

Tuesday, June 6.

FIRST DIVISION.

[Sheriff of the Lothians  
and Peebles.

CAMPBELL v. CALEDONIAN  
RAILWAY COMPANY.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. (2) (b)—Personal Bar—Form of Counter-Issue.*

Terms of an averment by a defender which held relevant to support a plea-in-law that the pursuer was barred from claiming damages either at common law or under the Employers' Liability Act 1880, in respect that he had claimed and received compensation under the Workmen's Compensation Act 1897.

This was an action of damages raised in the Sheriff Court of the Lothians and Peebles by Walter Bertram Campbell against the Caledonian Railway Company, in respect of injuries received by the pursuer while in the employment of the defenders as a lampman. The sum concluded for was £500, and the action was laid at common law and under the Employers' Liability Act 1880. The accident took place on 2nd January 1899, and (as averred by the pursuer in condescence 8) on 19th January notice thereof was given to the Railway Company in terms of the said Act, and also under the Workmen's Compensation Act 1897.

The defenders pleaded, *inter alia*, that the action was irrelevant, and on 28th March 1899 the Sheriff-Substitute (MAC-ONOCHE) repelled that plea and allowed parties a proof of their averments. The pursuer thereupon appealed to the Court of Session for jury trial.

The defenders then craved leave to amend the record by substituting the following for their original answer to condescence 8 for the pursuer—“(8) Admitted that notice was given as stated, and that the defenders decline to make any payment to the pursuer under the Employers' Liability Act or at common law. Explained and averred that the pursuer has claimed compensation from the defenders under the Workmen's Compensation Act 1897, and from the expiry of the period of a fortnight from the date of the accident the defenders have paid him one-half of his weekly wage as compensation under the Workmen's Compensation Act. Said payments amounted *in cumulo* to £3, 19s. 2d. as at 6th May 1899, and compensation still continues to be paid.”

They also craved leave to add the following plea-in-law—“(7) The pursuer having claimed and received from the defenders compensation under the Workmen's Compensation Act 1897, and the defenders being still willing to pay compensation under that Act, the pursuer is barred from claiming damages from them at common

law or under the Employers' Liability Act 1880.”

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), sec. 1, sub-sec. (2) (b) provides that “when the injury was caused by the personal negligence or wilful act of the employer . . . nothing in this Act shall affect any civil liability of the employer, but in that case 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 the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act.” . . . .

The pursuer lodged an answer to the defenders' proposed amendment on record, and submitted the following additional plea-in-law:—“The defences are irrelevant.”

The case having been sent to the summar roll, argued for the pursuer—The defenders' proposed averment was not relevant to support the plea of bar, and therefore should not be admitted to probation. In order to exclude the workman's remedy under the Employers' Liability Act of 1880, there must be a deliberate election by the workman of his remedy under the Act of 1897. There was no averment of any such election here.—*M'Cafferty v. M'Cabe*, May 12, 1898, 25 R. 872, and *Macleod v. Pirie*, November 15, 1893, 20 R. 381, referred to on the question of procedure, assuming the amendment to be allowed.

The defenders argued that the proposed amendment was relevant, and that issues should be ordered. The question raised by the defenders' new averment could best be determined by a counter-issue.

The LORD PRESIDENT delivered the judgment of the Court (consisting of his Lordship, LORD ADAM, and LORD KINNEAR) to the following effect:—We think that there is a relevant averment, and we shall allow the parties to lodge the issues proposed for the trial of the cause, reserving for consideration whether the question of bar can conveniently be tried upon the proposed counter-issue.

The Court appointed the issue or issues proposed for the trial of the cause to be lodged within eight days, and subsequently on 14th June approved of an issue lodged by the pursuer, and of a counter-issue lodged by the defenders, the latter of which was in the following terms:—“Whether the pursuer accepted from the defenders compensation under and in terms of the Workmen's Compensation Act 1897, in respect of the accident founded on.”

Counsel for the Pursuer—Constable.  
Agent—Andrew Gordon, Solicitor.

Counsel for the Defenders—Balfour, Q.C.  
—Deas. Agents—Hope, Todd, & Kirk,  
W.S.