

Tuesday, March 8.

SECOND DIVISION.

[Sheriff Court, Edinburgh.]

MURRAY v. NORTH BRITISH
RAILWAY COMPANY.

Master and Servant—Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 6—Right to Proceed against Undertakers after Damages Received from Employer—"Employer" Entitled to be Indemnified.

A lorryman in the employment of a firm of carting contractors was injured in consequence of his horse taking fright in the goods yard of a railway company where the horse and lorry were employed under a contract between the carting contractors and the railway company. The injured man received a payment in respect of his injuries from the carting contractors, and granted a receipt therefor in full satisfaction of all claims against them, "reserving all claims against any other parties;" and thereafter made a claim for compensation under the Workmen's Compensation Act against the railway company as undertakers. Held that in terms of section 6 of the Act the applicant was precluded from claiming against the undertakers, who were his "employers" in the sense of that section.

Section 6 of the Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37) enacts as follows:—"Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some other person other than the employer to pay damages in respect thereof, the workman may at his option proceed either at law against that person to recover damages or against his employer for compensation under this Act, but not against both; and if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person."

In an arbitration under the Workmen's Compensation Act 1897 in the Sheriff Court at Edinburgh, William Hall Mitchell Murray, carter, 96 Duke Street, Leith, claimed compensation from the North British Railway Company as "undertakers" in respect of injuries sustained by him in the company's goods yard at South Leith.

On 31st December 1903 the Sheriff-Substitute (HENDERSON) dismissed the application.

The following facts were stated as proved or admitted:—"1. That on 16th July 1903 the applicant Murray, who was in the employment of Messrs Cowan & Company, carting contractors, in the course of his employment as a carter was in charge of a lorry in the goods yard of the North British Railway Company at South Leith. 2. That while the loaded lorry was being drawn alongside some railway waggons

to be unloaded the horse took fright, and began to rear and kick, and kicked Murray so severely that he sustained a compound fracture of both bones of his left leg below the knee. . . . 4. That the horse and lorry were at the time employed under contract between Cowan & Company and the North British Railway Company, and the latter were accordingly undertakers within the meaning of the 4th section of the Workmen's Compensation Act 1897. . . . 9. That on 3rd August Messrs Laing & Motherwell, W.S., who were agents for the poor, under instructions from Murray's wife, wrote to Messrs Cowan & Company calling on them to make some proposal as to what they were prepared to do in the way of compensation to Murray, and adding that failing a satisfactory promise an action would be raised in the Sheriff Court against them. 10. That after some correspondence and telephonic communications between Messrs Laing & Motherwell and Mr J. C. Chisholm, solicitor, on behalf of Cowan & Company, Mr Chisholm, by letter of 28th August, made an *ex gratia* offer of £5 and £2, 2s. of expenses. 11. That Messrs Laing & Motherwell on 1st September accepted this offer, and added—"As you are offering these without admitting any legal liability, and as an *ex gratia* payment, we of course reserve all rights to compensation our client may have from other parties." 12. That thereafter the sum of £7, 2s. was paid to Murray, who granted the following receipt:—"Edinburgh, 8th September 1903. —Received by me, William Murray, from Messrs Cowan & Company, per John C. Chisholm, solicitor, 44 Queen Street, Edinburgh, the sum of seven pounds two shillings in full satisfaction and liquidation of all claims (if any) competent to me against the said Messrs Cowan & Company under any Act of Parliament or at common law in respect of injuries, whether now or hereafter to become manifest, arising directly or indirectly from an accident which occurred to me on or about the 16th day of July 1903, and any loss or damage consequent thereon, reserving all claims against any other parties." 13. That this receipt had been revised by Messrs Laing & Motherwell on behalf of Murray, and acting as his agents."

On the facts stated the Sheriff-Substitute held in law "that the applicant having claimed and received damages from his employers Cowan & Company was barred by the terms of the 6th section of the Workmen's Compensation Act from claiming compensation from the undertakers."

The question of law was—"Whether the applicant was barred by the terms of the 6th section of the Workmen's Compensation Act 1897, or otherwise, from claiming compensation from the undertakers in respect of the payment from his employers Messrs Cowan & Company on 8th September 1903 in the circumstances above set forth."

Argued for the appellant—Section 6 of the Act did not apply. The word "employer" in that section could not be read as meaning "undertaker;" the indemnity of the undertaker was otherwise provided

for—section 4 of the Act. Section 6 was intended to give the direct employer, who might be liable to indemnify the undertaker, a right of indemnity against a third party, if any, in whom the circumstances created a legal liability.

The respondents were not called upon.

LORD TRAYNER—I think the Sheriff has done right in applying here the provisions of section 6 of the Workmen's Compensation Act, and in respect thereof dismissing the claim. The construction of this statute has given rise to a great diversity of judicial opinion, but one thing has certainly been decided in this Court, namely, that the statute only applies to employment "by the undertakers" as there defined. Accordingly it is on the undertaker that the primary obligation for compensation is laid. Here it is found as matter of fact that the respondents were the undertakers, and against them accordingly the appellant would have had his claim. But section 6 provides that if any other person beside the undertaker, that is the "employer" under the Act, is liable for compensation for the injury sustained, the injured workman may pursue him at common law instead of making his claim against the employer-undertaker, but he cannot claim compensation for the same injury from both. If he obtains compensation from one of them all claim against the other is excluded. The appellant in exercise of his option has claimed and received compensation from Cowan & Company, not the undertakers although his masters, and has therefore precluded himself from making the present claim against the respondents.

LORD MONCREIFF—I am also of opinion that the Sheriff is right. We have heard a very ingenious argument on the construction of section 6 as contrasted with section 4 of the Act. But I think it is very plain that the appellant comes within the scope of section 6, and having made a claim against his own employers who are said to be liable at common law and recovered compensation from them he is not now entitled to proceed against the Railway Company. The purpose of this 6th section is simply to prevent a workman recovering from both. He is entitled if the case comes under the Workmen's Compensation Act to claim damages and proceed against the undertaker—the "employer" in the sense of the statute—or if there is a third party who was liable at common law for the injury, then the workman may, if he chooses, proceed against that person and not against the undertaker. But if he does that he cannot make a second claim against the undertaker. Confusion has arisen a little from the fact that the concluding words of the 6th section, "and if compensation is paid under this Act the employer shall be entitled to be indemnified by the said other person" also occur in the 4th section of the statute in this shape—"provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently

of this section." It was argued that the word "employer" in the 6th section was not synonymous with "undertaker," but in my opinion the two words are used in the statute interchangeably, and when the statute speaks of the "employer" the "undertaker" is meant. Therefore this proviso, which occurs both in the 4th and 6th sections, is intended to apply to the same case, viz., the case of the "undertaker" being called upon to make compensation under the statute, in which case he is entitled to be indemnified by the person (who may or may not be the workman's own employer) who is liable at common law.

But the true scope and meaning of the preceding part of the section is that a workman who has been injured cannot recover damages both from the undertaker and from the person liable at common law.

Now, what was done in the present case was this. The workman made a claim for compensation against his own employers, Cowan & Company, who were not the undertakers, and they made a payment which was accepted by Murray. It is true that in the receipt which was granted for this payment Murray's agents endeavoured to reserve right to claim additional compensation from the undertakers the North British Railway Company, but looking to the terms of the sixth section of the statute, Murray by accepting compensation from Cowan & Company, had lost his right to claim against the North British Railway Company.

On these grounds I think the Sheriff-Substitute's judgment is right.

LORD JUSTICE-CLERK—I concur. If a party claims from the undertaker under the Act, and succeeds in getting compensation from him, the undertaker can get relief from anybody by whose fault the injury for which he has paid compensation "was caused under circumstances creating a legal liability." On the other hand, if a party chooses to go against the person against whom he thinks he has a claim at common law, and succeeds in getting compensation from him, then there is no claim against the undertaker. I agree with the Sheriff.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Counsel for the Respondents—Guthrie, K.C.—Grierson. Agent—James Watson, S.S.C.