Counsel for the Pursuers — Dundas — Howden. Agents — Mackenzie & Black, W.S.

Counsel for the Defenders—George Watt—A. M. Anderson. Agent—J. L. Officer, W.S.

Friday, June 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

LIVESEY *v.* PURDOM & SON.

Agent — Custom — Custom Regulating Business Relationship between Two Solicitors in England not Applicable between One Solicitor in Scotland and One in England.

An alleged general custom having the force of law in England, by which one solicitor in England instructing another solicitor in England in a litigation on behalf of a client, becomes personally liable for costs incurred by the solicitor employed—*held* not to apply to the case of a solicitor in Scotland instructing a solicitor in England.

In August 1891 Thomas Purdom & Son, solicitors, Hawick, wrote to J. M'Keever & Son, solicitors, Carlisle, introducing their client J. A. Macdonald, contractor, Hawick, in order that an action at his instance against the Corporation of Workington might be raised and prosecuted by Messrs J. M'Keever & Son.

The action was brought but was unsuccessful. J. A. Macdonald was unable to pay the balance of the account incurred by Messrs M'Keever & Son for professional services rendered by them and their London agents in connection with the action.

During the progress of the action the firm of J. M'Keever & Son in March 1892 assigned their business to the firm of J. M'Keever, Son, & Livesey, and the latter firm in August 1892 assigned their business to Alfred John Livesey, solicitor, Carlisle. The latter became entitled under the assignations to all unpaid accounts due to his authors.

In January 1894 Mr Livesey raised an action against Messrs Thomas Purdom & Son for the sum of £604, 15s. 7d., being the amount of their account for services rendered in connection with Mr Macdonald's action.

The pursuers averred, *inter alia*—"(Cond. 5) By the law of England, a solicitor employing another solicitor in the conduct of an action for a client, as in the present case, is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred. The contract of employment between the defenders and the said John M'Keever, and J. M'Keever, Son, & Livesey, and the pursuer, is an English contract, and the rights and liabilities of parties thereunder fall to be determined by the law of England, according to which the defenders are liable in payment of the account sued on.

The defenders pleaded, *inter alia*—"(3) The defenders never having employed the pursuer or his alleged predecessors or their London agents, to perform the services and to make the payments charged for, should be assoilzied. 4. *Separatim*, assuming that the work charged for was done, and the outlays stated in the pursuer's account were made on the instructions of the defenders, they acted as agents for a disclosed principal, and are not themselves responsible to the pursuer or his alleged authors."

After hearing proof the Lord Ordinary (KYLLACHY) on 6th April pronounced the following interlocutor:—"Finds that the contract of employment, being to be performed in England, its construction and effect falls to be determined by the law of England: Finds that by the law of England an agent duly authorised, contracting on behalf of a disclosed principal, does not pledge his personal credit: Finds that by custom, judicially recognised, there is an exception to this rule in the case of contracts of employment between country solicitors in England and also between country solicitors in England and London solicitors, but that the pursuer has failed to prove that the said exception applies where, as in the present case, one of the parties to the employment is not a solicitor practising, or entitled to practise, in England: Finds, therefore, that the defenders are not personally liable to the pursuer for the balance of the account sued for: And assoilzies them from the conclusions of the action, and decerns."

"*Note.*— . . . The matter to be decided is whether the defenders, notwithstanding that they acted for a disclosed principal, are personally liable in respect of an alleged rule of the law of England to the effect, as stated by the pursuer, 'that a solicitor employing another solicitor in the conduct of an action for a client as in the present case is held to employ him as his own agent in the matter, and is personally responsible to him for all costs and charges incurred.' . . .

"It is not disputed that the contract being to be performed in England its construction and effect must be determined according to English law; and as to that law English counsel have been examined on both sides. There does not, however, appear to be any real controversy as to what the law of England is. It is, on the one hand, admitted that by the general law of England an agent contracting on behalf of a disclosed principal binds his principal and not himself. On the other hand, it is also admitted that to this rule there is in England an exception established by custom, and judicially recognised, to the effect that an English country solicitor employing a London solicitor on behalf of a client becomes personally liable for the latter's costs, and that the result is the same as between English country solicitors when they employ one another. The point to be decided is whether the present case falls within the rule or within the exception.

"It appears to me that the parties here

must be held to have contracted with reference not to the exception but to the general rule. In other words, I do not think it is proved that the exception in question extends beyond the case of solicitors practising and entitled to practise in England. It is clear upon the evidence that the exception depends not upon any general principle of jurisprudence, but upon what seems properly described as a custom judicially recognised; and I do not, I confess, see how that custom can be extended so as to include a case which can never come within it. The defenders here are no doubt solicitors—that is to say, they practise the profession of the law; but they are not qualified to practise as solicitors in England, and in any question with English solicitors they are, I apprehend, simply laymen.

"On the whole, therefore, I have come to the conclusion that according to the law of England the defenders are not liable, and are entitled to absolvitor."

Against this interlocutor the pursuer reclaimed.

The following are the arguments of the parties, and the opinions of the Court upon the point reported.

Argued for pursuer—By the common law of Scotland a solicitor who instructed another to conduct a case was liable to the latter in the expenses incurred. No doubt the Law-Agents Act 1873 (36 and 37 Vict. cap. 63), sec. 1, altered the common law rule as far as law-agents in Scotland were concerned, but this was an exception, the common law rule still applied when either of the solicitors was not a law-agent. It had been proved that by a general custom throughout England an English solicitor employing another on behalf of a client was liable for expenses incurred by the latter. Therefore both in England and Scotland the same rule applied. The principle thus ruling in both countries necessarily also applied to the case of one solicitor in one of these countries employing a solicitor in the other.

Argued for the defenders—Even if it was assumed that there was here a contract of employment, the client had been disclosed to the pursuer, and the defenders had undertaken no responsibility guaranteeing the pursuer against loss if the client was unable to pay the expenses of the litigation. A general custom affecting English solicitors *inter se* had no application to this case. The judgment of the Lord Ordinary was right and ought to be upheld.

At advising—

LORD JUSTICE-CLERK—A great deal has been said about an alleged custom in England, by means of which an English solicitor, when he, on behalf of a client, employs another in a litigation, becomes liable for the expenses incurred by the solicitor employed in carrying on the litigation, there being another term of the contract by which the solicitor so liable is entitled to one-half of the profits. An attempt was made to show that this custom applied to the case of a Scottish solicitor who was the means of an English solicitor being employed. I see no possible ground for that. This custom exists amongst a defined class, viz., English solicitors *inter se*. But there is no such custom between agents in Scotland and solicitors in England. We cannot therefore give any effect to this argument.

I have therefore come to the conclusion that the result arrived at by the Lord Ordinary is right.

LORD YOUNG—It is said that a certain custom has grown up and now prevails among solicitors in England, and is applicable to the facts of this case. That custom happens to be—there are customs like it in trade and in that of shipbuilding specially—that if one solicitor introduces a client to another solicitor in order that a specific piece of business should be carried out, there shall be understood to have arisen a certain relation between the two solicitors. The first solicitor shall be held, unless he expresses himself to the contrary, to guarantee that the client he has introduced is a good and paying client, and in return he is to receive for his services in effecting the introduction one-half of the profits of the business to be performed.

Now, I am of opinion that that custom, which I assume has grown up and reigns among English solicitors, has no application to the facts of this case, which is not one between English solicitors. If the solicitors in Carlisle intended to hold Messrs Purdom & Son liable to them for the account, they should have taken a guarantee from the latter to that effect.

The law of Scotland recognises established customs, provided they are honest and expedient, and will enforce them as furnishing the terms of a contract in regard to matters where nothing is expressed. Custom is matter of fact which requires to be established to the satisfaction of the Court, and which when it is of such a nature as is here alleged, the Courts get to recognise and apply without evidence. But the idea that such a custom applies here cannot, in my opinion, be entertained.

LORD RUTHERFURD CLARK—I have come to the same result. I think that the custom does not apply to the present case.

LORD TRAYNER—I agree with the views expressed.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find that the defenders admit that a sum of £75 is due by them to the pursuer: Find that the defenders are not due to the pursuer any further sum, whether as having employed the pursuer on their responsibility to conduct the litigation for James Alexander Macdonald against the Workington Corporation or otherwise: Decern against the defenders for the said sum of £75: *Quoad ultra* assoilzie the defenders

from the conclusions of the summons, and decern."

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

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

Tuesday, June 19.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

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

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

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

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

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

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

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

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

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

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