up according to his own conscience and judgment.

I agree with your Lordship that we ought in this case to sustain the contention for the Crown, and to hold that there has been a failure to make the necessary return.

LORD KINNEAR and LORD PEARSON concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Find for the pursuer on the information No 2 of process, and that the defender as representing Messrs Cayzer, Irvine, & Company is bound to deliver the lists demanded of the persons for whom his firm conduct the business of underwriting, in the manner described, with the names and addresses of such persons, and to include in such lists the amount of profit effeiring to each: Adjudge the defender to forfeit and pay to the pursuer the sum of £50, and decern: Find the pursuer entitled to expenses," &c.

Counsel for Pursuer and Reclaimer—Solicitor-General (Ure, K.C.)—A. J. Young. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for Defender and Respondent—Dean of Faculty (Campbell, K.C.)—R. S. Horne. Agents—Webster, Will, & Co., S.S.C.

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*Wednesday, June* 13.

## FIRST DIVISION.

[Lord Low, Ordinary.

## HOPE *v.* THE LASSWADE DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF MIDLOTHIAN AND OTHERS.

*Local Government—Title to Sue—Parish Council—County Council—District Committee—Action to Determine Position of an Admitted Right-of-Way—Right of Parish Council to Take up Defence of Action—Local Government (Scotland) Act* 1894 (57 *and* 58 *Vict. cap.* 58), *secs.* 29 *and* 42.

A proprietor of lands brought an action against a District Committee of a County Council in order to have the position of an admitted public right-of-way determined. The District Committee did not defend, but the Landward Committee of the Parish Council of the parish in which the right-of-way lay sisted themselves as defenders. *Held* that the Landward Committee had no title, and that the right to litigate on such matters lay with the County Council and its District Committee.

*Expenses—Parish Council Sisted Defenders—Liability for Expenses from Lodging of Minute Craving Sist only—Action to Determine Position of Right-of-Way.*

The Landward Committee of a Parish Council sisted themselves as defenders to an action to determine the position of an admitted right-of-way within the parish, brought against the District Committee of the County Council who did not defend. *Held* that the Landward Committee, who were found to have no title, were only liable in expenses from the date of lodging the minute of sist.

The Local Government (Scotland) Act 1894, section 29, *inter alia*, enacts—"A parish council may repair and maintain all or any of the public ways (not being highways or footpaths at the side of a highway within the meaning of the Roads and Bridges (Scotland) Act 1878) within the parish, and the expense of such repair and maintenance shall be defrayed out of the special parish rate. . . . ."

Section 42, sub-section 1, provides—"It shall be the duty . . . of a district committee . . . to assert, protect, and keep open and free from obstruction and encroachment, any right-of-way . . . which it may appear to them . . . that the public have acquired by grant, prescriptive use, or otherwise, and they may . . . for the purpose of carrying this section into effect, institute and defend legal proceedings and generally take such steps as they may deem expedient."

Sub-section 2—"Where a parish council or any six parish electors of a parish have represented to the district committee, or where there is no district committee to the county council, that any public right-of-way within the district . . . has been or is likely to be shut or obstructed or encroached upon, it shall be the duty of the district committee, or, where there is no district committee, of the county council, if they are satisfied that the representation is well founded, to take such proceedings as may be requisite for the vindication of the right-of-way, and if the district committee refuse or fail to take proceedings in consequence of such representation, the parish council or the electors who made the representation, may petition the county council, and if the county council so resolve, the powers and duties of the district committee under this section, in relation to such right-of-way, shall be transferred to the county council."

Sub-section 3 enacts—"Any expenditure incurred by a county council or a district committee thereof in connection with any legal or other proceedings, under the two preceding sub-sections or either of them, shall be defrayed out of the road rate for the district, or where a county is not divided into districts, out of the road rate for the county. . . . ."

On May 5, 1905, Sir Alexander Hope of Craighall, Baronet, proprietor of the lands of Pinkie and others in the parishes of Inveresk and Newton and county of Midlothian, raised an action against the Lasswade District Committee of the County Council of Midlothian, as such District Committee and as representing the public interest, and also against the County Council

of Midlothian for any interest they might have, for declarator that he was proprietor of certain portions of the Haugh of Inveresk bounded by a space for a public walk 20 feet wide along the side of the river Esk, that the boundary between this space and his lands was certain lines, and that the public were entitled between certain points to go by the public walk but were not entitled to enter upon or traverse his lands without his consent. No defences were lodged by the defenders, but the Landward Committee of Inveresk Parish Council had themselves sisted defenders and lodged defences. The pursuer objected to their title and *inter alia* pleaded—"(4) The defenders the Landward Committee of the Parish Council of Inveresk have no title or interest to defend the present action."

The following narrative of the facts of the case are taken from the opinion of the Lord Ordinary (Low):—"The pursuer is proprietor of certain lands situated upon the river Esk which originally formed part of the commonty known as the Haugh of Inveresk. That commonty was, early last century, the subject of a process of division of commonty, and the lands in question formed the portion which was allotted to the pursuer's predecessor. It was stated in the decreet of division that the heritors had agreed to certain roads and walks being made upon the Haugh, and that, *inter alia*, there had been laid off a space of 20 feet broad along the water side *ex adverso* of the lands allotted to the pursuer's predecessor, which were described as bounded on the west by 'the public road along the river Esk.'

"It appears that prior to the decreet of division an embankment had been made by agreement among the heritors some distance from the river. For many years the public have walked along the top of the embankment, and the pursuer did not object until early in the present year, when the Landward Committee of the Parish Council of Inveresk proposed to undertake, and indeed actually commenced, certain operations upon what they claimed as the road mentioned in the decreet of division. The pursuer then maintained that that road was restricted to a space of 20 feet in breadth from the water's edge, while the contention of the Landward Committee was that it ran along the embankment, or at all events close to the embankment.

"In these circumstances the pursuer brought the present action, in which he seeks to have it declared that a line 20 feet from the water's edge is the boundary between his lands and the public road, and that the public are entitled to pass along the east bank of the river by means of the said space of 20 feet, and not otherwise.

"The defenders called were the Lasswade District Committee of the County Council of Midlothian, as such District Committee and as representing the public interest, and the County Council for any interest they might have.

"Neither of these bodies lodged defences, but the Landward Committee of the Parish Council of Inveresk lodged a minute asking to be sisted as defenders. The matter came before me in the Bill Chamber, and as I thought that the Landward Committee had *prima facie* an interest in the question, I sisted them as defenders, and they lodged defences."

On 16th October 1905 the Lord Ordinary (Low) pronounced the following interlocutor: — "Sustains the fourth plea-in-law for the pursuer: Finds, decerns, and declares in terms of the conclusions of the summons: Finds the defenders, the Landward Committee of the Parish Council of Inveresk, liable in expenses; allows an account of said expenses. . . ."

*Opinion.*—[*After narrating the facts of the case ut supra*]. . . . "The question which was argued before me in the procedure roll, and which I must now determine, is whether the defenders the Landward Committee have any right or title to defend the action, and to resist decree being pronounced in terms of the conclusions of the summons.

"That question seems to me to depend entirely upon the provisions of the Local Government (Scotland) Act 1894.

"What the defenders rely upon (and I think that it is the only part of the Act to which they can appeal) is the 29th section, which provides that 'a parish council may repair and maintain all or any of the public ways (not being highways or footpaths at the side of a highway within the meaning of the Roads and Bridges (Scotland) Act 1876) within the parish, and the expenses of such repairs and maintenance shall be defrayed out of the special parish rate.'

"It is not disputed that the road in question is a 'public way' of the kind there referred to, and the defenders argued that the right to repair and maintain the road involved the right to resist encroachments.

"That view might have had considerable force if it had not been that the Act makes special provision for the protection of rights-of-way. The 42nd section provides (sub-section 1) that 'it shall be the duty of a district committee . . . to assert, protect and keep open and free from obstruction or encroachment any right-of-way . . . which it may appear to them that the public have acquired by grant, prescriptive use, or otherwise, and they may for the purpose of carrying this section into effect institute and defend legal proceedings, and generally take such steps as they may deem expedient.'

"By the second sub-section the duty is laid upon the district committee of making inquiry, and if necessary of taking proceedings, if it is represented to them by a parish council, or any six parish electors, that a public right-of-way has been or is likely to be shut or obstructed or encroached upon. Finally by the third sub-section provision is made for any expenditure incurred by the district committee under the two preceding sub-sections.

"Now, I think that the road in question is plainly a right-of-way within the meaning of the 42nd section, and the ground upon which the Landward Committee of the Inveresk Parish Council are defending this action is that the pursuer is seeking to

obstruct or encroach upon that right-of-way. I do not think that the Landward Committee have any right to litigate that question. By the Act the duty of protecting rights-of-way is laid upon the District Committee alone, and full provision is made for the carrying out of that duty. That being so, I think that action by any other local body is excluded. That view seems to me to be strengthened by the consideration that a parish council, or the landward committee of a parish council, have no funds which they are entitled to use for the purpose of defraying the expenses of such a litigation.

"I am accordingly of opinion that the fourth plea-in-law for the pursuer falls to be sustained, and decree pronounced in terms of the conclusions of the summons."

The defenders reclaimed, and argued—The roadway in question fell within the class of roads dealt with by the Local Government (Scotland) Act 1894, section 29, and the reclaimers' obligation to maintain it in the public interest gave them a title to defend any suit which might increase the burden of maintenance. This had been recognised in England—*Bright* v. *North* [1847], 2 Ph. 216; *The Queen* v. *White and Others* [1884], 14 Q.B.D. 358. These cases were decided on the ground that authority to litigate was incidental to the statutory duties, and that rule applied in this case. Interest or title to defend existed in the reclaimers only, not in the District Committee or the County Council, for the question was not of the class dealt with by section 42. Here the question was merely of determining the boundaries of an admitted right-of-way, there was no obstruction or encroachment, and what was at stake was the cost of maintenance. The District Committee or the County Council had no interest or right to defend inasmuch as they did not bear the cost of maintaining the roadway. The Landward Committee had the powers granted to the Parish Council under sections 23 to 29, and alone had the right to defend such actions—section 23, sub-section 2 (*b*). The Landward Committee could obtain the money required from the Parish Council —section 27, sub-section 3—which had no power to revise the estimates, section 37. The right of making representations to the District Committee or the County Council under section 42, sub-section 2, did not negative the reclaimers' title, for that right was not given to a landward committee. There was no express exclusion of the reclaimers' title, and in circumstances like the present there was no other remedy provided. In real actions all parties having an interest had a title to defend—*Glasgow Shipowners' Association* v. *The Clyde Navigation Trustees*, February 25, 1885, 12 R. 695, 22 S.L.R. 374—and as the defenders were acting here in the interest of the public, seeing that the cost of maintaining the road would be much increased if the pursuer's contention were upheld, a liberal construction should be put upon the reclaimers' powers—*Milne* v. *Landward Committee of Parish Council of Inveresk*, December 12, 1899, 2 F. 283, 37 S.L.R. 210. The interlocutor of the Lord Ordinary should be recalled.

Counsel for the pursuer and respondent were not called upon.

LORD PRESIDENT—The point in this case is whether the Landward District Committee of the Parish Council of Inveresk has a right to step in and insist in being heard as a defender in an action brought by the proprietor of certain lands in the parish of Inveresk, which has for its object the determination of the boundaries of a certain public road. The genesis of this public road was a division of commonty which took place early in last century, when the public road was reserved from the lands allotted to the pursuer's predecessor. Questions having arisen as to the precise course of the road, the proprietor has raised this action to have the course of the road defined as occupying a certain space laid down on a plan produced with the summons. He has called as defenders the Lasswade District Committee of the County Council, and the County Council for any interest they may have. The District Committee of the County Council resolved not to defend the action, and thereupon the Landward Committee of the Parish Council made application to be sisted as defenders, and having been provisionally sisted have lodged defences, and the question now before us is whether they have a title to defend this action. I say "provisionally sisted," for I think the Lord Ordinary's first interlocutor should have been in other terms, and should merely have allowed defences to be put in in order to see whether the Landward Committee should be sisted as defenders or not. But that is really of no moment now, for the interlocutor allowing the sist is covered by this reclaiming note, which brings up all the previous interlocutors for review, and therefore no prejudice has been occasioned to the parties.

Now, it must be borne in mind that originally the title, in all questions of public right, is in the individual members of the public. The title to pursue actions for asserting such rights is in *quivis ex populo*, as was instanced in the *Glentilt* case, and I have as little doubt that *quivis ex populo* could come in and ask to be sisted to defend such an action, and consequently also an action of casting about. Within modern times public bodies have been created which have had certain rights with regard to these matters conferred upon them, though it is to be noted that these rights do not extend beyond what the statute has, either directly or by the clearest implication, conferred upon them. I do not think we have any legislative enactment directly affecting the matter now before us until the Local Government Act of 1894. It is true that by the Act of 1889 the Road Committee of the County Council were made the authority for highways, but then I do not think this is a highway in the sense of the Roads and Bridges Act 1878. But sec. 42 of the Local Government Act 1894 deals particularly

with the protection of rights-of-way, and it gives protection of rights-of-way to the District Committee of the County Council. It also gives a secondary right to the Parish Council, namely, a right of making representations to the District Committee, and of appealing to the County Council against the decision of the District Committee, if the District Committee refuses to take up a question which the Parish Council thinks it ought to take up. I have no doubt that the right which was explicitly given to the District Committee to maintain and make good a right-of-way does, as a necessary corollary, include the right to defend an action of casting about of a right-of-way, and therefore I think that the District Committee of the County Council, in virtue of the statutory powers conferred upon them, could have taken up the defence to this action. But where you find that full authority to take action has been conferred on the District Committee, and the limited authority of quickening them up has been conferred on the Parish Council, I think it is impossible to hold that a concurrent title with the District Committee to prosecute such action has been conferred on the Parish Council. The only direct authority given to the Parish Council is that conferred by sec. 29 of the Act of 1894, enabling them to repair and maintain public ways other than highways within the parish, and to defray the cost out of a special rate. It seems to me that ample scope is given to that provision if the interpretation of it is confined within its terms, *i.e.*, that the Parish Council may expend public money on maintaining such public ways as it finds *de facto* existing in the parish, but not on entering into litigation for the purpose of determining where public ways are and where they are not, that duty having been given to the District Committee of the County Council. I think, therefore, that the Lord Ordinary was right and that the reclaiming note should be refused, though the form of the first interlocutor is subject to the criticism I have already passed on it.

LORD M'LAREN—In the excellent argument that was presented to us the hypothesis of the reclaimers' case was that section 42 did not apply to the present circumstances—that this was a *casus improvisus*, and that, consequently, the Landward Committee of the Parish Council, being vested with all powers necessary for maintaining the public ways within its district, was entitled to come forward and maintain the public interest in this right-of-way by sisting itself as defender in this action. I should have great difficulty in holding that apart from express legislative enactment a local authority, such as a county council or a parish council, would be entitled to take up the question of a public right-of-way and litigate it in the interests of the public. But it is clear that when the Act of 1894 was under consideration it was considered by the Legislature that public bodies interested in the locality should be entrusted with the duty of protecting public rights-of-way, and that the matter should not be left altogether to the individual action of private citizens. Provision is made for this in section 42, which appears to me to be a carefully constructed section, and to define precisely the extent to which this right was conferred on local authorities. Now, that section makes careful provision that the lesser local authorities, such as parish councils and committees of parish councils, should not be allowed to expend the ratepayers' money in litigating, under the influence, as would often be the case, of local feeling, questions relating to public rights-of-way. At the same time the Legislature, recognising that these bodies have a very real interest in such matters, has conferred upon parish councils the right of making representations to the county authority, and if a District Committee of a County Council refuses to accede to such representations, there is an appeal to the County Council in its entirety against such refusal. But I think it is clear that these larger and perhaps more dispassionate public bodies, who have statutory authority to apply the rates for such a purpose, are the only local authority on whom a title is conferred to litigate actions of rights-of-way in the interests of the public.

So here I think that the District Committee of the County Council could have intervened to defend this action. But the proposition that, failing their intervention, it is open to the Parish Council, or the Landward Committee of the Parish Council, to step in and take up the defence seems to me to be open to very grave objection. That proposition amounts to this, that the Parish Council can assume the position of a court of appeal from the County Council or its District Committee, and, where the County Council has decided that public money shall not be expended on such a matter, to overrule that decision by themselves taking up the case at the public expense. As I have said, I do not think that the provisions of the Act confer any authority on the parish councils to litigate questions of rights-of-way; and it seems clear that the Legislature did not consider that they had any implied authority to do so because certain powers with regard to such matters are expressly given to them, and given to them only to a limited extent and in carefully guarded terms. The conclusion that I arrive at is this that the express authority given in these carefully qualified terms excludes the notion of any implied authority to be deduced from the creation of these bodies for public purposes, and, consequently, that the power given to the county councils to litigate these matters, and the powers given to the parish councils to make representations, when taken together, make it clear that the powers of parish councils in these matters are strictly limited, and do not extend to the right that is contended for by the reclaimers.

LORD KINNEAR—I agree. The interest of the public in the matter of actions to main-

tain rights-of-way is entrusted by the Local Government Act of 1894 to District Committees of County Councils. This action puts it on the District Committee to consider whether it was their duty to defend the action. They did consider the question, and decided that as there was nothing in the action which would prejudice the interests of the public, it was not their duty to defend it. There is nothing in the statute which in such circumstances entitles a subordinate body such as a Landward Committee to take on itself a duty entrusted to another public body.

LORD PEARSON—I am of the same opinion. The question in this case is under section 42 of the Local Government Act of 1894, which lays on the District Committee the duty of protecting public rights-of-way. Section 29 is the only section that gives the Parish Council any spending power in the matter of public ways. But that section is limited to repair and maintenance, and I do not think it gives the Parish Council any power to use public money in the vindication of rights-of-way. The only standing which the Parish Council has in the matter of rights-of-way is the limited right conferred on it by section 42, sub-sec. 2, of making representations to the District Committee.

The Court pronounced this interlocutor—

"Recal the said interlocutor [of 16th October 1905] in so far as it finds the said defenders the Landward Committee of the Parish Council of Inveresk liable in expenses, and in lieu thereof find the said Committee liable in expenses since the date of the lodging of the minute, No. 8 of process: *Quoad ultra* adhere to the said interlocutor and decern: Find the said Committee liable in expenses since the date of the interlocutor reclaimed against, and remit the account thereof and of the expenses above found due since the date of the lodging of the said minute to the Auditor to tax and to report."

Counsel for the Defenders and Reclaimers —Munro—W. T. Watson. Agents—M. J. Brown, Son, & Company, S.S.C.

Counsel for the Pursuers and Respondents — Scott Dickson, K.C. — C. D. Murray. Agents—Melville & Lindesay, W.S.

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*Thursday, June* 14.

## FIRST DIVISION.

[Sheriff Court at Peebles.

## THE IMPROVED EDINBURGH PROPERTY INVESTMENT BUILDING SOCIETY *v.* WHITES.

*Process — Pursuer — Designation — Address of Pursuer (a Society)—"Building Society Incorporated under the Building Societies Act* 1874"—*Sheriff Courts Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 6.

In a petition in the ordinary Sheriff Court the pursuer was designed as "The Improved Edinburgh Property Investment Building Society, Incorporated under The Building Societies Act 1874," no address being given. *Held* that this description satisfied the requirements of the Sheriff Courts Act 1876, sec. 6.

The Sheriff Courts Act 1876, sec. 6, *inter alia*, enacts—"Every action in the ordinary Sheriff Court shall be commenced by a petition in one of the forms, as nearly as may be, contained in Schedule (A) annexed to this Act, in which the pursuer shall set forth the court in which the action is brought, his own name and designation, and the name and designation of the defender. . . ."

On 18th April 1905 "The Improved Edinburgh Property Investment Building Society, Incorporated under The Building Societies Act 1874," presented a petition in the ordinary Sheriff Court at Peebles against Anthony White, contractor, and Christina White, spinster, residing at White Bank, Peebles, with conclusions for declarator and removing in respect of certain heritable subjects situated in Peebles. No address or further designation of the pursuer was given.

On 21st July 1905 the Sheriff-Substitute (ORPHOOT) pronounced an interlocutor in terms of the conclusions of the petition, and on 23rd October 1905 the Sheriff (MACONOCHIE) adhered.

The defenders appealed to the First Division of the Court of Session, and there raised the point that the designation of the pursuer was insufficient.

Argued for the appellants—The action was incompetent, as the requirements of The Sheriff Courts Act 1876, section 6, had not been complied with, no proper designation or address of the pursuers being given on which an operative decree could follow—*Joel* v. *Gill*, November 23, 1859, 22 D. 6, *per* L.J.-C. Inglis, p. 12.

Counsel for the respondents was not called on.

LORD PRESIDENT—The point has been raised by counsel in this case that inasmuch as this is a petition under section 6 of the Sheriff Court Act of 1876, it ought to set forth the name and designation of the pursuer, and that the name as set forth here does not include a designation. We were re-