service;" and then the Sheriff proceeds to deal with the application.

The case which we are dealing with is an ordinary application brought in the Sheriff Court under common law forms, and its merits appear to me clearly to raise a very important question under the 7th section of the Rivers Pollution Act. The proceeding is therefore in substance brought under that Act, and I observe that there was more than one long adjourned diet of proof in the course of its passage through the Inferior Court. It is an action in the Sheriff Court raised for the purpose of obtaining a decision whether the Magistrates are bound to allow the pursuers to empty their drains into the public sewers.

Besides the reasons I have adverted to I think that the question raised is too large and important to be decided finally by a local Judge from whom there is no further appeal, to the Superior Court.

LORD SHAND concurred.

LORD DEAS was absent.

The Court repelled the objection to the competency, and the case was sent to the roll.

Counsel for Pursuers (Respondents)—Guthrie. Agents—W. & J. Burness, W.S.

Counsel for Defenders (Appellants)—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, January 14.

FIRST DIVISION.

[Sheriff of the Lothians.

PATON *v.* NIDDRIE AND BENHAR COAL COMPANY (LIMITED).

Reparation—Process—Sheriff—Removal to Court of Session—Appeal—Judicature Act (6 *Geo. IV. c.* 120), *sec.* 40—*Court of Session Act* 1878 (31 *and* 32 *Vict. c.* 100), *sec.* 73—*Employers Liability Act* 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 6—*Sheriff Courts Act* 1877 (40 *and* 41 *Vict. c.* 50), *sec.* 9.

Held that an action brought in a Sheriff Court alternatively at common law and under the Employers Liability Act 1880 was competently brought up to the Court of Session by an appeal for jury trial which was not lodged till the fifteenth day after proof had been allowed, the provisions of the Act that an action under it "may be removed to the Court of Session . . . in the manner provided by, and subject to the conditions prescribed by, sec. 9 of the Sheriff Courts (Scotland) Act 1877" not having the effect of excluding appeal brought in the ordinary form under the Judicature Act.

The Judicature Act 1825 (6 Geo. IV. c. 120), sec. 40, provides—. . . . "In all cases originating in the Inferior Courts in which the claim is in amount above forty pounds, as soon as an order or interlocutor allowing a proof has been pronounced in the Inferior Court . . . . it shall be competent to either of the parties who may conceive that the case ought to be tried by jury to remove the process into the Court of Session." . . .

By A. S., 11th July 1828, sec. 5, such proceeding to remove the action must be taken within fifteen days of the interlocutor allowing proof.

The Court of Session Act 1868 (31 and 32 Vict. c. 100), sec. 73, provides—"It shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the Inferior Court in which the claim is in amount above forty pounds, at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV. c. 120." . . .

Robert Paton, miner, Arthur Place, Cowdenbeath, and his wife, Mrs Mary Gray or Paton, raised this action in the Sheriff Court at Edinburgh, against The Niddrie and Benhar Coal Company, for damages for the death of their son Neil Paton, which was occasioned by an accident in the defenders' pits through the alleged fault of the defenders. The pursuers claimed £500 in name of damages and *solatium* for the death of their son, at common law. Alternatively, the pursuers concluded, under the Employers Liability Act of 1880, for £234, being the alleged amount of three years' earnings of the deceased. The defence was that the action was irrelevant, and that the defenders were not in fault.

On 12th December 1884 the Sheriff-Substitute allowed a proof.

The pursuers, on 27th December 1884, appealed to the Court of Session for jury trial.

The Employers Liability Act 1880 (43 and 44 Vict. c. 42), sec. 6, provides that actions brought under it "shall be brought in a County Court," which term shall mean with respect to Scotland the Sheriff Court. Sub-sec. 3 provides—"In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, sec. 9 of the Sheriff Courts (Scotland) Act 1877."

The Sheriff Courts (Scotland) Act 1877 (40 and 41 Vict. c. 50), sec. 9, provides—". . . If a defender shall at any time before an interlocutor closing the record is pronounced in the action, or within six days after such an interlocutor shall have been pronounced, lodge a note in the process in the following or similar terms—that is to say, The defender prays that the process may be transmitted to the Court of Session . . . it shall be the duty of the Sheriff-Clerk forthwith to transmit the process to the Keeper of Rolls of the First Division of the Court of Session." . . .

When the case appeared in the Single Bills, the respondents objected to the appeal as incompetent to bring up an action founded on the Employers Liability Act of 1880, and argued that sec. 6 of that Act provided only one method of removing a case to the Court of Session for jury trial—namely, the manner set forth in sec. 9 of the Sheriff Courts (Scotland) Act of 1877. In the present case the interlocutor closing the record was dated 12th December 1884, and the date of the appeal was 27th December 1884. The note of appeal was thus dated more than six days after the date of the interlocutor closing the record.

Argued for the pursuer—The provisions as to removing contained in sec. 6 of the Employers Liability Act of 1880 were merely permissive

(providing that the action "may" be removed), and that there was nothing in the Employers Liability Act to deprive the pursuers of the right of appeal for jury trial under the Judicature Act; the right of appeal therein contained could not be taken away by implication. The Sheriff Court Act of 1877, by sec. 9, gave a right of removal to the defender only, and all that the Employers Liability Act did was to extend that right to either party. It did not follow that the ordinary method of bringing up an action of damages for more than £40 was affected.

At advising—

LORD PRESIDENT—This is an appeal for the purpose of having the cause tried by jury, and it professes to be brought under sec. 40 of the Judicature Act 1825, as amended by the Court of Session Act 1868, sec. 73.

The proceeding, then, contemplated, is the removing a cause from an Inferior to a Superior Court for the purpose of proceeding with it in the Superior Court. It is not therefore in the proper sense of the word an appeal, still it takes the form of an appeal, because in the original Judicature Act 1825 the removal was effected by an advocation, and in the Court of Session Act 1868 the only substitute for the abolition of advocation is a note of appeal. In substance, however, the thing undoubtedly was the removal of the cause from one Court to another for the purpose of its being proceeded with in the Court to which it is removed.

Now, in the Employers Liability Act there is another remedy of the same kind given—that is to say, it is provided that at any time before the closing of the record in an action brought under that statute, or within six days thereafter, either party may remove the cause from the Sheriff Court to the Court of Session by complying with a certain form, which is not identical by any means with the form provided by the Judicature Act, but it has the same effect of removing the process from the one Court to the other with the view of being proceeded with.

The time at which the removal takes place in the one case is different from that in the other, and the conditions under which the case may be removed in the one case and the other are different. The question therefore comes to be, whether in the Employers Liability Act it is intended to substitute the one mode of removal for other, and so imply the abolition of the old mode of removal?

It rather appears to me that this right of removing a cause from an Inferior to a Superior Court, provided by the Judicature Act and continued by the Court of Session Act of 1868, cannot be taken away by implication.

There is nothing inconsistent in the subsistence of both these modes of removing a cause from the one Court to the other. It is to be done at different stages of the process; it is to be done under different conditions and in a different manner; and if in the present case the appellants missed their opportunity of removing the cause from the Sheriff Court, under the Employers Liability Act, before the record was closed, or within six days thereafter, there is nothing to take away from them their other remedy of removing the cause as soon as an order for proof has been pronounced. I think, therefore, that this appeal is competent.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Court repelled the objection to the competency of the appeal, and ordered issues to be lodged.

Counsel for Pursuers (Appellants) — Hay. Agent—A. Menzies, S.S.C.

Counsel for Defenders (Respondents)—Ure. Agents—Dove & Lockhart, S.S.C.

Saturday, January 17.

SECOND DIVISION.

[Sheriff of Midlothian.

SCOTT *v.* ROY (SCOTT'S TRUSTEE).

(*Ante*, p. 147, November 26, 1884).

Bankruptcy — Sequestration — Appeal — Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 170.

Held that an appeal is competent against a judgment of a Sheriff recommending to a Government Department that that Department should consent to a portion of a bankrupt's pension being paid to his trustee for the purposes of his sequestration.

Pension—Application of Portion of Pension to Purposes of Sequestration — Bankruptcy Act 1856, *sec.* 149.

A bankrupt's sole asset was a Government pension. He had a large family dependent on him. *Held* that the pension not being more than enough for the support of the bankrupt and family, there was no ground for a recommendation to the Department from which it was paid, that a part of it should be paid to the trustee for the purposes of the sequestration.

The Act 19 and 20 Vict. c. 79, Bankruptcy (Scotland) Act 1856, sec. 149, provides—"The . . Sheriff may order such portion of the . . . pension of any bankrupt, as on communication from the . . . Sheriff to the . . . chief officers of the department to which such bankrupt may belong or may have belonged . . . they may . . . consent to in writing, to be paid to the trustee in order that the same may be applied in payment of the debts of such bankrupt." . . .

In March 1884 the estates of J. G. Scott were sequestrated. W. G. Roy, S.S.C. was appointed trustee. At the time of the sequestration the bankrupt was in receipt of a pension of £46 a year from the Post-Office.

The trustee presented this petition—a former petition having been dismissed on the ground that it had not been intimated to the bankrupt—(*vide supra*, p. 147), in which he prayed the Court to recommend the Postmaster-General or other chief officer or officers of Her Majesty's Post-Office, in virtue of section 149 of the Bankruptcy (Scotland) Act 1856, to consent to £10 out of the pension of £46, more or less, as to the Court and such officers might seem reasonable, being paid to him (the trustee) in order that the same might be applied in payment of the bankrupt's debts, and thereafter on receiving such consent, to ordain the said portion of the pension to be paid as aforesaid."