Thursday, November 19.

FIRST DIVISION.

[Sheriff-Substitute at Glasgow.

MULLIGAN *v.* DICK & SON.

Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 6—*Claim against Party Liable Other than Employer — Exercise of Option — "Proceed" — Bar — Settlement without Legal Proceedings — Effect of Discharge without Prejudice to Claim for Compensation.*

The Workmen's Compensation Act 1897 enacts (section 6)—"When 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, the workman may, at his option, proceed either at law against that third party 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."

A workman who was injured made a claim against a party not his employer whom he alleged to be liable in damages at common law, and received a payment in settlement of his claim without having resort to legal proceedings. He granted a receipt bearing that he accepted the payment made "without prejudice to" his claim against his employer for compensation. In a subsequent claim for compensation under the 1897 Act, *held* that the workman had exercised his option to proceed against the third party liable at law, and was therefore barred from claiming compensation from his employer.

This was a case stated for appeal by the Sheriff-Substitute at Glasgow (STRACHAN) in an arbitration under the Workmen's Compensation Act 1897, between Andrew Mulligan, labourer, Glasgow, and John Dick & Son, masons there.

The case set forth that the following facts were admitted or proved—"1. That the appellant was a labourer in the employment of the respondents. 2. That the respondents were contractors for the mason work in connection with the repair and reconstruction of the building of the Grosvenor Restaurant in Gordon Street, Glasgow. 3. That William Baird & Son, roof and bridge builders, Glasgow, were contractors for the iron and steel work in connection with the said contract. 4. That on 5th November 1902, while engaged in the course of his employment at said building, the appellant was struck on the back by a hammer or other heavy article, which fell upon him from a height of about 60 feet, and that as a result of said accident he was incapacitated for his work. 5. That the appellant made a claim against the said William Baird & Son for compensation on the ground that the falling of the hammer by which he had been injured was caused through the fault of a workman in their employment, and the sum of £17, 2s. sterling was paid to him by the said William Baird & Son in full settlement of his claim. 6. That a receipt was granted by the appellant, dated 27th February 1903, whereby he acknowledged to have received from the said William Baird & Son 'the sum of £17, 2s. sterling, in full settlement of my claims against the said William Baird and Son, in respect of an accident which happened to me in the Grosvenor Restaurant, Gordon Street, on or about the 5th November last, but always without prejudice to my claim for half wages under the Workmen's Compensation Act 1897, against my employers in respect of said accident.'"

In these circumstances the Sheriff-Substitute held in law "that the appellant, having claimed and received damages from the said William Baird & Son, was barred from claiming compensation from his employers."

At Mulligan's instance he stated this case for appeal, with the following question of law—"Whether the appellant, having claimed and received damages from the said William Baird & Son 'without prejudice to his claim for half wages under the Workmen's Compensation Act 1897, against his employers,' is barred from claiming compensation from the respondents, his said employers?"

Argued for the appellant—The Sheriff was wrong in holding that the case fell under section 6 of the Act (quoted in rubric). The proceedings there contemplated were legal proceedings. *Separatim*, the fact that the receipt granted was expressed to be "without prejudice" to the claim for compensation kept that claim alive on a principle well established in the law of cautionary obligations—*Muir* v. *Crawford*, May 4, 1875, 2 R. (H.L.) 148, per Lord Ch. Cairns at p. 149. The converse of the present case, *i.e.*, the case where the workman first claimed compensation and then claimed from the third party liable, had been decided on the view now contended for in England, on the ground that a receipt "without prejudice" had been given—*Oliver* v. *Nautilus Steam Shipping Company*, July 9, 1903, 19 Times L.R. 607. (*Bennett* v. *Wordie & Co.*, March 16, 1899, 1 F. 855, 36 S.L.R. 643, was also cited.)

Argued for the respondents—On the plain meaning of the words of section 6 the workman had exercised his option by proceeding against the third party liable. The word "proceed" was used in its popular sense, not in its technical and forced meaning of taking legal proceedings—*Powell* v. *Main Colliery Co.* (1900), A.C. 366, per Lord Robertson at p. 381. The case of *Oliver* (*cit. supra*) was decided as a question of fact, and did not touch the present case. If the appellant's contention were right, the third party who had settled the claim against him, would

in addition have to relieve the employer of the compensation found due. That is to say, he would have to pay twice, and the workman would receive both compensation and damages—the result which section 6 was passed to prevent.

LORD PRESIDENT—The question in law which is put for our decision in this case is whether the appellant having claimed and received damages from William Baird & Son "without prejudice to his claim for half wages under the Workmen's Compensation Act 1897 against his employers" is barred from claiming compensation from the respondents, his employers.

The facts of the case are very short. The appellant was a labourer in the employment of the respondents, who were contractors for the mason work in connection with the repair and reconstruction of the building of the Grosvenor Restaurant in Gordon Street, Glasgow, and William Baird & Son, roof and bridge builders, Glasgow, were contractors for the iron and steel work in connection with the repair and reconstruction.

On 5th November 1902, while the appellant was working at the building, he was struck on the back by a hammer which fell upon him from a height of 60 feet, and as a result of the accident he was incapacitated from his work. The appellant made a claim against William Baird & Son for damages on the ground that the falling of the hammer by which he was injured was caused through the fault of a workman in their employment, and Baird & Son paid to him the sum of £17, 2s., in full settlement of his claim against them. Baird & Son were not his employers, and therefore so far no question as to the liability of the appellant's employers was introduced. The receipt which the appellant granted to Baird & Son bore that the payment was in full settlement of his claims against them, "but always without prejudice to my claim for half wages under the Workmen's Compensation Act 1897 against my employers in respect of said accident." If, therefore, language was competent to reserve his claim under the Act, it was unequivocally reserved. The question therefore comes to be, whether the fact of the appellant having claimed against and received a payment from a third party in respect of that party's fault deprives him of the remedy given by the Act, the basis of which remedy is not fault at all. The grounds of the claim are different, the persons against whom the claim was made are different, and it would, *prima facie*, be very difficult to see any reason why the fact of A having had a claim made against him, and having paid for his own fault, should have the effect of releasing B, who was no party to the settlement and who was the employer of the injured man, from the legal claim which is given by the Act of 1897 against B *qua* employer without the necessity of proving fault against him. It is, however, maintained that this is the effect of section 6 of the Act, which provides—[*His Lordship quoted the section*].

Now, that is plainly a provision directed to prevent an injured workman from being paid twice over by two different persons. The Sheriff-Substitute has held that in law the appellant having claimed and received damages from Baird & Son is barred from claiming compensation under the Act from his employer. I am of opinion that he is right. It seems to me that section 6 in giving an option to proceed either at law against the wrongdoer, who in this case was Baird, or against the employer, makes a clear provision against double compensation for the same injury, and gives a complete option to the workman to take one or the other but not both. The main argument addressed to us against the judgment of the Sheriff-Substitute was that in order to this provision applying the words "proceed at law" involve the institution of some proceeding by action or otherwise, and that inasmuch as there was no such proceeding in this case the alternative stated was not raised, and the provision did not apply. But it appears to me that the words "proceed at law" are not used in the technical sense of taking proceedings in a court. It seems to me that the meaning conveyed by the word "proceed" in the Act might be more shortly expressed by the word "go," and that if the workman goes against one party he has elected to take one of the remedies open to him, and that if he takes his common-law remedy he cannot also claim his statutory remedy. I therefore think that the argument that what was meant by the 6th section was some legal or judicial procedure, and not an extra-judicial settlement of a claim duly made, is not well founded, and that the conclusion at which the Sheriff-Substitute has arrived is a sound one. Reference was made to the English case of *Oliver* (19 T.L.R. 607), but it probably is sufficient to say that upon a careful perusal of the report of that case it appears to me to have no bearing upon the present case. If your Lordships decide this case in the way I have ventured to propose we would not be doing anything inconsistent with what was done by the English Court in that case.

LORD ADAM—It appears from the statement of facts in this case that some work was going on in the repair of a building in Glasgow, that the respondents were contractors for the mason work, and the appellant was a workman in their employment. It also appears that Messrs William Baird & Son were contractors for the iron and steel work on the same building. On 5th November 1902 the appellant in the course of his employment on this building sustained an injury by being struck on the back by a hammer or other heavy article, which fell on him from a height of sixty feet. That injury was caused, or alleged to be caused, by a workman for whom Messrs Baird were responsible. In these circumstances, as your Lordship has pointed out, the appellant had two remedies—he could either proceed for damages against the persons who were responsible for the fall of the hammer that is, against Messrs Baird, or

he could claim compensation from his own employers under the Workmen's Compensation Act. The Act did not deprive him of his right to damages if he could make out fault in the person who caused the accident. But here section 6 comes into operation, and provides that he may, in 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." That is what the Act says, and the question here is, Did the workman exercise his option? What happened was that he made a claim against Messrs Baird for damages, and received payment of £17, 2s., and the question is whether in doing so he exercised his option under the Act. I did not understand Mr Campbell to dispute that this was a proceeding for the recovery of damages, but he maintained that it was not a proceeding of the kind specified in section 6, which would bar a claim against the employers under the Act. The argument went the length of maintaining that no matter how large the claim, and no matter how successful it might be in obtaining payment, if it was not in the form of an action at law it was not a proceeding contemplated by the Act, because the provision of the Act means that nothing but an action at law will bar the claim against the employers. The appellant founds on the words of the Act "proceeding, either at law against that person to recover damages," and says that the option which the workman must exercise lies between proceedings at law—*i.e.*, an action in Court, and proceedings under the Workmen's Compensation Act. I think that construction is quite wrong, and that the Act does not mean proceeding at law in that sense. The true construction of the Act is that an alternative is given between a claim under the ordinary common law liability in contradistinction to proceedings under the Act. The statute says that if you take proceedings against the party in fault, that bars you afterwards from proceeding against your employers for compensation. I think that it cannot be disputed here that the appellant did proceed against the party at fault, and therefore exercised the option given to him under the Act. But then Mr Campbell's argument is that he exercised his option in a way that the Act does not recognise, because he accepted a payment from the party in fault under reservation of his claim against his employers for compensation. Now, that reservation might have certain legal results, but I cannot see how the reservation of a claim against his employers could prevent a claim against the party in fault from being an exercise of the option given by the Act.

On these short grounds I think the Sheriff was right in this case. As regards the English case cited I agree with your Lordship that it has no bearing on the present case.

LORD M'LAREN—I do not consider that the 6th section of this Act is open to the criticism sometimes directed against other clauses of the Act. The section is reasonably clear, and it is impossible to give effect to this appeal without doing violence both to the letter and to the spirit of the clause. The hypothesis of this 6th section is that the workman may have two remedies. There may be a legal liability upon some person other than the employer to pay damages, and there is also a claim for compensation under this Act. On that assumption the statute proceeds to give what has been described as an alternative right. Now, when a proposition or a rule is based upon a hypothesis, the logic of the case requires that the rule or proposition should be just as broad as the hypothesis to which it applies, neither broader nor narrower, because the one is the qualifying and guiding condition of the other part of the sentence. I should on this ground think it perfectly clear that the limitation of the right to take proceedings meant the limitation of the right to enforce one or other of the liabilities which are described as liability at common law and compensation under the statute. I might also say that I think the word "proceed" is sufficiently comprehensive to include the recovery of damages by voluntary agreement as well as recovery under a decree. Then, further, the clause indicates the reason for giving only an alternative right, because it ends by saying that if compensation be paid under the Act the employer would be entitled to be indemnified by the other party. That is still proceeding on the assumption that there are two persons who are liable to pay money to the injured workman. If the person other than the employer is to be proceeded against by way of relief, he should not also be liable to pay a separate award of damages to the injured man, and the reason applies just as much to the case of voluntary payments as to payments enforced by decree. It follows, then, in my opinion that as the appellant did claim a sum of money from Messrs Baird, who were not his employers, he is disabled from making a claim against his employers, who would not then have the complete right of relief which they were entitled to under the statute. It is maintained that inasmuch as the money was paid without prejudice to another claim the difficulty is removed; but it is quite plain that the introduction of these words could have no effect in removing the difficulty, because if we held that there was a good claim against the employers, then they must have their right to relief under the statute, and there would be prejudice to the person who has already paid. But that is just an indirect consequence of trying to give the section the construction which the appellant proposes to put upon it. I wish also to reserve my opinion upon the point decided in the case of *Oliver* (19 T.L.R. 607), because in that case the first election was against the employer, and it was held as a condition of the money being repaid that the workman might change his mind and proceed against the other person who was liable at law. That is a very different case from the present case,

because there is no prejudice whatever to the other person if the man has given up his claim against his employer, because that other person being legally liable has no relief against anyone; and if by agreement between the employer and the workman the money is to be repaid, then I do not see that the person otherwise liable could have any defence on the ground of election. If it has not been repaid I can perfectly understand the ground on which the Court of Appeal in England held that the employer was bound to receive the money, and that the action against the true author of the injury should be allowed to proceed. I am therefore for dismissing the appeal.

LORD KINNEAR—I agree with your Lordships that the Sheriff is right. The appellant was injured by an accident for which, on the hypothesis on which the case comes before us, Messrs William Baird & Son, who were not his employers, were responsible on the ground of fault. The appellant claimed damages from Messrs Baird, and obtained £17, 2s. in settlement of his claim, and the question now is whether he can also claim compensation from his employers under the Workmen's Compensation Act. It appears to me that the statute offers a perfectly clear option to the workman in circumstances like the present. He may either go against the person responsible for the injury, who in the running title of the 6th section is conveniently called the stranger, or he may go against his employer for compensation under the Act, but he cannot go against both. Therefore if he has made a claim against the stranger the statute says that he shall have no claim against his employers. But it is said for the appellant that although he claimed and received damages from the stranger, yet the receipt which he gave for it reserved in express terms his claim for compensation, and that therefore he may still claim against his employers. Now, if the question were whether the transaction between the appellant and Messrs Baird had by its terms and according to the true intent of the appellant determined his election, I should have thought there was great force in the argument that the inference of a final election which might otherwise have been derived from the claim made against Messrs Baird was expressly excluded by the terms of the receipt. It is perfectly clear that the appellant did not intend to choose between the two claims. He intended to claim damages from Messrs Baird, and afterwards to claim compensation from his employers. If that proceeding were possible, that is, if the statute would allow it, I think there would be great force in the argument. But then I think that is exactly what the statute does not allow. It says that you must choose between alternative claims, and that if you choose to go against the stranger you cannot also go against the employers. The election is determined for the workman by force of the statute when he has made an effective claim, either against the stranger or against his employers. The argument—I think the only argument—which was stated to exclude the operation of section 6 was that what that section really presented to the workman was not an option between two alternative claims but an option between two different forms of procedure, that is to say, that he has a choice between enforcing his claim by an action at law or by proceedings under the Workmen's Compensation Act, and therefore that if the workman does not find it necessary to enforce his claim against the stranger by action, but finds him ready to settle it without an action, the necessity for the election presented by the statute has not arisen, and the workman may go on to claim compensation from his employers. I think that view depends on an inadmissible construction of the word "proceed" as used in section 6. It is said that the word is used in a technical sense, and that "proceed at law" means proceed by way of an action according to the ordinary course of law, and that it will cover nothing but an action at law. I think that is not the meaning. If this clause is construed according to its obvious meaning without exact attention to grammatical analysis, I should say that two alternatives are proposed to the workman—he may claim at law against the person who is liable on the ground of fault, or he may proceed against his employers for compensation, but that the particular machinery by which he may enforce either claim is not specified. But if we are to give strict attention to mere grammatical construction, I observe that the words are, that the workman may proceed, either at law against the person liable in damages, or against his employers for compensation under the Act. Therefore the word "proceed" covers both branches of the alternative right; and it must be conceded that if the word "proceed" is used with regard to the methods of enforcing compensation under the Act, it cannot mean proceed by an action in the ordinary course of law, because that is not the method by which such a claim can be made good, and therefore the argument founded on the supposed technical force of the term "proceed" necessarily fails.

I consider, therefore, that the alternative presented to the workman is to make his claim against the person liable in damages, or to claim compensation, but not to claim both. That may leave open a question in certain cases as to whether the receipt of money without action may in particular circumstances involve proceeding in the meaning of section 6; but I have no doubt that the circumstances described by the Sheriff in the present case amount to proceeding at law for damages, and to proceeding with the effect of recovering them. The workman has made an effective claim against the stranger liable in damages, and thus his election is necessarily determined, and he cannot also go against his employers under the Act.

I do not think that the doctrine developed in *Muir* v. *Crawford* (2 R.(H.L.) 148) has any application to the question we are now considering. If indeed the discharge of

the employer rested entirely on the legal implication derived from the fact of payment by the person in fault, then it might be a perfectly good answer to his defence for the workman to say, "You are not discharged by my taking payment from Messrs Baird, because I specially reserved my right as against you, and the legal implication of discharge is excluded by the express reservation." But then the discharge of the employer does not rest upon any such legal implication; the statute gives him indemnity, and the discharge to which the Sheriff has found him entitled does not depend on the existence or non-existence of a reserved claim against him, but on the express provision of the statute that if the workman claims against one he cannot claim against the other.

I would only add with regard to the case of *Oliver* (19 T.L.R. 607) that I agree with your Lordship and Lord Adam that the decision in that case does not apply to the circumstances of the present case at all.

The Court answered the question in the case in the affirmative and refused the appeal.

Counsel for the Appellant—Campbell, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondents—Watt, K.C. —Horne. Agents—Connell & Campbell, S.S.C.

Wednesday, November 18.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'MURRICH'S TRUSTEES *v.* M'MURRICH'S TRUSTEES.

Proof—Writ or Oath—Innominate and Unusual Contract — Admissibility of Parole—Transference of Right of Succession — Agreement to Divide Funds Destined to Survivor.

Under a private Act of Parliament certain funds were destined to the survivor of A and B. After A's death his representatives brought an action against B, concluding for declarator that it had been agreed between A and B that on the death of either, one-half the funds should belong to the representatives of the deceased, and one-half to the survivor. They averred that an agreement to this effect had been entered into, and that a draft of a deed giving effect to it had been prepared, but that A had died before the draft was signed by either party. *Held* that these averments could only be proved by the defender's writ or oath—*per* the Lord Ordinary and the Court, on the ground that they set forth a contract of an innominate and unusual character; and *per* Lord M'Laren, on the ground that it was not competent to prove by parole a transference of a right of succession conferred by writing.

This was an action at the instance of Marcus John Brown, S.S.C., Edinburgh, and others, trustees of the late James M'Murrich, who resided near Tarbet, Dumbartonshire, against Peter M'Murrich, residing at Faskadail, Dunblane. During the course of the action Peter M'Murrich died, and his testamentary trustees were sisted as defenders in his stead.

The following narrative of the facts of the case is taken from the opinion of the Lord Ordinary (KINCAIRNEY)—"In the year 1879 the lands of Stuckgown were sold under a private Act of Parliament, and the price was invested in the hands of trustees under a destination specified in the statute, in terms of which James M'Murrich became liferenter of the funds, and he was so in 1902. At that time the fund stood destined in fee to the survivor of James M'Murrich the liferenter, and of Peter M'Murrich, who was apparently his nephew. Both were old men, James being 90 and Peter 76.

"James M'Murrich died on 9th October 1902, and if the succession to the fund were regulated by the statutory destination Peter M'Murrich would have taken the whole funds, amounting to £30,000 or thereby.

"But the representatives of James M'Murrich claim one-half of the funds, and they have raised this action to enforce that claim. They make that demand on the following grounds—They aver that in October 1902 an agreement was made between James and Peter M'Murrich to the effect that on the death of either the fund should be divided equally between the survivor and the representatives of the deceaser, instead of the whole passing to the survivor. They state that this agreement got the length of being embodied in a draft and was ready for signature when James M'Murrich died, it is said, suddenly. It does not appear that either draft or deed was submitted to Peter M'Murrich.

"Defences to this action were lodged by Peter M'Murrich, who denied that he assented to the agreement averred, and the question raised by the record is whether the alleged agreement for equal division is established or not. That resolves into a question as to the mode of proof."

The exact terms of the pursuer's averments so far as material are fully stated in the opinion of the Lord President, *infra*.

The defenders pleaded, *inter alia*—"(4) The agreement alleged to have been entered into being an innominate contract of an unusual kind and of great importance can only be proved by probative writing."

On 31st July 1903 the Lord Ordinary pronounced the following interlocutor—"Finds that the averments of the pursuers as to the alleged agreement between James M'Murrich and Peter M'Murrich can only be proved by writ or oath of party."

Opinion.—[*After stating the facts ut supra*]—"I am of opinion that this alleged agreement is only provable by writ or oath. The contract averred is innominate, it is important, and it is certainly unusual, and