did not enter, and which there is no reason for saying could have entered, the minds of the defenders at the time of lodging the charge can be regarded as disturbing the result to which one is unhesitatingly led on the subject of probable cause as at the time of the charge. And if there was such probable cause, there can be no inference of malice. Of direct proof there is none.

But the charge was not only made but was persisted in, and I may even say is persisted in to the present day, though no prosecution has taken place. I am not the least surprised at this when I find the following to be fact, viz.—That by direct instructions of the defenders continued efforts had been made during the months prior to the pursuer sending up the articles in question to Burt Brothers, to get out a cheap floating compass such as is above referred to, and that these efforts had failed, and the attempt had been abandoned by the defenders because Burt Brothers had found it impossible to produce the requisite parts as a commercial undertaking—that the articles sent up to Burt Brothers were not articles which, with a few possible exceptions, they could have used for the purpose in question; and that Burt Brothers' business was of such a nature that it is preposterous to suggest that the defenders would have committed to them,

or that they would have undertaken, the work necessary to carry out the alleged design of the pursuer and Clark.

I have thought it necessary to deal thus in detail with the pursuer's alleged counter case, because, while I think it is no answer whatever to the defence, its statement and its complete refutation leads me without hesitation to the conclusion, not merely that the verdict is against evidence, but that it must be entered up for the defenders.

LORD MACKENZIE—I agree with your Lordships, and only add anything because of the important nature of the case. Upon the first two issues, if the Court is of opinion that the jury was not entitled, on any reasonable view of the evidence, to come to the conclusion that the defenders had no probable cause when they lodged information with the criminal authorities, the pursuer cannot hold the verdict he has obtained.

That he did obtain a verdict is to be explained, in my opinion, only on the hypothesis that the jury failed to appreciate the state of knowledge of the directors of the defenders' board when they made the charges complained of. Nor is this surprising looking to the inherent difficulties of the case, which have only been cleared away by the explanation given us by the defenders' counsel.

The charge (for though there are two issues the charge is really one) is contained in the letter from the defenders' law agent to the Procurator-Fiscal, Glasgow, dated 11th November 1911, that there was evidence of theft or fraud against Mills, the pursuer of this action. When this letter was written the defenders had shortly before received information that the pursuer, their works manager, had in January of that year ordered to be made in the works a complete set of gauges, jigs, and pattern pieces for the whole range of Admiralty compasses, and that the bulk of these had been sent to Burt Brothers, Birmingham, in three consignments, in June, July, and September, and were still lying there. The instructions from the pursuer to Harris, an employee of Burt Brothers, as to what was to be done with them is shown by correspondence—they were to be kept safely in his own room until he was told what to do with them. The list shows the balance of the order. These articles had been made but had not been forwarded.

The case for the pursuer now is that these articles were forwarded by him on the instructions of Clark, one of the defenders' board, as the result of a plan which had been thought out between them for the manufacture of a cheap liquid compass for the mercantile marine; that Burt Brothers were to stamp and spin all the necessary parts and put them together; that the completed article (with the exception of the filling and painting) was then to be sent back to Kelvin & White in Glasgow; and that the articles were sent in the ordinary course of business. The defenders' reply to this is that this account of the purpose with which the articles were

sent is demonstrably absurd; that it was an explanation which Mills never gave them, though he had the opportunity of doing so on 8th November, and never gave to anyone until he went into the witness-box; and that if this explanation is shown to be inherently impossible they were justified in taking the view upon the information they had on 11th November, including Mills' own statement on the 8th, that the articles had been sent in order that when Mills carried out the intention he formed in June of leaving Kelvin & White and going into partnership with Dent Brothers, a rival firm, either with or without Clark, these articles might be used to his advantage.

Harris told the partners of Burt Brothers about these things, and their suspicions were aroused by the nature of the articles sent them. They had lain for months without further explanation than Mills had given Harris, and they were not suited for the ordinary work that Burt Brothers had been in the habit of doing for Kelvin & White. They consulted their solicitor and were told to keep their eyes open. One of the partners, Mr Wynn, went to Glasgow and gave Dr Bottomley, the defenders' chairman, an outline of what Harris had told him, but left it to the defenders to make their own inquiries in Birmingham. This they did, and No. 95 contains the notes of the interview that Dr Bottomley and the others had with Harris on 3rd November. These were reported to the defenders' board, together with an inventory of the articles which were found in Birmingham and had been sent by Mills. The order for these had been given by him verbally in Kelvin & White's works, and no list was kept there of what had been sent. The discoveries and information obtained at Birmingham produced the same effect upon the defenders' board in Glasgow as upon Mr Wynn and Mr Southall, the partners of Burt Brothers. The defenders' directors accordingly summoned Mills to a meeting of the board in Mr Alexander's, the law agent's, office on 8th November, and asked him for an explanation.

The explanation now put forward by Mills that the articles were sent by him on the instructions of Clark for the purpose of having a cheap liquid compass made by Burt Brothers was never suggested by Mills then. If the explanation be true, it is a simple one and would have been quite sufficient. The whole of the evidence, in my opinion, goes to show that Mills must have known that this explanation had no chance of passing muster with a body of men possessed of the business knowledge that the defenders' board had. In the first place, they had been experimenting for months trying to bring out a cheap liquid compass by substituting stamped and spun pieces for castings. Their attempts had failed, because though it was found commercially possible to spin compass bowls, it was impossible to spin rings, the sections of which were highly convoluted, at a cost that would pay. The reason for

this is that a series of spinnings would be required, which would then need to be joined together. Therefore except in the case of the small boat compass the attempt had been abandoned. It was to renew this attempt, according to the pursuer's theory, that the articles were sent to Burt Brothers (behind the backs of the board), although throughout the experiments Clark had been in continual and close consultation with Dr Bottomley, and there had never been any suggestion that these articles would help in conducting the experiments. In the next place, the directors knew that the jigs, gauges, and pattern pieces sent were wholly unsuitable for any such purpose as that alleged. Gauges are to measure the outside and inside dimensions or thickness of a piece of metal. Jigs (which may be combined jig and gauge) are not to measure but to assemble the parts and to put together the compass, including the card. The complete set of pieces of the Admiralty compass would not serve for the manufacture of a cheap compass. The Admiralty compass requires to be of a certain weight and thickness in order to resist vibration from gunfire and otherwise. A gauge which is adapted to measure metal of that thickness is not adapted to measure spun metal, which *ex hypothesi* to secure cheapness must be lighter. A jig which will assemble the component parts of the regulation Admiralty compass is not adapted to assemble parts of a compass in which the metal is necessarily to be of less thickness. Not only were the articles sent not adapted to effect any such purpose, but it was not part of Burt Brothers' business to assemble the component parts of a compass. The defenders' directors knew that they had not the plant, staff, or premises; that they were stampers and spinners, and not compass makers. Yet the pursuer sent them the tools applicable for assembling the whole range of Admiralty compasses, eight all told, from the largest to the smallest, and sent them jigs which would not enable them to spin anything. It is not possible to spin from cast patterns without redesigning, and there were no fresh designs. Nor had any quotations been got. If, however, the projected cheap compass was to contain as great a weight of metal as was in the Admiralty there would be no saving in cost. Further, the directors knew that they held the sole licence for the manufacture and sale of the compass covered by the Chetwynd & Clark patent, the compass in question (except in the case of Admiralty orders), and that a sub-licence had been applied for. The application was made by Captain Chetwynd, who in the earlier part of 1911 asked that it should be granted to Messrs Dent, and later on asked that it should be granted to himself. The directors intimated their refusal of this request on 1st November 1911. The pursuer's counsel said he could not deny that if Mills left Kelvin & White, set up in business for himself and got Admiralty orders, that the articles he sent to Burt Brothers would

have been useful to him. The directors knew these facts when they asked Mills for an explanation on 8th November. Before the meeting they had also been informed by telephone of the two letters received that morning by Burt Brothers, both dated the day before—one from Mills, the other from Clark—recalling the articles which had been sent to Burt Brothers, but assigning different reasons. Not only are the reasons inconsistent, but they are extraordinary in themselves. The shorthand note of what passed at that meeting on 8th November is proved to be substantially accurate by those present at the meeting. The pursuer gave no such reason as he gave before the jury. In my opinion, the whole weight of the evidence is against the truth of the only explanation now tendered by the pursuer.

The explanation that he gave then was that he sent these articles, made in the defenders' works, to Burt Brothers, to lie there till he could use the work that was got from them; that he was looking to his future; that he had been in negotiation about Dent's business; and that he anticipated when he left the defenders he would be able to get work done by Burt Brothers the same as they did for Kelvin & White. The result of what passed at this meeting was that Mills was dismissed. The directors next had a meeting with Clark, whose resignation as at 31st December had been already tendered that morning, and to whom Mills had telephoned in the interval. The result of this meeting was that Clark's resignation was altered to take effect on that day, and was accepted. The directors three days after lodged information against Mills with the procurator-fiscal. In my opinion there is not evidence in the case that they had no probable cause, and the verdict for the pursuer upon the first two issues is accordingly wrong upon this ground.

I am further of opinion that there is no evidence of malice. The suggestion that Harris concocted his story because of a dispute with Mills about the price of lamps is quite untenable. It was said that the directors had not made sufficient investigations before lodging the charge. The answer to this is that it was for the Crown to investigate on a *prima facie* case being made. I have no doubt that one element which weighed with the jury was the fact that Crown counsel had ordered no proceedings, and in the argument before us it was maintained that the charge had been unduly pressed. As regards both these matters it appears to me the case assumes a totally different complexion after the nature of the jigs and gauges has been fully explained. This was evidently what the defenders desired to do to the Crown authorities. The latter regarding the matter of prosecution as a practical question would not go further into the matter. Looking to what is contained in these prints and to the ground travelled in argument, I am not surprised. I am unable to find evidence to support the contention that the defenders' motive was to

have the pursuer arrested in order to prevent him from competing with them in business. The pursuer has entirely failed to prove malice.

So also, I am of opinion on the above grounds that the pursuer has failed to prove that the defenders were actuated by malice in issuing on 18th November the circular complained of in the third issue. This is sufficient ground for holding that the verdict on the third issue is bad.

It is not necessary in arriving at a conclusion to proceed upon the argument that was submitted as regards the drawings prepared on the pursuer's instructions. As I am satisfied that we have before us all the evidence that could reasonably be expected, judgment should, in my opinion, be entered in favour of the defenders on all the three issues. It is not necessary to dispose of the counter-issue.

LORD ORMIDALE—I concur in the opinions which have been expressed, and were it not that I was the Judge who presided at the trial I should not consider it necessary to add anything to what has already been said.

The case is obviously of vital importance. The time occupied in its trial was of unusual duration, and there can be no doubt that the whole facts and circumstances which have any bearing on the question between the parties have been thoroughly and exhaustively investigated.

The leading issues are the first and second, dealing with the same subject-matter, namely, the information or charge lodged with the Crown authorities, and it is because I think, as I thought at the trial, that there is really no evidence of want of probable cause, that in my opinion the verdict of the jury upon those issues cannot stand.

What were the facts within the knowledge of the defenders on the 11th November 1911, the date on which the matter was placed by them in the hands of the procurator-fiscal at Glasgow?

Up to November 1st they had no notice or knowledge at all about the despatch of the articles in question to Birmingham, nor did they know that the pursuer, who had been their works manager since March 1909, was proposing to leave their service. But on that date Mr Wynn, one of the partners of Burt Brothers, travelled to Glasgow for the express purpose of seeing Dr Bottomley, the chairman of the company, and made a general statement to him of certain incidents which had been causing him and his partner, Mr Southall, the greatest uneasiness for a considerable time, and with reference to which they had thought it necessary to take legal advice.

Inquiries were at once instituted by the defenders, with the result that by the 8th November they became aware that the pursuer had early in 1911 instructed the manufacture in their works in Glasgow of an entire set of the gauges, jigs, and pattern-pieces for the whole range of Admiralty compasses—that the greater

portion of these had been sent to Burt Brothers, Birmingham, in three separate lots on June 31st, July 6th, and September 25th—that Burt Brothers had received no instructions or explanations as to the purpose for which the articles had been sent, but had been asked merely to keep them carefully until they were told what was to be done with them—that the pursuer proposed to leave their service and start business for himself, and that he had been negotiating to that end with Dent & Company, a rival firm of compass makers.

They had on 31st October finally considered and refused an application by Captain Chetwynd for a sub-licence for the manufacture of the Chetwynd-Clark compass which had been for some time before them, and had been latterly somewhat pressed. At first Captain Chetwynd's proposal was that the sub-licence should be granted to Dent & Company but latterly to himself.

The defenders were fully aware that the jigs, gauges, and pattern-pieces were not suitable nor required for the work which in ordinary course Burt Brothers did for them, and they knew that the jigs, &c., had been recalled by letters from both Mr Clark and the pursuer on November 7th, —different, and not altogether consistent, reasons for the recal being assigned by these parties.

In these circumstances, on the 8th November the defenders called the pursuer before the board at a meeting in the office of Mr Alexander, their solicitor, and invited him to give an explanation. Now the pursuer according to the story he told in the witness-box had a very simple explanation of the whole matter, namely, that he had ordered the articles to be made and had thereafter sent them on to Burt Brothers on the instructions of Mr Clark in pursuance of a plan which the latter had formed to have a cheap liquid compass for the use of the Mercantile Marine stamped and spun in conformity with the Admiralty patterns. No such explanation and nothing approaching it was tendered by the pursuer on the 8th November, although he had the fullest possible opportunity of doing so. On the contrary, he made a statement which Mr Alexander, the law agent, referred to as a confession, and I think that description of it is justified—that he had sent the articles to Burt Brothers—he did not say on Mr Clark's instructions—and that he intended to use them for his own purposes. Just exactly how he intended to use them he did not very clearly say, but it was to be for his own advantage.

Later on the same day the defenders called Mr Clark before them. In the interval between the pursuer's interview with the board and his own, Mr Clark had received a communication over the telephone from the pursuer. He had already sent in his resignation that morning. He was not examined at length as the pursuer was, the meeting was mainly concerned with his resignation, but not a word fell from him to indicate that the matter could be explained and cleared up in the way

that the pursuer sought to explain and clear it up at the trial.

It was with the information and knowledge which I have summarised, and in the absence of any explanation by the party implicated indicative even of a proper and innocent motive for the manufacture and despatch to Burt Brothers of the jigs, gauges, and pattern-pieces, that the defenders lodged their complaint with the Crown authorities.

In doing so they had in my opinion reasonable ground. It seems to me impossible to understand why the explanation tendered by the pursuer in the witness-box—so simple and yet so sufficient if true—was not put forward by him on the 8th November, except on the hypothesis that he knew perfectly well that the defenders would recognise it at once to be absurd and ridiculous—that, as Mr Clyde put it, it was a myth—and inherently impossible.

This in my opinion is demonstrated conclusively by the evidence adduced in this connection. The technical evidence has been examined and explained by your Lordship, and I say no more on it than that I respectfully adopt what your Lordship has said. It must be noted that from the end of 1909 down to the middle of 1911 the defenders had been applying their minds to the question of how to produce a cheap liquid compass, and that Dr Bottomley had been constantly in contact with Mr Clark on this very subject. Many spinnings had been attempted by Burt Brothers in connection therewith, and the only spinnings which had been approximately successful were the compass bowl and one small ring. Otherwise the attempt to spin rings for a cheap liquid compass had proved an utter failure. Again, there is no evidence to contradict that of Burt Brothers and Mr Harris that the Birmingham firm had neither men, material, nor premises adequate for the construction and assembling of compasses, for it must be kept in view that according to the story of the pursuer Burt Brothers were not only to stamp and spin the necessary parts of the compasses but they were further to assemble these parts and to return the compasses, except for the filling of the liquid and the painting, as finished articles. Now that would have been an entirely new departure and altogether outside their ordinary line of business, just as, on the other hand, the devolution of the manufacture of their compasses to an outside firm would have been unprecedented in the business of the defenders.

I think that the jury failed altogether to appreciate or indeed to consider at all the evidence led by the defenders on this part of the case, and simply jumped to the conclusion that because Burt Brothers were able, after instruction, to assemble the parts of the binnacle top they must also be able to assemble the compass float.

As regards the third issue, which deals with the circular tendered by the pursuer if the explanation tendered by the pursuer is discredited, as I think it is, then in my opinion it was contrary to the evidence

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 Ormisdale, 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