Thursday, December 5.

SECOND DIVISION.

[Sheriff Court at Dumfries.

DUMFRIES COUNTY COUNCIL *v.* LANGHOLM MAGISTRATES.

Process — Sheriff — Appeal — Competency — River—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *sec.* 11—*Appeal by Special Case against Interlocutory Judgment — Leave to Appeal — Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *sec.* 28 (*c*).

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), sec. 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. . . . 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. . . ."

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 28, enacts—"*Appeal to Court of Session.*—Subject to the provisions of this Act, it shall be competent to appeal to the Court of Session against a judgment of a sheriff-substitute or of a sheriff, but that only if . . . the interlocutor appealed against is a final judgment, or is an interlocutor— . . . (*c*) against which the sheriff or sheriff-substitute, either *ex proprio motu* or on the motion of any party grants leave to appeal: Provided that any exclusion or allowance of appeal competent under any Act of Parliament in force for the time being shall not be affected by this or the preceding section."

Where a party to an action under the Rivers Pollution Prevention Act 1876 applied to the Sheriff to settle a special case, under section 11 of the Act, for appeal to the Court of Session against an interlocutory judgment of the Sheriff, and the Sheriff settled the case, the Court *held* (*diss.* Lord Salvesen, who held the appeal competent without the leave of the Sheriff) that the provisions of section 28 (*c*) of the Sheriff Courts (Scotland) Act 1907 applied to an appeal by way of special case under section 11 of the Rivers Pollution Prevention Act 1876, that the appeal was therefore incompetent unless the leave of the Sheriff had first been obtained, and that the party had not obtained the leave of the Sheriff by merely applying to him to settle the special case and his settling it.

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75), sec. 11, is *quoted in rubric.*

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), enacts—Section 28 (*c*)—". . . [*quoted in rubric*] . . ." First Schedule, Rule 93—"*Form of Appeal.*—The party desiring so to appeal, or his agent, shall do so by writing on the interlocutor sheet (or on a separate paper, in like manner as in the case of an appeal from the sheriff-substitute) a note in the following terms:—The pursuer [*or* defender *or* other party] appeals to the —— Division of the Court of Session."

The County Council of the County of Dumfries, *pursuers*, brought an action in the Sheriff Court at Dumfries against the Magistrates of Langholm, *defenders*, under the Rivers Pollution Prevention Act 1876 to have the defenders restrained from polluting the river Esk.

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The action is irrelevant. (3) The pursuers' statements regarding pollution are lacking in specification, and ought not to be remitted to proof."

On 29th January 1912 the Sheriff-Substitute (CAMPION) pronounced an interlocutor in which he repelled the first, second, and third pleas-in-law for the defenders and granted leave to appeal.

An appeal was taken but was not persisted in. Thereafter the pursuers having refused to adjust, the defenders moved the Sheriff to settle a Special Case, which he did.

The *question of law* in the case was—"Was I [the Sheriff] right in repelling the first, second, and third pleas-in-law for the defenders and appellants, or any and which of them?"

Argued for the respondents—The appeal was incompetent. It was incompetent by the ordinary Sheriff Court procedure, since section 11 of the Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75) provided a way of appeal to the Court of Session in the form of a special case. But the right of appeal was only against summary orders made in virtue of section 10, restraining the commission of an offence, and not against interlocutory judgments. Such appeals would multiply and delay procedure and be contrary to the policy of the Act. In the case of *County Council of Lanark* v. *Magistrates of Airdrie*, May 22, 1906, 8 F. 802, 43 S.L.R. 632, founded on by the appellants, the merits of the case had been substantially disposed of. Moreover, section 11 provided that all the enactments relative to Sheriff Court procedure should apply to such appeals. By section 28 (*c*) of the Sheriff Courts (Scotland) Act 1907 an

interlocutory judgment of the Sheriff could only be appealed to the Court of Session if his leave had first been obtained, and the appellants here had omitted to obtain such leave. The application to the Sheriff to settle a case did not amount to asking for leave to appeal, because by rule 93 of the first schedule of the Sheriff Courts (Scotland) Act 1907 an appeal must be duly noted in writing, and in this case there was no written note of appeal. The leave must also be given by the Sheriff in writing.

Argued for the appellants—The appeal was competent. Section 11 of the Rivers Pollution Prevention Act 1876 gave a right of appeal on incidental questions of law as well as on the merits—*County Council of Lanark* v. *Magistrates of Airdrie* (*cit. sup.*), *per* Lord President and Lord M'Laren (the subsequent history of the case (*see* 44 S.L.R. 915, and 47 S.L.R. 508, [1910] A.C. 286) showed that the parties so regarded the effect of the decision); *Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130, 20 S.L.R. 92. Section 28 (*c*) of the Sheriff Courts (Scotland) Act 1907 did not apply to appeals by way of special case made under section 11 of the Rivers Pollution Prevention Act 1876, and under section 11 no leave was required. Even if leave were necessary, the Sheriff had in fact granted it, inasmuch as he had settled the Special Case when requested to do so by the appellants. The present appeal was analogous to an appeal by way of stated case under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), Second Schedule, sec. 17 (*b*), and in appeals under that Act the leave of the Sheriff was not required.

At advising—

Lord Dundas—We have here an appeal in the form of a Special Case stated by the Sheriff of Dumfries and Galloway under the Rivers Pollution Prevention Act 1876. The respondents (pursuers in the Sheriff Court proceedings) are the County Council of the County of Dumfries. The defenders (appellants) are the Provost, Magistrates, and Councillors of the police burgh of Langholm. An objection to the competency of the appeal is taken by the respondents. The interlocutor of the learned Sheriff which the appellants seek to bring under our review is dated 29th February 1912. The Sheriff thereby adhered to an interlocutor of the Sheriff-Substitute (which repelled certain preliminary pleas for the defenders directed against the pursuers' title to sue, and the relevancy and specification of their averments), and remitted the case to the Sheriff-Substitute to proceed. The objection to the competency is that this interlocutory appeal, though it is in the form of a Special Case, as directed by the Rivers Pollution Act, cannot be entertained because it is brought without leave asked of and granted by the Sheriff. I think the objection is well founded and must be sustained.

The Rivers Pollution Act 1876, which, though applicable to Scotland, is conceived to a great extent in language presumably more familiar to an English than to a Scots lawyer, enacts (section 10) that the County Court (Sheriff Court) having jurisdiction in the place where any offence against the Act is committed, may "by summary order" require any person to abstain from the commission of such offence, and may require him to perform any statutory duty in respect of which he is in default, subject to such conditions as the said Court may think right to insert in the order, with power to the Court, previous to granting such order, to remit to skilled persons to report. Section 11 enacts that "if either party in any proceedings before the County Court" (Sheriff 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 to" either Division of the Court of Session. "The appeal shall be in the form of a special case"; and there are further provisions, which I shall presently quote, as to the mode of procedure in such appeal. Reading these sections, I should infer the policy of the Act to be that the appeal in the form of a special case is intended to bring up "the decision" of the lower Court, with all or any of the pleas-in-law, or on the facts as found by the Sheriff, after the substance of the case has been determined. The "decision" is to be "by summary order." It is obvious that it may often be to the interest of defenders who are charged with some offence under the Act to avail themselves, for the mere sake of delay and putting off the evil day, of every right of appeal they can legally resort to. If the appellants' argument is correct, there might be a series of appeals by way of special case brought, as matter of right, upon successive points of law, fact, or procedure. I do not think the Act contemplated this. Apart, however, from considerations of general policy, it seems to me that we must decide this question of competency having regard to section 11 of the Rivers Pollution Act and to the existing legislation as to appeals to this Court from the Sheriff Court. I think that section 11 must be read as one consistent whole, and not, as was suggested, to the effect that the first part of it, which I have already quoted, gives an absolute statutory right of appeal in no way limited or affected by what is contained in the latter part of the section which I now quote. It provides that, "subject to the provisions of this section"—*i.e.*, as I read these words, subject to the appeal being duly taken in the form of a special case—"all the enactments, rules, and orders relating to proceedings in actions in County" (Sheriff) "Courts . . . . 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." In other words, an appeal from the Sheriff Court under section 11 is declared to be subject, apart

from the special form in which it must be stated, to all enactments relating to appeals in ordinary Sheriff Court actions. Now the Sheriff Courts (Scotland) Act 1907 (section 28) defines what interlocutors, other than "a final judgment," may be appealed to this Court; and these, besides interim decrees for payment and decrees of sist, are interlocutors "against which the Sheriff or the Sheriff-Substitute, either *ex proprio motu* or on the motion of any party, grants leave to appeal." The proviso which follows has in my judgment no application here, for the Rivers Pollution Act makes no "allowance of appeal" except subject to the provisions above quoted. It seems to me clear that an interlocutory appeal like the present, though stated in the form of a special case, is not competent without leave.

The appellants sought to derive aid from what happened in *County Council of Lanark and Others* (1906, 8 F. 802). All that that case decided was that in proceedings under the Rivers Pollution Act an appeal in ordinary form is incompetent; it must be in the form of a special case. The Sheriff's interlocutor which it was there sought to review, though not technically a "final judgment," disposed substantially of the merits of the case, for he found that the defenders admitted that they were permitting sewage matter to fall or flow into the stream condescended on, and were thus committing an offence under the statute; repelled nine out of the ten pleas-in-law for the defenders; reserved meanwhile their eighth plea, and before making a remit, as directed by section 10 of the Act, appointed parties to be heard as to the terms of the remit. The First Division held that the appeal was incompetent. The Lord President in the course of his opinion made observations which seem to me to harmonise with what I have said as to the presumed policy of the Act and the scope and effect of an appeal in the form of a special case. But the present appellants found upon some *obiter dicta* in the opinion of Lord M'Laren. His Lordship pointed out that the interlocutor, not being a final judgment on the merits, could not, as the legislative provisions about appeals then stood, be appealed in the ordinary course, but towards the conclusion of his opinion he stated the view 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." So far I agree with Lord M'Laren, but I do not gather that he meant that if objection is taken in the course of a proof in the Sheriff Court to the admission or rejection of evidence, the proof must there and then be adjourned until an appeal in the form of a special case upon that objection is decided by this Court, and be thereafter resumed. I apprehend that, the objection being duly noted, the proof would proceed, and the objection could be subsequently considered either separately, if it were the sole matter of appeal, or along with such other points in law or on the merits as it was desired to bring up for review, by an appeal in the form of a special case afterwards properly presented to this Court. I agree with Lord M'Laren that if the appeal were successful upon a point as to evidence which the Sheriff had improperly rejected, the case would have to go back to the Sheriff Court, and that a second appeal might in that event be necessary and would be competent. But Lord M'Laren went on to say that he considered that, the Sheriff having disposed of a point of law, the appellants' remedy under the circumstances was by means of an appeal in the form of a special case. That question, however, as his Lordship expressly added, was not before the Court, which had no special occasion to consider section 11 closely in relation to that kind of question with which we are now dealing. Lord Kinnear, after summarising the provisions of the section, said—"But that is all to be 'subject to the provisions of this section'; that means that a party is to have the benefit" (and I venture to interpolate "and be subject to the inconveniences, if any") "of all the existing enactments provided he takes his appeal in the form provided by this section, and not otherwise." This seems to be entirely in accordance with my view of section 11 already expressed. Lord Kinnear added—"I therefore think that in this form the appeal is incompetent, but the appellant's 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." I understand his Lordship to mean, that though the appeal as presented was incompetent, the appellants might competently raise all their points on an appeal by special case brought at the proper time for that purpose. The subsequent history of the *Airdrie* case (see 44 S.L.R. 915, *affid.* 47 S.L.R. 508, [1910] A.C. 286) discloses that the Sheriff's interlocutor was in fact subsequently brought under review of the First Division and the House of Lords by an appeal in the form of a special case, but no question of competency was raised or considered. I think nothing that was said or done in the *Airdrie* case—to which I have referred at such length on account of the insistent arguments upon it at our Bar—affords any warrant for the proposition that, as matters stood prior to 1907, an interlocutor dealing solely with preliminary points such as title to sue and relevancy could competently form the subject of an appeal to this Court under section 11 of the Rivers Pollution Act. It seems to me doubtful whether any interlocutor other than a final judgment could have been so brought up for review, and some confirmation of that view is found in the procedure adopted by a very experienced Sheriff of Midlothian in the *Portobello* case (1882, 10 R. 130, at p. 133). Sheriff Davidson added a note to his interlocutor stating that he had "deserned in the matter of expenses at this stage to enable the defenders to appeal the case immediately." But however this may be,

the present question must, as I think, be decided upon a construction of the existing Act of 1907 and of section 11 of the Rivers Pollution Act, and construing these enactments I think it is reasonably clear that an interlocutor such as we have here to consider cannot be appealed against without leave even in the form of a special case. There is no hardship in this result, for the whole pleas of parties can always be brought up as matter of right at the proper time, and if peculiar reasons pointed to the advisability of a special case upon preliminary questions alone, the Sheriff might grant leave for such an appeal, or the course prescribed at the close of section 11 of the Rivers Pollution Act might be resorted to, and an application made at the initial stages of the proceedings for their removal into the Court of Session, as was done in the recent *Midlothian* case (1902, 4 F. 996, 39 S.L.R. 767, 1903, 5 F. 700, 40 S.L.R. 519).

I should perhaps notice in conclusion a suggestion rather faintly made by the appellants' counsel to the effect that if leave was necessary here it must be held to have been granted as matter of inference from the fact that the Sheriff has stated a case. This, I think, will not do at all. An appeal must be duly noted in writing (see rule 93 in the First Schedule to the Act of 1907), and when the Sheriff's leave is necessary and he is willing to grant it he must do so in writing. Here there is no written note of appeal, and no signification in writing by the Sheriff that he either grants or refuses leave to appeal. I infer that the learned Sheriff desired to leave the whole question of competency for the decision of this Court.

For the reasons now stated, I think we must sustain the objection to the competency of this appeal.

The case was sent to the Summar Roll to be heard, reserving the question of competency. For the sake of convenience and to avoid unnecessary expense we heard counsel upon the merits of the appeal. It may be permissible, especially as one of your Lordships is of opinion that the appeal is competently before us, to say in a word that the appellants' case appeared to me to possess no merits at all. The argument in support of it was in my judgment, and I believe in that of both my brethren, barely stateable.

LORD SALVESEN—I cannot help regretting that a difficult question of competency should have been raised in an appeal which admits of easy decision on its merits; but as we cannot proceed to consider the merits until we have held the appeal competent, and as the argument against the competency was strenuously maintained, it is our duty to decide it.

The right of appeal in proceedings before the Sheriff presented under the Rivers Pollution Prevention Act 1876 depends on the construction of section 11. The First Division in the *Airdrie* case (8 F. 802) held that these provisions are exhaustive and exclude the common law right of appeal. A statutory form of appeal by way of a special case is provided instead. Provided this form of appeal is used, any party 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, may appeal from that decision" to the Court of Session. It was maintained that this clause must be read along with the previous section, which deals with the Sheriff pronouncing an order requiring a person to abstain from the commission of an offence under the Act and the conditions on which it is granted, and that "the decision of the Court" referred to in section 11 means either a final decision, or at all events one which settles the main controversy between the parties. I am unable so to read it. Such a decision would be a decision on the merits, but the appeal allowed embraces decisions on points of law in addition to decisions on the merits. In the present case the Sheriff has repelled a plea of no title to sue, which is a decision on a point of law. It can therefore, in my opinion, be properly brought up for review by means of a special case.

The view that I have arrived at appears to me to be in accordance with the opinions of Lord M'Laren and Lord Kinnear in the case I have already referred to. After referring to the terms of the Act Lord M'Laren said—"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 appellants I, should advise that their remedy under the circumstances was by means of an appeal in the form of a special case"; and Lord Kinnear, after holding that an appeal in common form was incompetent, said—"But the appellant's remedy is not thereby taken away, for he can raise all his points on appeal by way of special case, on proper application to the Sheriff for that purpose."

It is interesting to note that Lord M'Laren's advice was taken, and an appeal by way of special case was afterwards presented and entertained without objection under circumstances which are in my opinion indistinguishable from those that are present here. No doubt the point that was argued before us was not taken, and the observations of the two Judges quoted above were *obiter*, so that there is no binding decision on the matter; but I agree with these observations, and I think the subsequent history of the *Airdrie* case shows that they were understood by the parties as substantially settling the question of the competency of an appeal on a point of law before there had been inquiry.

I would only further add that a decision on the merits may involve questions of law as well as questions of fact, but I think the Act intended to give a right of appeal on incidental questions of law which might arise before the merits were reached. There can be no better illustration of this than

a decision repelling or sustaining a plea of no title. I am not moved by the suggestion that it is inconvenient to have appeals to this Court from interlocutory judgments, and that the right of appeal is liable to be abused for the sake of obtaining delay. The same observation might be made with regard to the provisions of the recent Sheriff Courts Act, which represents the mature views of the Legislature as to the decisions of the Sheriff which it is considered desirable should be appealable to the Court of Session. But the inconvenience is not all on one side. Nothing, for instance, could be more unfortunate than that there should be inquiry into the merits when it might turn out in the end that the pursuer had no title to sue.

It is not necessary, however, further to elaborate this matter, as I understand both your Lordships to hold that this appeal is incompetent on the second ground argued, namely, that the Sheriff has not granted leave to appeal; and that the interlocutor appealed against, if it had been pronounced in an ordinary action, would not have been appealable without such leave. I fully recognise that such a restriction upon the right of appeal where the decision is not final might be very desirable, as the Sheriff would presumably not grant leave unless he considered there was a real question of law to be decided, and so mere dilatory appeals would be excluded. The question, however, is whether the proviso at the end of the section introduced this limitation on the statutory right of appeal already conferred by the earlier part. When one turns to the Sheriff Courts Act 1907, I think it will be found that no provision is made for an appeal in the form of a special case. The rules of procedure connected with appeals, so far as they were founded on by the respondents, all deal with appeals in ordinary course. Where an interlocutor is appealable to the Court of Session without leave, all that the appellant has to do is to write upon the interlocutor sheet or on a separate paper a note of appeal. He does not need to consult the Sheriff; and when the note of appeal has been duly signed, the process is transmitted by the sheriff-clerk to the Court of Session. Where the interlocutor is one which requires leave, the appellant must ask and obtain leave within four days of its signature. This procedure does not appear to me to be applicable to an appeal in the form of a special case. I understand that your Lordships are prepared to hold that an application for a special case should take the place of an application for leave to appeal. I see no warrant for so adapting the language of the Sheriff Courts Act to circumstances to which it does not apply. It is only after the parties have failed to agree on the form of a special case that under the Rivers Pollution Prevention Act an application falls to be made to the Sheriff to state a case. If parties agree, the Sheriff is not asked to intervene, and there is no time limit within which the case falls to be adjusted. I fail to see, therefore, how the rules relating to an appeal of a totally different kind can be made applicable to this special form. On the same footing it would seem to follow that if the appealing days prescribed for an ordinary appeal have expired before the special case has been adjusted, the appeal would be incompetent. The ordinary rules prescribed by the Sheriff Courts Act become still more difficult to apply in the case of an appeal founded on the rejection or admission of evidence. Is the statutory right of appeal to depend in this case also on leave being granted? I apprehend that would be to take away the right of appeal expressly conferred in probably a majority of the cases to which it applied. It was suggested that the proof before the Sheriff would have to be stopped so as to admit of a special case being presented to determine the validity of the Sheriff's finding on the question of his rejection or admission of evidence. I do not agree. I think the Sheriff would continue to take the proof so far as he held it competent, although in the ordinary case it might be well for him to delay issuing his decision until he ascertained whether his rulings were sound, or whether further evidence required to be led, otherwise he might find himself in the position of having issued a decision on a proof which had only partially been led, or allowed his mind to be influenced by evidence which he ought not to have admitted. This serves to illustrate how impossible it is to apply a code of procedure designed to regulate the recognised mode of appealing the judgment of an inferior court to an appeal on specific grounds, and in a form which, I understand, is only recognised in this particular statute. I regret, therefore, that I am unable to concur with the majority of your Lordships in holding that this objection to the competency is well founded. It is not for the Court to legislate so as to create a new code of procedure applicable to a case for which the Sheriff Courts Act of 1907, which now regulates appeals in ordinary cases, makes no provision. If the latter clause of the section is read as your Lordships propose, it really takes away the right of appeal conferred by the statute on points of law, or on the admission or rejection of evidence, unless the Sheriff grants leave to appeal within a given number of days after his interlocutor has been pronounced. I may add that the alleged advantage from so construing the section is really more apparent than real, because I think it may be assumed that parties will not agree upon a special case, and failing agreement, that the Sheriff will not state such a case unless there is some genuine question of law for the decision of a superior court. On these grounds I am of opinion that this objection to competency also fails.

On the merits, all I need say is that I entirely agree with the opinion of the Sheriff as expressed in his note; and indeed I think the argument for the appellants was barely stateable.

LORD GUTHRIE—I agree with your Lordship in the chair. This case was sent to

the roll to be heard on the merits, reserving the question of competency. Being of opinion that the case is not competently before the Court, we are not in a position to consider, still less to decide, the merits. But it is right to say that my impression is not only that the appeal was unfounded, but that the only objection brought before us was so plainly unstateable that I should have been surprised had the Sheriff, if the request had been made to him, granted leave to appeal.

The question of competency depends on section 11 and section 21 (5) (6) (7) of the Rivers Pollution Act of 1876, and sections 27 (*c*) and 28 (*e*), and rules 92 and 93 of the Sheriff Court Act of 1907.

The complainers say that under the first paragraph of section 11 of the 1876 Act they got an unqualified and unconditional right to appeal such judgments as those of the Sheriff-Substitute of 29th January 1912 and of the Sheriff of 29th February 1912, by way of a special case, prepared and adjusted as this one has been. They contend that the provisions of the fourth paragraph (read along with section 21) under which "all the enactments, rules, and orders relating to proceedings in [the Sheriff Courts of Scotland] and to enforcing judgments in [Sheriff Courts] and appeals from decisions of the [Sheriffs], and to the conditions of such appeals and to the powers 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," do not apply to or qualify or control the absolute right of appeal contained in the first paragraph of section 11.

If the complainers are wrong in this view they do not seriously dispute that before the interlocutors in question could be appealed from the Sheriff to the Court of Session leave to appeal would be required, which could be granted *ex proprio motu* or on an application for leave to appeal, in terms of section 28 (*c*). It was suggested indeed, rather than argued, that the Sheriff's signature of the present Stated Case implied or was equivalent to leave to appeal having been granted by him. But apart from the fact that the respondents have throughout kept open their objection to the competency of the Stated Case, there is no provision in the statute, if leave to appeal be necessary, for any equivalent to the regular procedure.

I cannot assent to the complainer's view. I see no reason to think it probable, and it seems to me to be in plain opposition to the terms of section 11. It is true that there are no qualifications and conditions in the first paragraph of section 11. But that paragraph is only part of a section, and the whole section must be read together. It is true also that the qualifications and conditions in the fourth paragraph of the section are prefaced by the words "subject to the provisions of this section." But it does not appear to me that these words introduce any difficulty. They would only have done so if there had been any insuperable difficulty in reading the condition in question consistently with the second paragraph of the section, or any intolerable hardship caused by so doing. I confess I see neither insuperable difficulty nor intolerable hardship, or any difficulty or hardship at all. Taking the section as a whole I read it as allowing an appeal in the form of a special case against an interlocutory judgment in a prosecution under the Act, but only on leave to appeal having been got by the ordinary statutory method.

It was said that the respondents' contention was inconsistent with the case of the *County Council of Lanark* v. *Magistrates of Airdrie*, 8 F. 802. But the point was not taken in that case.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal as incompetent and remitted the case to the Sheriff to proceed as accords.

Counsel for the Appellants — Wilson, K.C. — Morton. Agents — Norman M. Macpherson, S.S.C.

Counsel for the Respondents — Clyde, K.C.—Hon. W. Watson. Agents—Webster, Will, & Company, W.S.

Thursday, December 5.

SECOND DIVISION.

[Sheriff Court at Glasgow.

CHARLTON & BAGSHAW *v.* THOMAS LAW & COMPANY.

Ship—Contract—Bill of Lading—Liability for Damage to Cargo—Unseaworthiness — Latent Defect — Express Stipulation that Latent Defects should not be Considered Unseaworthiness—Provisions of Statute Imported into Bill of Lading—Exercise of Due Diligence.

A bill of lading contained a stipulation that "any latent defects in the hull and tackle (of the ship) shall not be considered unseaworthiness." The bill of lading also contained a "Clause Paramount" which declared that the bill of lading should be construed subject to all the provisions of an Australian Act. The Act provided that in every bill of lading "a warranty shall be implied that the ship shall be at the beginning of the voyage seaworthy in all respects," and . . . "(5) Where any bill of lading or document contains any clause, covenant, or agreement whereby . . . (*b*) any obligations of the owner or charterer of any ship to exercise due diligence, and to properly man, equip, and supply the ship, to make and keep the ship seaworthy, and to make and keep the ship's hold, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and