to be communicated. I therefore reserve my opinion upon that question.

LORD RUTHERFURD CLARK—In regard to the question of competency raised in this interlocutor, I agree with your Lordships that the interlocutor should be affirmed. On the question of the relevancy of the pursuer's averments I reserve my opinion.

The Court adhered, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for Pursuer—Ure. Agent—Robert Emslie, S.S.C.

Counsel for Defenders—J. P. B. Robertson—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, July 8, 1882.

SECOND DIVISION.

DAILLY *v.* BEATTIE & SONS.

GARDEN *v.* BEATTIE & SONS.

Process—Issue—Reparation—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42).

These were two actions brought by persons who when in the employment of the defenders on 4th May 1882 were injured by the fall of a pile of old building material belonging to the defenders at Advocate's Close, Edinburgh. The pursuers alleged that the fall of this pile was caused by the fault of the defenders or those for whom they were responsible. The case averred by them was one of fault against the defenders for which previous to the Employers Liability Act 1880 they would have been responsible at common law, and also a case of fault against them as being responsible for the negligence of fellow-servants of the pursuers (certain foremen builders of the defenders) for whom the defenders were alleged to be responsible under that Act.

The pursuers did not remove the actions to the Court of Session under section 6 of the statute, but allowed the cases to remain in the Sheriff Court until an order for proof was pronounced. They then appealed to the Second Division for jury trial under the 40th section of the Judicature Act. They proposed this issue for the trial of each action:—"Whether on or about the 4th day of May 1882, and in or near Advocate's Close, Edinburgh, the pursuer while in the employment of the defenders was injured in his person through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The defenders objected to the cases being tried under a single issue in each case, and maintained that as the actions were laid both at common law and under the Employers Liability Act there ought to be in each case, in addition to the issue proposed, another issue so framed as to raise the question whether there was a cause of action of the kind for which the statute gave a remedy.

The Court, without calling on pursuers' counsel, approved of the issue proposed by the pursuers, on the ground that a single issue was quite fitted for the trial of the case, which depended upon the application to the facts of the case of the common law as amended by statute.

Counsel for Pursuers—Rhind—Sym. Agent—Thomas M'Naught, S.S.C.

Counsel for Defenders — Trayner — Salvesen. Agents—Drummond & Reid, W.S.

Friday, November 10.

SECOND DIVISION.

SPECIAL CASE—MAGISTRATES OF PORTOBELLO *v.* MAGISTRATES OF EDINBURGH.

Process — Sheriff — Competency of Appeal from Sheriff-Substitute to Sheriff—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. c.* 75), *secs.* 3, 11, 20, 21.

Held that there is under this statute an appeal from Sheriff-Substitute to Sheriff-Principal.

Where a statute confers a new jurisdiction, such jurisdiction is, in the first instance, to be regulated by the terms of the statute conferring it. Where a statute directs proceedings under it to be taken in a Court already existing, without specifying any limitations, the presumption is that the proceedings are to be conducted according to the ordinary forms of that Court.

Rivers Pollution Prevention Act 1876, *sec.* 20—"*Water-course mainly Used as a Sewer.*"

A stream into which sewage had been conducted to such an extent that it had ceased to be anything but a common sewer, flowed into a larger stream the water of which above the junction was comparatively pure. As the result of the junction the proportion of the water of the larger stream to the lesser stream, including the sewage therein, was about 3 to 1, except in very dry weather, when it was much less. The stream formed by the junction of the two streams was regularly used for watering cattle. *Held* that it was not "a stream or water-course mainly used as a sewer."

Question—Whether the Rivers Pollution Act of 1876 entirely prohibits the discharge of solid or liquid sewage matter into a stream, subject only to the exception contained in the Act?

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. c. 75) enacts by sec. 3 that "every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter shall [subject as in this Act mentioned] be deemed to have committed an offence against this Act." . . .

This was an appeal at the instance of the Magistrates of Edinburgh, by Special Case stated by agreement of parties, under the provisions of the Rivers Pollution Prevention Act 1876, against interlocutors pronounced by the Sheriff of Midlothian on 29th June and 22d July 1880 in a complaint at the instance of the Magistrates of Portobello as the sanitary authority under the said Act, in which complaint they charged the defenders (appellants), as sanitary authority of the city of Edinburgh, with having caused or knowingly permitted the sewage of certain districts of Edinburgh to be discharged into the Jordan or Pow Burn, which, being a tributary of the Braid or Figgate Burn, discharged

into and rendered insanitary that stream within the burgh of Portobello, and in which they also prayed the Court to order summarily, and require and ordain, the defenders to desist from the commission of the offence charged.

The Magistrates of Edinburgh lodged defences to the complaint, in which, *inter alia,* they maintained a prescriptive right to discharge sewage into the Figgate Burn.

The material facts were as follow:—The Pow Burn rises a short distance westward of Morningside, the southern suburb of Edinburgh, and flows east. A somewhat larger stream, named the Braid Burn, rises in the Pentland Hills to the south-west of Edinburgh, and after a course of 10 miles eastwards past the southern and eastern suburbs of Edinburgh, runs through the western part of the municipal district of Portobello, and falls into the Firth of Forth at a point within the burgh boundary of Portobello. The Pow joins the Braid Burn at a point on the south-east of Edinburgh about three miles from the sea, and from that point they flow together, and the stream formed by their union is called the Figgate Burn. Above the junction the Braid Burn was at the period of this Special Case, and for more than forty years had been, a comparatively pure stream, used for most primary purposes. At the same time, it was the opinion of analysts that at the date of this case it was not to be recommended for culinary purposes, though it might be employed for washing and for watering cattle. The Pow Burn above its junction with the Braid was the natural recipient of the drainage of the districts through which it passed, and for more than forty years had been used for carrying away the sewage of the southern districts of Edinburgh called Morningside, Grange, Newington, Causewayside, Mayfield, and Echo Bank. In consequence of the growth of these suburbs the amount of sewage allowed to run into the Pow had greatly increased since 1862, more particularly in consequence of a certain system of drainage constructed between that year and the year 1874. The proportion of the Braid to the natural stream of the Pow was as 9 to 1, but including the sewage in the Pow the proportion of the Braid to the Pow was as 3 to 1; and during summer, in dry seasons, the Braid was diminished about one-half, while the Pow, although correspondingly reduced in its natural flow, received a constant supply from the Edinburgh drainage pipes. The Figgate Burn received the field drainage on its course and the overflow stream of Duddingston Loch, into which the sewage of Duddingston village is conducted. The water of the Figgate had been used only occasionally since 1851 for domestic purposes within the district of the local sanitary authority of Portobello in consequence of receiving the drainage of the above-mentioned districts of Edinburgh. Prior to 1851, when a supply known as the Crawley water was introduced into Portobello, the Figgate had been used for drinking, and generally for domestic purposes, although well-water was used in preference, and a well was sunk about 1840 by a person who resided in Portobello close to the bank of the Figgate, because he could not drink the water of the Figgate. It formed the only water supply for the cattle in the Duddingston and Abercorn policies, to the south-east of Edinburgh, through which policies it flowed.

By section 20 of the Rivers Pollution Prevention Act 1876 the expression "stream" "includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board by order published in the *London Gazette.* Save as aforesaid, it includes rivers, streams, canals, lakes, and water-courses, other than water-courses at the passing of this Act mainly used as sewers, and emptying directly into the sea or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid."

Proof having been led in the complaint before the Sheriff-Substitute (Hallard), he pronounced on 19th May 1880 an interlocutor in the following terms:—"The Sheriff-Substitute having heard counsel on the proof, productions, and whole process—Finds, in point of fact, (1) That for a period of more than forty years the sewage of the southern districts of the city of Edinburgh has been in use to be cast into a stream known at the upper part of its course as the Jordan Burn, then as the Pow Burn, under which name it joins a larger stream beyond these districts known as the Braid Burn; (2) that said Jordan or Pow Burn is the natural outlet for the drainage of said districts; (3) that at some distance below the point of junction between the Pow and the Braid, the stream resulting therefrom is known as the Figgate Burn, under which name it enters the municipal boundaries of Portobello, and reaches the sea after passing through that burgh; (4) that the Figgate Burn is the only stream mentioned in the present proceedings, which the pursuers have a statutory title and interest to preserve from pollution, as being a stream within, or passing through or by any part of, their district; (5) that said stream, at the date of the Rivers Pollution Prevention Act of 1876, was, in terms of section 20 thereof, a water-course mainly used as a sewer and emptying directly into the sea: Finds, in point of law, that said stream, flowing through the pursuers' municipal boundaries as aforesaid, is not within the protection of the statute: Sustains the defences to that effect: Dismisses the petition: Finds the defenders entitled to expenses," &c.

On an appeal being presented to the Sheriff (Davidson), the defender objected to its competency, founding on sections 11 and 21, sub-sections 5 and 7, of the Act, quoted *infra* in the opinions of the Lord Justice-Clerk and Lord Young. The Sheriff repelled the objections, and appointed parties to be heard on the merits. Thereafter, on the 29th June 1880, he pronounced the following interlocutor, being the interlocutor first appealed against in the Special Case—"The Sheriff having considered the appeal for the pursuers, with the proof, productions, and whole process, and heard counsel for the parties, Recalls the interlocutor appealed against: Finds that the pursuers are the sanitary authority of the burgh of Portobello, under the Rivers Pollution Prevention Act 1876, and the defenders are the sanitary authority of the burgh of Edinburgh; that the southern district of the burgh of Edinburgh, comprising Morningside, Grange, Newington, Mayfield, and others, are drained by or under the authority of the defenders into the Pow Burn; that the Pow so receiving the sewage of these districts is a sewer, and full of sewage mat-

ter, the amount of which has for some years much increased, and is increasing in consequence of the increase of buildings within the district; that the Pow, after having collected the said sewage, falls or is carried into the Braid Burn, of which it is a tributary; that the Braid Burn, after the Pow has entered it, becomes polluted by the sewage of the Pow, and continues polluted therein till it enters the burgh of Portobello and discharges itself into the sea; that within Portobello the Braid, or as it is called after the junction of the Pow, the Figgate Burn, in consequence of the sewage brought into it by the Pow, is in a polluted and insanitary state, its waters unfit for domestic and ordinary use, and dangerous to the health of the inhabitants: Finds that the said Braid or Figgate was not, within the meaning of the said Rivers Pollution Act, a water-course mainly used as a sewer at the passing of the said Act; and appoints the case to be put to the roll that parties may be heard as to further procedure."

On the 22d July 1880 the Sheriff pronounced this other interlocutor, being the interlocutor second appealed against in the Special Case:—"The Sheriff having resumed consideration of this case, and heard parties' procurators, Repels the defences: Remits to Mr Allan Duncan Stewart, C.E., Edinburgh, to examine the Pow, Braid, and Figgate Burns, hear parties, and report on the best practicable and available means of preventing the fall or flow of sewage matter from the southern districts of the city of Edinburgh into the Braid or Figgate Burns, or of rendering harmless the said sewage matter, and the nature and cost of the work and apparatus required: Finds the pursuers entitled to expenses, and decerns."

The Magistrates of Edinburgh appealed to the Court of Session, and this Special Case was agreed on under section 11 of this Act, which provides that such appeal shall be in the form of a Special Case to be agreed on by the parties.

The questions submitted to the Court were:—"(1) Whether the appeal taken by the pursuers to Sheriff Davidson, on 25th May 1880, against the interlocutor of Sheriff-Substitute Hallard, was a competent appeal under the provisions of the Rivers Pollution Prevention Act 1876? (2) Whether the interlocutor pronounced by Sheriff Davidson on 29th June 1880 is a valid and competent judgment under the said Act? (3) Whether the Magistrates and Town Council of Edinburgh have committed an offence within the meaning of the Rivers Pollution Prevention Act 1876, by causing to fall or flow, or knowingly permitting to fall or flow or be carried into the Pow Burn, and by means of the Pow Burn into the Figgate Burn, the sewage of the foresaid districts of Morningside, Grange, Newington, Causewayside, and Mayfield."

Argued for the appellants—(1) The appeal to the Sheriff was incompetent. The only appeal competent under the statute from the Sheriff-Substitute was to the Court of Session. The statute confers co-extensive or alternative jurisdiction on the Sheriff-Substitute and the Sheriff-Principal. (2) The Sheriff had erred in finding that the Figgate was not, under the Act, a water-course mainly used as a sewer in 1876, the date of the passing of the Act. (3) A prescriptive right of discharging sewage into the Figgate Burn had been acquired by the appellants.

Authorities—*Hay* v. *Kippen* and *Lowson* v. *Keddie*, in Sellar's Manual of Education Act, p. 165; *Balderston* v. *Richardson*, February 20, 1841, 3 D. 597; *Russell* v. *Haig*, M. 12,823; Bell, Oct. Ca. 338; 3 Pat. App. 403; *Leitch* v. *The Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40.

At advising—

Lord Justice-Clerk—I think there is not much difficulty about this case, and we have had the case sufficiently before us to enable us to give our opinions now. There are three questions on which our opinion is asked. The first is, whether the appeal taken to the Sheriff in May 1880 against the interlocutor of the Sheriff-Substitute was a competent appeal under the provisions of the Rivers Pollution Act of 1876. The second point urged for the City is, that the stream in question having been mainly used as a sewer for forty years, or having been mainly used as a sewer in 1876, does not fall under the provisions of the statute. The third point is, that independently altogether of that, the use which has been made of this Figgate Burn (consisting of the two streams) for the last forty years, excludes entirely such a decision as the Sheriff has given on the provisions of the statute.

I am of opinion that none of these grounds are well founded either in the terms of the statute or in principle. In regard to the first, I do not think it necessary to go through the clauses of the statute. But the view maintained is this—and there is a good deal of soundness in it in cases where the principle is applicable—that where a new and special jurisdiction is given to any Court the exercise of it must be regulated entirely by the conditions of the statute under which it is conferred, and that in the general case remedies which might have been competent in an ordinary civil process are not to be presumed or inferred to be given by the specific statute. That has been affirmed to be a ground of judgment in various cases of a similar kind. But, on the other hand, I think that where a well-known and recognised jurisdiction is invoked by the Legislature for the purpose of carrying out a series of provisions which are important for the public without any specific form of process being prescribed, the presumption is that the ordinary forms of that Court are to be observed in carrying out the provisions, and, indeed, generally that the Court has been adopted and chosen and selected because it is seen to be advisable that the ordinary rules of such Court and its forms of procedure shall be applied to give effect to the provisions of the legislative Act. In regard to the County Courts in England, under this very Rivers Pollution Act, that is eminently the case, because the clause of the statute in regard to County Courts and in regard to the Sheriff Court Court (which are put upon the same footing) makes it perfectly clear that all powers which the County Court have for executing their ordinary jurisdiction, these they shall have in executing the provisions of this statute. With regard to offences against this Act, section 3 provides—"Every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter, shall be deemed to have committed an offence against this Act. Where any sewage matter falls or flows or is carried into any stream along a channel

used, constituted, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried, shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the Court having cognisance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream." And then we come to the provisions of the 11th section in regard to the County Court. In the first place, it says that, "Subject to the provisions of this section, all these enactments, rules, and orders relative 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 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 had related to a matter within the ordinary jurisdiction of the Court." So that the County Court takes up the jurisdiction conferred by this statute simply under its ordinary rules as applied to ordinary actions, and when we come to the interpretation clause—the clause in which the application of the Act to Scotland is dealt with (sub-section 5 of sec. 11)—it is said that "the expression County Court shall mean the Sheriff of the county, and shall include Sheriff-Substitute, and the expression 'plaint entered in the County Court' shall mean petition or complaint presented in the Sheriff Court." There is, your Lordships thus see, no provision whatever in the statute in regard to Sheriff Courts beyond putting them on the same footing as County Courts for carrying out any one of the provisions which the statute contains. I think therefore that the ordinary procedure of the Sheriff Court is the proper procedure for carrying out the provisions of the statute. It was said in the course of the discussion that this was a statute intended to impose penalties on those responsible for the pollution of streams, but that is not an accurate description. It is a hybrid statute, which involves penalties only in the event of disobedience to the directions of the Court. But the first and primary jurisdiction is one of a purely civil nature. And for this reason:—The Court have the power to order, and are desired to make orders, to carry out specific matters, and if the orders of the Court are obeyed then there are no penalties. Therefore, from the clauses and arguments I have referred to I do not gather anything hostile to the jurisdiction of the Sheriff Court being the ordinary jurisdiction, and the procedure being the ordinary procedure.

Then in regard to keeping a note of the evidence, I do not think it requires much consideration of the facts to show that that must have been in the contemplation of the framers of the Act. It would be utterly impossible in dealing with large and involved interests necessarily falling under the jurisdiction so conferred to carry out such actions to any satisfactory result without a note or record of the evidence being kept.

I am therefore of opinion that this appeal was well taken to the Sheriff.

The Sheriff has found, in the second place, that this stream, the Figgate Burn, does not fall under the definition of a "stream or water-course mainly used as a sewer," and that therefore it falls under the provisions of the statute. I am of opinion that he is perfectly right. It is clear enough upon that excepting clause that the phraseology is anything but precise, though professing to be an interpretation clause of what the word "stream" means. It includes "water-course" amongst the different things which are included within the term. "Water-course" will no doubt include every running stream, large or small, from the smallest brook to the largest river. And in the collocation we have before us I take "water-course mainly used as a sewer" to mean a course where water has run or may run, but which is mainly used for another purpose. I think that it means a water-course which has been converted into a sewer, and although water still runs in it, yet that is its main and primary use, and that in that case, and in that case only, the provisions of the statute are not to apply.

Now, I am very strongly impressed with that view. From the introduction of the word "streams" in the prior part of the clause, and the exemption of streams, whatever the interpretation of streams may be, from that excepting provision, I am convinced that what are referred to are water courses which have ceased to be running streams in the proper sense of the word, but have been made part substantially of a system, more or less artificial, of drainage—not merely that sewage has been conducted into them, but used as sewers, and therefore no longer fit for any other public use. Now I am satisfied that, at all events, that cannot be predicated of the Figgate Burn in this case. But I think it can very well be predicated of the Pow Burn. That is a water-course that is mainly used for sewage—that is to say, it has been made a sewer and nothing else, and that sewer debouches into the Figgate Burn. Compounded, these two streams, the Pow and the Braid, have a greater proportion of pure water than the Pow had before its junction with the Braid. The proportion of the Braid to the Pow in its natural state is stated to be as 9 to 1. But now that the Pow has been converted into a sewer, or at all events used for the purpose of conveying the increased amount of sewage sent down into it in recent years, the proportion of purity and impurity in the united stream is very different from what it was before such a quantity of sewage was sent into the Pow. The proportion of the Braid to the Pow, including sewage, is 3 to 1, except in summer, when the Braid is diminished by about a half, while the Pow, as might be expected, remains pretty much the same, because it receives constant accessions from the drainage of the south side of the city.

But, on the whole matter, my opinion is that this is not a case in which the Figgate Burn, made by the junction of the two streams, has been shown to be mainly used as a sewer. I am satisfied, on the contrary, that in 1876 it was not mainly used as a sewer, although doubtless it was used for the conveyance of sewage, without its use being by any means confined to that purpose.

Then there is the last point—the point in regard to the heritable right—the right constituted by 40 years' possession. I think it plain on the Case that there is no such right. The Case states that before 1851 the primary uses were substantially enjoyed. It is of no moment whatever that it was

used for the purpose of conveying sewage, providing the primary uses were not thereby destroyed. And it is necessary for the upper heritor to show that the primary uses have been destroyed before the upper heritor can have his prescriptive right to pollute the stream established.

In these circumstances, I am of opinion that this Special Case must be answered in accordance with the views I have now expressed.

Lord Young—I am of the same opinion. The Case deals with large interests, and is important accordingly, but I must say I think it is not attended with any serious difficulty. The appeal is against two interlocutors, and against two interlocutors only—that is, against the interlocutors of 29th June and 22d July 1880. The interlocutor of 29th June is printed in the Case, and it finds a number of facts, none of which, however, are complained of except the last; and that finding is—"Finds that the said Braid or Figgate Burn was not, within the meaning of the said Rivers Pollution Act, a water-course mainly used as a sewer at the passing of the said Act." That is the only finding in the interlocutor which is complained of by the appellants. The interlocutor concludes by appointing the case to be put to the roll, when parties may be heard as to further procedure.

Now, I am of opinion that the appellants have shown no cause, with reference to the facts stated in the Case, or the inferences to be legitimately drawn therefrom, for interfering with the Sheriff's finding, as proceeding upon an erroneous view of the law or the merits of the case. I am not satisfied upon the facts as stated, and the argument adduced to us as to the right view of them, and the right inference to be drawn from them, that the Sheriff was wrong in finding that the Braid or Figgate was not within the meaning of the Act a water-course mainly used as a sewer at the present date; and I think that is sufficient so far as that interlocutor is concerned. I might go further, and say that I think the Sheriff's conclusion was a right one. But it is probably better to put it on the strictly legal ground that the parties have not satisfied us that that finding of the Sheriff was wrong, having regard to the facts and the law applicable to them, and the legitimate inferences to be drawn from them.

Now, the second interlocutor, and the only other one appealed against, repels the defences. In his interlocutor of 22d July the Sheriff "Having resumed consideration of this case, repels the defences, and remits to Mr Allan Duncan Stewart to examine the Pow, Braid, and Figgate burns, hear parties, and report on the best practicable and available means of preventing the fall or flow of sewage matter from the southern districts of the City of Edinburgh into the Braid or Figgate burns, or of rendering harmless the said sewage matter, and the nature and cost of the work and apparatus required." That of course is all with the view of abating the nuisance. Of course there is no appeal against that part of the interlocutor, assuming that the Sheriff had jurisdiction in the matter at all, for it was a very reasonable course indeed for him to take—the only reasonable one in the circumstances. Therefore I assume that the appeal is against his repelling the defences in the lump. And I look to the record necessarily to see what these defences are. The first is—All parties are not called. We have not heard a word of argument on that, and I assume that if the Sheriff had jurisdiction that plea was excluded. The second of the defences is—The pursuers' statements are not relevant. We have had no argument in support of that. The next is—The stream in question not being within the definition of "streams" in the Rivers Pollution Prevention Act of 1876, the present application is unfounded. That relates to nothing except the contention which the Sheriff has disposed of by the prior interlocutor, namely, that upon the facts as stated this appeared to be a water-course which had not been mainly used as a common sewer at the date of the passing of the Act. And so, if the first interlocutor was right—and I have stated my reasons for thinking it was—it follows that this defence should be repelled. The fourth defence is—The defenders not having polluted the stream in question, and not having committed any offence within the meaning of the Act, the petition ought to be refused. The fifth touches more nearly the most serious question that has been raised in the case. It is—"The stream referred to having been polluted by sewage for more than forty years prior to the Rivers Pollution Act of 1876, must be held to be appropriated to the reception of sewage from the districts in question." The last is—"The pursuers' averments being unfounded in fact, the petition ought to be refused."

These are all the defences, and with the exception of the fifth, as to which I shall have a word to say, I state comprehensively that I entirely concur with your Lordship in saying that they were rightly repelled by the Sheriff, or, at all events, that on the facts as stated, and attending to the argument addressed to us as to the right view of them, and the inferences to be deduced from them, I am not at all satisfied that the Sheriff was wrong in repelling them.

On the view which was latterly presented,—that the respondents here had, irrespective of this statute altogether, acquired a prescriptive right to discharge sewage into this stream, and that therefore the provisions of the statute were not applicable—I must say that although this plea seems to glance at that subject, neither the record nor the conduct of the proceedings before the Sheriff indicate that there is any intention on the part of the Magistrates of Edinburgh to raise that large and important question. I shall say a word or two more on that proposition, that that large question is not raised by the record on the proceedings, meaning thereby the evidence taken. On that account I abstain from expressing my opinion on the interesting and very important question, whether the Rivers Pollution Act prohibits any discharge of solid or liquid sewage into a stream which might have been lawfully discharged into it prior to the passing of the Act. The inclination of my opinion, as at present advised, would be that it did; that subject to the exception expressed in the Act itself, it absolutely prohibits the discharge of solid or liquid sewage into the stream, and that although such a discharge might have been lawful before the Act. I say subject to the exceptions in the Act itself, but I think it not necessary to express any decided opinion upon that question, for I do not think it is raised in this case. Such an application before the Sheriff is not a convenient process to try a question—a very important question—of heritable

right. It is not an easy question, and the Sheriff, generally speaking, has not jurisdiction in such a question, at least if it is above a certain value, and here the value would be enormous. But, I repeat, it is not a convenient process to that end. And the statute itself, if such a question arose incidentally, provides a mode of bringing it into the Supreme Court at once, for the conclusion of the 11th clause is that 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 the Judge may think fit." But I do not think such a question does arise here—I mean, it is not presented on the record by any averment of discharge into the Figgate where the petitioners are interested in it. If such a question was intended to be raised—that they had acquired a heritable right by long usage to do the thing complained of as contrary to the statute—involving a statement as to what the usage was, and a proof of it in the regular manner, that was a case to be very distinctly stated on the pleadings, so that it might be properly raised for consideration. Now I think it is not. I think the case before us, as stated, does not enable us to deal with that question. And we must therefore abstain, as I desire to abstain, beyond the utterance of the hint I have just given as to the inclination of my opinion, from entering on that question whether prior use is a justification of discharging solid or liquid matter into the stream or into a stream contrary to the provisions of the Act. On that matter also I conclude that the Sheriff was right in repelling the fifth plea-in-law. And I think it necessary to repeat that I do so without expressing any view as to the effect of the statute upon such a case, or as to whether the Magistrates of Edinburgh were at liberty or are at liberty to raise such a case or not.

Lord Craighill—On the first and second questions submitted for the opinion of the Court the case appears to me to be plain. Under the Rivers Pollution Act of 1876 the plaint is to be presented to the County Court Judge of the district within which the pollution is said to have occurred, and in Scotland the complaint is to be presented to the Sheriff Court. This part of the case depends upon the question whether or not under the statute there is an appeal from the Sheriff-Substitute, where he has been the Judge when the proceedings originated, to the Sheriff; and the reason for raising that question is said to be this, that in the provisions of the statute there are words clearly indicating that the trial and judgment shall be by but one Judge. But I am of opinion that any such contention as that is overruled by the provision which is contained in the fourth sub-section of sec. 11. By that provision, as applied to Scotland by sec. 21, it is enacted that the procedure in the Sheriff Court in all complaints under the Rivers Pollution Act is to be the same as it would have been "if the action had been one in a matter subject to the ordinary jurisdiction of the Court." Now, if proceedings in an ordinary action had begun in the Sheriff Court, and the Sheriff-Substitute been the original Judge, from him there would have been an appeal to the Sheriff. What, therefore, is competent in an ordinary action, is, under the statute, competent in a complaint alleging the pollution of a stream in breach of the provisions of the Rivers Pollution Act.

As regards the third question which is submitted for the opinion of the Court, I agree with your Lordship that cause has not been shown why the interlocutors of the Sheriff ought to be altered; because, in the first place, it has not been shown either that the Figgate Burn is a stream or water-course which is mainly used as a sewer; or, in the second place, that there existed in 1876 a right belonging to the Magistrates of Edinburgh to discharge sewage into the stream.

With reference to the first of these matters, it may not be very easy to define in form of words what is involved in the expression "mainly used as a sewer," but I think it must mean this at least, that the water-course is used really as a sewer, and not as a stream or ordinary burn. And I think that what is involved in this qualification is very well illustrated by comparing or contrasting Pow Burn with Figgate Burn. The former of these is now, and in 1876 was certainly, mainly used as a sewer. It was only courtesy to the burn that would have led anyone to describe it as a burn not to a large extent polluted. But as regards the Figgate Burn things were different. The water of that stream is not absolutely pure; it cannot be used, and in recent years has not been used, for primary purposes; at the same time, it is used for many and for very important purposes, and it would be an entire misdescription of its condition to describe it as in reality a sewer and not a stream or burn. Upon these considerations, therefore, I am of opinion that the Sheriff has well decided this part of the case. I am of opinion further that on the second ground his judgment ought also to be maintained. The Magistrates may or may not have a right to discharge sewage into the Pow Burn; they may or may not be able to show that the discharge for forty years has been such as to contaminate the Figgate Burn three miles further down to an extent which would form a good defence to such a complaint as the complaint presented by the Magistrates of Portobello. But I commit myself to no opinion; much less do I give any judgment on the question simply because there are not in the Special Case with which we have to deal materials which would warrant a judgment.

I therefore entirely concur in the judgment your Lordship has proposed, and in the reasons which you have stated in support of it.

Lord Rutherfurd Clark—On the point of procedure I shall say nothing more. On the merits of the appeal I wish to make one or two remarks only.

The first point on which the Sheriff's judgment is assailed is this:—The appellants contend that the Figgate Burn in 1876 was mainly used as a sewer, and therefore was exempted from the operation of the Act. On that question of fact I see nothing to show that the judgment of the Sheriff is wrong. To that extent, therefore, it should be affirmed.

The judgment was assailed on another ground. It was maintained that the Sheriff in pronouncing this interlocutor was invading certain prescrip-

tive rights which the city of Edinburgh or the inhabitants of Edinburgh, whom the Magistrates represent, had acquired in discharging sewage into the Figgate Burn. I can only say that I see no such right averred in this Special Case. Therefore I think that plea is not a good plea; and I concur in the judgment proposed.

The Court, without specifically answering the question proposed, dismissed the appeal and affirmed the judgment of the Sheriff, and remitted to him to proceed with the cause.

Counsel for Appellants (Magistrates of Edinburgh)—Solicitor-General (Asher, Q.C.)—Mackintosh—Mackay. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondents (Magistrates of Portobello)—Keir—Harper. Agent—R. P. Stevenson, S.S.C.

Friday, November 10.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

BARCLAY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Reparation—Railway—Level-Crossing—Landlord and Tenant—Title to Sue—Acquiescence—Railways Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 39, 40, *and* 52.

A line of railway passing through a farm crossed a road by means of a level-crossing which was constructed in terms of an award pronounced in an arbitration between the railway company and the proprietor of the farm at the time of the formation of the railway line. The road was not one of those maintained by the road trustees of the district, but the public had a right-of-way over it both as a footway and for wheeled traffic. For twenty-four years after the formation of the level-crossing no complaint was made by anyone that any other means of crossing the railway ought to have been provided. At the end of that time the tenant of the farm (who had been tenant for more than twenty years) raised an action against the company for the value of two cattle which had got on the line at the level-crossing and been killed by a passing train, maintaining that the road was a public carriage road which the company were, under the Railways Clauses Consolidation Act 1845, bound to have either carried over the railway by means of a bridge, or to have obtained the sanction of the Sheriff or Justices of the Peace to cross by a level-crossing. *Held* (1) that the pursuer could only sue such an action as tenant of the farm, and in so suing was bound by the arbiters' award pronounced between his landlord and the defenders, and had therefore no title to found on the alleged neglect of statutory requirements; (2) that the pursuer having used the level-crossing without objection for more than twenty years was barred from insisting that the defenders had not complied with the statutory requisites in regard to its formation; (3) (on the facts) that no negligence had been proved against the defenders.

The Railways Clauses Act 1845 (8 and 9 Vict. cap. 33), enacts by sec. 39—"If the line of railway crosses any turnpike road or public highway . . . . either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, ... provided always that with the consent of the Sheriff or two or more Justices, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

Section 40 provides:—"If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates, and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering on the railway." . . .

Section 52 provides—"If the railway shall cross any highway other than a public carriage-way on the level, the company shall, . . . if such highway be a bridle-way, erect and at all times maintain good and sufficient gates . . . on each side of the railway where the highway shall communicate therewith."

Section 53 provides—"When the company shall intend to apply for the consent of the Sheriff or two Justices as hereinbefore provided [in sec. 39, *supra cit.*], so as to authorise them to carry the railway across any highway other than a public carriage road on the level, they shall, fourteen days at least previous to the time at which such application is intended to be made," give certain notice, "and if it appear to the Sheriff or to any two or more Justices acting for the district in which such highway is situated, after such notice as aforesaid, that the railway can, with a due regard to the public safety and convenience, be carried across such highway on the level, it shall be lawful for such Sheriff or Justices to consent that the same may be so carried accordingly."

Section 60 provides—"The railway company shall make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, . . . sufficient fences for separating the lands taken for the use of the railway from the adjoining lands not taken, and protecting such land from trespass, or the cattle of the owners and occupiers thereof from straying thereout by reason of the railway, together with all necessary gates, made to open towards such adjoining lands, and not towards the railway." . .

James William Barclay, M.P., tenant of the farm of Auchlossan, in the county of Aberdeen, raised this action against the Great North of Scotland Railway Company, concluding for the sum