ing its general scheme, together with a claim of benefits under the will, was any part of the contemplation or intention of the testator. On that subject, also, I think Lord Johnston has come to a correct conclusion.

LORD ROBSON—I concur, and I have nothing to add to the reasons which have been stated with such fulness.

LORD CHANCELLOR—I also agree.

Their Lordships reversed the order appealed from, with expenses out of the general estate, and not out of any particular portion.

Counsel for the Appellant—Macmillan. Agents—Webster, Will, & Company, W.S., Edinburgh—Grahames, Curry, & Spens, Westminster.

Counsel for Respondents—Blackburn, K.C.—Leadbetter. Agents—W. & J. Cook, W.S., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Friday, December 9.

SECOND DIVISION.

[Sheriff Court at Cupar.

GRAY *v.* ST ANDREWS DISTRICT COMMITTEE OF FIFE COUNTY COUNCIL AND OTHERS.

Statute—Construction—Imperative or Permissive Words—Highways (Scotland) Act 1771 (11 *Geo. III, cap.* 53), *sec.* 1.

Road—Statute Labour Road—Width—Highways (Scotland) Act 1771 (11 *Geo. III, cap.* 53), *sec.* 1.

The Highways (Scotland) Act 1771, sec. 1, proceeds on the following preamble—"Whereas by an Act of the Parliament of Scotland, passed in the year 1669, and entituled 'Act for repairing Highways and Bridges,' it is enacted that the said highways shall be twenty feet of measure broad at least, or broader if the same have been so before"—and enacts—"That the justices of the peace and commissioners of supply for the respective shires and stewartries, and the commissioners and trustees of turnpike roads established by special Acts of Parliament within that part of Great Britain called Scotland, shall have power, and they are hereby authorised and empowered, to make, repair, clear, widen, and extend, and to keep in good repair after being so cleared, widened, and extended, the several highways and roads under their management and direction respectively, so as the same shall be in all places full twenty feet width of clear passable road, exclusive of the bank and ditch on each side of such highway or road respectively."

A statute labour road in Fife had been made of the width of 25 feet, but at a certain place it had been narrowed to a width of 11 feet 6 inches by means of obstructions placed thereon by the road authorities. A man who had been injured in a driving accident at this place brought an action of damages against the road authorities. He proved that the accident was due to the narrowness of the road.

Held (1) that the enactment in the Highways (Scotland) Act 1771, sec. 1, as to the width of the road was imperative, not empowering only; and (2) that accordingly the defenders were bound to maintain the road in question so as to afford to the public a clear passable width of twenty feet, and having failed to do so were in fault.

Road—Reparation—Statute Labour Road—Delegation of Duty as to Half of Road to Another Authority—Accident to Member of Public through Failure to Maintain Road of Statutory Width—Liability to Make Reparation—Joint and Several Liability where Encroachment on both Halves of Road.

The *medium filum* of a certain statute labour road was for 1000 yards the boundary between the jurisdictions of the A and C District Committees. By an arrangement between the two Committees which had subsisted for many years, 500 yards of the said road had been wholly maintained by the A Committee, and 500 by the C Committee. A person who had been injured in a driving accident, which occurred on the part of the road maintained by the A Committee, brought an action of damages against both Committees, in which he proved that the accident had been caused by the road having been narrowed, by heaps placed on both sides thereof, to less than the statutory minimum width of twenty feet. The C Committee maintained that in virtue of the said arrangement sole responsibility for the road rested with the A Committee, and that they were not liable for the said accident. The A Committee maintained that the liability was joint and several.

Held (1) that the arrangement founded on did not relieve the C Committee from statutory liability as in a question with the public for the proper construction and maintenance of the half of the road lying within its own jurisdiction, and (2) that as the accident had been caused by the road having been illegally narrowed by obstructions placed upon both sides thereof, both Committees were jointly and severally liable to the pursuer for the damage he had suffered.

The Highways (Scotland) Act 1771 (11 Geo. III, cap. 53), sec. 1, is quoted *supra in rubric.*

David Gray, 270 Great Western Road, Aberdeen, brought an action in the Sheriff Court at Cupar against the St Andrews

and Cupar District Committees of the Fifeshire County Council, in which he claimed damages from the defenders in respect of an accident sustained by him while driving along the statute labour road from Newport to Balmerino. He averred that the dogcart in which he was being driven came into contact with a cart belonging to David Gray, farmer, Gauldry, which was proceeding in the opposite direction, with the result that he was thrown from the dogcart and seriously injured. He further averred that the road was at the place of the accident under the management and control of both defenders, and that the said accident was due to the fault of both.

The western boundary of the St Andrews district strikes the said road at a point a few yards west of the bridge which carries it over the North British Railway line. Thereafter the said boundary runs along the centre of said road for a distance of about 1000 yards, and then strikes south through the fields. For the said 1000 yards the southern half of said road is within the St Andrews district, the northern half being within the territory of the Cupar District Committee. Since the Local Government Act of 1889, instead of each of the defenders keeping up the side of the road lying within its district, the 500 yards or thereby to the east had, by custom or by arrangement and for convenience, been maintained on both sides by the St Andrews District Committee, and the 500 yards or thereby to the west by the Cupar District Committee. The said practice was also followed by their predecessors under the Roads and Bridges Act of 1878. In so doing the St Andrews District Committee and their predecessors, *quoad* the northern side of the easterly half of said road, acted as the servants of the Cupar District Committee and their predecessors, while *quoad* the southern side of the westerly half the Cupar District Committee and their predecessors acted as the servants of the St Andrews District Committee and their predecessors. The St Andrews District Committee, in reference to the question of liability as between them and the Cupar District Committee, admitted that with reference to the portion of road where the accident occurred, no money payment has been made by the Cupar District Committee to the St Andrews District Committee since the arrangement between those Committees was entered into, the St Andrews District Committee being compensated for their outlay on said piece of road by the Cupar District Committee maintaining an equivalent stretch of road further to the west.

After sundry procedure in the Sheriff Court the case came to depend in the Court of Session, and the Second Division allowed a proof before answer, which was taken by Lord Ardwall.

The *facts* of the case with regard to the accident, as established by the proof, appear from the following findings in fact made by the Court—"Find in fact (1) that the pursuer, while being driven in a dogcart along the statute labour road leading from Newport to Balmerino in Fife on 2nd February 1909, and at a point 440 yards or thereby west of the bridge across the North British Railway Company's line, was thrown out of the said dogcart and sustained personal injuries; (2) that the pursuer was thrown out owing to the step of the dogcart coming in contact with a cart which had been proceeding in the opposite direction, but which was then stationary; (3) that at the said point the said road lay to the extent of its southern half within the district of the defenders the St Andrews District Committee, and to the extent of its northern half within the district of the defenders the Cupar District Committee; (4) that the defenders failed to maintain the said road at the said place of such a width as to afford a clear passable road of 20 feet in width; (5) that the road at said place had been constructed of a greater width than 20 feet, but that the defenders by placing and leaving bings of road metal and heaps of road scrapings on one side of the road, and heaps of road scrapings on the other side, with gullies cut here and there between said heaps, had narrowed the clear passable road to 11 feet 6 inches in width; (6) that the accident to the pursuer is not proved to have been caused by any fault on the part of the pursuer or of the driver of the dogcart, but was caused by there being only 11 feet 6 inches of a clear passable road at said place; and (7) that the pursuer has sustained loss, injury, and damage through said accident to the amount of £175."

Argued for pursuer—The defenders were liable at common law for negligence. There was a manifest danger on the road which they were bound to take means to remove. It was no answer to say that the obstruction could have been seen—*M'Fee* v. *Police Commissioners of Broughty Ferry*, May 16, 1890, 17 R. 764, 27 S.L.R. 675. The defenders, in any event, were liable in respect of their breach of the statutory duty to provide a highway having a 20 feet width of passable road — Highways Act 1771 (11 Geo. III, cap. 53), sec. 1. It appeared from the preamble of this Act that the enactment in question (section 1) really provided machinery for carrying out the then existing Scots law that roads should be 20 feet wide (see Act of 1669, cap. 16). The public had thus had a right to have roads of such width. The words in section 1 of the Act of 1771, though *prima facie* permissive, were here obligatory, for enabling words fell to be construed as compulsory whenever the object of the power was to effectuate a legal right —*Julius* v. *Bishop of Oxford*, 5 A.C. 214 (Lord Blackburn at 243). Moreover, the powers conferred here were for the public benefit. A similar provision had been considered imperative in *Walkinshaw* v. *Orr and Others*, January 28, 1860, 22 D. 627 (Lord Justice-Clerk Inglis at p. 631). Sections 2-8 of the Act of 1771 also indicated that the words in section 1 must be considered imperative. Up to 20 feet the land could be taken from owners without compensation; beyond 20 feet questions

of compensation arose (section 5). *Quoad* turnpike roads, the provision had been repealed by the General Turnpike Act of 1831 (1 and 2 Will. IV, cap. 43)—see preamble—which was itself repealed by the Roads and Bridges Act of 1878 (41 and 42 Vict. cap. 51), sec. 122. The Act of 1771 still remained in force *quoad* roads not turnpike, and applied to the road in question, which was a statute labour road — Short Titles Act 1896 (59 and 60 Vict. cap. 14). It was not necessary in all circumstances that a made road should be maintained of 20 feet width, but the roadway to this extent must be kept clear of obstructions — *Cromar* v. *Western District Committee of East Lothian County Council*, February 18, 1902, 9 S.L.T. 437 (*per* Lord Low). Furthermore, even if the words in the enactment were considered merely empowering, the power had been exercised, for the road was 25 feet broad between fences, and if the donee of a power chose to exercise it he must do so in conformity with the power—*Magistrates of Inverness* v. *D. Cameron & Company*, June 24, 1903, 5 F. 977 (Lord Kinnear, at p. 988), 40 S.L.R. 729. Cupar District Committee could not get rid of their statutory duty by delegating it to St Andrews — *Stephen* v. *Thurso Police Commissioners*, March 3, 1876, 3 R. 535, 13 S.L.R. 339; *Hardaker* v. *Idle District Council*, [1896] 1 Q.B. 335; *Barnett* v. *Mayor, &c., of Poplar*, [1901] 2 K.B. 319. This was not a contract between the two Committees under section 56 of the Roads and Bridges Act (*sup. cit.*). It was merely an arrangement between them. They were jointly and severally liable, as the accident was caused by their combined fault in respect of the deficiency of width on both sides of the road. The pursuer was accordingly entitled to a joint and several decree against both. If one of the defenders paid the whole sum, he could recover half from the other — *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, June 5, 1894, 21 R. (H.L.) 39, 31 S.L.R. 937.

Argued for defenders (St Andrews District Committee) — The Highways Act of 1771 (*sup. cit.*) did not impose an absolute obligation on road authorities that roads should be of a minimum width of 20 feet. The preamble indicated that the words were merely empowering, as it showed that under the then existing law—the Act of 1669, cap. 16, which introduced the system of statute labour — which the statute was repealing, it was imperative that roads should be 20 feet wide. In the previous Acts of 1617, cap. 8, and 1661, cap. 38, the words were imperative. Section 61 of the Turnpike Roads (Scotland) Act (*sup. cit.*), which prescribed 20 feet as the least legal breadth of a turnpike road, would have been unnecessary if the words in section 1 of the Act of 1771 had been imperative. No similar provision was found in the Statute Labour (Scotland) Act 1845 (8 and 9 Vict. cap. 41). That was just because the matter was to remain discretionary as regards statute labour roads. The general canon of construction laid down by Lord Justice-Clerk Inglis in *Walkingshaw* v. *Orr and Others* (*sup. cit.*) was inconsistent with *Julius* v. *Bishop of Oxford* (*sup. cit.*), and had been overruled by that case, which established that words which were in form permissive *prima facie* gave discretion. It was true that having in view the subject-matter of the statute they might impose a duty, but the fact that the statute was for the public benefit was not *per se* enough. There was nothing in this statute to make discretionary words obligatory. *Hart* v. *Lanark County Council*, March 10, 1904, 6 F. (H.L) 31, 41 S.L.R. 374, was also referred to. Furthermore, usage ought not to be left out of account. In point of fact, very few statute labour roads in Scotland were of the width of 20 feet. But even if the words of the statute were imperative, that was not enough to entitle the pursuer to succeed, unless the narrowness of the road directly conduced to the accident. It must be the *causa causans* thereof. The pursuer must show that his fault had not also contributed to the accident — *M'Naughton* v. *Caledonian Railway Company*, December 17, 1858, 21 D. 160; *Wilson* v. *Wishaw Coal Company*, June 21, 1883, 10 R. 1021, 20 S.L.R. 680; *Renney* v. *Magistrates of Kirkcudbright*, December 19, 1890, 18 R. 294 *rev.*, 19 R. (H.L.) 11, 28 S.L.R. 242, 30 S.L.R. 8; *Carse* v. *North British Steam Packet Company*, March 13, 1895, 22 R. 475, 32 S.L.R. 418; *Cayzer, Irvine, & Company* v. *Carron Company*, 9 App. Cas. 873; *Davies* v. *Mann*, 1842, 10 M. & W. 546; the "*Monte Rosa*," [1893] P. 23. The pursuer had not established that the proximate cause of the accident was the narrowness of the road. It had been proved that the actually inducing cause thereof was the negligence of the driver. If there was liability at all, Cupar and St Andrews were jointly and severally liable. Cupar could not free themselves of responsibility in a question with the public by means of the arrangement as to the upkeep of the road by St Andrews. Statutory responsibility cannot be got rid of by delegating it to a contractor—Glegg on Reparation (2nd ed.), pp. 28 and 29; *Stephen* v. *Thurso Police Commissioners* (*sup. cit.*); *Hardaker* v. *Idle District Council* (*sup. cit.*); *Holliday* v. *National Telephone Company*, [1899], 2 Q.B. 392. Even where a statute gave power to contract with a person for carrying out any of the operations it authorised, it was doubtful whether there was power to delegate—Glegg on Reparation (*sup. cit.*), p. 29; see *Aldred* v. *West Metropolitan Tramways Company*, [1891] 2 Q.B. 398; *Barnett* v. *Mayor of Poplar* (*sup. cit.*). If there was liability, there should be a joint and several decree against both sets of defenders, as they were both to blame — *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited* (*sup. cit.*); *Caughie* v. *Robertson & Company*, October 15, 1897, 25 R. 1, 35 S.L.R. 3.

Argued for defenders (Cupar District Committee)—They adopted the argument of St Andrews on the construction of the Highways Act of 1771 (*sup. cit.*). They

quoted in addition Maxwell on the Interpretation of Statutes (4th ed.), pp. 554-576; Hardcastle on Statutory Law (4th ed.), pp. 251-255; *in re Newport Bridge*, 1859, 2 E. & E. 377; *Beckett* v. *Campbell & Hutcheson*, January 22, 1864, 2 Macph. 482 (Lord Cowan at p. 486). Cupar had had nothing to do with the maintenance of this road for thirty years. It was therefore a pretty startling proposition that they should now be made responsible for its condition. There was no statutory obligation upon Cupar in a question with the public. By section 11 of the Roads and Bridges Act 1878 (*sup. cit.*) the management and maintenance of roads was vested in the county road trustees. They were the only body who could be sued—section 14. By section 16 it was provided that the county should be divided into districts and district committees be appointed. The district committees were merely the road trustees acting through subdivisions of their number—section 49. Sections 15, 26, 27, 29, 41, and 45 were also referred to. The Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) put the county councils in the place of the road trustees and left the duties as they were. The district committees of the county councils therefore took the place of the district committees of the road trustees. The County Council in carrying out its statutory duties must be held to have sanctioned the arrangement between St Andrews and Cupar. Sections 11, 16, 27, 71, 77, 79, and 82 of the Act were referred to. It had existed for thirty years, and every year documents were laid before the County Council that must have certiorated them of the arrangement. It was in effect an alteration in the boundaries of Cupar and St Andrews by the parent body. If the County Council assented to the arrangement Cupar got rid of her jurisdiction altogether. St Andrews were charged with the statutory duty. Even if Cupar were the authority charged with the maintenance of half the road, they had contracted with St Andrews to maintain it —Roads and Bridges Act 1878 (*sup. cit.*), section 56 — and their contractor, St Andrews, were alone liable in a question with the public — *Howitt* v. *Nottingham Tramways Company*, 1883, 12 Q.B.D. 16; *Aldred* v. *West Metropolitan Tramways Company* (*sup. cit.*). The proximate cause of the accident was the driver's negligence. If not, it was the bings of stone on the St Andrews side of the road that caused it. It was also to be observed that this road was 25 feet from fence to fence. If the obstructions placed there by St Andrews had caused the accident, there was negligence at common law, and St Andrews, who *de facto* had administration of the road, must be responsible.

At advising—

LORD ARDWALL — The accident out of which this action of damages arises was caused by a gig in which the pursuer was being driven by a servant of George Colley, coach hirer, Wormit, coming in contact with a cart belonging to Mr David Gray, farmer, Balgone, Fifeshire, with the result that the pursuer was knocked out of the gig and sustained the injuries which are spoken to by the medical witnesses.

It may be here stated that the driver of the gig was a lad experienced in driving, and that the horse was a quiet and well-behaved one.

The accident happened on the statute labour road leading from Newport to Balmerino in Fife. The road at the point in question, though it had been constructed of a width of about 26 feet between fence and fence, had at the time of the accident only a clear passable space of about 11 feet 6 inches, and the pursuer seeks to make the road authorities who are liable for the construction and maintenance of the road responsible to him for the loss and damage he has sustained through the accident.

I do not think it necessary to examine the evidence in detail, but I think the following facts are important, and are sufficiently established by the evidence.

The cart with which the gig collided was at the moment of the accident standing with its near wheel about 6 inches over the north verge of the road, and was at the moment stuck in a small water channel or gulley made for the purpose of carrying water off the road.

Taking the width of the cart, including the hub of the wheel, at 6 feet 2½ inches, and the width of the gig at 5 feet 7 inches, that amounts to 11 feet 9½ inches, or 3½ inches more than the width of the roadway; but deducting the breadth of one hub of the cart and one hub of the gig, as these might project over the verge on each side, this will amount to about 11 inches, and thus leave a space of about 7½ inches between the two crossing vehicles, assuming they were both as close to their respective sides of the road as possible. This was too little space for the ordinary exigencies of driving, and, as several witnesses put it, the road was dangerously narrow. With the cart in the position it was, there was a space of about 13 inches to spare for the gig to pass the cart. This in my opinion was insufficient for safety, considering the ordinary risks of driving and the presence of heaps of road metal on one side of the road. In this state of matters Fleming, the driver of the gig, when attempting to pass the cart caught the nave of the cart wheel with the step of the gig. It would thus appear that if the gig had, as the driver says it had, one of its wheels close to or upon one of the heaps of metal on the southern half of the road immediately before the collision, there must have been a slight approach towards the middle of the road in order to account for the accident.

It seems to me not very material, in the view I take of the case, to determine what caused the slight swerve which brought the step of the gig into contact with the wheel of the stationary cart. The carter thought the gig horse had shied a little. The driver of the gig says that his near wheel was on a heap or bing of road metal, and that it slipped down, with the result

of forcing the gig in a slanting direction out towards the centre of the road. There is also a suggestion that Fleming was in course of pulling his horse out from the side of the road sooner than he ought to have done. This, however, I do not think is proved, although I think it not unlikely that, not expecting that the cart would have stopped, he may have been so guiding his horse as that he would have cleared the cart if it had been proceeding on its journey, but came against it owing to its having unexpectedly stopped. But I think two observations are sufficient to dispose of this part of the case. The first is that the swerve was of the slightest, and would have had no bad results except for the undue narrowness of the road; and further, that it was the narrowness of the road that brought about the situation of difficulty and danger out of which the driver of the gig failed to extricate his vehicle without anything as it seems to me that can properly be held to amount to fault on his part. I do not think it is proved by satisfactory evidence that the driver of the gig was guilty of negligence, and of course it lay on the defenders to prove this. But even supposing that he was guilty of negligence, such negligence could not be imputed to the pursuer as contributory negligence on his part, and accordingly that fact would not disentitle the pursuer from recovering damages from the defenders if the accident was due in whole or in part to the undue or illegal narrowness of the road. For the reasons above indicated, I am of opinion that the road was too narrow for safety, and that it was to this narrowness that the accident was primarily and principally due.

The next question that arises is, Are the road authorities who are responsible for the maintenance of the road at that place guilty of a legal wrong so as to render them liable to the pursuer in damages? Counsel for the pursuer, while he relied for the most part upon a breach of statutory duty on the part of the defenders, also raised the question of their liability at common law for negligence. Now while I think it was the duty of the road authorities to take all reasonable means for the safety of the public, and although I think it has been shown that the road was too narrow at the point where the accident happened, which, I may observe, is the very narrowest part of the whole road, yet I think it is a question of some difficulty on the evidence whether it has been proved that the defenders were guilty of negligence at common law. The danger was not very obvious. The road had been used for many years, and there had been no complaints proved although there have been one or two accidents which did not lead to complaints being made, and it appears that this is the first collision which is proved to have taken place on the road.

I accordingly think that a clearer ground of liability is to be found in the breach by the defenders of their statutory duty.

The duties of road trustees with regard to maintaining a road of a certain width depends upon the statutes which have been passed on the subject of roads in Scotland. The first Act seems to have been the Act of 1617, cap. 8, which gave power to justices of the peace to mend highways and passages to and from any market town or seaport, and declared that the breadth of these highways should be 20 feet at the least, and that those of larger breadth should remain unaltered and be maintained by the justices of the peace. This Act was renewed in the same terms by the Act of 1661, cap. 38, and appears to have been the only existing provision for the construction or maintenance of public roads till the Statute of 1669, cap. 16, was passed, which introduced the system of statute labour. That Act provided that the road should be 20 feet broad at least, or broader "if the same have been so before, and shall be so repaired."

The next Act of importance on this subject is the Act of 1771 (11 Geo. III, cap. 53) entituled "An Act for Widening the Highways in that part of Great Britain called Scotland."

Section 1 of that Act provides that "the justices of the peace and commissioners of supply for the respective shires and stewartries, and the commissioners and trustees of turnpike roads established by special Acts of Parliament within that part of Great Britain called Scotland, shall have power, and they are hereby authorised and empowered, to make, repair, clear, widen, and extend, and to keep in good repair after being so cleared, widened, and extended, the several highways and roads under their management and direction respectively, so as the same shall be in all places full 20 feet width of clear passable road exclusive of the bank and ditch on each side of said highway or road respectively."

With regard to turnpike roads, which are included in the section just quoted, the provision regarding their minimum width is repealed, and since the passing of the Roads and Bridges Act 1878 the matter of their width is apparently in the discretion of the road authority. The road in question, however, is admitted to be a statute labour road, and none of the road or other statutes have repealed the provisions of the Act of 1771 regarding the minimum width of such roads, and accordingly the provisions quoted from the Act of 1771 are still subsisting and must be given effect to.

I think I may observe that these provisions in the case of many districts of the country might be found to operate harshly, and, if enforced, might be a means of imposing great burdens upon road authorities and the ratepayers, and there seems no good reason why, if the provisions as to the minimum width of turnpike roads have been repealed, similar provisions should not also be repealed with regard to statute labour roads. This, however, is not a matter for the consideration of the courts of law.

It was very forcibly and anxiously argued for the defenders that the words of the Act of 1771 must be construed as empowering

words, and not imperative. I am of opinion, however, that they must be dealt with as imperative. It is true that in the section quoted the justices of the peace are "authorised and empowered" to do certain things with regard to roads, but it is on the express condition and with the object that these roads shall be full 20 feet in width; and I think an examination of the rest of the Act, and particularly sections 5 and 7, show that it was the intention of the Legislature that it should be imperative on the justices of the peace and other road authorities to make and maintain the highways under their charge at full 20 feet in width.

Not only do I think that it may be inferred from the terms of the Act itself that it is imperative and not merely permissive as regards the direction that the trustees shall maintain the roads of a minimum width of 20 feet, but I think the general canon in the construction of statutes applies, that where powers are conferred in a statute for the public benefit they must be exercised, and the enactment is imperative. These are the words of Lord Justice-Clerk Inglis in delivering judgment in the case of *Walkinshaw* v. *Orr and Others* (22 D. at p. 631). In that case a similar provision to the present in the Roads Acts 1 and 2 Will. IV, cap. 43, and 4 Will. IV, cap. 41, was under consideration, and his Lordship went on to say—"This is a case in which the power is given clearly for the public benefit, and therefore *prima facie* it appears to me an imperative enactment." The provisions in that statute were to the effect that a turnpike road should not be less than 20 feet in width, and the Lord Justice-Clerk from the clauses in that Act, which are similar to those in the Act under consideration, said that he had no difficulty in drawing the following inferences—first, that the power to the trustees is a power which they are bound to exercise; and secondly, that no turnpike road is in a legal condition, or in a condition in which it should be allowed to remain for a single day, if it is of a less width than 20 feet.

The case of *Julius* v. *The Lord Bishop of Oxford* (5 A. C. p. 214) was founded on to the contrary effect, but that was a very special case and a very special statute; and there it was held that the case then under consideration was not such as to cast the duty on the bishop which the appellant maintained was cast on him by the Act, but it is noticeable that in that case Lord Blackburn said, on p. 241, "If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf"; and he quotes with approval the judgment of Justice Coleridge in *Reg.* v. *Tithe Commissioners* (14 Q.B. 474), where he says—"The words undoubtedly are only empowering, but it has been so often decided as to become an axiom that in public statutes words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." Lord Blackburn passes a certain criticism upon this statement, but adds this sentence—"The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right."

I accordingly do not consider that the decision in that case detracts from the authority of the observations of the Lord Justice-Clerk Inglis in *Walkinshaw's* case.

On this question, then, I am of opinion that it was compulsory upon the road authorities in charge of the road in question to maintain it so as to afford a clear passable width of at least 20 feet.

This view was well expressed by Lord Low in his opinion (copies of which were furnished to us at the discussion) in an Outer House case as follows:—"I do not mean to say that upon all statutory highways a made road must be maintained of a width of 20 feet. What width of made road it is necessary to maintain must be a question of circumstances, but I am of opinion that road trustees are bound to keep a roadway of the required width free of dangerous obstacles."

It is unnecessary to go over the various Road Acts for the purpose of showing (what has not been disputed in this case) that the bodies who are now responsible to make and maintain public roads in terms of the Road Acts are the district committees of the county councils throughout Scotland. Further, it is not necessary in this case to enter on the question of the construction of the road in question, or to inquire whether the road authorities had failed to make the road originally of the width of 20 feet, because, as has already been pointed out, the road as originally made was about 25 or 26 feet in width, and the fault of the road authorities really consisted in this very serious breach of duty that they laid down and permitted to remain on one side of the road heaps of broken road metal and road scrapings, and on the other side heaps of road scrapings, and in addition had gulleys cut at frequent intervals between these heaps, and in this way the width of the road was narrowed to the width of 11 feet 6 inches at the place where the accident happened.

The next question is what road authorities were under the Road and Local Government statutes liable for the upkeep of the road at the place where the accident happened. Now at this place, and apparently for some considerable distance on each side of it, extending to apparently 1000 yards in all, the boundary line between the parish of Forgan, which is within the jurisdiction of the St Andrews Road District Committee and the parish of Balmerino, which is within the jurisdiction of the Cupar Road District Committee, runs along the middle of the road in question. In terms of the Roads and Bridges Act, the road districts are made up of certain parishes, and the boundaries of the parishes are necessarily the boundaries of these districts. Accordingly, the southern half of the road at this place, which was in Forgan parish, ought

to have been maintained by the St Andrews District Committee, while the northern half of the road, being in Balmerino parish, ought to have been maintained by the Cupar District Committee; and undoubtedly these two bodies are responsible to the public for the proper construction and maintenance of the road in terms of the Road Statutes, at the place where the accident happened, each for the half of the road lying in its own district. There is no suggestion in the present case that there was a greater width of passable road to the north of the centre line of the road than to the south of the centre line of the road. Accordingly both District Committees were equally responsible for the narrowness of the road at the place where the accident happened, because it was owing to the deficiency of width on each side of the centre line of the road that the road came to be illegally narrow. It was thus the joint fault of the two road authorities that led to the accident, and it follows, in my opinion, that they are jointly and severally liable to the pursuer for the damage he has suffered.

The Cupar District Committee endeavoured to escape liability and to throw it entirely on the other defenders by pleading that in pursuance of an arrangement between them and the St Andrews District Committee the whole of the width of the road at the place in question had for more than thirty years been maintained by the St Andrews District Road Committee, the Cupar District Committee paying nothing to the St Andrews District Committee, who were compensated for their outlay on the said piece of road by the Cupar District Committee maintaining an equivalent stretch of road further to the west. This arrangement is set forth in the minute of admissions at the close of the oral evidence in the case.

I am of opinion, however, that whatever may be the effect of this arrangement on the liability *inter se* of the two District Committees, the Court cannot in this action (at all events without the consent of all the parties, which is not forthcoming) decide that question.

Section 56 of the Roads and Bridges Act 1878 (41 and 42 Vict. cap. 51) was referred to and founded on by the Cupar District Committee as justifying this arrangement, but an examination of that section shows that the arrangement or contract between the two committees set forth in the minute of admissions I have referred to was not entered into under that section of the Act at all, and did not conform to the conditions under which the contracts there mentioned require to be made. At best the Cupar District Committee can be in no better position with reference to the St Andrews District Committee than if there had been a regular contract between them for the upkeep of the road there; but in my opinion no such contract would have relieved them from their statutory liability as in a question with the public. I am therefore of opinion that the decree in this action must be against the two sets of defenders jointly and severally, leaving them to work out their own individual liability *inter se* as best they can.

With regard to the question of damages, that is a jury matter, and I am disposed to admit to the full the claim made by the pursuer, amounting in all to £103, 3s. 2d. Beyond that I cannot say that his injuries have been proved to be of a very serious nature, and I am of opinion that we should allow him such other sum for personal injuries as will bring up the total damages to £175, for which sum he will obtain decree.

LORD SALVESEN.—The facts in this case have been so fully and accurately stated by my brother Lord Ardwall that it is unnecessary to recapitulate them. The important question in the case is one of law, namely, whether the defenders were in fault in permitting the road at the place at which the accident happened to be so obstructed as to leave a clear width of no more than 11 feet six inches.

The statute relied on by the pursuer is that of 11 Geo. III. cap. 53. It proceeds on the following preamble—"Whereas by an Act of the Parliament of Scotland passed in the year 1669, and entituled Act for repairing Highways and Bridges, it is enacted that 'the said highways shall be twenty feet of measure broad at least, or broader if the same have been so of before'; and by the enacting clause it provides that the justices of the peace and commissioners of supply 'shall have power, and they are hereby authorised and empowered, to make, repair, clear, widen, and extend, and to keep in good repair after being so cleared, widened, and extended, the several highways and roads under their management and direction respectively, so as the same shall be in all places fully twenty feet width of clear passable road, exclusive of the bank and ditch on each side of such highway or road respectively.' The pursuer contends that while the statute in form confers only authority on the road trustees, it was imperative on them to exercise such authority, and that their failure to do so in the present case constitutes a breach of their statutory duty. The defenders, on the other hand, maintained that it was in their discretion to determine in any particular case the width of the statute labour roads under their charge, and that accordingly there was no statutory duty upon them to maintain a passable roadway of more than 11 feet 6 inches in breadth.

In the case of *Julius* v. *The Bishop of Oxford* (L.R., 5 A.C. 214) the House of Lords had occasion to consider the effect of enabling words in a statute, and they decided that such words by themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. At the same time, they held that there may be circumstances which may couple the power with a duty to exercise it, but that it is not enough to infer such a duty that the thing to be done is for the

public benefit or in advancement of public justice. On the construction of the Church Discipline Act they reached the conclusion that there were no grounds for holding that the words there used, which were *prima facie* permissive, imported obligation. While so deciding, all the noble Lords expressed the opinion that the question whether a public authority on whom a power is conferred is bound to exercise it must be solved *aliunde;* and, to use the words of Lord Selborne, "in general it has to be solved from the context, from the particular provisions, or from the general scope and objects of the enactment conferring the power"; and Lord Blackburn said (p. 241)—"If the object for which the power is conferred is for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right, when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the powers are equivalent to saying that the donee must exercise them."

Applying this rule of construction to the 1771 Act, I have no difficulty in reaching the conclusion that the enabling words there must be construed as *imperative.* As the preamble discloses, there was already a pre-existing obligation that highways should be 20 feet broad at least. There was thus a right on the part of members of the public using them to have them maintained of such width; and the object of the enabling clause was to secure that this pre-existing public right should be carried into practical effect. The Act would have entirely failed of its purpose if it had been understood from the first that the justices of the peace and commissioners of supply had an absolute discretion in the exercise of the powers conferred upon them. Up to a clear width of 20 feet the land necessary for the construction of a road could be taken from the owners without compensation; beyond that, and up to a breadth of 30 feet—which is the maximum breadth to which the widening of roads was authorised—the proprietors were to receive compensation. The sections of the 1771 Act which deal with this matter are 2 to 8 inclusive; and the language of section 2, which confers the power to widen beyond 20 feet, is in marked contrast to that of section 1. The words there are that "the commissioners may order and direct" the highways and roads to be still further widened and enlarged "in such places and for such distances as they judge to be for the public benefit." This power is obviously one which falls to be exercised or not exercised in the discretion of the donees.

In the case of the road in question it appears that the full powers conferred by the Acts of 1669 and 1771 had originally been exercised for the public benefit; for the road even at the place in question was 25 feet broad between the fences, and thus provision was made for a 20 feet width of clear passable road exclusive of the bank and ditch on each side. The case is therefore not so favourable to the defenders as if the statutory powers had never been exercised to their full extent; for even if the Statute of 1771 were construed as being permissive only as regards the original construction of the road, it might well be argued that the breadth of the passable roadway having been once fixed at 20 feet, the commissioners were bound to maintain it free from obstruction. Apart from this, I reach the conclusion, as already stated, that, having regard to the context, the general scope and objects of the enactment and the previous statute recited in the preamble, the enabling words in the 1771 Act are to be construed as imperative on the original donees whose obligation has admittedly been transmitted to the defenders. This conclusion is in accordance with the dictum of Lord President Inglis in the case of *Walkingshaw* (22 D. 627, at p. 631), although the general canon which he lays down for the construction of statutes requires to be modified in view of the opinions of the House of Lords in the case of *Julius.*

It follows that the road in question was at the time of the accident not in a legal condition; and if this condition caused or contributed to the accident to the pursuer — as I have no difficulty in holding — those who had the administration of the road and were responsible for its condition are liable in compensation.

I am not at all moved by the argument founded on the alleged similar condition of many statute labour roads in Scotland and the expense which, it is said, would be thrown upon the ratepayers in rural districts to clear or widen them so as to conform with the statutory provision. What was regarded as imperative in 1669 when roadmaking was in its infancy can scarcely be treated as impracticable now. I need scarcely say, however, that the statute does not lay any obligation on the road authorities to have the road metalled to the full extent of 20 feet. In the case of many country roads which are little used it would be entirely absurd to incur such expense; and the road trustees are free to exercise their discretion as to this.

While the breach of the statutory duty is a sufficient ground on which to rest the liability of the defenders, I am by no means clear that the pursuer would not have had a good action at common law, in view of the fact that the road had originally a clear width of 20 feet, and that there was no good reason why it should have been narrowed by obstructions placed at each side of the metalled part. It is a common law duty of road trustees to maintain the roads under their charge in a condition in which they may be safely traversed by those using them, and I am inclined to think that the defenders here did not fulfil their common law duty. A road which is barely wide enough for two vehicles to pass each other is probably more dangerous than one which is obviously insufficient, for the attempt will not then be made. It is not, however, necessary to decide this question, and on the other points I so entirely concur with the opinion of Lord

Ardwall that I deem it unnecessary to add anything.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

The Court pronounced this interlocutor—

". . . Find in law (1) that under the Road Statutes, and particularly 11 Geo. III, cap. 53, the defenders were bound to maintain a clear passable road at said place of not less than 20 feet in width; (2) that the defenders were in breach of said duty in laying down and allowing to remain on said road obstructions which reduced the width of clear passable road to 11 feet 6 inches; and (3) that the defenders were under the Road Acts and the Local Government Act each liable to maintain one-half of the said road at said place of a clear passable width of not less than 20 feet, and that it was reduced to the width of 11 feet 6 inches by and through their joint fault, and that therefore they are liable to the pursuer jointly and severally for the loss and damage sustained by him," &c.

Counsel for Pursuer—M'Lennan, K.C.—A. M. Stuart. Agent—J. Pearson Walker, S.S.C.

Counsel for Defenders St Andrews District Committee—Constable, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders Cupar District Committee—A. M. Anderson, K.C.—J. B. Young. Agent—William Black, S.S.C.

Tuesday, January 31.

FIRST DIVISION.

[Sheriff Court at Dumbarton.

ANDERSON *v.* M'GOWN.

Sheriff—Process—Jurisdiction—Remit to Court of Session—Competency—"Actions Relating to Questions of Heritable Right or Title"—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, c.* 51), *sec.* 5.

A builder raised an action in a Sheriff Court against one whom he averred to be under contract a joint-adventurer with himself and another in a speculation involving the acquisition of lands and building of tenements. The action concluded for payment of £2365 odds, which pursuer averred to be one-third portion of the disbursements made and charges incurred by him on account of the joint-adventure. The defence was that the pursuer had not acted in accordance with the agreement, in respect, *inter alia*, that he had erected buildings which he was not entitled to erect. At the closing of the record the defender required the cause to be remitted, under the Sheriff Courts (Scotland) Act 1907, sec. 7, to the Court of Session, as being an action relating to a question of heritable right and title.

The Court *held* that the action did not relate to a question of heritable right or title within the meaning of sec. 5, and *remitted* it back to the Sheriff Court in terms of section 4, sub-section 5, of the Act of Sederunt of 5th January 1909.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) enacts—Section 5—"Nothing herein contained shall derogate from any jurisdiction, powers, or authority presently possessed or in use to be exercised by the sheriffs of Scotland, and such jurisdiction shall extend to and include— . . . (4) Actions relating to questions of heritable right or title, including all actions of declarator of irritancy and removing, . . . : Provided that actions relating to questions of heritable right or title, including irritancy and removing, . . . shall, if raised in the Sheriff Court, be raised in the Sheriff Court of the jurisdiction and district where the property forming the subject in dispute is situated, and all parties against whom any such action may be brought shall in such action be subject to that jurisdiction: Provided also that it shall be competent for either party at the closing of the record or within six days thereafter to require the cause to be remitted to the Court of Session in the case of actions (*a*) relating to questions of heritable right and title where the value of the subject in dispute exceeds fifty pounds by the year or one thousand pounds in value."

The Act of Sederunt of 5th January 1909 provides—Section 4, sub-section 5—"Upon the appearance of the cause in the Single Bills of the Division to which it has been remitted, parties will be heard upon any motion made to retransmit the cause to the Sheriff Court or directed against the competency of the remission. . . ."

On 17th November 1910 William Anderson junior, builder, 49 Bellfield Street, Glasgow, *pursuer*, raised an action in the Sheriff Court at Dumbarton against Andrew M'Gown, residing at Mansefield, Drumchapel, *defender*, and Charles A. Cameron, residing at Torloisque, Drumchapel, for any interest he might have. In the petition the pursuer made a claim "for payment of the sum of £2369, 15s. 7½d. sterling (two thousand three hundred and sixty-nine pounds, fifteen shillings and sevenpence halfpenny) conform to account hereto annexed, being the defender Andrew M'Gown's one-third share of the cost of nine tenements on a plot of ground at Dumbarton Road, Stewart Street, and Swindon Street, Dalmuir, erected by pursuer on behalf of himself, the defender Andrew M'Gown, and the said Charles A. Cameron, as joint-adventurers or joint-owners, and interest accrued to 10th November 1910, in terms of agreement or joint-adventure amongst the parties."

The following *narrative* is taken from the opinion of Lord Kinnear, *infra*:—"The pursuer brings his action upon the allegation of a contract which he describes as a joint-adventure for carrying out a certain building speculation; and he says that certain parties have made an agreement to