ments he had received no vouchers. All the sums so alleged to have been paid were less in amount than £8, 6s. 8d.

The pursuer pleaded, *inter alia*—"(4) The application of the payments otherwise than as credited, and the alleged payments beyond those credited, can only be proved by the pursuer's writ or oath."

By the Bills of Exchange Act 1880, section 100, it is provided:—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange, bank cheque, or promissory-note, which is relevant to any question of liability thereon, may be proved by parole evidence."

On 30th March 1900 the Sheriff-Substitute (HAMILTON) pronounced the following interlocutor:—"Finds that the defender has failed to set forth a relevant averment of payments to account of the sum sued for beyond those credited in the prayer of the petition: Therefore repels the defences in so far as not already dealt with, and decerns against the defender for payment to the pursuer of twenty pounds, five shillings and sixpence, being the sum brought out in the statement No. 16 of process, with interest thereon at the rate of £5 *per centum per annum* from the date of citation till payment: Finds the pursuer entitled to expenses, modified to Two pounds, two shillings, and decerns against the defender for payment thereof to the pursuer."

On appeal the Sheriff (RUTHERFORD) adhered to the interlocutor of the Sheriff-Substitute and dismissed the appeal.

The defender appealed to the Court of Session, and argued that under section 100 of the Bills of Exchange Act 1880 (quoted *supra*) he was entitled to a proof of his averment that he had made payments which were not credited in the account.

Argued for the respondent.—It was clear that at common law payment of a debt constituted by writ could not be proved by parole—Dickson on Evidence, sec. 610. This rule had not been altered by sec. 100 of the Bills of Exchange Act. The terms of that section had been interpreted and limited by decisions—*National Bank of Australia* v. *Turnbull & Co.*, March 5, 1891, 18 R. 629; *Gibson's Trustees* v. *Galloway*, January 22, 1896, 23 R. 414.

LORD ADAM—At this stage in the case the first question is, whether in ascertaining the balance due, certain payments set forth in the answer, and alleged to have been made, are to be included. According to the arguments before us, these payments are not vouched by any writ, but it is maintained, in the first place, that as the payments in question are each of them under £100 Scots or £8, 6s. 8d., they may be proved by parole. In answer to this, Mr M'Lennan maintained that according to the law of Scotland payments of an obligation constituted by writing can only be proved by writ or oath, no matter how small the payments may be, and for this he cited authorities. In this I think Mr M'Lennan is right. But then the other side maintains that even if that be true in the ordinary case, in this case, when the obligation is founded on a bill of exchange, the rule is modified by section 100 of the Bills of Exchange Act 1882. In my opinion it was not the intention of that section to alter the rules of the law of Scotland as to the modes in which payment of a debt may be proved. By the ordinary rule of the law of Scotland payment of a debt constituted in writing cannot be proved by parole, and I do not think that section 100 was intended to alter that rule.

[His Lordship proceeded to deal with the question of the interest charged.]

LORD M'LAREN—I concur with Lord Adam. I should have preferred not to give an opinion in a case of this kind, on the construction of section 100 of the Bills of Exchange Act 1882—a section which has already given rise to difficulties, and which may come before us again for construction. This much I may say, that a defence of payment would not usually or properly be described as a "fact relating to a bill of exchange" relevant to a question of liability thereon. If that is so, I think section 100 does not apply to the present case. I agree as to the necessity of enforcing the rule that, subject to known exceptions, payment in pursuance of a written obligation must be proved by the writ or oath of the creditor.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court dismissed the appeal.

Counsel for the Appellant—J. C. Watt. Agent—J. B. W. Lee, S.S.C.

Counsel for the Respondent—M'Lennan. Agent—Robert Broatch, Solicitor.

Saturday, October 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

FISKEN *v.* FISKEN.

Process—Reclaiming-Note—Competency—Printing—Omission from Print Appended to Reclaiming-Note of Interlocutor Closing Record—Court of Session Act 1825 (6 *Geo. IV. c.* 120) (*Judicature Act*), *sec.* 18—*A. S. 11th July* 1828, *sec.* 77—*Court of Session Act* 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 5.

A reclaimer boxed along with and appended to his reclaiming-note prints containing the record as finally closed, and all the interlocutors pronounced in the cause, with the exception of the interlocutor pronounced by the Lord Ordinary closing the record.

Held that his omission to print this interlocutor did not render the reclaiming-note incompetent, in respect that, although he was bound to print the record as authenticated, he was not bound to print the interlocutor which was the proof of such authentication.

The Court of Session Act 1825 (6 Geo. IV. c. 120) (Judicature Act), sec. 18, enacts as follows:—"Where any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it. . . . Provided that . . . if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before" [*i.e.*, by the signature of the Lord Ordinary, sec. 10].

The Act of Sederunt, 11th July 1828, sec. 77, enacts that reclaiming-notes "if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record in terms of the statute, if the record has been closed; and also copies of the letters of suspension or advocation and of the summons with amendment, if any, and defences" . . .

Section 5 of the Court of Session Act 1850 (13 and 14 Vict. cap. 36) provides that the "record shall be closed by interlocutor of the Lord Ordinary before whom the process depends."

On 28th March 1900 William Fisken raised an action of divorce for adultery against his wife Mrs Isabella Treasurer or Fisken.

By interlocutor dated 20th June the Lord Ordinary (KYLLACHY) closed the record on the summons and defences, and on the motion of the defender sent the case to the procedure roll.

By interlocutor dated 4th July the Lord Ordinary having heard counsel in the procedure roll opened up the record, allowed the pursuer to amend the same as proposed at the bar, and this being done of new closed the record, sustained the libel as amended as relevant and allowed parties a proof of their averments, and the pursuer a conjunct probation.

A proof was led, and by interlocutor dated 28th August the Lord Ordinary found that the pursuer had failed to prove the adultery libelled, and assoilzied the defender from the conclusions of the action.

Against this interlocutor the pursuer reclaimed. Along with and appended to his reclaiming-note the pursuer boxed prints containing the record as finally amended and closed on 4th July, and all the interlocutors except the interlocutor dated 4th July.

When the case was called in the Single Bills the defender and respondent objected that the reclaiming-note was incompetent, because the interlocutor of 4th July had been omitted from the print.

Argued for the defender and respondent —Section 18 of the Judicature Act 1825 required copies of the record authenticated by the Lord Ordinary to be boxed. A record was authenticated under the present practice not by the signature of the Lord Ordinary but by the interlocutor closing the record. Unless that interlocutor were printed, there could not properly be said to be boxed a record authenticated by the Lord Ordinary. The rules on this subject were very strictly applied—*Williamson* v. *Howard*, May 18, 1899, 1 F. 864.

Argued for the pursuer and reclaimer—The interlocutor of 4th July had by inadvertence been omitted to be printed, but that omission did not make the reclaiming-note incompetent. The record which had been boxed was the amended record authenticated by the Lord Ordinary. This was all that the Judicature Act required, it did not provide that evidence of such authentication should also be printed. In the case of *Williamson* v. *Howard*, *supra*, the record appended to the reclaiming-note did not contain some of the amendments allowed by the Lord Ordinary. The record appended to the reclaiming-note was thus not the authenticated record. Here the authenticated record had been printed, and that was all that the Act required, although it was customary and proper to print all the interlocutors pronounced by the Lord Ordinary.

At advising—

LORD TRAYNER—The competency of this reclaiming-note is objected to on the ground that it does not comply with the requirements of the Judicature Act. That statute (sec. 10) requires the record to be authenticated by the Lord Ordinary, and also (sec. 18) that the record, "authenticated as before," shall be boxed to the Judges with any reclaiming-note. The record, according to modern practice, is authenticated by the interlocutor of the Lord Ordinary closing the record, and it is the record so closed (and authenticated) that must be boxed with the reclaiming-note. That record has been duly boxed in the present case. It is not suggested that the record boxed with the present reclaiming-note is not, or differs in any respect from, the record as closed (and authenticated) by the Lord Ordinary. But the interlocutor by the Lord Ordinary closing the record was not printed and boxed with the reclaiming-note, and it is said therefore that the record as placed before us is not authenticated. I think the objection is not a sound one. It fails to distinguish between the thing authenticated and proof of authentication. The record authenticated by the Lord Ordinary has, as I have said, been duly boxed, and there is no dispute about that. The proof of the authentication has not been printed and boxed, but we have it before us on the interlocutor sheet. The Judicature Act does not require the interlocutor to be printed. It is usually printed, and it is convenient that it should be, but it is not required by statute. The reclaiming-note before us appears to me to be in accordance with statutory requirements, and the objection to its competency should, I think, be repelled.

LORD MONCREIFF—In this case the reclaimer has failed to print and box with his reclaiming-note the Lord Ordinary's interlocutor of 4th July 1900, by which he allowed the record to be opened up and amended, of new closed the record, and

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