death of the last survivor of the truster's immediate children, J. A. Shiell's uncles and aunts. That was really the substance of the right, and being so, it appears to me that however it may be described, it cannot be described as a right of liferent. In one view it was more than a liferent, for it embraced as an essential element a right of fee—a contingent fee no doubt, but still a fee—while in another view it was less than a liferent. For it might terminate during the granter's life by the death which might have occurred at any time of the survivor of J. A. Shiell's uncles and aunts.

I cannot in such circumstances accept the ingenious and able, but I think somewhat strained, argument of the second parties, which would in my opinion extend the operation of the 17th section of the Entail Act of 1868 to a kind of case which it does not cover, and which certainly it did not contemplate.

LORD LOW—I am of the same opinion. The object of the 17th section of the Entail Act of 1868 was, I apprehend, to prevent the tying up of moveable estate by the creation of liferents, and it was accordingly enacted that it should be competent to constitute or reserve a liferent "in favour only of a party in life at the date of the deed." What was struck at therefore was the limitation of the right of a person unborn at the date of the deed to a liferent. There was, however, no limitation of the right of John Anthony Shiell to a liferent. On the contrary, he was given a fee of a portion of the trust estate in the event of his surviving the period of payment. It is true that in addition to the contingent right of fee the testamentary trustees were directed in a certain event which happened to apply for his behoof the income of the proportion of the trust estate which he would take in fee if he survived the period of payment. But it seems to me to be impossible to regard that direction as limiting the right given to John Anthony Shiell to a liferent. As matter of fact his right was not limited to a liferent, and the circumstance that he enjoyed the income for a time but died before the fee vested in him, was a mere accident which cannot qualify the nature of the right conferred upon him. I may add that it seems to me to be doubted whether the right to the income given to him can properly be described as one of liferent at all, but however that may be, I am satisfied that it was not a liferent within the meaning of the enactment in question.

That short view appears to me to be sufficient for the decision of the case, but I also concur in what your Lordships have said.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the first branch of the first question and the first branch of the third question in the negative, and found it unnecessary to answer the other questions of law.

Counsel for the First Parties—Dean of Faculty (Campbell, K.C.)—Constable—A. M. Stuart. Agent—Thomas Henderson, W.S.

Counsel for the Second Parties—Cullen, K.C.—A. R. Brown. Agents—Cowan & Stewart, W.S.

Tuesday, August 15, 1905.

OUTER HOUSE.

[Lord Pearson.

THOMSON & GILLESPIE *v.* THE VICTORIA EIGHTY CLUB.

Club—Social Club—Liability of Members and of Committee-men—Goods Purchased on Credit by Clubmaster on Instructions of Committee—Liability Jointly and Severally of Committee.

Held per Lord Pearson (1) that the ordinary members of a social club, in the absence of special circumstances, are not liable for goods supplied to the club on the orders of the clubmaster; but (2) that the members of the committee, which passed the accounts for payment in ordinary course, and whose members had general knowledge that the supplies necessary for the club's existence were being given by the particular tradesman, were liable; and (3) that such liability was not *pro rata* but joint and several.

On 26th February 1904 Thomson & Gillespie, wine merchants, Edinburgh, and Alexander Scott Cairns, sole partner of that firm, raised an action against (1) the Victoria Eighty Club, 25 Dundas Street, Edinburgh, (2) Robert G. Armstrong and others, the members of the committee of the Club, and (3) the said Robert G. Armstrong and others, the known members of the Club, in which they sought to recover £165 (subsequently restricted owing to a payment to £120), the balance due to them on account of liquor supplied to the Club. Seventeen of the members called appeared to defend, including R. W. Millar, who was a member of committee. No appearance was entered or defences lodged for the Club or the Committee of Management. The conclusion of the summons against the Club was not insisted in, as it had apparently no funds.

The pursuers pleaded—"(1) The account sued for having been incurred for behoof of the members of the Victoria Eighty Club, and being due and resting-owing to the pursuers, and the second defenders being at present the committee having the management of the affairs of the said Club, the pursuers are entitled to decree in terms of the first conclusion of the summons with interest and expenses. (2) Such of the third defenders, the members of said Club, as were members of committee during the currency of said account, are conjunctly and severally, or in any view *pro rata*, liable as individuals in payment of

said account in respect that (*a*) they ordered and contracted to pay for the goods, (*b*) they procured the said goods on credit in knowledge of the insufficiency of the Club funds. (3) The third defenders, the members of said Club, having authorised and delegated to the committee the ordering of the goods in question, and *separatim* having acquiesced in said goods being got on credit notwithstanding the insufficiency of the Club funds, are conjunctly and severally, or severally, or in any view in equal shares and proportions, liable for payment of the price of said goods."

The facts of the case and the arguments of parties sufficiently appear from the Lord Ordinary's opinion.

LORD PEARSON—"The pursuer Mr Cairns is the sole partner of Thomson & Gillespie, wine merchants in Edinburgh. He sues for payment of £165, 0s. 6d. (now restricted to £120, 0s. 6d. in respect of a payment to account) as the price of liquor supplied by him between 6th September 1902 and 8th August 1903 to a social club in Edinburgh known as the Victoria Eighty Club.

"He calls three sets of defenders, namely, (1) the Club itself; (2) the office-bearers and other members of the committee of the Club as at the date of raising the action, as such committee, and as representing the Club; and (3) the whole members of the Club (some 98 in number including the pursuer himself), so far as known to the pursuer, as such members and as individuals.

"There are two alternative conclusions for payment. The first is directed against the first and second sets of defenders, and is for payment of the account out of the funds of the Club. The second alternative is directed against the third set of defenders as members of the Club, and as individuals, and decree is asked against them 'conjunctly and severally, or severally, or otherwise *pro rata* and in equal shares.' The Club having admittedly no funds, the pursuer chooses the second alternative, and moves for decree accordingly, and this jointly and severally, which he maintains is the true character of their liability. Further, it is to be noted that while the defenders called in the third place are called expressly 'as members of the said Club and as individuals,' the pursuer's pleas-in-law draw a distinction between the members of the Club generally and such of them as were committee-men during the currency of the account sued on. This distinction is not expressed in the summons, but as the conclusion is for payment by them not only as members of the Club, but also as individuals, I think it may be held competent to treat it as including a conclusion for individual liability against the members of committee. I understand that of the 98 defenders called in the third place, eighteen were members of committee, and the rest were ordinary members, and that of the seventeen compearing defenders one (R. W. Millar) was a committee-man and the rest ordinary members.

"Stated briefly, the material facts as to the Club and the pursuer's connection with it are as follows. It was formed on 31st May 1899, the entry-money being 5s. (afterwards raised to 10s.), and the annual subscription 5s. At the close of the first year there were one hundred and seventy members. In pursuance of the rules, there was a committee of twenty-one, consisting of the three office-bearers and eighteen members, one-third retiring annually. The committee had the management of the whole affairs of the Club, with full power to provide and alter the furnishings, to provide periodicals, and to purchase liquors. They had power to appoint sub-committees. The pursuer supplied liquors to the Club from about March 1900. As he had friends in the Club and was getting orders from it, he became a member of it sometime in 1902, and so continued for about six months, when he sent in his resignation, which does not appear to have been formally accepted. He did not use the Club; but he got the printed report and balance-sheet of May 1902, from which he says he saw that the Club was going back and was practically insolvent.

"The account now sued on is for liquor supplied between 6th September 1902 and 8th August 1903, under deduction of certain payments to account. About two years previously, when he began supplying the Club, he gave one month's credit, and was for a short time punctually paid. But the period was gradually extended, and he kept on sending supplies, believing (as he was assured by the clubmaster Angus M'Leod) that all the members were liable, or (as the pursuer puts it) that the committee gave M'Leod orders and that the Club were responsible. All the orders were given through the clubmaster personally, and were upon a printed form and signed by him. It does not appear what the precise form of order was. In so ordering supplies the clubmaster acted upon the instructions of the committee to this extent, that they told him what tradesmen to employ, and instructed him to order supplies as necessary; and the invoices from the tradesmen were laid before the committee, who passed them for payment, the cheques being signed by two of the office-bearers. When the account fell into arrear, the pursuer, though not pressing, wrote several times for payment, and succeeded in getting certain payments to account, which are now credited.

"I consider first the claim made against the ordinary members. This is an action on contract for the price of goods sold and delivered by the pursuer, and the question is, who the other contracting party was. The question who is in law liable to pay for supplies furnished to a club has not been much canvassed in Scotland. The course of the English decisions, of which there are now a good many, shows the necessity of having careful regard to the circumstances of each case, including the rules of the particular club. But subject to this (which I shall consider presently) they have also resulted in establishing what I may call the *prima facie* legal view of such contracts as are here in question, as determined by

the known practice of social clubs. To begin with, it is impossible to affirm the liability of the Club as such, for that is not a legal entity, capable of contracting or of being sued. The liability must rest either with the members as such, or the committee-men, or some of them, or the clubmaster. Circumstances might be figured in which it was the clubmaster alone; but in the normal case this view has never been received with favour, any more than has the argument, submitted in some cases, that there was really no contract at all, and that the tradesman must be deemed to have relied merely on an honourable understanding that he would be paid. In the ordinary case the clubmaster is regarded as having acted as an agent, and not as principal, in such a contract. But unless there is something special in the circumstances he is not regarded as having acted as agent for the ordinary members as such. The matter is thus put by Lord Lindley in one of the latest decisions (*Wise*, 1903, L.R. App. Cas. 139)—'Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to anyone else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by everyone, that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding-up proceedings—see *Fleming* v. *Hector*, 1836, 2 M. & W. 172; *St James's Club*, 2 D. M. & G. 383.' It will be observed that this is expressed quite generally, and not as applicable merely to the case in hand, which was a case arising within the club itself, upon a claim by the trustees against the members for relief of an obligation. Of course there may be exceptional cases either way. There may be cases where certain ordinary members have intervened and pledged their own credit for the goods. There may be cases on the other hand where the rules of the club emphasise and strengthen the view that ordinary members were not to be liable, as happened in both the cases cited by Lord Lindley, in each of which there was an express rule (as also occurs in the present case) that all members should pay ready money for what they were served with in the club. But the distinction referred to by Lord Lindley has been affirmed in other cases where there was no such rule.

"But it is said that the special circumstances of the present case as disclosed in the proof are sufficient to fix the Club members as such with responsibility. The pursuer has devoted a large part of the proof to an attempt to show that they are liable as having authorised and approved of the committee ordering liquors from the pursuer on credit, when it was well known to all the members that the revenue of the Club was insufficient to pay for the supplies, and that there were not Club funds available for paying the account. In my opinion the pursuer has entirely failed to make good this ground of action. An attempt is made in the first place to show that the members generally must have known, and that some of them did in fact know, that the club could not subsist except on credit, inasmuch as the profits on the drink, which were necessary for carrying it on, could not be realised until some time after the drink was delivered, and even then were speculative, depending on the amount of the drawings. There is, however, no direct evidence of any ordinary member, as such, having either antecedently authorised or subsequently approved the dealing on credit, and even if they had, it would not follow that they stood committed to the pledging of their own credit. The evidence taken as a whole really amounts to no more than this, that the witnesses had an impression that the members in general recognised a responsibility, either legal or moral, to make good the payments. Nor can I hold that the pursuer's argument upon the yearly reports and balance-sheets of the club is well founded. It is said that the ordinary members knew or ought to have known from these that the Club was truly insolvent. I cannot hold that they had any duty to inquire; and therefore the question is whether they in fact knew. But it is not proved that they knew it in fact; and even those who are fixed with the knowledge of the balance sheets say, and say (as I believe) truly, that they drew no such inference. If that was what the balance sheet was intended by the committee to represent, it was most misleading. The auditors' docquet *prima facie* represented the very reverse; and if, as the account seems to represent, the Club could clear its liabilities even upon the depreciated or break-up value of the furnishings, much more would it be able to do so if it were to carry on successfully, as everyone concerned assumed it would be able to do. It may be observed that the pursuer, himself a member, says he regarded the balance sheet as an indication of insolvency. Perhaps not very much can be made of the circumstance that he was a member of the Club; but this at least follows from it, that he ought to have made himself acquainted with the rules, and that if he thought insolvency impending he ought to have made the more sure as to who his debtor was, and have resorted to the obvious course of calling a halt, and moving for an investigation into the propriety of continuing the Club. The view I take on the merits renders it unnecessary either to discuss the still more favourable position in which some of the ordinary members are placed by reason of special circumstances, or to dispose of the preliminary pleas taken by these defenders. They say that all those who were members of the Club during the period covered by the account have not been called as defenders; and that it results from this either that the

pursuer should now call those whom he has omitted, or that (if he contends for joint and several liability) his action is incompetent on the authority of the case of *Neilson* v. *Wilson*, March 12, 1890, 17 R. 608, 27 S.L.R. 505. I need say no more than that I am not satisfied that either of these pleas is applicable to such a case as the present.

"The pursuer pleads alternatively that in any event those who were members of the managing committee during the currency of the account cannot escape liability. As I have said, eighteen of the defenders called are alleged to be in that position; and of these, seventeen have not appeared to defend the action. The remaining one, the defender Robert W. Millar, is, of course, quite entitled to raise the question of his liability as a committee-man. The material facts as disclosed in the proof are these. Mr Millar was a member of the Club from nearly the beginning. He was elected a member of the Committee at the annual general meeting of the Club on 26th June 1900, at which he was present; and in the normal course he would be one of the committee-men retiring in July 1903. It appears that he gave attendance more or less regularly at the committee meetings until November 1902. According to his evidence he desired to have done with the Club and ceased to use it about February 1903. By non-payment of his annual subscription in May 1903 he assumed that he ceased to be a member in July of that year, it having been (as is alleged) the practice of the committee to score out the names of members after two months' default in subscription. But according to the rules there is in that state of things no *ipso facto* demission of membership, but merely a power to the committee to strike the names of defaulters off the roll, which so far as appears was not done in the case of Mr Millar. He received circulars after May 1903 to attend committee meetings. The general meeting summoned in July 1903, when his membership of committee should have run out subject to re-election, proved abortive for want of a quorum, and the Club went on (as I take it) with the existing state of things, summoning a special general meeting in December 1903, which likewise failed for want of a quorum. He says it was then he first heard of the pursuer's account, and he was one of those who subscribed to the levy then made of 30s. per member to raise money to pay that account. He did not send in his resignation as member of the Club until March 1904, after this action was raised. As to the financial position of the Club, he says that he had no reason to doubt its solvency, and that from the balance sheet of May 1902 he thought it was in a very fair way. As to the practice of the committee, his evidence is that the Club was worked on one month's credit. There was a refreshment sub-committee of which he was not a member; but the accounts due by the Club were laid before the committee and passed for payment every month; and usually the committee had submitted to them a comparative statement of the Club drawings from liquors for the month or quarter just ended compared with the corresponding period of the preceding year. These in the autumn of 1902 showed a great falling off as compared with the previous year. This of itself showed a serious position of matters; for obviously it was to the profit on the sale of liquors that those in the management of the Club had to look for payment of the tradesmen. Mr Millar now says that if he had realised the situation he would have called a general meeting of the members to consider the position, and that he did not do so only because he did not consider it at the time. All this time the weekly supplies were being obtained from the pursuer; and although Mr Millar says he was not aware of the particular orders or of their amount, he was aware generally that fresh orders were being given and that the Club could not be kept open unless fresh supplies of liquor were got. I cannot doubt that all this implies liability on the part of the members of committee to see the account paid, and that on the facts the clubmaster gave the orders as their agent. It is no sufficient answer to point to the pursuer's evidence as showing that he thought the Club and all its members were liable to him, and that it was on their credit that he relied. It is, of course, of some importance to ascertain who it was to whom the pursuer thought he was giving credit. But the mistake made by the pursuer was in a sense a mistake in law and does not alter the facts. The true principal can be sued when he is discovered, notwithstanding that credit was erroneously given to another—see the opinions of Lord Esher and Lord Justice Lopes on this point in *Steele* v. *Gourlay* (1887, 3 T.L.R. 772). No doubt there are cases in which certain selected committee-men have been found liable on grounds special to themselves, *e.g.*, the personal giving of orders or the signing of cheques for payment of specific accounts to the same merchant. But it does not follow that where no such specialty exists the members of committee are not liable as such. That depends upon the course of dealing and the practice of the committee of which they are members. If the system of orders and payments adopted by the committee is such as to fix the members of committee with the general knowledge that supplies necessary to the existence of the Club were being obtained from a particular tradesman, and his accounts were passed by the committee for payment as part of their ordinary business, then I hold that the committee-men are liable, with such relief as they can obtain from the Club funds, or from the members by way of contribution. Nor do I think that there is room (in such a case of continuous weekly supplies) for distinguishing between those committee-men who were present and those who were absent from any particular meeting, as if only those who attended a meeting were liable for the accounts passed at that meeting. Then it is suggested that Mr Millar's membership of the Club or of the

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