

the law of Scotland in support of the motion, but he relied on two English cases. He further maintained that the marriage between the pursuer and defender being regular, there was a presumption of law in its favour until it was finally set aside.

The Court refused the motion, the LORD JUSTICE-CLERK observing that he would like to hear argument before holding that such a motion was competent, but he had no difficulty in disposing of it in the circumstances of this case. To grant the motion would just be setting the Lord Ordinary's interlocutor at defiance without inquiring into the grounds upon which it proceeded.

LORD NEAVES said he could quite conceive the existence of circumstances in which, so long as the woman was *in possessio*, she might prefer a claim for aliment, but as the Lord Ordinary had declared the marriage to be null, the case that he had in view did not arise.

ADV.—CLARK *v.* KINLOCH—*ante*, p. 40.

*Reparation — Culpa — Road Surveyor.* Circumstances in which a road surveyor held not liable in damages for injuries suffered by a passenger along a road, in respect the injuries were not caused by failure in the discharge of any duty imposed on him either by statute or common law.

Counsel for the Pursuer (Respondent)—Mr Scott and Mr F. W. Clark. Agent—Mr Bridgeford, S.S.C.

Counsel for the Defender (Advocator)—The Lord Advocate and Mr Moncreiff. Agents—Messrs Burn, Wilson, & Burn, W.S.

This case, which we reported at the time of its hearing, and which involves a claim of damages at the instance of a woman, with concurrence of her husband, for injuries sustained through falling into a hole on the Shotts turnpike road, was to-day advised. The Sheriff, reversing the judgment of the Sheriff-Substitute, had found the defender (who is surveyor of the road) liable in damages, which he assessed at £50.

The LORD JUSTICE-CLERK said—This is a case of some general importance. But the chief difficulty is to ascertain precisely what the state of the fact is. I will endeavour to state the facts which I think are proved, and on which my judgment proceeds. The pursuer and her husband were walking along the footpath on the north side of the turnpike road in October last, between seven and eight in a dark and misty evening. The footpath was next to the turnpike road, and the wife was on the north side and off the road. The footpath was generally about 12 or 13 feet wide, but at a particular place near a smithy it suddenly contracted, so that the level space on the footpath was reduced to three or three and a half feet. This had been caused by the turnpike road having been there raised above the natural level of the ground by the necessity of having a cart entrance from the turnpike road so raised to certain houses adjoining, which were built at a lower level. That cart entrance ran for some time parallel to the footpath and to the north, and it seems to have been the formation of the cart entrance that caused the narrowing of the footpath from between 12 and 13 feet down to between 3 and 3½ feet. This operation was probably coeval with the raising of the level of the turnpike road. At all events, however this may be, the raising of the level of the turnpike road and the formation of the cart entrance were all before the defender had become surveyor of the road. Now it appears to me that it was on account of the sudden contraction of the width of the footpath that the pursuer, in the dark, perhaps unaware of it, walking on the north side, suddenly came on that part of the footpath where it entirely disappeared, slid down the slope, and broke one of the bones of her leg. It appears to me that the accident was probably caused by the manner in which the footpath was there contracted. It is not

proved to be due to any other circumstances. I think the accident was caused by malconstruction of the road, not by its being out of repair. Now that being the state of the fact, the question is, whether the pursuer is entitled to recover damages in reparation of her injury from the defender, who is the surveyor of the road, on the ground that he had a duty in regard to the footpath to perform, in which he failed, and, in consequence of which failure the injury was sustained. The duty of maintaining turnpike roads is vested by Acts of Parliament in the trustees of the roads. They are charged by general and by local Acts with the general duty of maintaining and repairing turnpike roads, and special duties by certain clauses of the General Turnpike Act, and particularly by the 82d, are laid upon them. (His Lordship quoted the terms of the section, which provides that trustees may make and keep in repair a footpath along the road, and that within two miles of every town or burgh having a population of 2000 a footpath must be made and kept in repair, and provides a remedy for being compelled to do so.) Now, whether this footpath is referred to one or other of the categories mentioned in this section is of no importance. If under the latter, the trustees were bound to make and keep it in repair; if under the latter, when made, they were bound to keep it in repair. In either case the obligation to keep the footpath in repair is laid by the Act on the trustees. There are sections of the statute which also lay particular duties on trustees, the 94th, for example. (His Lordship quoted the terms of the section, which provides that trustees shall erect parapet walls along bridges, embankments, &c., at dangerous places of the road, and action is given to the procurator-fiscal to compel them to do so.) Here, again, if any protection was necessary at this part of the footpath, the duty of providing it is laid by the statute on the trustees; and with reference to their duty in these respects, and all other duties, a very summary and effective remedy is given to all persons, under the 117th section, which is found very efficient in compelling trustees to do their duty. The duty thus laid on trustees being to keep the road in repair generally, and also the footpath, and to provide all kinds of securities against accidents, the question is, whether this statutory obligation is imposed also on the surveyor, the defender? Now, that may be considered in two points of view. The surveyor is the servant of the trustees independently of any provision of the Act of Parliament, and there may be cases where a master may delegate the performance of his own duty to a servant, such as a foreman, in which, being a superior servant of that kind, I am not prepared to say that the master would not be liable. But if this is to be considered a question at common law, we must look to see the employment or contract between the road trustees and the surveyor. On the other hand, if it is said that the duty of the surveyor which he violated was a statutory one, then he must examine the clauses of the Act to find the grounds of liability. As regards the employment, apart from the statute, we have that distinctly stated in the evidence of Mr Moncreiff, clerk to the trustees. (His Lordship quoted Mr Moncreiff's evidence, to the effect that the duty of the surveyor is to superintend contractors on the road, and to look after surfacemen, and he has no other; further, that no instructions had been given to him in regard to that part of the road where the accident happened; and that since he was appointed surveyor the place had not been altered.) Now, what is the nature of this employment? It is a supervision of contractors in the performance of their contracts—contractors with the trustees, the surveyor himself not being a party to the contract. But the surveyor, so far as I can see, has no power to employ men as his servants. He is in no independent position, like a person with a contract of his own. He is in no other sense different from the ordinary servants of the

trustees, except that his duty is to superintend contracts entered into by other parties, not himself. Now, I cannot say that at common law a servant so employed is responsible for failure of duty by his employer; and if there is failure of duty here it is on the part of the trustees. If the footpath was in a bad condition it is demonstrable that it was the duty of the trustees to repair it, and no one else was entitled to give directions to that effect. At common law, therefore, we are in this position, that there is no evidence of any intention on the part of the trustees to delegate their statutory duties to the surveyor, or that he undertook it, or that he undertook anything else but to keep the road as he found it. It is said that the result of this is that nobody is answerable—that the trustees are not liable, because their funds are not liable to be applied to such a purpose as that of meeting claims of damages. But then, if the trustees have committed a personal delinquency, they are as much liable for that as anybody else; and being trustees does not absolve them from that obligation, except that they cannot take the trust-funds to defray its consequences. But does the Act of Parliament impose any duties upon the surveyor under which he was bound to take any measures in regard to the footpath in which he has failed? I have examined all the clauses in the statute having reference to surveyors, and I cannot find anyone that has a more direct bearing than the 101st section. It is not worth while to go over the other sections, because they all come to this, that what he is directed to do he must do as the servant of the trustees. But something is said in the 101st section. (His Lordship quoted this section, observing that it places contractors, surveyors, day labourers, and every person working on the road, on the same footing. The clause provides for cases of parties laying things on the road without duly removing them, or putting obstructions causelessly, or digging pits without protecting them, and provides a penalty of £5 for each offence, and gives action to any person travelling on the road.) His Lordship resumed—Now I cannot see that in the whole of this section there is any special duty laid on a surveyor in particular. It deals with a general class of neglects which may occur with anybody who is working on the road. The passages of the section chiefly relied upon by both the Sheriff-Substitute and the Sheriff-Depute are—first, that passage which describes the offence of laying matter on the road, or knowingly allowing it to remain there. The Sheriff-Substitute thinks that if anything is suffered to remain on the road, even a hole, the surveyor will be liable. I cannot agree with that. The surveyor is not more answerable than any other person. If the surveyor saw it there he was bound to remove it; but the statute only creates liability when there is knowledge. But then the Sheriff-Depute says that it is the last offence mentioned in the statute—viz., digging a pit and not fencing it—which has been committed in this case. I think this is perfectly extravagant. In the first place, there is no case of digging a pit in the record; and if there were, the trustees would be liable in the first place, and the surveyor only in so far as he was personally concerned in the operation. I should have been very sorry to have been compelled to arrive at a different result, and affirm the judgment of the Sheriff-Depute, because I should then consider the law to be in a very anomalous state indeed. This surveyor has charge of seventy miles of road. His salary, so far as I can see, is small; and yet the duties attaching to his office, according to the contention of the respondents, involved him in responsibility for the safety of every person travelling on the road. I should have hesitated to arrive at that conclusion even on better grounds than any that were submitted to us in argument; but I am happy to say, if I am right in my view of the facts, that there is no doubt of the legal principle. I think, therefore, that the interlocutor of the Sheriff should be recalled, and the defender assolizied.

The other Judges concurred.—Judgment accordingly recalled.

Wednesday, Nov. 22.

## REGISTRATION APPEAL COURT.

### APPEALS FROM STIRLINGSHIRE.

#### GOW v. WATSON.

The first case taken up was that of James Gow, farmer, Bankend, Denny, against Alex. Gillespie Watson, clerk, Grangemouth. Mr Watson was by the assessor placed on the list of voters for the present year, as proprietor of houses Nos. 34 and 37 Union Street, Grangemouth, in said county, but objections were lodged thereto by Mr Gow. The value was admitted to be sufficient.

The facts are—1. A society or company exists at Grangemouth called the "Grangemouth Building and Investment Society." It was instituted in 1859, and is duly enrolled under the provisions of the Act 6 and 7 William IV., chapter 32, and has its rules approved of and signed by the registrar of friendly societies in Scotland. The purposes of the society is to raise a fund to enable its members, under the said Act and rules, to acquire heritable property. And its object is by the rules declared to be, by building or otherwise, to put the members in possession of heritable property.

2. In the year 1861 the society or company acquired right, in virtue of a feu-disposition from the Earl of Zetland, to a piece of ground extending to one acre or thereby, situated in or near Grangemouth, the conveyance being taken to certain persons for their own rights and interests respectively as partners of the said company, and also as trustees for behoof of the whole remanent partners or members, both present and future, of the said company and their assignees.

3. The company at different times erected various dwelling-houses on said piece of ground, and the directors, under their powers, when they considered that they had a sufficient property for disposal among the members of the company, under rule 18th, advertised publicly by printed notices, that four self-contained dwellings of three rooms each would be exposed for competition among the members on the 5th of February 1864, of which date, under certain "conditions of sale," two of the said dwellings, which were "put up" at £150 each, were "sold" to the claimant, a member of the company, at £157 and £155 respectively, or altogether £312. The claimant's entry was to be at Whitsunday 1864, and he did then enter to and take possession of the premises, and he has ever since, by himself or his tenants, occupied or possessed the same. He paid at entry £22 in cash to account of the price, and then had twelve shares of £25 each of the company, amounting altogether to £300. He did not pay up that £300, but he was entitled to receive an advance to that amount from the company on the security of the property, of which he availed himself to the extent of £290, which with the £22 paid in cash made up £312, the price of the property. The building or block-account of the company was credited with the £312, and there was placed to the debit of the claimant's share-account the said advance of £290, and his obligation was, under the rules of the company, to pay the same (besides interest) in instalments of 2s. a share, or for his twelve shares, £1, 4s. per month. Besides paying the interest, he has ever since regularly paid these instalments, and there has been credited to him the profits accruing on his shares; and altogether there has, from these instalments and profits, been placed to the credit of his share-account the sum of £30, 5s. 2d. In all he has thus paid £52, 5s. 2d. towards the cumulo price of £312, and there now only stands at the debit of his share-account £259, 14s. 10d., being the balance of the price.

4. No conveyance has yet been granted by the company in favour of the claimant, and his title consists of the conditions of sale and act of preference and the journal and ledger of the company in