found in fact and in law in terms of the findings in the former interlocutor, and decerned of new in terms of the conclusions for interdict and removal.

Counsel for the Pursuers and Respondents—Wilson, K.C.—Horne. Agents—Davidson & Syme, W.S.

Counsel for the Defenders and Appellants—Watt, K.C.—Munro. Agent—John N. Rae, S.S.C.

Thursday, March 19.

FIRST DIVISION.

COUNTY COUNCIL OF MID-LOTHIAN *v.* OAKBANK OIL COMPANY, LIMITED.

COUNTY COUNCIL OF LINLITHGOW *v.* PUMPHERSTON OIL COMPANY, LIMITED.

COUNTY COUNCIL OF LINLITHGOW *v.* UNITED COLLIERIES, LIMITED.

(*Ante, Midlothian County Council* v. *Pumpherston Oil Company*, July 15, 1902, 39 S.L.R. 797, and 4 F. 996).

River—Pollution—Proceedings by County Council under Rivers Pollution Prevention Acts, 1876 *and* 1893—*Competency—Procedure—Notice to Alleged Offenders—Consent of Secretary for Scotland—Sufficiency of Notice—Rivers Pollution Prevention Act* 1876 (39 *and* 40 *Vict. cap.* 75), *secs.* 4, 5, 6, 10, *and* 13.

Held (1) that, under the Rivers Pollution Prevention Act 1876, a sanitary authority does not have a title to take proceedings against alleged offenders against the Act until the consent of the Secretary for Scotland has been given to the institution of such proceedings; (2) that accordingly the two months' notice which, under section 13 of the Act, alleged offenders are entitled to receive of an intention to take proceedings cannot be effectually given until the Secretary for Scotland has consented to the institution of proceedings; and (3) that proceedings against alleged offenders taken by a sanitary authority, which had given the alleged offenders notice of their intention to take proceedings prior to the date at which the consent of the Secretary for Scotland was given to the proceedings being taken, were incompetent in respect that the sanitary authority had failed to give proper notice in terms of the Act, and so had deprived the alleged offenders of the opportunity of being heard before the sanitary authority, as provided for in section 6 of the Act.

These cases are reported *ante ut supra.*

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. cap. 75) enacts as follows:—

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 5—"Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream, any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this Act, unless in the case of poisonous, noxious, or polluting matter 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 matter so falling or flowing or carried into the stream."

Section 6—"Unless and until Parliament otherwise provides, the following enactments shall take effect:—Proceedings shall not be taken against any person under this part of this Act, save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board" [for which in Scotland there is substituted one of Her Majesty's Principal Secretaries of State (*see* sec. 21 (4)), and now the Secretary for Scotland (*see* Secretary for Scotland Act 1885 (48 and 49 Vict. c. 61), sec. 5 (1), and Schedule, Part I.)]. . . . The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality. The said Board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufacturers are reasonably practicable and available under all the circumstances of the case, and that no material injury

will be inflicted by such proceedings on the interests of such industry. Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of the Act, shall, notwithstanding any consent of the Local Government Board, 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 relate to his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken." . . .

Section 10 — "The County Court (in Scotland Sheriff Court—sec. 21 (5)) having jurisdiction in the place where any offence against this Act is committed may by summary order require any person to abstain from the commission of such offence." . . . "Any person making default in complying with any requirements of an order of a County Court (Sheriff Court) made in pursuance of this section shall pay to the person complaining, or such other person as the court may direct, such sum not exceeding fifty pounds a day for every day during which he is in default, as the court may order."

Section 13—. . . "Nor shall proceedings in any case be taken under this Act for any offence against this Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender." . . .

By section 55 of the Local Government (Scotland) Act 1889 (52 and 53 Vict. c. 50) the County Council is empowered to enforce all the provisions of the Rivers Pollution Prevention Act 1876 in relation to so much of any stream as is situate in or passes through or by any part of the county.

These were proceedings under the Rivers Pollution Prevention Act, and the question now decided and reported was whether the preliminary procedure prescribed by sections 6 and 13 of the Act of 1876 as necessary before proceedings under that Act can be taken had been duly observed.

On 8th May 1902 the County Council of Midlothian as sanitary authority for the county brought a petition in the Sheriff Court of the Lothians and Peebles at Edinburgh against the Oakbank Oil Company, Limited, carrying on business at Mid-Calder, Midlothian, and having their registered office at 39 St Vincent Place, Glasgow, craving the Court "to ordain the defenders to abstain from causing to fall or flow, or knowingly permitting to fall or flow, or to be carried into the stream commonly called or known as the Linnhouse Burn, or into the river Almond, any poisonous, noxious, or polluting liquid, and in particular any poisonous, noxious, or polluting liquid refuse from the shale oil work at Mid-Calder aforesaid, belonging to the defenders."

The defenders were proprietors of and carried on a shale oil work at Oakbank, Mid-Calder, in the county of Midlothian.

On January 19th 1901 the pursuers had sent a notice to the defenders in the following terms:—"The County Council of the County of Midlothian, being the Sanitary Authority of the said county under the Rivers Pollution Prevention Act 1876, hereby give notice that having been informed of pollutions issuing from your works at Oakbank into the Linnhouse Burn, they call upon you to take all possible steps to provide remedial measures to prevent pollution. Notice is further given that application has, in terms of section 6 of the said Rivers Pollution Prevention Act 1876, been made to the Secretary for Scotland for his consent to the institution of proceedings under the Act, and failing any attempt on your part to deal with this matter efficiently within two months from this date the said Authority will proceed to enforce the Act above cited."

The pursuers in January 1901 applied to the Secretary for Scotland for his consent to the institution of proceedings against the defenders under the Rivers Pollution Prevention Acts.

On January 30th 1901 the defenders received a letter from the Scottish Office informing them that application had been made by the County Council of Midlothian in terms of section 6 of the above Act for the consent of the Secretary for Scotland to the institution of legal proceedings against them in respect of the alleged pollution, and requesting that any observations which they might have to offer thereon, together with any reasons why the Secretary for Scotland should withhold his consent, should be sent to the Scottish Office within fourteen days.

The Secretary for Scotland, after an independent inquiry, at which the defenders did not attend, gave his consent in September 1901. No intimation that he had done so was sent to the defenders. No further notice of the pursuers' intention to institute proceedings was sent to the defenders after the pursuers had obtained the consent of the Secretary for Scotland.

The pursuers averred that the defenders' oil work was a factory, and the work carried on therein was a manufacturing process within the meaning of section 4 of the Rivers Pollution Prevention Act 1876; that the defenders' oil work was situated near the Linnhouse Burn, which passes through the county of Midlothian and is a tributary of the Almond, which for a great part of its course passes through the said county; and that the Linnhouse Burn and river Almond were streams within the meaning of section 20 of the Rivers Pollution Prevention Act 1876.

The pursuers further averred as follows:—"(Cond. 4) The pursuers have found that 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. (Cond. 5) 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. With reference to the answer, the defenders are called on to state what means for rendering harmless said liquids they have adopted."

The defenders denied the averments of the pursuers in Cond. 4 and 5, and stated that their works had been in existence for more than forty years; that during that period discharges from the works had been made into the said streams; and that they had taken and were taking every reasonable precaution, and were using the best practicable and reasonably available means, to prevent any pollution of the said streams. The defenders also stated as follows:—"(Ans. 7) Explained that, following upon the said notice of 19th January 1901, a correspondence ensued between the defenders and Mr A. G. G. Asher, W.S., on behalf of the pursuers. The defenders wrote on 1st February 1901 stating their position in regard to the matter, and received a reply from Mr Asher, dated 5th February 1901, stating that the matter would be further inquired into. The defenders have received no further intimation between that date and the service of the petition. Explained further that the defenders were not advised of any independent inquiry, or that the said Secretary had given his consent as stated, nor were they given an opportunity either by the Secretary for Scotland or by the pursuers after obtaining his consent of objecting in terms of section 6 of the Act to the present proceedings being taken, or of removing any cause of complaint discovered by the inquiry instituted by the said Secretary. The provisions of sections 6 and 13 of the Act have been entirely ignored. No intimation was made to the defenders after obtaining said Secretary's consent."

The pursuers pleaded, *inter alia*—"(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."

The defenders pleaded, *inter alia*—"(1) The action is incompetent."

On October 30th 1902 the defenders' agents wrote to the County Clerk of Midlothian intimating that the defenders required the pursuers to afford them an opportunity of being heard against proceedings being taken against them. The letter further stated—"You are aware that our clients had no intimation that the Secretary for Scotland had given his consent to the proceedings, and that consequently they had not an opportunity of requiring to be heard prior to the initiation of the proceedings."

On November 5th 1902 the County Clerk of Midlothian replied—"Your letter is the first intimation which the committee have received of your clients' desire to have an opportunity of being heard against proceedings being taken, and I am instructed to inform you that they are not now prepared to accede to that request in view of the procedure which has already taken place in Court."

Similar actions in respect of pollution of streams passing through the respective counties were brought by the County Council of Midlothian against the Pumpherston Oil Company, Limited, in the Sheriff Court at Edinburgh, on 8th May 1902; by the County Council of Linlithgow against the Pumpherston Oil Company, Limited, on 9th May 1902; by the County Council of Linlithgow against the United Collieries, Limited, as owners of the Crofthead Colliery, on 9th May 1902; and by the County Council of Linlithgow against the United Collieries, Limited, as owners of the Fallahill Colliery, on 9th May 1902. The three latter actions were in the Sheriff Court at Linlithgow. In all these cases the essential facts as regards the preliminary procedure prior to the institution of proceedings in Court were practically identical with those narrated *supra* in the case of the Oakbank Oil Company.

In the action by the County Council of Linlithgow against the Pumpherston Oil Company, Limited, a correspondence was produced between the County Clerk of Linlithgow and the defenders showing that after the action was raised in the Sheriff Court the defenders suggested a conference between the parties with a view to concerting means of removing the cause of complaint. The defenders submitted plans showing proposed additional works for the prevention of pollution.

On October 20th 1902 the County Clerk of Linlithgow wrote to the defenders in these terms—"Your letter sending plan and statement showing the proposed works for the prevention of pollution of the river Almond, and the proposed additional works which you are prepared to carry out, has now been submitted to counsel, who advise that no proposal should be considered by the County Council without the judicial admission from you that pollution has existed and does exist. I shall be glad to hear from you as to this as early as possible."

The defenders refused to entertain the suggestion for a judicial admission.

The procedure by which, under section 11 of the Rivers Pollution Prevention Act 1896, the petitions and processes were removed from the Sheriff Courts at Edinburgh and Linlithgow respectively to the

Court of Session, is reported, *ante*—*Midlothian County Council* v. *Pumpherston Oil Company, Limited*, July 15, 1902, 39 S.L.R. 767, and 4 F. 996.

Argued for the pursuers—The procedure prescribed by the Rivers Pollution Prevention Act 1876, as preliminary to proceedings being taken, had been duly observed. The consent of the Secretary for Scotland had been obtained; written notice of the intention to take such proceedings had been given to the several defenders; and in each case more than two months had elapsed between the date of the notice and the date at which the petitions were brought. As soon as these three conditions were fulfilled, the County Councils as the sanitary authorities in the respective counties were *in titulo* to take proceedings. All that was required by the statute was written notice of the County Councils' intention to take proceedings, and there was no warrant in the statute for holding that such notice could not be effectually given until the consent of the Secretary for Scotland had been obtained. It was absurd to say that the County Council could not "intend to take proceedings" before the consent of the Secretary for Scotland was given. As soon as the "intention to take proceedings" was formed by the County Council the notice was properly and effectually given. On January 30, 1901, in the Oakbank case, the defenders received from the Scottish Office notice that an application had been made to the Secretary for Scotland for his consent to legal proceedings being taken. They were therefore in knowledge that the notice sent to them on January 19, 1901, was being followed up. Under section 6 they were at liberty to send a written request for a hearing before the County Council, but they made no such request for a hearing until October 30, 1902, five months after the action was brought. In these circumstances the provisions in sections 6 and 13 could not avail them, and their objection to the competency on the ground that they were deprived of an opportunity of being heard should be repelled. At the best, the objection was a purely formal and technical one. In the Pumpherston case it was quite reasonable for the County Council to insist that the defenders should judicially admit the pollution before schemes for mitigating the pollution could be considered.

Argued for the defenders—The petitions were incompetent in respect that the pursuers had not given notice to the defenders in compliance with the requirements of the Act. With a view to protecting industries the statute had prescribed stringent conditions-precedent to proceedings being taken under it. In particular the defenders had no notice of the consent of the Secretary for Scotland having been given, and consequently did not have the opportunity of being heard before the sanitary authority. The notice sent by the pursuers was issued prior to the consent of the Secretary for Scotland being obtained, and therefore before the pursuers were *in titulo* to bring the actions. At the date of the notice the pursuers could not tell that they would ever be in a position to take proceedings, and therefore the notice was ineffectual. An effectual notice could have been sent only after the consent of the Secretary for Scotland had been granted. This objection was not merely technical but went to the substance of the case, inasmuch as under the course followed by the pursuers the defenders were deprived of the opportunity of demanding a hearing by the County Councils. This was the defenders' only opportunity of stating their defence, in so far as it was based on the industrial interests imperilled, for such industrial interests were not competent, or at least not appropriate, matters of consideration for a court of law. In any event the defenders had an absolute right under the Act to have this aspect of the case laid before the County Council before the County Council took proceedings. It was said that the defenders the Oakbank Oil Company had not asked for a hearing by the County Council until the action had been brought against them, but the reason for that was that they assumed that if the Secretary for Scotland consented to the prosecution they would receive notice of such consent and be allowed two months, as provided for in the Act, in which to make representations to the County Council before the action was brought. In the case of the Pumpherston Oil Company negotiations were proceeding as to the best means of preventing pollution when the County Council suddenly and unwarrantably insisted on an admission that pollution existed. This demand by the County Council, insisted in while denying the defenders a hearing, was in contravention of the Act.

At advising—

Lord Kinnear—In these actions, which have been raised under the Rivers Pollution Act 1876 by the County Councils of Mid-Lothian and Linlithgow against various oil and colliery companies, the question we have to consider is whether the preliminary procedure prescribed by the Act of Parliament has been duly observed. This Act introduces a new and in some respects stringent remedy for the pollution of rivers, and empowers the sanitary authority of the district to enforce it by action. By the 4th section it is made an offence against the Act to cause or permit to flow into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process; by the 5th section of the Act it is made an offence in like manner to cause or permit certain drainage from mines to flow into any stream; and summary orders for the restraint of these offences may be enforced by the imposition of a penalty not exceeding £50 a-day for every day during which the offender may be held to be in default. The present complaints against the oil companies are based upon the 4th, and those against the collieries on the 5th section,

and with reference to both cases it is maintained, and apparently on plausible grounds, by the pursuers, that no prescriptive use will afford any defence against the actions. If the actions are well founded, therefore, the pursuers will be entitled to obtain a summary order which may be followed by very serious consequences to the defenders and their trades. But the Legislature, considering apparently that too severe an enforcement of the Act might cause injury to a manufacturing industry out of proportion to the benefit to be obtained, has made various provisions for the purpose of securing that the interests both of the alleged offender and of any district which may be the seat of any manufacturing industry shall be duly considered before any proceeding shall be instituted by the sanitary authority. For these purposes the statute places certain stringent restrictions upon the proceedings which may be taken under it for preventing the discharge of liquids from mines and manufactories. In the first place, it forbids any such proceedings to be taken without the consent of the Secretary for Scotland, and it enacts that in giving or withholding consent the Secretary shall have regard to the industrial interests involved in the case, and that he shall not give his consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry unless he is satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings upon the interests of such industry. In the second place, when the Secretary for Scotland has given his consent, after due inquiry and after considering all the matters which he is required to take into account, an additional safeguard is provided for the manufacturer, and it is enacted that any person within such a district against whom proceedings are proposed to be taken shall, notwithstanding any consent of the Secretary for Scotland, be at liberty to object before the sanitary authority to such proceedings being taken, and that the sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Secretary for Scotland is directed to have regard, whether such proceedings as aforesaid shall or shall not be taken. Now with reference to these directions it is to be observed that the statute does not prescribe that any notice shall be given to the manufacturer of any application which may be made by the sanitary authority to the Secretary for Scotland for his consent to a prosecution, or of any inquiry which the Secretary for Scotland may direct for his own guidance. In the cases before us it appears that the defenders received notice from the Scottish Office that application had been made to the Secretary for Scotland, and as to the inquiry he was to institute, but they were not parties to the inquiry which he made, and the notice which they received seems to have proceeded from the discretion of the Secretary for Scotland and not from any express direction of the statute, and therefore the defenders could not complain that the proceedings taken by the Secretary for Scotland for the purpose of determining his own judgment in the matter were *ex parte*, because I think it is allowed by statute that they shall or may be *ex parte*. But it is manifest that in any such *ex parte* proceedings considerations may be overlooked which might have been brought forward by the manufacturer himself if he had been present, and which might have a very material bearing upon both of the questions which the Secretary for Scotland is required to consider, to wit, the question of expediency, having regard to the industrial interests involved in the case, and to the circumstances of the locality, and the question of fact whether means for rendering the liquids harmless are reasonably and practically available under all the circumstances of the case and have not been adopted. And accordingly the Legislature has been careful to provide a remedy against any miscarriage of this kind by prescribing that after the consent of the Secretary for Scotland has been given the manufacturer shall have an opportunity of being heard by himself and his agents and of leading evidence before the sanitary authority, which is thus placed in a quasi-judicial position, and is directed, after inquiry and after hearing parties, to consider impartially, and finally for the purpose in hand, the very questions which have already been considered provisionally and in the absence of the party complained against by the Secretary for Scotland. Now, when it is provided that the person against whom proceedings are proposed to be taken is to be at liberty, notwithstanding the consent of the Secretary for Scotland, to object to such proceedings, I should have thought it very plainly implied that such person must have due notice that the consent he is going to oppose has been given in fact. But this is made matter of express enactment in a subsequent clause of the statute. By the 13th clause, which is one of a series dealing with legal proceedings, it is enacted that "no proceedings in any case shall be taken under this Act for any offence against this Act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender." I am of opinion that this notice cannot be given effectively until the Secretary for Scotland has given his consent to the proceedings. It must plainly be notice of a definite intention to take proceedings at a fixed date, and therefore it can only be given by a prosecutor having a title to sue. Now, the 8th section empowers any sanitary authority to enforce the Act, "and for that purpose to institute proceedings in respect of any offence," but subject always "to the restrictions in this Act contained." The qualification must of course refer,

among other restrictions, to those contained in the 6th clause, and therefore the sanitary authority cannot take or intend proceedings until they have obtained the consent of the Secretary for Scotland, which is not to be given until after due inquiry and consideration. The sanitary authority, therefore, cannot tell till then whether it will be proper or possible for them to take such proceedings, and they certainly cannot tell when, if ever, they will be in a position to do so. An intimation that proceedings will be instituted two months after a given date would seem to me to be merely futile if the sanitary authority cannot tell at that date that proceedings will ever be taken at all, or even that the question whether they are to be taken or not will be determined within the two months. I am of opinion, therefore, that the alleged offender is entitled to have his two months' notice after it has been definitely fixed that proceedings are to be instituted, and after the prosecutor has thus obtained a sufficient title to sue. This is the only construction which will enable the restriction contained in section 13 to be read in harmony with the restrictions contained in section 6. There can be no question that it is after the consent of the Secretary for Scotland has been given that the manufacturer is empowered to apply to the sanitary authority and to be heard upon the question whether, notwithstanding such consent, proceedings should be taken against him; and it cannot be supposed that Parliament, when it allowed him to be heard against the Secretary for Scotland's decision, intended that the two months' notice to which he is entitled should run out before the Secretary's decision had been given.

In these circumstances I do not think it by any means a merely formal objection that the notice given in these cases is not good notice under the Act. The substance of the objection is that the defenders have been deprived of their only opportunity for bringing forward a good defence which the Act enables them to plead before the sanitary authority, but which is no longer open to them when once proceedings have been taken in a court of law. I do not think it necessary or proper to express any definite opinion at this stage as to the pleas which may still be open in this Court. But it is at least a plausible view of the statute, and I do not think the pursuers dissented from it, that while the sanitary authority are required to take into account the industrial interests involved and the circumstances of the locality, and are forbidden to prosecute unless they are satisfied that no material injury will be inflicted by such proceedings on the interests of a manufacturing industry, these are not considerations within the competence of a court of law, and must therefore be finally disposed of before the prosecution begins. I express no opinion upon that argument, but if it is an argument that may be reasonably maintained, the defenders' interest to have the points in question considered by the body which is specially empowered to consider them is very clear. The material point, however, is that whether these are matters on which the sanitary authority is final or not, they are at least matters on which it is bound to hear the defenders and to take evidence, and that by the course which has been followed they have been deprived of the opportunity for being heard and for adducing their witnesses.

In applying these views to the particular cases before us I do not think it necessary to examine the facts of each of these cases in detail. So far as this point is concerned they do not materially differ, and I take the case of the County Council of Mid-Lothian against the Oakbank Oil Company as an example. In that case the pursuers gave a notice, on the 19th of January 1901, that they had been informed of polluting matter issuing from defenders' oil works and falling into the stream, and called upon the defenders to take all possible steps to provide remedial measures to prevent pollution. They further gave notice to the defenders that they had applied to the Secretary for Scotland, in terms of section 6 of the Act, for his consent to the institution of proceedings under the Act, and that, failing some attempt on the part of the defenders to deal with the matter efficiently within two months after the date of said notice, they would proceed to enforce the said Act. I shall consider immediately the terms of this notice, but in the first place it is to be observed that it is dated 19th January 1901, and that after February 1901 no communication appears to have been made by the pursuers to the defenders. The Secretary for Scotland gave his consent, as I understand, in September 1901, and no notice whatever was given to the defenders that such consent had been given, and on the 8th of May 1902 the action was raised. The notice, therefore, was given in January 1901, before the consent of the Secretary for Scotland was obtained, and the action is raised on the 8th May 1902, and the question is whether that is good notice that proceedings will be taken within two months after the date of the notice. The notice, in the first place, called upon the defenders to take all possible steps to provide remedial measures to prevent pollution, and that might have been quite reasonable if the pursuers were in a position to have taken action, but it is not the statutory notice, because the defenders are entitled, in the first place —that is, before any proceedings are taken —to show, if so advised, that they were already taking, not all possible measures to prevent pollution, but the best means that in all the circumstances were reasonably practicable and available for rendering the polluting liquids harmless. I observe this in the first place, because I think it suggests, what is confirmed by other incidents in the course of negotiations between the parties, that the pursuers had misapprehended the nature of the statutory proceedings which they are authorised to take altogether, and taken for granted that they were in the position of pursuers of an ordinary action

at common law for the abatement of a nuisance. It would have been perfectly reasonable in such a case to have intimated to the persons complained against that they were committing what the pursuers considered a nuisance, and that if it was not put a stop to within a reasonable time an action would be brought against them. But that is not the position in which the statute places the sanitary authority. Then the notice goes on to say that the sanitary authority had applied for the consent of the Secretary for Scotland to institute such proceedings; and that must have made perfectly obvious to the defenders what we now know to be the fact, that the Secretary for Scotland had not given his consent, but that the matter was still under consideration; and then it goes on to say that failing the defenders, within two months, taking steps to provide remedial measures to prevent pollution, the pursuers would proceed to enforce the Act. Now, if that means that they were going to raise their action within two months from the date of their notice, it is perfectly clear, and must have been clear to the defenders, that they were not in a position to give any such intimation. They had no title to sue. They could not tell whether the Secretary for Scotland's decision would be given within two months, and in point of fact it was not given for eight months, and they could not tell whether when it was given it would be for or against the institution of proceedings; and therefore I think there is nothing in this notice to put upon the defenders the duty of making application within two months that they should be heard by the sanitary authority upon the question which the sanitary authority is required to consider after taking evidence and hearing the parties. On the contrary, they were quite entitled to assume that if the Secretary for Scotland decided in favour of a prosecution they would have notice that he had done so, and would then have an opportunity to consider whether, notwithstanding his consent, they would state objections to his decision. At all events they were entitled to expect that two months at least before the action was raised they would have notice from pursuers who had been placed in a position to institute proceedings. The only notice given to them was on 19th January 1901, when they were informed, by clear implication if not in words, that the question of a prosecution was still undecided by the Secretary for Scotland. I think therefore that they were justified in requiring the County Council still to hear them on their objection against proceedings being taken, as they did in their agents' letter to the county clerk of 30th October, where they say—"You are aware that our clients had no intimation that the Secretary for Scotland had given his consent, and consequently had not an opportunity of requiring to be heard prior to the initiation of the proceedings." The answer is that this is the first intimation of a desire to be heard against proceedings being taken, and that the committee could not accede to the request in view of the procedure which had already taken place in Court. That would have been a perfectly good answer if the pursuers had given the statutory notice which would have put it upon the defenders to make their application in writing within the time fixed by the statute. But as no sufficient notice was given they cannot put the defenders *in mora* by taking proceedings which, without due notice, they were not entitled to institute. The letter of the 30th October puts the application which it makes after the action was raised upon precisely the right ground when it says that the defenders had had no intimation that the Secretary for Scotland had consented to the proceedings, and consequently had been deprived of the opportunity for requiring to be heard at the proper time, and I think the answer brings out very clearly the prejudice which the defenders may suffer from the failure to follow with exactness the procedure prescribed by the statute. I may observe with regard to another of the cases — that against the Pumpherston Oil Company—that the correspondence goes to confirm the view I am disposed to take of the origin of what I think the error in procedure. It appears that after the action had been raised there was some negotiation between the County Council of Linlithgow and the Pumpherston Oil Company as to the best means of dealing with the drainage complained of so as to prevent pollution, and that the negotiations advanced to the extent that the parties were in the course of considering practically what proper means could be taken to prevent the pollution. But it seems to have come somewhat suddenly to an end on the 20th October, when the clerk of the County Council announced that the Council had been advised that no proposal should be considered without the judicial admission that the pollution had existed and did exist. And to this resolution they adhered after remonstrance. Now I think that here again the County Council misunderstood their position. It is perfectly reasonable, in an action at common law for the abatement of a nuisance, for the pursuer to say that the existence of the nuisance must be judicially established or admitted before he is asked to consider schemes for its mitigation; because until the basis of fact on which his absolute right to interfere depends is admitted or proved, the point of view from which such schemes are to be considered cannot be ascertained. But the statute imposes upon the sanitary authority the duty of considering impartially, after hearing parties and evidence, whether the best available and practicable means for mitigating the nuisance are being adopted or not; and the position in which this letter places the County Council is this, that whereas the statute requires them to consider that question in the first place and to hear parties before they prosecute, they announce that they will not consider the question unless the alleged offenders will first plead guilty.

I think that if that question had occurred before the action was instituted it is impossible to suppose that the County Council would not have been ready to hear the defenders. As the question was not raised till after this action had been brought they might have been quite entitled to insist on obtaining a judgment or admission at that stage if they had given due notice before raising their proceedings. But as the defenders had been deprived of their statutory opportunity for objecting they were still entitled to be heard as to the methods they were using for rendering the discharge harmless at the time when the pursuers refused to hear them.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court pronounced this interlocutor:—

"The Lords having considered the cause, find that the pursuers have failed to give the defenders written notice of their intention 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: Find the defenders entitled to the expenses of the debate in the Summar Roll, and remit the account thereof to the Auditor to tax and to report, and *quoad ultra* reserve the question of expenses."

Counsel for the Pursuers—Clyde, K.C.—Macphail. Agents—Tods, Murray, & Jamieson, W.S.—James A. B. Horn, S.S.C.

Counsel for the Defenders the Oakbank Oil Company, Limited—Ure, K.C.—A. Moncrieff. Agents—Drummond & Reid, W.S.

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

Counsel for the Defenders the United Collieries, Limited—Ure, K.C.—M'Lennan. Agents—Drummond & Reid, W.S.

Friday, March 20.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CORRANCE'S TRUSTEES *v.* GLEN AND OTHERS.

Succession—Mutual Settlement by Spouses—Revocability by Survivor—Pactional or Gratuitous—Husband and Wife—Donation inter virum et uxorem.

A husband and wife by mutual settlement bequeathed the estate of the predeceaser to the survivor, and on the death of the survivor mutually assigned and disponed the whole estate of the survivor to trustees, directing them to pay and apportion one-half of the residue to certain relations of the husband and the other half to certain relations of the wife. Power was reserved to revoke or alter during their joint lives with mutual consent, and power was reserved to the husband and wife respectively, each by himself or herself alone, to alter or revoke the bequest of the one-half of residue bequeathed to his or her respective relations, and to dispose of the same as he or she respectively might think fit. The wife having predeceased and the husband having married again, the husband made a trust-disposition and settlement by which he gave a liferent of the residue to his second wife if she survived and postponed the division of the half of residue bequeathed to the first wife's relatives until the death of the second wife. He revoked all testamentary writings by himself or his first wife, and also all donations to her. The husband having predeceased the second wife, *held* that the clauses of the mutual settlement settling the extent to which the spouses, together or each separately, should have a power of revocation were pactional; that the husband could not by his trust-disposition and settlement effectually alter the provision in favour of the first wife's relatives; and that they were entitled to half of the residue upon the death of the husband.

On 23rd February 1891 Andrew Corrance, Blairgrove, Coatbridge, and his wife Mrs Janet Glen or Corrance, executed a mutual general trust-disposition and settlement. Thereafter, his wife having predeceased him, Andrew Corrance executed a trust-disposition and settlement, and the question in the present case was whether a certain provision in the latter deed which affected the provisions contained in the former was valid and effectual.

The mutual settlement executed by Mr and Mrs Corrance was, *inter alia*, in the following terms:—"We, Andrew Corrance and Mrs Janet Glen or Corrance, spouses, both residing at Blairgrove, Coatbridge, for the settlement of the succession to our means and estate after our respective deaths, do hereby mutually assign, dispone,