Railway Company may be entitled, or of fixing in any way the character and extent of the accommodation which may be lawfully given. They take their stand upon their position as joint-owners of a part of the Scottish North-Eastern undertaking, and say, "In respect of our right of joint-ownership we peremptorily exclude the North British Railway Company from running its carriages and engines over any part of the line within the conclusions of our summons." Now that they are not entitled so to exclude the North British Railway Company, I think with all your Lordships is very clear. I must confess that irrespective of the running powers given to the North British Railway Company by the Act of 1866, I should myself have some difficulty in seeing how these conclusions of the summons could have been sustained in any case. The pursuers rest their right as I have said entirely upon their joint-ownership in this station, but then they are joint-owners of railway lines and a railway station subject to rights conferred by the Legislature upon all other companies and all other persons. Every company has the right to run over the lines of every other company. Of course we all know that that is not a right of any practical value, because the Legislature has given to other companies than the owning company a right of passage only, and has not given the right to such facilities as are necessary to make the right of passage practically available, or to make it a right that could be safely used without the risk of serious injury to the public. But then the difficulty of practically working out a right which the Legislature has given does not prevent it being theoretically a perfectly good right, and it does appear to me that if the Caledonian Company had agreed so to work its signals and points as to enable the North British to run with safety beyond the point 200 yards south of the Aberdeen passenger shed, at which the pursuers desire to stop them, it would have been extremely difficult for the pursuers to say, in respect of their joint-right of property merely, that they excluded such use. They might very well have made it practically of no avail to the North British Railway Company. That is perfectly possible. But to take their stand on their mere legal right, and say, in respect of the joint-right we have we debar everybody at our pleasure from coming on that portion of our lines, would appear to me to be a proposition which it would be very difficult for them to maintain.

But it is not necessary to consider that in determining this action for the reasons your Lordships have given, because the Legislature has undoubtedly conferred on the North British Railway Company just those practical running powers which are necessary to enable the general right given by the General Clauses Act to all companies to be made effectually advantageous. Upon the construction of the clauses of the statute upon which the extent of the running power depends I have nothing to add. I agree with your Lordship that the action must be dismissed, the particular accommodations to which the North British Railway Company may be entitled or to which the Caledonian Railway Company and the North British Railway Company together may be entitled in the use of this station being a question which we have no means of dealing with in this action.

The Court adhered.

Counsel for the Pursuers — Graham Murray — Ferguson. Agents — Gordon & Falconer, W.S.

Counsel for the Defenders—D.-F. Balfour, Q.C.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, June 2.

FIRST DIVISION.

[Sheriff of Inverness, Elgin, and Nairn.

EDWARDS AND ANOTHER *v.* THE PAROCHIAL BOARD OF KINLOSS AND ANOTHER.

Reparation—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101)—*Ruinous House Demolished by Officer of Local Authority*—Ultra vires.

Section 118 of the Public Health Act 1867 provides that "The local authority and the board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act, and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected, and every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act shall be commenced within two months after the cause of action shall have arisen."

On complaint that an unoccupied house was dangerous to the public, the officer of a local authority under the Public Health Act pulled it down without intimation to the owner or instructions from the local authority. The local authority, however, adopted his proceedings.

In an action by the owner raised more than two months after the proceedings, *held* that the officer had acted outwith the provisions of the Public Health Act, that accordingly the three months' limitation did not apply, and that the local authority having adopted the actings of their servant, were liable in damages.

John Edwards sued the Parochial Board of the Parish of Kinloss as the Local Authority under the Public Health (Scotland) Act 1867, and Archibald Keir Leitch, their clerk, for damages for the demolition of certain house property in the village of Findhorn.

In June 1886 Leitch received a letter from the agents of the adjoining property calling his attention to the ruinous state of the subjects in question which had been unoccupied for some years, and which were alleged to be dangerous to the public from the falling of loose slates. Leitch visited the premises, and after inspection he ordered the removal of the loose slates with a view to rendering the building safe.

In February 1890 Leitch, in consequence of further complaints made regarding the state of the house, and after a report from a mason in Forres, but without the consent of the pursuers or notice to them, or without the authority of his employers, removed the remaining slates, threw down the walls to a height of from four to five feet from the ground, took down and removed the roofing and fittings, and sold the timber so removed. The house was then in a filthy condition, and was used largely as a public convenience.

The pursuers pleaded, *inter alia*—"(1) The defenders having, through their officer acting in their behalf, wrongously and unwarrantably interfered with and partly demolished the property of the pursuers, are liable in damages therefor."

The defenders pleaded, *inter alia*—"(2) The pursuers are barred by the 118th section of the 'Public Health (Scotland) Act 1867,' from insisting in the present action, and the same ought to be dismissed with expenses."

The local authority in the course of the action intimated that Leitch had acted on their behalf.

The Sheriff-Substitute (RAMPINI) on 2nd August 1890 found, *inter alia*, that the proceedings by the defender Leitch, acting on behalf of the Parochial Board as Local Authority of Kinloss, did not fall within the scope of the Public Health (Scotland) Act and were unwarrantable in law, and he assessed the damages at £50.

"*Note.*—. . . The proof shows that what the defender Leitch did do was to pull down this building, not to abate a nuisance, but because he considered it to be dangerous to the public safety, and this neither he nor his board had any power under the Act to do. They were trenching on the duties of the procurator-fiscal. Had Leitch studied the Public Health Act as carefully as he was bound to have done he must have seen that to pull down a building even if it was ruinous and dangerous was an act beyond the power which the law conferred on the board whose servant he was. And he acted in a very high-handed manner. He does not seem to have consulted his board at all. As soon as he had received Messrs R. & R. Urquhart's letter complaining of the dangerous state of the building, he proceeded on his own authority to have it put into a condition of safety. He left the way in which this was to be done to others, and their idea was that the only way to make it safe was to take it down. Had the act been one which he was entitled to do, he might, the Sheriff-Substitute thinks, even in the face of irregularity like this, have claimed the protection of the 118th section of the statute. But there is a great difference between a legal act carried out in an irregular manner and an act radically and essentially illegal. Acts illegal because irregular may be overlooked when there is *bona fides* on the part of the officers doing them, but acts illegal because *ultra vires* are in a different position. The protection only applies to wrongs done by persons 'acting under the Act,' which it is impossible to maintain that the defender Leitch was. It will not save him to say that his object was not to ensure the safety of the lieges but to abate a nuisance; the proof clearly establishes the contrary. Nor have the defenders shown that a nuisance did exist, which they or their sanitary inspector had the power to abate under the Act."

On appeal the Sheriff (IVORY) on 23rd October 1890 recalled this interlocutor and assoilzied the defenders.

The pursuers appealed to the Court of Session, and argued—That the actings of Leitch were wholly illegal and outwith the statute. He had power to deal with a nuisance, but not to pull down house property. Here the board adopted the actings of their clerk and were therefore responsible. The amount fixed by the Sheriff-Substitute who took the proof was reasonable, and the Court would not without good cause, interfere with his estimate of the damage sustained by the pursuers—*Mackay* v. *Chalmers*, February 5, 1859, 21 D. 443; *Knox* v. *MacArthur*, June 7, 1865, 3 Macph. 890.

Argued for respondents—Whether the Board were aware of what Leitch was doing or not, they had, by the minute of admissions, virtually adopted his actions, and it was for the pursuers to show that these were outwith the provisions of the protecting clause of the statute. Its terms were unusually wide, and were framed to cover just such a case as the present. The facts of the case showed that some interference by the officer of the board was absolutely necessary; and if in such circumstances a wrong was done in proceeding under the Act, sec. 118 protected the officer and the board—cases under protecting clauses in statutes—*Ferguson* v. *M'Ewen*, February 7, 1852, 14 D. 457; *M'Laren* v. *Steele*, November 13, 1857, 20 D. 48; *Murray* v. *Allan*, November 29, 1872, 11 Macph. 147; *Ferguson* v. *M'Nab*, June 12, 1885, 12 R. 1083; *Hastings* v. *Henderson*, July 15, 1890, 17 R. 1130.

At advising—

LORD PRESIDENT—With regard to the merits of this question, I do not understand that your Lordships entertain any doubts. In all that has taken place the Parochial Board of Kinloss professes to have acted

under or in terms of the Public Health (Scotland) Act 1867, and it has its officer appointed under the provisions of that statute. The question therefore comes to be, whether in discharge of their duties under that Act the Parochial Board were entitled to order the demolition of the pursuer's house? I cannot find in the statute any authority for such a proceeding. They are entitled when they find a nuisance to order its removal, but they are not entitled to order a house to be pulled down. One can imagine a case in which the health of the inhabitants of a district might be so imperilled by the insanitary condition of a building that its removal might become a matter of necessity; but that is not the case which we have at present to deal with. No doubt this house, from not being occupied, had become a nuisance, but any objection which arose from this could easily have been remedied without necessitating its being pulled down.

It appears to me that the Sheriff has gone wrong on the general question raised under the statute, and that his interlocutor must therefore be recalled.

With regard to the amount of damages, I cannot agree with the sum found due by the Sheriff-Substitute, as I consider it in the circumstances excessive, and I propose, if your Lordships should agree with me, that we should reduce the amount to £10.

LORD ADAM—I think that the view of this case taken by the Sheriff-Substitute is the right one except in respect to the amount of damage sustained by the pursuer. I think that he has assessed the damage far too high, and that the sum named by your Lordship is reasonable in the circumstances.

[*His Lordship here enumerated the parties to the action and the facts established by the proof as above narrated.*]

The whole defence to the present action is grounded on section 118 of the Public Health Act of 1867; but from what I have already observed, it is clear that in what was done the officer was not acting in terms of the statute, but entirely outwith its provisions, and they are accordingly not entitled to the protection which the Act secures.

There is, however, the further question as to how far the Local Authority is to be held responsible for actings of their officer. Upon this matter I should have had considerable doubts had it not been for the admission appended to the report of their proof, by which they virtually adopt his actings. That being so, I can only view the actings of Leitch as being for and by the authority of the Parochial Board, and being so they are conclusive of the present case.

LORD M'LAREN—It was practically admitted in the Court below, and it has not been disputed here, that the act which is complained of was *ultra vires* of an inspector of poor. The Public Health Act no doubt gives extensive powers connected with the removal of nuisances, subject however to the approval of the Sheriff.

In the present case a double error was committed—first, in treating as a nuisance a building which did not fall under that category; and second, in not following out the provisions of the statute.

In considering how far a public body is liable for its servants, it is clear that when an illegal act is done by the servant, the principal must either approbate or reprobate the action.

What the public authority has done in the present case is to approve of and adopt the action of their servant, and then to plead the protecting clause of the statute. But in order to secure that protection the action complained of must have been done by the servant in the *bonâ fidê* execution of the statute, and that was not what occurred in the present case.

If the act done be not within the scope of the statute, then I do not think that the three months' limitation provided by the 118th section has any application. As regards the amount of damages I concur in the sum fixed by your Lordship.

LORD KINNEAR concurred.

The Court recalled the interlocutor of 2nd August and 23rd October 1890, and assessed the damages at £10.

Counsel for the Pursuer—M'Kechnie—Baxter. Agents—A. J. & J. Dickson, W.S.

Counsel for the Defenders—Jameson—Salvesen. Agent—R. Stewart, S.S.C.

Tuesday, June 2.

SECOND DIVISION.

SIR ROBERT JARDINE, BART. *v.* JOHNSTONE AND OTHERS.

Entail—Disentail—Whether Provision to Children a Burden on the Entailed Estate—Entail Amendment Act 1848 (11 *and* 12 *Vict. c.* 36), *secs.* 6 *and* 21.

By section 6 of the Entail Amendment Act 1848 provision is made, in the event of an entailed estate being disentailed, for existing debts and provisions in favour of younger children; and by section 21 it is provided that such provisions may be made a burden upon an entailed estate by way of bond and disposition in security.

A deed of entail dated in 1769 conferred power upon the heirs of entail to give suitable provisions for their children "to affect the rents of the lands, . . . such provision to be given by each heir of entail to his or her children . . . not exceeding three years' rent of the estate, and which provisions shall only affect the persons of the succeeding heirs of entail possessing the estate and the rents thereof to the extent of one-half of whatever the heir