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

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

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

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

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

LORD KINNEAR was absent.

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

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

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

Friday, June 22.

SECOND DIVISION.

[Sheriff of Perthshire.

M'LAREN AND OTHERS *v.* HOUSTON.

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

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

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

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

years prior to the action; that the pursuer's possession included the ground up to the east face of the gable, the line of which was the boundary between the parties, and that the projection of the defender's roof was an invasion of the right of the pursuer, who was entitled to interdict.

William Houston, dairyman, residing in Hill Street, Coupar Angus, was proprietor of a byre, the north and south wall and the roof of which rested against the east gable-wall of a house belonging to James Alexander Playfair M'Laren. In the course of certain building operations M'Laren extended his roof so that it projected 7 or 8 inches over the roof of the byre.

Houston raised an action of interdict against M'Laren in the Sheriff Court at Perth.

The defender in answer averred—"Explained that pursuer has no west boundary wall to his byre. Explained further, that the scarcement or foundation of the defender's east wall projects, and always has projected, fully 11 inches beyond the wall itself, and the new roof only projects 7 inches, or 4 inches more than the former roof projected."

The defender pleaded—"(2) Defender's operations being within his boundary, the pursuer's crave for interdict should be refused, with expenses."

The Sheriff-Substitute (GRAHAME) allowed a proof, from which it appeared that each party had a good and sufficient title to his property, and had possessed it for more than fifty years previous to the date of the action. The defender's house had been built in 1770, but there was nothing to show whether it was built upon the extreme verge of his property or not. The scarcement stones upon which this gable-wall was founded projected 11 inches eastwards from it. The north and south walls of the byre rested upon the scarcement stones, and the walls and roof of the byre rested against the gable. The top of the scarcement stones were some inches above the floor of the byre.

Upon 11th January 1894 the Sheriff-Substitute found that the defender did not propose to project his roof beyond the boundary of his property, and refused the interdict.

Upon appeal the Sheriff (JAMESON) recalled the Sheriff-Substitute's judgment, and found (1) that the pursuer and defender M'Laren were conterminous proprietors of certain subjects in Coupar Angus, situated to the west of Hill Street; (2) that in 1892, and for forty years previous, the state of the subjects was as follows—there was an old two-storey house on the defender's property, with its east gable immediately adjoining the pursuer's property, while on the pursuer's property there was erected a building, latterly used as a byre, the walls and roof of which were built close up to and rested on the said east gable of the defender's house, and the scarcements of the foundations of said gable projected about 9 inches beyond the east face of the gable; (3) that the title-deeds of the parties merely described the properties as bounded by each other; (4) that at the date of raising the present action the defender M'Laren, whose property lay immediately to the west of the subjects occupied by the pursuer, was carrying on certain building operations in connection with the rebuilding of his house; (5) that the roof of the defender M'Laren's new house projected 7 inches or thereby beyond the line of the east face of the east gable of the defender's old house: Found in point of law (1) that the titles of the parties fell to be interpreted by the possession had twenty years prior to the raising of this action; (2) that the possession had by the pursuer and his predecessors, as above described, was sufficient in law to constitute possession of the ground up to the line of the east face of the east gable of the defender's old house, notwithstanding the projection of the foundations of said gable beyond said line, and that said line must therefore be held to be the boundary between the property of the pursuer and that of the defender M'Laren; (3) that the defender M'Laren's building operations, so far as they consisted of projections of the roof or other portions of the new house beyond the line of the east face of the east gable of the old house, constituted an invasion of the pursuer's rights of property, and that the pursuer was entitled to interdict against said proceedings: Therefore interdicted the defenders, and all others acting for them, or under the instructions of any of them, from encroaching upon the pursuers's property on the west boundary thereof, and specially from building, or continuing to build, a roof projecting over the roof eaves and side walls of the pursuer's byre, being part of the pursuer's property and subjects in the police burgh of Coupar Angus, to the west of Hill Street there, and situate said byre property and subjects between certain subjects, of which the defender M'Laren is proprietor, and Hill Street aforesaid, &c.

"*Note.*—The findings in the interlocutor sufficiently explain the grounds on which I have decided this case. I have felt it to be a narrow one, and it was not without difficulty that I arrived at the conclusion I have done. I am of opinion that the projection of the scarcements of the foundation of the defender's old house beyond the line of the gable wall does not raise a presumption that these scarcements were within the original boundary of the defender's property. On the contrary, I think the presumption rather is that the defender's predecessors desired to take full advantage of their property by building the gable up to their boundary line, and this necessarily involved some projection of the scarcements into the adjoining property. I believe this to be a common practice, and I may refer to the case of *Leonard and Others* v. *Lindsay & Benzie*, 13 R. 959, as an illustration of it. This view of what was the boundary between the properties is further confirmed by the fact that when the pursuer's predecessors came to build, they built close up to the east face of the defender's east gable, and in fact

rested their house upon that gable, and that has been the state of matters for more than forty years, and I think it constitutes possession by the pursuer and his authors of the ground up to the line of the east face of the east gable of the defender's old house for that period, and as the titles fall to be interpreted by possession, I hold that the boundary line between the two properties is the line of the east face of the east gable of the defender's old house. There is no dispute that the defender's proposed roof will project over the line, and I have granted interdict against the operations to that effect. Should this decision become final, I might suggest that this is a case in which the parties might make some reasonable arrangement for the present, reserving the pursuer's rights in future should he thereafter desire to raise the roof of his house."

The defender appealed, and argued—There was a presumption that the scarcement stones were upon the defender's own land, because it was more likely he would keep his gable wall back a few inches from the verge of his own land rather than trespass upon his neighbour's land. The analogy which the Sheriff supposed to exist between this case and *Leonard* did not exist, because that was a case of two houses in a street joined together, while each house was held in this case under a separate title—*Gariochs* v. *Kennedy*, March 7, 1769, M. 13,178. Assuming, however, that the pursuer had acquired a right of property in the scarcement stones by prescription and possession, regard must be had to what he had acquired, and all that he had got was the right to rest his walls upon them; he never had used any but the extreme end ones, and so could not claim right to build his walls upon the other stones or to raise it higher.

The respondent argued—The title-deeds merely described the properties as bounded by each other. They therefore fell to be interpreted by possession. It was clear that for fifty years pursuer had possession of the ground which he now claimed. It was not a case of both parties having possession. Defender had not possession of the ground by his scarcements. The pursuer's byre was built on his scarcements, and the pursuer had possessed these for the prescriptive period, and they were now his. Pursuer had therefore exclusive possession of the ground in question. The presumption was that this possession was in virtue of a right of property, and not merely by tolerance of the defender. In any event, what the pursuer had acquired was not a servitude of support, but a right of property to the ground up to the east gable of the defender's house. The evidence further showed that it was probable that this was the original boundary, as the wall dividing the two properties, and which was built by the defender, was in a line with the gable of his house, and not with the scarcements. There was no presumption that scarcements were within the defender's property; and it was the common practice to project these into adjoining property—*Leonard* v. *Lindsay*, June 11, 1886, 13 R. 959. In any view, the complainer had had such possession as entitles him to a possessory judgment.

At advising—

LORD JUSTICE-CLERK—This case is very unfortunate for all parties, as the matter in dispute is of trifling value. The facts of the case are that the defender, who owns a certain property in Coupar Angus upon which a house or cottage is built, has recently raised the height of the house, and in doing so has endeavoured to put the roof of his house a few inches further out than the wall which supports it. Neither party has any title to their property which specifies the boundaries of it, each property is bounded by the other, and while the defender has had his house for fifty years the pursuer has had right and has occupied a byre next it for more than forty years. The two side walls of the byre rest upon the scarcement stones of the foundation of the house, but the byre has no end wall, and is bounded by the defender's wall.

The defender now says that there is a presumption that in making the scarcement of his gable wall outside the line of the wall itself, he had put it upon his own property, and that in fact the line of the scarcement was the extremity of his property on that side.

I agree with the Sheriff that there is no presumption of that kind at all. The fact is that for fifty years or so the pursuer or his authors have been in possession of all the ground that lies outside the gable wall itself, as it stands above the ground. The Sheriff has therefore found that the defenders have no right to project their roof beyond the line of the gable wall over any part of the byre which has been possessed by the pursuer. I think he is right, and that we must find to the same effect.

LORD RUTHERFURD CLARK—This is a very plain case. It is, I think, impossible to doubt that the pursuer is the proprietor of the whole area of the byre. It is enclosed by four walls, of which the defender's gable is one, and it has been possessed by the pursuer for more than the prescriptive period upon a sufficient title.

It appears that the scarcement stones of the defender's gable are within the area of the byre, and the defender relies on this fact as proving that the line of these stones is the boundary. At the best, there is a mere presumption which in my opinion must yield to the clear proof by which the ownership of the pursuer is established.

LORD TRAYNER—I am of the same opinion. The question is whether the projection of the defender's roof from his gable wall over the roof of the pursuer's byre is an invasion of the pursuer's property. The defender justifies his action on the ground that the projection complained of is not carried beyond the line of the scarcement stones which he says is the boundary of his property. He asks us to assume that

this is so, and maintains that there is a presumption that when he built his house, he kept his gable within the line of his feu. In my opinion there is no such presumption. I cannot say whether the defender, in building his house, went to the verge of his property or not, but it is certain that the pursuer's byre, which extends eastwards from the gable of the defender's house, has been in the occupation of the pursuer on a habile title for fifty years.

In these circumstances I think he must be regarded as the proprietor of the *solum* east of the gable, including the ground on which the scarcement stands. I think there has been an infringement of the pursuer's right, and that he is entitled to our judgment.

LORD YOUNG was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties in the appeal against the interlocutor of the Sheriff of Perth, dated 16th April 1894: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore dismiss the appeal and affirm the interlocutor appealed against, and of new interdict the defenders and all others acting for them or under their instructions, in terms of the interdict in the said interlocutors, and decern," &c.

Counsel for Appellant—Vary Campbell—H. Johnston — Orr. Agents — Miller & Murray, S.S.C.

Counsel for Respondent—Macfarlane—Graham Stewart. Agent — John Dobie, Solicitor.

Wednesday, June 13.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

M'KENZIE (FRASER'S TRUSTEE) *v.* CAMPBELL.

Agent and Client — Money Handed by Person Accused of a Crime to his Agent for the Purpose of Preparing for his Defence—Revocable Mandate—Sequestration of Client—Accounting by Agent.

A person apprehended on a criminal charge handed money to his agent with instructions to prepare for his defence, and also to pay on his behalf any sum he might direct. His estates were sequestrated shortly thereafter, and before the trial took place.

Held that the case was ruled by that of *Pollitt*, 1893, L.R., 1 Q.B. 175 and 455, that the money remained under the client's control, that the mandate was revocable at his will and fell by his sequestration, and that after sequestration his agent held the moneys entrusted to him for behoof of the creditors, and was bound to account therefor to the trustee in bankruptcy.

Case of *Charlwood*, 1894, L.R., 1 Q.B. 643, *distinguished.*

Bankruptcy — Arrestment within Sixty Days of Sequestration—Bankruptcy Act 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 108.

The 108th section of the Bankruptcy Act provides that "No arrestment . . . of the funds . . . of the bankrupt on and after the sixtieth day prior to the sequestration shall be effectual; and such funds . . . shall be made forthcoming to the trustee."

Held that an arrestment used within sixty days of sequestration is not absolutely ineffectual. It creates no preference in favour of the arresting creditor, but the arrestee must account for money so arrested, and make it forthcoming to the trustee in bankruptcy.

Thomas James Fraser, corn factor, Glasgow, was apprehended upon 11th October 1893 on a charge of forgery.

On the 12th and 13th October he handed over to his agent James Murdoch Campbell, Glasgow, sums amounting to about £250, and to him he wrote the following letters—"12*th October* 1893.—With reference to the money which I have instructed you to receive from Mr Howie, my cashier, and take possession of, I request and authorise you to use the same for the purposes of my defence in the criminal charge against me, in such manner as you may think advisable, as also to pay on my behalf any sum or sums that I may direct you." "14*th October* 1893.—From the moneys in your hands, handed to you by me, I instruct you to pay for my maintenance while in prison awaiting trial. You will also note that you have to pay for the food, &c., I had in the police office. You are also to pay for any underclothing, collars, &c., also for the papers and stamps you are to send me through the governor."

Upon 14th October 1893 arrestments at the instance of certain creditors of Fraser for a total sum of £1120 were used in Campbell's hands, and upon 25th October Fraser's estates were sequestrated, when Robert Campbell M'Kenzie, C.A., Glasgow, was appointed trustee.

Mr M'Kenzie's appointment was confirmed on 13th November, and the following day he wrote to Campbell asking him to account for all moneys in his hands received from Fraser as at 14th October, under deduction of the sum necessary to meet his business account up to that date. This Campbell refused to give, but promised to account to the trustee for any surplus in his hands after carrying out Fraser's defence.

Fraser's defence was arranged for, but on 27th December 1893 he pleaded guilty, and was sentenced to a period of penal servitude.

On 20th November 1893 Mr M'Kenzie brought an action against Campbell to have him ordained to account for the whole intromissions with Fraser's means and estate had by him as factor or agent for Fraser. After setting forth the facts given above, the pursuer pleaded, *inter*