

mine that question or to do anything but the exact ministerial act which the sheriff-clerk is appointed to perform.

I agree with your Lordship, therefore, that the appellant is not entitled to have the memorandum which he proposes recorded, because it is not the exact agreement which was made between the parties.

LORD MACKENZIE — I agree with your Lordships. I do not think it was part of the duty of the Sheriff in this case first of all to construe the written document, and then, after arriving at an opinion as to the true meaning of that document according to his view, to record a memorandum of agreement giving effect to that construction. I think his duty, and his only duty, was to record the memorandum of agreement in terms in which it was agreed to by the parties.

LORD JOHNSTON was sitting in the Valuation Appeal Court.

The Court pronounced this interlocutor—

“Find that the Sheriff-Substitute was right in refusing to record the memorandum of agreement lodged in the application by the appellant: Find it unnecessary to answer the question of law as stated in the case: Further, in respect that the appellant now states at the bar that he desires to have the printed agreement signed by him on 17th August 1911 recorded as an agreement under the Workmen's Compensation Act 1906, recal the determination of the Sheriff-Substitute as arbitrator appealed against, and remit to him to proceed as accords, and decern.”

Counsel for Appellant—Crabb Watt, K. C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for Respondents—Horne, K. C.—Carmont. Agents—J. & J. Ross, W.S.

Thursday, November 30.

SECOND DIVISION.

[Sheriff Court at Glasgow.]

WRIGHT v. LINDSAY AND OTHERS.

Master and Servant—Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 6—Right of Workman to Take Proceedings both against Third Party and Employer—Receipt of Compensation by Workman under Reservation of Claims against Third Parties—Competency of Action of Damages against Third Party.

The Workmen's Compensation Act 1906 enacts, sec. 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 having been injured by collision with a motor car, received from his employers compensation, which he accepted under reservation of claims against third parties, and on the understanding that he would make repayment if he recovered damages. He thereafter brought an action of damages against the owners of the car.

Held that he had not “recovered” compensation in the sense of the Act, and was entitled to maintain such action of damages.

Robert B. Wright, Dalmuir, *pursuer*, brought an action of damages for personal injuries in the Sheriff Court at Glasgow against J. S. Lindsay and others, motor car hirers there, *defenders*.

The following narrative, taken from the opinion of Lord Salvesen, gives the facts of the case.—“This case raises an important question under the Workmen's Compensation Act 1906, which, as it has a general application, deserves careful consideration. The pursuer was injured by a collision with a motor car which belonged to the defenders. He was at the time employed as a night watchman with the firm of J. & H. Williamson. Both the Sheriffs have found that the injuries which the pursuer received were due to the fault of the person in charge of the motor car, for whom the defenders are responsible; and if the case had stopped there the Sheriff-Substitute would as a matter of course have assessed the damages to which he considered the pursuer entitled. The defenders, however, pleaded that the pursuer had already received compensation from his employers, and that his right to recover damages against them is barred by section 6 of the Act. The only findings in fact with regard to this matter are as follows—‘Finds that after the accident the pursuer claimed and received compensation from his employers under the Workmen's Compensation Act for the period from 6th July 1909 to 16th November 1909, amounting to £11, 7s. 5d., and granted receipts therefor: Finds that this compensation was received by the pursuer under reservation of his claims against third parties, conform to the receipt No. 15/1 of process.’ The Sheriff has, however, supplemented these findings in his opinion by saying that the payments made by the employers' agent were so made ‘on the footing that the pursuer was to recover from the party in fault,’ and that ‘it was understood that under the Act the pursuer would have to pay them back if he recovered anything from the party in fault.’ These findings were not seriously challenged.”

The terms of the receipt granted by the pursuer are set forth in the Sheriff's note, *infra*.

On 19th May 1910 the Sheriff-Substitute (BALFOUR) pronounced this interlocutor—“... Finds that after the accident the pursuer claimed and received compensation

from his employers under the Workmen's Compensation Act for the period from 6th July 1909 to 16th November 1909 amounting to £11, 7s. 5d., and granted receipts therefor: Finds that this compensation was received by the pursuer under reservation of his claims against third parties, conform to the receipt No. 15/1 of process: Finds, however, that that reservation has no effect, and the pursuer having elected to take compensation under the Workmen's Compensation Act is now barred from recovering damages in respect of the accident from third parties: Therefore . . . dismisses the action and decerns."

Note.—[After dealing with the facts of the case].—"While the defenders' liability for the accident is clear, it appears to me that the pursuer is barred from recovering damages from them in respect that he has claimed and obtained compensation under the Workmen's Compensation Act from his employers. The sixth section of the Act provides—[quotes, *v. sup.*]. In this case the pursuer elected to take compensation under the Act, and he agreed to accept the weekly sums paid to him in satisfaction of the compensation payable by his employers, but he reserved his claims against third parties. It appears to me, however, that according to the sixth section of the Act the pursuer cannot obtain both damages and compensation, and that having elected to accept compensation according to the receipts produced he cannot now recover damages against third parties.

The English case of *Oliver v. Nautilus Steam Shipping Company*, 2 K.B.D., L.R. 1902, was referred to by the pursuer as showing that a receipt given without prejudice did not bar the workman from taking an action against a third party, but the Scotch case of *Mulligan v. Dick & Son*, 6 F. 126, throws a different light upon the effect of such a receipt. It was held in that case that a workman who made a claim for damages at common law against a person other than his employers, and without having taken legal proceedings received a payment in settlement of his claim, had taken proceedings in the sense of the Act, and that therefore he had exercised his option and was barred from claiming compensation against his employers, and it was further held that a clause in the receipt granted by him reserving a right to claim compensation from his employers did not prevent this result, and the English case of *Oliver* already referred to was distinguished. The opinions of the judges are instructive, and show distinctly that a workman cannot recover both damages and compensation, and that receipts with a reservation such as occurs in the present case will not prevent the application of the statute."

The pursuer appealed to the Sheriff, who on 25th October 1910 adhered to the interlocutor of the Sheriff-Substitute.

Note.—[After dealing with the facts].—"But there is the defence that the pursuer had claimed and received compensation from his employers, and that his right to recover damages is barred by section 6 of

the Workmen's Compensation Act 1906. The facts are that his employers gave notice to the Railway Passengers Assurance Company, with which they were insured, of the accident, and that as a result the pursuer received from them, from 6th July to 16th November 1909, sums amounting in all to £11, 7s. 5d. The circumstances in which the payments were made are described by Robert Beattie, the manager of the insurance company. In his evidence Mr Beattie says that he recognised these payments as full compensation to pursuer in terms of the Act. They stood in the employer's place, and these payments were made by them on the footing that the pursuer was to recover from the party in fault, and that the pursuer reserved his right to common law action against that party. It was understood that under the Act the pursuer would have to pay them back if he recovered anything from the party in fault. The receipts granted by the pursuer were in these terms—'I, Robert Wright, having elected to take compensation under the Workmen's Compensation Act, hereby agree to accept the weekly sum of 11s. 4½d. in satisfaction of the compensation payable by Messrs J. & H. Williamson for the accident I met with when engaged in their employment on the 29th day of June 1909, under reservation of my claims against third parties.' The statute says in clause 6—[*The Sheriff here quoted section 6*]. Now it is clear in the present case that the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person (namely, the defenders) other than the employer to pay damages. Therefore clause 6 would apply to the defenders. The workman therefore might take proceedings both against the defenders to recover damages and against his master to pay compensation, but the statute expressly declares that he shall not be entitled to recover both damages and compensation. In this respect the statute differs from the Workmen's Compensation Act 1897, where the workman was put to his election of either raising an action for damages against the other person or claiming compensation from his employer, and in the event of his choosing the one remedy his claim for the other came to an end. He might find by raising the action which turned out not to be good in law that he had excluded himself from the other remedy in which he had a perfectly good claim. All the cases to which I was referred, or have been able to discover, were brought under the previous Act, and owing to the difference in the terms of the two statutes do not seem to give very much aid in this matter. The question is, Has the pursuer, in the circumstances, recovered the compensation which was paid to him by the insurance company? If he has, then there is a statutory bar to any decree being pronounced in his favour in the present action. I think it is enough that he should have made a claim upon his master, or the insurance company, under the Act, and received payment

in respect of that claim, to bring his action under the word 'recover' in the statute. The further question therefore is, did the agreement between him and the representative of the insurance company, that he should be free to raise an action of damages against the person otherwise responsible for the accident, and that he was to repay out of the sum recovered any money he got under the Compensation Act to the company, take him outside of the meaning of the word 'recover' in the section referred to? That must be taken along with his reservation, in the receipt given, of his claims against the third parties. I think the question whether he has recovered compensation is one of fact, and that the reservation in the receipt and the agreement with the company did not alter the fact that he did recover these payments from the company. If before raising this action the pursuer had repaid the money to the insurance company another question might have been raised, but we have the evidence of Mr Beattie that he recognised those payments which as a matter of fact had been made as full compensation to the pursuer in terms of the Act. If that be so, it seems to me that the statute applies, and that the pursuer is barred from recovering damages from the person other than his master liable for the injury, namely, the defenders. Accordingly I think the action should be dismissed. . . ."

The pursuer appealed, and argued—By section 6 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) a workman was entitled to take proceedings both against his employer and against a third party liable to him in damages. He could follow both proceedings out to judgment, and was not bound to elect between compensation and damages till both questions of liability had been determined. These were his statutory rights, and it was for the respondents to show that he had waived them. If in accepting a weekly sum from his employers, the workman expressly reserved his right to proceed against third parties, he had not exercised his right of election. Section 6 was passed to remedy the defect in the Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37). By section 6 of that Act the workman could only take one set of proceedings. He had the option of suing the third party at law to recover damages, or of proceeding against his employer for compensation. The new Act was altered so as to make sure that the workman would get his compensation one way or the other. It was not, of course, intended that at the end of the day he should be in the position of recovering both compensation and damages. He was certainly not to be paid twice, but there was nothing in the section to prevent him from getting some compensation from his employer to keep him from starving while the question of damages was being litigated. The pursuer had not "recovered" compensation in the sense of the Act when he had not made his final election, and had undertaken

to repay his employer out of what he might recover from the defenders. The question had been decided in England favourably to the pursuer's contention—*Oliver v. Nautilus Steam Shipping Company, Limited*, [1903] 2 K.B. 639. The case of *Mulligan v. Dick & Son*, November 19, 1903, 6 F. 126, 41 S.L.R. 77, relied on by the Sheriff-Substitute, was really in the pursuer's favour—see Lord M'Laren's opinion, 6 F. at 131. *Huckle v. The London County Council*, June 24, 1910, 26 T.L.R. 580, was also referred to.

Argued for the defenders (respondents)—The question whether a workman had recovered compensation was one of fact—*Mackay v. Rosie*, 1908 S.C. 174 (Lord President at 178), 45 S.L.R. 178. The pursuer had been paid full compensation for four months—until he went back to his work. He was therefore barred from suing a third party delinquent, for, as matter of fact, he had exercised his election and had received weekly sums as compensation from his employer—*Oliver v. Nautilus Steam Shipping Company (sup. cit.)*, [1903] 2 K.B. 639, *Vaughan Williams (L.J.)* at 645. The pursuer having in fact recovered compensation, the reservation in the receipt was ineffectual. *Burton v. Chapel Coal Company, Limited*, 1909 S.C. 430, 46 S.L.R. 375, was also referred to.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case was injured by a motor car, and the motor driver has been held to be in fault. The pursuer's employers paid him certain sums as compensation, but this was done upon the express footing that the pursuer was to sue the motorman's master for damages, and if he was successful the sums given to him in the meantime were to be returned.

The defenders maintain that the pursuer having accepted payments from his employers, is excluded from his claim against them at common law. They base their plea upon the 6th section of the Workmen's Compensation Act, which is not the same as the corresponding clause in the older Act, but favours the injured workman in a greater degree. The section strikes only at the workman recovering both from his master and from the wrongdoer. Now the question in the circumstances of this case is, whether the pursuer has so "recovered" compensation that he is barred from proceeding in his action. Looking to the arrangement made it appears to me that what the pursuer has received is not compensation recovered under the Act. It is of the nature of a sum advanced by the employers under conditions which exclude the idea of its being a final acceptance of compensation under the Act. The arrangement is in every sense reasonable and humane. The employer knows that if his servant cannot get damages from the alleged wrongdoer, he must provide compensation. But as the litigation for damages is a long and protracted proceeding he arranges with the workman—"I will give you now what

corresponds to what would be my liability, so that you may be supported, but you must engage to me to return me what I advance if you are successful in getting the fuller compensation from the wrongdoer." I am of opinion that payments made under such an arrangement are no bar to action at law. I am confirmed in that opinion by the English case of *Oliver* quoted to us, in which payments by the master on receipts bearing to be "without prejudice" were held not to bar the workman's action against those in fault for the injury. I can see no reason why that decision should not be an authority to be respected, although not technically binding upon this Court. I would have come to a similar conclusion had there been no such case in the books, but I am glad to be confirmed in my view by the case quoted. The case of *Mulligan* was a converse case to the present. *Mulligan* had recovered damages from the defender in an action, and it was held that he could not obtain compensation from his employers. Any other decision would have been manifestly unjust. I hold that where payments received from the employers are made under a *bona fide* agreement that the money is to be returned if damages are obtained from the wrongdoer, the case is not one to which the section of the Act applies. This is to my mind clearly such a case.

I am therefore in favour of recalling the finding of the Sheriff-Substitute, holding the pursuer barred from maintaining his claim of damages, and sustaining the 8th plea-in-law for the defenders.

As the proof was not before us, it will be necessary that there be further procedure before it can be finally disposed of.

LORD SALVESEN—[After the narrative of facts given supra.]—Assuming these to be the facts, the question is whether the pursuer's claim against the defenders is excluded. It would certainly be odd if it should be so, seeing that both the parties to the agreement, which is said to operate as a bar, understood and intended that the pursuer, notwithstanding the payments, should be at full liberty to proceed against the defenders at common law, and the defenders can show no good ground in equity why they should be absolved from their civil liability to the pursuer. Under the arrangement between the pursuer and his own employers they are secured against being called upon to make any payment to the employers after they have settled the pursuer's claim as judicially ascertained, and counsel for the pursuer expressed his willingness to allow extract of any decree against the defenders to be superseded until he has produced in process a receipt from the employers showing that they had been repaid the amount advanced by them and a discharge of their claims against the defenders. Unless, therefore, the language of section 6 admits of no other construction than that put upon it by the Sheriffs, there seems no good ground in principle or in equity why the pursuer should be barred

from recovering damages at common law to which *ex hypothesi* he is otherwise entitled.

The sixth section of the 1906 Act is expressed in different terms from the corresponding section of the earlier Act. The workman is now entitled to take proceedings both against the third party by whose negligence he has been injured and against his own employers under the Act. In this respect it is more favourable than the earlier Act, which gave the workman only an option to proceed either at law against the third party to recover damages or against his employers for compensation under the Act, but not against both. The only limitation now is that he shall not be entitled to recover both damages and compensation. The Sheriffs in deciding the case against the pursuer have put a very narrow meaning upon the word "recover." In their view it is enough that the pursuer has, as in a question with his employers, accepted payments of money from them as in satisfaction of compensation under the Act. I do not think I should have differed from them if the payments had not been made and accepted under reservation of the pursuer's right to proceed against third parties. But where a payment is made by an employer to his workman on the footing that he shall be entitled to recover damages at common law against third parties, and that the sums which the employer has disbursed are to be repaid out of any damages which he may so recover, I think the case is entirely different. The compensation so paid is in the nature of an advance by the employer for the maintenance of the pursuer pending proceedings to make good his claim, and is only accepted as in full of the workman's right under the Act against his employer in the event of his claim against the third party being unsuccessful. I cannot think that it was ever intended that the Act should make ineffectual an arrangement of this kind, eminently reasonable from the point of view of both workman and employer and in the interests of both. The English case of *Oliver*, [1903] 2 K.B. 639, although decided under the previous Act, is a distinct authority for the contrary proposition. There it was held that a claim against an employer by a workman under the Act and receipts signed by the workman "without prejudice" for payments made by the employer did not bar the workman from afterwards suing the actual wrongdoer for damages. The precise point that arose in *Oliver's* case has not been the subject of decision in Scotland, but in the case of *Mulligan* (6 F. 126) Lord M'Laren, as I read his opinion, expressed approval of the decision arrived at by the English judges; and at all events it is plain that the decision in *Mulligan's* case did not in the least impair its authority. The ground of the decision there was that as the workman had recovered a sum of damages from the actual wrongdoer he could not make a claim against his employers, as they would not then have the complete right of relief to which they were

entitled under the statute. Here there is no prejudice suffered either by the defenders or by the pursuer's employers. In my view, therefore, the word "recover" falls to be construed as implying unconditional payment, and does not apply to a case where the money is paid conditionally and falls to be repaid to the employer out of the damages that may be eventually awarded against the wrongdoer.

As parties desired to have the opinion of the Court on this question of law the evidence has not been printed, and we are therefore not in a position to dispose of the case as a whole. It will be open for the defenders to maintain that the findings in fact on which the Sheriffs have affirmed their liability are erroneous; and it will also be necessary that the damages should either be assessed by us or agreed on by the parties. All that we are in a position to do is to recal the findings of the Sheriff-Substitute that the pursuer is barred from recovering damages from the defenders, and that part of his interlocutor in which he sustains their eighth plea-in-law. In place thereof we must repel this plea-in-law and continue the cause. Parties can then enrol the case for further procedure.

LORD GUTHRIE—I am of the same opinion. I think the effect of the defenders' contention would really be to render nugatory the alteration which section 6 of the Act of 1906 made upon the corresponding section of the previous Act. For while Mr Fraser admitted that the workman might take a double set of proceedings, he maintained that he could not go on with both. If that were so, the result would be to throw the workman at a later stage into the same position as, under the old Act, he was at the beginning. He would be bound to elect his remedy before the whole question of liability was decided, which is just what section 6 of the 1906 Act was intended to prevent. If judgment in both sets of proceedings were given on the same day, he would naturally have to make his election then, but if liability is admitted by the employer and compensation received from him, the question is whether he is thereby barred from recovering damages from a third party. I think not. It is unnecessary to decide whether or not an express reservation of his rights is required. If it is, there is such a reservation in the present case.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the said interlocutors in so far as they find that the pursuer is barred from pursuing this action, and in so far as they sustain the 8th plea-in-law for the defenders: Repel the said 8th plea-in-law and continue the cause."

Counsel for Pursuer (Appellant)—D. Anderson—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for Defenders (Respondents)—Cooper, K.C.—M. P. Fraser. Agents—Clark & Macdonald, S.S.C.

Tuesday, December 19.

SECOND DIVISION.

(SINGLE BILLS.)

M'GREGOR'S TRUSTEES *v.* KIMBELL.

(Reported *ante* July 14, 1911, 48 S.L.R. 950, and 1911 S.C. 1196.)

Expenses—Process—Trustees—Special Case—Interlocutor Finding Parties Entitled to Expenses out of Fund—Expenses as between Agent and Client.

A special case was brought by testamentary trustees to determine questions regarding the disposal of accumulated funds in their hands which had fallen into intestacy, and an interlocutor was pronounced in terms of an agreement by the parties including the trustees, finding "the whole parties" entitled to their "expenses as the same may be taxed by the Auditor" out of the accumulated funds.

Held that the account of expenses incurred by the trustees must, in terms of the interlocutor, be taxed as between party and party and not as between agent and client.

A Special Case was presented to the Court by David Edward and another, trustees of the late James M'Gregor, *first parties*, Mrs Alice Jeffs or M'Gregor, now Kimbell, widow of the said James M'Gregor, and now wife of William Alfred Kimbell, *second party*, and others, to determine, *inter alia*, whether the second party was entitled to *jus relictae* out of certain accumulated funds in the hands of the trustees, which had fallen into intestacy.

The Special Case stated, *inter alia*—"It has been agreed that the taxed expenses of the several parties to this case shall be paid out of the surplus accumulated funds referred to, so far as still in the hands of the first parties, subject to the sanction of the Court."

On July 14, 1911, the Court pronounced an interlocutor finding the second party entitled *jure relictae* to one-half of the said accumulated funds (see *report ut supra*), and finding the whole parties "entitled to their expenses as the same may be taxed by the Auditor—to whom remit—out of the surplus accumulated funds in the hands of the first parties."

The second party thereafter lodged a note of objections to the Auditor's report on the first parties' account of expenses, in which she objected that the Auditor had taxed the account as between agent and client instead of as between party and party in terms of the interlocutor of 14th July 1911.

In the Single Bills the second party moved the Court to remit the account back to the Auditor to tax as between party and party, and argued—The agreement and the interlocutor used the word "expenses" without qualification. That meant expenses as between party and party—*Fletcher's Trustees v. Fletcher*, July