Friday, March 17.

FIRST DIVISION.

[Sheriff Court at Stirling.

LAWRIE *v.* THE BANKNOCK COAL COMPANY, LIMITED.

Sheriff — Appeal — Competency — Removal to Court of Session for Jury Trial— Action of Damages by Father of Deceased Employee against Son's Employers — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 30 — *Workmen's Compensation Act* 1906 (6 *Edw. VII, cap.* 58), *secs.* 13 *and* 14.

The Workmen's Compensation Act 1906, enacts — Sec. 14 — "In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the Sheriff Court and concluding for damages . . . at common law or under the Employers' Liability Act 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law. . . ."

Sec. 13 — ". . . Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his . . . dependants or other person to whom or for whose benefit compensation is payable."

The Sheriff Courts (Scotland) Act 1907, sec. 30, enacts—"In cases originating in the Sheriff Court (other than claims by employees against employers . . .) where the claim is in amount or value above £50, and an order has been pronounced allowing proof, . . . it shall, within six days thereafter, be competent to either of the parties who may conceive that the cause ought to be tried by jury, to require the cause to be remitted to the Court of Session for that purpose, where it shall be so tried. . . ."

The father of a deceased workman raised an action in the Sheriff Court against his son's employers for damages in respect of the death of his son, laid alternatively at common law and under the Employers' Liability Act 1880. A proof having been allowed, the action was, on the pursuer's motion, remitted to the Court of Session for trial by jury under sec. 30 of the Sheriff Courts Act 1907. On the case appearing in the Single Bills the defender objected to the competency of the appeal in respect of the provisions of the Workmen's Compensation Act 1906, secs. 13 and 14.

Held that the cause had been competently remitted to the Court of Session, and issues *allowed.*

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), secs. 13 and 14, and the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 30, so far as material, are *quoted supra in rubric.*

Henry Lawrie, Haggs, Castlecary, brought an action against the Banknock Coal Company, Limited, in which he claimed £500 damages—or alternatively £179 odd under the Employers' Liability Act 1880—in respect of the death of his son Archibald Lawrie, miner's drawer, who resided with him, and who was fatally injured while at work in the defenders' employment. On record the pursuer averred that the deceased was earning at the time of his death 23s. per week, and that he contributed all his earnings to his parents for the maintenance of the house. The defenders denied liability at common law and under the Employers' Liability Act, but admitted the pursuer's right to compensation as a dependant under the Workmen's Compensation Act. They pleaded, *inter alia*, that the action was irrelevant.

On 28th February 1911 the Sheriff-Substitute (DEAN LESLIE) repelled the plea to relevancy and allowed a proof.

On 3rd March 1911 the pursuer required the cause to be remitted to the First Division of the Court of Session.

On the case appearing in the Single Bills counsel for the respondents objected to the competency of the appeal. They argued—The appeal was incompetent, for the pursuer was a "workman" as defined in section 13 of the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). Workman so defined included "dependants," and the pursuer, according to his own averment, was a dependant of the deceased. Workmen so defined were by section 14 of that Act deprived of the right of appeal to the Court of Session for jury trial. It was inconceivable that the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) meant to repeal this provision of the Workmen's Compensation Act 1906, for it specially conferred upon employees (*i.e.*, workmen) the right of jury trial in the Sheriff Court—Act of 1907, sec. 31. The pursuer was an "employee," for he was a dependant, and therefore a "workman" in the sense of the Act of 1906.

Argued for appellant—It was settled that such appeals were competent—*Cook* v. *Bonnybridge Silica and Fireclay Company, Limited*, 1911 S.C. 177, 48 S.L.R. 243; *Brown* v. *Glenboig Union Fireclay Company*, 1911 S.C. 179, 48 S.L.R. 245. *Esto*, however, that the question was still open, the appeal was clearly competent—Sheriff Courts (Scotland) Act 1907, sec. 30. Section 14 of the Workmen's Compensation Act, on which the respondents relied, was inapplicable, for it only barred appeals at the instance of workmen as defined in section 13 of that Act. Even if it were applicable it did not follow from the pursuer's averment that he was a dependant and so within the definition in section 13 of the Act. Assuming, however, that he was, the appeal was still competent, for the Act of 1907 repealed (section 52) all statutes inconsistent with its provisions,

and therefore section 14 of the Workmen's Compensation Act 1906.

At advising—

LORD PRESIDENT — This is an action raised in the Sheriff Court by the father of a lad who met his death by accident while in the employment of the defenders. It concludes for damages at common law, or, alternatively, under the Employers' Liability Act. The Sheriff repelling a plea of irrelevancy, allowed a proof. Upon that the pursuer, conceiving that the case was suitable for trial by jury, required it to be removed to the Court of Session in terms of section 30 of the Sheriff Courts (Scotland) Act 1907. The argument before your Lordships has been that that is incompetent.

Looking at the terms of the Sheriff Court Act by themselves the matter seems almost beyond argument. Taking sections 30 and 31 together all causes originating in the Sheriff Court are divided into two categories—(1) Those that are raised by employees against employers in respect of injury caused by accident arising out of or in the course of their employment and concluding for damages under the Employers' Liability Act, or, alternatively, for damages at common law, and (2) all other causes which do not fall under category (1).

If a cause is not in category (1) it must be in category (2), and causes under category (1) are dealt with by section 31, causes under category (2) by section 30.

Is this, then, an action by an employee against an employer in the ordinary sense of the words? The answer must clearly be "No," inasmuch as the pursuer does not aver that he was in the service of the defenders. Therefore the cause falls under category (2) and section 30 applies; and under section 30 it is clear that the present demand is competent.

The argument of the defenders, however, really rests upon what I cannot help thinking is a triumph of distorted ingenuity. They do not controvert any of the propositions which I have laid down. They say, however, that employer and employee are not used in the ordinary sense exclusively. In particular, they say that the word "employee" (a word which, by the way, is a novelty in a Scottish Act of Parliament) is Anglo-French for workman in service; and that if we go to the Workmen's Compensation Act of 1906 we find that by section 13 any reference to a workman who has been injured, where the workman is dead, includes a reference to his dependants or others to whom or for whose benefit compensation is payable; and further, that in section 14 where a workman (interpreted by definition aforesaid) raises an action in the Sheriff Court against his employer for damages under the Employers' Liability Act, or, alternatively, for damages at common law against his employer, such action cannot be removed or appealed to the Court of Session.

It is then argued that the state of the law being such in 1906, when in 1907 the right of jury trial in the Sheriff Court was given to employees, that must be held to include the whole class of workmen from whom the right of jury trial had been taken away by section 14 of the Workmen's Compensation Act, that is, not only workmen proper, but workmen enlarged by the definition to include dependants; and lastly, that as there is here an averment that the deceased man paid his earnings into the family purse, it follows that the present pursuer was a dependant of the dead man.

This argument is, in my opinion, not only excessively involved but fails in two particulars. First, I should not have held, under the Act of 1906, that the right of the father to jury trial in the Court of Session was taken away. Section 14 is a curious section inasmuch as it is really quite foreign to the rest of the Act. It has no corresponding section in the original Workmen's Compensation Act of 1897, and it is, indeed, a Scottish procedure section dealing not with the Act at all but with actions at common law.

The position of a father whose son was killed by the fault of anyone was by the common law of Scotland—evolved from the old law of assythment as explained by Lord President Inglis in *Eisten's* case—that he had action against the wrongdoer for solatium and damages. The Employers' Liability Act created no new right of action, but simply took away a certain defence competent to employers. The right to action rested in those who had it independently of that Act—with different rights and results, it may be noticed in passing, in England and Scotland; because in England the right to sue in respect of death rested on Lord Campbell's Act, under which the rights are not identical with those under the Scottish common law action already mentioned.

If, in order to avail himself of the sweeping away of a defence, a father raised an action in the Sheriff Court (which he had to do in order to pray in aid the Employers' Liability Act), he had, as soon as proof was fixed, a right to appeal to the Court of Session for jury trial under section 40 of the Judicature Act as amended by the Court of Session Act. I should not have held that that right was taken away by section 14 of the Workmen's Compensation Act 1906. The interpretation clause 13 was not, I think, introduced with reference to section 14; but, holding that it applies, I cannot think that it was meant to make a right of appeal in an action at law depend upon a fact which would have to be antecedently inquired into, which fact has no relevance to an action at law. If the argument is sound, fathers who are not dependants of their sons would have an appeal; fathers who are would have none. Even if you take the facts in this case as averred, it leaves it quite unascertained whether the father was a dependant or not. The fact that the son paid money into the family purse does not render the father a dependant. It depends on what he got out in return. If the value of the

son's board and lodgings was equal to what he paid in, then the father could not be a dependant. In each case, therefore, in order to find out whether there was a right of appeal, you would have to go into an antecedent and preliminary inquiry as to whether the father, who was raising the action, was or was not a dependant—to my mind a very absurd result.

But the chief ground upon which I should have held that the right was not taken away is that the right of the father to sue is quite independent of any idea of workmen's compensation, and that therefore nothing but clear enactment could take that right away.

The second and even stronger objection is this—Assume that the right was taken away by section 14, Parliament could give it back or could give something else instead. As regards the workmen themselves in a question with employers, Parliament did, by section 31 of the Sheriff Courts Act of 1907, give something else, namely, jury trial in the Sheriff Court. The argument of the respondent assumes that Parliament must have meant to treat the father of a deceased workman in the same way, and that therefore the word "employee" must include someone else who never was an employee. But if so, why did it not say so? Nothing would have been easier than to say, "Action by employees, including therein action by the persons who at law have a right of action in respect of the employee's death." Instead of that, Parliament uses words which give the father, not the same right under section 30, but a different right, namely, the right which he always had up to, *ex hypothesi*, the year before, namely, jury trial in the Court of Session. It professes to deal exhaustively with all removals to the Court of Session; it uses words which by themselves clearly give the right to come to the Court of Session for jury trial, and then in section 52 it expressly repeals all enactments inconsistent with its own provisions.

Accordingly, even if I could hold that section 14 of the Workmen's Compensation Act had taken away the right, I should hold it restored by the combined action of sections 30 and 52 of the Sheriff Courts Act.

The result is that, in my opinion, the objection to competency must be overruled and issues ordered.

LORD JOHNSTON—I have found very great difficulty in this case owing to what appears to me to be a conflict between the two statutes to be immediately mentioned, which I cannot help feeling has arisen, without any intention, by the failure of those who drafted and passed the Sheriff Courts Act of 1907 to observe what the situation really was under the Workmen's Compensation Act of 1906.

The pursuer claims damages at common law, or alternatively under the Employers' Liability Act 1880, in respect of the death of his son, a miner in the employment of the defenders and respondents. On 28th February the Sheriff allowed a proof, and on 3rd March the pursuer lodged a minute requiring the cause to be remitted for trial by jury to the Court of Session.

The question is, Was he entitled to do so?

I take first the Workmen's Compensation Act 1906.

Section 14 provides that where a workman raises an action of damages in the Sheriff Court against his employer independently of the Act, in respect of injury caused by accident arising out of and in the course of his employment, either under the Employers' Liability Act 1880 or alternatively at common law or under that Act, his action shall not be removed under that Act or otherwise to the Court of Session, and shall not be appealed to that Court except by appeal on a question of law.

This provision has obviously nothing to do with claims of compensation under the Act of 1906 itself. But independently of that Act there were three possibilities: first, an action at the instance of the workman himself; second, an action at the instance of the workman, insisted in after his death by his legal personal representatives; and third, an action raised after his death for *solatium*, which is competent to certain relations, viz., the spouse, the parents, and the children of the deceased—*Eistens* v. *North British Railway*, 8 Macph. 980; *Darling* v. *Gray & Sons*, 19 R. (H.L.) 31.

Now not only is action competent at common law in all these three sets of circumstances, but to the claims made in all such actions the Employers' Liability Act applies. For that Act says, section 1 —"Where after the commencement of this Act personal injury is caused to a workman" in four specified states of circumstances, "the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work."

That the 14th section of the Act of 1906 intended to preclude removal of all these actions, if raised in the Sheriff Court, to the Court of Session for jury trial, or their appeal except on questions of law, is, I think, clear from the definition clause, section 13, which provides that "unless the context otherwise provides," "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants or other person to whom or for whose benefit compensation is payable." Primarily this refers to compensation under the Act. But when applied to section 14, unless workman is to have a different meaning in section 14 and in the rest of the Act, which the context does not provide, then, having regard to the terms of the 14th section and to those of the Employers' Liability Act 1880, compensation has, I think, a different and wider meaning, the result being that the restriction of removal and appeal to the Court of Session covers not merely actions raised by the workman

himself, but those raised by the specified relations after his death.

The present action is raised by the father of a deceased workman in his own right, and under the Act of 1906 he could not in my opinion have removed it to the Court of Session for jury trial or otherwise than by appeal on point of law.

But then the Sheriff Courts Act of 1907 steps in and incautiously uses the word employee in place of workman, and gives no definition extending it beyond its natural meaning. It provides (section 30) that in causes originating in the Sheriff Court, when the claim is more than £50 in value, the case may be removed to the Court of Session for jury trial, but with the exception of claims by employees against employers in respect of injury—in fact, with the exception of just those cases which were specially provided for under the Act of the previous year 1906, section 14, only that the term "employee," without any extending definition, replaces the term "workman" with one.

This is just another instance of the haste and want of comprehensive care of which the Sheriff Courts Act of 1907 has already shown so many instances. But it has got to be applied as it stands. Section 31, then, in the excepted cases—again using the definite term "employee" without any extending definition—provides to either party an optional right to require a special kind of jury trial in the Sheriff Court, and excludes appeal for jury trial to the Court of Session. And so the employee himself is debarred from appealing to the Court of Session for jury trial, but is given the option of a Sheriff Court jury trial. The relative suing in his own right, not being an employee, expressly or by definition, is on the other hand impliedly excluded from demanding a Sheriff Court jury trial on the new model. But appeal for jury trial is open to him unless his case is still governed by section 14 of the Act of 1906.

I should have held this to be so but for the repeal clause (section 52) of the Sheriff Courts Act of 1907, which repeals all statutes *per aversionem* "now in force so far as the same are inconsistent with the provisions of this Act." Section 14 falls, I think, under this repeal.

The present appeal, which was in my opinion incompetent in 1906, is therefore made competent in 1907. I therefore agree in the result at which your Lordship has arrived.

LORD MACKENZIE — I agree with the opinion delivered by your Lordship in the chair.

LORD KINNEAR was absent.

The Court repelled the objection and ordered issues.

Counsel for Pursuer (Appellant)—Watt, K.C. — Mair. Agents — Macpherson & Mackay, S.S.C.

Counsel for Defenders (Respondents)—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, March 9.

FIRST DIVISION.

[Sheriff Court at Linlithgow.

CONWAY AND ANOTHER *v.* PUMPHERSTON OIL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (1)—*"Arising Out of and in the Course of the Employment"—Disobedience of Order by Entering Forbidden Area.*

C., a drawer employed in a coal mine, along with a companion S., was working in a level from which they were driving an "upset." On the morning of the day of the accident the fireman discovered an outbreak of gas in the "upset," and accordingly placed a board across the entrance, chalking upon it, "No road up here," such a board or fence being the usual mode of warning persons that it was dangerous to enter the place so fenced. Both C. and S. understood what the putting up of the board meant, and that it was dangerous to work in the "upset." C. and S. were working that morning at a different part of the mine. C. required a pick, and knowing that S. had left one in the "upset," went to get it. S., who had been warned by the fireman earlier in the day not to go into the "upset" for the pick, but to get one from another place which he named, called out to C. that he was to go to this other place, but C. did not apparently hear what he said. C. entered the "upset," passing over or under the fence with a naked light in his cap, an explosion took place, and he was killed.

Held that as at the time of the accident C. was acting within the sphere of his employment, the accident was one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act 1906.

This was a Stated Case, on appeal, in an arbitration under the Workmen's Compensation Act 1906, between John Conway, labourer, Caldercruix, Airdrie, and another, *claimants*, and the Pumpherston Oil Company, Limited, *defenders*.

The Case stated—"This is an arbitration under the Workmen's Compensation Act 1906, in which I was asked by the appellants to award them compensation on the narrative that they were partially dependent on the earnings of their son Maurice Conway, who died on 19th January 1910, in consequence of personal injury by accident arising out of and in the course of his employment as a drawer with the respondents.

"In the course of the arbitration the following *facts* were admitted or proved to my satisfaction:— . . . 5. The accident to the deceased occurred on 17th January 1910 in the respondent's No. 3 Starlaw