At advising—

LORD PRESIDENT—[*After the narrative above quoted*]—I am of opinion that the defenders' averments disclose a *prima facie* case in support of the defenders' plea which it is incumbent on the pursuers to rebut, and that they ought to have an opportunity of doing so. Without hearing evidence, but on a consideration of the documents in process, the learned Sheriffs came to the conclusion that the averments of the defenders were proved and the averments of the pursuers disproved.

I cannot agree, for here is a pure issue of fact to the determination of which I think it is essential that there should be an investigation into the facts. I propose therefore that we should allow parties a proof of their averments upon record.

It will be for the defenders to consider whether they will take any part in the investigation of the facts, because it is apparent that it is immaterial to them which way this issue of fact is decided—whether decree passes against them or not, they will be safe from any charge of violating the Royal Proclamation. Having quite properly raised the question I do not consider that it is incumbent on the defenders to incur further expense by appearing at the proof.

It is, however, equally obvious that the public interest is here involved, for a decree for payment of this money might result in a breach of the Royal Proclamation. I think therefore that the papers in this case ought to be laid before the Lord Advocate in order that he may consider whether or no he should intervene. It is, of course, entirely within his discretion whether he takes part in the subsequent proceedings in this case or not. This Court has no right and certainly no desire to dictate to the public prosecutor what course he should take. That would be a matter entirely within his discretion. But I ought to point out that the determination of a question such as is raised here would be unsatisfactory if it were decided in the absence of a proper contradictor in the field. Accordingly, if the defenders decide that they ought to take no further part in the investigation of the facts and the discussion which may follow, then obviously it is in the public interest and for the public advantage that the Crown should be represented.

The course which I propose has, as your Lordships are aware, been determined on after consultation with the other Division of this Court.

LORD MACKENZIE—I am of the same opinion. I take the view that the course adopted by the Court in this case may be taken as a notification to all litigants throughout the country who may be placed in a position similar to that of the defenders here that there is not an obligation upon them to litigate in the way in which they would be called upon to do if their private interests were involved. If there is a doubt as to whether they are in safety to pay to a pursuer on the ground that he is an alien enemy, they discharge their duty if they consign the money in the hands of the Court. They are not called upon, in my opinion, to undertake to litigate a question which truly is one for those responsible for the management of public affairs. If there appears to the Lord Advocate to be a question which ought to be litigated, in my opinion the expense of that should not be cast upon the private litigant but should be undertaken by the public authorities.

LORD SKERRINGTON—I concur.

LORD JOHNSTON was absent.

The Court pronounced this interlocutor—

"Recal the interlocutors of the Sheriff of 10th May 1915 and of the Sheriff-Substitute of 25th January 1915: Allow the parties a proof of their averments on record: Appoint the proof to proceed before Lord Mackenzie on a day to be afterwards fixed by his Lordship: Meantime appoint the record and relative print of documents to be laid before the Lord Advocate in order that he may consider the same, and, if so advised, compear in the subsequent proceedings in the cause: Reserve all questions of expenses."

Counsel for the Appellants—Horne, K.C. —Gentles. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondents—Wilson, K.C.—J. R. Gibb. Agents—D. M. Gibb & Sons, S.S.C.

Tuesday, November 2.

SECOND DIVISION.

DAWSON *v.* GIFFEN.

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

A brought an action of damages against B for slander contained in a letter written by B to A in reply to three letters written by A to B. Three months after the action was raised B brought an action of damages against A for slander contained in the three letters written by A to B. The two actions were tried together before a jury, who found for the pursuers in each case, awarding £180 damages to A and one farthing damages to B. B having moved the presiding Judge for a certificate that the action at his instance was one for vindication of character in terms of the Court of Session Act 1868, sec. 40, A opposed the motion on the ground that B had himself given publicity to the letters by raising his counter action. The presiding Judge granted the certificate. Thereafter B moved in the Second Division for expenses in the action at his instance, and A opposed the motion.

The Court (*following Winn* v. *Quillan*, 1899, 2 F. 322, 37 S.L.R. 234) *awarded* B the expenses moved for by him.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 40, enacts—"Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than five pounds, 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 to try a right besides the mere right to recover damages; or that the injury in respect of which the action was brought was malicious; or, in the case of actions for defamation or for libel, that the action was brought for the vindication of character, and was in his opinion fit to be tried in the Court of Session."

On 21st January 1914 Mrs Rose O'Neill or Giffen, widow, Glasgow, brought an action against Michael D. Dawson, Scotch whisky merchant, Glasgow, for £250 damages for slander alleged to have been contained in a letter written by the defender to the pursuer in reply to three letters written by her to him.

On 15th April 1914 Dawson brought an action against Mrs Giffen for £250 damages for slander alleged to be contained in the letters written by her to him.

An issue and counter issue in the first action and an issue in the second action having been allowed, the actions were tried together on 21st and 22nd July 1915 before the Lord Justice-Clerk and a jury, when the jury found for Mrs Giffen in the action at her instance and assessed the damages at £180, and found for Dawson in the action at his instance and assessed the damages at one farthing.

On 2nd November 1915 counsel for Dawson moved the Lord Justice-Clerk to certify, in terms of section 40 of the Court of Session Act 1868, that the action at his instance was brought to try a right besides the mere right to recover damages, being an action for the vindication of character, and cited the case of *Craig* v. *Jex-Blake*, 1871, 9 Macph. 973.

The motion was opposed by counsel for Mrs Giffen, who argued that the letters were private and had been given publicity by Dawson himself after Mrs Giffen's action had been raised. Accordingly there had been no proper publication of the slander, and in the circumstances the action could not properly be described as an action for vindication of character — *Williamson* v. *M'Cann*, 1908, 16 S.L.T. 518.

The Lord Justice-Clerk granted the certificate, and on 2nd November 1915 counsel for Dawson moved the Second Division of the Court to apply the verdict and to award him expenses in the action at his instance. He argued that an award of expenses followed as matter of course on the certificate, and stated that there was no case where expenses had been refused after a certificate had been granted.

Counsel for Mrs Giffen objected to the motion, and argued that the granting of the certificate was not final on the question of expenses. It did not preclude consideration of the question by the Court. The certificate was merely the warrant which entitled the Court to consider the question — *Winn* v. *Quillan*, 1899, 2 F. 322, *per* Lord Young at 325, 37 S.L.R. 234, at 235. The decisions dealt with ordinary actions. They did not apply to the present case, which was that of a counter action. Even if the counter action were a fit one to raise in the Court of Session, no extra expense had been incurred by it. In any event the present case was one where it would be appropriate to modify the expenses if the Court were to allow them.

The Court, which consisted of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie, without delivering opinions, pronounced an interlocutor applying the verdict and finding Dawson entitled to expenses.

Counsel for Dawson—Horne, K.C.—W. J. Robertson. Agents—Thomas & William Liddle, W.S.

Counsel for Mrs Giffen—George Watt, K.C.—King Murray. Agent—C. F. M. Maclachlan, W.S.

Wednesday, October 27.

FIRST DIVISION.

[Lord Dewar, Ordinary.

ALDIN *v.* STEWART.

Reparation — Bar to Action — Master and Servant — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 6 (1)—*Right of Workman to Take Proceedings against both Third Party and Employer—Receipt of Money Payments by Workman from Employer.*

The Workmen's Compensation Act 1906 enacts—Section 6—"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation."

A workman while in the course of his employment was knocked down and injured by a motor car. He received payments from his employers, and signed receipts for certain sums "being compensation for accident." He thereafter brought an action against the owner of the motor car. He stated that when he signed the receipts he was in minority, had no legal advice, and was unaware of his legal rights, particularly of his right to choose between compensation from his employer and damages from the owner of the car.