

charged in the principal issue.

LORD ADAM and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

“The Lords having considered the reclaiming-note for the pursuer against the interlocutor of Lord Kincairney dated 23rd June 1899, together with the notice of motion for the pursuer to vary counter issue, and heard counsel for the parties upon the amended issues and counter-issues proposed by the pursuer and the defender respectively, adjusted and authenticated by the Lord Ordinary: Adhere to the Lord Ordinary's said interlocutor of 23rd June 1899: Refuse the reclaiming-note and the motion to vary counter-issue: . . . Find the defender entitled to expenses since the date of the interlocutor reclaimed against, and remit,” &c.

Counsel for the Pursuer—Guthrie, Q.C.—Gunn. Agents—Mackay & Young, W.S.

Counsel for the Defender—Dean of Faculty (Asher, Q.C.)—Kennedy. Agents—Gordon, Falconer, & Fairweather, W.S.

Tuesday, January 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LITTLE v. P. & W. MACLELLAN,
LIMITED.

Reparation — Master and Servant — Personal Bar — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (1) and (2) (b)—Election to Accept Provisions of Act.

A workman who had sustained injuries received from his employer certain weekly payments extending over a period of six months from the date of the accident, and signed receipts therfor which bore to be granted “in full satisfaction of amount due to me as compensation under the Workmen's Compensation Act 1897 . . . based on my average weekly earnings in accordance with the said Act.” Thereafter he brought an action in which he claimed damages at common law and under the Employers Liability Act 1880, subject to deduction of the sums already received by him. He alleged that he had accepted the payments made to him as payments to account of the compensation due to him by law, and that he did not understand he was thereby making an election of the provisions of the Workmen's Compensation Act 1897. Held that the pursuer had not stated any relevant ground for setting aside the receipts granted by him; that in granting these receipts he must be considered to have elected to accept the provisions of the Workmen's Compensation Act 1897; and that consequently

in terms of section 1 (2) (b) of that Act he was barred from insisting in an action of damages for the same injuries.

Process — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (4)—Reparation.

An action of damages for personal injuries at common law and under the Employers Liability Act 1880 having been dismissed on the ground that the pursuer was barred from insisting in it by having elected to accept the provisions of the Workmen's Compensation Act 1897, the Court, in pursuance of section 1 (4) of that Act, remitted to the Sheriff to determine the amount of compensation due under the Act, and found the defenders entitled to expenses.

This was an action brought in the Sheriff Court at Glasgow by John Ryan or Little, blacksmith, Glasgow, against P. & W. MacLellan, Limited, 129 Trongate, Glasgow, and Clutha Works, Vermont Street, Kinning Park, in which the pursuer craved decree for the sum of £500, or otherwise for the sum of £280, 16s.; “subject alternative sums to deduction of the sum of £19, 10s. paid to account,” as damages due to him at common law or under the Employers Liability Act respectively on account of personal injuries sustained by him while working in the defenders' employment, and due as he alleged to the fault of the defenders or of those for whom they were responsible.

The question in the case came to be, whether the pursuer was barred from insisting in this action by having received certain weekly payments from the defenders.

With regard to this the pursuer averred as follows:—“(Cond. 19) The defenders have since the accident paid to the pursuer to account the sum of £19, 10s. by weekly payments of 16s. 3d. from 29th August 1898 to 13th February 1899. The defenders' statement in so far as inconsistent herewith denied.”

In answer the defenders averred as follows:—“Denied as stated, and explained that pursuer elected to take provisions of the Workmen's Compensation Act 1897, and has been paid regularly under said Act down to the date of raising this action.”

The pursuer averred that the accident took place on 15th August 1898, that his average wages were 36s. per week, that he was still under treatment, and that as a result of the injuries received he had permanently lost the use of his right hand for work.

The defenders in addition to pleas upon the merits of the action pleaded as follows:—“(1.) The action is incompetent and irrelevant either at common law or under the Employers Liability Act 1880. (4) The pursuer having elected to take the benefit of the compensation allowed under the Workmen's Compensation Act 1897, and his one-half wages having been paid to him thereunder, he is barred in insisting on this action.”

Receipts granted by the pursuer for the payments made to him were produced, the nature of which sufficiently appears from the Sheriff-Substitute's first note, quoted *infra*.

The present action was raised in February 1899.

The Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 1 (1), enacts as follows:—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the first schedule to this Act. (2) Provided that . . . (b) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, 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; and shall not be liable to any proceedings independently of this Act except in case of such personal negligence or wilful act as aforesaid."

On 7th April 1899 the Sheriff-Substitute (BALFOUR), after hearing parties' procurators, appointed the case to be put to the procedure roll.

Note.—[After stating the nature of the case]—"On examining the seventeen receipts which have been produced I find that the first three of them bear to be granted 'on account of compensation due to me at this date,' the next four are granted 'in full satisfaction of amount due to me as compensation under the Workmen's Compensation Act 1897, in respect of an accident . . . based on my average weekly earnings in accordance with the said Act,' and the remaining ten are granted either on account of 'compensation' or 'in full of' compensation to date. Now, it appears to me that after the pursuer granted the four receipts for compensation under the Workmen's Compensation Act the remaining receipts (although not specially so expressed) must be held to have been granted for the same compensation as is mentioned in the previous four receipts, that is, for compensation under the Workmen's Compensation Act, and I am of opinion that by granting these fourteen receipts the pursuer exercised his option (in terms of section 1 (2) (b) of the Workmen's Compensation Act) to claim compensation under that Act, and the employers are not liable to pay compensation independently of that Act.

"The defenders' averment (No. 19) as to the pursuer having elected to claim compensation under the Workmen's Compensation Act is met by a simple denial on the part of the pursuer, and with the view of

giving the pursuer an opportunity of considering his position and stating definitely whether he has any relevant averments to make as to the footing on which he signed the receipts, and as to whether he understood them, I have continued the case till the 13th inst."

Thereafter the pursuer lodged a minute in which he "craved leave of the Court to amend the record by adding at the end of the 19th article of the condescence the words, 'Explained that the pursuer accepted such payments and granted receipts therefor on the footing that they were merely to account of compensation due to him by law in respect of said injuries, and that he did not understand that he was thereby making an election as averred by the defenders.'"

On 9th May 1899 the Sheriff-Substitute issued the following interlocutor:—"Having heard parties' procurators, sustains the first and fourth pleas-in-law for the defenders, dismisses the action, and decerns: Finds the pursuer liable to the defenders in expenses," &c.

Note.—"In accordance with the suggestion in my previous interlocutor the pursuer proposed to amend his record to the effect that he accepted the payments and granted the receipts on the footing that they were merely to account of compensation due him by law, and that he did not understand that he was thereby making an election. It appears to me that this amendment does not meet the requirements of the case. There is nothing said about the pursuer being in a weak state of mind or body, or that he was in a condition which rendered him unable to understand the documents, or that he was induced to grant the receipt by representations made by the defenders. Having regard to the recent case of *Mathieson v. Hawthorns*, 36 S.L.R. page 356, I am of opinion that the pursuer has not stated a relevant case."

The pursuer appealed to the Sheriff (BERRY), who by interlocutor dated 3rd August 1899 recalled the interlocutor appealed against, and allowed a proof before answer.

Note.—"I think nothing has taken place to bar the pursuer from insisting in his present action. No claim seems to have been made by him against his employers under the Workmen's Compensation Act, and they have entered into no agreement to pay him compensation under it. They are apparently free to discontinue making payments to him when they please. In my view there has been no such exercise of an option on the part of the pursuer to take his remedy under the Workmen's Compensation Act as to prevent him from suing the defenders independently of its provisions."

The pursuer appealed to the Court of Session for jury trial.

It was intimated from the bar on behalf of the pursuer that he was willing (1) to repay the sums received from the defenders, and (2) that such repayment should be made a condition of his proceeding with the present action.

Argued for the defenders—The pursuer was barred from insisting in this action. The terms of the receipts granted by him showed that he had elected to claim compensation under the Workmen's Compensation Act 1897, and that being so, he could not now sue his employers at common law or under the Employers Liability Act 1880.—Workmen's Compensation Act 1897, section 1 (1) (b); *Campbell v. Caledonian Railway Company*, June 6, 1899, 1 F. 887. No relevant ground for setting aside the receipts granted by the pursuer had been stated on record.—*Mathieson v. Hawthorns & Company, Limited*, January 27, 1899, 1 F. 468.

Argued for the pursuer—The pursuer was not barred from insisting in the present action. *Prima facie*, he had a right to sue at common law or under the Employers Liability Act, and the defenders were bound to produce some agreement by which the pursuer had given up that right. No such agreement was produced. There was nothing to show that the pursuer had elected to abandon his right to sue and to content himself with the provisions of the Workmen's Compensation Act. The mere taking of payments did not necessarily infer election. In the receipts produced there was no discharge by the pursuer of his right to sue at common law or under the Employers Liability Act; and, on the other hand, there was no obligation upon the defenders to go on making weekly payments to the pursuer. This case was therefore distinguished from cases like *Wood v. North British Railway Company*, July 2, 1891, 18 R. (H.L.) 27, where there was an agreement to accept payment of a certain sum as in full of all claims. Here there was no agreement binding upon either side. Apart from this, the receipts produced were obtained from the pursuer by the defenders without explaining to him what his rights were, and what effect the granting of such receipts was intended to have. In the case of *Campbell v. Caledonian Railway Company, cit.*, the Lord President Robertson told the jury at the trial that employers were bound to give such explanations before taking such receipts from their workmen. Further, all that the Workmen's Compensation Act provided was that the employer should not be bound to pay both under the provisions of that Act and apart from it. The pursuer did not propose that he should do so here. The Act did not make the workman's original election final and irrevocable. From the 4th sub-section of section 1 it appeared that a workman who had elected to proceed under the law apart from the Act might, if he failed in his action, obtain compensation under the Act, which showed that election to proceed in one of the ways which was open to a workman was not in itself a bar to his ultimately proceeding in the other way.

LORD JUSTICE-CLERK—The pursuer here is brought face to face with the fact that receipts for the sums paid to him have been granted by him in very specific terms.

Four of them bear to be granted in "full satisfaction of amount due to me as compensation under the Workmen's Compensation Act 1897, . . . based on my average weekly earnings in accordance with the said Act." Having accepted payments on that footing he now wishes to go on with an action under the Employers Liability Act. In these circumstances I would have expected that he would have given some clear explanation as to how he came to grant such receipts showing that he was entitled to have them set aside. Accordingly, he was invited by the Sheriff-Substitute to furnish such explanations as he could, and in response to that invitation he put in a minute proposing to amend the record by stating that he "accepted such payments and granted receipts therefor, on the footing that they were merely to account of compensation due to him by law in respect of 'his' injuries, and that he did not understand that he was thereby making an election as averred by the defenders." That amendment does not appear to me to be relevant to be admitted to probation with the view of showing that he was entitled to have these documents set aside. I am therefore for sustaining the defenders' fourth plea and dismissing the action.

But under the Workmen's Compensation Act 1897, section 1, sub-section 4, the pursuer can obtain a decree under that Act without the necessity of instituting any fresh proceedings, and I think the proper course here will be to remit back to the Sheriff Court so that the amount of compensation due to the pursuer under the Compensation Act may be finally adjusted.

LORD M'LAREN—It is perfectly plain that compensation under the Workmen's Compensation Act 1897, and compensation under the Employers Liability Act are mutually exclusive. If a workman accepts compensation under the one he necessarily waives his rights under the other. Now, in so far as appears from evidence in writing, the pursuer has accepted payments under the Workmen's Compensation Act, and so it would appear that he had elected to take compensation under that Act. No explanation consistent with the claim now set up is offered as to how he came to grant the receipts which are produced. If I had thought there were any merits in the case—if the pursuer had been imposed upon, or if he had been in weak health when the receipts were taken from him—I should have been disposed, as I imagine your Lordships would, to allow inquiry. But there is nothing of that sort alleged here. I can only gather from the summons that second thoughts are best, and that the pursuer now prefers to proceed under the Employers Liability Act. I think that he is not entitled to do so, and that this action must be dismissed. But under the kindly provisions of the Workmen's Compensation Act we can remit to the Sheriff Court to have the amount due to the pursuer under that Act determined, and I think we should do so here.

LORD TRAYNER—I agree. I think that the view which the Sheriff-Substitute took was the right one. The pursuer might have brought an action at common law or under the Employers Liability Act, but he did not do so, and it appears that from 29th August 1898 (a fortnight after he received the injury complained of) down to two days before the raising of the present action he was receiving payments from his master nearly equal in amount to the maximum sum obtainable by him under the Workmen's Compensation Act. He says these were merely payments to account of what was due to him at law. He cannot take up that position now. The receipts granted by him for these payments bear to be granted as "in full satisfaction of the amount due to him as compensation under the Workmen's Compensation Act," based on his average weekly earnings, "in accordance with the said Act."

If any valid objection had been stated to the receipts, — if the pursuer could have stated any relevant ground for setting them aside — the case might have been different. But if nothing of that kind is said — and it is not said here — then these discharges must stand against him according to their terms, and according to their terms they are a bar to this action going on.

I am of opinion that the pursuer must be held to have exercised his option, and I therefore agree with your Lordships that this action should be dismissed.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced this interlocutor:—

"Recal the interlocutor appealed against, as also the interlocutor of the Sheriff-Substitute of Lanark, dated 9th May 1899: Sustain the fourth plea-in-law for the defender: Dismiss the action: Remit to the Sheriff to determine the amount due to the pursuer under the Workmen's Compensation Act 1897, and decern: Find the respondents entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Pursuer—A. S. D. Thomson. Agents—J. Douglas Gardiner & Mill, S.S.C.

Counsel for Defenders—W. Campbell, Q.C.—Chisholm. Agents—Anderson & Chisholm, Solicitors.

Friday, January 12.

SECOND DIVISION.

[Sheriff-Substitute at Edinburgh.]

M^o MAHON v. MATHESON.

(*Ante*, 36 S.L.R. p. 704.)

Executor—Decree Against Executor—Construction of Decree—Admissibility of Evidence to Construe Decree.

A small-debt summons was raised against "J. M., commission agent, 21 Guthrie Street, Edinburgh, trustee and sole executor on the estate of the deceased Mrs J. W., . . . , defender." The decree following thereon found "the within designed J. M., as libelled, defender, liable" for the sum sued for.

The pursuer proceeded upon this decree to poind certain articles of furniture, the private property of J.M. In a process of interdict against sale under the poinding a proof was allowed, from which it appeared that J.M. had no trust funds in his hands either at the date of the decree or at the time when the debt due by the deceased was first intimated to him.

Held that *ex facie* the decree was to be construed as a decree against J.M. as trustee and executor, and not as an individual, and that this construction had not been displaced by the proof.

This is a sequel to the action reported *ante*, vol. xxxvi. p. 704, and 1 F. 896.

The proof allowed by the interlocutor of Court of 7th June 1899 was taken before the interim Sheriff-Substitute (HARVEY), who on 13th November pronounced the following interlocutor:—"Finds in fact (1) that the deceased Mrs Jane Smith or Charlton or Ward, formerly residing at 5 South College Street, Edinburgh, died on 17th July 1897; (2) that the pursuer in the present action was duly confirmed executor-nominate upon the estate of the said deceased Mrs Ward, and was the sole accepting trustee under her trust-disposition and settlement; (3) that by minute dated 16th August 1897 he appointed W. R. Mackersy, W.S., to be law-agent in the trust; (4) that the sole beneficiary under the said trust was Miss Mary Elizabeth Ward, daughter of the said deceased Mrs Ward; (5) that the trustee having duly made up a title in his own name, by disposition dated 13th and recorded 14th December 1897, disposed and conveyed the heritable estate falling under the trust to Miss Ward; (6) that the executry funds were uplifted and administered by Mr Mackersy, and were never in the personal possession of the trustee; (7) that by discharge, dated 9th March 1898, proceeding upon accounts duly audited, the trustee was discharged of his intrusions and actings with the executry funds by Miss Ward; (8) that after the date of this discharge neither the trustee nor his agent had any executry or trust-estate in his possession; (9) that no notice is proved to have