Thursday, October 28.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

KELLY *v.* NORTH BRITISH RAILWAY COMPANY.

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 Parties and Employers—Receipt of Compensation by Workman under Reservation of Claims against Third Parties.*

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 at work in a railway siding was injured by moving waggons. He received from his employers "compensation" under an arrangement, constituted by letters, that he intended to take action against a third party, that the compensation should be without prejudice to and under reservation of any claim he had against third parties, and that if he recovered damages from third parties he should repay whatever compensation had been paid to him. He thereafter brought an action against the owners of the waggons.

Held that he had not recovered compensation in the sense of the Act, and was therefore not barred from maintaining the action of damages.

Wright v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, *followed.*

Patrick Kelly, 28 Young Street, Calton, Glasgow, *pursuer*, on 16th April 1915 brought an action of damages for personal injuries against the North British Railway Company, *defenders.*

Pursuer on 17th December 1914 was in the employment of the Glasgow Corporation, and while in the course of his employment at a railway siding in the Corporation's Haghill depot was injured by a waggon belonging to the North British Railway Company which was being shunted by servants of the Railway Company.

The parties, *inter alia*, averred—"(Cond. 9) The pursuer has made application to the defenders for reparation for the injury he has suffered, but they have refused or at least delayed to do so, and this action has been rendered necessary. With reference to the answer, it is admitted that the pursuer has been in receipt of weekly compensation, under the Workmen's Compensation Act, from his employers the Glasgow Corporation, since about the date mentioned; but it is explained that said compensation was paid by them and accepted by him on the express conditions that it should be without prejudice to and under reservation of any claim the pursuer had against the defenders, and that should he succeed in obtaining damages from the defenders, whatever compensation they might have paid him should be repaid to them. (Ans. 9) Admitted that pursuer has applied to the defenders to make reparation for the injury he has suffered, and that they have refused to do so. *Quoad ultra* denied. Explained that the pursuer has claimed and has received weekly since 24th December 1914, from his employers the Corporation of Glasgow, compensation at the highest rate allowed under the Workmen's Compensation Act, and he is still in receipt of that compensation. The Corporation on 21st December 1914 intimated to the defenders a claim of relief by them against the defenders in respect of the compensation payable by them to the pursuer."

The pursuer pleaded, *inter alia*—"(3) The pursuer having accepted payment of compensation under the Workmen's Compensation Act, under express reservation of his claim against the defenders, he is not barred from maintaining the present action."

The defenders pleaded, *inter alia*—"(5) The pursuer having claimed and received compensation under the Workmen's Compensation Act 1906, from his employers, cannot, in terms of the provisions of said Act, recover damages from the defenders."

On 1st July 1915 the Lord Ordinary (ORMIDALE) repelled the fifth plea-in-law for the defenders and approved of an issue for the trial of the action.

Opinion.—"It was admitted by counsel for the defenders that the averments of the pursuer in condescendence 9 as to the receipt by him of payments as compensation from his employers under an obligation to repay these if he recovered damages from the defenders are true in fact. In these circumstances it appears to me to be impossible to distinguish the present case from *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210.

"Mr Cooper is desirous of having the question decided in that case reconsidered. That cannot however be done in the Outer House."

The defenders reclaimed, and argued—The present case was distinguishable from *Wright* v. *Lindsay* (*cit.*). In *Wright* v. *Lindsay* it was held (*per* Lord Justice-Clerk and Lord Salvesen) that what was paid was not compensation but a gratuity for maintenance pending litigation. Here the employer paid the workman compensation, and the payments were of the precise amount, date, and duration prescribed by the Act. The workman himself called it compensation. In these circumstances no form of words or qualification could alter the nature of the agreement and make the payments other than compensation. *Wright* v. *Lindsay* (*cit.*) was in conflict with the prior decisions—*Mulligan* v. *Dick & Son*,

1903, 6 F. 124, 41 S.L.R. 77; *Murray* v. *North British Railway Company*, 1904, 6 F. 540, 41 S.L.R. 383—and should not be followed. Where compensation had been taken damages could not be recovered—*Woodcock* v. *London and North-Western Railway Company*, [1913] 3 K.B. 139, *per* Rowlatt, J., at p. 146; *Page* v. *Burtwell*, [1908] 2 K.B. 758. To recover compensation did not mean to recover by legal proceedings; it was sufficient if the workman claimed compensation and recovered it—*Page* v. *Burtwell* (*cit.*). The pursuer had recovered compensation, and was barred from maintaining the present action.

Counsel for the respondent were not called on.

LORD PRESIDENT—On the pursuer's pleadings as they stand on this record there is a great deal to be said for the North British Railway Company. More unfortunate pleadings I have rarely seen.

It is common ground that on a certain date in December 1914 the pursuer suffered personal injury by accident arising out of and in the course of his employment with the Corporation of Glasgow, and that he was entitled to claim, if he chose, compensation from his employers under the statute. But then he alleges—and he alleged at the time—that his injuries were due to negligence on the part of the Railway Company's servants, and accordingly that he proposed to raise an action against the Railway Company to recover damages from them.

That claim for damages is now before us, and is met by, *inter alia*, a plea to the effect that the pursuer, having claimed and received compensation under the Workmen's Compensation Act 1906, from his employers, cannot, in terms of the provisions of that Act, recover damages from the defenders, and if that plea is sound this action falls to be dismissed. Now it is met by a most unfortunate plea on the part of the pursuer to the effect that, having accepted payments of compensation under the Workmen's Compensation Act, under express reservation of his claim against the defenders, he is not barred from maintaining the present action. I should have supposed that if he had taken compensation under the Workmen's Compensation Act, even although he had accepted the payment without prejudice and reserved his claim against the North British Railway Company, nevertheless their fifth plea-in-law would fall to be sustained. And when we examine the pleadings we find that the pursuer explicitly sets out that he did receive compensation under the Workmen's Compensation Act, and then proceeds to narrate certain reservations which were made in the receipt for the payment. In the course of the argument, however, we were informed that the arrangement under which the payments were received was expressed in writing. The writing is now before us, and it is admitted by both parties that there is nothing beyond the agreement which we find there expressed. The letter, which is written by the solicitors for the pursuer to the Town-Clerk of Glasgow on 3rd February 1915, is as follows:—"Dear Sir—We act for Patrick Kelly, an employee of the Corporation, who was injured on 17th December last through being knocked down by some waggons belonging to the North British Railway Company at Haghill depot. At the time of the accident Kelly was engaged in his ordinary duties as a servant of the Corporation. It is our intention to take proceedings against the Railway Company on Kelly's behalf, and we shall be obliged if you will in the meantime pay him whatever compensation may be due to him under the Workmen's Compensation Act 1906, on the footing that it is paid without prejudice to, and under reservation of, any claim he may have against the Railway Company, and also, of course, on the understanding that should he succeed in obtaining damages from the Railway Company, whatever compensation you have paid him will be repaid to you out of such damages." And the Corporation of Glasgow made payment upon that footing.

Now it appears to me that the true effect of that arrangement is that the payments subsequently made by the Corporation of Glasgow were not payments of compensation under the statute at all, but were payments made by them temporarily for the purpose of enabling the pursuer to tide over the time which must elapse before the issue of his action with the North British Railway Company, and were not intended by the pursuer to be—and were not intended by the Corporation to be—payments made in virtue of their liability under the Act of Parliament.

This interpretation which I put upon the letter is, I think, in strict accordance with the interpretation put upon a similar arrangement, partly expressed in writing and partly proved by parole evidence, in the case of *Wright* v. *Lindsay*, 1912 S.C. 189, 49 S.L.R. 210, because although in that case the written receipt bore only the reservation of subsequent claims, the oral evidence showed—I read now from the learned Sheriff's narrative, 1912 S.C. 189, at pp. 190-1, 49 S.L.R. 210, at p. 211—that while the payments were made by the insurance company, they were made 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." And reading the receipt along with the oral evidence, the majority of the Judges of the Second Division came, as I read their judgments, to the conclusion that this was not a payment under the Workmen's Compensation Act, but was an interim payment of the kind I have described as intended in the letter we have before us in the present case.

Therefore upon the ground that the pursuer has not recovered payment from some one liable to make payment to him under the Workmen's Compensation Act, I think that this action ought to be allowed to proceed, and that we should adhere to the interlocutor of the Lord Ordinary.

LORD MACKENZIE—I am of the same opinion. There was no attempt on the part of the North British Company to argue that the workman could not effect by some appropriate form of words the purpose that plainly is disclosed as his intention upon the terms of the letter of 3rd February 1915, which your Lordship has read. The only question before us is whether that purpose has been effected by the terms of the particular letter. The difficulty has been introduced into the case by the view taken in the pleadings that the payment which was made was a payment of compensation under the Act, and if that was the true view of the agreement which was made, then the case would be in a similar position to that of *Aldin* v. *Stewart*, *supra*, p. 49, which we decided yesterday. There the workman had for a period, I think, of several months, accepted payments, and upon the evidence which was led it plainly appeared that he must have been quite well aware that he was accepting those payments under the Workmen's Compensation Act. In those circumstances we held that he was barred from taking proceedings to recover damages.

This case appears to me to be in marked contrast to that, because on a fair construction of the letter I think it is apparent that what the workman was receiving in the way of payment was not compensation under the Act but payments under a special agreement, which set out that he intended to take proceedings against the Railway Company. For my part I should consider the substance rather than be anxious to criticise the precise form, and unless it was quite plain that the man had actually received compensation under the Act—effectively received it so that it must remain in his pocket for all time coming—I do not think it can be successfully pleaded against him that he is barred from taking the alternative proceedings pointed to in section 6 (1) of the Act.

LORD SKERRINGTON—I concur.

LORD CULLEN—I also concur.

LORD JOHNSTON was absent.

The Court adhered.

Counsel for Pursuer (Respondent)—Anderson, K.C.—J. B. Young. Agents—Weir & Macgregor, S.S.C.

Counsel for Defenders (Reclaimers)—Wilson, K.C. — E. O. Inglis. Agent—James Watson, S.S.C.

Thursday, October 28.

FIRST DIVISION.

[Sheriff Court at Hamilton.

THOMSON *v.* JOHN WATSON LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *Schedule I, sec.* 3—*Review of Weekly Payments—Payments in respect of Partial Incapacity—Workman Subsequently Enlisting in Army—Average Weekly Wage which Workman is Able to Earn.*

A workman and his employers agreed that partial compensation be paid in respect of an industrial disease, and a memorandum of agreement to that effect was recorded. The workman thereafter enlisted in the army. The employers applied for suspension of the weekly payments while the workman was in the army.

Held that the employers were not entitled to have the payment of compensation suspended, but that the arbiter should assess compensation on the basis, not of the army, which was not "suitable employment" in the meaning of the Act, but of what suitable industrial employment the workman could have engaged in having regard to his state of health.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) enacts—Schedule I, section 3—"In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper."

John Watson Limited, coalmasters, Earnock Colliery, Burnbank, Hamilton, *respondents*, applied in the Sheriff Court at Hamilton for review of the weekly payments of compensation made by them to James Thomson, formerly fireman, 12 Forrest Street, Low Blantyre, and then private, 7th Battalion Royal Scots Fusiliers, *appellant*. The Sheriff-Substitute (SHENNAN) as arbitrator suspended the payment of compensation. The workman appealed by Stated Case.

The Case stated—"The following *facts* were admitted:—1. The appellant was employed by the respondents as a colliery fireman in their Earnock Colliery. He was duly certified to be disabled in respect of miner's nystagmus from 15th April 1914. On 19th June 1914 the parties agreed that partial compensation be paid by the respondents to the appellant at the rate of 17s. 8d. per week, and thereafter a memorandum of agreement to this effect was recorded in