Friday, December 12.

SECOND DIVISION.

(Before seven Judges.)

THE ALLOA POLICE COMMISSIONERS *v.* WILLIAM VIRTUE.

Public Trustees—Trust-funds—Reparation.

The Police Commissioners of a burgh having failed properly to light and watch a street under repair, an action of damages was raised against them for injuries caused by this neglect—*held*, in conformity with the judgment of the House of Lords in *Gibb* v. *Mersey Docks* (as reversing the judgment of the House in *Duncan* v. *Findlater*), that the trust-funds were liable therefor.

This case came up on appeal from the Sheriff (MONRO) of Clackmannanshire, and was heard on October 16th and 17th before the Second Division; their Lordships ordered it to be reheard before seven Judges. The conclusions of the summons were as follows—"Therefore the defenders ought to be decerned to pay to the pursuer the sum of £500 sterling, being damages sustained by the pursuer, and as *solatium* due to him by and through the fault, culpable negligence, and failure in the performance of the duties imposed on the said Commissioners by the foresaid Act, or by and through the fault, culpable negligence, and failure of duty of some person or persons for whom they are or were responsible, the said Commissioners or other person or persons for whom they are or were responsible having, on or about the 17th day of February last, 1872, culpably, negligently, and in failure of the duties imposed on them by the said Act, left lying on the public street or road in the said burgh, commonly known as Castle Street (which street is within the limits of the said burgh of Alloa), after sunset, and after it was quite dark, a "trestle" or block of wood, without having lighted, fenced, or enclosed the same, or taken other proper precautions to guard against accident, in consequence whereof the pursuer, being then the driver of and sitting in a spring cart or other vehicle drawn by a horse, and lawfully driving along said street, the wheel of said cart struck against said "trestle" or block of wood, and was thereby overturned, falling on the pursuer, whereby, or in consequence whereof, pursuer's body was crushed, his head dangerously and permanently injured, and his physical system severely impaired."

An important question of law was raised as to whether Commissioners of Police under the General Police and Improvement Act are liable in damages for personal injury caused by the act or negligence of their servants in executing repairs on a street in a burgh.

The Pursuer is a servant in the employment of James Bayne, farmer at Anchors-cross, near Dunblane, and he was in the habit of taking meat, the property of his master, from Anchors-cross to Alloa, in a spring cart, for sale. On the evening of Saturday, the 17th day of February last, whilst driving along Castle Street of Alloa (which is within the limits of the burgh of Alloa, and under the management and control of the Commissioners), in company with William Mackenzie, engineer, and when about to stop at the door of Mrs Hutchison, one of his customers, residing there, the spring-cart in which the pursuer was sitting, and of which he was in charge, was suddenly and violently upset, and the horse thrown down. In consequence, he was dashed to the ground, and he was dangerously hurt about the head and face. After having been extricated, the pursuer was carried to an hotel in Alloa, where he lay for ten or twelve days, attended by a medical man. The upsetting of the spring-cart, with its attendant consequences, it was alleged, were caused by one of its wheels having struck against or gone over a "trestle" of wood, which had been left lying on the street by the Police Commissioners of the burgh of Alloa, or their servants, employed in repairing the street, in failure of the duties imposed on the Commissioners by the said "General Police and Improvement (Scotland) Act 1862," and incumbent on them at common law. The occurrence happened a little before seven o'clock in the evening, it being then after sunset and quite dark. The trestles, and particularly that one which upset the spring-cart driven by the pursuer, were neither lighted, fenced, nor enclosed, nor were precautions taken to guard against accident. The defenders, in their answers, referred to the Act of 1862 for the duties incumbent upon the Commissioners, and explained that none of the Commissioners were personally aware that the trestles were upon the street, and that it was not their duty personally to remove the same. They admitted that the trestles should have been removed when it became dark, and also that they were not removed at the time of the accident.

The important sections of the General Police and Improvement (Scotland) Act 1862 that applied to the case are as follows:—Section 64. "The Commissioners shall, in such manner as to them shall seem best for the police purposes of this Act, estimate, assess, levy, and apply the sums of money hereby authorised to be raised for the police purposes of this Act; and shall have power to appoint, at such salaries as they shall judge meet, clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not herein otherwise provided for, to be employed in the execution of this Act; and to remove and suspend such clerks, treasurers, collectors, surveyors, and other persons at pleasure; and to fix the number and description of officers to be employed in the execution of this Act, and the wages to be paid to them respectively, whether oppointed by themselves or not; and to increase or diminish their numbers from time to time as they shall see cause; and to make orders and regulations for their government." Section 66. "The monies derived from the assessments hereby authorised to be levied, and all other property acquired by the Commissioners in pursuance of the powers hereby granted, shall be, and the same are hereby vested in the Commissioners for the uses and purposes mentioned in the Act, and for no other purpose whatever." Section 110 of the Act empowers the Commissioners to appoint some person by the title of "inspector of cleansing" to perform the duties therein specified. And section 233 provides that "The Commissioners shall, during the construction or repair of any streets, public or private, and during the construction or repair of any buildings, sewers or drains, take proper precaution for guarding against accident, by shoring up and protecting the adjoining houses, and may stop any such street, and prevent the same being used as a common passage

or thoroughfare while such works are carried on, as to them shall seem proper; and the Commissioners shall cause any sewer or drain or other works during the construction or repair thereof to be lighted and guarded during the night so as to prevent accidents."

The pursuer stated that Archibald M'Dougall, the inspector of cleansing, was a servant in the employment of the Commissioners, and acted in connection with the repairs of streets and work of that description, under the directions and control and by the authority of the Commissioners, not in the position of an independent officer or contractor.

Finally, the defenders averred that there is no municipal corporation and no common good in Alloa, and that the Commissioners of Police of that burgh have been elected and exist exclusively under the Act of 1862, and have no funds or property except the assessments levied by them under the provisions of that Act. The payment of claims of damages such as that preferred, they maintained, was not a use or purpose to which the assessments authorised to be levied by the Act could be applied, and that the Commissioners had no funds or property available to meet such a claim; on the contrary, the only funds held by them were appropriated by the statute to other purposes.

The pursuer pleaded—"The pursuer having, at the time and place he sustained the injuries condescended on, been engaged in his lawful occupation, and the said injuries having been caused to him by and through the fault, culpable negligence, and failure on the part of the Police Commissioners of the burgh of Alloa, or of their servants, or other person or persons for whom they were and are responsible in the performance of the duties imposed upon them by "The General Police and Improvement (Scotland) Act 1862," and incumbent on them at common law, the said Commissioners are liable to make reparation to the pursuer in the sum sued for, with expenses, and decree ought to be pronounced therefor against the defender as clerk to and representing the said Commissioners, and liable to be sued for them under the said Statute. *Separatim*, the defenders are liable to be sued for the damages sought to be recovered, in respect they can pay the same either (1) out of the assessments levied by them under the General Police and Improvement (Scotland) Act, or, (2) out of the other funds belonging to the burgh coming into their hands, and not specially appropriated by the said Act."

The defenders pleaded—"(1) The pursuer's statements are not relevant or sufficient in law to support the conclusions of the summons. (2) The action cannot be maintained, in respect that the Commissioners have no funds or property available to meet the pursuer's claim, and that the only funds and property held by them are specifically appropriated to other purposes. (3) The defender ought to be assoilzied, in respect that the said accident was not caused by any act or ommission of the Commissioners, or of any person for whose acts or omissions the Commissioners are pecuniarily responsible. (5) The pursuer's whole material statements being unfounded in fact, the defender ought to be assoilzied, with expenses."

A further plea in defence, that the pursuer's own negligence caused, or at least materially contributed to, the accident, did not fall within the question of law raised under the appeal. At the debate before the Sheriff-Substitute it was stated that no personal liability was alleged against the Commissioners, the conclusions of the action being insisted in against them solely as a corporate body The defenders, relying on the case of *Duncan* v. *Findlater*, as reversed in the House of Lords, 23d August 1839, maintained that they were in the same position as road trustees, who in that case were held not to be responsible for damages to a passenger injured by the fault of a contractor employed by them to repair the road; and that the funds they were entitled to levy by assessment could be applied, under the express provisions of the Police Act, only to the specific purposes therein set forth which did not include such a claim. On behalf of the pursuer, it was, however, contended that the case of *Findlater* did not support such a rule; that the *dicta* of the Lord Chancellor in that judgment went beyond the case; that although the general rule had been followed in subsequent cases in Scotland, the authority of the decision had lately been rejected in English cases involving the same question; that having been set aside in an English appeal in the House of Lords—*The Mersey Dock Trustees* v. *Gibb*—in 1866, it could not now be held as authoritative; and that, in conformity with the rule now finally settled in England, a body of trustees or commissioners in the position of the defenders were liable for damage caused by their servants' neglect or failure in duty, and that the funds leviable by them were applicable to such a claim. It was admitted that no recent case in the Court of Session had occurred in which this view had been given effect to.

The Sheriff-Substitute (BENNET CLARK), on 14th May 1873, pronounced the following interlocutor and note:—"Having heard parties' procurators on the closed record, and specially on the first, second, and third pleas in law for the defenders, and having made avizandum, repels the same in so far as dilatory, and finds, 1st, That the pursuer's averments are relevant and sufficient in law to support the conclusions of the summons; 2d, That the accident and injury to the pursuer, upon which he founds his claim of damages, having been caused, as he avers, by the act or omission of servants of the defenders employed by them in repairing a street within the burgh of Alloa, on which the accident happened, the defenders, as Commissioners of Police of the said burgh, are liable in reparation to the pursuer; and 3d, That the funds levied and administered by the defenders as Commissioners of Police under the General Police and Improvement Act are available to meet any claim of damages the pursuer may establish as resulting from said accident: And before further answer, allows the parties a proof of their respective averments on record, and grants diligence against witnesses and havers in common form, and appoints the cause to be enrolled that a diet of proof may be fixed.

"*Note.*—The defenders, while admitting generally the pursuer's allegations that he was thrown out of a spring cart in which he was driving along Castle Street, in the burgh of Alloa, on the evening of the 17th February 1872, in consequence of the wheel coming in contact with a trestle standing on said street, the same being at the time under repair, whereby he was injured in his person, maintain that they are not responsible in damages for any injury he may thereby have sustained.

"It was stated that the conclusion was insisted in against the defenders solely as a corporate body, no personal liability being alleged against them. The question debated, therefore, was whether Commissioners of Police under the General Police and Improvement Act are liable in damages for personal injury caused by the act or negligence of their servants in executing repairs on a street of the burgh.

"The defenders, relying on the case of *Duncan* v. *Findlater*, as reversed in the House of Lords, 23d August 1839 (1 Rob. 911), maintained that they were in the same position as road trustees, who in that case were held not to be responsible for damages to a passenger injured by the fault of a contractor employed by them to repair the road; and that the funds they were entitled to levy by assessment could be applied, under the express provisions of the Police Act, only to the specific purposes therein set forth, which did not include such a claim.

"It was contended on behalf of the pursuer that the case of *Findlater* did not support such a rule; that the *dicta* of the Lord Chancellor in that judgment went beyond the case; that although the general rule had been followed in subsequent cases in Scotland, the authority of the decision had lately been rejected in English cases involving the same question; that having been set aside in an English appeal in the House of Lords in 1866, it cannot now be held as authoritative; and that, in conformity with the rule now finally settled in England, a body of commissioners or trustees in the position of the defenders are liable for damage caused by their servants' neglect or failure in duty, and that the funds leviable by them are applicable to such a claim.

"It was admitted that no recent case in the Court of Session had occurred in which this view had been given effect to; but it was maintained that the rule of law having been thus conclusively ascertained, it must prevail, although the point has not yet occurred for decision in the Court of Session. If the English authorities are to be regarded, the argument of the pursuer appears to warrant the conclusion that the rule of liability is now that for which he contends.

"The law laid down in *Duncan* v. *Findlater* in the Court of Session was, 'That road trustees on a public road are liable for any injury that may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, when engaged in any operation performed under the authority of the trustees.'

"The Lord Chancellor (Cottenham), in moving the reversal of the decision, laid it down that, in such cases in England, the law held that trustees were not liable; and, after referring to the cases in Scotland founded on in support of the judgment of the Court of Session, he remarked, 'There cannot be any doubt that there has been for some time past a course recognised in Scotland in conformity with the decision in this case.' Then, referring to the Turnpike Acts, and the results which might flow from the rule given effect to in the Court of Session, he goes on to remark: 'Finding the rule of law clearly established in England, and nothing in the law of Scotland leading to a contrary course of decision, I cannot hesitate to say that I think this a case in which the practice in Scotland has been erroneous, and ought to be set right;' which was done by reversing the decision of the Court of Session.

"Lord Brougham, who concurred, stated even more strongly his disapproval, and said that the effect of the reversal would be 'not only to make the Scotch law in this matter consistent with its own general principles with respect to the liability of agents and other persons, but it will make it likewise entirely consistent with the law of England.'

"In the case of *Ainslie* v. *Stewart* (19th Nov. 1839), which was an action against road trustees for injury from the upsetting of a gig (the judgment in which had been delayed till the disposal of the appeal in *Findlater*), the defenders were assoilzied; and it was remarked from the bench (per Lord Gillies), 'We can do nothing else since the reversal in *Findlater's* case, for it appears that what is the law of England is now the law of Scotland.'

"The general rule thus established has been followed in practice since. There is no report of any recent case in the Court of Session in which the point has been raised, but it was stated by the pursuer's agent at the hearing that the view for which he contended had been given effect to in at least one Sheriff-Court, and has been acquiesced in.

"The English appeals, in which the question was very deliberately considered, and conclusively determined in the House of Lords, are, *The Mersey Dock Trustees* v. *Gibbs*, and the same parties v. *Penhallon*, June 1866 (Law Reports, H. of L. I. 93). The opinion of the Judges having been required, was delivered by Justice Blackburn in a very able and elaborate review of all the authorities. In referring to the opinion of Lord Cottenham in *Duncan* v. *Findlater*, it was stated that 'his remark not being the point decided by the House, is not conclusively binding,' and the Judges said, 'we must dissent from the position there laid down, both on principle and preponderance of authority.'

"The Lord Chancellor (Cranworth) concurred with J. Blackburn in his review of all the decisions and the conclusion arrived at by the Judges. Lord Wensleydale and Lord Westbury also concurred. Lord Westbury remarked particularly on Lord Cottenham's opinion in *Findlater's* case, and said that 'if his views were recognised as the law, it would undoubtedly lead to very great evil and injury.'

"The result of the judgment of the House of Lords in these cases is thus stated in the rubric:—The principle on which a private person or a company is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of these works, although these tolls are not applicable to the use of the individual incorporation, but are devoted to the maintenance of the works.

"The principle established in that judgment was given effect to in a recent case, *Forman* v. *The Mayor and Magistrates of Canterbury*, Jan. 27, 1871 (Law Reports, vi. 214), which resembles the present case in its circumstances. A heap of stones had been left at the side of a road without light, and the plaintiff, on a dark night, drove his cart against it, and was upset and injured.

"The road was in the district of which the defenders were the local Board of Health (who by the Public Health Act, 1848, are constituted Surveyors

of Highways within their districts), and the heap was left there by the negligence of persons employed by them to repair the roads. It was held that the defenders were liable as the local board to an action for the negligence of their servants.

"J. Blackburn, who had delivered the opinion of the Judges in the House of Lords in the *Mersey Docks Appeal*, and who was presiding Judge in this case, remarked that the House of Lords, in these cases, had decided that 'a public body like the Local Board of Health are answerable for the negligence of their servants, just as if they were acting as the servants of a private person, and not for a corporation incorporated for a public purpose. The individuals comprising the body are not responsible, it is the Board that are, and they would have to pay the damages out of the funds in their hands as a Local Board of Health.'

"The defenders attempted to show that there was a distinction between trustees and a corporation; and they referred to the opinion of Lord Neaves in the case of *Dargie* v. *The Magistrates of Forfar*, 17 D. 730. But it is not easy to see any substantial difference between these defenders and the defenders in this action. The principle on which the rule is founded applies equally to every corporate or other body intrusted with the execution of a work for the benefit of the public, and administering funds for that purpose. If the duty is to make and maintain roads, and the work is to be executed with safety to the public, the restriction of the funds to the execution of that work and other specified purposes is not inconsistent with its application in reparation for damage caused by negligence on the part of persons performing the work. It may fairly be regarded as one of the possible items of expenditure, and is not excluded by any general enumeration of the uses to which the funds are restricted.

"If, then, the reversal in *Findlater's* case proceeded on the ground that there was no principle in our law or any course of decisions to support the rule; and that the authorities in England being to the opposite effect, that the same rule should prevail in Scotland, as was expressly found by that judgment; and if in England the course of decisions now no longer supports that rule, but it has been departed from, and a rule similar to that in observance with us prior to that reversal has been conclusively established upon a broad general principle, it seems necessarily to follow that our old rule must now be held to subsist.

"The law is so laid down in the last edition of 'Bell's Principles' by Mr Guthrie (1872), sec. 2031, p. 879. Referring to the view that trustees holding funds for special statutory purposes were not liable for the fault of themselves or their servants, so as to affect these funds, and to the House of Lords' judgment in *Findlater's* case, and the recent English cases on the subject, he says, 'The case (*Findlater's*) on which that view was founded, appears to have been misunderstood or to have gone too far, and the general rule is now fixed that statutory trustees, unless the statutes under which they act provide otherwise, are liable to make good in their corporate capacity, and out of their public funds, the damage caused by their own or their servants' fault, in the same way as individuals.'

"The interval since the debate has been unavoidably lengthened from the necessity of referring to the English authorities."

This, on 31st May 1873, was affirmed by the Sheriff-Depute (MONRO) in the following interlocutor:—"The Sheriff having considered the appeal for the defenders against the Sheriff-Substitute's interlocutor of 14th instant, and whole process, adheres to the said interlocutor, and dismisses the said appeal, and decerns.

"*Note.*—The Sheriff concurs in the views expressed by the Sheriff-Substitute. There is no doubt a difficulty caused by the case of *Duncan* v. *Findlater* as reversed in the House of Lords: but the Sheriff feels much relieved of that difficulty by the *dictum* of Justice Blackburn, speaking for the consulted Law Lords in the case of the *Mersey Docks*, that 'all that was really decided in that case was that the trustees were not liable for the negligence of persons in their employment who were not shown to be their servants.' What goes beyond this is to be regarded simply as the *dicta* of Lords Cottenham and Brougham; and, as those *dicta* have been repudiated by later and higher authorities in England, there remains nothing to impede the application of what appears to be the old law of Scotland, and to be now also the established law of England, viz,, that for such a wrong as that here alleged a public trust or corporation is equally liable for its servants as are private individuals. In addition to the observations of Mr Guthrie, quoted by the Sheriff-Substitute, the Sheriff may refer to Mr Guthrie Smith's work on Reparation, p. 164 *et seq.*, and Mr Badenach Nicolson's notes in his edition of Erskine's Institutes on pp. 664 aud 666 (vol. 2)."

Against these interlocutors an appeal was presented to the Court of Session.

Argued for the Commissioners (Appellants)—We object to the three findings in the interlocutor of the Sheriff-Substitute. These would have been quite proper findings if the judgment in *Duncan* v. *Findlater* had ceased to be law. That, however, is not so. and consequently they must be reversed by this Court. The respondent relies on the recent decision in the case of *Gibb* v. *The Mersey Docks Co.*, but it is a question whether this Court can accept a suggestion thrown out by an English Court sitting in judgment on an English case, and by such acceptance reverse the rule of law as established in Scotland by the decision of the House of Lords in *Duncan* v. *Findlater*. This decision, we maintain, is still the law of Scotland, and applies directly to this case. Alloa is a burgh under the Police Act of 1862, and the action is founded on the allegation that the pursuer's cart was upset, and he himself injured by having come into collision with a trestle which the Police Commissioners or their servants had improperly left in the public road. These averments contain—(1) No charge of personal fault against the Commissioners; (2) No demand for personal liability in reparation. We further maintain that under the statutes there was a specific appropriation of the funds in the hands of the Commissioners. On this point the Acts of 1850 and 1862 are upon all-fours. The leading sections to which we refer are §§ 48 and 173 of the Act of 1850, and §§ 64, 66, 85, 110, and 135 of the Act of 1862. The Legislature evidently had the idea of damages being payable before them in framing these Acts, and expressly then and there specified what was to be done with the money raised by the Commissioners after having provided for the damages.

They have powers—(1) to pay damages; (2) to assess for damages; but these powers are for what is done under the Act. Now this claim is not for damages for what has been done in the execution of the Act, but entirely outwith it. This body is simply a Police Commission, not a corporation. The views in *Duncan* v. *Findlater* are supported in the subsequent cases of *Thomson* v. *Mitchell*; *Ainslie* v. *Stewart*; *Ross* v. *Heriot's Hospital*; *Dargie* v. *Mags. of Forfar*.

Argued for Respondent—*Qui facit per alium facit per se.* [Lord Justice-Clerk—Is this a corporation?]—Well, to all intents and purposes the Commissioners are so. They never die, and they may sue and be sued through their clerk. [Lord Neaves—Does a Board stand in the same position as a master does towards his servant?]—I maintain that it is so. Given the relation of master and servant and the liability follows. Under the Road Act Lord Cottenham thought that there was such a specific appropriation of the funds as to exclude a claim for damages, but here we are under a different statute, and one in which there is nothing to support such a contention. The only section bearing on the question is the 66th, and that will not sustain such an interpretation. The old rule of the law of Scotland, until upset by the case of *Duncan* v. *Findlater*, was clearly to the effect of rendering persons in the position now occupied by the appellants liable to a claim for damages such as is now presented to this Court. I maintain that the current of the decisions has set the other way since that case; that the *dicta* of the learned Lords there were seen to have gone too far until the whole principle was recently upset in the *Mersey Docks* case. The rubric in that case is as follows:—

"*Corporation—Public Purposes—Trust-Funds—Negligence—Damages—Knowledge.*

The principle on which a private person or a company is liable for damages occasioned by the neglect of servants, applies to a corporation which has been entrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works, and in case of any surplus existing the tolls themselves are to be proportionally diminished.

Parnaby v. *The Lancaster Canal Company* (11 Ad. and E. 223) which was the case of an ordinary company, approved of, and the principle of liability for negligence there established applied to a corporate body entrusted by statute with the performance of a public duty and receiving therefrom no profits or emoluments for itself.

If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them.

Per Lord Westbury—Trustees may render the property of their beneficiaries liable to third persons for acts done in the exercise of the trust.

Per Lord Westbury—Some of the observations of Lord Cottenham in *Duncan* v. *Findlater* commented on and denied."

Thus the former rule of law in Scotland revives. [Lord President—One result is that we shall have all the cases which, owing to *Duncan* v. *Findlater*, have never come before us, now pouring into Court, and that great injustice will have been done to the country during these last thirty years.]

Appellant's Authorities—*Police Act*, 1850, §§ 48, 173; *Police Act*, 1862, §§ 64, 66, 85, 110, 135; *Duncan* v. *Findlater*, 15 D. 1304, and 16 D. 1153; reversed Aug. 1839, 6 A. and F. 894, and 1 M. and Rob. 911; *Thomson* v. *Mitchell*, 1 Rob. 936; *Ainslie* v. *Stewart*, Nov. 19, 1839; *Ross* v. *Heriot's Hospital*, 5 Bell's App. 37.

Respondent's Authorities—*Innes*, M. 13,189; *Dargie* v. *Mags. of Forfar*, 17 D. 730, and 18 D. 343; *Threshie* v. *Mags. of Annan*, 8 D. 276; *New Clyde Shipping Co.* v. *Clyde Trs.*, 4 D. 1501: *Ogilvy* v. *Mags. of Edinburgh*, 1 S. 24; *Weatherston* v. *Mags. of Linlithgow*, 2 Macph. 238; *M'Gibbon* v. *Prison Board of Edinburgh*, 13 D. 487; *Scott* v. *Mayor of Manchester*, 1 H. and N. 59; *Gibb* v. *Mersey Docks*, 1 H. and N. 164, L. R., H. of L., 1, 93; *Hartman* v. *Ryde Commissioners*, 33 L.J.,Q.B., 39 and 296; *Wynch* v. *Conservators of Thames*, L. R. 7 C. P. 458, July 5, 1872; *Jones* v. *Liverpool Docks*, 11 H. L. C. 443; *Coe* v. *Wise*, L. R. 1 Q. B. 714, and L.J.,Q.B. 281.

At advising—

The Lord President read the following opinion:—

This is an appeal from the Sheriff-Court of Clackmannanshire under the 40th section of the Act 6 Geo. IV. c. 120, as amended by the 73d section of the Act 31 and 32 Vict. c. 100, for the purpose of having the cause tried by jury. But the appellants, who are defenders in the Sheriff-Court, are entitled, before an issue is adjusted for the trial of the cause, to submit to review any judgment on preliminary pleas which may have been pronounced by the Sheriff before the appeal was or could competently be taken. Accordingly, they now ask the Court to review and alter a judgment pronounced by the Sheriff-Substitute on 14th May last sustaining the relevancy of the action, and affirmed by the Sheriff-Principal on appeal, by interlocutor of 31st May.

The defenders and appellants contend that the averments in fact made by the pursuers disclose no relevant ground of action for subjecting them as Commissioners of Police, or the funds in their hands, to liability in damages. If this contention is well founded, the appellants are entitled to have the interlocutor of the Sheriff-Substitute and Sheriff recalled, and decree of absolvitor pronounced in their favour.

The allegations of the pursuer are, in substance, that he was severely injured by the upsetting of a spring cart which he was driving along Castle Street of Alloa on the evening of 17th February 1872, after seven o'clock; that this occurrence was caused by the wheel of the cart having come in contact with a large block of wood or "trestle," which, along with several others of a similar size and description had been negligently left lying on the roadway or street by the servants of the defenders, the Commissioners of Police, while repairing the street under their orders—none of the said trestles in the street under repair being either lighted,

fenced, or enclosed, and no other precaution having been taken to warn passengers of probable danger, or to guard against accident.

The defenders and appellants were appointed Commissioners of Police, and were acting as such at the time of the accident under the General Police and Improvement (Scotland) Act, 1862. By that statute they are authorised and required *inter alia* to maintain, repair, and improve the streets of the burgh, to levy a rate for the purpose, and to appoint all necessary officers and other persons to execute the provisions of the Act under their orders and supervision. The moneys derived from the rates and all other property belonging to the Commissioners in pursuance of their powers, are by § 66 declared to be vested in them "for the uses and purposes mentioned in the Act, and for no other purpose whatever." To pay damages in reparation of injuries sustained by reason of the negligence of the Commissioners or their servants in the execution of the Act is not one of the "purposes mentioned in the Act." But by § 263 the Commissioners are specially required to take all necessary precautions for guarding against accidents during the construction or repair of any streets, buildings, sewers, or drains, and in particular to cause the works under repair to be lighted and guarded during the night.

If the question thus raised for decision had occurred for the first time, or was to be decided on general legal principles applicable to the construction of the statute or the liability of statutory commissioners to such a claim as is made by the pursuer, the case would require the gravest and most deliberate consideration. Even as it is, the question is one of great importance. But I apprehend it must be determined by the authority of decided cases, and not by reference to general principles. The state of the authorities however is sufficiently embarrassing, and may well cause some doubt upon which side this Court is bound to hold the preponderance of weight to lie.

Prior to the year 1839 the prevailing opinion among Scottish lawyers and judges was, that statutory trustees in the situation of the appellants were liable in damages to persons injured by the wrong or negligence of themselves or their servants in the performance of their statutory duty, and that such claims of damage fell to be made good out of the trust funds vested in them by statute for statutory purposes—there being no other funds in their hands which could be made available. Accordingly, in practice such actions were directed, not against individual trustees or against the particular wrongdoers, but, as in the present case, against the officer appointed by statute to represent them as a quasi-corporation and to sue and be sued on their behalf. But in the year 1839 the House of Lords, in the case of *Duncan* v. *Findlater*, solemnly and unequivocally decided, reversing the judgment of this Court, that no such liability could attach to persons acting gratuitously as statutory trustees, or commissioners administering funds specially appropriated by statute to specified purposes, and having no other funds at their disposal.

An attempt has been made to show that the judgment of the House of Lords in that case did not affirm any general rule or doctrine, but merely gave effect to their disapproval of the presiding Judge's charge in the case before them. But that this is not so may be very clearly demonstrated by an examination of the report of the case in M'Lean & Robertson's Reports, p. 911. Lord Cottenham, as Chancellor, in delivering judgment, said, "There has arisen a conflict of opinion in this country and in Scotland upon a point arising under Acts of Parliament very much depending upon the construction of these Acts." He then speaks of the great inconvenience arising from such conflict, and adds, "This never was more strongly felt than in cases in which the questions arise from enactments which are common to both. . . When questions first arise upon those Acts of Parliament which create trusts of money for public purposes in both countries, the Courts have a common principle upon which to engraft such rules as it might be advisable to adopt in administering justice upon questions arising under these Acts. In England it has been held by repeated decisions that trustees of a turnpike road are not liable for damages arising from the acts of those employed in carrying into effect works under the provisions of the statute. . In all these cases it was held that the trustees, doing only that which by the statute it was their duty to do, and being guilty of no personal default, were not answerable for damages sustained by the acts or neglect of persons employed by them in the active execution of that duty." The conclusion of his Lordship's judgment is in these terms, "I think this is a case in which the practice in Scotland is erroneous and ought to be set right; and this, I think, ought to be effected in this case by reversing all the interlocutors appealed from, the first of which is that which directed the issue; because, as the ground of defence which I think ought to prevail appears upon the summons itself, and in the defences as originally made, the cause was, before the interlocutor directing the issue, in a state which would have enabled the Court to dispose of it." The cause of *Duncan* v. *Findlater*, in short, was before the issue was sent to be tried precisely in the same situation as this cause is now. A question of relevancy was raised by the defender, and the Lord Chancellor was of opinion that the defence ought to have been sustained and the defender assoilzied without any inquiry, because persons in the position of road trustees could not be subjected to liability for damage arising from the neglect or wrong-doing of themselves or their servants. Lord Brougham, the only other member of the House who expressed an opinion, concurred entirely in the opinion of the Lord Chancellor; and accordingly the judgment of the House was to reverse the whole interlocutors, including the interlocutor directing the issue, and the Court of Session afterwards, in applying the judgment, assoilzied the defender (2 D. 139). If the only objection entertained by the House of Lords had been to the direction of the presiding Judge at the trial, the only competent judgment would have been to allow the exception and direct a new trial to be made; but instead of this they went to the root of the matter, and pronounced the Scottish doctrine and practice, not in that case only but in all other similar cases, to be altogether erroneous.

It can admit of no doubt, I apprehend, (1) that the Scottish rule and practice prior to 1839 was, that road trustees or other statutory trustees or commissioners for executing public works, though possessed of no other funds than those that were by statute specially appropriated to these public works, might still be made answerable in an action of damages for the wrong or negligence of themselves or their servants; (2) that the English rule and

practice was exactly the reverse of this; and (3) that the object and effect of the judgment of the House of Lords was to make the Scottish rule and practice conformable to the English rule and practice.

Accordingly, the Court of Session and all the inferior Judicatories in Scotland, have ever since followed the rule so authoritatively promulgated. But if they had ever entertained any doubt as to the import of the decision or its general applicability, this doubt would have been very speedily removed. In *Thomson* v. *Mitchell*, decided in 1841 (1 Rob. 142), a judgment was pronounced by the House of Lords giving effect to the same rule in different circumstances and in a different form. In *Ross* v. *Heriot's Hospital* (5 S. B. 37) this Court thought the rule of *Duncan* v. *Findlater* was not applicable, and they were unwilling to carry what was to them a new doctrine further than they had been instructed was necessary to reconcile the practice of the English and Scottish Courts. But in reversing their judgment Lord Cottenham, Chancellor, said (referring to *Duncan* v. *Findlater*, and the practice it was in that case intended to correct), "The opinion of those noble Lords who attended that discussion was expressed in disapprobation of any such practice, and observations were made which one would have supposed would have led to a very deliberate consideration in the Court of Sessas to whether such a practice was justifiable by the law of Scotland, or, I might say, by the law of any other civilized country." Lord Brougham, speaking of the rule laid down in *Duncan* v. *Findlater* as a general and extremely applicable rule, says, "It was perfectly clear, upon all principle and analogy, and upon every view of common sense that could be taken of the matter, that it was rightly so laid down." (p. 55) Lord Campbell, who was one of the counsel in *Duncan* v. *Findlater*, contributes his testimony to the great importance and general applicability of the doctrine which it embodies. Speaking of the opposite or Scottish rule, he says, "The doctrine was entirely scouted, I may say, and I should have thought that after that decision we should have heard no more of it for all time to come. That doctrine is contrary to all reason and sense and justice; it is wholly unsupported by any authority, and I think we may safely say it is entirely contrary to the Law of Scotland."

Acting in conformity with these high authorities, the Court of Session carried out the principle of *Duncan* v. *Findlater* in many cases, and reformed their practice accordingly. It is unnecessary to refer to the decided cases. But the effect of the judgment in *Duncan* v. *Findlater* in preventing cases of a similar kind from being brought into Court can be known only to those who were extensively engaged as legal advisers during the period of 30 years which have since elapsed.

This Court, however, while readily carrying out the new rule, have on various occasions referred to extended it beyond the precise class of cases to which it was adjudged to be applicable. In *Dargie* v. *Mags. of Forfar* (17 D. 730 and 18 D. 343), and *Kerr* v. *Mags. of Stirling* (21 D. 169) they held that the rule did not apply to an action of damages against the magistrates of a Royal burgh for injury sustained through their failure to keep the thoroughfares of the burgh in a safe state, because the defenders had in the "common good" of the burgh a fund which could be made available to repair the damages caused by their failure of duty. So, in the large class of cases affecting the liability of statutory trustees to pay local rates out of the specially appropriated moneys in their hands, the deliberate judgment of this Court was in favour of such liability. The case in which this was decided (*Clyde Navigation Trs.* v. *Adamson*) was heard on appeal by the House of Lords on the same day with the *Mersey Docks Comrs.* v. *Jones*, which had been decided by the Court of Exchequer Chamber in England against the liability of the Commissioners, and the case of the *Mersey Docks Comrs.* v. *Cameron*, which had been decided by the same Court in favour of the liability. The result was that the judgment of this Court in the *Clyde Navigation Trs.* v. *Adamson* and the judgment of the Exchequer Chamber in *Mersey Docks Comrs.* v. *Cameron* were affirmed, while the judgment of the Exchequer Chamber in *Mersey Docks Comrs.* v. *Jones* was reversed by the House of Lords. I mention this set of cases in their order, because it will be found that they have a material bearing on the effect and authority of a subsequent judgment of the House of Lords which I shall notice by-and-bye.

But while the practice in Scotland was conforming itself to the rule laid down in *Duncan* v. *Findlater*, the practice in England seems to have been gradually drifting away from that well established English rule. Omitting all notice of prior instances of the gradual change, in the case of *Cox* v. *Comrs. of Middle Level Feus*, in 1864 (33 L. J. B. 281), in circumstances undistinguishable in point of principle from *Duncan* v. *Findlater*, the Court of Queen's Bench decided, only by a majority of 2 to 1, against the liability, and in another similar case, occurring in the same year and in the same Court, the judgment went the other way, *i.e.*, in favour of the liability, there being only two judges present.

So far as the English practice is concerned, the question was at length brought very deliberately under consideration in the two cases of *Mersey Dock Commissioners* v. *Gibb* and *Mersey Dock Commissioners* v. *Penhallow*. In the former of these cases the judgment of the Court of Exchequer was against the liability, but this was reversed by the Court of Exchequer Chamber. The latter case came before the Exchequer chamber by bill of exceptions, and judgment went to the same effect. If these cases had gone no further, we would probably have never heard of their occurrence, except perhaps as a singular example of fluctuation of judicial opinion on a question of frequent occurrence. But the judgment of the Exchequer Chamber was in both these cases carried to the House of Lords by appeal, and in both the judgment of the Exchequer Chamber was affirmed after taking the opinion of the English Judges.

This judgment of the House of Lords in 1866 is, in my opinion, an entire subversion of the judgment of the same Supreme Tribunal in *Duncan* v. *Findlater* in 1839. The two cannot possibly stand together.

The opinion of the English Judges, as delivered by Mr Justice Blackburn, states as matter of fact that the case of *Duncan* v. *Findlater* was "brought before the House of Lords on a bill of exceptions," and represents that the judgment of reversal proceeded on the disagreement of the House with the precise terms of the direction of the presiding Judge at the trial. But the same opinion of the English Judges controverts the proposition maintained by Lord Cottenham, while admitting its general applicability, and concludes that "not

being the point decided by the House, it is not conclusively binding."

I believe I have already sufficiently shown that this is an entirely erroneous view of the case of *Duncan* v. *Findlater*, and that the broad proposition announced by Lord Cottenham was absolutely essential to justify the reversal of the Interlocutor of the Court of Session directing the issue, or, in other words, sustaining the action as relevant. It is probable that the learned Judges of England were misled by the report of *Duncan* v. *Findlater* contained in the 6th volume of Clark and Finelly's Reports, and omitted to consult the authorised reports of the House of Lords judgments in Scotch appeals of that date, compiled by M'Lean and Robinson. The former report (of Clark and Finelly) does represent the case as coming before the House on a bill of exceptions only, and the judgment of the House as reversing only the interlocutor of the Court of Session disallowing the exceptions, and the interlocutor decerning for the damages found due by the verdict; and the same report also omits the material part of the concluding paragraph of the Lord Chancellor's speech, in which he expressly and emphatically announces his purpose to reverse the interlocutor directing the issue to be tried, for the purpose of establishing a general rule and principle applicable to all cases of statutory trustees who act gratuitously and have not funds in their hands except such as are devoted by statute to specified public purposes.

The noble and learned Lords who addressed the House of Lords in pronouncing judgment, on a consideration of the opinions of the Judges of England, proceeded on somewhat various grounds, though all agreeing in one result. Lord Wenleysdale would have been disposed to support the doctrine of *Duncan* v. *Findlater* and the old rule of the English Law on which it was founded, but for the judgment of the House of Lords in *Mersey Dock Commissioners* v. *Cameron*, and *Mersey Dock Commissioners* v. *Jones*, (the cases regarding the liability of the Dock Commissioners to local rates,) which, in his opinion, deliberately and finally established a principle applicable as clearly to the liability of statutory commissioners or trustees for the negligence of themselves or their servants, as to the liability of their property to rates. The Lord Chancellor (CRANWORTH) adopted the opinion expressed by the Judges, and condemned the principle announced by Lord Cottenham. Lord Westbury spoke of Lord Cottenham's opinion as "a misapprehension on the part of the noble and learned Lord that would lead to very mischievous consequences." In another place the same noble and learned Lord remarks:—"These observations of Lord Cottenham, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were recognised as the law, undoubtedly lead to very great evil and injury."

No doubt the Lord Chancellor and Lord Westbury appear to have been misled (in common with the English Judges) as to the nature of the judgment pronounced in *Duncan* v. *Findlater*, and treated the observations of Lord Cottenham as *obiter dicta*. But that cannot alter the state of the fact, that the supposed *obiter dicta* were the true and only possible grounds of the judgment of reversal of the interlocutor directing the issue—a fact which now places this Court in a position of considerable embarrassment.

In 1839 the House of Lords authoritatively determined that the rule and practice previously prevailing in Scotland was erroneous, and that the opposite and then prevailing rule and practice of the English Courts was sound and ought to be followed. In 1846 the still prevailing English rule was supported and the former Scottish rule condemned in still more forcible language,—Lord Cottenham recommending the Court of Session to consider "whether such a practice" (as theirs) "was justifiable by the law of Scotland or by the law of any other civilised country," Lord Campbell denouncing it as "contrary to all reason and sense and practice." In 1866 the English rule and practice established by the judgment of the House of Lords in 1839 is condemned as unsound and "mischievous" and likely to "lead to very great evil and injury" by the same high authority.

In these circumstances, the question arises whether we are now bound still to follow the judgment in *Duncan* v. *Findlater*, or are entitled and bound at once to reverse our later rule and practice and follow the last judgment in *Mersey Docks* v. *Gibbs* and *Mersey Docks* v. *Penhallow*, and revert to the old Scottish rule prevailing before 1839. It has been represented that the former (*Duncan* v. *Findlater*) is a judgment in a Scotch appeal, while the latter (the *Mersey Dock Commissioners*) is a judgment in an English appeal—that in the former case the House of Lords was sitting as a Scotch Court, and in the latter as an English Court, and that, however probable it may be that on the next occasion of an appeal in a Scotch case raising the same question, the judgment will be in accordance with that in the *Mersey Docks* cases, still this Coure is not entitled to anticipate that result, but must be guided in the mean time entirely by the proper Scotch authority.

I am unable to assent to this reasoning. I think it is an error in constitutional law to represent the House of Lords as sitting at one time as a Scotch Court and at another time as an English Court. That House, I apprehend, sits always in one character—as the House of Lords of the United Kingdom, and as such the Imperial Court of Appeal for the whole three parts of the United Kingdom. It has occasion to administer at one time the law of Scotland, at another the law of England, and at another the law of Ireland. But in appeals coming from all the three countries it has also to deal with principles of law that are common to the whole three; and it was with such principles,—the rules applicable to the construction of statutes of the Imperial Legislature,—that the House was dealing both in *Duncan* v. *Findlater* and in the *Mersey Docks* cases. The judgment in the former case was reversed by the English Judges as binding on them, and by the House of Lords as binding on them in dealing with English cases, although unfortunately they mistook its import and effect; and I think the judgment of the same supreme tribunal in the *Mersey Docks* cases is binding on us, and that the import and effect of that judgment is in no respect equivocal or capable of being misunderstood.

In arriving at this conclusion I am by no means insensible to the great inconvenience, and even injustice, that must inevitably arise from the sudden

and complete alteration of the rule of law applicable to such cases. During the thirty years which have elapsed since the judgment in *Duncan* v. *Findlater* several actions have been dismissed as irrelevant which would have been sustained if this Court had been acting on the principle which must now guide them. But an infinitely larger number of claims against statutory trustees or commissioners for injuries sustained through the wrongdoing or negligence of themselves or their servants have never seen the light in deference to the judgment in *Duncan* v. *Findlater*. What proportion of these rights of action may still survive and be made available, the rolls of Court in the course of the next year or two will demonstrate. But many of them must from various accidents be now incapable of resuscitation, and no one can calculate what amount of injustice had been suffered by the suppression of these claims for a long period of years, even where they can still be brought forward. But nothing that this Court can do will remedy in any way this injustice and inconvenience. Certainly an adherence to the rule laid down in *Duncan* v. *Findlater* would not provide such a remedy. But all that we can do I think we are bound to do, and that is by our judgment in this case to make it known to the Judges that such claims and rights of action are no longer excluded by the judgment of the House of Lords in *Duncan* v. *Findlater*.

I am therefore for adhering to the judgments of the Sheriff-Substitute and the Sheriff.

Lord Justice-Clerk, Lord Benholme, and Lord Jerviswoode concurred in this opinion of the Lord President.

Lord Cowan read the following opinion—

The issue to which this case was brought in course of the argument was, whether the decision of the House of Lords, reversing the judgment of this Court in *Duncan* v. *Findlater*, 1839, is to be held an authoritative decision in the disposal of this and all similar questions.

That case was carefully considered in this Court. The action was directed against certain Road Trustees represented by their treasurer, and concluded for damages in respect of injury caused by the overturning of a carriage through obstruction caused by a heap of stones being left in the roadway through alleged negligence or fault on the part of the Trustees or others in their employment. And the defence stated to the action was that the office of Trustees being gratuitous, and the funds under their management devoted to the purposes of the trust, they were not liable *qua* Trustees—no personal negligence or fault being imputed to them—to the effect of making the trust-funds liable for the alleged injury or damage. This defence was overruled by the Court, 18th July 1837, in so far as an issue was adjusted for the trial of the cause on its merits. At the trial an exception was taken to the charge of the presiding Judge, on the ground of misdirection in point of law, in having stated "that road trustees on a public road are liable for any injury that may happen to passengers in consequence of negligence or improper conduct of labourers or surveyors or other persons employed by them when engaged in any operation performed under their authority." This exception was disallowed (19th June 1838), and, strangely enough, certain English decisions which were pleaded in support of the defence were disregarded, Lord Corehouse remarking "that the result which would be occasioned in Scotland by the doctrine of the defender is wholly unwarranted by our law; and further, if there be a possibility of assimulating the law of England on this subject to the law of Scotland, I do not think that it can be done by any Court which administers Scottish law." And the Lord President said "that according to the law of Scotland the trust-funds are liable, and that the trustees *qua* trustees are liable in terms of the direction."

An appeal was taken against this judgment, the result of which being that the House of Lords, sitting as a Scotch Court of review, reversed all the interlocutors appealed from, "the first of which," as observed by the Lord Chancellor, "is that which directed the issue, because, as the ground of defence which I think ought to prevail appears upon the summons itself, and in the defences as originally made, the cause was, before the interlocutor directing the issue, in a state which would have enabled the Court to dispose of it." Lord Brougham concurred with the Lord Chancellor in holding that the judgment pronounced by the Court of Session could not be sanctioned, and that it was their duty to set right the practice which had prevailed in Scotland, and destroy and abrogate the authority of previous cases which proceed upon the same principle.

This judgment afterwards received the approbation of the House of Lords in two cases which were referred to at the debate — *Thomson* v. *Mitchell*, July 28, 1840, and *Heriot's Hospital* v. *Ross*, March 19, 1846, which, though not analagous in the circumstances, involved to some extent the same principle; and the Law Lords who disposed of those cases referred to their judgment in the case of *Duncan* v. *Findlater* as a precedent which the Courts in Scotland were bound to follow. Indeed, not the Lord Chancellor only, but Lord Brougham and Lord Campbell, expressed themselves in no measured terms at what was thought to be a want of sufficient regard to that authoritative judgment—"no reference (it was said) being made to that important authority of this House setting right the law, or rather setting right the practice, and that the case had been decided in a manner that (Lord Campbell believed) gave universal satisfaction to all who heard it."

This was in 1846, and as all your Lordships are aware, the law thus authoritatively announced has been ever since considered to be beyond dispute. No liability of the kind has been attempted to be fixed on trustees, or to be made chargeable on trust-funds under their management until now.

The present action is directed against the defenders, who had charge of the streets of the town of Alloa under the General Police Act, and concludes for damages for personal injury caused by the act or negligence of their servants in executing repairs on one of the streets. It was scarcely disputed that the claim was made in circumstances in all respects similar to those which occurred in *Duncan* v. *Findlater*. In the record, indeed, a statement is made with a view to distinguish the two cases, but in the argument this attempted distinction was virtually abandoned, and, at any rate, it was not on that ground that the case was remitted to this Court for judgment. The real and only question for decision is, Whether the judgment in *Duncan* v. *Findlater* is binding on this Court? The pursuer's contention is, that the recent decision in th

English case of the *Mersey Dock Trustees* v. *Gibbs*, by the House of Lords, must be held to have set aside the authority of that decision, and to have brought back the principle on which such cases are to be decided in future to that which prevailed in Scotland before the judgment of the House of Lords in 1839. Assuming this to be so, the interlocutors of the Sheriff-Court under appeal will fall to be confirmed on the grounds so clearly and well stated in the interlocutor and note of the Sheriff-Substitute, adhered to by the Sheriff-Principal. On the contrary assumption, it is no less clear that these interlocutors must be recalled, and the deenders assoilzied from the conclusions of the action. I am humbly of opinion that the latter course ought to be followed for these reasons.:—

In the first place, I am not fully satisfied that there may not be reasons which would justly influence the minds of Judges sitting in an English Court in deciding on liabilities arising under their local statutes, which would not apply to Scotland any more than Lord Corehouse was when he delivered his opinion in 1838 against the authority of the English decisions then referred to in support of a contrary doctrine to that which it appears now prevails in England.

In the second place, I am not satisfied that the *Mersey Docks* case, decided by the House of Lords in 1866, presented the same state of circumstances as occurred in the case of *Duncan* v. *Findlater*, and as occur in this case, viz., the entire devotion of the trust-funds, by force of the statute, to the purposes of the trust, viz., the formation and repair of the roads under charge of the Trustees. But however this may be, and giving to the decision all the authority in principle which the pursuer contends it ought to receive, it is still a judgment in an English case; and this leads me to observe—

In the third place, that I cannot hold the judgment, even of the House of Lords, under an English local statute, sitting as a Supreme Court of appeal and determining a purely English case, as a binding precedent on the Courts of this country. That such a judgment is entitled to the greatest respect and deference is not for a moment to be questioned. But here the situation in which we are placed is altogether peculiar. The law we are called upon to adminster has been authoritatively declared by the House of Lords, sitting as a Supreme Court of Appeal in Scottish causes, and has formed the rule for judgment and been followed and observed as such for upwards of thirty years. Until the same Supreme Court of Appeal shall in a Scotch cause alter that rule of judgment as applicable to the law of Scotland, I think it would not be consistent with my duty, whatever may be the views of the other members of this Court, to yield to the authority of a judgment in a purely English case in regard to a purely English local statute, even of that high tribunal. The views of English lawyers and English judges may have undergone a change since 1839 and 1846, but I cannot think that to be a good reason for our adoption of the principle of a judgment inimical to what has been the understood law of Scotland since the judgment in *Duncan* v. *Findlater*.

Lord Deas and Lord Neaves concurred with Lord Cowan.

The Court pronounced the following interlocutor:—

"Dismiss the appeal: Affirm the interlocutors of the Sheriffs appealed from: Find the appellants liable in the expenses in this Court, and remit to the Auditor to tax the same and to report; and remit to the Sheriff to proceed with the cause, and decern."

Counsel for Defenders (Appellants)—Solicitor-General (Clark), Q.C., and Balfour. Agent—C. Taylor, S.S.C.

Counsel for Pursuer (Respondent)—Guthrie Smith. Agents—Frasers, Stodart & Mackenzie W.S.

Friday, December 12.

FIRST DIVISION.

[Bill Chamber.

GARDINER *v.* THE CALEDONIAN RAILWAY COMPANY.

Land Clauses Consolidation (Scotland) Act 1845—*Railway Clauses Consolidation (Scotland) Act*, 1845, §§ 16, 46, 49, and 69—*Caledonian Railway Company, Private Acts* (1866 *and* 1872)—*Accommodation Works—Substitute Road.*

Where a Railway Company, in exercise of statutory powers, having taken lands from one proprietor, proposed to give part of these lands as a substitute road to another proprietor, which proceeding would have the effect of preventing the former from making a siding to connect his lands with the railway without paying way-leave to the latter:

Held—(1) that whatever is legitimately within the purposes of the railway undertaking is within the purposes of the Lands Clauses Act, and therefore within the purposes contemplated in the acquisition of land by the company. (2) That accommodation works to another proprietor are legitimately within the purposes of the undertaking and of the Act, and the land taken from one proprietor may be lawfully used by the Railway Company in fulfilling their obligation to finish such accommodation works; (3) that where an intersected road belonging to a proprietor on the line cannot be restored, then the giving a substitute road to the proprietor is an accommodation work within the meaning of the Act. (4) That the question of the necessity of giving a substitute road in any particular circumstances is one to be decided solely by the Railway Company, so long as no evidence can be produced of an abuse by them of their legal right, to the detriment of the private party, the landowner.

This was a note of suspension and interdict presented by James Gardiner of Haughhead, in the County of Lanark, in which he asked that the respondents, the Caledonian Railway Company, should be interdicted, prohibited, and discharged from constructing on the lands taken by them from the Complainer's estate of Haughhead, under the power conferred by "The Caledonian Railway (Lanarkshire and Midlothian Branches) Act, 1866," and "The Caledonian Railway (Additional Powers) Act, 1872," any service or other road leading from the Glasgow and Carlisle turnpike road, in the neighbourhood of the complainer's property, to the lands of Ross, belonging to Mr