appearing from the opinions of the majority of the Court was that before the superior made his claim, if not indeed immediately on the truster's death, the trust purposes had become inapplicable and unworkable. And that therefore the trustees held simply for the heir; and that, even supposing they were bound to hold until he attained majority, that condition was purified before the superior made his claim.

Again, in *The Duke of Athole* v. *Stewart*, 17 R. 724, the trustees were directed to convey the lands to the truster's eldest son alive at his death, and the heirs of his body, and they did so. It was held that the heir was not liable in a composition, because the trust was truly one for continuance of the existing investiture.

In *The Duke of Athole* v. *Menzies*, 17 R. 733, the trustees were directed to convey the estate to the testator's only son on his attaining majority, and failing him to certain other heirs. On the eldest son attaining majority the trustees disponed the estates to him and he was infeft. The superior having claimed a casualty of a year's rent from the heir it was held that he was only liable in a casualty of relief, the trust conveyance being regarded as one for him as heir and not as affecting his radical right as heir. It will be observed that in that case the Court disregarded the circumstance that at the outset of the trust it was not certain that the trustees would have to convey to the heir as he had not at that time attained majority.

These cases, however, differ very widely from the present, in which the heir's interest is expressly confined to a liferent, and where the only circumstances in which he could demand a conveyance would be in the event of the total failure of the new investiture.

The case in my opinion falls under the decisions of *Grindlay* v. *Hill*, January 18, 1810, F. C.; *Lamont* v. *Rankine's Trustees*, 6 R. 739, and 7 R. (H.L.), 10; and similar cases.

The LORD JUSTICE-CLERK was absent.

The Court answered the question of law by declaring that the first parties were liable to make payment to the second party of a composition of one year's rent and feu-duties of the lands and estate of Milton for the year 1874-75, and found and declared accordingly.

Counsel for the First Parties—Macfarlane, K.C. — Macmillan. Agent — J. P. Watson, W.S.

Counsel for the Second Parties — H. Johnston, K.C.—Macphail. Agents—Lindsay, Howe, & Co., W.S.

Tuesday, December 15.

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. 797, and March 19, 1903, 40 S.L.R. 519.)

River—Pollution—Proceedings by Sanitary Authority—Prescription—Manufactories Discharging before and after 1876—*Rivers Pollution Prevention Act* 1876 (39 *and* 40 *Vict. c.* 75), *secs.* 4 and 16.

In proceedings at the instance of a local authority, for the prevention of the pollution of a river by discharges from a manufactory, under the provisions of sections 4 and 16 of the Rivers Pollution Prevention Act 1876 (quoted *infra*), *held* (1) that it was no answer to aver pollution for forty years by defenders or their authors; (2) that in the case of a manufacturer who had commenced to discharge into the river since the Act came into operation, the only relevant defence was that he was not in fact polluting; and (3) that in the case of a manufacturer who had discharged into the river prior to the Act, and continued to do so by the same channel, it was a relevant defence to aver that he was using the best practicable and reasonably available means for rendering his discharge harmless.

River—Pollution—Prescription.

Opinion (*per* Lord Kinnear) that a right to pollute a river cannot be acquired by prescription.

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 now existing or vested in any person or persons by Act of Parliament, law, or custom, and such other rights 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 any 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 an order on the said companies to abstain from polluting the river Almond. The proceedings were, by interlocutor dated July 15, 1902, removed into the Court of Session. (See 4 F. 996, 39 S.L.R. 797.)

Both companies lodged answers. It was admitted that the Pumpherston Oil Company did not commence their works until 1884.

The Oakbank Oil Company made the following averment (which was not denied) as to their use of the river—"The works of the defenders have been in existence for a period of over forty years, and during that period discharges from the said works have been made into the said stream. During the said period the channel along which the said discharges have been made has had its outfall at the same spot."

In both cases the material averments of the pursuers were as follows—"For some time past the defenders have been and still are causing to fall or flow, or knowingly permitting to fall or flow, or be carried into the said Linnhouse Burn, and thereby into the said river Almond, large quantities of poisonous, noxious, or polluting liquids, and in particular sulphuric anhydride, ammonia, and the tarry matters produced in the manufacture of paraffin oil and other shale products, or other poisonous, noxious or polluting liquids proceeding from their said oil works, or from manufacturing processes carried on by the defenders therein, and are thereby committing an offence against section 4 of the Rivers Pollution Prevention Act 1876. The defenders have taken no effectual means for rendering harmless the said poisonous, noxious, or polluting liquids proceeding from their said manufacturing processes, although such means are reasonably practicable and available."

Both companies denied these averments.

The pursuers pleaded—"(1) The defences are irrelevant and ought to be repelled. (2) The defenders having polluted the said streams, 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—"(1) The pursuers' averments are irrelevant. (2) The pursuers' material averments not being well founded, the defenders should be assoilzied with expenses. (3) The defenders having adopted every practicable and reasonably available means for the purpose of avoiding pollution, are entitled to absolvitor. (4) The actings of the defenders being within their right at common law, they are entitled to absolvitor."

The Oakbank Oil Company pleaded—"(1) The action is incompetent. (2) The pursuers' statements being irrelevant, the action ought to be dismissed. (3) The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. (4) The defenders having prior to the passing of the Rivers Pollution Prevention Act 1876, and continuously thereafter, 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. (5) The drainage area of the district through which the said stream and its tributaries flow, and from which its water is derived, having been devoted to manufacturing purposes and the discharge of the sewage so as to render the water (even if otherwise suitable) unfit for primary uses and for many of the secondary uses of water, for a period beyond the prescriptive period, and the said defenders having in no way contributed to an increase in the pollution or to a change in character of the water, are entitled to absolvitor. (6) The stream referred to having been polluted by sewage for more than forty years prior to the passing of the Rivers Pollution Prevention Act 1876, must be held to be outwith the definition of a stream in the said Act. (7) The defenders having applied to the Secretary of Scotland for a certificate under the Rivers Pollution Prevention Act 1876, sec. 12, the prayer of the petition should not be granted pending the result of the said application. (8) *Separatim*—The defenders, or their predecessors in the said oil works, having for upwards of forty years discharged waste products from their works into the said stream, and the defenders not having increased any pollution thereby caused, they are entitled to absolvitor."

The case was heard on the objections to the pursuers' title to insist in the proceedings, and is reported of date 19th March 1903, 40 S.L.R. 519. At that date the following interlocutor was pronounced:—"The Lords having considered the cause, Find that the pursuers have failed to give the defenders written notice to proceed in terms of the statute: Find in law that the defenders are entitled in respect of want of notice to object to the competency of the proceedings: Of consent of the defenders sist process *in hoc statu* to allow the pursuers, if so advised, *de novo* to give the defenders written notice of the pursuers'

intention to take proceedings against them under the said statute, reserving to the defenders their whole rights and pleas under the said statute and at common law," &c.

On 4th April 1903 the pursuers served on each of the defenders the following notice:—"The County Council of the county of Midlothian, being the sanitary authority of said county under the Rivers Pollution Prevention Act 1876, and empowered under the Local Government (Scotland) Act 1889 to enforce all the provisions of the Rivers Pollution Prevention Act 1876, hereby give notice, with reference to the notice served upon you on 19th January 1901, that they have obtained the consent of the Secretary for Scotland to the institution of proceedings against you under the said statute, for the purpose of having you ordained to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the Linnhouse Burn or into the river Almond, any poisonous, noxious, or polluting liquid from the Shale Oilworks at Midcalder belonging to and occupied by you. And they further give you notice that it is their intention to take such proceedings against you, and, in particular, on the expiry of two months from this date to enrol the petition at present pending in the First Division of the Court of Session at the instance of said County Council against you, sisted by interlocutor dated 19th March 1903, to have the sist recalled and the action proceeded with."

On the receipt of this notice both companies applied to the pursuers to afford them an opportunity of being heard against the proceedings being taken in terms of section 6 of the Act of 1876.

Section 6 enacts, *inter alia*—"Any person . . . against whom proceedings are proposed to be taken under this part of the Act shall . . . be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken so far as the same relates to his works or manufacturing processes."

An inquiry was accordingly held before the County Council on 12th June 1903, at which evidence was led for the defenders.

After consideration of the evidence the pursuers intimated that they had resolved that proceedings ought to be taken under the statute.

On 14th July 1903 the Court, on the motion of the pursuers, recalled the sists contained in the interlocutor of 19th March (quoted *supra*), and sent the cases to the Summar Roll.

The cases were heard together.

In reference to the 7th plea-in-law for the Oakbank Oil Company (quoted *supra*) it was stated at the bar that the Secretary for Scotland had refused the certificate therein referred to.

Argued for the Oakbank Oil Company—On the question of prescription—The pursuers' averments were irrelevant in so far as directed against them. It was not denied that they had discharged into the river Almond in the same manner as they were now doing for more than forty years. That gave them a prescriptive right to continue that discharge, which was effectual in a question with the pursuers, under section 16 of the Act (quoted *supra*)—*Magistrates of Portobello* v. *Magistrates of Edinburgh*, November 9, 1882, 10 R. 130, 20 S.L.R. 92.

Argued for the defenders—Prescription was no defence against proceedings under the Act. There could be no prescriptive right to pollute a river, although if pollution went on for forty years that might bar the right of others having interest in the river to object. But the right of the sanitary authority to object could not be barred, because it only dated from 1876. Section 16 fairly construed reserved the rights of other parties to object to pollution, not the right of anyone to pollute.

An argument was also submitted on both sides as to the relevancy of proof that the best practicable means had been used to render the discharge harmless. Its import fully appears from the opinions of the Judges.

At advising—

LORD PRESIDENT—The question which we have now to determine is what procedure should be adopted for maturing these two cases for final judgment. The one which stands first in the roll is at the instance of the Midlothian County Council against the Pumpherston Oil Company. That company was established in 1884, and accordingly it is not, and could not be, alleged that it has discharged polluting matters into the stream throughout the prescriptive period. In that case therefore there can be no question as to using the best reasonably practical and available means for preventing pollution under section 4 of the Rivers Pollution Prevention Act 1876, as one of the conditions of getting certain dispensations from the provisions of the Act. This company being a new one, the question comes to be, is there any ground stated by it against inquiry, or are there grounds upon which the inquiry, if there is to be inquiry, should be limited. The first plea for that company is that the pursuers' averments are irrelevant. It appears to me that it is impossible to sustain that plea, because the averments are undoubtedly relevant, and nothing more need be said on that subject. The next plea to be noticed is the third—"The defenders having adopted every practicable and reasonably available means for the purpose of avoiding pollution are entitled to absolvitor." This plea is plainly founded upon section 4 of the Act of 1876, which in effect provides that where polluting liquid is carried into a stream along a channel used, constructed, or in process of construction at the date of the passing of the Act (1876) the person causing or permitting the polluting liquid to flow into the stream shall not be deemed to have committed an offence against the Act if he shows to the satisfaction of the Court 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. The plain objection to sustaining that plea is that the clause of the Act of 1876 to which I have just referred has no application to a new company like this, which was established in 1884, eight years after the passing of the Act of 1876. The duty of the Pumpherston Company is to stop the pollution. The next plea to be considered is the fourth —"That the actings of the defenders being within their right at common law they are entitled to absolvitor." This plea, as it is presented, involves a question of fact, but if it be true that the defenders are doing what is alleged by the pursuer, then common law will not justify them. For these reasons it appears to me that the proper course in the Pumpherston case will be to repel the first, third, and fourth pleas-in-law for the defenders, and before further answer to allow the parties a proof of their respective averments, so that the facts will be duly ascertained and the law applied o them.

The Oakbank Oil Company's case, which stands next in the roll, is in a different position, because that company's works and those of their predecessors in business at the same place are, according to the averments, old works, and accordingly the provisions of section 4 of the Act of 1876 to which I have just referred, relative to using the best practical and reasonably available means for rendering the pollution harmless, may apply to their case. Their first plea is that the action is incompetent, but it seems to me that whatever the decision on the merits of the action may be, it is undoubtedly a competent action upon the averments made in it, and I therefore propose that that plea should be repelled. The second plea is that the pursuers' averments are irrelevant, and that the action ought to be dismissed. It appears to me that that plea cannot be sustained, because whatever the result of the inquiry may be, there are very clear and pointed allegations of pollution to the injury of the pursuers. The next plea to be noticed is the fifth, which is in these terms—"The drainage area of the district through which the said stream and its tributaries flow, and from which its water is derived, having been devoted to manufacturing purposes and to the discharge of the sewage so as to render the water (even if otherwise suitable) unfit for primary uses and for many of the secondary uses of water for a period beyond the prescriptive period, and the said defenders having in no way contributed to an increase in the pollution or to a change in character of the water, are entitled to absolvitor." It seems to me that in so far as this is a proposition in law it cannot be sustained, and therefore it should now be repelled. The next one to be referred to is the sixth—"The stream referred to having been polluted by sewage more than forty years prior to the passing of the Rivers Pollution Prevention Act 1876 must be held to be outwith the definition of a stream in the said Act." Now, it seems to me that this plea is not well founded. Whatever the effect of pollution having been put into the stream by this company or its predecessors may be, the question as to the statutory obligation to use the best practicable and reasonably available means to render the pollution harmless remains. In this respect this case is distinguished from the, Pumpherston case, which relates to a new company. The Oakbank Company may possibly have a defence upon that plea, but in the absence of evidence we can neither sustain nor repel it now. The seventh and eighth pleas are very much in the same position. The seventh is—"The defenders having applied to the Secretary of Scotland for a certificate under the Rivers Pollution Prevention Act 1876, section 12, the prayer of the petition should not be granted pending the result of the said application." I understand that the Secretary for Scotland has refused a certificate. I think we were given to understand that this is so, and of course if the Secretary for Scotland has refused a certificate this plea would fall to the ground. The eighth plea is—"The defenders or their predecessors in the said Oil Works having for upwards of forty years discharged waste products from their works into the said stream, and the defenders not having increased any pollution thereby caused, they are entitled to absolvitor." This plea in effect asserts that the fact of the defenders having discharged polluting matter into the stream for forty years entitles them to continue this discharge whether they are or are not using the best practicable and reasonably available means to render the pollution harmless. While the Act of 1876 did take account of the rights which might have been at common law acquired by a prescriptive user of sending pollution into a stream, it, by section 4 which I have read, required persons so circumstanced, if they were to continue to make the discharge, to satisfy the Court that they were using the best practicable and reasonably available means of rendering the discharge into the river innocuous. The eighth plea, as it is stated, wholly disregards that provision, and proceeds upon the assumption that prescriptive user alone is sufficient to entitle them to discharge polluting matters into the stream as heretofore. If your Lordships concur in the opinion now expressed, it appears to me that we should repel the 1st, 2nd, 5th, 6th, 7th, and 8th pleas-in-law for the defenders, and *quoad ultra* allow the parties a proof of their respective averments, and to the pursuers a conjunct probation.

LORD ADAM—The 4th section of the Pollution of Rivers Act of 1876 appears to me to make a division between two classes of manufactories—those that came into operation after the Act and those which were in operation before it, and the way it does it is this. There is a general enactment that every person who causes to fall or flow into any stream any poisonous,

noxious, or polluting liquid proceeding from any factory or manufacturing process shall be deemed to have committed an offence against the Act. Accordingly, so far as that clause goes, it strikes against all manufactures. But it is modified in this way by the provision following upon that, which says—"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." So that it appears in the case of this manufacture which came into operation after the Act, it is no defence, if in point of fact they are polluting the stream, it is no answer, that they are using in that case the best practicable and available means. The clause provides in the case of manufactories, before the passing of the Act, if they discharged by an old channel constructed at the date of the passing of the Act, or by a new channel constructed in substitution of it, and having its outfall at the same spot, it shall be an answer to the petition against them that they are using the best practicable and reasonably available means. That, as it appears to me, is the distinction drawn in the Act between the one class of manufactures and the other. Therefore it appears to me it lies upon the petitioners to prove pollution, and if they prove pollution it seems to me that is enough for the decision of the case, unless the respondents are able to prove there is no pollution; and that is the one question in the Pumpherston case. In the case of the Oakbank Oil Company, which is the old one, if pollution has taken place, it would be quite a good answer to the petition, although pollution has taken place, that the respondents are using and have used the best practicable and reasonably available means to avoid pollution, and if they succeed in proving that, then they are not committing an offence against the Act. Therefore it appears to me the question in the Oakbank case is whether, if there is proof of pollution, that company is using the best practicable and reasonable means to avoid it. I think that is the real question which requires to be proved in the Oakbank case. There was another question in the Oakbank case founded on prescription. It was said that the company have been for the last forty years doing exactly what they are doing now, and that what they are doing now is no worse than it was in the last forty years. It is said that would be a good defence against the Act. I understand that plea is founded on the 16th section of the Act, which says—"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." It was said they have a right to pollute by forty years' of use, and that that right should be preserved intact. I do not think that is the meaning of the clause at all. I think the rights or powers which are not to be affected are rights and powers conferred by the Act in putting an end to pollution, and that any other rights or powers are *ejusdem generis* with the rights or powers for putting a stop to nuisance, and may be exercised in the same manner as the others. If a proprietor has a right at common law to put an end to a nuisance, such rights or powers vested in him would not be affected by the statute. That is clearly the meaning of the section. It is not any limitation of powers and rights; the only limitation in the case of an old manufacture is this, that if they would be able to prove that they have taken all practicable means within the Act, the Act shall not be enforced against them. That becomes pretty clear, because in the last clause of the 16th section it is enacted—"Provided nevertheless that in any proceedings for enforcing against any person such rights or powers, the Court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act." It is the right or power of enforcing a cessation of a nuisance that this section has protected. In my humble opinion forty years' prescription offers no defence against this Act, and I agree with your Lordship that by repelling the pleas stated we will be able to limit the proof to the real matters at issue between the parties.

LORD M'LAREN concurred.

LORD KINNEAR—I agree with your Lordships that the interlocutors proposed are the proper and appropriate orders for the future conduct of this case, and I also agree with Lord Adam that there is no question of prescription at common law to be tried. The distinction between the two cases I understand to be this, that whereas in the Oakbank case the Court must consider whether the best available means has been adopted for rendering the discharge harmless, there is no necessity for any such inquiry in the Pumpherston case. In both cases the statute requires the sanitary authority and the Secretary for Scotland to consider before allowing any prosecution whether the best available means of rendering their discharges into the river harmless have been adopted or not. In the case of the Oakbank works, which have been in existence during a period prior to the passing of the Act of 1876, it is alleged that they are using the same channel and the same outfall as they formerly did, and in such a

case the Act requires that the Court also shall be satisfied, and shall not hold an offence to have been committed if the persons accused shall be able to show that they are using the best practicable and reasonably available means of rendering harmless the poisonous or noxious discharges into the stream. But there is no similar requirement to be found with regard to the discharges of new manufactures since the passing of the Act of 1876. I think that distinction is quite clearly brought out in the 4th section. But then there arises a totally different question, which was argued by the Oakbank Company — whether by virtue of the 16th section they are not entitled to plead as against the present proceedings a prescriptive right to pollute. I agree with Lord Adam's construction of the 16th section. It is enacted in that section—"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." I think that the word "other" in that sentence plainly means "other of the same." There is a certain ambiguity that sometimes arises on the word "other" in the English language, because it may mean one besides, or it may mean one of two contrasted things. But in this case I cannot see any reason for holding that it means anything but any other right of the same kind as is conferred by the statute, and that is made quite clear by the last clause of the section to which Lord Adam referred. It provides—"In any proceedings for enforcing against any person such rights or powers, that is, the rights or powers saved from being affected by the Act, the Court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act." The right kept alive, therefore, is a right to abate a nuisance and not a right to carry it on. Then I think also that Mr Clyde's argument is perfectly sound, that to suppose that the rights saved included the right to pollute rivers is to ascribe to the Legislature an inexact use of legal language which is not to be presumed. The general doctrine which Mr Clyde referred to was laid down quite clearly by the Lord President in the case of *Rigby & Beardmore* v. *Downie*, March 8, 1872, 10 Macph. 568, at p. 573, where he says that no man ever acquires a right to pollute a river in the sense in which, for example, the public acquires a right to use a road. The Lord President's observations in that case were not made by way of mere criticism of language at all, but for the purpose of marking a distinction from which very important legal consequences followed, because in that case the defenders, who were accused of polluting a river, maintained that although the river had been practically pure for twenty years preceding the raising of the action, they had been in the habit of polluting it for forty years prior to that time, and their argument was that as they had acquired a right by forty years' prescription it could not be lost by less than forty years' disuse. It was for the purpose of repelling that defence that the Lord President pointed out that there is no such thing as acquiring a right of polluting the river. The true effect of such use of the stream according to his Lordship is that persons lower down the stream lost their right to object to the use complained of by submitting to it for the prescriptive period. Now, if that be applied in the present case it is quite obvious that a sanitary authority exercising the powers conferred by this statute is not in an analogous position to a riparian heritor complaining of discharges into a river by another riparian proprietor. The sanitary authority has not a right of property to be disturbed at all. It is empowered for the public benefit to enforce the statute, and it is material to observe what the statute does. It does not purport to define the uses of rivers which may be made in respect of proprietary right at all, but it says that a person who causes to fall or flow noxious or polluting liquids proceeding from a manufacturing process into a river shall be deemed to have committed an offence against this Act. That is the substantive part of the statute, and I am quite unable to see how any plea of prescription arising from possession before the Act passed could possibly affect the question whether an offence against this Act has been committed or not. That is the only question which we have now to consider. Therefore I think the pursuers are quite entitled to a proof, to prove in the first place whether this river is in fact polluted by the discharges of both defenders, and in the second place whether the Oakbank Company can discharge the burden laid upon them of proving that they are using the best practicable means of rendering the pollution harmless. I do not think it at all follows after the proof has been led and the pursuers succeed in establishing pollution that the other question as to the best practicable means for rendering the pollution harmless may not arise. That question may arise with reference to the remedy to which the pursuers may be entitled, but in the meantime I quite agree with your Lordships as to the way in which the proof should be regulated by the order proposed.

The following interlocutors were pronounced:—

In the Pumpherston Oil Company's case—

"Repel the 1st, 3rd, and 4th pleas-in-law for the defenders: *Quoad ultra* allow to the parties a proof of their respective averments."

In the Oakbank Oil Company's case—

"Repel the 1st, 2nd, 5th, 6th, 7th, and 8th pleas-in-law for the defenders: *Quoad ultra* allow to the parties a proof of their respective averments, and to the pursuers a conjunct probation."

Counsel for the Pursuers—Clyde, K.C.—Macphail. Agent—J. A. B. Horn, S.S.C.

Counsel for the Defenders, the Pumpherston Oil Company—Ure, K.C.—Moncreiff. Agents—Drummond & Reid, W.S.

Counsel for the Defenders the Oakbank Oil Company — Ure, K.C. — Younger. Agents—Cairns, M'Intosh, & Morton, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, December 17.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

KING *v.* KIDD.

Justiciary Cases—Review—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55) *sec.* 403—*Preliminary Proceedings Narrated in Statute Omitted by Prosecution—Alternative Charge—"Disorderly House or Brothel."*

The Burgh Police (Scotland) Act 1892 under the heading "Disorderly Houses and Gambling Houses" enacts in sec. 403—"The magistrates may, on a complaint by the burgh prosecutor, grant warrant to enter into and search from time to time, during any period not exceeding thirty day from the date of such warrant, any house or building or part of a house or building or other place, which on examination of the chief constable or an inspector or lieutenant of the police, and at least one other person not holding any office or situation under this Act, the magistrate is satisfied there is reasonable ground for believing to be kept, managed or used or suffered to be used as a brothel; and any constable under authority of such warrant may take into custody and convey to the police office the occupier of such house or building or part of a house or building, or place or any person found therein who either temporarily or permanently manages or assists in the management of such brothel, and every such person shall be liable on conviction before the sheriff, or two magistrates, of being the occupier of or of temporarily or permanently managing or asisting in the management of such brothel to a penalty" . . .

A complaint set forth that the accused did keep or use her house "as a disorderly house or brothel" contrary to the above-recited enactment, and she was convicted of the "offence charged." No search warrant had been granted nor any examination of the house made, nor had the accused been apprehended, all as contemplated in the first portion of the enactment. A suspension was brought on the ground (1) that the preliminary proceedings required by the statute had not been carried through, and (2) that the conviction was a general conviction upon an alternative charge. *Held* that the two portions of the statute were separate and the charge not alternative, and the suspension *refused.*

Jane Anne Robertson or King was charged upon the 26th November 1903, in the Police Court of the burgh of Alyth, under a summary complaint at the instance of David Sinclair Kidd, solicitor, the burgh prosecutor there. The complaint was that she "being the occupier of a house situated at No. 4 Mill Street, Alyth, in the burgh of Alyth, did for a period of twenty-one days immediately preceding the 23rd of November 1903, keep or use said house as a disorderly house or brothel contrary to the Burgh Police (Scotland) Act 1892, sec. 403."

The accused was cited upon the 23rd November to appear at the Court to be held upon the 26th November to answer this complaint. She appeared and was represented by an agent, who stated the following objections to the relevancy and competency of the complaint. . . . "(2) Object to 'disorderly house' being in the complaint and wish deletion thereof. (3) Object to competency altogether, as sec. 403 of the Burgh Police Act 1892 does not grant power to magistrate to grant warrant to serve a complaint." The objections were repelled and the accused pleaded not guilty, but after evidence had been led was convicted "of the offence charged" and was sentenced to thirty days' imprisonment.

A bill of suspension was brought in which it was stated—"No search warrant in terms of said section [recited in rubric] was ever granted by any magistrate. No examination of the house occupied by complainer was ever made in terms of said section by a chief-constable, or an inspector, or lieutenant of police, and at least one other person not holding any office or situation under the said Act. The complainer was not apprehended by a constable acting under such warrant."

This was not denied.

The suspender pleaded—"(1) The conviction or sentence complained of ought to be suspended, with expenses, in respect (1st) that the complaint is irrelevant; (2nd) that the section founded on does not authorise prosecution for keeping a disorderly house; (3rd) that the statutory proceedings prior to prosecution were not carried out; (4th) that a general conviction was pronounced on a charge which is alternative."

Argued for the complainer—The statute laid down a course of proceedings to be followed before any conviction under this section of the statute could be obtained, and that course had not been followed here. The reason for such precautions was the protection of any innocent third party, *e.g.*, the landlord, and it could therefore not be said that this objection was not a substantial one. It was impossible to hold that the two portions of the section were separable, for the person liable to the penalty was "every such person," which referred to the person described in the preceding portion. Further, the charge was of keeping a disorderly house, which was not made an offence specifically by any section