allowed a proof. The question is, whether in respect of this omission we are bound to refuse to receive the reclaiming-note. This depends upon the provisions of the Judicature Act 1825, in particular sections 10 and 18, and the relative Act of Sederunt of 11th July 1828, section 77. Under the statute it is provided that the party reclaiming shall box printed "copies of the record authenticated as before"—that is, by the signature of the Lord Ordinary; and by the Act of Sederunt it is provided that reclaiming-notes shall not be received "unless there be appended thereto copies of the papers authenticated as the record in terms of the statute if the record has been closed."

It is no longer the practice for the Lord Ordinary to authenticate the record by his signature on the paper. But under section 5 of 13 and 14 Vict. c. 36, the record is closed by interlocutor signed by the Lord Ordinary.

If a very strict view were taken of these enactments, I think that it might be contended with some force that even after the alteration in the form by which the closed record was authenticated, it was necessary that there should be boxed to the Court, not merely copies of the record, but also copies of the interlocutor by which it was authenticated, otherwise the papers lodged would not disclose, as had hitherto been done, that the record had been duly authenticated.

However, I am not disposed to press this view. It is not desirable to extend further than their terms absolutely compel us the scope of these old enactments, which, if violated carry with them such penal consequences to the party. They admit of the construction which your Lordships are prepared to put upon them. Therefore, while I think it is right and proper that with every reclaiming-note there should be lodged copies of the earlier interlocutors, and in particular of the important interlocutor closing the record and allowing a proof, I am not prepared to hold that the failure to lodge copies of such interlocutor involves the refusal of the reclaiming-note, whatever other penalty may be imposed upon the party.

The LORD JUSTICE-CLERK concurred with Lord Trayner.

LORD YOUNG was absent.

The Court sent the case to the roll.

Counsel for the Pursuer and Reclaimer—Salvesen, Q.C.—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Counsel for the Defender and Respondent—Tait. Agent—Andrew H. Hood, S.S.C.

Tuesday, October 23.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

HUNTER *v.* DARNGAVIL COAL COMPANY, LIMITED.

Process—Proof—Separate Proof of Preliminary Defence—Discharge—Reparation—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 1 (*b*).

In an action of damages brought by a workman against his employers for personal injuries sustained in their employment, the defenders alleged in defence that the pursuer had claimed compensation under the Workmen's Compensation Act 1897, that the defenders had thereupon adjusted with him his average weekly wage, and had paid him half the amount so adjusted during thirty-three weeks, that for these payments he had granted receipts, and that he was consequently barred from suing the present action.

Held that proof of the averments relating to the defenders' plea of bar and the pursuer's answers thereto ought to be taken before the main question was remitted to proof.

This was an action at the instance of William Hunter, miner, in the employment of the Darngavil Coal Company, Limited, in which the pursuer concluded for damages due to him at common law on account of personal injuries sustained by him while working in the defenders' employment. The defenders, besides lodging defences to the pursuer's condescendence, put in a separate statement of facts, in which they averred as follows:—" (Stat. 1) Upon 15th February 1899 the pursuer sent to the defenders a notice, signed by him, in these terms:—'I hereby give notice that on the 31st day of January 1899 I was injured in the course of my employment in your West Longrigg Colliery through winding-rope slipping off drum, and that I claim compensation therefor under the Workmen's Compensation Act, 1897.' (Stat. 2) Following upon said notice, the defenders adjusted with the pursuer the average wage which he was earning prior to the accident to be £1, 13s. per week, and that the compensation payable to him was therefore 16s. 6d. per week. The defenders have paid compensation to the pursuer at this rate during 33 weeks after the first fortnight, the amount so paid being £27, 4s. 6d. Receipts for said payments, signed principally by the pursuer, and in one or two instances by his wife, are herewith produced and referred to."

The pursuer averred in answer that he had been induced to sign the notice in question by the defenders in ignorance of its character, and that he had been led by them to believe that it was merely a formal receipt which not would prejudice his rights against them. He admitted that he had

received certain payments, but denied that the defenders had adjusted his average wage with him.

The defenders, in addition to pleas upon the merits of the action, pleaded—"(2) The pursuer having applied for and received compensation under the Workmen's Compensation Act, is barred from suing the present action."

The pursuer pleaded—"(3) The defenders are barred from founding upon the payments made to the pursuer in respect that the said payments were made in bad faith, without any notice to the pursuer that they were under the Workmen's Compensation Act, and on the representation that they would not prejudice the pursuer's claims. (4) The pursuer having signed the alleged claim under the Workmen's Compensation Act under essential error induced by the misrepresentations of the defenders, as condescended on, he is not barred from claiming reparation at common law."

The defenders produced the receipts founded on, which showed the sums paid weekly to the pursuer, signed by him or his wife. The receipts were written upon sheets headed as follows:—

"RECEIPT for WEEKLY PAYMENTS.
Name of Member—Darngavil Coal Company, Limited.
Date of Accident—31st January 1899.
Date from which Compensation begins—15th February 1899.
Amount of Payment authorised—16s. 6d. weekly."

Below the heading there were columns containing the amount paid on each occasion, the week in respect of which it was paid, the date of payment, and the signature of the claimant or near relative, and of a witness.

By interlocutor dated 13th July 1900 the Lord Ordinary (KINCAIRNEY) appointed the pursuer to lodge issues for the trial of the cause, and appointed the defenders to lodge issues for the trial of their defence embodied in their second plea-in-law.

"*Opinion*—In this action of damages by a workman for injury through the fault of the defenders, they have pleaded, 'The pursuer having applied for and received compensation under the Workmen's Compensation Act, is barred from suing the present action.' The defenders' averments in support of this plea seem to me to be relevant, and such as cannot be disregarded without inquiry. Neither can they, in my opinion, be accepted without inquiry, and I think the pursuer's explanations in answer to the defenders' averments are also relevant. There must therefore be proof as to this plea of bar. The question is how the inquiry is to be made. There are two ways of making it. Either the defenders must be allowed a proof of their averments, and the trial of the pursuer's action must be postponed until a judgment is pronounced on that proof; or else issues must be adjusted for the trial both of the main case and of the defence of bar. There are inconveniences attending either course, and it is not easy to say on which side they predominate. In these circumstances, I think the safest course is to follow the precedent of *Campbell* v. *Caledonian Railway Company*, 6th June 1899, 1 F. 887, where the latter course was adopted by the First Division. I do not regard that case as a decision which I am bound to accept, but as an example which I am safe to follow."

The defenders reclaimed, and argued—The pursuer was barred from insisting in this action by electing to take compensation under the Act. Where there was an averment that the pursuer had discharged his claim the proper course was to remit it to proof *primo loco*. If that averment were proved there would be no need for an inquiry into the merits—*Docherty* v. *M'Alpine & Sons*, Nov. 21, 1899, 2 F. 128; *Little* v. *P. & W. M'Lellan, Limited*, Jan. 16, 1900, 2 F. 387. In *Campbell* v. *Caledonian Railway Company*, June 6, 1899, 1 F. 887, there was no plea in bar as there was in the present case. In any view the pursuer must refund the sums paid to him if the action was to be allowed to proceed on the merits.

Argued for the pursuer—The Court would not readily interfere with the discretion exercised by the Lord Ordinary as to the mode of proof. But the Lord Ordinary was right in following the precedent of the case of *Campbell*, *supra*, which was indistinguishable from the present. The defenders' averments were not relevant to support the plea of bar. It was not said that the pursuer had discharged his claim under the Act. The notice of 15th February 1899 was not a claim in the sense of the statute, in respect it did not demand a specific sum—*Bennett* v. *Wordie & Company*, May 16, 1899, 1 F. 855. The defenders did not aver that the payments made to the pursuer were made under the Act, and the receipts bore no reference to it. Further, there was no admission of liability under the Act by the defenders, and payment without such admission would not bar them from pleading that the pursuer's claim came too late—*Rendall* v. *Hill's Dry Docks Company, Limited* [1900], 2 Q.B. 245. The pursuer was therefore entitled to go to trial on the whole case.

LORD JUSTICE-CLERK—I am unable to concur with the decision of the Lord Ordinary. Where, as here, there are distinct averments that the claim made by this workman, and the payments made by the defenders were made under the Workmen's Compensation Act, and where these averments are disputed, the proper course is to determine this matter first. If it turns out that there was no such arrangement as is averred, then the case is still open; but if it is proved that such an arrangement was made, then the case is at an end. By this course the pursuer cannot possibly suffer any prejudice; but both parties might suffer prejudice if the case were to go to jury trial and it turned out that the pursuer had no ground of action in consequence of his having accepted compensation under the Workmen's Compensation Act.

LORD TRAYNER—I agree. In the ordinary case I would not be disposed to interfere with the discretion of the Lord Ordinary in determining the manner in which the proof is to be taken. I think that that is a matter very much within his discretion. But this is not a question of the mode but of the time at which and the matter concerning which the inquiry should be made. I think that where, as here, there is a plea in bar, that is the first question to be determined. If well founded, it excludes all inquiry as to the merits.

LORD MONCREIFF — I agree with your Lordships. If there is a plea in bar founded upon an alleged discharge or settlement of the subject-matter of the action, and the statements in support of it present a sufficiently strong *prima facie* case, the proper course is to send the case to trial upon that question *primo loco*. In the defenders' averments here there is a strong *prima facie* case that the pursuer's claim has been settled, and I think therefore that that question ought to be disposed of first.

LORD YOUNG was absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the cause for proof upon the averments in support of the defenders' second plea-in-law, and the pursuer's answers thereto.

Counsel for the Pursuer and Respondent —Salvesen, Q.C.—D. Anderson. Agents—Adamson, Gulland, & Stuart, S.S.C.

Counsel for the Defenders and Reclaimers —W. Campbell, Q.C.—Hunter. Agent—W. B. Rankin, W.S.

Wednesday, October 24.

FIRST DIVISION.

BURRELL & SON *v.* RUSSELL & COMPANY.

(*Ante*, Dec. 23, 1898, 36 S.L.R. 250; March 26, 1900, 37 S.L.R. 641.)

Expenses — Taxation — Fees to Counsel — Fees for Proof — Hearing in Inner House.

In a case of great complexity the proof and hearing on evidence lasted in all about twelve days. A reclaiming-note was presented, the debate on which extended over nine days. The Auditor reduced the fees charged for senior and junior counsel at the proof from thirty and twenty guineas *per diem* to twenty and fifteen respectively, and at the debate on the reclaiming-note from twenty and fifteen guineas *per diem* to fifteen and ten. Objection having been taken to this reduction the Court *repelled* the objection upon the ground that there was nothing to justify interference with the decision of the Auditor.

Expenses—Taxation—Fees to Skilled Witnesses.

Objections to the reduction by the Auditor of fees paid to a certified skilled witness from £214, 10s. to £67, 7s. 6d. *repelled.*

This case is reported *ante ut supra.*

On the case being brought up for approval of the Auditor's report, the pursuers objected to the report in so far as the Auditor had disallowed certain fees to the amount in all of £487, 19s. 2d.

The fees charged for senior counsel at the proof had been reduced from thirty guineas *per diem* to twenty guineas, and the fees charged for junior counsel from twenty guineas *per diem* to fifteen guineas. For the hearing in the Inner House the fees to counsel had been reduced from twenty guineas and fifteen guineas *per diem* to fifteen guineas and ten guineas respectively.

The case was one of great complexity. The proof and hearing on evidence occupied twelve days, and the hearing in the Inner House occupied nine days.

The pursuers also objected to the reduction of a fee of £214, 10s. charged for a certified skilled witness, Mr William Hannay Campbell, naval architect, Glasgow, to £67, 7s. 6d. In the account rendered by Mr Campbell, and paid by the pursuers, he charged the sum now claimed by the pursuers for fifty-nine days employed by him in "professional services rendered to Messrs Burrell & Son in their action against Messrs Russell & Company." The professional services referred to consisted in making calculations, models, plans and sections, preparing to give evidence, and attending consultations, and Court to give evidence.

Argued for pursuers—1. Considering the great complexity and importance of the case, it would be reasonable to allow double the ordinary fees to counsel for each day of the proof and of the hearing in the Inner House. That course was justified by practice — *Tannett, Walker, & Company* v. *Hannay & Sons*, January 31, 1874, 1 R. 440; *Duke of Buccleuch* v. *Cowan and Others*, July 12, 1867, 5 Macph. 1054; *Neilson* v. *Barclay*, July 19, 1870, 8 Macph. 1011.2. The Auditor had only allowed the leading skilled witness £67 for work which had occupied him fifty-nine days. In the case of the *Duke of Buccleuch, supra*, five guineas per day had been allowed to a similar witness. The same had been allowed in the case of *Gillespie* v. *Russell*, March 2, 1855, 17 D. 532.

Argued for defenders — (1) There was a distinction in the matter of counsel's fees between proofs and jury trials, the rate allowed being higher in the latter—*Wilson* v. *North British Railway Co.*, Dec. 13, 1873, 1 R. 304; *Campbell* v. *Ord and Maddison*, Nov. 5, 1873, 1 R. 149. (2) The witness in question was not in the position of a leading expert, being merely a subordinate official. Moreover, the information which he supplied had been to a great extent obtained by him for the purposes of the contract between the parties, and not for use at the trial.