(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."

The petition stated (Cond. 2)—"The pursuer has entered upon the management of the said estate, and finds that the bankrupt's assets (with the exception of a small quantity of household furniture hypothecated to his landlord for rent, and the said pension) consists of a number of claims of damages, which in so far as actions have been raised have been decided against him. The pursuer is satisfied that these claims are utterly groundless and worthless, and there are no available funds out of which even the expenses of sequestration can be met."

The petition was intimated to the bankrupt.

The bankrupt lodged answers stating—(2) "On 26th December 1883 the liquidator of the Money Order Bank (Limited) obtained a decree in *cessio* in the Sheriff Court, Edinburgh, against the defender for arrears of calls on shares in said bank, and in said *cessio* the said liquidator proposed the pursuer as trustee, but on personal grounds the Sheriff rejected him and appointed another person as trustee." (3) On 28th March 1884 sequestration was awarded in said Court against the defender at the instance of the said liquidator, and the grounds of this double action, set forth by said liquidator in a report of the same date to the shareholders of said bank, are as follows:—"To provide against any further delay in a final decree of *cessio* being obtained against Mr Scott, the liquidator's agents thought it right in the meantime to proceed against him under a decree for £310, 1s. 2d., being the taxed amount of expenses in the action for £5500 against the bank, and so to have his estates sequestrated, and prevent his carrying on his appeal to the House of Lords without first having obtained his trustee's concurrence, or his intimating any fresh actions without finding caution for expenses." He further stated that his family consisted of six persons wholly dependent on the pension for their support.

The Sheriff-Substitute pronounced this interlocutor:—"Repels the defences; recommends Her Majesty's Postmaster-General or other chief officer or officers of Her Majesty's Post-Office to grant his or their consent, in writing, for payment to the pursuer, as trustee on the defender's sequestrated estate, of the sum of ten pounds sterling per annum out of the pension of forty-six pounds payable to the defender for services rendered by him in Her Majesty's Post Office.

"*Note.*—The Sheriff-Substitute thinks there can be no doubt that our law does not admit a debtor to the *beneficium competentiæ* to the extent to which it was recognised in the laws of Rome (Bell's Com. 7th edition, vol. ii. p. 483; and the case of *Pringle* v. *Wilson*, 1788, M. 1393, there referred to), and the only difficulty which the Sheriff-Substitute feels in disposing of the present application arises from the circumstance that the bankrupt appears to have a large family dependent upon him, while the sum of £10 per annum will only go a very small way indeed towards payment of his debts, which amount to between £400 and £500; at the same time, in the course of former proceedings with reference to this matter, which proved abortive in consequence of an informality, the Postmaster-General, assented to the sum of £10 being paid to the trustee out of the bankrupt's pension, and the Sheriff-Substitute is of opinion that his creditors are entitled to this if the consent of the Post-Office authorities can still be obtained."

Scott appealed, and argued his case in person. He stated that the pension of £46 was all he had to maintain his family of six persons.

The pursuer objected to the competency of the appeal on the ground that the Sheriff's deliverance was not a "final judgment," and therefore not capable of being appealed.

Section 170 of the Bankruptcy Act 1865 provides—"It shall be competent to bring under the review of the Inner House of the Court of Session, or the Lord Ordinary in time of vacation, any deliverance of the Sheriff after the sequestration has been awarded (except where the same is declared not to be subject to review), provided a note of appeal be lodged with and marked by the sheriff-clerk within eight days from the date of such deliverance, failing which the same shall be final, and such note, together with the process shall forthwith be transmitted by the Sheriff-Clerk to the Clerk of the Bill Chamber, and the Lord Ordinary's decision shall, when not expressly made final by this Act, be subject to review of the Inner House, and it shall be competent to the Inner House or the Lord Ordinary to remit to the Sheriff with instructions."

At advising—

Lord Craighill—This is an appeal against a deliverance of the Sheriff-Substitute of Midlothian, pronounced in the proceedings taken in the sequestration of the appellant's estates. He was for some time a servant in the Post-Office, and on retiring from the service a pension was awarded to him amounting to £46 per annum. His estates were sequestrated in March 1883, and the trustee, acting in virtue of the powers conferred by sec. 149 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), presented a petition to the Sheriff praying that the Sheriff should recommend that the Postmaster-General should consent that a portion of the appellant's pension might be applied in payment of his debts. The appellant opposed this application on the ground that the pension was not more than sufficient for the maintenance of himself and his family; but the Sheriff thought fit to give a recommendation that £10 of the pension might be so applied. This deliverance is the subject-matter of the present appeal. The respondent, the trustee, has objected to the competency of this appeal upon the ground that the Sheriff's deliverance is not a final judgment. This objection is, I think, inappropriate in the circumstances of the present case. The deliverance is not a judgment in an action to which the provisions of the Sheriff Court Acts or the Court of Session Act of 1868 apply. It is a proceeding under the Bankruptcy (Scotland) Act of 1856, and it is the provisions of that Act which must be followed. The 170th section enacts as follows—[*His Lordship here quoted the section*]. Obvious it is, therefore, that the deliverance in question, as it is not one of those declared not to be subject to review, may be appealed against to this Court. The objection, therefore, against the competency must in my opinion be overruled. It would be unfortunate, I think, were it necessary to come to a different conclusion, because the result would be that in place of reviewing the recommendation of the Sheriff before it was presented to the Postmaster-General,

we should be obliged to come to a consideration of the subject after the case had been submitted to him and he had consented to the recommendation embodied in the Sheriff's deliverance. There would at this stage be a review, accordingly, not merely of the deliverance of the Sheriff but of the consent which had followed upon it. This was not a thing in contemplation, and, to say the least, would be inconsistent and anomalous, but it may, and I think it ought, to be avoided. Any deliverance of the Sheriff not excluded from review may, as we have seen, be appealed against, and the sooner an appeal against such a deliverance as that which on this occasion was pronounced is submitted to review the better for all concerned. These things being so, the question is whether the deliverance should be affirmed or recalled. The trustee and the Sheriff appear to think that a sum out of any pension, large or small, may be applied in payment of the debts of the pensioner. But this appears to me to be an erroneous view of the statutory provision. Cause must be shown, and here no cause has been shown by the trustee. No proof has been offered that £46 is more than is required for the support of the appellant and his family, and without something to support that conclusion the deliverance appealed against cannot be sustained. How it should be assumed that £46 is more than is required for the appellant's maintenance I cannot understand. The contrary appears to be the reasonable conclusion. And therefore it is my opinion that the deliverance should be recalled, there being no ground in the circumstances of the case for the application which the trustee has presented and the deliverance appealed against which the Sheriff-Substitute has pronounced.

LORD RUTHERFURD CLARK—I am of the same opinion, and have no doubt about the competency or about the merits. The appeal falls to be determined under the 170th section of the Bankruptcy Act, and, on the other point, I see no propriety in ordering the bankrupt to pay his pension into a sequestration of which it would be the sole asset.

LORD YOUNG—I entirely concur. I have no doubt as to the competency of this appeal, and I agree with Lord Craighill it is altogether expedient that the appeal should be taken at this stage.

On the merits I confess I have very little sympathy with a sequestration taken out as this is, not for the purpose of distributing and ingathering the assets of the bankrupt, but for an indirect and sinister purpose. The trustee stated that the funds of the estate, with the exception of a small quantity of household furniture hypothecated to his landlord for rent, and the said pension, consist of a number of claims of damages which, in so far as the actions had been raised, had been decided against him. The trustee was satisfied that these claims were utterly groundless and worthless, and there were no available funds out of which the expenses of the sequestration could be met,

This is not, then, a process to distribute an estate. It is of the nature of a scandal, and it is unfortunate the law permits it. We have a report by the liquidator of the Money Order Bank with regard to the sequestration, in which he says—"To provide against any further delay in the final decree of *cessio* being obtained against Mr Scott, the liquidator and agents thought it right in the meantime to proceed against him under a decree for £310, being the taxed amount of expenses in an action for £5500 against the bank, so as to have his estates sequestrated and prevent his carrying an appeal to the House of Lords without having first obtained his trustee's concurrence, or his instituting any further actions without finding caution for expenses." I hope the law will provide some means of overcoming these somewhat scandalous procedings. But we are not further concerned with that here than as to the account which the record gives of both sides of a sequestration which is the foundation of the present application, in which it is proposed to take £10 of the bankrupt's little pension of £46 as the asset to be distributed by the trustee.

I entirely agree that the Sheriff's judgment ought to be altered, and this petition dismissed with expenses, and I have to propose that, as the poor man has appeared himself without agent or counsel, the Court should modify the expenses to be paid to him for his attendance in the Sheriff Court and here, and for preparing the proceedings, to £7, and for that grant decree against the respondent.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor of the Sheriff-Substitute, and dismissed the application.

Counsel for Trustee—Nevay. Agents—Richardson & Johnston, W.S.

Saturday, January 17.

OUTER HOUSE.

[Lord M'Laren.

DON'S TRUSTEES *v.* CAMERON (MACKINTOSH'S TRUSTEE).

Bankruptcy—Right in Security—Heritable Bond—Trustee—Tantum et tale.

A lender agreed with a borrower to lend him a sum on bond over heritable property for five years at 4 per cent., the interest to be 5 per cent. if regular payment should not be made. The borrower granted a bond payable at the next term, with interest at 5 per cent., and the loan was made. The borrower having shortly thereafter been sequestrated, his trustee consigned the amount of loan with 4 per cent. interest, and sold the estate as unencumbered. The lender sued him for damages for the loss of the investment and for 5 per cent. interest. The Lord Ordinary *assoilzied* the trustee (*reserving* a claim in the sequestration for loss of interest), *holding* that the obligation not to disturb the investment was a personal obligation of the bankrupt resolving into a claim in the sequestration for a dividend for loss of interest.

In July 1883 an agreement was entered into between the marriage-contract trustees of Robert Bogle Don, merchant, Dundee, and his wife, and Mr Francis Henry Pottinger Mackintosh of Farr,