Friday, January 9.

FIRST DIVISION.

[Sheriff of Forfarshire.

GUTHRIE, CRAIG, PETER, & COMPANY *v.* THE MAGISTRATES OF BRECHIN.

Process—Sheriff—Appeal—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 101), *secs.* 77 *and* 108—*Rivers Pollution Prevention Act* 1876 (39 *and* 40 *Vict. c.* 75), *sec.* 7.]

A manufacturer whose works were within burgh presented a petition in a Sheriff Court to have a local authority ordained to allow him to empty the drains containing the discharge from his works into the burgh sewers. He founded upon section 77 of the Public Health Act 1867, and upon section 7 of the Rivers Pollution Act 1876. The local authority in defence also founded on section 7 of the Rivers Pollution Act 1876, stating that the liquid in question would injure the sewers and prejudicially affect the sewage, and the Sheriff gave judgment upon this issue. *Held* that in these circumstances the 108th section of the Public Health Act of 1867 did not operate to prevent an appeal to the Court of Session against the judgment of the Sheriff.

Messrs Guthrie, Craig, Peter, & Company were tenants and occupiers of the Brechin Paper Mill Manufacturing Works, within the burgh of Brechin, and as such were liable for sewerage or drainage assessment to the Magistrates and Town Council of the burgh, who were also the local authority under the Public Health (Scotland) Act 1867, and the Public Health (Scotland) Amendment Act 1871. Section 77 of the Public Health (Scotland) Act 1867, provides—"Any owner or occupier of premises within the district of a local authority, liable for general or special sewerage or drainage assessment, shall be entitled to cause his drains to empty into the sewers of such local authority on condition of his giving twenty days' previous notice of his intention so to do to the local authority, and of complying with their regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the local authority to superintend the making of such communications."

On 12th March 1883 Messrs Guthrie, Craig, Peter, & Company gave the Magistrates notice, in terms of the 77th section of the Public Health (Scotland) Act 1867, that they desired to cause the drains from their works to empty into the sewers within the burgh, and intimated their readiness to comply with the regulations as to the mode in which the communication should be made and otherwise.

The Magistrates replied agreeing to give facilities for enabling them to carry the liquids proceeding from their works into the public sewers, provided they were satisfied that this would not prejudicially affect the sewers or the sale of the sewage matter conveyed along the sewers.

Messrs Guthrie, Craig, Peter, & Company obtained a report from a chemical expert to this effect, but the Magistrates refused to allow any communication between the drains and the sewers to be made.

Messrs Guthrie, Craig, Peter, & Company accordingly presented a petition in the Sheriff Court of Forfarshire at Forfar, praying that the Magistrates should be ordained "to allow the pursuers to cause the drains of and containing the liquid flow from the Brechin Paper Mill Manufacturing Works, situate on the river South Esk, within the burgh of Brechin, tenanted and occupied by the pursuers, to empty into the sewers of the defenders in or near River Street within the said burgh of Brechin; and to find that the pursuers are entitled to make all proper communications between their said drains and the said sewers for the purpose aforesaid, on condition of the pursuers complying with the defenders' regulations in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by the defenders to superintend the making of such communication."

Besides founding on the 77th section of the Public Health Act 1867 (above quoted), they set forth the 7th section of the Rivers Pollution Prevention Act 1876. That section provides—"Any sanitary or other authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers, provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise, be injurious in a sanitary point of view; provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, or where such facilities would interfere with any order of any Court of competent jurisdiction respecting the sewage of such authority."

The defenders stated in answer, that as part of a new drainage system which had recently come into operation, the sewage running through their drains which entered the river South Esk was now under a new scheme prevented from falling into the South Esk till it had been purified by passing through a sewage farm, and they averred that the discharge from the pursuers' drains would prejudicially affect the sewers, and prejudice the quality of the sewage for the purpose of such application to land. It would also, they said, unduly increase the volume of the total discharge.

The Sheriff-Substitute (ROBERTSON), after proof, found that a plan of purification proposed by the pursuers would render the discharge from their works harmless, and that the defenders were therefore bound to receive it in their sewers.

The Magistrates appealed to the Court of Session.

When the case appeared in the Single Bills the pursuers objected to the competency of the appeal, and argued—The petition was brought under the 96th section of the Public Health Act 1867, which provided a statutory remedy where the local authority neglected any duty imposed upon it under the Act. The 77th section imposed a duty on the local authority which they declined

to perform, and the Sheriff having now ordained them to do so, appeal against his judgment to the Court of Session was precluded by the 108th section of the Act, which provided that "no appeal shall be competent . . . . from the decree or order of any Sheriff, except in cases certified in terms of the preceding section; and no decree or order, or any other proceeding, matter, or thing done in the execution of this Act, shall, excepting as herein provided, be subject to review in any way whatever." The previous section, referred to in the 108th section, had no application to the present question, and dealt with questions of nuisance only.

The appellants argued—This was an action to vindicate an alleged civil right conferred by the 7th section of the Rivers Pollution Act 1876. That section was complete in itself, and in no way depended on previous statutes. There was no special machinery for enforcing it, and this action might have been brought in the Court of Session. Again, section 108 of the Public Health Act only excluded appeal in cases brought under the 107th section.

At advising—

Lord President—There is no doubt that the petitioners found their application upon both the Public Health Act and the Rivers Pollution Act. Whether it was necessary for them to found upon the Public Health Act it is perhaps unnecessary to inquire in disposing of this objection to the competency of the appeal, because it appears to me that what the pursuers ask in the prayer of their petition, and what they have got, are the facilities which are provided for them under the 7th section of the Rivers Pollution Act. Under the 77th section of the Public Health Act the right is given to the owner and occupier of premises within the district of the local authority "to cause his drains to empty into the sewers of such local authority on condition of his giving twenty days' previous notice of his intention so to do to the local authority." Owners and occupiers are not under any obligation to require that any particular facilities shall be given by the local authority. They have an absolute right to connect their drains with the main sewers in the district. This seems only reasonable and necessary in order to carry out the object of the Public Health Act, and to complete the system of drainage. If parties are not to be entitled to connect their drains with the main system of drainage in the burgh it is plain that the object of the Act would be defeated.

What is asked here is that the defenders shall "allow the pursuers to cause the drains of and containing the liquid flow from the Brechin Paper-Mill Manufacturing Works, situate on the river South Esk, within the burgh of Brechin, tenanted and occupied by the pursuers, to empty into the sewers of the defenders in or near River Street within the said burgh of Brechin, and to find that the pursuers are entitled to make all proper communications" between their drains and the sewers belonging to the defenders. That is precisely the thing which is contemplated by the 7th section of the Rivers Pollution Act, because in that section the local authority, who have the sewers of the burgh under their control, are ordained to give facilities "for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers."

The language in the prayer of the petition therefore coincides with the language of the section which I have just read, and not with that of the 77th section of the Public Health Act. The remedy which is asked is under the later Act, and although the petition is laid upon both Acts, the remedy sought is under the second only, and accordingly the question has been so treated and disposed of in the Inferior Court.

The defence stated on the part of the Local Authority is, that the liquids proceeding from the manufactory are of such a character that the sewage will be destroyed, and be no longer serviceable for useful purposes, if the pursuers' drains are connected with it, and accordingly that the Local Authority cannot be compelled under section 7 of the Rivers Pollution Act to admit it into their sewers. There is a condition in that section that it "shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers." This defence having been stated, what is the course which has been followed? The petitioners reply that this is not the character of the liquid which will be discharged from their drains, but that, on the contrary, they are innocuous, and will not prejudicially affect the sewage. Upon the issue between these two opposing statements the Sheriff has given judgment.

That is an issue which could not have arisen except under the Rivers Pollution Act, and the question which we have now to determine is, whether it was the intention of the Legislature that the judgment under that issue should not be subject to review by this Court?

That is a very important question, and in many cases of the very highest importance both to manufacturers and local authorities, and I can find nothing in the Rivers Pollution Act which prohibits an appeal against a judgment upon that question.

Whether if the petition had been laid entirely on the 77th section of the Public Health Act, an appeal would have been competent or not, I give no opinion, because I do not think that this is the point to be determined; but I think it is pretty clear that if it had been laid upon the 77th section no such question as that which has been determined by the Sheriff in this petition could have arisen.

Lord Mure—I am of the same opinion. This is an action which is mainly founded upon the 7th section of the Rivers Pollution Act; this is clear if we look to the averments of the parties upon record, and to the way in which it has been treated in the Inferior Court.

The question which we have at present to decide is, whether this is a summary application such as is excluded from review by this Court under the provisions of the Public Health Act 1867? Under the 108th section of that Act a variety of proceedings are excluded from review, but these appear to me to have reference to such applications for enforcing the provisions of the Act as are dealt with in the 105th section. It is enacted that these applications are to be by summary petition, "and the sheriff, magistrate, or justice shall thereupon, if he see fit, appoint the petition to be answered within three days after

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