[*23d August* 1839.]

(Appeal from the Court of Session, Scotland.)

THOMAS DUNCAN, Writer in Perth, Treasurer to, and on behalf of, the Trustees for the Turnpike Road from Perth to Dundee through the Carse of Gowrie by Inchture, Appellant.[1] (No. 35.)

[*Attorney General* (*Campbell*)—*Lord Advocate* (*Rutherfurd*).]

JAMES FINDLATER, Coal Merchant and Innkeeper in Perth, Respondent.

[*Pemberton — James Anderson.*]

Reparation — Road Trustees — Public Officer. — Held (reversing the judgment of the Court of Session) that road trustees on a public road are not liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees.

Practice — Issue. — Under an issue, Whether a particular act has been done to the "loss, injury, and damage" of a party, it is left open to try the question of the damage, and the liability of the party causing the damage to make compensation. — Per Lord Chancellor, confirming the opinion of Lord Eldon, Chancellor. (See p. 926.)

Practice — Pleading — Preliminary Defence. — In an action directed against the clerk and treasurer of road trustees, acting under the statutes, for injury sustained by alleged negligence on the part of persons employed by them,

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[1] 15 D., B., & M., 1304; S. C. 16. D., B., & M., 1150.

the summons concluded against the said trustees and their said clerk for payment of a sum as compensation. It was pleaded for the trustees, that the " injury, such as it was, " not having arisen from misconduct on the part of the " trustees, or of any person for whom they are in law re- " sponsible, or from any cause for which they are legally " responsible, the defender is entitled to absolvitor." When the record was closed, an issue was sent to a jury, to try whether the act complained of had been done to the loss, injury, and damage of the pursuer. The House of Lords reversed the interlocutor directing the issue, the Lord Chancellor observing, that, " as the ground of defence " appears upon the summons itself, and in the defences as " originally made, the cause was, before the interlocutor " directing the issue, in a state which would have enabled " the Court to dispose of it." (See p. 936.)

1st Division.

Lord Ordinary Cockburn.

THE turnpike roads within the county of Perth during the year 1835 were under the management of trustees, whose powers and duties are regulated by the general road act for Scotland, 1 & 2 W. 4. c. 43., and also by a local act, 2 W. 4. c. 82.

The general road act provides (sec. 10.), that " it " shall be lawful for the trustees acting under any turn- " pike act to appoint clerks, collectors, treasurers, " superintendents, surveyors, and other officers, with " reasonable salaries or allowances for their trouble :" (sec. 16.) that " the trustees may sue and be sued in name " of their clerk or treasurer ; provided always, that all " expenses of process or proceedings so incurred by such " clerk or treasurer shall be reimbursed and paid out of " the trust funds of the turnpike road for which he shall " act :" (sec. 101.) that " if the surveyor of any turnpike " road, or any contractor or other person employed on " such road, shall lay on any part of any such road " any heap of stones or other materials for the repair

" thereof, and shall permit the same to remain longer " than necessary for the breaking and spreading of such " materials, or shall lay on any such road any matter or " thing, or shall knowingly permit to remain on any " part of any such road any matter or thing which may " endanger the safety of any passenger, or shall dig any " pit, or make any cut on any turnpike road without " sufficiently fencing the same, such person shall for " every such offence forfeit and pay a sum not exceed- " ing 5*l.*, over and above the damages occasioned " thereby, and expenses; and it shall be lawful for any " person travelling along any turnpike road to pro- " secute for such sum, damages, and expenses in " manner herein-after provided." By sec. 109. the trustees or the procurator fiscal, or any person authorized by the trustees, are empowered to prosecute for payment of toll duties, penalties, or fines due under the statutes; the enactment declaring, " that it shall be " lawful for the said trustees to allow the expenses of " such prosecutions to be defrayed out of the funds of " the trust." Sec. 117. provides, that " if the repair- " ing or maintaining of any turnpike road shall be " neglected, or such road so badly kept that travellers " are injured, impeded, or obstructed in using the same, " any person having paid toll duty thereon, and finding " caution to pay expenses of process, may present a " petition and complaint against the trustees of such " road to the Court of Session, and the said court is " hereby authorized to receive the same, and to adjudge " and determine therein in a summary manner, without " abiding the course of the roll; and to pronounce " such orders and decrees as to the repairing and keep- " ing of the road, or otherwise, as the justice of the

DUNCAN v. FINDLATER.

23d Aug. 1839.

Statement.

"case shall seem to them to require, having due regard "to the funds of the trust; and particularly to deter- "mine whether the road is in such a state of repair "as to justify the levying of the toll duties or any "proportion thereof levied by the said trustees; and "also to determine as to the expenses of such com- "plaints and proceedings thereon; and if any such "complaint shall be found to be without probable "cause, the complainer shall be found liable, over and "above the expenses of process, in a penalty of 20*l.*, to "be paid to the trustees for the purposes of the trust; "and it shall not be lawful to present any such com- "plaint, or institute any proceedings on any of the "grounds above mentioned before any other court, "or in any other manner than as aforesaid." Sec. 118. provides, that "all civil causes, and prosecutions for "expenses, toll duties, penalties, forfeitures, and fines "imposed by this act or any local turnpike act, or for "any damages incurred, or any wrongs done or in- "juries suffered in any matter thereto relating, or for "any thing done in pursuance of any of the powers "by this or any such act given and granted, shall be "commenced within six calendar months after the "penalty, &c. shall have been incurred, or wrong done, "or injury suffered."

The statutes expressly authorize the trustees to raise certain funds in the shape of toll duties, which are specially appropriated by the statutes. The local act (sec. 16.) enacts, "that at any of the stated "general meetings of trustees it shall be lawful for "the said trustees to direct the tolls arising at the "gates or turnpikes erected or to be erected on "the said roads to be applied towards making, repair-

" ing, upholding, and improving the aforesaid roads " and bridges thereon respectively, in such manner as " the said trustees shall think fit; and paying the " expense of management, interest of the money bor- " rowed, advanced, and owing at the time; and the " surplus shall be appropriated annually to extin- " guish the principal of the money so borrowed, " advanced, and owing, and to no other purpose " whatsoever."

James Findlater, coal merchant in Perth, while driving a gig at night along the turnpike road between Dundee and Perth, near Inchture, came in contact with a large heap of stones placed partly on the footpath, and partly on the road. There was no light set up or watchman posted, or any other precaution taken to warn travellers as to the state of the road. The stones had been placed there by persons in the service of a contractor employed by the road trustees, for the purpose of filling up a drain which had been dug across the road. The gig was overturned, and the son of Findlater, who was along with him, received so much injury in consequence of the accident that he died soon after; Findlater was also himself considerably injured.

Findlater brought an action in the Court of Session against the road trustees, libelling that the obstruction on the road had been occasioned by the operations carried on by the road trustees " or their surveyors or " contractors, or other person or persons for whom " these trustees were and are responsible;" and that the trustees, " or their workmen or others employed by " them as aforesaid, did knowingly and most culpably " permit that aforesaid part of the north side of the " road to remain in this state of danger till the follow-

DUNCAN v. FINDLATER

23d Aug. 1839.

Statement.

" ing day, and did not use any means by which pas-
" sengers travelling at night could be led to believe or
" suspect that there was any obstruction upon the said
" road."

The road trustees were sued through their treasurer, Thomas Duncan, and the summons concluded against " the said trustees and the said Thomas Duncan as the " clerk and treasurer, or the clerk or treasurer, of the " said road trustees, and as representing them," for payment of 500*l.* as solatium for the loss of his son, and 500*l.* as compensation for the injury sustained by himself. They pleaded, 1st, that the pursuer was not entitled to damages on account of his son's death; 2d, that the pursuer's injuries did not entitle him to damages; 3d, that, " at any rate the overturn and consequent " injury, such as it was, not having arisen from mis- " conduct on the part of the trustees, or of any person " for whom they are in law responsible, or from any " cause for which they are legally responsible, the de- " fender is entitled to absolvitor."

The libel being in form an action of damages, the cause was by interlocutor (appealed against) transmitted to the issue clerks. The defender moved the Lord Ordinary to remit the cause to the Court of Session roll, to determine the legal liability of the trustees as raised by his plea in the first instance. The motion was refused on the ground, that if the plea was well founded effect would be given to it at the trial. The issue, as originally framed by the issue clerks, was alternative as against the trustees or those employed by them; the Lord Ordinary limited it to the trustees, but on application to the Court the alternative form was restored, and the following was the form of

the issue sent to trial:—" Whether the pursuer and his " son, while travelling in a gig along the said road, near " the west half-way house, were overturned through the " fault or negligence of the said trustees, or others in " their employment, to the loss, injury, and damage of " the pursuer? Damages claimed: for reparation, and " as a solatium for the loss and deprivation suffered by " the death of the pursuer's son, 500*l.*; for compensa- " tion and reparation for injury sustained and expenses " incurred by the pursuer in the premises, 500*l.*"

DUNCAN v. FINDLATER. 23d Aug. 1839. Statement.

At the trial the Lord President directed the jury, in point of law, " that road trustees on a public road are " liable for any injury which may happen to passengers " in consequence of the negligence or improper conduct " of labourers or surveyors or other persons employed " by the trustees, or by the officers of the trustees, when " engaged in any operation performed under authority " of the trustees." The jury found for the pursuer as follows: viz. damages for loss of his son 500*l.*, for injury received by himself 300*l.*

The appellant excepted to the above direction.

The First Division of the Court, having advised the cause upon the bill of exceptions, after an oral debate, and cases, disallowed the bill of exceptions by the following interlocutor:—" The Lords, having advised " the cases for the parties, disallow this bill of exceptions, " and find the defenders liable to the pursuer in the " expenses incurred by him in the discussion on this " bill, and appoint an account thereof to be given in, " and remit to the auditor to tax the same, and to " report." The First Division thereafter applied the verdict as follows:—" In respect of the verdict found by " the jury, on the issue in this cause, the Lords decern

Judgment of Court, 19th June 1838.

Judgment of Court, 22d June 1838

DUNCAN v. FINDLATER.

23d Aug. 1839.

Judgment of Court.

"against the defenders for payment of 500*l.* in name of "damages to the pursuer, as reparation for the depri- "vation suffered by the death of his son, and for pay- "ment of 300*l.* as reparation for injury sustained by "the pursuer himself: Find the defenders liable to "the pursuer in the expenses incurred by him in this "action. Appoint an account thereof to be lodged, "and remit to the auditor to tax the same, and to "report."

The road trustees appealed.

Appellant's Argument.

Appellant.—It has been conceded that the appellants are not personally responsible; in making this concession the only ground of action is virtually abandoned. The trust funds are created by statute; no right, claim, or remedy can be maintained against the statutory funds, unless such right, claim, or remedy can be supported from the statute. The statutes from beginning to end are perfectly silent as to any claim against the trustees, or the funds under their management, on the part of individuals who suffer accidents by the negligence of surveyors or contractors, or persons employed on the road, while, on the other hand, they expressly affirm and recognize a right of action against these surveyors and other persons when guilty of such faults or negligence as lead to injury; and a form is prescribed by which those parties may be proceeded against in a summary manner. The absence of the slightest notice of a valid claim against the trust, with this recognition of a right of action against the parties offending, affords the clearest grounds for holding that the legislature never contemplated any such proceeding as that now adopted. The

terms used in the statutes in providing the remedy are, in point of legal construction, exclusive of any other manner of proceeding than that therein pointed out.

The statutes are in perfect consistency with the general principles of law applicable to such questions. The general maxim is, culpa tenet suos auctores. This maxim has been extended to infer vicarious liability only in cases where public policy imperatively requires that it should be so extended.

It is contended, however, that the law of Scotland establishes the judgment appealed from, and certain cases are cited to support that proposition. These cases do not apply. The question is not, how the law of Scotland has dealt with the maxim qui facit per alios facit per se; the question is, what is law of Scotland under the existing turnpike statutes; and none of the cases referred to can have the slightest application to this question. The appellant's argument in the Court below (as it is now) was almost entirely founded upon the particular enactments in the road statutes relating to this question, and yet it will be seen that the judges when delivering their opinions do not once allude to the statutes or any of the enactments in them. But even independently of the statutes the rule of law in Scotland in reference to the maxim qui facit per alios, is clearly adverse to the claim of the respondents.[1]

There being no authority in the law of Scotland adverse to the plea of the appellants, and this being a case as to the construction of a British act of parliament, it is conceived English cases must be of perfect authority, the more especially as the meaning and import of similar

[1] Linwood v. Vans Hathorn, 11th March 1817. Fac. Coll.

DUNCAN v. FINDLATER.

23d Aug. 1839.

expressions in statutes relating to either or both countries must necessarily have been intended by the legislature to be the same.[1]

Appellant's Argument.

The appellant's defences and pleas in law, the form of the issue, the direction of the judge, the exception to that direction, and the judgment itself now appealed from, completely negative the argument attempted to be raised, to the effect that the appellant is excluded from urging the question of liability. This being a cause appropriated to the jury roll, the appellant had no opportunity of raising the question of liability before going to trial.

Respondent's Argument.

Respondent.—By the law of Scotland a master is civilly responsible for the negligence of a servant in the exercise of his calling.[2] The circumstance that he is servant to a trustee or body of trustees makes no difference. Even although the trust should be public, the rule is the same, e. g. magistrates of a burgh are liable for the escape of a prisoner.[3] The law of Scotland recognizes the broad general principle, that public funds raised by taxation are responsible for wrongs done to individuals in the execution of the public purposes to which such funds are appropriated.[4] There are various cases in which this principle has been enforced against road trusts, to the effect of attaching funds under the administration of

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[1] Humphreys, Man. & Ryl. 187; Hall, 2 Bing. 156; Harris v. Baker, 4 Maul. & Sel. 28; British Plate Glass Manufacturers, 4 T. R., 794; Bolton, 4 Dowl. & Ryl. 195; Everett v. Cooch, 7 Taunt. 1.

[2] Fraser and other cases in Shaw's Digest, voce Reparation, Nos. 286. 288. 290. 292, 293, 294, 296, 297, 298. 301, 302.

[3] Ersk. b. iv. tit. 3. s. 14. and notes by Ivory.

[4] Innes, 1 Feb. 1798, Mor. 13189.

road trustees.[1] The same view of the law has been taken by the Court under police statutes.[2] Such being the rule of law in Scotland, it is irrelevant to inquire into the law of England, even supposing that a different principle existed in that country. But the English cases founded upon by the appellant do not bear at all upon the present question. The object in these cases was, to render the parties against whom the suit was directed personally responsible for injury sustained by individuals, being the necessary consequence of works authorized by the legislature to be performed by them. The respondent, however, has not averred that there was misconduct on the part of the trustees which renders them personally responsible. There is no question raised on that point. The case of the respondent is, that in consequence of the negligence of those employed under the trustees the funds of the trust are responsible. [*Lord Chancellor.* — Can property be liable for damages without some party being found liable?] The parties guilty of the negligence may be liable for the consequences; the trustees will have their action of relief against them, but according to the principle recognized in Scotland in such cases, the party suffering the damage is entitled ante omnia to be indemnified from the trust funds.

It is said that the remedies given by the general turnpike act and the relative local statute are exclusive of any proceeding against the trust funds. It is humbly conceived that this is not so; on the contrary, the true principle applicable to both statutes seems to be, that

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[1] Gunn, 28th Feb. 1820, 2 Murr. 194; M'Lauchlan, 14th May 1827, 4 Murr. 216; Millar, 17th July 1828, 4 Murr. 563.

[2] Nimmo, 8th July 1832, 10 S. & D. 844; Kelly, 22d Jan. 1833, 11 S. & D. 287; Mitchell, 1 Feb. 1838, 16 D., B., & M., 409.

DUNCAN v. FINDLATER.

23d Aug. 1839.

Respondent's Argument.

the public or their trustees draw a fund from the lieges for the purpose of maintaining good and safe roads, and consequently if they or their managers fail in this respect, the trust funds, or in other words the public, must, in the first instance, be answerable for the consequences, whatever claim of relief may remain against those by whose direct act an injury may have been done. The purposes for which the toll duties may be applied are large and comprehensive, and must be taken as including the police of the roads; i. e., maintaining them in a state free from obstructions. The statute imposes a penalty upon any party employed on the road for particular acts of negligence, but that penalty is over and above the damages which a party thereby injured may obtain against the fund which is legally responsible therefor.

The objection taken in the bill of exceptions is not within the record. The pleas in law do not raise the question of liability of the trust funds; the only question raised by the issue was damage or no damage, through the misconduct of those employed by the trustees. It is a mistake to say that the appellant had no opportunity of maintaining the irresponsibility of the trust funds as a defence. If such a defence had been originally made it would, if well founded, have entitled the respondent to absolvitor before going to trial. Under the thirty-third section of the judicature act and relative provisions of the statute 1 Will. 4. c. 69., the appellant might have obtained the judgment of the Court upon any question of law or relevancy going to exclude the action. Such a defence, however, comes too late in a bill of exceptions[1],

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[1] Kerr v. Inglis, 6th July 1832, 10 S. & D. 774; Batty v. Shaw, 5 W. & S. 462; Laidlaw, 11th March 1831, 9 S. & D. 571.

the purpose of which is to have the direction of the judge upon matters of law arising out of the record reviewed. [*Lord Chancellor.* — The Lord President clearly thought that the question of liability was embraced in the issue.] The issue cannot be held to embrace a question not raised by the pleas in law.

Respondent's Argument.

LORD CHANCELLOR.—My Lords, this case on the merits is one of very great importance, and I should be very sorry to be called upon to advise your Lordships upon it, without taking some time to examine into the cases which have been referred to. The point upon the merits is one startling to the ears of an English lawyer, namely, that for damage sustained by the conduct of persons in the execution of a public trust, the party sustaining the injury has a remedy, not against the immediate author of the injury, or against the trustees personally, but that he has a direct remedy against the trust fund, by suing, not the trustees, but the officer of the trustees who has the custody of the trust funds. It is admitted that the effect of this judgment, if it stands, will be, not to give a remedy against the trustees, who may be supposed to be the authors of the injury, but against the trust fund; and if that is exhausted in the payment of the damages, that it must be supplied by a taxation upon the public.

Ld. Chancellor's Speech, 8th July 1839.

There is no such principle in the law of England, and though certain cases have occurred in the Court of Session apparently producing this effect, I have not heard any principle referred to which would have originally supported that decision. If that principle had been part of the law of Scotland, your Lordships may be assured the industry and learning of the counsel would

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

have furnished your Lordships with some instances of it; they have furnished instances in which the particular thing has been done, but no principle has been referred to, which, if brought under the consideration of the court, would have given weight to the adjudication. A number of years has elapsed since the first case in 1798[1] was decided, and it does not appear that any case has come up to your Lordships House upon the subject till the present, at least none in which the point has been expressly raised and decided. Your Lordships were told there was a case pending in this House[2], raising precisely the same question, against the commissioners of police of Edinburgh. I have had inquiry made while the argument was proceeding, and if it had been a case in which the question was likely to be raised, or further information could be obtained from the discussion, I should have thought it right that that case should be argued before this case was disposed of; but I find that that case is set down to be heard ex parte, and that your Lordships are not likely to derive much information from it; and it would not be fair, that a case to be heard ex parte should influence your Lordships in deciding this case, which has been fully argued on both sides. There is one point of this case with respect to which I may now state in what view it occurs to me. It is contended that the appellant cannot raise this question in the present state of the case, because it is said that the point was not raised by the pleas in law in the courts below, consistently with the judicature act, which requires that the party should state the whole grounds of his defence. The pleas in this record are

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[1] See ante, p. 920. Mitchell, 1st Feb. 1838, 16 D., B., & M., 409.

certainly as large as can be well conceived. The third plea appears to be a general plea of not guilty, opening to the party sued every possible ground upon which he could make out that he was to be discharged from the obligation sought to be imposed upon him by the pursuer; it is, that the injury complained of "not "having arisen from misconduct on the part of the "trustees or any person for whom they are in law "responsible, or from any cause for which they are "legally responsible, the defender is entitled to absol-"vitor." Thus, (leaving out that part which does not immediately refer to the present subject,) the proposition is, that the injury complained of was not sustained from any cause for which the defenders were legally responsible; it is in short a plea of not guilty, alleging that there is no cause of action.

Then upon that plea an issue was directed, and another question arises upon the terms of the issue, namely, whether it did not involve a proposition of law. The question sent to trial before the jury was, "Whe-"ther the pursuer and his son, while travelling in a gig "along the said road, near the west half-way house, "were overturned through the fault or negligence of "the said trustees or others in their employment, to the "loss, injury, and damage of the pursuer?" not simply whether the injury arose from the negligence of persons in the employment of the trustees, and what damage had been sustained in consequence of such injury, but whether it has been sustained "to the loss, injury, and "damage of the pursuer."

Now it is said that, according to the acceptation of those terms in Scotland, it makes no difference in the import of an issue, whether the inquiry be if the act

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

Under an issue whether a particular act has been done to the "loss, injury, "and damage" of a party, it is left open to try the question of the damage, and the liability of the party causing the damage to make compensation; see also p. 934 post.

done be simply to the damage, or whether it be further inquired if it be to the loss, injury, and damage of the party suffering. I do not find that it has been so understood; it is not so stated by the Lord President, nor by the judges before whom the cause was brought, and it would not be so understood in this country. A very peculiar case[1] upon this subject occurred in my own recollection. I was counsel in the case; a complaint was made by a party who had a mill supplied by water; the water was taken to supply the Glamorganshire Canal, and the proprietor of the mill complained that the canal company had exceeded the power given to them under the act, and had deprived his mill of a portion of water to which he was entitled. It came on before Lord Eldon[2], upon a motion to dissolve an injunction which had been obtained ex parte; there was no doubt upon the point, whether the works carried on by the company were authorized by the act; but Lord Eldon directed this issue[3], "Whether the widening and "deepening of the basin in the pleadings mentioned," &c. "did, or will to the damage and injury of the plaintiff, diminish the supply of surplus water" to the plaintiff's works: "Lord Eldon stated that his object "in using those words was not only to ascertain what "damage had been sustained, but whether it was such "damage as that for which the defendants were respon-"sible,—whether it was damnum absque injuria, whether "it was to the injury of the party, whether it was "injurious, in the sense which a court of justice puts "upon the word." He left it open to try the question

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[1] Blakemore v. Glamorganshire Canal Navigation, 1 My. & Ke. 154.
[2] 17th and 23d Dec. 1824. [3] See 1 My. & Ke. p. 169.

of the damage, and the liability of the party causing the damage to make compensation; and so I must understand the meaning of the terms here. I find that the Lord President lays down, as a proposition of law, that which according to the construction put by the respondent he had nothing to do with. If the respondent's construction of the issue be correct, the jury had nothing to do but to ascertain the fact whether the injury was sustained in consequence of the act of the trustees, and the amount of the damage; but the Lord President lays it down, "that road trustees on a public road are liable "for any injury which may happen to passengers in "consequence of the negligence or improper conduct "of the labourers or surveyors or other persons em-"ployed by the trustees, or by the officers of the "trustees when engaged in any operation performed "under the authority of the trustees." Upon that ruling the bill of exceptions was tendered, and in the argument on the bill of exceptions it was never contended that this ruling was immaterial, that it was not within the province of the judge to lay down the law, or that it was immaterial how he laid it down. It is clear that it was not so argued in the Court below from the opinions of the judges, which are printed in the cases; but whatever is the meaning of the issue, if the judge in laying down the law lays down an incorrect rule for the jury to act upon, which is likely to have an effect upon the finding of the jury, the party against whom the verdict passes will have a right to complain that a rule was laid down which might influence the verdict under which he was suffering. I therefore cannot but think that your Lordships have the question to decide whether the rule of law laid down by the Lord Presi-

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

dent at the trial of the issue is a correct rule of law, applicable to cases arising in Scotland, and you have also necessarily to consider whether the rule applying to the liability of trustees, which seems to have been adopted in Scotland for a considerable number of years, and which is directly contrary to any rule we have here, is a rule that ought to continue to prevail in Scotland, particularly when it arises under an act which clearly directs the application of all the tolls which may be received under the act. At the same time, in reference to this latter consideration, I do not think that the statute precludes this question, because, in directing the application of monies raised, it must be understood as dealing with those monies after paying all lawful demands out of the funds, all the expenses of the officers, and so on, which must be paid out of the funds; that is, the law throws the liability upon the funds, and it does not go so far as to say that they are not to be liable to pay this. The legislature can hardly be said to have had in view such an application of the funds; if the funds are legally applicable to the purpose, the statute does not so overrule the application of them, as to say that nothing shall authorize the laying such a burden upon the funds. For the purpose of considering the general question, I propose to your Lordships that the farther consideration of this case should be postponed.

Farther consideration adjourned.

Ld. Chancellor's Speech. 23d Aug. 1839.

LORD CHANCELLOR.—My Lords, in this case 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 those acts, and, as to which, the earliest decision referred to

23d Aug. 1839.

Ld. Chancellor's Speech.

in Scotland is of the year 1798[1], notwithstanding which the authority of the English decisions, as applicable to the rule to be hereafter followed in Scotland, has been objected to, as an attempt to overrule Scotch law by the weight of decisions in England. Nothing can be more important than to preserve the integrity of Scotch law in cases in which that country has law distinct from that of England.

The titles to property, and the rights and interests of individuals in Scotland, are regulated by the laws of that country, and, undoubtedly, all such laws ought to be maintained. But in cases in which there is no peculiar law of Scotland applicable to the subject matter of a contract between parties, when questions arise to which no preceding principle of law can be satisfactorily applied, there is great inconvenience, and a degree of reproach to the law itself, in the adoption in the two countries of different and inconsistent rules in the administration of justice; and this can never be more strongly felt than in cases in which the questions arise from enactments by the legislature which are common to both.

In looking through the papers in this case, and upon referring to the authorities quoted, I have in vain sought for any rule or principle of Scotch law, applicable to this question, which would lead to the adoption of a course of decision peculiar to that country. So far from finding any principle in the law of Scotland for making the liability of persons for the acts of others acting under their presumed authority greater than it is in this country, I find the rule laid down in Lin-

[1] See ante, p. 920.

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

wood v. Vans Hathorn[1], by a majority of the judges, much more restrictive of such liability than the rule adopted in the case of Bush v. Steinman.[2] Let it, however, be assumed that such liability is regulated by the same rule in both countries; when questions first arise upon those acts of parliament which create trusts of money levied 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 those acts. In England it has been held by repeated decisions that trustees of a turnpike road are not liable for damage arising from the acts of those employed in carrying into effect works under the provisions of the statutes. The cases of Baker v. Harris[3], in 1815; Hall v. Smith[4]; Humphreys v. Mears[5], in 1827; are conclusive upon that point. 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.

Another class of cases establishes another rule under those statutes; namely, that trustees exceeding the authority which the statute gives them are personally liable for the consequences of the act done, but that keeping within that authority they are not liable for any damage which these acts may occasion to any other person; the person injured, if he cannot find a remedy in the

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[1] Linwood v. Vans Hathorn, Fac. Coll., 11th March 1817.
[2] Bush v. Steinman, 1 Bos. and Pull., 404.
[3] Baker v. Harris, 4 M. & Sel., 28. [4] Hall v. Smith, 2 Bing., 156.
[5] Humphreys v. Mears, Man. & Ry., 187.

provision of the statute, is without redress. That was the decision in the British Plate Manufacturers v. Meredith [1], and Bolton v. Crowther.[2]

In the former class of cases the actions were in some, if not in all the instances, against the clerk or person provided by the statute for the purpose of being sued on behalf of the trustees; so that if the plaintiff had obtained judgment the remedy would have been against the trustees as such, and not against them individually. The opinion of the court in all those cases having been in favour of the defendant, it was not necessary to consider the effect of the judgment as against the trust fund; but the opinions of the judges, as reported, shew that they considered the course of proceeding adopted by the plaintiff to apply to the defendants in their official capacity, and not to infer personal liability. Lord Wynford, in Hall v. Smith, says, "We think that "under these circumstances the commissioners are "not responsible for the accident that has happened, "and that the actions cannot be maintained against "their clerk."

The first case referred to as having arisen in Scotland is Innes v. the Magistrates of Edinburgh, 6th February 1798.[1] In that case the injury, which the pursuer had sustained, arose from a defect in the streets created in the progress of works for rebuilding the university, under the direction of trustees, and he sued such trustees, and also the magistrates. The court held the trustees not liable; the liability of the magistrates was indeed estab-

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[1] British Plate Manufacturers v. Meredith, 4 T. R. 794.

[2] Bolton v. Crowther, 4 Dow. & Ry., 195.

[3] Innes v. the Magistrates of Edinburgh, 6th February 1798, Mor. 13189.

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

lished, but upon grounds which have no application to the present case, as it rested upon the supposed duties of the magistrates of Scotch burghs. At that time then, the rule, now considered as part of the law of Scotland, had not been established.

The next case appears to be that of the Airdrie Road Trustees, in 1820[1], in which the jury found not that the trustees were liable for the original act of a stranger, (Waddell,) but that they did improperly allow or permit the stones to remain on the road for two or three weeks. This verdict was sanctioned by the court, but a new trial was directed as to the liability of Waddell, the wrong-doer; and as nothing further appears as to that case it is probable that it was afterwards settled. Now, whether this finding against the trustees was right or wrong, it does not much apply to this case; it found a culpable neglect or omission of duty in not removing the stones, which is very different from finding a liability from the unauthorized act of any person employed in the works.

The case of M'Lauchlan v. the Wigtonshire Road Trustees, in 1827[2], was what we should call in this country a nisi prius case; it was also a case like the last, of imputed negligence, in not effectually stopping up ana bandoned road; and the claim was against the trustees personally; the Chief Commissioner saying, "The "trustees are individually liable, and have no funds "to pay the damages if found due." In Millar v. The Road Trustees[3], that point was not taken. The case of Aitkin v. Peebleshire Road Trustees, in 1836, (mentioned

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[1] Airdrie Road Trustees, 1820, 2 Mur., 194. 215.

[2] M'Lauchlan v. Wigtonshire Road Trustees, 1827, 4 Mur. 216.

[3] Millar, 17th July 1828, 4 Mur. 563.

in the respondent's case,) was compromised. The two last cases are instances in which the liability of trustees was assumed, but neither of them has the weight of decision, except in so far as in the former the opinion of the Chief Commissioner was expressed to that effect.

Several cases have been referred to of suits instituted against the Commissioners of Police of Edinburgh, and particularly one at the suit of Mitchell. I abstain from making any observations on those cases because much may depend upon the act of parliament under which those commissioners act; and because the latter case is now under appeal before this House; and it would, therefore, be improper to prejudge the merits of that case.

Such is the state of decisions in England and in Scotland upon this subject. The learned judges of the First Division state that the law has been fully established in Scotland; and upon that authority, and from what appears from the reported cases, there cannot be any doubt that there has been for some time past a course recognized in Scotland in conformity with the decision in this case; but when the cases which have occurred there are examined, it does not appear that there has been any solemn decision of the Court of Session establishing the law before this case. If the decisions had been of much earlier date, and of much more weight, from repeated recognitions by the Court of Session, it might still have been the duty of this House to correct an error which this House might find to have led to such a course of adjudication, but in the present case the House has not any such difficulty to overcome.

Independently, therefore, of authority, it remains to be considered what are the merits of the case upon the

DUNCAN v. FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

statutes under which the trustees act. It was contended, in the course of the argument, that the defenders had not properly raised the point upon which they now insist in the pleadings. I think, however, that the issue as framed raises the whole case; the terms are, "Whether the "pursuer was overturned through the fault or negli- "gence of the trustees, or others in their employment, "to the loss, injury, and damage of the pursuer?" That word "injury" raises the question, as it implies responsibility in the defenders.

In a well-known case in the Court of Chancery (referred to, ante, p. 926) Lord Eldon directed an issue, in very similar terms, for the purpose of raising the question of right on the part of the plaintiff, and of liability on the part of the defendant. Under the issue in the present case, if the jury had been satisfied of the loss, and of the negligence of the trustees, or those employed by them, they would not have found a verdict in the affirmative, unless satisfied that the pursuer was entitled to redress as against the defenders; and so the learned judge must have understood the issue from the manner in which he expounded the law to the jury. The law was there laid down by that learned judge, that road trustees on a public road are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees when engaged in any operation performed under the authority of the trustees. This is so stated in the bill of exceptions, by which all parties are bound, and if the law be inaccurately laid down the verdict found under such direction and exposition of the law cannot stand.

Now, the law as laid down would amount to this, that road trustees (that is, the road funds under their control, for such is stated to be the character of the suit,) are liable for an injury happening to a passenger, from the improper conduct of any person when engaged in any operation performed under the authority of the trustees. That the conduct of such person was not in due execution of the purposes of the act constitutes part of the proposition, for otherwise it would not be improper. The result, therefore, of such a rule of law would be, that (however improper the conduct of any person employed by the trustees or their officers, though wholly unauthorized by the trustees, and though unconnected with their employment,) all damage arising from such conduct would be to be compensated out of the funds of the public in the hands of the trustees,—a proposition not supported by any principle of law, regulating the liability of trustees for the acts of their servants.

How much greater latitude is to be adopted in claims against the present trust fund will be best seen by referring to the statutes. The general turnpike act by the tenth section authorizes the trustees to appoint superintendents, surveyors, and other officers. This must include a contractor, by whom the work is to be carried on. So far then the trustees were acting under the powers of the statute. The 16th section authorizes suits against the trustees in the name of their clerk; the 101st section gives a remedy against any surveyor or contractor who may leave any materials improperly on the road, by means of a penalty of 5*l.* in addition to the damages sustained. The particular statute, under which the defenders are trustees, authorizes the levying certain tolls and duties. The 4th section appoints trustees, very many in

DUNCAN
v.
FINDLATER.

23d Aug. 1839.

Ld. Chancellor's Speech.

number, including justices of the peace and other official persons, guardians of infants, curators of fatuous persons, and mandatories of female proprietors. The 16th section directs the tolls to be applied in repairing and improving the roads, and in paying the expenses of management and interest of money borrowed, advanced, and owing at the time, and that the surplus should be appropriated annually to extinguish the principal of the money so borrowed, advanced, and owing, and to no other purpose whatsoever.

It is impossible to suppose that the framers of these statutes contemplated that any part of these tolls and funds would be diverted from the purpose for which they were to be raised, in order to compensate for damages to arise from any improper act of any person whilst employed under the authority of the trustees. Such an application of the tolls and funds would not be in accordance with the 16th section, unless it could be shown that the law was clearly such, at the time the statute passed, as to justify the supposition that such an application had not been enumerated, because known to be incident to the execution of the trust.

But why should the trust funds be so liable? If the thing done be within the powers of the statute, the party sustaining any damage from it cannot be entitled to compensation unless the statute itself provides it, and for this reason, that upon this supposition the act creating the damage would be lawful; if then the thing done be not within the powers of the statute, either from exceeding these powers or from the manner of doing it, why should the public funds bear the burden of indemnifying the guilty party? Many cases may be supposed in which the trustees may be so far actors in the transaction

creating the damage as to render their property liable, but none in which the trust funds ought to be applied in satisfaction of the party injured.

Finding, therefore, the rule of law clearly established in England, and nothing in the law of Scotland which authorizes a contrary course of decision, I cannot hesitate to say that I think this is a case in which the practice in Scotland has been 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. However, after the course of practice which has prevailed in Scotland, I do not think that the defender is entitled to any costs of the suit, and of course there can be no costs of this appeal.

Ld. Chancellor's Speech.

Interlocutor directing an issue reversed, in respect the question might have been disposed of on the pleadings.

LORD BROUGHAM.—My Lords, I entirely agree in the view my noble and learned friend has taken of this case,—a case of no ordinary importance, whether we regard the law of that part of the kingdom where it was decided, or the rights and liabilities of trustees, bodies of men acting oftentimes in very difficult circumstances. I also entirely agree in the doctrine, that this, a Scotch law question,—referring to Scotch practice, decided in a Scotch court, and coming to your Lordships as judges of appeal from that court,—is to be disposed of by you as if you yourselves were judges in a Scotch court;—that the principles of Scotch law, whether to be found in text writers or in

Ld. Brougham's Speech.

DUNCAN
v.
FINDLATER.

23d Aug. 1839.

Ld. Brougham's Speech.

the statute book, or in the decisions of judges in Scotland, must be the guide by which your Lordships should be governed. But though this would show that if there be any principle of Scotch law to support the present decision, if there be any authority in the text writers, if there be any decided cases, or if there be any dicta of judges heretofore laying down one rule, that rule must be followed in this case by your Lordships in preference to any opposite or different rule, which we might be disposed to adopt in the same question, arising as a question in courts in this country; yet I hold it to be equally clear, (as clear as any proposition can be,) that if, on the contrary, the Scotch law be silent upon this, if there be no cases decided, and no authority either of judges or of text writers at variance with the principles which would be adopted by the English law, and which would govern the decision of the English courts had the question arisen here,—we are bound to lean to the doctrine which would regulate us in our own courts, in order to avoid the manifest inconvenience, in the first place, of two nations who are living together in the intercourse which so happily subsists between our Northern brethren and ourselves, being governed in respect of our trade or other matters arising out of that intercourse by different laws; and in order to avoid, in the second place, the opprobrium which must arise from two systems of law being found to exist, without difference of circumstances, in two such countries upon directly opposite principles.

Now, in the present case there may either be decisions bearing directly upon the point, or there may be decisions which may govern the case, although no decision have yet taken place upon it; that there is

no case of a date prior to 1820 relating to turnpike trusts, and trusts of a similar description, is admitted; that therefore there is no rule of law solemnly recognized and laid down by the court as to the liability under such trusts, is not denied. But it may be that some general principle exists extending the liability of persons further, through their agents, than the law of England allows that liability to exist here. When we come to examine that, however, we find that it is quite otherwise, and that this liability, according to the general principles of Scotch jurisprudence, is more restricted than according to our principles of jurisprudence. The case of Bush v. Steinman[1] in the Court of Common Pleas was a decision which gave perfect satisfaction in Westminster Hall,—a decision perfectly consonant to a crowd of other cases,—and yet that case of Bush v. Steinman I take upon me to say would not have been so decided in Scotland.

The case was this: a person had employed a builder to do work for him; that builder employed a sub-contractor, that sub-contractor employed a person to bring the materials; the person who was to bring the materials, not the contractor in the first instance, or the sub-contractor in the second instance, but a person three off from the gentleman who had given the orders so to have the work done for him, brought the materials, and laid them down in a negligent and careless manner, so that an individual had his carriage damaged thereby; that individual brought his action against the gentleman who had employed the contractor to do the work, and the consequence was that he recovered damage. A motion

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[1] Ante p. 930.

DUNACN v. FINDLATER.

23d Aug. 1839.

Ld. Brougham's Speech.

for a new trial was made, and the facts as they had appeared on the trial were these: that the person farthest off, that is D., being employed to furnish materials by C., he being the sub-contractor of B., who was employed to build the wall, and which B. had been employed by A., had been guilty of the negligence out of which the injury arose; and under these circumstances the court held that A., the person who employed B., which B. employed C., which C. employed D., was liable for the negligent laying down of the materials by D., though he, A., was neither the person who laid down the materials, nor the person who employed D. to lay them down, nor the person who contracted with C. the employer of D., but only the person who had set the whole going by contracting with B. to do the work, which had been done by D., the injury being owing to D.'s negligence. Consequently the rule may be stated thus: I am liable for what is done by the man whom I employed, nay, for what is done by the person whom he employs, nay more, for what is done by the person whom the other employs, as if I had done it myself; and for this reason, that I in effect employ him to do it; I set the whole in motion, and it was for my benefit as well as by my orders it was done.

I am, therefore, of opinion that neither by the Scotch law, by decided cases, by direct authority varying with the circumstances of the case, nor by general principles applicable to the question, which the Court of Session has laid down, can this judgment be sanctioned. Such being my opinion, and entirely agreeing with my noble and learned friend, I hold it to be my duty to set right the practice which has prevailed in Scotland, this not being the only case. It will reverse the decision in the case in

question; it will also destroy and abrogate the authority of the previous cases which proceed upon the same principle; it will set right the administration of the law, and make it inconsistent with no decision up to the period of 1820; and it will make it consistent with the general principle of Scotch law, and make the Scotch law in this matter not only consistent with its own general principles, with respect to the liability of agents and other persons, but it will likewise make it entirely consistent with the law of England.

I also agree with my noble and learned friend that all the interlocutors appealed from ought to be reversed, and I also agree with him as to costs. The costs of the appeal of course cannot be given, and it would be highly expedient and proper toward the parties that the pursuer should not be saddled with the costs in the Court below; he has not been so, and I apprehend he ought not to be.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal, of date the 10th of March 1837, and the 19th and 22d of June 1838, be and the same are hereby reversed, with this declaration, that neither party shall be liable to the other party in expenses in the said Court of Session.

RICHARDSON and CONNELL—DEANS and DUNLOP,
Solicitors.