respondent the said Alexander Mitchell Carnwath Dick from the office of trustee under the postnuptial contract of marriage and trust-deed of settlement of Doctor and Mrs George Robertson, and of consent appoint David Robertson, Esquire, 4 Maitland Street, Edinburgh, to be a trustee under said contract of marriage and deed of settlement, with the powers contained therein and in the Trust (Scotland) Act 1867, including the power to assume new trustees: Further, authorise the said trustees to complete a title *habili modo* to the trust-estate set forth in the prayer of the petition: Allow the expenses of the petitioners to be taken out of the funds of the trust-estate: And *quoad ultra* find no expenses due to or by any of the parties, and decern."

Counsel for the Petitioner—C. D. Murray. Agent—Marcus J. Brown, S.S.C.

Counsel for the Respondent—J. D. Millar. Agents—Duncan & Black, W.S.

Saturday, December 16.

SECOND DIVISION.

WINN *v.* QUILLAN.

(*Ante*, October 27, 1899, p. 38).

Expenses—Jury Trial—Certificate by Presiding Judge—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 40.

By section 40 of the Court of Session Act 1868 it is enacted—"Where the pursuer in any action of damages in the Court of Session receives by the verdict of a jury less than £5, 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 . . . for the vindication of character and was in his opinion fit to be tried in the Court of Session."

Opinion (per Lord Young) (1) that the only effect of granting such a certificate is to put the awarding of expenses within the power of the Court, and that it does not *per se* entitle the pursuer to an award of expenses; and (2) that the motion for a certificate should be made in presence of the defender.

Peter Winn raised an action of damages against James Quillan for having falsely and calumniously on six separate occasions, extending over a period of ten years, called him an informer, thereby representing that the pursuer was a man who for the sake of reward and from sinister and disreputable motives had betrayed his fellows and disclosed secrets or given information to the Crown or its executive against Irishmen and others, to the loss, injury, and damage of the pursuer.

The Court sustained the relevancy of the action (*ante*, p. 38), and six issues were adjusted, one for each occasion, and damages laid at £500.

The case was tried before the Lord Justice-Clerk and a jury. The jury returned a verdict for the pursuer on all the issues and assessed the damages at one farthing. Thereafter, on the application of the pursuer, made without intimation to and not in the presence of the defender, the Lord Justice-Clerk granted the pursuer a certificate to the effect that the action was brought for vindication of character and was fit to be tried in the Court of Session.

The pursuer moved for his expenses, and argued—The presiding judge who had tried the case had granted a certificate, and this showed that in his opinion the pursuer was entitled to expenses. Where a pursuer succeeded in obtaining a verdict and damages for slander, and received a certificate from the judge presiding at the trial, he was entitled to his expenses even though the damages given were nominal—*Craig* v. *Jex Blake*, July 7, 1871, 9 Macph. 973; *Bonnar* v. *Roden*, June 1, 1887, 14 R. 761; *Macmillan* v. *Wilson*, October 25, 1887, 15 R. 6. Where the pursuer had failed on some of his issues there might be modification—*Rogers* v. *Dick*, February 4, 1864, 2 Macph. 591—but in the present case he had been successful all along the line.

Argued for defender—The statute only provided for what was to happen as regards expenses in the event of the pursuer not getting a certificate from the judge; it did not say what expenses he was to get in the event of his getting a certificate. This question was accordingly left to be determined by the common law. The Court were entitled to modify expenses in actions which ought to have been brought in the Sheriff Court or where juries had awarded small sums of damages — *Jamieson* v. *Hartil*, February 5, 1898, 25 R. 551; *Shearer* v. *Malcolm*, February 16, 1899, 1 F. 574. And in *Graham* v. *Napier*, January 21, 1874, 1 R. 391, the expenses were modified notwithstanding that the certificate had been granted. The present was a typical case for modification. It should have been brought in the Sheriff Court; there had been unnecessary delay, and some of the issues were superfluous.

LORD JUSTICE-CLERK—I do not think that this is a case for modification of expenses on any ground connected with the verdict. I think the case was one in which the pursuer was entitled to raise an action in the Court of Session for vindication of his character, and one in which the pursuer could not have allowed the course of slander to which he was persistently subjected to be continued without grave consequences to himself. I was of that opinion when I granted the certificate, and I still think that nothing came out at the trial to preclude the pursuer from getting that certificate. I am therefore of opinion that the pursuer is entitled to the expenses of the trial without modification.

LORD YOUNG—I do not know whether I indicated before, when the case was before us on the question of the adjustment of issues, but I do so now, that I think that we have here no case of actionable slander. I think therefore that it is better that I should take no part in the disposal of the present motion. There are two matters of a general nature, and not directly connected with the present action, upon which I should like to say a word. The first is, that when the judge who presided at the trial is to be asked for such a certificate, the motion should be made in presence of the other party. It is an important matter, upon which the other party ought to have an opportunity of saying what he thinks fit. That I think is the usual and proper course.

The only other general remark which I have to make is, that I think the only effect—the only legal effect—of granting such a certificate is to put the question of expenses within the power of the Court. Without the certificate it is out of the power of the Court to deal with the question of expenses. The certificate merely removes that prohibition. I am far from saying that the judge's certificate is not entitled to receive, as I think it will always receive, very great weight.

LORD MONCREIFF concurred with the Lord Justice-Clerk.

LORD TRAYNER was absent.

The Court applied the verdict and decerned against the defender for the sum of one farthing sterling, and found the pursuer entitled to expenses.

Counsel for Pursuer—Kennedy—Gunn. Agents—J. & L. H. Gow, S.S.C.

Counsel for Defender—Dundas, Q.C.—J. H. Robertson. Agents—Simpson & Marwick, W.S.

Saturday, December 16.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

WILSON *v.* CALEDONIAN RAILWAY COMPANY.

Reparation—Master and Servant—Negligence of Foreman—Risk Voluntarily Incurred—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1, *sub-sec.* (3).

In an action of damages for reparation under the Employers Liability Act 1880, by a labourer against a railway company, the pursuer averred that on a certain date he was in the defenders' employment, that his duty was to discharge waggons, and that in cases of hampers and such like goods this was done by means of light cranes; that he was about to unload a waggon containing large bundles of soft goods, and "as these were just the sort of goods that required the aid of the crane" he asked the foreman for the use of the crane; that the latter, instead of complying with his request, "peremptorily ordered him to go ahead without the crane;" that the pursuer did so, and succeeded in transferring the first package from the waggon to the platform, but that in attempting to put the second on to the platform the package proved "too heavy and unwieldy, owing not only to its actual size and weight but also to the fact that the centre of gravity was always shifting on account of the nature of the package's contents;" that the pursuer "turned the package up on its end in the customary way in order to move it off the waggon, when, owing to its nature, it yielded, and being too heavy and unwieldy for one man to manipulate," pursuer in attempting to remove it from the waggon to the platform strained and injured his back; that the accident was due entirely to the fault of the foreman in refusing the pursuer the use of the crane, or in not employing another man to assist the pursuer, and that the defenders were responsible for the fault of the foreman, his ordinary or principal duty being superintendence and not manual labour.

Held that the action was irrelevant.

John Wilson, labourer, Glasgow, raised in the Sheriff Court at Glasgow an action for £163, 16s. damages, under the Employers Liability Act 1880, against the Caledonian Railway Company.

The pursuer averred—"(Cond. 2) On 22nd February 1899 the pursuer was in the employment of the defenders as a labourer at their goods station, Buchanan Street Glasgow. (Cond. 3) His duty was to discharge waggons. This is done, in the case of hampers and such like goods, by the aid of light cranes erected on the different platforms or tables by defenders for the purpose. (Cond. 4) On said date pursuer was about to unload a waggon containing large bundles of soft goods, and as these were just the sort of goods that required the aid of the crane, he asked the foreman, Donald MacDonald, to turn the jib of the crane towards the waggon. Pursuer was in the waggon at the time. The foreman, instead of complying with pursuer's request, peremptorily ordered him to go-ahead without the crane, and pursuer, who was bound to conform to MacDonald's order, did so, and succeeded in transferring the first package from the waggon to the platform, but in attempting to put the second package on to the platform the package proved too heavy and unwieldy owing not only to its actual size and weight, but also to the fact that the centre of gravity was always shifting on account of the nature of the package's contents. The pursuer had turned the package up on its end in the customary way in order to move it off the waggon, when, owing to its nature, it yielded, and being too heavy and unwieldy for one man to manipulate, pursuer, in