leaning against it, seemed to have been making an effort to follow the Act, though rather a clumsy one.

Ten ballot papers bore the cross on the *left* of the candidate's name, six of these being for Robertson and four for Adamson. The authority of *Haswell* v. *Stewart* was cited on the one side against these votes, where the election Judges held them not good, Lord Benholme dissenting. On the other side, the case of *Woodward,* an English authority to the opposite effect, was cited.

Lord Justice-Clerk—The point here is not one beyond controversy, but I am inclined to follow the decision in *Haswell* v. *Stewart.*

Lord Neaves—I am of the same opinion as I was at the time when *Haswell* v. *Stewart* was decided. The voter has transgressed an express provision of the Act.

Lord Ormidale—This point was very carefully considered in the Wigtown case, and I think the decision then arrived at was right; I cannot help regarding this, if allowed as a very simple way to make collusive arrangements for the identification of the voter.

Lord Gifford—I concur. The statute says the voter shall mark his ballot-paper with a cross on the right hand, and that cannot, it appears to me, be got over.

The Court accordingly disallowed these ten votes, and struck them off.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the cause, . . . Sustain the votes under class I of this state; reject the votes under class II; sustain the vote under class III; sustain the vote under class IV; under class V sustain the vote under ballot paper No. 415; reject the votes under ballot papers Nos. 434 and 388: Find that the result of applying these findings to the election in dispute is to leave the defender Adamson in a majority of one: Therefore sustain the defences for the defender Alexander Adamson, and assoilzie him from the whole conclusions of the summons, and find him entitled to expenses: Remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Mair. Agents—Legat & Shield, W.S.

Counsel for Defender (Adamson) — Rhind. Agents—Ferguson & Junner, W.S.

Thursday, July 6.

SECOND DIVISION.

[Lord Shand, Ordinary.

YOUNG *v.* NITH NAVIGATION COMMISSIONERS.

Navigable River — Ship — Obstruction— Damages—Liability—Trustees.

The Commissioners, as statutory trustees for the navigation of a river, made additions to a dyke in the bed thereof. This dyke was covered at high water, and a perch was placed to indicate the extent of the additions. Heavy floods having carried away the perch, a vessel was injured by coming into collision with the dyke.—*Held* that as the Commissioners were bound to indicate by some means or other the sunken dyke, they were liable in damages, though they averred that the insufficiency of funds had been the cause of the delay in replacing the perch.

Process—Expenses—Personal Liability of Statutory Trustees.

The Commissioners for navigation of a certain river defended an action for damages arising out of injury to a vessel, inflicted by certain operations conducted by their orders in the bed of the river.—*Held* that such defence, though unsuccessful, did not subject them in personal liability, and decree given against them *qua* trustees, reserving all questions as to personal liability should the statutory funds prove insufficient.

This was an action at the instance of Robert Young and others, owners of the "Arabian" steam-tug, against the Commissioners of the Harbour of Dumfries and of the Nith Navigation, under 51 Geo. III. c. 147. The summons concluded for £200 in name of damages for the stranding of the "Arabian," which on 21st November 1874 left Carsethorn for Dumfries, towing a timber-raft. The tug proceeded safely to a point on the Dumfries side of the river at high water, and half-a-mile above Kelton. The raft was then disengaged, and the tug turned to go down stream, when it stranded on a stone dyke in the fairway of the river, about 3 or 4 feet above the river bed, but at the time covered with water. As the tide was ebbing, the tug settled down and was not able to be floated off till next tide, when she was found to be strained considerably and damaged.

The pursuers averred that it was the duty of the Commissioners to keep the river in a fit state for navigation, and to exercise reasonable care in so doing. Particularly, the pursuers said that the dyke in question should have been properly indicated by buoys, perches, or beacons to warn vessels off it, and that the defenders had culpably neglected to do this, though an addition, some 70 yards in length southwards, had been made to the dyke by them only shortly before the accident to the "Arabian." There was one perch, but it was some 30 yards above the spot where the tug grounded, although since the accident another perch has been placed at the southmost end of the dyke.

The Act 51 Geo. III. c. 147, under which the Commissioners are appointed and are acting, provides *inter alia* for the levying of certain rates (sec. 11) to be applied to the improvement of the navigation, harbour, ports, and roads; to the erection of lighthouses, and placing buoys, cranes on the quays, &c. These duties formed the defenders' sole source of income. Further, (sec. 37) the Commissioners were directed to make and keep the river navigable from Glencaple Quay to Dumfries Caul, "so as there may be at least 6 feet water at neap tides in every part of the said river within the limits aforesaid, when the same is practicable, and in case the funds will admit of the expense thereof, for ships, vessels, barges, and lighters to come to and go from the said town, and for that end to alter, direct, and make, or cause to be altered, directed, and made, the channel of the said river through any contiguous land, soil, or ground, part of the present bed of the said river betwixt Glencaple Bay and the Caul of Dumfries aforesaid, and to make, set up, and erect on both sides of the said river such and so many jetties, banks, weirs, walls, sluices, works, and fences for making, securing, continuing, and maintaining the channel of the said river within proper bounds for the use of the said navigation, as to the said Commissioners shall seem proper."

The Commissioners were also (sec. 28) empowered to license pilots and to levy a fine of 5s. on any one acting in this capacity without a license. Sec. 55 confers certain borrowing powers, and to assign the rates in security for repayment of the borrowed funds. The 58th section of the Act is as follows:—"And be it enacted, that no action shall be commenced against the said Commissioners or any other person or persons for anything done in the execution of this Act after three months after the fact is committed; and the defender or defenders in such action or process may produce this Act and plead that the said things were done by authority and in virtue thereof; and if the facts alleged shall appear to have been done, then and in such case the defender or defenders shall be acquitted from such action or process, and the pursuer or pursuers shall be found liable in the whole expense of process: Provided always that it shall be competent to any person or persons interested to prosecute the Commissioners for embezzling, squandering, or misapplying the funds hereby vested in them at any time within twelve months after the offence shall have been committed."

The defenders in their statement set forth that the whole rates had been assigned in terms of the 55th section of the Act, but were insufficient to pay the interest on the borrowed money. They also stated that in May 1874 they had erected a perch at the south end of the new dyke, but that it was carried away in August 1874 by a raft. In September it was replaced, and again carried away by a flood in October. During the three months following a frequent recurrence of floods prevented the restoration of the perch until January 1875, though efforts were made to replace it. Further, the defenders alleged that the usual turning-place for tugs was 700 yards south of the dyke, and that the "Arabian" was not turned at a proper place, and further, was unskilfully managed, and that there was gross negligence and carelessness on the part of the men in charge of her.

The pursuers pleaded—"1. The pursuers having, through the fault or negligence of the defenders, sustained damage to the amount libelled, they are entitled to decree as concluded for, with expenses. 2. No statutory limitation of action applies to the present claim; or otherwise, the limitation applicable is that which is provided by the Act 5 and 6 Vict. c. 97, sec. 5. 3. The defenders' statements are irrelevant. 4. The defenders' material averments being unfounded, and their pleas being untenable, the defences ought to be repelled."

The defenders pleaded—"1. The action is excluded by the 58th section of the Act 51 Geo. III. c. 147. 2. The pursuers' statement is irrelevant and insufficient in law to support the conclusions of the action. 3. The pursuers' statement, or the material portions thereof, being unfounded in fact, the defenders are entitled to absolvitor. 4. The accident to the "Arabian" condescended on having been caused through the fault of those on board, and not through the fault of the Commissioners or their servants, the defenders are entitled to absolvitor, with expenses."

The Lord Ordinary (SHAND) pronounced the following interlocutor, with note appended:—

"*1st February* 1876.—Having heard counsel and considered the cause, Finds that on 21st November 1874 the steam-tug "Arabian," belonging to the pursuers, while navigating the river Nith at or about half-a-mile above Kelton, grounded or stranded on a stone dyke in a channel of the river, and that the loss and damage thereby caused to the pursuers amounted to £150: Finds that the said stone dyke was erected by the defenders in or about April and May 1874, and was at the place where the pursuers' steamer stranded covered at high water and unseen: Finds that the stranding of the steamer was caused by the fault of the defenders in having failed on the said 21st November 1874 to have any perch, beacon, or buoy, or other mark on or in the neighbourhood of the said dyke to warn persons navigating the river of the existence and situation of said dyke: Therefore decerns against the defenders Thomas Fergusson Smith, provost of the burgh of Dumfries, and others, as 'Commissioners of the Harbour of Dumfries and the Navigation of the river Nith' under the statute mentioned in the summons, and Thomas B. Anderson as their clerk, for the said sum of £150 sterling: Further, finds the defenders, as commissioners and clerk foresaid, and also the defenders, Commissioners foresaid, personally liable in expenses, and remits the account thereof to the Auditor to tax and report.

"*Note.*—I have had the benefit of a full and complete argument on this case, and having given my best attention to the evidence as it proceeded, I do not think it necessary to defer giving judgment.

"I do not think any difficulty arises as to the facts of the case on which the question of the liability of the defenders turns. The evidence, as it seems to me, clearly enough shows the way in which the accident took place. It appears that the steamer belonging to the pursuers

having been employed to tow a raft of wood from Silloth, had proceeded as far the first day as Carsethorn, where she waited all night until the tide and light should be suitable for taking the raft farther. On the morning of the next day, soon after daylight and at a suitable time for the tide, the steamer started with the raft in tow and went up the river as far towards Dumfries—which was the ultimate destination of the raft—as it appeared to those on board that it was safe to do looking to the state of the tide. Benefit was taken of the water in the river up to the point of high water, and it was judged prudent by those in charge of the steamer to go no farther, for with the ebbing tide there might have been difficulty, if not danger, in taking the steamer farther. Accordingly, having arrived at about half-a-mile above Kelton, the steamer stopped, threw off the raft, and proceeded to turn for the purpose of returning down the river. At the place at which she turned I think it is proved that if the hidden dyke upon which the steamer grounded had not been there, there was a sufficient depth of water and ample room for turning safely. Indeed, the preponderance of the evidence goes to shew, further, that if the dyke had been obvious by being raised above the height at which it was, so as to be visible at high water, there was room enough to turn the steamer between the Dumfries shore and the dyke even if there had been no further breadth of water beyond. But it appears that those in charge of the tug—certainly at the time unaware that the dyke was opposite to them—turned the head of the steamer towards the Kirkcudbright shore, with the result that the steamer grounded on the dyke. In that state of matters the complaint made by the pursuers is that this dyke was there under high-water several feet, with no notice of its presence. The fact is, as I think has been proved in the evidence, that the men of skill and experience in charge of the steamer were not aware of its existence. It had been built but a short time before, and there was no mark to shew its presence. On the other hand, there was a mark or beacon farther up, which was so far misleading as to lead the persons in charge of the steamer to think that the dyke ended higher up the river. We have the evidence of not only the captain of the vessel, Irving, and Charters, and the mate, but of several other persons, that that was a suitable enough place at which to turn a vessel; and there is, in particular, the evidence of M'Burney, a man of very great experience in the river, who says it would not have occurred to him that there was any difficulty about turning a vessel there if there had been no dyke, or even assuming the dyke to be there, if there had been notice of its presence. On the other side it is suggested that this was not a suitable place for turning. Viewing that as a jury question, I am of opinion that the evidence greatly preponderates in favour of the pursuers. I see no reason to doubt that it was quite a suitable place. The practice in regard to those rafts seems to be just what one would expect—that sometimes they are taken higher up than this point and sometimes not so high, stopping most generally (as Mr Johnstone pointed out) at a spot about half-a-mile below this. But all that seems to depend upon the state of the river—upon the point of the river which the vessel reaches at high tide; and I think it was a reasonable enough thing for those in charge of the steamer to detach the raft at the point they did, and to proceed to turn the steamer at that point. It is said for the defenders that there is evidence that this steamer was unskilfully turned. Again, I think that has not been proved; I think the preponderance of evidence is greatly the other way. Charters, who was in charge of the steamer, was a man of great experience; so was Irving; so was the mate. They are corroborated by the engineer on board; and I certainly prefer their evidence much to that of Smith, who was on the raft engaged with his own duties there, or Beattie and the man with him, who were half-a-mile away, and on whose evidence on this subject I can place no reliance. Beattie says it was evident from the way in which the steamer was being propelled that she would have run upon the opposite shore if there had been no dyke there, but I think he is the only one who goes that length. He spoke at great disadvantage from the distance at which he was, and I do not think that was the fact. I cannot conceive that those in charge of the vessel, who were perfectly sober then, and who were men of skill, should have been driving the vessel upon the opposite shore for no possible reason, and I therefore do not accept Beattie's evidence upon that subject. It is further said that Charters knew of the existence of this dyke at that place. Charters has himself expressly said he did not. There has been evidence led to shew that on one or more occasions he conversed from the side of the river opposite this place with those who were making the dyke. He does not remember that, and I do not think it is very satisfactorily proved that his attention was drawn to this continuation of the original dyke; but whether it was or not, the complaint of the pursuers is—if it be well founded—that there was an absence of that very provision which would quicken a man's memory in such circumstances—which would enable people to see there was a dyke there, and thus avoid the danger of relying on the chance of a man remembering that there was a sunken danger at this point. And I can quite well understand that, seeing the beacon at the point at which it was on that occasion, any one, even pretty well acquainted with the river, might not observe when he had come to about 30 yards below the beacon that he had reached a point at which he had seen a dyke in course of building at a previous time. Even if it had been proved that Charters knew at one time of the dyke being there, I am satisfied he had forgotten it at this time. But I am of opinion, further, that his fault would not save the Commissioners from responsibility if they are otherwise responsible, for I look upon him as a person who contracted to take this vessel up as an independent pilot, recognised as holding an independent position, rather than in the light of a servant for whose actings the pursuers would be responsible in a question of this kind with the Commissioners.

"But the question remains, Whether, assuming the facts as I have now stated them, there is fault on the part of the defenders? Now, it appears that about ten years prior to 1874 there had been a dyke of some extent built from a

place called Crook's Pow down to the place where the continuation was afterwards built. That dyke stood for ten years; but in the spring of 1874, about March or April, the Commissioners resolved that it should be extended in terms of Mr Stevenson's plan, and they extended it accordingly. The work was obviously of a kind to cause danger, because, in the first place, it narrowed the breadth of the river, which had been available for a channel before, by cutting off a part next the Kirkcudbright shore; and, in the next, because at high-water, the time at which the channel would be most frequently used, that unseen danger would exist until the water had fallen 3 feet. A good deal was said about the circumstances of the Commissioners,—that they have very limited means for executing such works, and that that should be kept in view in considering the whole case. That is quite reasonable; but, on the other hand, I think the Commissioners must have this in view, that if they have limited funds they should not begin works of this kind unless they are prepared to accompany these works with the ordinary means of warning to the lieges. If they have not the means of executing works which shall be safe, then they should refrain from executing them. But if they do execute works of the kind I have alluded to—calculated to cause danger in the use of the ordinary channel of the river—then it appears to me quite plain that they should make a reasonable provision for warning all those who are in the use of the river channel. What is in the circumstances a reasonable provision is a jury question, and sitting here as a jury I think the only reasonable provision for such warning is one that shall be of a permanent character,—one that shall be the means of making permanently known that there is a dyke here, that the river shall not be left in this state, that a beacon or perch or some other means of warning shall be there during so many months, and shall be away for so many other months of the year. That some warning was judicious, proper, and I may say necessary, was scarcely disputed by the defenders. A perch was put up there, and Mr Johnstone has admitted that it was a proper thing to do, and that the Commissioners were bound to put up something of the kind. If that had remained it would have been a sufficient and suitable means of warning. It is said, however, that it was removed by spates, or by a raft having come in contact with it—and that appears to be the fact. It seems to have been carried away, according to the evidence of the harbour-master Little, about the end of October or the beginning of November; and this accident occurred on 21st November. I am not satisfied that the perch was replaced as soon as it might have been after the beginning of November, or that for twenty-one days there was no opportunity of putting it up. If temporary expedients of this kind are used for giving notice, there must be very great care on the part of the Commissioners that should the perch be removed it shall be replaced as rapidly as possible; and I do not think, taking Little's evidence as a whole, and bearing in mind the casual employment he obtains from the Commissioners, that there was that effort to replace the perch which there should have been. It appears plain from the evidence that for six or seven hours on the day of this accident there was almost dry ground at the place where the steamer went aground, and I think that a few yards below where the perch was the state of the ground was not very different. I do not believe this was the single day upon which that state of matters existed. There is evidence to a contrary effect, and I think Little, having been employed merely from time to time—sometimes for the Commissioners and sometimes for others—was not likely to be so much on the alert as he ought to have been.

"If it be the fact, on the other hand, that it is a necessary result of putting up perches in the way hitherto in use that they must come down in time of spate, and cannot be replaced for two or three months at a time, then that demonstrates this as a thoroughly inefficient mode of giving warning. What the best, and at the same time the least expensive, mode is I am not prepared to say; but I should think that by raising a cairn of stones at the end of the dyke, as is done in other rivers, or by raising the stones much higher round the post or pillar, or by putting a buoy there, or by a prominent mark on the land, with notice to the people in the habit of navigating the river that that indicates the end of the dyke, —by one or other of these means I do not doubt that the end could be attained. If that cannot be done, and if the river is to be left in the state of which we have heard, for months during the time of navigation, then I am clearly of opinion that those sunken rocks or dykes should not be there; and upon the whole matter I am of opinion that there was fault on the part of the defenders here which gave rise to this accident.

"With regard to the damage which was occasioned by the accident, there is no doubt, I think, that the vessel was considerably injured. It has been proved that she lay upon this dyke, straight across it, for a very considerable time, and was very severely strained. The captain and some of the others on board found as she went down the river that she was making a good deal of water, and the water was running out of her sides. She was surveyed and laid up for repairs; and we have two accounts produced—one for general repairs she received, and another for repairs in connection with the damage due to this accident as shown by survey, and amounting to £162. In addition to that, there was evidence that wages had been paid to the amount of £26, and that there had been an outlay for another tug of £10, making in all £198. On the other hand, I think that the new skin or planking which was put on the vessel did make her stronger than she had been before; and taking that fact into view, and considering also that probably the shipbuilders may have had a leaning to putting into the account for damages rather than into the other a few items which they thought were doubtful, I think I may strike off £48 from their account, so that the result would be £114, with the items of £26 and £10, amounting together to £150; and I think that for that sum decree should be given."

The defenders reclaimed, and argued—All they could be required to do was to make the most of all the small rates at their disposal. They were operating at a place and in a river where very few vessels passed up and down, and they took all reasonable care, which the pursuers' servants did not do.

Counsel for the pursuers (respondents) were not called upon.

At advising—

Lord Justice-Clerk—There cannot be here any doubt that the damage to the "Arabian" arose from this sunken dyke, and equally there cannot be doubt that there was upon the defenders an obligation to indicate the sunken dyke by some means or another so as to protect vessels passing up and down the river. The grounds of defence are twofold—first, that there was not any negligence in the failure to fix the perch, and secondly, that there was contributory negligence by the pursuers' servants in navigating the vessel. As to the first ground, it is clear that the Commissioners might in a variety of ways have indicated the presence of the new wall—even by marks on the banks for instance. Clearly they had a duty to discharge, and did not discharge it. On the second ground, that of contributory negligence, it was maintained that this consisted, firstly, in the fact that Charters, who commanded the tug, knew of the extension of the dyke southwards. Now, as to this, I think the knowledge, supposing it to have existed, did not deprive him of his right to have the extension marked by a perch or buoy in the same way as any other member of the public; and I may further observe that the only perch then standing was (from its situation 30 yards north of the extremity of the dyke) extremely likely to mislead. In the next place, it was said that this was not a proper place at which to turn the tug. That view is negatived by the evidence, for although some witnesses say the place was not a good one, yet fully as many say it was very suitable for turning at. As to the last point made—that of intoxication of the persons in charge of the tug—the evidence appears to me to show that they were perfectly sober at the time, whatever they may have been at night afterwards. Accordingly, I am for adhering to the interlocutor of the Lord Ordinary.

Lord Neaves—I am of the same opinion. This is a question as to a navigable river and an obstruction set up in it by the defenders. The river is open not merely to the people on the banks and in the neighbourhood, but to the whole world if it chooses to come. I consider that in not giving any kind of notice as to this subaqueous wall the Commissioners were guilty of gross negligence, and I think that the Lord Ordinary was right in rejecting all suggestions of contributory negligence.

Lord Ormidale—I concur, and have nothing to add.

Lord Gifford—I am of the same opinion. This putting up of a perch is evidently at most a trifling matter, for it is in evidence that the time occupied by two men in fixing it was only an hour. With what your Lordship has said on the question of contributory negligence I entirely agree, and would only observe that it is not in point to say that the "Arabian" would have gone ashore on a bank beyond the dyke had the dyke not been there.

The Court adhered to the interlocutor of the Lord Ordinary.

On the question of expenses, which had been given against the defenders personally by the Lord Ordinary, the defenders quoted the cases of *Dickson* v. *Bonar's Trs.*, Nov. 20, 1829, 8 S. 99; and *Kirkland* v. *Kirkland's Trs.*, Feb 3, 1842, 4 D. 613,

At advising—

Lord Justice-Clerk—I have no doubt that the Lord Ordinary's judgment, as we have already held, is right upon the merits, but he has found the defenders personally liable in expenses. That portion of the interlocutor should, I think, be recalled. The Commissioners here decerned against are a large body of persons, many of whom certainly, and perhaps even all of whom, have no personal interest in this action save as members of the general public. I am not of course prepared to say whether under certain circumstances they might not render themselves personally liable, nor do I consider how far the knowledge that they had no funds would justify them in defending an action such as the present. The claim made against the Commissioners is directed against them *qua* trustees, and accordingly the appropriate decree for expenses is the same as the appropriate decree for damages. In case the funds should prove insufficient, I am disposed to reserve any claims for personal liability.

Lord Neaves—I concur, but would observe that if the pursuers cannot get payment out of the public funds, perhaps they may do so otherwise.

Lord Ormidale—I am quite of the same opinion. Had this case been one in which an improper litigation was carried on by the Commissioners, it would have been quite right to find them personally liable, but that is not so. In such a case as that the public funds would not be liable; here they are so. The decree accordingly must, in the first instance at all events, go out against the Commissioners *qua* trustees.

Lord Gifford—I feel quite satisfied with the course proposed by your Lordships. Had it been shewn that the trustees of this public purse had gone and incurred heavy expenses, well knowing they could not as trustees pay them, matters might have stood on a totally different footing; and I am not prepared to say they could as individuals have escaped; but such is not the present case.

The Court, on the merits, adhered to the Lord Ordinary's interlocutor, recalled the finding as to expenses, found the Commissioners liable in expenses *qua* trustees, and reserved all questions as to personal liability in the event of the statutory funds proving insufficient.

Counsel for Reclaimers (Defenders)—R. Johnstone. Agents—J. C. & A. Steuart, W.S.

Counsel for Respondents (Pursuers) — Mackintosh. Agents—Webster & Will, S.S.C.