The Court, without delivering opinions, granted authority to the *curator bonis* to resign the trusts on behalf of his ward.

Counsel for Petitioner—Begg. Agents—Morton, Neilson, & Smart, W.S.

Friday November 10.

SECOND DIVISION

[Lord Lee, Ordinary.

MORRISON *v.* BAIRD & COMPANY.

Master and Servant — Reparation — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 6 — *Removal of Action to Court of Session— Competency.*

Held (1) that an action of damages against an employer in respect of injuries suffered by his servant while in his employment may competently be laid both at common law and under the Employers Liability Act 1880; and (2) that the removal of such an action from the Sheriff Court to the Court of Session, under section 6 of that Act, brings up for decision the whole action both at common law and under the Act.

Observations (*per* Lord Justice-Clerk and Lord Young) on the nature of the change effected in the law by the Employers Liability Act 1880.

This was an action raised in the Sheriff Court of Lanarkshire at Airdrie, at the instance of Mrs Christina Bird or Morrison, widow of Sylvester Morrison, concluding for £500 damages in respect of his death while in the employment of the defenders William Baird & Co., from injuries received when at his work in their Westfield Limestone Pit.

The pursuer averred—"(Cond. IV.) The whole work in the Westfield Pit is carried on under the control and supervision of a general manager, and a staff under him, appointed and paid by the defenders. Their general manager, Mr William Cameron, is non-resident, but comes to inspect and supervise the works once a-week or thereby. Under him John Campbell acts as underground manager, and is constantly in the pit. These managers and the staff employed by the defenders have the whole control and management of the works. They have the power to employ or dismiss any of the men in the pit, and to order any portion of the work to be done or to be stopped. The character of the working is very hazardous, chiefly owing to the great height and steep dip of the limestone seam. The men working on the benches [explained by a preceding article to mean plies or slabs of limestone separated by "beds" or natural splits] require chains fastened to the rock to enable them to hold on and keep a footing on the benches. It is the duty of those in charge of the works, and employed for the purpose by the defenders, to see that every possible precaution is taken for the safety of the men working in the pit. The mine is worked under 'The Metalliferous Mines Act, 1872'. (Cond. V.) The defenders are in the habit of arranging with certain of their men to excavate one or more of the working faces of limestone in the pit, giving them a fixed rate for every ton of limestone produced at the bottom of the shaft, and authorising them to employ the necessary bossers, benchers, breakers, and drawers. Such arrangements are not made for any fixed period, and either party can bring them to an end whenever he pleases. In all cases the defenders retain to themselves the whole control and supervision of the working, and of its various parts, and of all the men in the mine, and all the workmen engaged in the mine form one organisation, and are subject to one general control exercised by the defenders or by those to whom their authority is delegated. (Cond. VI.) At the time when the accident hereinafter mentioned occurred, one of the working faces of the said pit was wrought by James M'Intyre, a miner residing in West Calder, under an arrangement with the defenders such as is above described. M'Intyre had under him the various classes of workmen required for taking out the stones. The said deceased Sylvester Morrison, who was not himself a practical miner, was for a fortnight prior to the said accident engaged under M'Intyre as a drawer. His work was to draw the limestone in the trucks from the working face to the pit shaft. On the forenoon of said 22d April 1881 he was requested by the said James M'Intyre to take his dinner an hour before the other miners took theirs, and to come while they were absent to assist him in removing stones from the place where the benchers were working, down to where the breakers were working, that they might thus clear the way for the benchers to resume work when they had taken their dinner. He did as he was ordered, and while he was engaged removing the stones a large mass of rock, weighing several tons, fell from the face of rock above them, crushing the said Sylvester Morrison, and jamming him against other stones which lay beside him, and inflicting serious internal and external injuries through which he died on or about 29th April 1881. M'Intyre also suffered injuries which prevented him resuming work for some weeks. (Cond. VII.) The mass of rock which fell down and caused the accident had been left by those in charge of the mine in a dangerous position, projecting over the face of the rock, almost detached from the rest of the rock, and almost without any support. The accident through which the said Sylvester Morrison lost his life occurred through the culpable negligence and fault of the defenders, or of the said William Cameron, John Campbell, or James M'Intyre, or one or more of them, or of others in the defenders' employment, in charge of the working of said pit, or at least of the said working face, or by reason of the defective and insufficient arrangements made by the defenders for carrying on the works. The said Sylvester Morrison did not know that the said mass of rock was insufficiently supported. He was ordered from his regular work of drawing trucks along the levels to the pit shaft to the place where he met the accident, without being told that he incurred any special risk. After the accident wooden supports were placed on the roof of the pit along the said sand gurry, to prevent more accidents arising from stones falling down on the men working below."

The defenders denied fault. They averred that the work of excavation in their pit was done under contracts with limestone miners, who were paid at a certain rate per ton excavated, and that these

contractors employed and paid their own "bossers," "benchers," and "drawers." They denied that they had any power to dismiss the contractors' men. They averred that when Morrison was injured he was not their servant, but was employed and paid by M'Intyre, who was a contractor with them and not their servant.

The pursuer pleaded, *inter alia*:—"(1) The death of the said Sylvester Morrison having been caused by the negligence or faults of the defenders, or those for whom they are responsible, the pursuer is entitled to decree against them at common law in terms of the conclusion of the summons. (2) The accident in question having been caused by the negligence of persons in the service of the defenders who had superintendence entrusted to them, whilst in the exercise of such superintendence, the pursuer is entitled to decree in terms of the Employers Liability Act 1880."

Then followed certain other pleas, which like the second were founded on sec. 1 of the Employers Liability Act 1880.

The defenders pleaded, *inter alia*—"(1) The action is incompetent as laid;" and also—"The statements for pursuer are irrelevant."

The record having been closed, the pursuer, in virtue of the provisions of sub-section 3 of section 6 of the Employers Liability Act 1880, lodged a note to have the process transmitted to the Court of Session.

Section 6 of the Employers Liability Act 1880 provides that "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 presented by, section 9 of the Sheriff Court (Scotland) Act 1877." That section provides that if a defender of any action in a Sheriff Court "shall at any time before an interlocutor closing the record is pronounced in the action, or within sixty days after such 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,' the Sheriff Clerk shall transmit the process forthwith to the Keeper of the Rolls of the First Division, who shall, under the directions of the Lord President, mark the Division and Lord Ordinary before whom it is to depend, and transmit it to the Clerk at the bar of such Lord Ordinary, and the process shall thereafter proceed as if it had been initiated in the Court of Session."

The process having been marked to Lord Lee, his Lordship, on the motion of the defenders, allowed this additional plea-in-law for them, as proposed at the bar, to be added to the record—"(2) The removal of the action to the Court of Session under the Act of 1880 infers the abandonment thereof, so far as not founded on that Act; at all events, such removal cannot bring up the action except in so far as it is founded on the said Act, and *quoad ultra* it should be dismissed." Thereafter he repelled their first plea, "The action is incompetent as laid," and the additional plea just stated, and appointed issues to be adjusted for the trial of the cause.

"*Opinion.*—In this case, as in a good many other cases, some of which have already gone to trial and been disposed of, I have, as a matter of course, given effect to the view of the recent statute which I understand to have been authoritatively expounded in the case of *M'Avoy* v. *Young's Paraffin Oil Company* (Nov. 5, 1881, 9 R. 100).

"That view is that the Employers Liability Act was intended to operate, and operates, merely to exclude in certain cases a defence which but for its provisions would be pleadable by the employer against a claim of damages for personal injury suffered in his employment. The Act bears to be 'An Act to extend and regulate the Liability of Employers.' The leading enactment is framed upon this principle, and provides that in the specified cases the workman or his representatives 'shall have the same right of compensation and remedies against the employer' as if he had not been a workman in his service nor engaged in his work. The Lord Justice-Clerk accordingly stated that 'that Act was only intended to clear up the law.' And Lord Young explained even more fully 'that the operation of the Act of 1880 is just to exclude a defence which theretofore would have been competent to the employer in the event of its appearing to the satisfaction of the jury that the defect or neglect which led to the accident was attributable to the carelessness or negligence of fellow-workmen.'

"When that case came back to the Outer House for the adjustment of issues the point now pleaded was raised by the Lord Advocate, and fully discussed before me (19 Scot. Law Rep. 137). I thought that the ratio of the decision upon the question of procedure settled the point, and I so decided; and I am bound to say that in the trial of the cause upon an issue which left it open to the pursuer to maintain his claim, both on the common law alone and also on the law as amended by the statute, no difficulty arose either in ascertaining the verdict of the jury (which ultimately proceeded on the statute) or in submitting that verdict to the consideration of the Court upon a motion for a new trial.

"In other cases the same course has been followed (*Moffat* v. *Lyall*, tried 2d February 1882; *Gordon* v. *Walker*, *Henderson*, *& Company*, issues adjusted 26th May; *Strachan* v. *Aitken & Mansell*, issues adjusted 6th June; *Hendry* v. *Cassels*, issues adjusted 20th June).

"It is now again pleaded, however, that the removal of the action to the Court of Session infers the abandonment of it so far as not founded on the statute, or, at all events, that such removal brings up only so much of the action as is founded on the statute; and it was stated to me that the Second Division of the Court, in the case last mentioned, had given effect to this plea in varying the issue then adjusted. As, however, it was admitted that no opinions were delivered, and that the plea had not been formally sustained in either of its branches, I think it right in the meantime to adhere to the view which I understood to be laid down in *M'Avoy's* case, and which appears to me irreconcileable with the contention that the pursuer of such an action is by the statute put to his election between a claim at common law alone and a claim under the Act.

"The point is of such essential importance in the working of the Act that, even if I am mistaken in supposing that it was not decided in *Hendry* v. *Cassels*, I should think it desirable in the circumstances to avoid leaving any room for doubt on the subject.

"In case the point should not have been de-

cided in varying the issue in *Hendry* v. *Cassels*, I may again explain briefly the view upon which I have hitherto proceeded in these causes.

"I hold it to be a question of construction whether the words of the 6th section, 'any action under this Act,' include an action under the common law of Scotland as amended by the Act. And I am of opinion that on a sound construction of the statute they do. I think that an action which relevantly libels a claim at common law, and also pleads the statute to meet the possible case of the facts disclosing a defence at common law which may be met by the provisions of the Act, is an action 'under this Act,' and none the less so that it is in one view laid upon the common law alone.

"This view, I think, was necessarily involved in the doctrine of *M'Avoy's* case, and the contrary view appears to me to be inconsistent with the professed object of the statute.

"To hold that the statute in its 6th section was not intended to enable either party to remove such an action as a whole to the Court of Session it is necessary to suppose that the ground of action under the statute is entirely distinct from and exclusive of an action at common law. I think, according to the true meaning of the statute, the ground of action is in every case fault; and that the statute is only required and pleaded to the effect of meeting a defence that in certain cases the employer is not responsible for the fault. That appears to me to be the doctrine which was expounded in *M'Avoy's* case.

"Again, to hold that the effect of the statute was to put the pursuer to his election between libelling a case under the statute and libelling a case at common law, independently of the statute, would be to suggest that the Legislature, while professing to amend the law in favour of the workman, did so in a manner which would practically defeat that object. I apprehend that the intention of the Legislature presumably was to enable both parties to obtain a judgment according to the law as amended, and upon the facts as these should be ascertained. The notion that it should be impossible under the law as amended to try a cause of this kind either before the Sheriff or before a jury without limiting the Court beforehand to one or other of the two alternatives—of liability at common law alone, or liability by reason of the statute—is one which I cannot reconcile either with the statute itself or with the doctrine of the case of *M'Avoy*.

"Once more, it appears to me that such an action as the present was undoubtedly competent in both aspects in the Sheriff Court. Suppose that the defender desired to remove it to the Court of Session, could it be said that he could only remove it under the 6th section in so far as founded on the statute. I confess myself entirely unable to arrive at that conclusion. I think that the statute enabled him to remove it as a whole, and did not require or allow him to remove it in part only, leaving the other branch in the Sheriff Court. The process would certainly be removed in its entirety. There would be nothing left for the Sheriff to write upon; and it would be a strange conclusion that the defender should have it in his power, by removing one aspect of the cause to the Court of Session, to extinguish the pursuer's claim at common law.

"If a defender was intended to have it in his power to remove such an action as a whole to the Court of Session in the manner provided by section 6, I think it follows that the pursuer has the same power.

"On the whole, although the statute may be awkwardly framed, I think that it admits of a construction which is consistent with its professed object, and that it is unnecessary to create a difficulty, which should not exist, by holding that the form of process introduced by the 40th section of the Judicature Act is alone applicable to the action so far as laid on the common law. Even if the double form of process could be applied at the same time to effect the removal of the cause, I should hesitate to find it necessary to resort to so cumbrous a procedure; for I do not think that the statute suggests the necessity of a double process of removing. But as the case stands, it appears to me still more difficult to adopt a construction which would lead to that result. The time allowed for removal under the recent Act is different from that allowed under the Act of George IV. for appeal for jury trial. But I think that the difference is not intended to disable the pursuer in such a case from having all the remedies to which according to the amended law he is entitled. The more natural construction of the 6th section is, in my opinion, to regard it as applicable generally to all actions under the statute, although also pleading the common law liability of employers."

The defenders, having obtained leave, reclaimed, and argued—The action as laid is incompetent. The Employers Liability Act 1880 prescribes the mode for bringing the case from the Sheriff Court to the Court of Session. This mode is only appropriate to actions brought under the Act. Actions at common law cannot so be brought. The action must either be at common law or under this statute, or the claim must be restricted to what this statute allows. Further, the action is irrelevant (1) at common law—it is covered by the case of *Woodhead* v. *Gartness Mineral Co.*, Feb. 10, 1877, 4 R. 469; (2) under the statute, the operation of which is limited to certain definite cases, and particularly to cases where there is a contract of service between the "employer" and the "workman." Here the pursuer's own averments were that the deceased was not in the defenders' service, but in the service of a person who was working in the mine as an independent contractor.

The pursuer on the question of procedure supported the interlocutor of the Lord Ordinary. On the question of relevancy the pursuer submitted that the relevancy of the averments fell to be discussed at a later stage, when the issue was adjusted.

During the argument the defenders proposed, and were allowed, to add the following plea to the record:—"The action cannot be maintained under the Employers Liability Act, because on the averment of the pursuer the said Sylvester Morrison was not a servant of the defenders."

Authority—*Woodhead* v. *The Gartness Mineral Company*, Feb. 10, 1877, 4 R. 469.

At advising—

Lord Justice-Clerk—The only question raised in this interlocutor, or rather by this reclaiming-note, which proceeds upon leave granted by the Lord Ordinary, is, whether it is a competent pro-

ceeding, or whether it brings up only that part of the action which is based, or may be supposed to be based, on the recent Employers Liability Act. I am very clearly of opinion that the Lord Ordinary has dealt quite rightly with the case in appointing an issue to be lodged. I will say a word on the question of relevancy immediately, but in the meantime I have to say that I think he dealt rightly with the record in ordering the issue proposed for the trial of the cause to be lodged. I cannot conceive that the Legislature ever intended that there should be a common law action and a separate statutory action as well. I think the plea on that part of the case proceeds on a total misapprehension of the nature of the operation of the statute. It does not truly confer a new ground of action which the common law does not give. The ground upon which the action is brought—the ground of liability—is a common law liability; and the only effect of the statute is, in the case of fellow-workmen, to take away a plea which might exclude such an action based upon the common law in the event of the wrong complained of having been done by a fellow-workman. The statute, under certain provisions and with certain safeguards, provides that that shall not be a plea to exclude liability for the future, provided the action be within certain limits and on certain conditions. Now, I do not look to that as raising a new ground of action at all; on the contrary, the ground of action *qui facit per alium facit per se* remains, for that is the foundation of the liability which exists between master and servant. But the judgment in the case of *Woodhead* and the other authorities had decided that where a servant claiming damages on that ground was a fellow-workman of the man who immediately caused the injury the master was not responsible. The statute, I say, was intended to take away that ground of defence in such cases; and accordingly I am of opinion that there are not two actions, but only one, and that the Lord Ordinary dealt rightly in allowing the issue to be lodged.

On the question of relevancy I do not see that we are called upon under the reclaiming-note to pronounce any opinion at all. The question raised on the reclaiming-note is one of competency, and I am of opinion that the action is competent. The Lord Ordinary has dealt to some extent with the question of relevancy, but I do not think we should express any opinion on that matter at all; at the same time, I may say that my impression unquestionably is, if I had to do anything, that the statute, whatever may be the reading given to the interpretation clause, provides that wherever a workman would otherwise have a ground of action under the common law, it shall be no answer to him, if his action is within certain limits, that the injury was inflicted directly by one who was in law a fellow-servant or fellow-workman, and it is therefore needless to say that a man who is a fellow-servant is not a servant at all. I think that would be a construction of this statute which would necessarily neutralise entirely the benefit intended to be conferred. I am therefore of opinion that we should adhere.

Lord Young—I am of the same opinion in regard to this interlocutor (which the defenders have reclaimed against on leave granted) which your Lordship has expressed. The Lord Ordinary has repelled the first and second pleas-in-law, leaving the action undisposed of as regards the third plea-in-law, which is the plea against the relevancy of the action. But the incompetency, which is the subject of the first plea and the second plea, was so argued before us as to raise, to a large extent at least, the question of relevancy. I agree with your Lordship that the action is not incompetent—to combine the common law and the provisions of the Employers Liability Act in the same action. I adhere, indeed, to what I said, and what I understand your Lordship said, in the case of *M'Avoy*, which is referred to in the Lord Ordinary's note—that, in truth, the statute does no more than remove a defence in the class of actions to which it refers which was theretofore competent, namely, it provides that an employer against whom such action is raised shall not in certain circumstances, specified in the statute, be entitled to plead what the common law entitled him to plead—that he is not responsible to one employee for the default and negligence of others. The statute does no more than remove that defence in certain specified circumstances. Whether the circumstances of any case are such as to admit of that defence is certainly a very nice question, requiring minute and anxious attention to the facts, and so nice, indeed, as in the past to have led to considerable difference of opinion whether the facts and circumstances of the case are such as to raise the doctrine of collaborateur. The late Lord President of this Court, before the passing of the statute, said the difficulty always was to determine who is a collaborateur. Is the person through whose negligence in the particular case the calamity complained of occurred in the relation of a collaborateur with the person who suffered? If so, then there is no doubt about the application of the rule of the common law—that the master is not responsible. Even that, however, is a difficult question, depending on a careful consideration of the facts of the individual case, and frequently, as I have said, led to great difference of opinion as to the law applicable to the facts of the particular case, and as to whether the relation of collaborateur existed or not. And therefore it would be a very grave misfortune if a party could not so frame his action as to entitle him to the remedy which the common law would give him if the relation of collaborateur did not subsist between him and the person to whose negligence it shall appear on the facts that the accident was attributable, and also entitle him to plead the statute if it should appear upon these facts that that relation did exist, but nevertheless that the negligence was of a character such as the Act provides for; and I should be slow to pronounce any decision, or express any opinion, which would give countenance to the view which would involve that misfortune. Therefore, in so far as the plea of incompetency is rested upon the combination of the common law and the statute in the same action, I am clearly of opinion that that plea is not well founded.

But then it was argued—and here the question of relevancy was undoubtedly before us—that no case is competently presented under the statute upon the facts as stated by the pursuer—that is, taking the pursuer's statement of the facts—that he was working in the employment of a man named

M'Intyre, who was a servant of the defenders, to do the work during the performance of which the accident occurred. Taking it that M'Intyre's employment was on the footing that he himself should hire a labourer to assist him in the work, then it is clear, if we should have to decide it now, that the relation of collaborateur in the ordinary sense did not subsist between the deceased and the defenders' manager or other servant to whose negligence the accident is, on the statement, attributed. But then the case of *Woodhead* is referred to, and that case determines that the relation of collaborateur does subsist in these circumstances. I own that is a nice question, and in the case of *Woodhead* there was a difference of opinion upon it. It was argued before Seven Judges, and the Court in the result determined by a majority that the relation did subsist in those circumstances—that is to say, that for the purposes of the rule of law in question the party suffering, and the party through whose negligence that suffering was occasioned, were fellow-servants of the same common employer, and that the common employer was therefore not liable. Then comes the remedial Act—for it is notably a remedial statute—a statute to remedy that rule of the common law in certain specified cases in which it appeared to the Legislature to operate hardship. Well, it is a familiar rule in the interpretation of remedial statutes that you shall interpret them with reference to the evil to be remedied—that unless there be an impossibility (which I cannot say I have ever encountered in any case) you shall make the remedy co-extensive with the mischief which it appears plain from the language of the statute that it was the purpose of the statute to remedy. Now, this case is certainly within the rule referred to. That the statute was intended to provide a remedy for the mischief, of which the case of *Woodhead* was an example—that is, the hard operation of the common law—in specified cases where the relation of collaborateur exists—is beyond all question. That is not a matter of conjecture at all—I mean the intention of the Legislature—but a matter of certainty from the words of the Act. It is plainly the intention of the Act. But then it is said, "Oh! but the statute must fail in its end in this particular case, because although it is certainly within the mischief to be remedied, the relation of collaborateur subsists according to the rule of the common law as established in the case of *Woodhead*, and though the doctrine operated hardly, and as the Legislature thought mischievously, and this is one of the cases provided for by the Act, yet the plain intention of the Legislature shall be frustrated, because the doctrine in the case of *Woodhead* is applicable to the common law, and therefore although efficacious to extend the mischief, is not to be taken as establishing what shall constitute the relation of collaborateur so as to bring the case within the remedy of the remedial Act." Now, I cannot assent to that. I think it is against the established rule of interpreting remedial statutes liberally according to the plain intention of the Legislature—interpreting them so as to meet the mischief, and the whole mischief, which it appears to be the intention of the Legislature to remedy. Nor do I feel it necessary to strain anything in order to reach that conclusion, for, as I observed in the course of the debate, every statute must be interpreted with reference to the rules of the common law. What shall constitute the relation of collaborateur with reference to the question of a master's liability, is a question of common law upon which as the case of *Woodhead* shows, there may be nice and subtle argument and difference of opinion on the result. That and similar rules of the common law cannot be embodied in every statute which provides for the case where such relations exist, and an evil of the common law is attendant upon it in the state of the common law at the time when the statute is passed. You must read the statute with reference to the rules of the common law—with regard to this and an infinite variety of other particulars. One of the illustrations—a very gross one no doubt—of the necessity of referring to the rules of the common law is given in the text-books—that although a statute provides that "any person" doing so and so shall be punished in a certain manner, you must read that with reference to the rule of the common law that if the person is a lunatic or idiot he shall not be responsible at all. The statute does not go on to express that. It is implied by the tacit reference to the rule of the common law which every statute must be read with. Now, here I read these provisions with reference to the rule of the common law, and I take the rule of the common law in question to be established by the case of *Woodhead*. Therefore upon the pursuer's statements I should hold that the relation contemplated by the recent Act subsisted between him and the person through whose negligence the accident arose. Upon the whole matter, while deeming it to be according to my duty to express these views in regard to the relevancy, which question was fully argued to us although under the head of incompetency, I concur in the conclusion at which your Lordship has arrived, namely, that the Lord Ordinary has rightly repelled these two pleas, and that his interlocutor should be adhered to.

Lord Craighill—More than one question was argued to us on this reclaiming-note, though only one has been decided by the Lord Ordinary. The first is that on which judgment has been given by him, and it is, whether so far as concerns the defenders' alleged liability at common law the case can be regarded as properly, if at all, before the Court? What is said is that the appeal brought up the action only so far as it is an action under the Employers Liability Act of 1880. There is, however, but one action, and it is not, and it could not reasonably be said that so far as laid on the statute the case at the stage where the appeal was taken could not be appealed. The practice of the Court would be a refutation of this contention. This being so, I think there was brought up by the appeal the action, such as it was, before the Sheriff; the opposite view would result only in a multiplication of suits, and that is not a result that ought to be encouraged. I am clear that the objection to the interlocutor of the Lord Ordinary ought to be overruled.

The next question raised by the reclaimers was the relevancy of the grounds of action, of which, as already mentioned, there are two, one based on the common law, and the other upon the Employers Liability Act, but as the decision to-day is not to be given on the question of relevancy, I think it better, in respect of many considerations, that the opinion which I have formed ought not

to be communicated. I therefore reserve my opinion upon that question.

Lord Rutherfurd Clark—In regard to the question of competency raised in this interlocutor, I agree with your Lordships that the interlocutor should be affirmed. On the question of the relevancy of the pursuer's averments I reserve my opinion.

The Court adhered, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for Pursuer—Ure. Agent—Robert Emslie, S.S.C.

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

Saturday, July 8, 1882.

SECOND DIVISION.

DAILLY *v.* BEATTIE & SONS.

GARDEN *v.* BEATTIE & SONS.

Process—Issue—Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

These were two actions brought by persons who when in the employment of the defenders on 4th May 1882 were injured by the fall of a pile of old building material belonging to the defenders at Advocate's Close, Edinburgh. The pursuers alleged that the fall of this pile was caused by the fault of the defenders or those for whom they were responsible. The case averred by them was one of fault against the defenders for which previous to the Employers Liability Act 1880 they would have been responsible at common law, and also a case of fault against them as being responsible for the negligence of fellow-servants of the pursuers (certain foremen builders of the defenders) for whom the defenders were alleged to be responsible under that Act.

The pursuers did not remove the actions to the Court of Session under section 6 of the statute, but allowed the cases to remain in the Sheriff Court until an order for proof was pronounced. They then appealed to the Second Division for jury trial under the 40th section of the Judicature Act. They proposed this issue for the trial of each action:—"Whether on or about the 4th day of May 1882, and in or near Advocate's Close, Edinburgh, the pursuer while in the employment of the defenders was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The defenders objected to the cases being tried under a single issue in each case, and maintained that as the actions were laid both at common law and under the Employers Liability Act there ought to be in each case, in addition to the issue proposed, another issue so framed as to raise the question whether there was a cause of action of the kind for which the statute gave a remedy.

The Court, without calling on pursuers' counsel, approved of the issue proposed by the pursuers, on the ground that a single issue was quite fitted for the trial of the case, which depended upon the application to the facts of the case of the common law as amended by statute.

Counsel for Pursuers—Rhind—Sym. Agent—Thomas M'Naught, S.S.C.

Counsel for Defenders—Trayner—Salvesen. Agents—Drummond & Reid, W.S.

Friday, November 10.

SECOND DIVISION.

SPECIAL CASE—MAGISTRATES OF PORTOBELLO *v.* MAGISTRATES OF EDINBURGH.

Process—Sheriff—Competency of Appeal from Sheriff-Substitute to Sheriff—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. c.* 75), *secs.* 3, 11, 20, 21.

Held that there is under this statute an appeal from Sheriff-Substitute to Sheriff-Principal.

Where a statute confers a new jurisdiction, such jurisdiction is, in the first instance, to be regulated by the terms of the statute conferring it. Where a statute directs proceedings under it to be taken in a Court already existing, without specifying any limitations, the presumption is that the proceedings are to be conducted according to the ordinary forms of that Court.

Rivers Pollution Prevention Act 1876, *sec.* 20—"*Water-course mainly Used as a Sewer.*"

A stream into which sewage had been conducted to such an extent that it had ceased to be anything but a common sewer, flowed into a larger stream the water of which above the junction was comparatively pure. As the result of the junction the proportion of the water of the larger stream to the lesser stream, including the sewage therein, was about 3 to 1, except in very dry weather, when it was much less. The stream formed by the junction of the two streams was regularly used for watering cattle. *Held* that it was not "a stream or water-course mainly used as a sewer."

Question—Whether the Rivers Pollution Act of 1876 entirely prohibits the discharge of solid or liquid sewage matter into a stream, subject only to the exception contained in the Act?

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. c. 75) enacts by sec. 3 that "every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter shall [subject as in this Act mentioned] be deemed to have committed an offence against this Act." . . .

This was an appeal at the instance of the Magistrates of Edinburgh, by Special Case stated by agreement of parties, under the provisions of the Rivers Pollution Prevention Act 1876, against interlocutors pronounced by the Sheriff of Midlothian on 29th June and 22d July 1880 in a complaint at the instance of the Magistrates of Portobello as the sanitary authority under the said Act, in which complaint they charged the defenders (appellants), as sanitary authority of the city of Edinburgh, with having caused or knowingly permitted the sewage of certain districts of Edinburgh to be discharged into the Jordan or Pow Burn, which, being a tributary of the Braid or Figgate Burn, discharged