committee ceased in July 1903, and that at that time the account sued for was not completed. But I cannot accept the view that his membership ceased. The committee did not in his case exercise their option to strike him off the roll as a defaulter, and the consequence was that he had to send in his formal resignation in March 1904. Nor can I hold that his office as committee-man really ceased in July 1903. There being no quorum at the general meeting nothing could be done; and in these circumstances I hold that the continuity of administration remained unbroken and that the committee remained in office *de facto* from the necessity of the case, not perhaps having all the powers, but having all the duties, of the normal committee until they or rather the outgoing third should be lawfully replaced. Further, I think it clear that the liability is not merely *pro rata*, and that the proper course is to decern against the compearing defender Mr Millar for payment, reserving any right of relief competent to him."

This interlocutor was pronounced:—"The Lord Ordinary having considered the cause, in respect the pursuers do not insist for decree in terms of the first alternative conclusion of the summons, dismisses the same, and decerns; and as regards the second alternative conclusion, decerns against the defender Robert W. Millar for payment to the pursuers of the sum of one hundred and twenty pounds and sixpence sterling with interest at the rate of 5 per cent. per annum from the date of citation, reserving to the said defender any right of relief which may be competent to him: Assoilzies the other compearing defenders from the said last-mentioned conclusion (other than the defender William Hill who has already been assoilzied), and decerns," &c.

Counsel for the Pursuers — M'Lennan, K.C.—Armit. Agent—George Matthewson, S.S.C.

Counsel for the Defenders (James Anderson and Others)—A. M. Anderson. Agent—W. P. Crow, Solicitor.

Counsel for the Defenders (A. M. Cruikshank, R. W. Millar, and Others)—Munro. Agents—Reid & Crow, Solicitors.

Counsel for the Defenders (William Hill and Harry Rawson)—Lippe. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defender (J. G. Reid)—Munro. Agents—Reid & Crow, Solicitors.

Tuesday, May 22, 1906.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANARKSHIRE COUNTY COUNCIL *v.* BURGH OF AIRDRIE.

LANARKSHIRE COUNTY COUNCIL *v.* BURGH OF COATBRIDGE.

River—Process—Pollution—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *sec.* 11—*Appeal to Court of Session in Common Form—Competency—Statute.*

The Rivers Pollution Prevention Act 1876, sec. 11, provides for review by one of the Divisions of the Court of Session by way of special case of any proceedings under that Act in the Sheriff Court, and it also provides for a petition or complaint presented in the Sheriff Court being removed to be tried by the Superior Courts in the first instance if thought desirable.

In a petition presented in a Sheriff Court to have the defenders ordained to cease polluting certain streams, the defenders, after the Sheriff had found that they had admitted polluting and were therefore guilty of a breach of the Act, brought an appeal to the Court of Session in common form. *Held* that section 11 of the Rivers Pollution Prevention Act 1876 was exhaustive as to the method of review and exclusive of the common law right of appeal, that the appeal was therefore incompetent and fell to be dismissed, and that it was not and could not at this stage be an application to have the case tried in the first instance in the Superior Court.

Guthrie, Craig, Peter, & Company v. *Brechin Magistrates*, January 9, 1885, 12 R. 469, 22 S.L.R. 343, *commented on.*

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), section 11, enacts—"If either party in any proceedings before the County Court under this Act feels aggrieved by the decision of the Court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice. The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the Judge of the County Court upon the application of the parties or their attorneys. The Court of Appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses. Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, and to enforcing judgments in County Courts and appeals from decisions of the County Court Judges, and to the conditions of such appeals, and to the power of the Superior Courts on such appeals, shall apply to all proceedings under this Act, and to an appeal from such action, in the same manner as if such action

and appeal related to a matter within the ordinary jurisdiction of the Court. Any plaint entered in a County Court under this Act may be removed into the High Court of Justice by leave of any Judge of the said High Court, if it appears to such Judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a County Court, and on such terms as to security for and payment of costs and such other terms (if any) as such Judge may think fit."

Section 21 provides for the application of the Act to Scotland and *inter alia*—"(5) The expression 'the County Court' shall mean the Sheriff of the county, and shall include Sheriff-Substitute, and the expression 'plaint entered in a County Court' shall mean petition or complaint presented in a Sheriff Court. (6) The expression 'the High Court of Justice' shall mean the Court of Session in either Division of the Inner House thereof."

On 28th August 1905 the County Council of the County of Lanark presented a petition in the Sheriff Court at Airdrie against the Provost, Magistrates, and Councillors of the Burgh of Airdrie, in which the pursuers sought to have the defenders ordained to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the North Calder Water, the Luggie Burn, the Gartsherrie Burn, the North Burn, the South Burn, and the Brown Burn, all streams flowing through parishes within the pursuers' district, any solid or liquid sewage matter. A similar petition was also presented against the Provost, Magistrates, and Councillors of the Burgh of Coatbridge. The pursuers founded on the Rivers Pollution Prevention Act 1876, and pleaded—"(1) The defenders having committed an offence against the statute founded on, and polluted the said streams in manner libelled, the pursuers are entitled to have them ordained to abstain from doing so."

The Sheriff-Substitute (GLEGG) found that the action related to a question of heritable right or title in which the value of the subject involved exceeded £1000, appointed the cause to be enrolled for further procedure, and granted leave to appeal. The Sheriff (GUTHRIE) recalled his Substitute's interlocutor, and subsequently, after hearing parties' procurators, found that the defenders admitted permitting sewage matter to fall into the streams, and that they were thus committing an offence, and repelled all their pleas save, in the case of Airdrie, No. 8, which was to this effect—"There being no means practicable and available by which the defenders can render the sewage less harmful, the defenders should be assoilzied," and a similar plea in the case of Coatbridge. The defenders brought an appeal to the First Division of the Court of Session. The appeal was in ordinary form.

On the case appearing in the Single Bills the pursuers (respondents) took exception to the competency of the appeal and argued —The Rivers Pollution Prevention Act 1876 conferred new powers on local authorities and laid down regulations for their exercise. Section 11 prescribed the method of obtaining review of the proceedings in the Inferior Court. That was exhaustive and excluded the common law right of appeal. This appeal was therefore incompetent and could not be treated as an application to have the cause tried in the first instance in the Superior Court as it had already gone too far in the Sheriff Court. [They also advanced an alternative argument, on the supposition that the common law right of appeal subsisted, that the appeal was incompetent as being premature, the Sheriff not having exhausted the case].

Argued for appellants—The appeal was competent. There was a common law right of appeal from the Sheriff Court and it was not taken away; it therefore subsisted—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130. Had it been intended to take it away the Rivers Pollution Prevention Act 1876 would have said so expressly. A similar appeal had been entertained by the Court—*Guthrie, Craig, Peter, & Company* v. *Magistrates of Brechin*, January 9, 1885, 12 R. 469, 22 S.L.R. 343. A special case was not appropriate here, for it proceeded on facts proved or admitted. Here the Sheriff had found the defenders in the wrong without proof or admission. The Act made provision for the cause being tried in the Superior Court if it were thought desirable. It was desirable here. [On the alternative argument they quoted Sheriff Courts Act 1853 (16 and 17 Vict. cap. 80), section 24; Court of Session Act 1868 (31 and 32 Vict. cap. 100), section 53; *Duke of Roxburghe*, May 26, 1875, 2 R. 715, 12 S.L.R. 472; *Turner's Trustees* v. *Steel*, January 9, 1900, 2 F. 363, 37 S.L.R. 250, *per* Lord M'Laren.]

LORD PRESIDENT—These two cases are actions at the instance of the County Council of Lanark against the burgh of Airdrie and against the burgh of Coatbridge respectively, relating to substantially the same circumstances. Both are complaints at the instance of the County Council against the Magistrates of the respective burghs, for polluting, by outflow of their sewers, certain tributary streams of the river Clyde, and both were originated by petitions presented in the Sheriff Court under the provisions of the Rivers Pollution Prevention Act 1876, of which contravention was alleged to have been committed. In both cases the defenders joined issue, but although the defenders were not quite the same in each case it is unnecessary to advert to the distinctions between them as far as the disposal of the present appeal is concerned. Although the defenders did not in terms admit pollution—did not at least admit an infringement of the Rivers Pollution Act—yet it is quite clear from the defences lodged that the sewers did discharge into these streams. The defenders, however, have stated many pleas in defence, including pleas of incompetency, no title to sue, and irrelevancy. Now the

Sheriff-Substitute at first disposed of the action on the first plea of incompetency, on the ground that it related to a question of heritable right or title in which the value of the subject in dispute exceeded £1000, and allowed an appeal; and the Sheriff recalled his Substitute's interlocutor, and then took up and proceeded to deal with the other pleas in the action. I am now referring specially to the Airdrie case, and in that case what he did was to repel all the pleas except the 8th, which he reserved, but he made a finding that it was admitted that sewage was being permitted to fall into the streams, and a finding that the respondents were thus committing an offence against the Rivers Pollution Prevention Act. He then made a remit, under the 10th section of that Act, to a man of skill, and from the terms of the interlocutor one is led to infer that the manner in which he eventually may dispose of the 8th plea will probably depend on the nature of the report of the man of skill.

But however that may be, that is the interlocutor which is appealed against here, and the question that arises for decision is as to the competency of the appeal. Now, the Rivers Pollution Prevention Act, after providing that the initial proceedings shall take place before the County Court, which, by the interpretation clause, is in Scotland the Sheriff Court, proceeds to make this further provision in section 11—"If either party in any proceedings before the County Court under this Act feels aggrieved by the decision of the Court in point of law, or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice," the High Court of Justice being in Scotland the Court of Session. The section goes on to provide that the appeal shall be in the form of a special case, but it also contains this provision—"Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in County Courts, . . . and appeals from decisions of the County Court Judges, and to the conditions of such appeals, and to the powers of the Superior Court on such appeals, shall apply to all proceedings under this Act." But the same section further provides as follows:—"Any plaint entered in a County Court under this Act may be removed into the High Court of Justice by leave of any Judge of the said High Court if it appears to such Judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a County Court."

I am of opinion that the provisions under the Act are exhaustive. The Act gives a purely statutory remedy and not a common law remedy. It is true that the common law remedies are not interfered with but remain as before, yet the remedies here provided are statutory and in some ways peculiar. I do not propose to go into an exposition of the co-existence of these two systems of remedies, which matter was before us in a recent case. It is enough to accentuate the fact that the remedies here are statutory and entirely different from those at common law. The statute here provides that the aggrieved party shall have his choice of the method of procedure. If he thinks that the case should be tried *ab initio* in the High Court, *i.e.*, the Court of Session, he must come and persuade a Judge of that Court to remove the case there, and if he does that, then his preliminary pleas will be disposed of by him. But if he does not do that, and joins issue in the Sheriff Court and has some of his pleas disposed of there, his opportunity of removal to the Court of Session is gone. If proceedings have taken place in the Sheriff Court, the remedy then available to him, as provided by the Act, is an appeal in the form of a special case. On that appeal all the pleas dealt with will come up for review, though of course only on the facts as stated by the Sheriff. It is to be noted, however, that under the terms of the section I have quoted, an appeal is competent in this form both on the law and on the merits.

Therefore I come to the conclusion without difficulty that this appeal is incompetent, and I do not think that that decision will do any injustice to the respondents, for if they choose to appeal by way of special case all their *fasciculi* of pleas will come up for review and form questions in the special case, though they must take care in adjusting the terms of the special case that it is made evident that these pleas have been dealt with in the lower Court.

As I have said, I have come to this conclusion without difficulty, and I should not have said anything further had it not been argued to us that the decision in the case of *Guthrie* v. *Magistrates of Brechin* is to the opposite effect. I do not doubt that that case did involve a determination of this point in a manner opposed to the view that I have just laid down, but clearly the question was never argued in that case. The case is complicated because there the question of competency, was not raised under the Rivers Pollution Act but under the Public Health Act. The defender in his defences founded on the 7th section of the Rivers Pollution Act, but the case was considered on competency, and the plea of incompetency was laid not on the Rivers Pollution Act but on the Public Health Act, and that contention was repelled. It is quite true that as the case went on it must have done so under the Rivers Pollution Act, for it was admitted by the Lord President and Lord Mure that it was truly an appeal under that Act and not under the Public Health Act; but still the point, as I say, was never argued, and so what would otherwise have been a binding decision, cannot weigh with us in deciding this case.

I therefore think that this appeal is incompetent and must be dismissed. After the pleas have been exhausted in the Sheriff Court it will be open to any party aggrieved to appeal to us by way of special case.

LORD M'LAREN—I agree as to the construction of The Rivers Pollution Act and

the conditions under which appeals in such cases must be taken to this Court. It is impossible to read section 11 without coming to the conclusion that it is exhaustive and that it excludes the common law right of appeal. But even were the common law right of appeal not excluded it would not avail the appellant, for he has not brought this appeal at that stage of the proceedings where a common law right of appeal would be available to him.

One important question that has been raised in this discussion is as to the stage at which such proceedings as this can be removed to the High Court. I think it is clear that it is only at an early stage that this step is competent, because the Act says that a plaint may be removed if it appears to the Judge to be desirable that it should be tried "in the first instance" in the High Court. Now, it cannot be doubted that removal would have been competent immediately after the closing of the record, or possibly even after the Sheriff's interlocutor of the 16th of November, which only disposes of two pleas of the defenders, and appoints the case to be enrolled for further procedure. Although I think that, as the Act has not provided a fixed time for removal of the cause, the power should be construed in a sense favourable to the right of removal, I have come to the same conclusion as your Lordship, that the removal is asked for at too late a stage—after the Sheriff has pronounced an interlocutor finding that an offence under the Act has been committed.

As to the other method of bringing the case to this Court, viz., by appeal, the provisions of the statute are wide, for appeal is competent to anyone who is aggrieved by the decision in the Inferior Court either in point of law or on the merits, or with regard to the admission or rejection of evidence. I think it follows that the Act does not limit the remedy to one appeal only, for on a question of the rejection of evidence, if the appeal were successful, the case would have to go back to the Sheriff for the evidence to be completed. But here the Sheriff has disposed of a point of law; and if I were entitled to advise the respondents I should advise that their remedy under the circumstances was by means of an appeal in the form of a special case. That question, however, is not before us, and I agree that the appeal in its present form is incompetent.

LORD KINNEAR—I agree, and I venture to think that the Act not only introduces new remedies but it creates new wrongs, for it allows a public body to treat as statutory offences operations of a riparian owner in cases where no other riparian owner and local authority could have interfered before the passing of the Act. Now, in creating this new offence the statute provides two distinct processes by which the matter may be brought under the cognisance of the High Court, or in Scotland the Court of Session. In the first instance it provides for removal to this Court, but if that procedure is not made use of, and the County Court or Sheriff Court proceeds to dispose of the matter in the first instance, then the statute allows of an appeal by way of a special case. The two methods are quite distinct, and that this is an appeal and not a removal is perfectly clear, for we are here asked to review the decision of the Sheriff finding that an offence under the Act has been committed. It is manifest that that is not a removal for trial "in the first instance," but an appeal against a decision of the Inferior Court.

Now, the statute provides that a party may appeal if aggrieved by the decision of the Inferior Court in point of law or on the merits, and the statute goes on to provide that the appeal shall be in the form of a special case, but it further provides that all the enactments, rules, and orders relating to such proceedings in County Courts and appeals therefrom shall apply to all proceedings and appeals under this Act. But that is all to be "subject to the provisions of this section;" that means that a party is to have the benefit of all the existing enactments provided he takes his appeal in the form provided by this section and not otherwise. I therefore think that in this form the appeal is incompetent, but the appellants' remedy is not thereby taken away, for he can raise all his points on appeal by way of special case on a proper application to the Sheriff for that purpose.

LORD PEARSON was not present.

The Court dismissed the appeal as incompetent, and remitted the cause to the Sheriff to proceed.

Counsel for the Pursuers and Respondents—Scott Dickson, K.C.—T. B. Morison. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for the Burgh of Airdrie, Defenders and Appellants — Wilson, K.C. — Murray. Agents — Drummond & Reid, W.S.

Counsel for the Burgh of Coatbridge, Defenders and Appellants—Hunter, K.C.—Horne. Agents — Laing & Motherwell, W.S.

Wednesday, May 23.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

ROBERTSON *v.* BRANDES, SCHÖNWALD, & COMPANY.

Contract—Construction—Foreign—Arbitration Clause—Reference to Arbitration in a Country not that of the Parties nor of Fulfilment—Law Governing Validity and Effectiveness of Clause.

A contract between a merchant in Scotland and a mercantile firm in Antwerp, to be implemented in Scotland, contained this clause — "*Arbitration.*—Any dispute on this contract to be settled by friendly arbitration in London in the usual way." *Held* that