newspaper containing the said libel. 3. The appellant, Mr. Morthland, was originally the sole and only real, as well as ostensible proprietor, editor, and conductor of the newspaper called the Scots Chronicle; and that the substantial right and interest which he had in all and each of these characters, in relation to that newspaper, never truly ceased and determined, down to a period subsequent to the publication of the 1st September 1797, which contained the libel in question; or, at least, because he stood in such a situation in regard to it, as to be in law completely responsible for the whole contents of that newspaper at the above mentioned period of its publication.

After hearing counsel,

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Clerk, Chas. Moore.*
For the Respondent, *Wm. Alexander, David Boyle.*

NOTE.—Unreported in the Court of Session.

SIR W. A. CUNYNGHAME, Bart., Hon. WM. BAILLIE of Polkemmet, ANDREW BUCHANAN, ANDREW GILLON of Wallhouse, and Others, ... } *Appellants;*

JOHN ALEXANDER HIGGINS, W.S., Assignee for the Hon. HENRY ERSKINE, the Hon. WM. HONYMAN of Armadale, one of the Senators of the College of Justice, the Representatives of Sir JOHN INGLIS of Cramond, Bart., and for seven other Trustees of the Edinburgh and Glasgow Turnpike, ... } *Respondent.*

House of Lords, 26th June 1802.

TRUST—ROAD TRUSTEES—POWERS TO BORROW MONEY—RELIEF.—In the construction of a turnpike road, under an act of Parliament, it became necessary to borrow money upon the security of the tolls. It was objected, by some of the trustees who had authorized the borrowing of money, and had attended the meetings in regard to the roads, and done other acts in the execu-

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tion of the trust, that they could not be held personally liable for the money borrowed as individuals, but only the tolls. Held by the Court of Session, that as the trustees, in order to construct the roads, were obliged to borrow money on the security of the tolls and on their own credit, and as the defenders (appellants), were members of the meetings, and, as such, gave their concurrence in appointing committees, with powers to enter in contracts to construct these roads, and afterwards homologated those contracts and agreements entered into, for carrying these into execution, they were liable in relief for their proportional share. In the House of Lords, the case was remitted for reconsideration, with indication of opinion expressed, that the interlocutors appealed from were wrong; that mere presence *per se* at a meeting of road trustees, held under the act, could not make a trustee liable as an individual, but only *qua* trustee; and that presence at meetings, which authorized things to be done not within the powers of the act, could not subject in liability, unless the individual expressly came bound as an individual; and that a majority of trustees, so binding themselves individually, could not also bind other co-trustees, who did not so bind themselves, though present at the meeting.

The road trustees, in executing the turnpike road between Edinburgh and Glasgow, under their act of Parliament, were empowered to borrow money for the construction of the road, on the security and credit of the tolls.

At a half yearly meeting of the general body of trustees, the borrowing of certain sums was duly authorized, for doing which certain trustees were named as a committee, with power to enter into contracts and agreements as to the construction of the road. Before the act was applied for, the three first named gentlemen, for whom Mr. Higgins acts as assignee, had become personally bound for £3500; and afterwards they, with seven other trustees, being the committees so appointed, bound themselves as trustees, as well as personally, in the several bonds granted for the sums so borrowed. The committees being invested with powers to enter into contracts, did accordingly enter into the same. The sums borrowed for these purposes, and the nature of these transactions, were regularly brought under the notice of the general body of trustees at their meetings, by whom they were approved of, and consequently homologated.

The act limited the powers of borrowing money to the sum of £10,000, for the purpose of making the roads, which being exhausted, the trustees, instead of going to Parliament for further powers, authorized further sums to be

borrowed beyond that amount. One of the bonds for £2000, bound the trustees signing it, not only as trustees, but also as individuals, their heirs and executors. The other bonds generally ran thus:—"We, a quorum of the trustees, ap- "pointed by act of Parliament, bind and oblige us, conjunctly "and severally, and our heirs, executors, and successors "whatsoever, to content and repay," &c.; and some of them, "We bind and oblige ourselves as trustees foresaid, as "well as individually, our heirs, executors, and successors."

The tolls having become insufficient as a security for payment of the sums borrowed, and the respondent's constituents, who signed the bonds as trustees, having bound themselves personally, as well as trustees, they sought relief against those other trustees who had not signed the bonds, but who had concurred in authorizing the entering into contracts for making the roads and the borrowing of money, or who, at least, were present at the meetings when such were authorized. The appellants were among those of the latter class, who, the moment they heard of an intention to make them personally liable, declined, with the exception of one, thereafter to attend any of the meetings. An action of relief having been raised, to compel them to pay their proportional share, they resisted, stating the following general defence, "That a trustee named by a general turnpike "act, who merely attends a meeting, and has his name "marked in the sederunt book, is never understood to bind "himself individually, but only to subject the tolls, or other "produce of the trust, in payment; and persons advancing "money, and contracting to perform work for behoof of the "trust, under the act of Parliament, if they are not satisfied "with the security of the trust fund, they must either de- "cline any dealings with the trustees, or must take care to "stipulate and obtain, in aid of the security of the public "fund, the collateral security of any particular trustees "who may be willing, either from motives of private inter- "est, or public spirit, to step forward and promote the work, "by binding themselves personally in any particular obliga- "tion, as very commonly happens in the borrowing of money "for turnpike roads. But though such trustees did super- "add their own personal obligation, it did not follow that "all the other trustees, who did not so become person- "ally bound, was liable in relief to them; but such trustees "had alone their relief on the security of the tolls, or other "trust funds."

There were, besides, some preliminary objections as to

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the calling of some of the defenders in the action, but these having been repelled,—the Court, on the merits of the case, pronounced this interlocutor:—"The Lords having heard "counsel for the parties, resumed consideration of the cause, "and having advised the same, they find it proved by the "minutes referred to, that the trustees assembled at meet- "ings held under the act of Parliament, for making the "roads in question, appointed committees of their number, "with power to enter into contracts and agreements rela- "tive thereto, in consequence of which, and of the con- "tracts and agreements thus entered into, a great expense "was incurred, which made it necessary to borrow consider- "able sums of money upon the credit of the tolls, and upon "the private credit of the pursuers, find that the pursuers are "entitled to a proportional relief from the other trustees "called as defenders in this action, who were members of "these meetings, and as such, either gave their concur- "rence in appointing committees, with powers to contract "as aforesaid, or afterwards homologated and approved "of those contracts and agreements entered into for carry- "ing the said resolutions of the general meetings into exe- "cution, and remit to the Lord Ordinary to proceed accord- "ingly."

Dec. 12, 1799.

Feb. 18, 1800.

May 14, ——

On reclaiming petition the Court adhered. Afterwards, the Lord Ordinary pronounced this interlocutor,—"Having "considered the interlocutor of the Court, of 12th Decem- "ber last, ordains each of the defenders to state, in a spe- "cial condescendence, the particular circumstances by "which he alleges he does not fall under the findings of "said interlocutor."

Against these interlocutors the present appeal was brought to the House of Lords, reserving all special defences competent to them as individuals, should the cause go back to the Court of Session. And the appellant, John Young, admitting, that besides being present at several meetings of trustees, and being appointed a member of several committees upon branch roads connected with the trust, he signed several contracts relative to these branch roads, and several bonds for borrowed money, and, consequently, admits liability, so far as these actings, voluntarily incurred by him, are concerned; but denies it *quoad ultra*.

Pleaded for the Appellants.—1. Trustees under turnpike acts, and other trustees or commissioners appointed by act of Parliament for the discharge of a public trust, and management of a public fund, if they keep within the bounds

of their official duty, cannot, by acting merely in discharge thereof, incur any personal debt or obligation whatever. This the appellants submit to be a clear proposition upon the general principles of law, and which is confirmed and supported by the tenor of all the statutes commonly called Turnpike Acts; and, in particular, both by the words and meaning of the act of the 32d of the king, for making the road in question, under which the appellants acted. Unless, therefore, it could be shown that the appellants have gone beyond the limits of their official character and duty, and either directly bound themselves as individuals for the expense of making this road, or for money to be borrowed to defray that expense, or by acting beyond or contrary to their duty as trustees, have done something that would in law raise such an obligation, no personal claim can lie against them on account of this road. The respondent, so far from pointing out the specific obligation, does not even allege any thing more against the appellants, than mere official attendance at certain public meetings of trustees, held under the act of Parliament for transacting the public and official business of the trust.

2. The claim by the respondent against the appellants is, for relief of bonds granted for money borrowed on the credit of the tolls, in which his constituents had become sureties for the trust funds, by binding themselves personally in the said bonds. There is no other question at issue between the parties but this, Whether they were, or he, in their right, is entitled to such relief from the appellants and other acting trustees? Upon the bonds themselves no such claim arises. The bond creditors assuredly have no claim against them, who did not become bound in these bonds, neither as trustees nor as individuals. If, therefore, the principal creditors have no claim, far less have the sureties. The money was borrowed upon the security of the tolls; the trustees who signed the bonds adding their own personal security; and, in this respect, therefore, they must be viewed in the character of sureties seeking relief. Accordingly, the Court, by their judgment, has not found the appellants liable upon the bonds, but on a different medium altogether. It is not the trustees who were present at meetings, which authorized the taking up of money upon bonds, or approved of the bonds when reported to them, that are found liable, but only the trustees who were present at meetings, which authorized or approved

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the entering into contracts or agreements relative to the making the roads. The trustees who had no interference, except in authorising the borrowing the money, or approving of the bonds when granted, for the money borrowed, are absolved from the action, which clearly shows that the Court below held it impossible that any claim could lie personally against the individual trustees on these bonds. The tolls were the main security for borrowing money. If, added to this, certain trustees chose voluntarily to superadd their own personal security, they must abide the consequence, without any relief against those who did not do so. They are, therefore, neither entitled under the bonds, nor as in right of the contractors, to make such claim against the appellants. Nor is there any evidence to show that they concurred in appointing the committees, or in approving the contracts, though their names may appear in the roll of members of meeting; and those of them who signed the contract were, by the tenor thereof, not taken personally bound to the contractor.

Pleaded for the Respondent.—The act of parliament obtained in 1792, for making this road, authorized the trustees therein named, to carry the purposes of the act into execution, but it provides no fund for the undertaking. The £10,000 which the trustees are authorized to borrow upon the tolls, was not a fund for making the road, because no money could be borrowed upon the security of the tolls until after a road was made; and, at any rate, the sum of £10,000 was admitted by all to be inadequate for making the road. 2. The road was a private concern *quoad* the expense of making it. Accordingly the trustees entered into contracts with workmen and others in making the roads, and into bargains with the proprietors of the ground occupied by the road, in which transactions their own personal credit was necessarily pledged; some of those trustees now refusing, pledged their credit, by subscribing the contracts and other writings, and the rest of them by authorizing and giving their unqualified approbation to these contracts, while they well knew the expense that would be occasioned thereby. 3. And it was further understood, through the whole course of the business, that all the trustees were to be equally liable for the expense of the undertaking, not only those who, by the appointment and with the approbation of the different meetings, came under obligation to third parties on account of the undertaking; but those who

concurred in, or approved of, or homologated such appointments or obligations. 4. It therefore follows that these bonds, having been granted to defray the expense of the work, a debt is thereby created against the whole of the trustees; and those who advanced the money for carrying it on, or granted their bonds for the money which was so applied, have a right to be relieved by their co-trustees.

After hearing counsel,

LORD CHANCELLOR ELDON said,*

"My Lords,

"This matter comes before your Lordships on an appeal from the Court of Session in Scotland, on certain interlocutors, which respectively bear date on the 12th Dec. 1799 and 18th Feb. 1800, and also an interlocutor of the Lord Ordinary, which bears date the 14th May 1800; and, my Lords, this cause arose out of certain acts that had been done by the appellants, or some of them, and the respondents, or some of them, in the execution of an act which passed both Houses of Parliament, for the purpose of making a road in several parts of Scotland, which it is necessary I should state, in order to make myself understood by your Lordships. The trustees appointed for carrying this act into execution are thus described in the act, 'That every person who is at present, or shall be at any time, after 'the commencement of this act, in his own right, or in the right of 'his wife, in the actual possession and enjoyment of lands valued in 'the tax rolls of one or other of the counties of Linlithgow and Lan-'ark at 100 pounds Scots of valued rent, and lying in any of the 'parishes through which the aforesaid roads do or shall pass, as he-'ritor, proprietor, or liferenter, and all and every the eldest son, or 'heir apparent of any heritors or liferenters, the provost or first ma-'gistrate of the cities of Edinburgh and Glasgow, and of the royal 'burgh of Linlithgow respectively, and the Sheriffs-depute of the 'counties of Lanark, Linlithgow, and Edinburgh, who had an inte-'rest merely for the year which they continued in office, but who, 'at the same time, are trustees by office, shall be trustees for open-'ing, making, amending, and repairing and keeping in repair, the 'roads and bridges aforesaid, and otherwise putting this act into exe-'cution, provided always that only one person shall act and vote as a 'trustee upon one qualification of 100 pounds Scots, and that the per-'son enjoying the greater interest in the lands shall be preferred.'

"The act of parliament gave these parties a power to raise money, but 'upon the credit of the tolls to arise in virtue of

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* Mr. Gurney's Short-hand Notes.

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this act, in such manner as they shall think proper, any sum or sums of money, not exceeding £10,000 Sterling, at an interest not exceeding the legal interest for the time;' and it gave a power 'to the trustees, or any five or more of them assembled, at the first meeting to be holden in virtue of this act, or at any of the foresaid stated half yearly meetings, to assign and make over the whole, or any part of the said tolls or duties, during the continuance of this act, (the charges of such assignments to be paid out of the said tolls), as a security or securities to such person or persons who shall advance or lend such sum or sums of money, their heirs, executors, or assignees, for the money so to be lent or advanced, and interest of the same.' This, your Lordships will observe, relates to the money to be borrowed.

"The act contains another clause, 'that it shall be lawful for the trustees, or any five or more of them, at a half yearly stated general meeting assembled, to contract and agree with such person or persons as they, or any five or more of them, shall judge proper, for the making and upholding, all or any part or parts of the said roads hereby appointed to be made and repaired, with power to them, or any five or more of them, to assign and make over to such person or persons, upon their giving good and sufficient security for the execution of the said agreements, any parts of the powers vested in them by this act, which shall be necessary for the execution of such contracts only, and any proportion of the tolls, duties, or forfeitures, to be taken and levied on the said roads so to be repaired by contract, and on no other, as the said trustees, or any five or more of them, shall appoint.'

"With respect to these contracts for making roads, your Lordships will find that they are put upon the same footing as the other official acts of the trustees, by a clause which provides, 'That regular 'accounts of all monies received, disbursements, contracts, matters 'and things respecting the execution of this act, shall be duly kept 'and entered by the clerk or treasurer of such trustees, in a book or 'books to be provided for that purpose, and which book or books 'shall and may be inspected and perused by any of the heritors of 'the counties of Linlithgow and Lanark, at all reasonable times, 'without fee or reward.' And as to the damages which may be done to the ground through which the road shall be carried, it is provided by the act, 'That the trustees shall make satisfaction to the owners of, and persons interested in, the grounds and hereditaments through which such roads shall pass, for the damage they may sustain by making, widening, and altering the said roads, or erecting toll houses as aforesaid; and, for that purpose, it shall be lawful for the said trustees, or any five or more of them, to contract and agree with the owners of, and persons interested in such grounds and hereditaments, for the purchase thereof, and for the loss and damage they may sustain in the manner here pointed out. And if

the persons shall refuse to treat or agree, the damages shall be assessed by a jury; and with respect to the mode of paying the damages which shall be assessed, the act points out, 'That the costs 'and charges of every sort and kind, attending the obtaining such 'an assessment by a jury, shall be paid by the trustees, or any five 'or more of them, out of the tolls and duties arising on the said 'road, or from any money to be borrowed upon the credit 'thereof.'

"It would be easy to read to your Lordships a great variety of other clauses out of this act. It is sufficient to state, that of those others which I shall abstain from reading, which I think I can predicate of those I have read, that the powers which the act gave, are powers vested in the trustees to do the acts which the act enables them to do, with the fund which the act provides; that is, in short, that the funds were to be applied to satisfy every demand which, in the regular execution of this trust, might happen to arise.

"My Lords, it appears, I think, that there was a sum of money, —I cannot very accurately state what it was that was subscribed, but it was between three and four thousand pounds, and, as I understand, necessarily subscribed, and the act gave the trustees a power to raise to the extent of £10,000. Your Lordships see that the trustees have a power of raising it upon the credit of the tolls. I mark that circumstance, because it is material to observe, that so long as there is a meeting under the authority of the act—a dealing under the authority of the act is a dealing with a fund, which, under the authority of that act, they have a right to dispose of; and the actings of the majority of those present will bind the whole; but it becomes a very grave and very serious question indeed, to say, that when your funds shall have been altogether exhausted, and when as to any fund they cease, under the authority of the act, to have any powers, it still shall be competent to the majority of such meeting to bind any individual not dissenting as an individual. They may overrule the whole of the co-trustees, as co-trustees, by a vote of the majority, when acting within the powers of the act; but when they came no longer to have a fund to dispose of which belongs to them as trustees, it must require, as I apprehend, the individual concurrence of the individual acting as an individual, made out by very clear and cogent evidence, in order to bind him, or make him liable personally.

"It appears that the trustees addressed themselves to the execution of the trusts of this act of parliament, and, in so doing, they held meetings, according to the provisions of the act of parliament. They formed committees according to the provisions of the act of parliament. They entered into contracts for doing the work which the act authorized and enabled them to do; and I believe I shall meet with the concurrence of your Lordships, when I say, that all these acts are *prima facie* to be taken to be acts done by them, not as individuals, but as trustees in the execution of the trusts reposed

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in them under the act of parliament; and so long as they confine themselves to do acts, in that character, they will be liable only in that character. It is certainly competent to any man who is a trustee under a Navigation Act, or a Turnpike Act, if he thinks proper to fall in love with the execution of a trust, and to embark with greater zeal in the project which the act enabled him to carry into execution, than belongs to his real character of trustee, to pledge himself individually, if he thinks proper, to the person with whom he is to deal;—he may make a contract with a person who is to repair part of the road;—he may make a contract with a person who is to build a bridge;—he may make a contract, if those are ordinarily made, with the daily workmen, to do works, which may entitle them to say to him, from the language of the contract he enters into, or from the manner in which he employs them—the terms on which he employs them—that they have embarked in the undertaking upon his personal credit; and that if he thinks proper so to contract with them, they have nothing to do with the question, Whether he has a fund to resort to or not; but they who so state themselves, in a question with him, are bound to make out that he did contract with them, not in the character of a trustee, but, divesting himself of that character, and making himself liable, whether he had a fund to resort to or not, and therefore as an individual.

"There is another class of cases, from which it might well be contended, that a trustee, with full knowledge that he had no fund, and could employ no fund, and that no fund could ever be brought within his reach, to be applied, if he contract in his character of trustee, as if there were a fund; in which case it might be said, upon the special circumstances of such case, and upon the ground of deceit, as holding out to the persons with whom he was dealing, that they might safely contract with him, and that there was a fund to which he and they could resort, that he made himself personally liable; but still it is for them to prove, from the terms of the contract, and the nature of the engagement, that they have a personal demand upon him; and I should think it a strong construction to put upon a great many acts of sederunt, which I find here, where they have made orders in the committee, and so on, that those orders are *prima facie* to be understood to authorize them not to act as trustees, up to the extent of their powers as trustees, but, divesting themselves of all that belongs to them in the character of trustees, that they are to be understood to be authorized to act, so as not only to bind themselves personally, but to bind other persons personally,—this appears to me to be a strong proposition.

"Up to a certain period in the transactions of these trustees, your Lordships must have observed that the fund which was to be raised by mortgage of these tolls, was not a trust debt. When, therefore, that fund which had been raised previous to passing the act, and that fund which could be made by mortgage of the tolls, was not yet

exhausted, it is not only *prima facie* to be supposed that the trustees are dealing as trustees, from the language with which they deal, but also from the fact that they have a fund to deal upon, according to the terms of the act of parliament. It becomes, it is true, a question that may be looked at in a very different point of view, when that period shall have arrived, after which they have no such fund upon which they could deal; and having no such fund upon which they could deal, they could not be supplied with it but by personal contributions, or by personal engagements, or by a fresh application to parliament; because, when any person joins in an act done for raising money, with a knowledge, on his part, that there is no such fund, it is a case in which it is somewhat more probable that he engaged himself personally. It does not prove the fact, but, in such a case, it is somewhat more probable that he might mean personally to engage himself; but I do not know that it carries it further than that it was somewhat more probable. It is clear we cannot go on the doctrine of probabilities.

"Now, without going through a great variety of meetings, in which persons have been present, sometimes more sometimes fewer in number,—the number of meetings in which money has been alleged to be borrowed by the trustees, previous to and subsequent to the total expenditure of these funds—without pointing out the instances in which some individuals join in securities that are given, and in which some individuals do join in contracts that are made; or the instances in which some persons individually, or together with other persons, enter into such securities and contracts, and without entering into the particularities which belong to each and every one of the securities which have been given in this case—the terms of which appear in very different and in very various language; some of the securities in which, upon the face of them, the trustees plainly bind themselves only *as trustees;* some of the securities in which the trustees bind themselves, describing themselves as trustees, but going on to bind their heirs, executors, and administrators; some of the securities in which the trustees bind themselves as trustees, and all other the trustees, having terms descriptive of their own heirs, executors, and administrators, but not having terms descriptive of the personal or real representatives of the other trustees whom they affect to bind; some of the securities, I think, affecting to bind not only themselves and their real and personal representatives, but the other trustees and their real and personal representatives also; and without entering into the question, what is the legal effect of said instruments?—whether they do bind the trustees who are described in them, only as trustees, or whether, because they name their heirs, executors, and administrators, they shall bind them personally?—without entering into the question, what is the legal effect with respect to those trustees, who are merely described as trustees by the general words, all others the trustees concerned in the execution of

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the act of parliament, or as these words can be taken to apply to any particular trustees, who were present at any meeting or sederunt that authorized the borrowing of money in the transactions to which this particular security, so expressed, applies ;—without entering into the question of law, how far it was possible for one trustee not only to bind another trustee, merely as such, but as an individual, by a bond not executed by themselves,—your Lordships will, I think, collect from these variations and differences in the terms and forms of the contracts, that the interest of those who executed the contracts might be different in different instances and circumstances. Your Lordships have, therefore, in this case, not only a class of cases which existed before the funds were exhausted,—which the act of parliament furnished, but you have a class of cases, both before and after that period arrived, in which considerable question may arise upon what must be taken to have been the intention of those who executed such securities so expressed, and whether it should seem to be probable, that those who executed securities and contracts so variously expressed, did not mean that all such securities and contracts should operate exactly in the same manner.

" One great argument for the respondents in this case, has been, that the trustees who were present at the meetings could mean nothing else,—attending to the state of the funds, and attending to the circumstances of fact, that here there was no road which could immediately produce tolls, and that they could mean nothing else but to authorize those who dealt with the contracts and securities not only to bind themselves personally, but also to bind all those who were present at the meeting at which that authority was given. Now *that*, I think, must depend upon different circumstances.

" The first question furnished by the case is, Whether a man's merely being present at such a meeting, authorizes that inference to be formed. The next question that may arise may be, Upon what degree of knowledge he had at the time that he was present at that meeting is he to be held personally liable ? Another question may arise, What have been his acts *ultra* the act of mere presence ? because, for the reason I before shortly alluded to, it seems a proposition I am incapable of finding a reason for, when it is stated that trustees, deriving their very existence and character as trustees under an act of parliament, can bind other persons out of a majority, with respect to funds over which they have no control as trustees, but which is the private money of those individuals in their private pockets ; and, upon such a case, were the question to arise upon the personal liability of A, B, C, D, E, and F, it would be necessary to enter into an inquiry of what was the act of A, B, C, D, E, and F. I observe that my Lord Ordinary, before whom this action first came, by an interlocutor, put it upon those who contended, that any individual trustee was liable as an individual, to show by what acts or facts he made himself so liable. When the case came before the Court of Session, they were pleased

to pronounce the following interlocutor (Interlocutor read), and which interlocutor, together with another, afterwards pronounced by the Lord Ordinary, to whom the Court of Session had remitted, has established this principle, as it seems to me, if I rightly understand it, that the mere presence, as proved by the minutes of the sederunt, will fix the personal liability of every man who was present, and not appearing from the minutes to have objected to the proceeding ;—and, consequently, that he will be bound on his part to show, by acts and deeds, that he was not liable—that he did protest in some such way as to shelter himself from the liability which is alleged against him.

" I will trouble your Lordships with reading these interlocutors, in order that your Lordships may see whether I have fully represented the effect of them. The first is of the 12th December 1799, (Here the interlocutor read.)

" Now, I understand the effect of that interlocutor to amount to this, that *every person* is liable, not only for every thing that was done, in consequence of the authority given by the meeting, although with reference to each, you can say no more than this, that he was present, and that he not only is liable for the proceedings of that meeting at which he was present, but that he will be liable, if he were present at a meeting to-day, for the effect and consequences of all the transactions that were authorized at all the preceding meetings, provided that, at the meeting held to-day, such notice is taken of the acts which have been done, under the authority given by any transactions of the preceding meeting, that, by the effect of that notice of the meeting held to-day, you can connect the transactions of that meeting with the transactions authorized at the former meeting, and, by virtue of this reasoning, he is said to homologate and approve the whole of such transactions. The effect of that is, that if, in a meeting consisting of four or five trustees, the chief magistrates of the borough of Glasgow, Linlithgow, or the other places named, had gone in, if he had gone in but once, and any transaction took place at that meeting, in which four or five trustees were met, he being one of them, that therefore he homologated, as it is called, all the transactions of the preceding meetings ; and if he did not object and protest against that, though he was trustee by virtue of his office, and by virtue of his office only for a year, and though his presence might be occasioned by such a motive as I have been stating, he is liable to a contribution to that extent, for the extent to which he would be liable would be limited by the amount to which they had borrowed ; but he might, upon that principle, be liable to a greater extent than the act had authorized the trustees, as trustees, to borrow and raise money. I do not know myself, whether there is any general understanding in the practice in Scotland, respecting those meetings which may give an interpretation to (I cannot call it the acts of persons who were accidentally present, but to) the mere fact of the presence of a person at a meeting, to this extent, that if the meet-

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ing lasted six hours, and he were then only one moment, and according to this doctrine, if he were there, and had departed two or three hours before the consideration was taken up, whether such a sum of money should be borrowed or not, the mere circumstance of having entered his name in the minutes, according to the understanding of these matters in Scotland, would render him liable. It would need a most inveterate practice indeed, upon which such a proposition as that could be established. It could not be the intention of a Mayor, or Sheriff, or an annual officer, to embark himself to this extent. I confess I cannot myself think that there is any such principle in the law of Scotland (unless indeed it differs materially from the law of England) which says, that the mere presence of a man at a meeting would of itself render him liable; first, because it may have been a case in which the man may not have voted at all; secondly, because he may have been in the minority; and, lastly, because, upon the question of personal liability, it does not appear to me how the majority could bind him. It would be pretty nearly the same thing, as arguing this proposition, that every one of your Lordships who came into this room, having his name taken down by your Lordships' clerk, must be understood to give his approbation to every measure, although the true sense of that is nothing more than that your Lordships were present; and, therefore, in this case, the man's presence is nothing more than that he was present. Now, upon this interlocutor, there is a remit to the Lord Ordinary, and this is the Lord Ordinary's interlocutor of 14th May 1800. 'Having considered the interlocutor of the Court of the '12th December last, ordains each of the defenders to state, in a 'special condescendence, the particular circumstances by which he 'alleges he does not fall under the findings of the said interlocutor.'

"My Lord Ordinary, who had this under his consideration before the Court of Session, was of opinion, that it was upon those who were charged, to prove circumstances which would relieve them from liability. The Court of Session, having found that the mere minutes of presence are sufficient *prima facie* evidence of the personal liability of any body, when the act that is authorized to be done has engaged those who did it personally. They made an interlocutor, which the Lord Ordinary has construed, and construed rightly, I think, according to the sense the Court of Session meant to express in the interlocutor, and he shifts the burden of proof altogether, and considers every person is liable till he proves that he is not liable. Now, I apprehend that that certainly is not the correct idea of our law: for I take our law to be unquestionably this, that when a trustee is dealing, upon an occasion in which he has engaged, that he is to be understood to be dealing in the character of a trustee, and to be engaged as a trustee; that unless there is something in the terms of the contract that he makes with others, which pledges his personal liability, he will be understood as engaging only as a trustee.

" This case is certainly an extremely important one, not only with respect to Scotland, but with respect to every part of the island, because it is a circumstance, I think, which, if the law is to be carried to this extent, and to be dealt out in this fashion, will make it exceedingly difficult to find persons who will act in the character of trustees ; and they cannot act as trustees for canals, roads, turnpikes, and so on, without attending every meeting, relative to the transactions that belong to the trust which they have to administer, from beginning to end. If they ever enter the room upon any meeting, without sifting all the minutes that are entered down, and without taking the trouble of protesting, and expressly protesting against what the majority do in every instance, and *that* whether it be an instance of conduct on the part of the majority, in which the majority can bind the individuals or not, it seems to me to attach a most frightful responsibility to the character of trustees, and which ought at least to be guarded with this check, that those who charge trustees as personally liable, shall make out clearly that they have rendered themselves personally liable, by the terms and nature of their engagements.

" Now this interlocutor goes to this extent, that it treats the cases with reference to the period before which the fund was exhausted, and the period after which the funds were exhausted, alike ; and it places the transactions with relation to that fund, which had been raised under the authority of the act of Parliament, exactly upon the same footing as those transactions which took place after that fund had been exhausted, though it could not reasonably be expected that the transactions afterwards could be made good, out of the funds which were so exhausted, the act of Parliament having provided no more. It also leaves this, in another point of view, an extremely difficult case to be dealt with. It is not a case, as I apprehend, in which the several pursuers have, each and every one of them, a demand against each and every other of the defenders, as arising out of each and every transaction in which they state the demand ; but it is a case in which different demands may be applicable (whether they can be sustained or not I do not know) to some of the pursuers, as arising out of some of the transactions in which they engage, and in which the other pursuers did not engage. Those again who do not participate in a right to make a demand in a transaction in which they are no parties, state a great variety of demands, as arising out of other transactions to which they are the sole parties, and to which others of the pursuers are not parties in it at all. So with respect to the defenders, it is contended that they are liable,—not each of them liable to all the pursuers in reference to any particular transaction which is stated, but some liable in reference to one transaction to some of the pursuers,—others liable in reference to other transactions to the other of the pursuers,—some liable to some defenders,—others liable to other defenders,—so that there is here an

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action and a question arising out of every sederunt almost which is in proof to have been had and made; and not only that, but there is a cause of action between different parties in each and every of these sederunts; and one general principle is applied by these interlocutors with respect to all of them.

"There certainly have been cases, in which persons, acting in the execution of the powers of navigation acts, and acts of this nature, have been held personally liable to those whom they have employed. A noble Lord may recollect the case of Forster *v.* Dell, in respect to navigation. *There* the question was, whether some trustees, who thought proper to enter into a personal engagement with a person whom they employed to do the work, were liable, because they entered into that personal engagement to pay those who did the work; and there can be no doubt *there* of the responsibility of all who were at that meeting, for every trustee *there* signed the order for it; and when you saw the terms of the order and the engagement were once proved to be conformable to the terms of the order, there could be no doubt upon earth that the engagement was the engagement of every person who had signed the order so authorized; but it is quite a different question, Whether an individual, who had been present during the time *that* transaction was authorized, and had not been a party, by signing the order, could possibly have been bound or not? In the present case, I apprehend your Lordships must look upon this as a case, in one respect, between persons who were employed *by the trustees;* because I observe that those trustees who insist that they have a right to call upon them for a contribution, have got an assignment of the demands of those persons who would have had a demand upon them, so that they stand in the place of the persons who have done the work, as well as that of the actual trustees who ordered that work to be done. That, however, carries the question no further than this, that if it were now a question between the persons who did the work and the trustees from whom proportional relief is now sought, Could the persons who did the work prove that the trustees who were not parties to the engagement with them, were nevertheless liable, by virtue of what they had done, as being liable to those who were parties to the engagement with them? and, Could they have proved that the engagements which were entered into, were engagements which bound those personally who were parties to them, and, by virtue of the authority given to them, bound those who gave the authority, though they did not enter into the engagement?

"Now, it may be one thing, whether this order was given when there were funds to supply it. It may be one thing, whether the trustees bind themselves in the particular instrument as trustees. It may be one thing, whether the trustees bind not only themselves as trustees, but affect to bind others, but still affecting to bind them only as trustees; and it will be a different question again, as applied

to those transactions which the trustees, who did not enter into the contracts and engagements, have bound themselves, really and individually, have bound their representatives, as standing in their places, and have affected to bind the other trustees also individually, and the representatives of the persons who should be the representatives of those trustees.

"There is another species of case which arises here, which is a distinguishing case from the rest, which requires a great deal of attention, when you are proceeding to determine in what case any person shall be considered as individually responsible. There are cases here, in which those who enter into them, expressly bind themselves as trustees, and go on to say, and we expressly bind ourselves as individuals, our heirs, executors, successors, and representatives. Why, if a person who has entered into such an engagement, produces another engagement, in which he has bound himself only as trustee, and has bound his heirs, executors, successors, and representatives, and has said nothing more about the other trustees, their executors, successors, and representatives, surely the very language of his contract will show that he did not bind them but as trustees, and did not mean to clothe them with a personal responsibility, which he has not, in express terms, attached upon himself by the execution of that instrument.

"My Lords, it seems to me not improper to submit to your Lordships also, that if the minutes of meeting are not in all cases to be taken as evidence, so as to throw the burden of proof upon the other side, so it cannot be generally distinguished, according to the interlocutor of the Lord Ordinary, that the burden of proof is in all cases upon the other side. A person's presence at a meeting, I admit to be evidence of his concurrence; but it is the slightest of all possible evidence of his concurrence. It is merely a fact, in which you may or may not, collect something towards the determination, whether he did or did not concur. But mere presence, as I apprehend, would not be enough to constitute his liability; and, in cases where the majority bind the others as a majority, they have no right to bind them as individuals, but only as trustees.

"As to the cases of magistrates, can any man living suppose, that a man who must be a magistrate in office for a year, and who is to cease to be in office at the end of that year, that if, two days before his official character of trustee had determined, he came into this room, perhaps for no other purpose but to see some of his neighbours collected there together, that he meant by that act, and that act only, to accede to any such engagement as that which might be come to, which might have bound him *personally* to the amount of ten times the fortune which he had to furnish towards making good this engagement. The very nature of the character under which a man acts as a trustee, makes the circumstance of his presence, as it appears to me, of more or less of evidence against him according to circumstances. If a man were a mere trustee, having no money to which he could resort

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except the funds (of the trust) to make good his engagement, it is less probable that he should engage, than a man of responsibility and fortune, though this presence is a circumstance of evidence of the slightest nature. A man might come into the room without any serious intention of taking any part in the business which is going on. It is too much to oblige him to prove the particulars of his conduct at that meeting to be such as to enable him to repel the conclusion, which, according to this interlocutor, is to be deduced from the mere fact of his presence.

"My Lords, the great variety of circumstances which obtain in this case, and which took place under the numerous sederunts and meetings that have been here had, will certainly raise a very strong inclination in the minds of some of your Lordships' body, (whom you are pleased occasionally to describe as noble and learned Lords,) to go a great deal farther. It seems at least proper, before the appellants are charged to the extent in which they shall be liable, that it would be reasonable that some farther inquiry should be made, which would bring before your Lordships the particular circumstances of each of the transactions, as applying to each of the individuals, who are supposed to be affected by this *personal* liability. The proposition, therefore, which I am disposed to make, I believe, with the concurrence of a noble and learned lord, and I believe I may also say, with the concurrence of another noble and learned Lord, is this,—To reverse the last interlocutor, but not to reverse the interlocutor of the Court of Session; but to send it back again to that Court, to review that interlocutor generally, and also the interlocutor which confirms it;—to review the interlocutors of the 12th December 1799, and of the 18th February 1800, to remit the cause to the Court of Session to require them to review these two interlocutors generally, and that they may find from which of the defenders, and in respect of what particular sums as to each of them, the pursuers, and which of the pursuers, are entitled to a proportionable relief, and by reason of what acts each such defender became liable, and in what sums the defenders respectively are liable to contribute to such relief. There is a minuteness perhaps in the terms of the reference; but I really do not know how to apply it to a case which embraces such a great variety of transactions, in which so many individuals are and are not parties, and which transactions embrace so many differences with respect to the nature of the authorities for raising money, and the terms and the nature of the engagements under which money has been raised, and work been done, without directing the inquiry in terms thus minute.

"When the Lords of the Court of Session shall have found these particulars, what are the demands which they conceive can be made, and upon what grounds liability falls upon each individual, as to the share which he may have taken in the several sums which may have been raised, either in the execution of the trusts of these acts, or those which may have been raised, either independently of any authority

of the act, that may very probably lead to an entire change of these interlocutors. These inquiries appear to me to be necessary in the present circumstances of the case."

LORD ROSSLYN,—

"I conceive, that the inquiries now suggested, when completed, may lead to a total change of the interlocutors of the Court of Session.

"In the execution of this turnpike act, the trustees do not seem to have attended to the powers given by parliament. In all cases, they were strictly limited in their powers of charging. If they expended the funds committed to them, they should have come to parliament for further powers.

"The road was made upon speculation as to the security of the tolls. If they produced money sufficient, not only to pay the interest of the debt contracted, but to establish a sinking fund, it was all very well; but if they were only equal to pay the interest, it would become necessary to apply for a new act.

"Will the Court say, that, in such an event, the trustees who acted under the first act would still be personally liable? Money borrowed upon the credit of tolls is often difficult to be procured. We deem it in this country an indifferent security, as there is no mortgage given to the creditor. Money is therefore generally borrowed and advanced by the friends of the road, and then the trust funds are given in security. Public men can do no more. They may, to be sure, bind themselves as individuals, but courts of law will not presume that they do so loosely.

"I trust, if this case should come back here, that the Court will have examined their principle laid down, and inquire whether A, B, and C, are bound to contribute, and how they are not only bound as trustees, but also as individuals?"

[His Lordship did not speak long, but what he said was spoken in so low a tone of voice that little could be heard of it.]

LORD ALVANLEY,—

"I so perfectly agree with the two noble Lords who have spoken, that I think it unnecessary to add more to what has fallen from the noble Lord who has just sat down, than to recommend to the parties, whether, instead of proceeding in this cause, they will not do that which is the only way in which they can possibly seek relief, or relieve themselves of the difficulty, namely, by applying to parliament to authenticate these acts, and to enable them to bind the trust funds so as to go on with this work, and indemnify the parties who have already contracted, and brought themselves under these obligations, some of which they have discharged out of their own private fortunes.

"My Lord Chancellor says he sees there is a fund open. My friend has pointed out, that these bonds, as they now stand, would not, in point of law, affect the trust funds; but thus far it will go, that every man who has actually assented as trustee to the making of these roads, will be bound, when he comes to act again as a trustee upon funds created by act of parliament, to indemnify those who

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have laid out money from their own private fortunes on the roads, by binding the trust funds in relief and security. These trustees now come against particular trustees, present at particular meetings, insisting that they, by their personal presence at these individual meetings, had bound themselves personally, together with the persons entering into the contracts, to the performance of those contracts, and to the payment of those sums borrowed. It is clear, when they entered into these contracts, that this was their idea; they proceeded upon this mistaken idea, that all the trustees of the road were, either as trustees, or as individuals, equally bound. Their expression is; 'We bind ourselves, and the whole trustees of the road.' So that when they entered into those contracts, they either conceived that they were only binding the funds, or if they conceived they were binding individuals, they thought they were binding all the trustees who happened to be present at particular times; and it was only afterwards, when they found the irregular manner in which they acted, they were under the necessity of calling upon the committee, which told them in the face, that it was impossible all the trustees of the road could be bound, that they thought fit to limit their demands upon those whom they never before conceived to be more bound than all the other trustees. With respect to the case which has been mainly relied on, I cannot say that I perfectly agree with the decision given in that case; and it was, besides, a case very different from the present. The parties there had entered into contract, which they signed, and agreed that the contract should be performed, and there was actual consent. I believe they did not intend to bind themselves, but the contractors could never have been supposed to have entered into anything but a personal contract with them. In that particular case, the contract did not bear upon the face of it, what all our turnpike contracts do, (for our trustees are prudent enough to make contracts which nobody can mistake, and which affect pointedly the funds, and the funds only); that the funds only were bound. The contracts here did expressly affect the funds, but were drawn up in such a way as that no man thought himself under a personal obligation. I heartily wish, that if the produce to be expected from them is of such magnitude, as it seems hinted to be, by the learned President of the Court of Session, that the parties would relieve themselves of this burdensome suit, by going to parliament, for I fear this will produce a great deal of ill blood among the parties, who will think themselves hard used, not having intended to make themselves more bound than the others were; and I believe, in the end, *that* will be found to be the best, the only way, in which the cause can be settled."

The Lord Chancellor put the question, which was carried *nem. con.*

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland, to review the interlocutors complained of, of the 12th Dec. 1799 and

18th Feb. 1800 generally; and to find from which of the defenders, and in respect of what particular sums, as to each of them, the pursuers, and which of them, are entitled to a proportional relief, and by reason of what acts each such defender became personally liable and in what sums the defenders are respectively personally liable to contribute to such relief; and it is further ordered and adjudged, that the interlocutor of the Lord Ordinary, of the 14th May 1800 be, and the same is hereby reversed.

For Appellants, *Wm. Adam, Wm. Alexander, Matthew Ross, Jas. Abercromby.*

For Respondents, *T. Erskine, Henry Erskine, John Clerk.*

NOTE.—Unreported in the Court of Session. Under the remit, *vide* Dow, vol. iv. p. 341, for what appears to have been done. The Road Act is the 32 Geo. III. c. 120, extended by 35 Geo. III. c. 150, (Bathgate and Airdrie Line.) The English case referred to by the Lord Chancellor was Horsely *v.* Bell, Ambler's Reports, p. 770, not "Forster *v.* Dell," as mistaken by the short-hand writer.

THOMAS GRAHAM of Calcutta, . . *Appellant;*

ISABEL and ANN HENDERSON, Sisters and Executrixes of the late COLONEL JOHN HENDERSON of the East India Company's Service, } *Respondents.*

House of Lords, 20th December 1802.

COPARTNERSHIP—LIABILITY—POWER OF ATTORNEY—RIGHT OF DELEGATION—JURISDICTION—FOREIGN.—A copartnership was empowered, as attorneys, to invest their constituent's funds in certain securities, and remit the interest. They did so, but, several years afterwards, the company underwent a change, by some of the old partners retiring, which changes were intimated to the constituent. The appellant was one of those who retired from the old company. The new company continued to correspond with and act for the party; but there was no renewal of the power or approval of their actings. They became bankrupt, with his securities and funds in their hands. In an action against the appellant to make good the loss; held, in the special circumstances, that he was liable, and that the Court had jurisdiction in the question.

Lieutenant Colonel Henderson, on retiring from India, committed the charge and management of his affairs in that country, to the house of Graham, Crommelin, and Moubray, of which the appellant was a partner; and, for that purpose, left with them, of this date, a power of attorney; and also, Jan. 22, 1787.