Tuesday, December 11.

FIRST DIVISION.

[Sheriff Court at Banff.

COWIE & SON *v.* COMMISSIONERS OF DUFFTOWN.

Police — Drainage — Effluent from Distillery—Onus—Rivers Pollution Prevention Act 1867 (39 *and* 40 *Vict. c.* 75), *sec.* 7 *—Liquid which would Prejudicially Affect Application to Land of Sewage.*

Section 7 of the Rivers Pollution Prevention Act enacts that "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers, provided that this section shall not extend to compel" such authority "to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land or otherwise of the sewage matter conveyed along such sewers."

A distiller whose works were within the district of a burgh local authority, and who was liable for drainage assessment in respect thereof, presented a petition in the Sheriff Court, founding on the above section, to have the local authority ordained to give him facilities for carrying the liquid effluents proceeding from his distillery into their sewers. The defenders stated that they were in course of forming new irrigation works to dispose of their sewage, and that the discharge in question would "prejudicially affect the disposal of the sewage matter" by application to the land in their irrigation system, and maintained that in respect of the proviso contained in the above section they were not bound to receive the effluent into the sewer. The pursuer maintained that the discharge was beneficial to land, and that in any event when mixed with sewage it might be so treated as to be innocuous. The Court found, in fact, that the quality of the effluent which the pursuers proposed to discharge into the sewers was such, that although in itself capable of being applied to land in certain quantities and intermittently at certain seasons with beneficial results, it would, if applied as it issued from the sewers after mixing with the other burgh sewage, continuously, and in the quantities which the pursuers required the defenders to receive, "prejudicially affect" the disposal of the sewage "by application to land." *Held* that the defenders were not bound to prove that it was scientifically impossible to treat sewage containing the effluent in question so as to render it innocuous to land, or by a course of experiments to discover and apply some method of treatment which would effect that object, and that upon the facts as found by the Court they were entitled to refuse to receive the discharge into their sewers.

Guthrie, Craig, Peter, & Co. v. *Magistrates of Brechin*, 15 R. 385, *distinguished.*

The Rivers Pollution Prevention Act 1876 (39 and 40 Vict. c. 75), sec. 7, enacts as follows: —"Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers, provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view: Provided also that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

The Public Health (Scotland) Act 1897, section 116, enacts as follows—"The owners or occupiers of distilleries, manufactories, and other works shall be compelled where possible to dig, make, and construct pools or reservoirs within their own ground, or as near their works as possible, for receiving and depositing the refuse of such works so far as offensive or injurious or dangerous to the health of those living in the vicinity thereof, or to use the best practicable means for rendering the same inoffensive or innocuous before discharging it into any river, stream, ditch, sewer, or other channel."

The Burgh Police (Scotland) Act 1892 enacts as follows (sec. 233)—"Any owner or occupier of distilleries, manufactories, or other works, who causes or permits any refuse, refuse water, steam, or other substance fitted to interrupt the free passage of a sewer, or to be otherwise injurious thereto, or to be injurious to the health of persons living in the vicinity, to enter a public sewer . . . shall be guilty of an offence. . . . Such owners and occupiers shall construct pools or reservoirs as near their works as possible, for receiving and depositing such refuse and other substances. If it shall be impracticable in the judgment of the commissioners to render such refuse or other substances inoffensive or innocuous, or to prevent the same from interrupting the free passage of the sewer or otherwise injuring the same, it shall be lawful for the commissioners to prohibit and interdict such owner or occupier from permitting the same to run into such sewer from his works aforesaid."

George Cowie & Son, distillers, were the owners and occupiers of the Mortlach Distillery, which was situated within the burgh

of Dufftown, and they paid assessments for sewers and drainage in respect of the premises to the Commissioners, who were the local authority of the burgh.

On 13th April 1898 they wrote to the Clerk to the Commissioners requesting that in terms of section 7 of the Rivers Pollution Prevention Act facilities should be given to them for causing the liquid refuse from their distillery to be carried into the public sewers.

To that letter the Clerk to the Commissioners replied on 29th April 1898 that they declined to grant the permission desired, on the grounds that the burgh sewer was sufficient only for the requirements of the district, and that the introduction of the distillery liquid refuse would prejudicially affect the disposal of the sewage matter.

An action was thereafter raised by Messrs Cowie against the Commissioners in the Sheriff Court at Banff, craving that the defenders should be ordained "to give facilities to the pursuers for enabling the pursuers to carry the liquids proceeding from the said Mortlach Distillery into the sewers under the control of the defenders, and to allow the pursuers to cause the drains containing the liquids proceeding from the pursuers' said Mortlach Distillery to empty into the said sewers of the defenders, and to allow the pursuers to make all necessary communications between their drains and the defenders' sewers for the purpose aforesaid on condition of the pursuers complying with the defenders' regulations in respect of the mode in which such communications are to be made, and subject to the control of any person who may be appointed by the defenders to superintend the making of such communications; or otherwise to give to the pursuers such facilities for the purpose aforesaid in terms of section 7 of the said Rivers Pollution Prevention Act 1876, and on such terms and conditions as to the Court may seem proper, and to find the pursuers entitled to expenses."

The pursuers pleaded—"(1) The defenders having wrongfully refused to give to the pursuers the facilities to which they are entitled under section 7 of the Rivers Pollution Prevention Act 1876, the pursuers are entitled to decree allowing them to carry the liquids from their said distillery into the defenders' sewers, and to make the necessary communication for that purpose. (2) Alternatively, and in any event, the pursuers are entitled to facilities for discharging the said liquids into the defenders' sewers upon their adopting such steps as the Court may think necessary in order to comply with the provisions of the said statute."

The defenders averred that their sewer was unable to carry off even the pursuers' present discharge, and that the latter were making arrangements to increase their output; that the pursuers had taken no means to purify the discharge; that it was of a noxious and offensive nature, and would injure the sewer and the health of persons living in the vicinity, and that it was impracticable to render it inoffensive.

The defenders further averred that they had been in use to discharge the ordinary sewage of the town into the river Fiddich, but that they had recently been called upon by the County Council to make provision for disposing of it, and proposed to proceed with an irrigation scheme, but that the introduction of the pursuers' discharge would render the scheme impracticable.

They averred—"(Stat. 8) The pursuers' sewage would further, if introduced into the defenders' sewer, prejudicially affect the disposal by sale, application to land, or otherwise of the sewage matter, in respect that the ingredients contained in the refuse from said distillery are of such a virulent caustic nature that the refuse would burn up and destroy all vegetable life in land to which it was applied, even though admixed with other sewage."

The defenders pleaded—"(2) The discharge from the pursuers' distillery being of an offensive character and calculated to interfere with the free flow of sewage in the sewer, and being otherwise injurious to the sewer and dangerous to the health of those living in the vicinity, the defenders are entitled to absolvitor. (3) The pursuers' sewage being of such a character as would, if introduced into the defenders' sewer, prejudicially affect the disposal of the sewage matter, the defenders are entitled to absolvitor. (4) The pursuers having failed to adopt any means for depositing the refuse of their distillery or rendering it inoffensive or innocuous before being discharged into the sewer, the action should be dismissed. (5) The defenders' sewer being only sufficient for the requirements of their district, the petition should be dismissed."

The Sheriff-Substitute (GRANT), after certain preliminary pleas had been disposed of, allowed the parties a proof, the nature of the facts established by which sufficiently appears from the findings in fact in the interlocutor and the opinions of the Court *infra*.

The Sheriff-Substitute on 28th July 1899 pronounced the following interlocutor—"Finds in fact, subject to regulations to be approved of by the Court (*a*) to secure the settling and cooling of that part of the liquid effluent of the pursuers' distillery known as burnt ale; (*b*) to secure a proper mixture at a suitable temperature of all the different parts of the said liquid effluent before discharge into the defenders' sewer; (*c*) to secure a right to the defenders to exclude for a period not exceeding one hour at a time the whole of the pursuers' liquid effluent in times of excessive rain, or other cause of an excessive discharge of surface water by the defenders' said sewer, that the said liquid effluents proceeding from the pursuers' Mortlach Distillery will not prejudicially affect the defenders' sewers or the disposal by sale, application to land, or otherwise of the sewage matter conveyed along said sewers, and will not from its temperature or otherwise be injurious in a sanitary point of view: Further, finds in fact that the said sewer is sufficient for the requirements of the district, including

the discharge of the liquid effluents from the pursuers' Mortlach Distillery, and in law that the defenders, as local authority of the burgh of Dufftown, are bound to give facilities to the pursuers to carry the liquid proceeding from their said Mortlach Distillery into the sewers under the control of the defenders: Therefore before further procedure appoints the defenders to lodge in process draft regulations in terms aforesaid within two months from this date, and continues the cause, and grants leave to appeal."

Thereafter on 21st February 1900 the Sheriff-Substitute pronounced an interlocutor whereby he approved of certain regulations proposed by the pursuers as amended, remitted to a man of skill to see certain works referred to in said regulations carried out, and on the completion of said works decerned in favour of the pursuers (subject to these regulations) in terms of the conclusions of the petition.

The defenders appealed to the First Division, and argued—The result of the proof was to show that hitherto all methods of purifying distillery refuse, and in particular burnt ale, either alone or mixed with sewage, had failed. It further showed that the effect of the burnt ale would be to prejudicially affect the disposal of the sewage by the irrigation scheme, and accordingly the defenders were, in terms of section 7 of the Rivers Pollution Prevention Act, entitled to refuse to receive it. Even if the pursuers' evidence were held to show that means might be adopted by which the pernicious effects of the burnt ale would be obviated, it was not incumbent upon the defenders to discover such means. The pursuers, not the defenders, were bound to purify their effluent so as to prevent its being injurious—*Guthrie, Craig, Peter & Company* v. *Magistrates of Brechin*, February 8, 1888, 15 R. 385; *Pasmore* v. *Oswaldtwistle Urban Council* [1898], A.C. 387.

Argued for the respondents—The only question was whether their effluent would prejudicially affect the sewage so as to make its disposal practically impossible. It was not enough for the pursuers to show it made the disposal difficult—*Guthrie, Craig, Peter & Co.* v. *Magistrates of Brechin, supra.* The respondents did not contend that the pursuers must receive an effluent noxious to vegetation and render it innocuous, for burnt ale, so far from being noxious, was extensively used as manure, and if combined with sewage there was no reason to believe it would be injurious to vegetation. The evidence clearly showed that if properly treated it would not be injurious. Section 116 of the Public Health Act of 1897 applied only to refuse which was a nuisance in the sense of that Act, and had no application to the provisions of the Rivers Pollution Prevention Act. It was not the duty of the pursuers to render perfectly innocuous the effluent which was to go into a common sewer.

At advising—

LORD PRESIDENT—Dufftown is a police burgh with a population of about 1800, and the defenders are the Commissioners of it. The defenders in 1881 established a sewerage system in the burgh, consisting of glazed fireclay spigot and faucet pipes, by which the sewage was discharged into the river Fiddich. In consequence of the County Council having complained of the discharge of the sewage into the Fiddich, the defenders consulted Mr George Gordon, C.E., and he advised that the sewage should be disposed of by filtration and irrigation. The defenders state that they intend to act upon his advice.

The pursuers are distillers carrying on business at Mortlach Distillery, which is situated in the burgh of Dufftown. On 13th April 1898 the pursuers wrote to the defenders' clerk intimating that they intended to cause the liquid refuse proceeding from their distillery to be carried into the sewers belonging to the defenders, and requesting that, in terms of section 7 of the Rivers Pollution Prevention Act 1876, the defenders would afford them facilities for doing so. The pursuers stated in their letter that they were prepared to comply with any regulations of the defenders in regard to the mode in which the communication between their drains and those of the defenders should be made. On 28th April 1898 the defenders resolved, as the burgh sewer was sufficient only for the requirements of the district, and as the introduction of the liquid refuse proceeding from the pursuers' distillery would prejudicially affect the disposal by sale, application to land, or otherwise of the sewage matter, as well as for other reasons, to decline to grant to the pursuers permission to introduce the liquid refuse proceeding from their distillery into the burgh sewer, and this resolution was duly intimated to the pursuers.

By section 7 of the Rivers Pollution Prevention Act 1876 it is enacted—[*His Lordship read the section which is quoted supra*].

By section 116 of the Public Health (Scotland) Act 1897 it is provided that—[*His Lordship read the section which is quoted supra*].

The present action is directed to enforce the claim of the pursuers to have the liquid refuse proceeding from their distillery received into the defenders' sewers, and the defenders maintain that they are not bound so to receive that refuse, upon the grounds (1) that their sewers are not of adequate capacity to receive it; (2) that it would injure their sewers by causing them to leak, in consequence of the acid which it contains acting upon the lime in the cement at the joints of their sewer pipes; (3) that it would be injurious to the public health; and (4) that the admission of the refuse into the sewers would prejudicially affect the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along them

It appears to me that the defenders have failed to establish the first three of these

objections, but I consider that a serious question, and a question of much general importance, is raised by their fourth objection. Section 7 of the Rivers Pollution Prevention Act 1876 does not declare that in order to warrant the refusal of a local authority to admit a liquid into its sewers, it must be established that the admission of that liquid would render the disposal of the sewage matter conveyed along the sewers, by sale, application to land, or otherwise, impossible. It is enough to warrant the refusal that the disposal of the sewage would be prejudicially affected by the admission of the liquid—that is to say, that its disposal by sale, application to land, or otherwise, would be rendered more difficult, or less advantageous, than if the liquid had not been admitted. The word "materially" may be introduced as qualifying this statement, but if it is proved that the effect of the admission of the liquid would be "materially" to prejudice the disposal of the sewage by sale, application to land, or otherwise, I think that this would afford a sufficient answer to the demand that the liquid should be admitted into the sewers. So construed, the provision in section 7 appears to me to be entirely reasonable and in accordance with the equities of the case. As the owners and occupiers of distilleries pay sewer rates, it is only just that they should get the benefit of the sewers, but they should only get a benefit similar to that received by other ratepayers, and if they were allowed to discharge into the sewers a liquid which would injure the sewers, or the sewage conveyed along them, in any of the particulars mentioned in section 7, they would get a greater and a different benefit, and would throw an unfair burden upon the other ratepayers. The equity referred to is also recognised by section 233 of the Burgh Police (Scotland) Act 1892.

The effluent from the pursuers' distillery to which the defenders chiefly object is the burnt ale, and they maintain that they have proved that even after the solid ingredients contained in it have been allowed so far to settle in the pursuers' settling ponds, the burnt ale, if applied to a sewage farm, as it must be throughout the year, while the distillery is working, would be most injurious in its effects. It is not, as I understand, disputed that burnt ale may be applied to land, or to vegetation, in certain quantities, at certain seasons, and at certain stages of growth, not only without injury, but with distinctly advantageous results. The defenders, however, say that if they were compelled to admit the pursuers' burnt ale into their sewers throughout the year, it would be highly prejudicial to any system of filtration, or of irrigation, or to any other system which they could adopt with a view to disposing of their sewage. It is essential to the efficiency and success of intermittent downward filtration, or indeed of any system of filtration, that the place upon which it is practised shall be kept porous; and they allege that burnt ale, even after its more solid ingredients have settled in the distillery, leaves upon the ground a glutinous or "clotty" deposit, which destroys its porosity, and prevents the filtration from being accomplished. The defenders also say that owing to its strong acidity the burnt ale in the sewage would have a burning or rotting effect on the vegetation, in the quantities in which, and in the circumstances under which, they would require to apply it to their land. It appears to me, upon a careful consideration of the evidence, that the defenders have established such a case on this head as to amount to a prejudicial affecting of the disposal of their sewage by application to land within the meaning of section 7 of the Act of 1876.

Even if I had thought that this point had not been proved as adequately as I consider that it has been, it appears to me that it would have been a sufficient answer to the pursuers' demand for the defenders to plead that the question how to dispose of sewage containing burnt ale by application to land in such quantities or proportions as would require to be dealt with in this case, has not as yet got beyond the experimental stage, and that they are not bound to conduct costly experiments for the benefit of the pursuers in regard to a matter with respect to which the pursuers are as yet unable to satisfy the conditions expressed in section 7 of the Act of 1876. The Sheriff-Substitute says in his note—"I certainly think the defenders have succeeded in showing that hitherto no local authority in Scotland (excluding those who have facilities for putting distillery refuse into the sea) has succeeded in disposing of it by purification. But where they fail is in not satisfying me that it is scientifically impossible to purify it, seeing that from its inherent nature it is not destructive, but may be positively beneficial to land; or that the difficulties they find in the solution of the problem are greater than those that have been successfully surmounted in England when dealing with far more virulent trade effluents, for which I refer to the evidence of Mr Thudichum." I am, however, of opinion that the defenders are not bound to prove the negative proposition that it is "scientifically impossible" to treat sewage containing burnt ale so as to render it innocuous to land. The question is a practical one, and for the reasons already given I think it is proved that no method has as yet been devised by which such a continuous application of sewage containing large quantities of burnt ale to land as would be necessary in the present case, could be prevented from being prejudicial in the sense of section 7 of the Act of 1876. It does not appear to me that the defenders are bound to embark upon a course of scientific experiment or invention, but that it is enough for them to show that in the present state of knowledge burnt ale in such quantities as the pursuers claim right to discharge into their sewers cannot be continuously applied to land without material injury and prejudice to the land.

The Sheriff-Substitute refers to Mr Thudichum's very interesting evidence as to the possibility of treating distillery effluents or

sewage containing them by bacterial or biological methods, but that highly skilled witness did not mention any case in which these methods had been so applied—indeed, the idea of such an application seems to have first occurred to him when preparing to give evidence in this case. I understand that the bacterial or biological method has been applied to ordinary sewage with more or less success, and that by it the injurious and putrescent substances in the sewage are not merely separated or disposed of but destroyed; this being accomplished, not by adding anything, but by the organisms normally present in the sewage or in the land as the filtering agent, upon which the sewage is treated. Evidence was, however, given on behalf of the defenders to the effect that the bacterial or biological method could not be successfully applied to distillery refuse, and especially to burnt ale, because the burnt ale would choke the filters and prevent the aeration, which is an essential part of the system. I do not think that the defenders are, in the present state of knowledge, bound to establish experimental bacterial beds and embark upon an attempt at discovery, with all the risks of failure incident to a process new in this application. If the pursuers have confidence in Mr Thudichum's suggestions, it is, of course, open to them to act upon these suggestions before presenting their effluents for admission into the defenders' sewers.

The pursuers relied upon the case of *Guthrie, Craig, Peter, & Company* v. *The Magistrates of Brechin* (15 R. 385), but the decision in that case does not appear to me to be at all at variance with the views now expressed. The petition was at the instance of a firm of papermakers, and it was proved that three liquids issued from their works, which were severally objectionable, but that they became harmless when they were mixed together and exposed to the action of the air in settling ponds. The experts reported that in their opinion the resultant fluid or effluent issuing from the pursuers' tanks into the public sewers of Brechin was not of such a character, so long as it was maintained in its then condition of practical neutrality, as to produce any injurious effect on the sewer pipes or on the crops or soil of the sewage farm, but that the larger volume of liquid to be dealt with necessitated a different mode of working the sewage farm to effect proper purification of the combined discharges from the sewer before they reached the river South Esk. It could only be alleged that the effluent was prejudicial "in its application to land" because the then existing sewage farm was too small for the reasonable treatment of the quantity which would be discharged. The present case, however, is very different, inasmuch as a question not merely of quantity but of quality is involved, and it appears to me to be established that the introduction of the pursuers' burnt ale into the defenders' sewers would prejudicially affect the application of the sewage to land in the sense of section 7 of the Act of 1876.

For these reasons I am of opinion that the interlocutors of the Sheriff-Substitute of 28th July 1899 and 21st February 1900 should be recalled, and that the prayer of the pursuers' petition should be refused with expenses.

LORD ADAM—The pursuers do not, as I understand, maintain that the liquid proceeding from their manufacturing premises, and which they desire to have admitted to the defenders' sewers, is, in the condition in which it leaves their works, so innocuous in its character or quality that in an undiluted state they are entitled to have it admitted to the sewers. What they do maintain is, that after being mixed with the other contents of the sewers, its condition is such that it would not prejudicially affect either the sewers, or the disposal of the sewage matter by sale, or its application to land, or otherwise, and therefore that the defenders are bound under the 7th section of the Rivers Pollution Act to give them facilities for carrying the liquid in question into their sewers.

That contention necessarily leads to the consideration of the state of matters at the outfall of the sewers, and raises the question of fact, whether the sewage matter as it issues from the sewers complies with the conditions specified in the Act, compliance with which entitles the pursuers to demand that the defenders shall give them facilities to enable them to carry the liquid coming from their works to the defenders' sewers. The defenders say that the sewage matter in question will, in consequence of the addition of the liquid proceeding from the pursuers' manufacturing processes, prejudicially affect the land to which it is applied, and will therefore prejudicially affect its disposal in that way, and that I think is the question at issue in this case.

Of the various liquids produced in the pursuers' works which go to the composition of the liquid in question, the one to the presence of which the defenders particularly object is burnt ale, which they say is prejudicial to the land to which it is applied.

The pursuers on the other hand maintain that burnt ale is not, in its nature or quality, prejudicial to land—that on the contrary it has been, and is, applied to land with beneficial results. That would appear to be true, but it is only true when it is applied to land in small quantities and at intermittent periods of longer or shorter duration. That, however, is not the question. The question is, whether it would prejudicially affect the land if applied in the quantity and continuously as the defenders would be bound to receive it as it issues from the sewers. I agree with your Lordship that the evidence clearly shows that it would. Burnt ale seems to contain a glutinous substance, which when so applied would destroy the property of the soil and render it unfit for filtration and agricultural purposes. Burnt ale may be beneficial to land when applied in small quantities, but I certainly think that it would poison any land when applied in the quantity in which in this case it would

necessarily have to be applied. If that be so, I think it is sufficient for the decision of the case.

But the pursuers further maintain that the liquid coming from their works can by treatment, by means of settling ponds or otherwise, be rendered perfectly innocuous in its application to land, and if that be so, that the defenders are bound to receive into their sewers and themselves apply the treatment requisite to produce that result.

Your Lordship has pointed out that no one has as yet succeeded in rendering the liquid innocuous in practice; and success, if at all, has so far only been obtained in the laboratory. But however that may be, I fail to see that the defenders are under any obligation of the kind. No doubt, if there was an absolute obligation on the defenders to receive into their sewers all liquids, whether innocuous or otherwise, then of course they would have to dispose of the sewage thence resulting by treatment or otherwise as might seem to them best. But they are under no such obligation. Their obligation is to receive only innocuous liquids, such as fulfil the conditions specified in section 7 of the Act. If the resulting sewage matter, as it issues from the sewers does not fulfil these conditions, as in this case, then the defenders are not bound to give facilities for the admission of the offending liquid the admixture with which produces that result.

In the *Brechin* case, when the local authority were finally ordained to admit the liquid proceeding from the manufacturing processes into the sewers, it had been ascertained, not merely by laboratory experiment, but by actual experience, that the liquid had been rendered innocuous, and fulfilled all the conditions specified in the 7th section of the Act. But it had been rendered innocuous by treatment in the manufacturers' own works. If the pursuers follow a similar course in this case, and offer an innocuous liquid for admission to the sewers, then, no doubt, the defenders will give them the necessary facilities.

Lord M'Laren—I was not a member of the Court at the time when the case of *Brechin* was decided, and do not feel called upon to examine the principle of construction of the statute which I find in the report of that case. I shall only say that from the report itself, and from the explanations made to us at the bar, the case appears to have been presented under conditions depending upon the state of the record and the previous evidence which somewhat limited the field of inquiry, and I do not gather that the Court was so free in that case to consider the pure question of liability under the statute as we are in the present case. But I am perfectly clear in my own mind that in this case it would not be in accordance with the statute to compel the burgh authority of Dufftown to receive the distillery effluent in the condition in which it is offered for their disposal. I do not enter into the facts of the case or the scientific evidence, because I accept your Lordship's reasoning and conclusions in all particulars.

Lord Kinnear—I am of the same opinion with your Lordships. I think the Sheriff-Substitute was probably right in declining to be convinced that it is impossible to purify the distillery effluent, but there is no *onus* on the defenders to show that no effective method of purifying such refuse can be discovered by proper experimentation. They are bound to take the pursuers liquid as it is, if they are bound to take it at all, and the question that they have to consider is, whether, if it were admitted, it would prejudicially affect the disposal of the sewage in its application to land; and therefore they must consider what is the character and condition of the liquid when it is presented to them for admission to their sewers; and, again, they must consider what will probably be the character of the discharge which issues from the sewers after the pursuers' liquid has been carried through them along with the ordinary sewage matter which they are designed to carry. If it appears that the matter issuing from their sewers at the outfall will be injurious, provided they are required to receive the liquids in question continuously and in the quantities which the pursuers call upon them to receive, then that shows that the admission of this liquid will prejudicially affect the disposal of the sewage matter by application to land, and there is nothing in the statute which requires them to go further and show that it is not within the resources of science to discover any effective method of treatment which will render the liquid innocuous. If that be practicable, there is nothing to prevent the pursuers discovering in the first place, and then applying, such method of treatment, and so presenting a harmless liquid for admission to the defenders' sewers. The true question comes to be, whether distillers are entitled to impose upon the local authority, or, in other words, upon the ratepayers, the cost and pains, first of discovering, and then of effectively applying, a method of treatment of distillery refuse which will render it innocuous, or whether they must not undertake that task themselves if they desire that it shall be admitted into the sewers of the local authority. It appears to me to be quite obvious that they cannot impose any such burden upon the community unless the Legislature has so enacted, and I find nothing in the statute which confers upon them any such right. I quite agree with what your Lordship has said with reference to the details of the *Brechin* case. I think it is distinguishable from the present case. In the first place, it was found in that case that certain factory refuse was not open to the charge that it would either injure sewers or prejudicially affect the disposal of sewage matter on its application to land, and so far the decision is only a decision upon a question of fact, which can afford no aid or guidance to us in determining a different question of fact with reference to a totally different subject. The only other point, as I read the case, which was decided was that the local authority, not having been able to show that the

liquid offered to them transgressed any of the conditions laid down in the 7th section of the statute, and not being able to find any other statutory condition which entitled them to exclude the refuse in question, the section compelled them to admit it. It was simply a decision that there were no conditions of the statute which would entitle the local authority to refuse liquid which had been offered to them, and that, having been offered it, they were bound by the main enactment of the section, because they could not shelter themselves under any of its provisos. It appears to me, therefore, that that is no real authority for the decision of the present case.

The Court pronounced this interlocutor:—

"Sustain the appeal: Recal the interlocutors of the Sheriff-Substitute, dated 28th July 1899 and 21st February 1900: Find in fact (1) that Dufftown is a police burgh, and that the defenders are the Commissioners and the Local Authority of it; (2) that in or about 1881 the defenders established a sewerage system in the burgh, consisting of glazed fireclay spigot and faucet pipes, by which the sewage was discharged into the river Fiddich; (3) that in consequence of the County Council having complained of the sewage being discharged into the Fiddich, the defenders intend to dispose of it in future by filtration and irrigation; (4) that the pursuers are the owners and occupiers of Mortlach Distillery, which is situated within the burgh; (5) that the pursuers demand that the defenders shall admit the liquid refuse from their distillery into the defenders' sewers, and that the defenders shall allow them to make all necessary communications between their (the pursuers') drains and the Dufftown sewers for the purpose of admitting the said liquid refuse, and that the defenders decline to do so; (6) that it is not proved (1) that the defenders' sewers are not of adequate capacity to receive and convey the said liquid refuse, or (2) that the said liquid refuse would injure the defenders' sewers in consequence of the acid which it contains acting upon the lime in the cement at the joints of their sewer pipes, or (3) that the said liquid refuse would be injurious to the public health, but that it is proved that the admission of the said liquid refuse into the said sewers would prejudicially affect the disposal by application to land of the sewage matter conveyed along the said sewers: Therefore find in law that the defenders are not bound to admit the said liquid refuse into the said sewers: Refuse the prayer of the petition: Find the pursuers liable to the defenders in expenses both in this Court and in the Sheriff Court, those in the Sheriff Court being on the higher scale, and remit," &c.

Counsel for the Pursuers and Respondents—W. Campbell, Q.C.—W. Brown. Agents—Alex. Morison & Co., W.S.

Counsel for the Defenders and Appellants—H. Johnston, Q.C.—Chree. Agents—Wallace & Guthrie, W.S., and C. J. Macpherson, Solicitor, Dufftown.

Tuesday, December 11.

SECOND DIVISION.

[Sheriff Court at Dundee.

HORSBURGH *v.* SHEACH.

Reparation—Negligence—Precautions for Safety of Public—Safety of Children—Builder Depositing Heap of Building Material against Wall Separating Public Street from Mill-Pond.

A carter brought an action of damages for the death of his son, a child of seven years, against a builder. The pursuer averred that the defender was engaged in building operations adjoining a public street; that the street was bounded on one side by a mill-pond, between which and the street was a stone-wall 8 feet high; that the defender deposited a large heap of building material on the street close to the wall, and reaching to within 30 inches from the top of the wall; that the pursuer's son, while playing with other children on the top of the heap, fell over the wall into the mill-pond and was drowned; that the wall was there for the purpose of protecting persons using the street against the dangers of the pond, and that in heaping up building material almost to the top of the wall, the pursuer rendered the pond an unprotected danger to the public; that the defender knew that children were in the habit of playing on the top of the heap, and yet took no steps to prevent them falling over into the pond, and that in erecting the heap, and failing to remove it or take precautions for the safety of the children playing about it, the defender was guilty of gross and culpable negligence.

Held that the action was irrelevant.

Andrew Horsburgh, carter, Dundee, raised an action in the Sheriff Court at Dundee against Robert Sheach junior, builder and contractor, Dundee, in which he craved decree for £200 as damages for the loss of his son William, aged seven years.

The pursuer averred—"(Cond. 2) In or about the month of March last the defender was engaged in making extensions to the works of Messrs A. B. Crichton & Company in Cunningham Street, Dundee, and in making these extensions he had to make use of considerable quantities of sand coping-stone, &c. (Cond. 3) Cunningham Street is bounded on one side by a mill-pond belonging to Messrs Malcolm, Ogilvie, & Company, and between the said pond and the street there is a stone-wall of 8 feet or thereby in height. (Cond. 4) While engaged in the work condescended upon the defender or his servants deposited a large