The Court (*following Winn* v. *Quillan*, 1899, 2 F. 322, 37 S.L.R. 234) *awarded* B the expenses moved for by him.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 40, enacts—"Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict unless the judge before whom such verdict is obtained shall certify on the interlocutor sheet that the action was brought to try a right besides the mere right to recover damages; or that the injury in respect of which the action was brought was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was in his opinion fit to be tried in the Court of Session."

On 21st January 1914 Mrs Rose O'Neill or Giffen, widow, Glasgow, brought an action against Michael D. Dawson, Scotch whisky merchant, Glasgow, for £250 damages for slander alleged to have been contained in a letter written by the defender to the pursuer in reply to three letters written by her to him.

On 15th April 1914 Dawson brought an action against Mrs Giffen for £250 damages for slander alleged to be contained in the letters written by her to him.

An issue and counter issue in the first action and an issue in the second action having been allowed, the actions were tried together on 21st and 22nd July 1915 before the Lord Justice-Clerk and a jury, when the jury found for Mrs Giffen in the action at her instance and assessed the damages at £180, and found for Dawson in the action at his instance and assessed the damages at one farthing.

On 2nd November 1915 counsel for Dawson moved the Lord Justice-Clerk to certify, in terms of section 40 of the Court of Session Act 1868, that the action at his instance was brought to try a right besides the mere right to recover damages, being an action for the vindication of character, and cited the case of *Craig* v. *Jex-Blake*, 1871, 9 Macph. 973.

The motion was opposed by counsel for Mrs Giffen, who argued that the letters were private and had been given publicity by Dawson himself after Mrs Giffen's action had been raised. Accordingly there had been no proper publication of the slander, and in the circumstances the action could not properly be described as an action for vindication of character — *Williamson* v. *M'Cann*, 1908, 16 S.L.T. 518.

The Lord Justice-Clerk granted the certificate, and on 2nd November 1915 counsel for Dawson moved the Second Division of the Court to apply the verdict and to award him expenses in the action at his instance. He argued that an award of expenses followed as matter of course on the certificate, and stated that there was no case where expenses had been refused after a certificate had been granted.

Counsel for Mrs Giffen objected to the motion, and argued that the granting of the certificate was not final on the question of expenses. It did not preclude consideration of the question by the Court. The certificate was merely the warrant which entitled the Court to consider the question — *Winn* v. *Quillan*, 1899, 2 F. 322, *per* Lord Young at 325, 37 S.L.R. 234, at 235. The decisions dealt with ordinary actions. They did not apply to the present case, which was that of a counter action. Even if the counter action were a fit one to raise in the Court of Session, no extra expense had been incurred by it. In any event the present case was one where it would be appropriate to modify the expenses if the Court were to allow them.

The Court, which consisted of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie, without delivering opinions, pronounced an interlocutor applying the verdict and finding Dawson entitled to expenses.

Counsel for Dawson—Horne, K.C.—W. J. Robertson. Agents—Thomas & William Liddle, W.S.

Counsel for Mrs Giffen—George Watt, K.C.—King Murray. Agent—C. F. M. Maclachlan, W.S.

Wednesday, October 27.

FIRST DIVISION.

[Lord Dewar, Ordinary.

ALDIN *v.* STEWART.

Reparation — Bar to Action — Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 6 (1)—*Right of Workman to Take Proceedings against both Third Party and Employer—Receipt of Money Payments by Workman from Employer.*

The Workmen's Compensation Act 1906 enacts—Section 6—"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation."

A workman while in the course of his employment was knocked down and injured by a motor car. He received payments from his employers, and signed receipts for certain sums "being compensation for accident." He thereafter brought an action against the owner of the motor car. He stated that when he signed the receipts he was in minority, had no legal advice, and was unaware of his legal rights, particularly of his right to choose between compensation from his employer and damages from the owner of the car.

Held that the workman had recovered compensation in the sense of the Act, and was not entitled to maintain an action of damages. *Per* the Lord President—"All the statute deals with is the question of fact—Did he *de facto* recover compensation from his employer under the statute? If so the claim is barred."

Hugh M'Donald Aldin, Muir of Turtory, Bridge of Marnoch, Banffshire, *pursuer*, on 17th July 1914 brought an action of damages for personal injuries against R. W. Stewart, Abbey Park Place, Dunfermline, *defender*.

The defender pleaded, *inter alia*—"(2) The pursuer having recovered compensation from his employers within the meaning of section 6 (1) of the Workmen's Compensation Act 1906, is statutorily barred from raising the present action."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 3rd June 1915, after proof, repelled the second plea-in-law for the defender and *quoad ultra* continued the cause.

Opinion.—"This is an action of damages for injuries which the pursuer sustained through being knocked down by a motor car, which he alleges was carelessly driven by one of the defender's servants. At the time of the accident the pursuer was employed by the Dunfermline and District Tramways Company, and was injured while in the course of his employment.

"In addition to a defence on the merits, the defender avers on record that the pursuer claimed and received half his weekly wage from his employer as compensation under the Workmen's Compensation Act 1906, and he pleads that the pursuer has thus recovered compensation within the meaning of section 6 (1) of said Act, and is therefore barred from pursuing this action.

"A proof of this averment was allowed *ab ante*, and the question for decision is whether, on the evidence, it has been established.

"The material facts—about which there is very little dispute—are briefly as follows:—

"At the date of the accident the pursuer was about eighteen years of age. He was admittedly injured while in the course of his employment. When he had partially recovered from his injuries he called, on 25th December 1913, at the Tramway Company Office, and had an interview with the manager. He expected that the company would give him something while he was unable to work, but he did not ask for anything. He did not require to do so, because the manager told him that the company, which was insured against such accidents, had arranged to pay half his average weekly wage until he was better. The manager then handed him the sum of 30s., and prepared a receipt which he asked the pursuer to sign. The pursuer accepted the money and signed the receipt. He knew in a general way that he was entitled to something from his employers when he was injured, and had heard of the Workmen's Compensation Act, but he did not know any of its provisions, and was not aware that if he accepted compensation from his employers he could not sue the defender for damages. Indeed it had not occurred to him to sue anybody. He expected that he would soon be well again and able to work, and he accepted the payment from the manager as something to tide him over the period of convalescence. But he appears to have received internal injuries, and has not yet recovered. He states that he has been medically advised that his injuries are permanent, and it was after he became aware of this, and was informed that he had a right of action against the defender, that he raised this action. He still regularly receives half his weekly wage—which amounts to about 11/3—from his employers, but he states that he intends to refund them all the payments they have made to him.

"The first receipt which he signed is in the following terms, viz. :—

'*Dunfermline and District Tramways Company.*

'Tramways Depot,
Cowdenbeath, 25th Dec. 1913.

'I have received from the Dunfermline and District Tramways Company the sum of one pound ten shillings, being compensation for accident sustained on Saturday, 6th December.

'£1, 10s. H. ALDIN.'

"The subsequent receipts are simple acknowledgments of money received, without reference to 'compensation,' until 26th November 1914, when the words 'without prejudice' are added. And from and after 8th February 1915 the words 'without prejudice, and under reservation of any claim against third parties,' are used in all the receipts. The receipts were qualified in this way when the pursuer became aware that he had a choice of actions, and that if he 'recovered' compensation from his employers he could not sue the defender.

"The question is whether in these circumstances the pursuer has 'recovered' compensation within the meaning of clause 6 (1) of the Act. That clause provides that a workman who has been injured by the fault of a third party while in the course of his employment shall have a choice of remedies. He may either proceed against his employer under the Act, or against the third party at common law ; and he is not obliged, as he was under the 1897 Act, to decide before proceeding which is likely to be the better claim. He may proceed against both concurrently, but he cannot recover against both. If he recovers compensation his right to claim damages is barred, or if he recovers damages he has no longer a right to claim compensation.

"The pursuer argued that the words 'proceedings' and 'recover' used in the section show that it was not intended to bar a workman from suing for damages unless he had already recovered compensation under legal proceedings taken against his employer in Court. But that reading is, I think, too narrow. I do not see why the word 'recover' should be limited to mean recover under legal proceedings. I think the fair meaning is this—If it can be shown that tne workman has really exercised his option, and has claimed and received com-

pensation or damages against one of the parties, he is barred from proceeding against the other—*Page*, [1908] 2 K.B. 758. The question therefore comes to be whether the pursuer did in fact exercise his option and finally elect to accept compensation rather than damages. I am of opinion on the evidence that he did not.

"He accepted money from his employers shortly after the accident, and signed a receipt acknowledging 'compensation.' That is very important, and in most cases would probably be regarded as conclusive evidence that he had finally made his choice. But I do not think that it is so in this case. The pursuer did not ask for compensation or payment of any kind. The manager is quite emphatic on that point. He did not prepare the receipt and did not know what it signified. He did not know that he had a choice of actions, or that acceptance of compensation barred him from proceeding against the defender. I do not see how a man can be held to have exercised an option who did not know that there was any option open to him, and I am quite satisfied on the evidence that the pursuer did not in fact know at the time he signed the receipt; and in view of the fact that he was a minor and had no advice I do not think that it ought to be presumed that he did know. It would, I think, be contrary to the true intention and spirit of the section to hold that a minor was barred from exercising the option which he was clearly entitled to have because he had signed a receipt which he did not know the meaning of. In the case of *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, where a workman of full age had claimed compensation from his employers and had granted receipts which bore that he had elected 'to take compensation under the Workmen's Compensation Act,' and which further bore that they were granted 'under reservation of any claims against third parties,' it was held that he had not 'recovered' compensation within the meaning of section 6 (1), and was not barred from suing a third party delinquent. The Lord Justice-Clerk said that the compensation paid must be regarded as 'of the nature of a sum advanced by the employers under conditions which exclude the idea of its being a final acceptance of compensation under the Act.' This, I think, is how the payments made in this case ought to be regarded also. It is true that the workman in *Wright's* case had specially reserved his claim against third parties. If the pursuer had had the same experience or advice it is possible that he too would have taken similar precautions. But in any case I think the only importance which can be attached to the qualification of the receipt is that it proves that the workman had not finally exercised his option. That in my opinion has been proved in this case also. The pursuer has never claimed payment from his employers. He does not ask for both compensation and damages. He does not propose to retain the money which he has received from his employers. He has undertaken to repay that from the damages which he hopes to recover from the defender, and his employers are apparently satisfied with this undertaking.

"In these circumstances I do not think that the pursuer has recovered compensation within the meaning of section 6 (1), and I am accordingly of opinion that the second plea-in-law for the defender ought to be repelled and the action allowed to proceed."

The defender reclaimed, and argued—It was proved that the pursuer had received compensation under the statute, and he himself had so stated in the receipts which he had signed. He was therefore barred from raising the present action. The test under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) was the *de facto* receipt of compensation—*Page* v. *Burtwell*, [1908] 2 K.B. 758—and not the exercise of an option as under the Act of 1897—*Oliver* v. *Nautilus Steam Shipping Company, Limited*, [1903] 2 K.B. 639; *Valenti* v. *William Dixon Limited*, 1907 S.C. 695, 44 S.L.R. 532; *Fowler* v. *Hughes*, 1903, 5 F. 394, 40 S.L.R. 321. *Valenti* v. *William Dixon Limited* and *Fowler* v. *Hughes* were also distinguished from the present case by special circumstances. The present case was *a fortiori* of *Mackay* v. *Rosie*, 1908 S.C. 174, 46 S.L.R. 999. *Machaffy* v. *Collen Brothers*, 1902, 36 Ir. L.T.R., was also in point. Ignorance of statutory rights could not be pleaded—Ersk. i, 1, 13. The pursuer did not aver lesion, as in *M'Feetridge* v. *Stewarts & Lloyds, Limited*, 1913 S.C. 773, 50 S.L.R. 505. It must therefore be presumed that he acted in full knowledge of his rights. In *Huckle* v. *London County Council*, 1910, 4 B.W.C.C. 113, the Court held that if the workman did not understand that he was signing a receipt for compensation under the Act he might not be bound by its terms, but if the decision was that if he did not know the legal results of so signing he might not be bound the case was wrongly decided. *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, was distinguishable from the present case, but in any event it was inconsistent with *Mulligan* v. *Dick & Son*, 1903, 6 F. 124, 41 S.L.R. 77, and *Murray* v. *North British Railway Company*, 1904, 6 F. 540, 41 S.L.R. 383, and should not be followed.

The respondent (pursuer) argued—The Lord Ordinary's statement of the pursuer's legal position was correct, and the present case was ruled by *Wright* v. *Lindsay* (*cit.*). The ultimate test under the Act of 1906, as under the Act of 1897, was whether the workman had exercised his option and elected between compensation and damages. Under the Act of 1906 the workman had the additional advantage of ascertaining the value of two possible claims before choosing between them. The pursuer had not made an election, as he was ignorant of his rights and did not know a choice was open to him. Further, the evidence did not show an agreement to accept compensation under the Act.

LORD PRESIDENT—I do not think that the interlocutor of the Lord Ordinary in this case can be supported.

It is an action of damages, raised on the 17th July 1914, in which the pursuer seeks

to recover compensation from the defender for injuries which befell him on the 6th December 1913. The claim is met by the defender with the plea that the pursuer has recovered compensation from a person who was liable to pay him compensation under the Workmen's Compensation Act 1906, by section 6 (1) of the Act. That defence, if proved, is fatal. I am of opinion, on the evidence before us, that the averments made by the defender in support of that plea are established.

On the 6th December 1913 the pursuer suffered by an accident arising out of and in the course of his employment. Three weeks later he went to his employers' office and there saw the manager. The manager then informed the pursuer that the company had arranged to give him half wages in respect of his accident. The appropriate clerk was asked to make the calculation of what the half wages would come to. She made the calculation, and a payment was made on that very day, which is acknowledged by the pursuer in a receipt which we have before us, which runs as follows: —"I have received from the Dunfermline and District Tramways Company the sum of one pound ten shillings, being compensation for accident sustained on Saturday, 6th December." That is a plain and unequivocal acknowledgment of a payment for compensation under the statute, and I agree with the Lord Ordinary that it would be in almost every case final and conclusive. The Lord Ordinary, however, thinks that it was not final and conclusive in this case on the ground, apparently, that the pursuer was only eighteen years of age, and did not know that he had an option presented to him of claiming compensation either against his employer or against the man whom, for shortness, I will call the wrongdoer. But the statute does not say so. All that the statute says is that if the pursuer recovers compensation from some one liable to pay him compensation under the Act, then he has no remedy against the wrongdoer.

Now I find in the subsequent proceedings nothing to modify or qualify in any way the terms of the receipt granted on 25th December 1913. It is true that the subsequent receipts do not refer in exact language to the claim for compensation payment, but they mention wages throughout, and we only see a change in the form of the receipt emerging as late as 26th November 1914, when the two words, "without prejudice" — which I do not understand, and which the pursuer himself does not understand—were added, and reappear in a succession of receipts down to 18th January 1915. There then appears a change in the qualification, which runs thus — "without prejudice and under reservation of any claim against third parties." That form of receipt was granted down to 16th March 1915 from 8th February 1915. The qualification has, of course, no relation to a case such as this, where the money was accepted as payment of compensation throughout a period of many months after the accident had taken place. But, in my opinion, and speaking for myself, it was an idle qualification, and could in no way affect the clear effect of the Act of Parliament, which says that if compensation is recovered from a person ready to pay it under the Act, then the claim is barred.

It is idle to say that the pursuer did not know that he had an option, did not know the meaning of "compensation," was not aware that his employer was liable to pay him compensation. With questions such as these the statute has nothing whatever to do. All the statute deals with is the question of fact—did he *de facto* recover compensation from his employer under the statute; if so, the claim is barred.

Inasmuch as the evidence here shows conclusively that he did recover compensation from his employer under the statute, I am of opinion that the second plea-in-law stated for the defender ought to be sustained and that this action ought to be dismissed.

LORD MACKENZIE — I am of the same opinion. Section 6 (1) of the Act of 1906 provides that the workman shall not be entitled to recover both damages and compensation. Now if in the present case the workman has recovered compensation it necessarily follows that he is not entitled to maintain an action for the purpose of recovering damages. Upon the proof in the case I think it plainly appears that he has recovered compensation within the meaning of the Act. It is a question of fact—did he in point of fact recover compensation, and I answer that in the affirmative.

With regard to the effect which is to be given to a receipt of payment of money subject to a qualification, that was a matter that was under consideration in the case of *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, but I do not regard the points there considered as really arising in the present case. The first receipt here was granted on 25th December 1913, and it was not until 26th November 1914 that any qualification, such as is contained in the words "without prejudice," was introduced, and therefore I do not think that that can affect the question we have to decide in the present case. Accordingly I agree with your Lordship.

LORD CULLEN—I also concur.

LORD JOHNSTON was absent.

LORD SKERRINGTON was presiding at a Circuit Court of Justiciary in Glasgow.

The Court recalled the interlocutor of the Lord Ordinary, sustained the second plea-in-law for the defender, and dismissed the action.

Counsel for Pursuer (Respondent)—MacLennan, K.C.—Christie. Agent—William Geddes, Solicitor.

Counsel for Defender (Reclaimer)—Constable, K.C.—MacRobert. Agents—Bonar, Hunter, & Johnstone, W.S.