from the conclusions of the summons, and decern."

Counsel for the Pursuer—Cullen. Agents—W. Kinniburgh Morton, S.S.C.

Counsel for the Defenders—Cook. Agents—Fife, Ireland, & Dangerfield, S.S.C.

Tuesday, June 19.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

STRACHAN *v.* ABERDEEN DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF ABERDEENSHIRE.

Reparation—Liability to Action for Non-fencing of Highway—County Council.

Held that a county council or its district committee is liable in reparation for damages sustained through a road under its charge being insufficiently fenced.

Remarks on the difference between English and Scots law on this subject.

Charles Strachan, baker, Woodside, Aberdeen, brought an action of reparation in the Sheriff Court there against the Aberdeen District Committee of the County Council of Aberdeenshire, for loss sustained by him through a horse and van, driven by one of his servants, falling into a burn at the side of a turnpike road which was unfenced.

He averred—"(Cond. 6) The defenders are responsible for the condition of said road, and were in fault in respect said road is at the part in question dangerous, and they were bound both at common law and under the Statute 1 and 2 Will. IV., cap. 43, to have it properly fenced and protected. The said road was known to be dangerous and unsafe, and prior to the management of the said road being transferred to the said County Council, complaints had been made of the unsafe condition of the said road at the part in question. The defenders did nothing to put the said road into a safe condition until after the accident libelled."

The defenders pleaded, *inter alia*—Contributory negligence on the part of the pursuer's servant.

Upon 17th February 1894 the Sheriff-Substitute (BROWN), after a proof, sustained this plea and assoilzied the defenders.

The pursuer appealed to the Sheriff (GUTHRIE SMITH), who on 29th March 1894 pronounced this interlocutor—"Finds in law that no action is maintainable against the County Council or its District Committee for suffering a road to be out of repair and in a dangerous condition. Therefore assoilzies the defenders. . . .

"*Note.*—[*After expressing doubts as to whether the road ought to have been fenced, and as to whether the plea of contributory negligence could be sustained*]— . . . It is not, however, on such points as these that the present action, as I view it, must be determined. The case raises a question which does not seem to have been submitted to the Sheriff-Substitute, and on which there is very little Scottish authority, which is in my opinion quite clear in point of principle. The pursuer seeks damages from the County Council, or in other words, the public. We are all familiar with actions of damages against a road authority for endangering the public safety by leaving a heap of stones on the highway unguarded, or digging a pit and leaving it unfenced and unlighted. In operations like these there is nothing wrong, they are a necessity of road administration provided they are done with reasonable care, but when done without this care they are justly held actionable. It is obvious, however, that between doing something wrong in itself, or wrong because done in a wrongfnl manner, and doing nothing, there is the widest possible difference, and it does not follow that a mere failure to keep in repair a road in a state of disrepair, nedessarily entitles the individual injured to redress. Yet the present action is laid entirely on this last ground, as very clearly appears from the condesceendence. It is there said 'Although at one time there existed, between the road and the burn, a stone and lime fence, it has been allowed to fall into a ruinous and dilapidated condition., Cond. 2—Yet, nevertheless, the defenders, the District Committee 'did nothing to put the road into a safe condition until after the accident.' Cond. 6—As was said in the House of Lords in the *Mersey Docks* case, in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. When the county roads were brought under the operation of the Act of 1878, the system of administration contemplated was this—the district surveyor was bound once a year to make up a report on the condition of the highways within his district, and containing a specification of the works and repairs to be executed thereon, and an estimate of the sums required for the purposes of the highways within the district (Sec. 49). These reports were to be passed on by the district committee with their recommendations to the general board which was there 'to consider and review the same, and give such orders as may seem necessary, and their decision shall be final (Sec. 50).' I do not know whether this particular road was ever reported on or not. If it was not, the fault, if any, lay with the surveyor, and the case of *Kinloch v. Clark*, 4 Macph. 107, decides that for such fault no action lies at the instance of the person injured. A surveyor exercises only a delegated authority. In most things he must first communicate with the committee, and if he fails in a pressing case to make such communication he may be open to the censure or dismissal by the committee, but he cannot be answerable to any member of the public for his breach of duty. If, on the other hand, the surveyor

has done his duty in the matter by bringing it before the district committee which decides to do nothing, I do not see how a court of law can review a decision which the Act of Parliament expressly declares shall be final.

"In a different but equally effective way the old Turnpike Act (1 and 2 Will. IV. c. 43) clearly excludes any such claims as the present. Section 117 prescribes the proceedings which are to be taken in case the trustees suffer the roads to fall into disrepair. In effect the remedy provided is the old common law appeal to the Court of Session in the form of petition and complaint against a public body, and no one is to be at liberty "to present any complaint or to substitute any proceedings on any of the grounds above mentioned before any other court or in any other manner than as aforesaid." This follows section 94 prescribing a similar course of proceeding in the Sheriff Court, in such a case as to prevent, namely, neglect to raise a parapet or provide other adequate means of security at dangerous parts of the road. Reading these two sections together, as I think we are bound to do, they seem to prove that down at least to 1878 an action of damages against road trustees for suffering a road to fall into disrepair was clearly incompetent.

"No doubt while section 94 is incorporated in the Act of 1878, section 117 is omitted, but that does not warrant the inference that thereby a new liability was intended to be created. The statute simply transfers the management of the roads to a new body, and in such a case the rights and liabilities are presumed to be transferred as they existed at the time of the transfer, unless in so far as they are expressly varied. It was on this ground that the Court of Queen's Bench in the case of *Gibson* v. *Mayor of Preston*, 1870, L.R., 5 Q.B. 218, decided that an action for personal injuries sustained by one of the public through the non-repair of a highway does not lie against a local board constituted under the Local Health Act of 1848, a doctrine repeated by Court of Appeal in *Glossop* v. *Heston Local Board*, 1879, 12 Ch. Div. 102, and recently affirmed by the House of Lords in *Cowley* v. *The Newmarket Local Board*, 1892, L.R., App. Cas. 345.

"There is an apparent contradiction between this view and the *Rothesay* case—*Fraser* v. *The Magistrates of Rothesay*, May 31, 1892, 19 R. 817—recently before the First Division—but in that case it was admitted that if in the opinion of the Court the road was dangerous, the defenders, both at common law and under the statute, were bound to fence. In the only similar case of neglect (as far as I can find) where the pursuer succeeded in getting damages—*Aitken* v. *Duncan*, 14 S. 204—the verdict went by consent, and with one exception in every case which has occurred since the reinstatement of *Duncan* v. *Findlater* as an authority on this branch of the law, the cause of actions has arisen, as they say in England, not from non-feasance but from mal-feasance The exception is *Greer* v. *The Stirling Road Trustees*, 9 R. 1069, where the Second Division, against the advice of Lord Young, differed from the local authority as to the sufficiency of a paling, but no question of competency was raised. Indeed, if this action were sustained, I do not see where it would end. If a claim of damages is relevant against an administrative body for neglect of duty resulting in personal injury, it must be equally so where the complaint is that they failed to take up and timeously carry through some improvement scheme relating to drainage, lighting, or water, for which legislative sanction had been obtained, whereby great advantages would have accrued to the complainer or his property. For all this the ratepayers of the county would have to pay, which, in the words of Lord Justice James, would be 'a very serious matter indeed for the community at large,' and subject our system of local representative government in towns and counties to a form of judicial control which the Local Government Acts certainly never contemplated."

The Turnpike Act of 1831 (1 and 2 Will. IV. c. 43), by section 94 — incorporated in the Roads and Bridges Act of 1878 (41 and 42 Vict. c. 51), by section 123 thereof—provides "That the trustees of every turnpike road shall erect sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the said roads; and if they shall fail therein, it shall be lawful for the procurator-fiscal or any commissioner of supply for the shire in which the part of such road complained of is situated . . . to prosecute the trustees of any such turnpike road before the sheriff of the shire in which such road is situated, who shall judge and determine therein in a summary manner, and upon finding the complaint well founded, may compel the said trustees to remedy the matter complained of." . . . Section 117 of the same Act provided for presenting a petition and complaint against road trustees to the Court of Session by any person, having paid toll thereon and finding caution for expenses, who thought the turnpike was not properly repaired or maintained. This section was repealed by section 122 of the Roads and Bridges Act.

The pursuer appealed to the Court of Session, and argued—(1) This road ought to have been fenced. (2) There had been no contributory negligence on the part of the pursuer's servant. (3) It could not be seriously maintained that road trustees, and therefore county councils, were not liable in damages if loss resulted through a road being insufficiently fenced—*Mersey Docks Trustees* v. *Gibbs*, 1864, L.R., 1 H. of L. App. 93; *Virtue* v. *Commissioners of Alloa*, December 12, 1873, 1 R. 285; *Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535; *Harris* v. *Magistrates of Leith*, March 11, 1881, 8 R. 613; *Greer* v. *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069; *Murray* v. *County of Middle Ward of Lanark Road Trustees*, June 9, 1888, 15 R. 737; *M'Fee* v. *Police Commissioners of*

Broughty Ferry, May 16, 1890, 17 R. 764; *Nelson* v. *County Council of Lower Ward of Lanarkshire*, December 11, 1891, 19 R. 311; *Fraser* v. *Magistrates of Rothesay*, May 31, 1892, 19 R. 817; *Campbell* v. *County Council of Peeblesshire*, January 17, 1893, 30 S.L.R. 252; *Gibson* v. *Glasgow Police Commissioners*, March 3, 1893, 20 R. 467. The English cases relied on by the Sheriff were not authorities. They proceeded on principles applicable to the administration of highways not recognised in Scots law. Neither could any valid distinction be drawn between mal-feasance and non-feasance.

Argued for respondents—The law was not settled in Scotland. *Greer* was the only case where road trustees had been held responsible for non-fencing. The question of fencing or not fencing fell to be determined by the road trustees, whose decision was final—*Beckett* v. *Campbell & Hutcheson*, January 22, 1864, 2 Macph. 482, and February 27, 1866, 4 Macph. (H. of L.) 6. The decision of the Sheriff, therefore, that the action was incompetent, was right. There was a valid distinction between mal-feasance and non-feasance. (2) This was not a dangerous place, except when trains were passing, and that was not the case here. (3) In any case the Sheriff-Substitute was right in finding there had been contributory negligence.

At advising—

LORD PRESIDENT—We have first to deal with the judgment of the Sheriff, in which he has found in law that no action is maintainable against the County Council, or its District Committe for suffering a road to be out of repair, and in a dangerous condition. Now that is a very important general proposition of law, and it is observable that it never occurred to the Aberdeenshire County Council to put forward this plea which, if it were sound, ought to have been stated *in limine*. So far as it goes, the attitude of the County Council is in accordance with the impression which one's own recollection of practice has formed, that this theory of the Sheriff—whether it may ultimately be justifiable on reason or not—is foreign to our practice.

The subject is no doubt an interesting one, but I cannot help thinking that the reasoning of the Sheriff proceeds upon an assumption regarding the common law of Scotland which is unsupported by authority. It seems clear enough that the cases which he refers to as decided in the English Courts rest upon the following statement which is given in the latest case in the Privy Council (*Municipality of Pictou* v. *Geldert*, 1893, App. Cas. 524), of the common law of England:—"Public bodies charged with the duty of keeping public roads and bridges in repair and liable to an indictment for a breach of this duty, were nevertheless not liable to an action for damages at the suit of a person who had suffered injury from their failure to keep the roads and bridges in proper repair." Now, against that, so far as Scotland is concerned we have the fact that there is a whole series of cases in which public bodies of road trustees, including county councils, which are the latest development of road trusts, have not questioned their liability to answer in damages where negligence is proved, and have been found liable in damages for failure to keep roads in repair. I think also that the cases which relate to municipal bodies, *e.g.*, police commissioners, are quite in point on the question of the common law view of their liability to third parties, because the case of *Virtue* and the other cases cited involve the general underlying doctrine that bodies of road trustees, whether in town or country, are liable to third parties for damage arising from their negligence.

Now, it has been attempted by the Sheriff to support his view by reference to section 94 of the Turnpike Act, which is incorporated in the Roads and Bridges Act of 1878. That section, however, merely obliquely and incidentally supports his general view of the common law immunity of such bodies, for in its terms it purports merely to limit the modes of action by which a person demanding of the trustees the execution of certain works as in fulfilment of their statutory obligations, shall obtain such execution of the works. But that is manifestly a remedy of a different kind from the one now in question, which is an action of damages by a person complaining that he has suffered special damage in his own person or property from breach of the statutory duty. Again, the 117th section of the Turnpike Act stands in this position, that it is not incorporated in the Act of 1878, and accordingly, so far as the existing law is concerned, it does not afford an argument. It might do so if it reflected any light upon the common law of Scotland and supported the view taken by the Sheriff, but there again I think the same answer applies, that section 117, like section 94, is dealing with a different matter—that is, the remedy of a person who claims more facilities for travelling than the road trustees will allow him. Accordingly, I do not think that these sections—either the one standing in the existing statute or the one which historically relates to this question—really give any support to the view of the Sheriff.

But apart from these sections, the view seems to be unsupported by anything in the text writers or decisions, and is certainly diametrically opposed to the current practice in regard to bodies litigating in this Court, there being a whole series of cases where that liability has been recognised.

Therefore I think it is impossible for us to give countenance to this doctrine of the Sheriff, because we should be running counter to what must now be regarded as the existing common law, and the sound construction of the statutes bearing on the liabilities of road trustees. Therefore in my opinion the Sheriff's interlocutor must be recalled.

[His Lordship then proceeded to deal with the merits of the cause, and held that the Sheriff-Substitute was right in

finding there had been contributory negligence on the part of the pursuer which entitled the defenders to be assoilzied.]

LORD ADAM — The judgment of the Sheriff in this case proceeds upon the ground that the action is not maintainable against the District Committee of the County Council. Now, it appears to me that if we were to affirm that ground of judgment we should necessarily recognise this, that we and our predecessors for many years have been going on an entirely wrong course, and that this Court, which has for years held road trustees liable for negligence and fault, has been quite wrong in doing so. It may be so, but I am afraid that we must be put right in that matter by another Court. I think that it is unnecessary to say more on the subject, because the practice has been so invariable that we must, like our predecessors, follow it now.

I have therefore no hesitation in thinking that the Sheriff's interlocutor must be recalled.

LORD M'LAREN—According to the law of Scotland as hitherto understood and administered, parliamentary trustees and local authorities constituted by Act of Parliament, although performing their duties without remuneration and without any view to profit, are responsible for negligence in the same manner as railway companies or other corporations who carry on public undertakings for profit. It is true that this principle suffered a temporary eclipse in consequence of the judgment in *Duncan* v. *Findlater*, which was founded on what seems to be a somewhat paradoxical application of the doctrine of *ultra vires*. It was held that when Parliament had authorised the levying of rates by a public body for public purposes this involved a practical immunity on the part of the administrators of those rates from civil responsibility for wrong, because the application of the rates to payment of damages would not be within the purposes of the trust. Now, the decision of the House of Lords in the celebrated litigation arising out of the responsibility of the *Mersey Docks Commissioners* restored the law to what, in Scotland at least, had been understood to be the sound principle of civil responsibility, and acting upon the views finally taken in the case of *Virtue*, re-established the principle of civil liability on the part of local authorities. I come, therefore, to the opinion that according to that decision, which is binding on us, if the Aberdeenshire County Council have done wrong to the pursuer, they are bound to make reparation for that wrong.

The cases cited to us in support of the Sheriff's interlocutor seem to show that in England there is an exception to the general rule of the responsibility of public bodies in the case of road authorities, but I am unable to gather from the terms of the judgment in the last case—the *Newmarket* case—whether this is a universal exemption applicable to all public bodies charged with the administration of roads, or whether it depends upon the terms of each individual Act of Parliament. I rather collect from the judicial opinion, and especially from that of Lord Herschell, that the English Courts were in a manner bound by the decision in the ancient case of *The Men of Devon*, 1788, 2 Durnford & East, 667, and that unless there was something in the terms of the local Act of Parliament which took the case out of the rule laid down in that decision, and laid upon the local authorities certain duties subject to the sanction of the responsibility for negligence, no action against them would lie. But it could not be seriously maintained that the decision in *The Men of Devon* had any relation to the Scots law of reparation. It was an action depending upon peculiarities in the English system of land, and I see nothing in this decision which ought to induce us to reconsider the principle and practice of the law of reparation as hitherto administered by our Courts.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Sheriff, but found there had been contributory negligence and assoilzied the defenders.

Counsel for the Pursuer and Appellant—Salvesen—Clyde. Agent—R. J. Gibson, S.S.C.

Counsel for the Defenders and Respondents—Dickson—W. Brown. Agents—Hagart & Burn Murdoch, W.S.

Friday, June 22.

SECOND DIVISION.

[Sheriff of Perthshire.

M'LAREN AND OTHERS *v.* HOUSTON.

Property — House — Gable — Scarcement — Boundary—Whether Line of Gable or Line of Scarcement the Boundary.

The scarcement stones of the east gable of a house projected 9 inches beyond the line of the gable. The property on the east was occupied by a byre, the walls and roof of which rested against the gable which formed the west wall of the byre. The properties had so existed for upwards of twenty years, and the title-deeds described them as bounded by each other.

The proprietor of the house projected its roof 7 inches over the roof of the byre, contending that the line of the scarcement and not the line of the gable was the boundary, on the presumption that in building he had kept within the limit of his property.

In an action of interdict against him by the owner of the byre—*held* that there was no such presumption; that the titles of the parties were to be interpreted by possession for twenty