Thursday, July 20.

FIRST DIVISION.

THE COUNTY COUNCIL OF MIDLOTHIAN *v.* THE PUMPHERSTON OIL COMPANY, LIMITED, AND THE OAKBANK OIL COMPANY, LIMITED.

(*Ante* July 15, 1902, 4 F. 996, 39 S.L.R. 767; March 19, 1903, 5 F. 700, 40 S.L.R. 519; December 15, 1903, 6 F. 387, 41 S.L.R. 181.)

River—Pollution—Proceedings by Sanitary Authority—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 4 *and* 16—"*Poisonous, Noxious, or Polluting Liquid*"—*Remedial Works.*

In petitions under sections 4 and 16 of the Rivers Pollution Prevention Act 1876, at the instance of a local authority, for the prevention of the pollution of a river by discharges from manufactories, the Court remitted to a man of skill to report as to the sufficiency of the remedial works executed by the defenders, and as to their being the best practicable and reasonably available means to render harmless any "poisonous, noxious, or polluting" matter discharged into the river from the works. The reporter having reported that in the first case the entrance of the effluent from the manufactory did not cause pollution, and did not affect the character of the water for any purpose for which it was then used, and that in the second case the general results of the purification were very satisfactory but that certain changes were required in them, the Court, on the defenders undertaking to carry out the changes recommended, *dismissed* the petitions.

Expenses—River—Pollution—Proceedings by Sanitary Authority—Rivers Pollution Prevention Act 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 4 *and* 16—*Remedial Works—Expenses where Remedial Works erected before and where after Local Authority held its Statutory Inquiry.*

In petitions under the Rivers Pollution Prevention Act 1876, secs. 4 and 16, at the instance of a local authority for the prevention of the pollution of a river, the actions were sisted of consent by the Court to allow of the local authority taking certain initial steps which had been omitted and which led up to its holding an inquiry as required by the 6th section of the Act. It was subsequently proved that the remedial works carried out by the two companies concerned, which were found to be sufficient, had in the one case been completed before the date of the inquiry, but in the other had only been commenced on recal of the sist. The Court, on dismissing the petitions, *found*, in the case where the remedial work had been completed before the inquiry, the pursuers liable to the defenders in expenses modified to one-half, and in the case where the remedial works had not been commenced till after the recal of the sist, the defenders liable in expenses from the date of the sist.

These cases are reported *ante ut supra.*

The Rivers Pollution Prevention Act 1876 enacts (section 4)—"Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction, at the date of the passing of this Act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid 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 reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream."

Section 16—"The powers given by this Act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by Act of Parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this Act had not passed. . . . Provided, nevertheless, that in any such proceedings for enforcing against any person such rights or powers the Court before whom such proceedings are pending shall take into consideration any certificate granted to such person under this Act."

The County Council of Midlothian, acting under the provisions of section 55 of the Local Government (Scotland) Act 1889, as the sanitary authority to enforce the provisions of the Rivers Pollution Prevention Act 1876, brought petitions in the Sheriff Court of Midlothian against the Pumpherston Oil Company, Limited, and the Oakbank Oil Company, Limited, praying for orders on the said Companies to abstain from polluting the river Almond. [The proceedings were by an interlocutor dated July 15, 1902, removed into the Court of Session (see 4 F. 996, 39 S.L.R. 797).] It was admitted that the Pumpherston Oil Company did not commence their operations till 1884. The Oakbank Company averred that their works had been discharging into the stream for more than forty years, and that the channel by which these discharges were made, had had its outfall at the same spot during that period.

The pursuers averred that the defenders for some time past had been and still were causing to fall or flow, or knowingly permitting to fall or flow or be carried into the said river Almond large quantities of poisonous, noxious, or polluting liquids, which they specified, and were thereby committing an offence against section 4 of the Rivers Pollution Prevention Act 1876. Further, that the defenders had taken no effectual means for rendering harmless the said poisonous, noxious, or polluting liquids proceeding from their manufacturing processes, although such means were reasonably practicable, and available.

Both companies denied these averments.

The pursuers pleaded—"(2) The defenders having polluted the said stream, and having thereby committed an offence against the statute libelled, the pursuers are entitled to an order or decree in terms of the prayer of the petition. (3) *Separatim*, the defenders' having failed to desist from the said pollution or to take any reasonably practicable and available means to prevent the same, the pursuers are entitled to decree in terms of the prayer of the petition."

The Pumpherston Oil Company pleaded, *inter alia*—"(3) The defenders having adopted every practicable and reasonably available means for the purpose of avoiding pollution, are entitled to absolvitor."

The Oakbank Oil Company, *inter alia*, pleaded—"(4) The defenders having prior to the passing of the Rivers Pollution Prevention Act 1876 discharged the waste products of their works into the said stream along a channel having its outfall at the same spot, and having taken the best practicable and reasonably available means to prevent any pollution, are entitled to absolvitor."

The cases were heard on certain objections to the pursuers' title to insist in the proceedings, and are reported of date 19th March 1903, 40 S.L.R. 519, 5 F. 700. At that date the Court pronounced an interlocutor of consent sisting the actions that the pursuers might take certain steps which had been omitted and led up to its holding an enquiry under section 6, and without which the actions were incompetent.

Subsequently, on the 14th July 1903, the Court, on the pursuers' motion, recalled the sists, and sent the cases to the Summar Roll.

The cases were heard together (December 15, 1903, 41 S.L.R. 181, 6 F. 387) and a proof was allowed which was led before Lord Adam in March 1904.

As a result of the proof a considerable conflict of evidence was disclosed, and the Court remitted to a man of skill to report. The interlocutor was the same in both cases save that in the case of the Oakbank Oil Company, the Linnhouse Burn, into which the effluent from that company's works fell before reaching the Almond, was also to be reported on as well as the river Almond, and was in the following terms in the Pumpherston case:—"Remit to Charles Hunter Stewart, Esq., Professor of Public Health in the University of Edinburgh, to examine the works and arrangements of the defenders the Pumpherston Oil Company at and about Pumpherston, MidCalder, and to report—(1) as to the sufficiency or otherwise of the means adopted by the defenders, the said company, for the purpose of preventing the pollution of the river Almond by effluents from their said works; and (2) as to whether the defenders the said company are or are not using the best practicable and reasonably available means to render harmless any poisonous, noxious, or polluting matter falling or flowing or carried into the river Almond from their said works."

On 30th January 1905 the reporter reported on the Pumpherston Oil Company's remedial works in detail, and summed up the effect of the effluent from the works upon the river Almond, as follows:—"The change in composition of the river Almond by the entrance of this effluent is, in my opinion, not of the nature of pollution, and does not affect the character of this water for any purpose for which it is at present suited."

As to the remedial works of the Oakbank Oil Company, Professor Stewart also reported in detail, concluding as follows:—"Though the general results of the purification are very satisfactory, yet, in the light of what I have pointed out, I beg to suggest the following changes in the method of working—"(1) That the discharge of 'soda tar water' on the older portion of the bing be discontinued. (2) That the 'soda tar water' instead of being, as at present, alkaline, should be made slightly acid, in order to facilitate the separation of the oil and tarry matter. (3) That after removal of this oil and tarry matter the 'soda tar water' should pass along with the 'spent ammonia liquor' and other refuse waters, through the series of separators, and discharge into the waste water pond. (4) That the impure effluent from the waste water pond be distributed on that portion of the bing on which fresh spent shale is being deposited."

It appeared from the proof that the remedial works of the Pumpherston Oil Company were completed in February 1903, *i.e.*, prior to the sist of the actions in March of that year, but that those of the Oakbank Oil Company were not carried out till the recal of the sist in July 1903, being completed in February 1904.

At a hearing on the proof and report—(*Pumpherston Case*)—Counsel for the pursuers argued—The Pumpherston Oil Company was initiated in 1884, some years after the passing of the Rivers Pollution Prevention Act, and thus the onus lay on them of proving that there was no pollution of the river. Now the proof had disclosed that pollution did exist both before and after February 1903 when the remedial works were completed, and the pursuers were entitled to an order in terms of the statute if pollution had existed, though it might have ceased since the proceedings were instituted—Lumley on Public Health ii, 1143, was referred to for an annotated edition of the statute. Further, the pursuers must be secured against the possibility

of the remedial measures being inadequate or imperfect, and it must be remembered that they were only instituted under fear of and during the present proceedings. If the order desiderated were not granted it should be held in suspense, and a condition should be added that the remedial works should be adequately kept up.

Counsel for the defenders argued — No pollution had been proved in terms of the Rivers Pollution Prevention Act 1876, nor had it been proved that there was any at the institution of these proceedings, or for some time prior to that, since the earlier proceedings were invalid by default of the pursuers in the initial steps of the procedure. Moreover, when the sist was granted in March 1903 it was of consent of the defenders, otherwise the action would have been incompetent, and they were not to be prejudiced by their own act. The proof did not disclose pollution even at common law. The Court had power by its order to require persons to abstain from doing something or to perform something, but no power of supervision or to suspend the order as the pursuers desiderated—Rivers Pollution Prevention Act 1876, sec. 10. Again, proceedings were not contemplated against parties honestly endeavouring to avoid committing a breach of the statute. Assuming therefore that there had been no pollution since February 1903, but that it had occurred at a date prior to that, there was no room for an order in terms of the statute, nor was an order competent in the form contained in the prayer of the petition, since "poisonous, noxious, or polluting liquid" were terms which admitted of argument and in themselves unsettled. Further, if no order could be pronounced, neither could anything ancillary, *e.g.*, anything having the force of a declarator. In any event, if an order should be pronounced it must refer to the present state of matters. The remedy sought was statutory, and it must be clearly shown that the action fell within the statute. The defenders were entitled to absolvitor.

Oakbank Case—Counsel for the pursuers argued—The Oakbank Oil Company was in existence at the passing of the Act in 1876, and completed its remedial work in February 1904, but to secure the statutory benefits of this position they must show that their effluent was flowing along the old channel, or at anyrate had the old outfall. This they had failed to do, and were consequently in no better position than the Pumpherston Company. The proof contained abundant evidence of pollution since proceedings were instituted, and the remedial works were only completed a fortnight before the proof; such being the case, if pollution was present there was no relevant defence. The pursuers could not accept the mere fact of remedial works having been erected as sufficient. Their duty was to stop pollution, and as an offence had been committed they were entitled to an order.

Counsel for the defenders argued—The measure of an offence under the statute was not greater than at common law, and at common law the offence depended on the effect produced by the effluent on the main stream, and the pursuers had failed to prove pollution therein. The effluent might be noxious, &c., but have so little effect on entering the main stream that no pollution was caused; such was the case here, and the defenders had committed no offence — *Duke of Buccleuch* v. *Cowan and Others*, December 21, 1886, 5 Macph. 214, 3 S.L.R. 138, see the opinion of Lord Cowan. Under the statute there must be proof of pollution, and that was lacking; if it was proved as at the date of the commencement of proceedings, that might affect expenses, but would not be ground for an order; to obtain that it was necessary to prove pollution in the recent past and good ground for apprehending its recurrence. In the present case these requisites had not been satisfied. The defenders were not debarred from claiming the benefit of section 4, since the use of their channels and outfalls fell within its terms as the proof disclosed. If the date of the proof was to be considered, then the "best available means" were being used, but the real and legitimate date of commencing proceedings was the recal of the sist in July 1903, and then also it was undoubted that the best means were being used to prevent pollution, and the report of Professor Hunter Stewart showed they had been successful.

At advising—

LORD M'LAREN—(*Pumpherston Case*)—This action is instituted under the powers of the Rivers Pollution Act 1876. It was originally a Sheriff Court action, but was removed to the Court of Session under the provisions of the 11th section. At the first hearing it was objected that the County Council had not given the defenders an opportunity of being heard before them, as required by the 6th section of the Act. We held the objection well founded, but instead of dismissing the action we sisted process in order that the defenders might have an opportunity of satisfying the County Council that they were using the best practicable means of preventing or minimising the pollution complained of. The County Council was not satisfied with the defenders' explanations, and it took up the position that the action must proceed, unless the defenders would give an admission that they were causing pollution of the Almond by the effluents from their works. When the case was resumed we allowed a proof, which was taken by Lord Adam in March 1904.

At the second hearing of the case we were of opinion that there had been pollution of the Almond proceeding from the defenders' oil works, but the evidence showed that the defenders, after their attention was called to the matter, had laid out a considerable sum of money on remedial works. We then made a remit to Professor Hunter Stewart to examine the defenders' oil works, and to report (1)

as to the sufficiency of the means adopted by the defenders for the purpose of preventing the pollution of the Almond by effluents from their works; and (2) whether the defenders were or were not using the best practicable and reasonably available means to render harmless any poisonous, noxious, or polluting matter carried into the Almond from their works.

At the third discussion counsel were heard on the import of the proof in conjunction with Professor Hunter Stewart's report, and we are now to consider whether it is necessary to pronounce an order under the powers of the Rivers Pollution Act.

Professor Hunter Stewart's report is a very complete and satisfactory paper. He made frequent visits to the defenders' works, studied all the processes, and took samples of the effluents or waste matters produced at the various stages of the manufacture carried on at the works, all of which were submitted to an elaborate quantitative analysis. In his report he describes the remedial measures carried out by the defenders, and concludes with a summary of the results obtained, and his opinion in answer to the questions submitted to him.

It would serve no useful purpose if I were to attempt an abridgment of the report, and this would indeed be a very difficult task, because the matters discussed do not admit of being generalised, and the conclusions depend on a detailed exposition of the reporter's observations and experiments. I shall only state that the pollution complained of arises from two sources —"the soda tar water," which is a waste product of the rectification of the crude mineral oil, and the "spent ammonia liquor," which is a waste product of the manufacture of ammonia from the ammoniacal liquor given off in the distillation of the shale. The waste products are collected in a pond and are made to pass through a longitudinal series of separators about sixty feet in length, by means of which most of the contained oil and tarry matter is separated and periodically skimmed off. The liquid is then pumped on to the top of the shale bing, and allowed to filter through it. This is apparently the most effective way of rendering the effluent innocuous. The reporter observes in his summary of results that it would be advantageous if a method could be devised for the removal of the large outstanding amount of sulphate of soda and sulphate of lime from the effluent, but this could only be done by evaporation, which would be very costly, and for this and other reasons he is of opinion that the treatment of the soda tar water by evaporation is not reasonably practical. His opinion on the whole matter is given in these words—"The change in composition of the water of the river Almond by the entrance of this effluent is, in my opinion, not of the nature of pollution, and does not affect the character of the water for any purpose for which it is at present suited."

I am satisfied that this is a sound opinion on the facts set forth in the report.

It was pointed out at the hearing on the report and evidence that the defenders' remedial works were completed before the 12th of June 1903, the date when the County Council held their statutory inquiry. The date of completion was sometime in February 1903. If we accept Professor Hunter Stewart's opinion that there is no longer any pollution detrimental to the stream in its present condition it follows that the County Council were not justified in proceeding with the action after the remedial works were completed, and that the Court is not called on to pronounce an order (under section 10) requiring the defenders to abstain from polluting the stream. Where such an order is necessary the Court has the power under the same section of suspending its operation on the defenders giving a satisfactory undertaking to execute remedial works, but as the necessary works have been executed I think we should dismiss the action and find the County Council liable in modified expenses.

LORD M'LAREN—(*Oakbank Case*)—In this case the nature of the pollution is exactly the same as in the case against the Pumpherston Oil Company, and the remedial works are substantially the same, but less perfect. Professor Hunter Stewart, in the conclusion of his report, suggests four changes in the method of working which are, in his opinion, necessary to bring it to the standard of efficiency for the prevention of river pollution, and I am of opinion that, on an undertaking being given by the defenders in terms of his recommendation, we should find it unnecessary to pronounce any order on the defenders.

In this case the remedial works were not undertaken until the defenders were compelled by the recal of the sist, and the active prosecution of the action, to consider their position. This difference in the cases has an obvious bearing on the question of expenses, and I suggest that the defenders should be found liable in expenses from the date of the recal of the sist.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court dismissed the petitions, finding the defenders the Oakbank Oil Company liable in expenses from the date of the recal of the sist, and modifying by one-half the expenses in which the pursuers were found liable to the defenders the Pumpherston Oil Company.

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