The other consideration is that as far as we can judge from the settlements which took place prior to the last settlement on 15th May 1900 the understanding of parties was in accordance with the construction maintained by the defenders, that is, that at every nineteenth year a double feu-duty was paid and accepted as in full of all that was then due including the feu-duty for the year.

These considerations seem to me to be sufficient to turn the scale in favour of the defenders and to entitle them to absolvitor. It is therefore not necessary to consider whether the present action is barred by the terms of the receipts which the pursuer gave in 1862 and 1881. But my impression is that the receipt given at Whitsunday 1881 is a complete settlement of all sums then due, including the casualty due at that term, and therefore has all the force and effect of a discharge. I do not, however, proceed on that ground.

The result therefore will be that the defenders will be assoilzied.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders from the conclusions of the summons.

Counsel for the Pursuers and Respondents —C. N. Johnston, K.C.—Grainger Stewart. Agents—A. & A. Campbell, W.S.

Counsel for the Defenders and Reclaimers —Campbell, K.C.—C. H. Brown. Agents Forrester & Davidson, W.S.

Friday, January 23.

SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.

FOWLER *v.* HUGHES.

Reparation—Master and Servant—Bar to Action—Election to take Compensation—Proof of Election—One Receipt Only—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *secs.* 1, *sub-sec.* 2 (*b*).

A workman sustained personal injury through an accident happening in the course of his employment. While he was in hospital, and shortly after the accident, his employer sent a clerk to him with 12s. 6d. and a form of receipt for money "received under the Workmen's Compensation Act 1897 from" the employer, "being compensation due" for the accident. The injured man signed the receipt, and filled in his name, address, and occupation, the date and the sum paid, and he received the 12s. 6d. Nothing was said as to the footing on which the receipt was granted, and it was not proved that the workman read it. Thereafter the workman raised an action against his employer for damages at common law or under the Employers Liability Act 1880. The defender, relying on the receipt, maintained that the action was incompetent, the pursuer having elected to take compensation under the Workmen's Compensation Act.

Held that election to take compensation under the Workmen's Compensation Act had not been sufficiently proved.

Little v. *P. & W. MacLellan, Limited,* January 16, 1900, 2 F. 387, 37 S.L.R. 287, *distinguished.*

William Fowler, residing at 435 St Vincent Street, Glasgow, raised an action in the Sheriff Court at Glasgow against John Hughes, wholesale rag and paper stock merchant, 81 to 89 Henrietta Street, Glasgow, concluding for damages at common law or under the Employers Liability Act 1880 for personal injury caused through the fault of the defender, his employer. The action was brought on 15th May 1902.

In defence the defender pleaded—"(1) The pursuer having elected to take compensation under the Workmen's Compensation Act 1897 the present action is incompetent."

In support of this defence the defender produced a receipt in the following terms:—"Received under the Workmen's Compensation Act 1897 from *Mr John Hughes* the under-mentioned sums, being compensation due me for accident which occurred to me on or about the 14*th* day of *November* 1901. "*Name*, WM. FOWLER.

Address, 435 St Vincent Street,
Occupation, Flock Machinist.

DATE OF PAYMENT.	SUM PAID.	SIGNATURE.
7th December	£0 12 6	Wm. Fowler."

With regard to this receipt the pursuer averred that it was prepared beforehand on behalf of the defender, and that the pursuer was not made aware of its terms, which were not explained to him.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1, sub-sec. 2 (*b*), enacts that where injury is caused by the negligence of an employer the workman "may at his option either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act," but that the employer shall not be liable both under and independently of the Act.

Proof was allowed and led with regard to the granting of the receipt founded on. From the proof it appeared that on 14th November 1901 the pursuer sustained an injury to one of his eyes while in the defender's employment and engaged in feeding a rag-tearing machine. He was detained in hospital until 11th January 1902, and after eight weeks the injured eye was removed. On 7th December David Johnston, a clerk in the employment of the defender, was sent to see the pursuer in hospital, and he handed him the receipt founded on by the defender. The pursuer looked at it, and filled in his name, address, and occupation, the date of payment, the sum paid, and his signature, and Johnston then gave him 12s. 6d. It was not proved that the pursuer read the receipt, and nothing was said as to the footing on which it was signed.

On 6th November 1902 the Sheriff-Substitute (BOYD) found that the pursuer had

elected to take compensation under the Workmen's Compensation Act 1897, and assoilzied the defender.

The pursuer appealed to the Court of Session, and argued—The receipt founded on by the defender did not embody any agreement that could be registered under the Workmen's Compensation Act. It was not a discharge of the pursuer's legal rights, and it did not prove election—*Hunter* v. *Darngavil Coal Company*, October 23, 1900, 3 F. 10, 38 S.L.R. 6; *Campbell* v. *Caledonian Railway Company*, June 6, 1899, 1 F. 887, 36 S.L.R. 699; *Little* v. *P. & W. MacLellan*, June 16, 1900, 2 F. 387, 37 S.L.R. 287. Even if the receipt were held to embody an agreement, the circumstances in which it was granted were such that the pursuer was entitled to resile, he being willing to refund the sum received—*Gow* v. *Henry*, October 27, 1899, 2 F. 48, 37 S.L.R. 40. Receipts such as the present, though extending over a long period, were not sufficient to instruct an agreement—*Rendall* v. *Hill's Dry Dock, &c., Company*, (1900), 2 Q.B. 245.

Argued for the respondent—The receipt was evidence of an agreement under the Workmen's Compensation Act, and the pursuer must be assumed to have read it, he having had an opportunity of doing so before signing it. It was not said that if he had read it he would not have understood it to be binding; and it was in similar terms to the receipts in the case of *Little* v. *P. & W. MacLellan, cit. sup.*, which were held to import election.

Lord Justice-Clerk—I certainly should be sorry to throw any doubt on the decisions that have been pronounced to the effect that a series of receipts extending over a long period, and headed in such a way as to indicate that they are receipts given under the Workmen's Compensation Act, may amount to sufficient evidence that there was an agreement to accept compensation under that Act. The evidence upon which the Sheriff-Substitute has decided that there was here such an agreement falls far short of that. There is just one receipt—for 12s. 6d.—[*his Lordship read the receipt*]. Now I cannot hold that that alone is sufficient evidence of an agreement by which the master was bound to pay and the workman entitled to receive compensation under the Workmen's Compensation Act, and not otherwise. Therefore, unless there is something in the evidence which clearly shows that there was such an agreement, I should be for holding that the agreement has not been established. On looking at the evidence I can find nothing to indicate that the matter was brought clearly before the workman at all. There may be a good deal to be said as to whether we are to hold this evidence to be evidence which we are to believe altogether as being absolutely truthful; but putting that entirely out of view, and taking only the evidence that 12s. 6d. was paid to the man, and that he gave the receipt, I think that there is no case to set up the receipt as being an agreement, or as implying an agreement, to give and to receive compensation under the Act. As I read the evidence of Johnston he probably did all he was employed to do, for I do not suppose that his employer wished him to take any responsibility. When asked the question "If you had known that this was going to prejudice his" (that is, the pursuer's) "claim, would you have told him that?" he very cautiously replied "I do not know anything about it." He had no authority to do more than pay the money and take the receipt. He says that he laid the receipt before Fowler, but he does not say that Fowler read it; all he says is that "he had time enough to read it." It may be true for all that appears from the evidence that the man simply accepted 12s. 6d. from his master and gave a receipt for it. To hold under these circumstances that there was a binding agreement merely because the words "Received under the Workmen's Compensation Act 1897" appeared at the top of the paper would not be according to justice in my opinion. I am satisfied that there is not sufficient ground for holding that there was an agreement. I therefore think that the Sheriff-Substitute's interlocutor is wrong, and that the case ought to be allowed to proceed.

Lord Young—I am of the same opinion in the result, and to a great extent on the grounds stated by your Lordship. The question is simply a question of fact to be determined by us on the evidence, the question being whether this injured workman elected to take his claim under the Workmen's Compensation Act as contrasted with his claim at common law. I am of opinion that the evidence before us does not establish that he did so elect. I do not think that a workman who is lying in bed in great suffering ought to be approached with a view to obtaining a document making such an election as this; and I certainly think that anyone who goes to a workman under such circumstances is very specially bound to bring under the workman's notice that he is asked to make an election between two things, either of which is open to him. Now this workman was approached immediately after the calamity, and no explanation was made to him at all. This receipt was just handed to him. It was not read over to him, nor was it explained to him. He was simply asked to sign the receipt, and 12s. 6d. was laid on the table. The person who brought the receipt to the pursuer cannot say whether the pursuer read it or not. The pursuer himself says that he did not—that he could not, owing to the state of his eyes at the time. I see no reason to disbelieve him. A man may not be able to read a document although he may be able to write a sum of money into it or to subscribe his name to it. I cannot regard this receipt as an agreement by the pursuer to take his compensation under the Workmen's Compensation Act. There is nothing in it to show that the defender put himself under obligation to consent to registration of it as an agreement between the two—the pursuer to accept and the defender to pay

compensation under the Act. My opinion therefore is, with your Lordship, that the judgment of the Sheriff-Substitute is wrong, and that the case ought to be allowed to proceed. I wish only to add, with respect to the cases that were cited to us, that I think the present case has no resemblance, in the matter of evidence, to the cases in which receipts bearing to be under the Workmen's Compensation Act were granted weekly for, I think, a period of six months. I think that that was very legitimate evidence to warrant the inference that there was an agreement between the workman and his employer. At the same time I can imagine cases in which receipts granted for even a longer period than six months would not be sufficient to warrant the inference that there was an agreement. Such a case occurred in England before three learned Judges, who were very competent to draw a conclusion from evidence, and the conclusion at which they arrived was that the evidence was not sufficient. But though one may be influenced, and very properly influenced, by being told that certain Judges thought such and such evidence sufficient, or, it may be, insufficient, that is merely a consideration to which one will always pay respectful attention in determining whether one should arrive at the same conclusion on similar evidence. It is not like a decision on a point of law.

LORD TRAYNER—I think that the case of *Little*, to which we were referred, was well decided, but it affords no precedent to be followed here. The two cases are widely different in their facts. We have in the case before us a question of fact, and the inference in point of law to be deduced therefrom. Under the Workmen's Compensation Act there are only two modes in which the right to compensation and the amount of compensation can be determined. The first is by arbitration, which is the mode if the parties do not agree. Agreement by parties accordingly is the second mode. Now in this case no compensation was fixed, and no inquiry was held by way of arbitration. The question of fact therefore is whether there was such an agreement between the parties as binds them both. I think that there is no proof of such an agreement. It was said that the pursuer's evidence is not true, and there is room for believing that in some respects it is not accurate, but I exclude that evidence from any consideration, except upon one matter on which he is certainly not contradicted. The pursuer says that he did not read the receipt now relied upon by the defender. Johnston does not contradict that, for he cannot say whether the pursuer read the receipt or not. If the pursuer had read the receipt and fully apprehended the import of the reference in it to the Workmen's Compensation Act—if he had had before his mind the character and extent of his rights under that Act and his right to claim damages at common law—I am by no means prepared to say that the signing of the receipt would not in such circumstances have gone far to prove the agreement alleged by the defender. But there is nothing in the evidence to suggest that at the time the pursuer signed the receipt he had presented to him he knew the difference between his rights at common law and his rights under the Workmen's Compensation Act. He could not therefore elect between the two rights. Indeed, all that took place when the receipt was granted is to be found in Johnston's evidence, who says, "I told him (the pursuer) nothing; I just handed him the receipt, and he signed it, and I put down the 12s. 6d."

From these facts I am unable to deduce the inference that the pursuer entered into an agreement by which his right to compensation under the Workmen's Compensation Act was admitted and its amount fixed. In my view no such agreement was made, and therefore I think the judgment of the Sheriff-Substitute should be recalled.

LORD MONCREIFF—I am of the same opinion. My only doubt is this, I do not believe some of the statements made by the pursuer. The Sheriff-Substitute did not believe them, and I think rightly. The first statement which I think doubtful is that in which the pursuer says that he could not see to read the receipt at the time. Two things make me doubt that. One is that Dr Gilchrist says that the pursuer was quite capable of reading ordinary print at the time and up to 30th December. Dr Gilchrist says, "He would have no difficulty in reading that document with his one eye on 7th December. Up till the 30th December his right eye was quite capable of performing its duty, and he could read perfectly well with it." Besides, the pursuer filled up all the blanks in this document, and I think that he would have had some difficulty in doing that if he could not read. Another statement which I doubt is the statement which the pursuer makes that Johnston told him that what he was going to sign would not interfere with any future claim he might make, and that Johnston instructed him where to put his name. Johnston denies that. But assuming that these statements by the pursuer are false, I think that the defence must be taken on the footing of Johnston's evidence. A claim was made by the pursuer's father on 3rd December; he says that he would be glad if the defender would call and arrange what sum is to be paid to the pursuer. The defender does not call on the father, but some communication passes between the defender and the insurance company, and Johnston is sent to pursuer. It does not clearly appear whether he was sent by the insurance company or by the defender, but at all events he was sent to the pursuer with a blank receipt and 12s. 6d. He says that the pursuer signed or filled up the receipt and took the money, and that not a word was said as to liability—as to the footing on which the receipt was granted. The question is, whether on this evidence we are bound to infer that the pursuer agreed

and elected to take compensation under the Workmen's Compensation Act. The case goes far beyond any case that has hitherto come before this Court, and I am not prepared to hold on the evidence that the pursuer elected to take compensation under the Workmen's Compensation Act and to abandon his claim at common law. If payments had continued to be made for a number of weeks or months, and a receipt in this form taken for each weekly payment, that would have been evidence on which we probably should have held that the pursuer had sufficiently and finally made his election. But all that happened was that 12s. 6d. was paid to him and a receipt for that sum taken from him. I think that that evidence is quite insufficient to prevent him from now insisting in his claim at common law.

The Court pronounced this interlocutor:—

"Sustain the appeal and recal the said interlocutor appealed against: Find that it has not been proved that the pursuer elected to take compensation under the Workmen's Compensation Act 1897: Therefore repel the first plea-in-law for the defender, and remit the cause to the Sheriff to proceed," &c.

Counsel for the Pursuer and Appellant—Salvesen, K.C.—M'Clure. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Respondent—Shaw, K.C.—T. B. Morison. Agents—Macpherson & Mackay, S.S.C.

Tuesday, January 27.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

SUTHERLAND *v.* BREMNER'S TRUSTEES.

Error — Mutual Error—Error induced by Misrepresentation — Misrepresentation—Innocent Misrepresentation — Statement of Opinion.

The law agents on the trust-estates of A and B wrote a letter to C informing him, as agents for A's trustee, that on A's estate being realised they thought a sum of about £150 would fall to be paid to each of D and E as their shares of said estate, and agreeing on C's paying them (the law agents) a certain sum and interest, to assign to C a decree in favour of B's trustees against D and E and an arrestment following thereon used by B's trustees against D and E in the hands of A's trustee.

C agreed to take the assignation, paid the sum of £256, 6s. 1d., and received an assignation of the decree and arrestment.

In an action brought by C against the trustees of A and B for reduction of the assignation in his favour, and for repayment of the £256, 6s. 1d., he averred that in the course of the realisation of A's estate it had been discovered that D and E were not and had never been beneficiaries on A's estate, and that consequently nothing was attached by the arrestment assigned to the pursuer. The grounds on which the action was based were (1) mutual error and (2) misrepresentation by the defenders. The pursuer admitted that at the date when the letter was written and the assignation was made the trustees of A and B *bona fide* believed that D and E were entitled to £150 each from A's estate.

Held that the action was irrelevant on the ground (1) that as regards both the subject and the character of the contract sought to be reduced the parties had been at one, and (2) that there had been no representation in the letter of the law-agents that D and E were as matter of fact entitled to a share of A's estate, but only an expression of opinion to that effect, and that this opinion had been expressed upon a matter as to which C might have informed himself.

In November 1901 Symon Flett Sutherland, S.S.C., Edinburgh, raised an action against Andrew Bremner, fish-curer, Wick, Andrew Louttit, Edinburgh, and William Smitton, Bank Agent, Wick, as trustees and executors under the trust-disposition of the deceased Mrs Margaret Mackay or Bremner, the said Andrew Bremner as trustee under the trust-disposition and settlement of Mrs Marjory Wares or Mackay, and the said Andrew Bremner, Andrew Louttit, and William Smitton as individuals.

The conclusions of the action were (1) for reduction of an assignation dated 31st January and 4th February 1901, granted by the defenders Andrew Bremner, Andrew Louttit, and William Smitton, as trustees and executors of Mrs Bremner, in favour of the pursuer, assigning to the pursuer the sums contained in a decree dated 26th November 1898 obtained by Mrs Bremner's trustees against Mrs Margaret Bremner or Sutherland and Mrs Catherine Bremner or Musgrave, with interest, together with the extract decree, and the execution of arrestment dated 26th January 1899 following thereon used by Mrs Bremner's trustees in the hands of the said Andrew Bremner as trustee of Mrs Mackay to the extent of £250, and the said defenders' claim or right to the funds or goods or others arrested thereby; and (2) for decree ordaining the defenders as trustees and executors foresaid and also as individuals, conjunctly and severally or severally, or otherwise equally or in *pro rata* shares, to make payment to the pursuer of £256, 6s. 1d., being the consideration in respect of which the above assignation was granted to him, together with interest thereon from 26th September 1899.

The pursuer averred (Cond. 2) that in 1898 Mrs Bremner's trustees obtained a decree for expenses, amounting to £244 odds, against Mrs Sutherland and Mrs Musgrave, who were daughters of Mrs Bremner and