drawn or indicated any such distinction, this reasoning would not have been without force. There is nothing of the kind, however, in the section, and a good deal may be said in favour of the view that the Railway Company having usually made, or being proprietors of, the line on which they carry, should have more than ordinary privileges as carriers—besides which, it may be important even for the public, that in regard to goods traffic carried by railway, the company should not be driven or induced to insist for payment of the charges for carriage of each parcel of goods when delivered;—but in order to prevent detention in the ordinary delivery of goods, should have a right of detention over other goods of the same party afterwards coming into their hands.

"The Lord Ordinary has considered the case and the various statutory provisions above referred to thus fully, because he has decided the point raised directly against the decision in the case of *Wallis* above referred to, in the Exchequer Court in England. In regard to that case itself, he may observe, that, as in the Scotch case of *Carter*, it did not occur to the Counsel for the plaintiff that he could maintain that the word 'tolls' in section 90 had the limited meaning now contended for. Accordingly there was no argument to that effect in the case. The point was apparently started by the Court, and given effect to at once without judgment being reserved, and without that deliberate argument which the Court would have had on a point for which Counsel had been prepared, and which has been fully considered. The Lord Ordinary is of opinion that if the point is to be decided on anything beyond the terms of the 3d and 90th sections of the General Act, and the clause in the Special Act regarding tolls, that, whatever may be the result, a careful consideration of the whole of the clauses above referred to is necessary, and judging from the report he doubts whether the matter received such consideration in the case of *Wallis*. The opinions of the learned Judges may have been fuller than the report shows. The Lord Ordinary can only say that, with the utmost respect for these learned Judges, he does not think the reasoning there stated is satisfactory. After the best consideration which he has been able to give to the statute, he has formed an opposite opinion from that at which these learned Judges arrived, and he has thus felt constrained to decide the case contrary to the view to which they gave effect. Whether the decision in the case of *Wallis* has been accepted by the legal profession in England, and has been acted on by railway companies since its date, the Lord Ordinary cannot tell; but he may observe there is nothing in the report to show whether the amount at stake was such as to warrant an appeal, and the case is one in which the railway company had evidently another formidable plea stated against them, for the charges were made partly for the carriage of goods by sea to Jersey, and this circumstance might of itself be sufficient to prevent an appeal being taken with the hope of success.

"The Lord Ordinary thinks it unnecessary to deal with the other grounds of appeal stated in this case in detail. He may, however, say that he is of opinion that if the appellants do not succeed on the ground now dealt with, the trustee's deliverance ought to be affirmed. It appears to the Lord Ordinary that the appellants, having been employed by the bankrupts simply as carriers, are not entitled to split down their rates of carriage into parts, and thus claim a right to retention of the goods for so much of the charges as they may estimate to be for the use of the line only. The bankrupts dealt with the appellants as carriers, making charges as such, and not as the owners of the line charging tolls for the use of the line.

"As little does it appear to the Lord Ordinary that there is any ground for the argument that the appellants acquired a right of lien or retention under special agreement between the parties. The Lord Ordinary has been unable to discover in the agreement any terms which either expressly or by implication could confer such a right."

This interlocutor was extracted and became final on December 11, 1873.

Counsel for Appellants—Lord Advocate (Young), Q.C., and Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Respondents — Solicitor-General (Clark), Q.C., and Maclean. Agents—Hill, Reid, & Drummond, W.S.

---

*Thursday, December* 11.

## SECOND DIVISION.

[Lord Gifford, Ordinary.

### MACDOWALL *v.* RENFREWSHIRE ROAD TRUSTEES.

*Renfrewshire Road Trustees—Security—Ranking of Creditors.*

*Held*—(1) that the effect of the statutes regulating the Renfrewshire roads is to create a community of interest in the creditors on the turnpike roads of the county; (2) that creditors in right of bonds creating a security over the tolls of special roads mentioned therein, are entitled to rank *pari passu* with the general creditors for whatever surplus funds to meet the *cumulo* debt might be in the hands of the road trustees.

The summons in this action, at the instance of Major-General Day Hort Macdowall of Garthland, and William Cuninghame, Esquire, late of Craigends, captain in the 11th Regiment of Hussars; against Andrew Hoggan and William Henry Hill, writers in Glasgow, clerks to the Trustees on the Roads in the County of Renfrew, and as such representing the said last-mentioned trustees, concluded for payment out of the funds, assets, and revenues, under the charge of the said Trustees, to the pursuer the said Major-General Day Hort Macdowall, of the sum of £1333, 6s. 8d. sterling, and to the pursuer the said Captain William Cuninghame, of the sum of £833, 6s. 8d. sterling, being the respective amounts paid by the pursuers respectively to the respective creditors in right of certain bonds dated 1793 and subsequent dates, and which bonds were granted under the authority of the Act 32 Geo. III. c. 121, (1792) upon the credit of the tolls of particular roads mentioned in the bond; and the question raised was whether, on a sound construction of the statutes regulating the Renfrewshire roads, the pursuers were placed in the situation of general creditors and entitled to rank *pari passu* upon the whole *cumulo* funds of the Renfrewshire

Road Trust. The facts of the case are fully stated in the interlocutor of the Lord Ordinary:—

"*Edinburgh, 25th July* 1871.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, the bonds libelled, and the various Acts of Parliament, minutes of the Road Trustees, and other writs founded on, Finds that the defenders, Messrs Andrew Hoggan and William Henry Hill, writers in Glasgow, are clerks to the Trustees on a great number of roads in the County of Renfrew, being, *inter alia*, the roads enumerated in the 3d section of the Act 6th Geo. IV. cap. 108, and as such the said defenders represent the Trustees on the whole of said roads: Finds that the pursuers are in right of certain bonds, or parts thereof, being the seven bonds mentioned in the conclusions of the summons granted by the Road Trustees, acting as trustees on certain special roads mentioned in the bonds: Finds that, besides and apart from any personal obligations created by the said bonds against the granters thereof as individuals, the said bonds respectively by their terms created only a security over the tolls on the special roads therein mentioned, and create no security in favour of the creditors over other roads not specially mentioned, and the tolls of which other roads are not specially mentioned or assigned: Finds that none of the Acts of Parliament, and none of the minutes of the Road Trustees founded on by the pursuers, entitle the pursuers, as creditors in the bonds founded on by them, to payment of the said bonds, or any part thereof, from the tolls or revenues of any other roads than the road specially mentioned in the bonds, in competition with the creditors on such other roads, or who hold securities over the tolls or revenues of such other roads; and, in particular, finds that the pursuers, as in right of the bonds libelled, or part thereof, are not entitled to a *pari passu* ranking with the other creditors of the whole roads under the charge of the Renfrewshire Road Trustees: Finds that there is nothing in the statutes, or in the minutes of trustees founded on, to create the whole debts incurred by the present Renfrewshire Road Trustees, or their predecessors, a *cumulo* debt chargeable upon the whole roads and revenues under the charge of the said Trustees: but, on the contrary, finds that each debt must be charged, in the first instance, only against the particular road or roads, tolls or revenues upon which by the terms of the bond it is made chargeable, or which by the bond are especially assigned or impledged: Finds that the pursuers are not entitled to decree for the sums concluded for against the Renfrewshire Road Trustees, or their clerks generally, in the broad terms in which decree is sought in the present action; but that the said decree must be limited or restricted so as to operate as a decree against the trustees only so far as they have, or may have, funds in their hands applicable to the payment of the bonds sued for; and with these findings, appoints the case to be enrolled for further procedure.

"*Note.*—This case has been several time debated in the Procedure Roll, and was from time to time delayed for the production of documents, particularly minutes of the Road Trustees, which it was thought might have a material bearing upon the points raised. As the history of the bonds sued upon goes back so far as 1793, opportunity was given to the pursuers to look over the Trustees' accounts and minutes for the last eighty years, so that anything bearing upon the suit might be extracted therefrom. The Lord Ordinary understands that the defenders have given the fullest information and the fullest access to their books and papers, and that no diligence or judicial order was necessary.

"These inquiries have necessarily caused considerable delay, and even yet many points connected with the history of the roads under the defenders' charge, and of the various debts, or classes of debts, over them, are involved in some obscurity.

"In many respects the action is not well suited to try the various questions which the parties have endeavoured to raise under it. The pursuers fairly and frankly avowed that their object, or one of their objects, was to try the question whether the numerous statutes passed by the Legislature in reference to the Renfrewshire roads, with the minutes of trustees following thereon, had not the effect of making the whole debts of the Renfrewshire Road Trust, whensoever contracted, and in whatsoever terms the bonds were expressed, catholic debts, affecting equally and entitled to rank *pari passu* upon the whole *cumulo* funds of the Renfrewshire Roads Trust. The parties also announced that they wished to raise the subordinate or alternative question, whether, supposing the whole debts are not to rank on the whole funds and tolls *pari passu* with each other, there may not be subordinate rankings, or rankings *secundo loco*, so that the tolls of one road, though primarily liable for its own debt only, may yet be liable subsidiarily for the debts of other roads, which are not so prosperous, and the tolls of which are not sufficient to pay their own proper debts.

"Still further, very serious questions are raised as to the rights of the Glasgow, Paisley, and Ayr Railway Company, the Glasgow and Greenock Railway Company, and the Glasgow, Crofthead, and Neilson Railway Company, or their successors, in reference to sums paid by these railway companies to the Road Trustees, and for which sums the railway companies have a valid claim of a certain character against the tolls or revenues of the roads or parts thereof. These questions depend *inter alia* upon the terms of the various railway Acts. Other questions still were raised regarding the effect produced by the Renfrewshire Road Trustees having, on 22d September 1864, divided the whole roads under their charge into three districts, and their keeping separate books and accounts for each district. These questions, again, involve an inquiry into the amount of debt on each district, and in some instances on each road, and very serious inquiries as to the rights of each individual creditor.

"Now, all this mass of legal inquiry is sought to be raised in a simple petitory action, concluding for part of seven bonds dated in 1793 and subsequent dates, and directed solely against the Renfrewshire Road Trustees generally, no parties being called as defenders except Messrs Hoggan and Hill, the clerks of the General Trust, and who represent *the whole trust*, or *congeries of trusts*, administered by the Renfrewshire Road Trustees.

"It very soon appeared to the Lord Ordinary that the rights of *competing creditors* could not be conclusively or effectually determined without calling these creditors into the field. The rights of the various Railway Companies could not be determined in an action to which they were no parties, and a general ranking of the trust creditors

could not be effected without general states of the trust affairs, and without seeing the precise terms, if not the precise history, of every bond or debt affecting the trust. All this pointed to an action of a declaratory nature, very different from the present, to the calling of numerous other parties into the field, and probably to an extensive investigation into the funds and liabilities of the trust.

"At the same time, the Lord Ordinary felt that the pursuers, who are in right of debts nearly eighty years old, and on which *no interest has been paid for many years past*, are entitled, were it for nothing else but to *stop prescription*, to a decree of *constitution* of their debts, either in terms of their bonds, or in terms of these bonds as affected and altered by subsequent legislation or by the minutes of trustees. He therefore could not dismiss the action as utterly incompetent, nor could he even appoint other parties to be called, for a mere decree of constitution against the Trustees could of course be obtained without calling other creditors of the trust.

"The result of the first debate, therefore, which was confined to the defenders' first and second pleas, was that these pleas were allowed to stand over, to be discussed and disposed of along with the merits.

"After making such inquiries as the parties thought necessary, both parties concurred in asking the Lord Ordinary to dispose by findings of certain questions of law arising upon the construction of the series of statutes which the Road Trustees have obtained, and of the minutes which have followed thereon. Both parties represented that such judgment, though not binding on absent creditors or absent parties, might probably save very expensive inquiry and very expensive proceedings.

"The Lord Ordinary, who felt very anxious as far as possible to meet the views of the parties, heard an argument upon the statutes and minutes, and the result is that he has pronounced the findings contained in the preceding interlocutor. He has regarded the present action as a mere action of constitution, and in this view it appears to him that the course he has taken is not inappropriate, because the findings will determine the precise terms in which decree of constitution is to be pronounced, and the limitations with which it is to be accompanied.

"The substance of the Lord Ordinary's opinion is that the pursuers, as creditors in the bonds libelled, are entitled to rank as creditors of the special roads mentioned in the bonds, and of no other roads, or at least—for the Lord Ordinary has gone no farther in the meantime—that they are not entitled to compete with, or to rank *pari passu* with, the creditors of other or different roads. The result is that the pursuers must be limited in the first instance to the Barnsford and Houston road, which apparently, under somewhat different or varied names, is the only road mentioned in their bonds.

"The series of statutes relating to the roads of Renfrewshire is one of the most complicated and intricate series of statutes to which the Lord Ordinary has had occasion to refer. There are in all about a dozen statutes, which require to be read, compared, connected together, and contrasted, and, as was remarked at the bar, it is not easy to reconcile some of their provisions.

"Omitting several earlier Acts, the leading statutes are the following:—29 Geo. III., c. 79 (1789); 32 Geo. III., c. 121 (1792); 32 Geo. III., c. 68 (1792); 37 Geo. III., c. 162 (1797); 43 Geo. III., c. 96 (1803); 44 Geo. III., c. 52 (1804); 46 Geo. III., c. 71 (1806); 52 Geo. III., c. 55 (1812); 1 Geo. IV., c. 83 (1820); 6 Geo. IV., c. 108 (1825); 1 Will. IV., c. 138 (1830); 3 and 4 Will. IV., c. 116 (1833); 19 and 20 Vict., c. 85 (1856).

"With these must be read the General Turnpike Act, 1 and 2 Will. IV., c. 43, and the previous General Act, being 4 Geo. IV., c. 49. In reference to the various railways interested in the road debts, the railway statutes must be referred to.

"The Lord Ordinary may dismiss in a single word the minutes of the Road Trustees. He is of opinion that none of these minutes affect the rights, preferences, or ranking of creditors whose debts were contracted prior thereto, and he thinks that, reading these minutes in connection with the statutes, none of them can be fairly held to enlarge in any way the rights of the creditors under bonds previously granted. Of course the minutes of trustees creating or dividing districts may fairly enough be read as explaining bonds subsequently granted over districts so erected. But no such question occurs in the present case. The bonds sued for in the present action are all dated long before any of the minutes to which the Lord Ordinary was referred.

"The Lord Ordinary thinks, therefore, that the minutes of the Renfrewshire Road Trustees do not really affect or change the rights of the pursuers as creditors under the bonds libelled. The whole question turns, and must turn, on the statutes.

"The result of the Lord Ordinary's perusal of the statutes is, that they have not the effect contended for by the pursuers. They do not, in the Lord Ordinary's opinion, enlarge the rights given by the bonds themselves.

"(1.) We start with the terms of the bonds themselves.

"For the sake of shortness and distinctness, it will be sufficient to take one of these bonds, and the Lord Ordinary will take the first mentioned, being the bond to the College of Glasgow for £1000, dated 13th and 30th November, and 2d, 4th, and 5th December 1793. Although the other bonds are somewhat varied in expression, the same principle applies to all. No argument was founded on any variation in their terms.

"The bond in question bears to be granted by the '*Trustees on the Turnpike Road from Barnfoot to Houston, and as such having power to borrow money for making and repairing the said road.*' It narrates the Act of 32 Geo. III., cap. 68, for enlarging the term and powers of the Act 30 Geo. II. It acknowledges the receipt of the loan of £1000 from the Glasgow College, which sum, with interest, it binds and obliges '*the trustees of the said road, and the rents, produce, and funds under their management,*' to repay. There are certain personal obligations superadded, with which in the present action we have nothing to do.

"Now, the Lord Ordinary is of opinion that where a creditor takes a bond expressed in terms so narrow and limited, the *onus* lies exclusively upon the creditor to show that by statute, or by the act of the debtor, the bond came to have a wider or more extensive application. The money was borrowed by the trustees of *a single road*, for the use and purposes of *that single road* alone. It was borrowed for the making and repairing the road

from Barnfoot to Houston, and for no other road whatever: and (apart from the personal obligation) it is the 'rent, produce, and funds of the said road,' and no other funds, which are liable in repayment. The pursuers say that other funds and other roads are now liable to repay the sum; but surely the *onus* is on the pursuers to show this, and certainly a very heavy *onus* it is. They must contradict, so to speak, the terms of their own bond.

"(2) It is not said by the pursuers that any corroborative bond in larger or in broader terms was ever given by the Road Trustees. The bond of 1793 is the sole and only document of debt libelled for the sum therein contained. The creditor never asked, and the debtor never gave, any bond of corroboration, or any new bond over other roads or over other funds, or even with new obligants. If, therefore, the security is enlarged, it must be by the bare force of the Acts of Parliament. It is not disputed that the bond of 1793 was granted in precise accordance with the Acts at its date—that it was then lawfully confined to the Barnfoot and Houston road—and that if there had been no subsequent statute the real security could never have gone beyond that road. This makes the sole point the terms of the statutes. The same remarks apply, *mutatis mutandis*, to the other bonds libelled.

"(3) The Lord Ordinary thinks there is nothing in the statutes, when fairly read and construed, to invert or alter the terms of the bonds.

"The Lord Ordinary may safely omit any special commentary upon the statutes prior to the Act 6 Geo. IV., cap. 108 (1825.) A number of the provisions of these statutes were referred to as pointing to an accumulation or consolidation of the various road trusts, and as implying rather than expressing some vague intention that the debts should be massed as a whole, and the funds administered *in cumulo*.

"It was hardly pretended, however, that this intention or inclination of the Legislature got any definite expression till the Act of 1825, although it is said (and denied) that the funds of the trust were, even previous to 1825, treated as *cumulo* funds, and interest paid from the tolls on all the bonds without regard to the particular tolls primarily liable for the special debts.

"The 13th section of the Act of 1825, and subsequent sections, are specially relied on by the pursuers. The rubric of the 13th section is in these words—'Tolls liable for aggregate debt,' and the pursuers argue that this was the true import of the clause, which they read as enacting that the whole *cumulo* tolls of the whole aggregate trusts shall be liable as one undivided fund for the whole aggregate or cumulo debt of the trust, without regard to the terms of special bonds.

"The Lord Ordinary cannot so read the clause. On the contrary, he thinks it is carefully expressed (though certainly its expression is neither very grammatical nor very accurate) so as to keep the tolls of each respective road liable for the debts of that road. The word 'respective' is introduced no less than three times into the short clause, and although this word is not quite accurately placed, the Lord Ordinary is unable to give it any other force or meaning than that of preserving and separating the debts of each road or district of roads as distinct and independent charges upon the tolls of the respective roads or district of roads.

"Again the word 'aggregate,' on which so much is founded in the rubric, does not occur in the clause itself. Indeed the word 'respective' seems to have been substituted for the word 'aggregate,' so that the rubric really gives no idea of the true enactment.

"Nor do the following clauses in the least help the pursuers. On the contrary, they seem to the Lord Ordinary to be conclusive against them.

"Much was founded upon the statutory form of the bond given in section 14. It is a general form of bond by the 'Renfrewshire Road Trustees,' and it was urged that the Trustees had no power to grant a bond over only part of their revenues, or over a single road.

"But even if this were so, it would not affect past bonds, or bonds granted long before the statute of 1825. Future bonds might be catholic, but it would require a very different enactment to make limited bonds, lawfully limited under former Acts, change their whole character—it may be to the serious prejudice of whole classes of creditors. For example, the Barnsford Road might have been a profitable and prosperous road, and all the other roads poor or bankrupt. It would be startling to hold, from a mere short form of bond given in 1825, that creditors of 1793, who held good securities, must share them with other creditors of far later dates, who held bad securities, or none at all.

"The true meaning of the clause prescribing the form of bond is that the security may be given in a short form, but it does not prohibit the defining or limiting what the security is to be. Wherever the security is not catholic, this of course must be expressed.

"Indeed it is remarkable that the Act of 1825 does not contain a power to borrow, and the reason is that it incorporates the Act 4 Geo. IV., cap. 49, which is the old General Turnpike Act. Now this General Act empowers (section 22) Road Trustees to borrow on the credit of the tolls of any particular road or roads, and in security to 'assign the tolls on such road or any part or parts thereof,' so that, in the Lord Ordinary's opinion, it is plain that even under the Act of 1825 special securities might be given even over a single road.

"But when other sections of the Act of 1825 are read, this becomes still more clear; for section 15 empowers the trustees to divide the roads into districts, and to assign the tolls of any particular district as a security for money borrowed for the use of the particular district, and it specially enacts that the tolls and duties of each district shall be liable for the monies borrowed for that district only, and shall not be liable for monies either already borrowed or to be borrowed for other roads or for other districts. Of course this enactment is utterly inconsistent with the idea that there is to be only one aggregate fund and one aggregate debt.

"And then, to make the matter still more complete, section 16 expressly enacts that without the consent of creditors their securities shall not be in anyways prejudiced, or lessened or *extended*, and that creditors who have lent money shall not be in anyways affected by allocations or divisions made under the Act. All this seems conclusive against the notion that the rights of the present pursuers might be altered or affected by the minutes of the Road Trustees, for it is not alleged that the pursuers or their authors were ever in any way parties or consenters to any of the said minutes.

"Reference was made to the 20th, 21st, and 22d sections of the Act of 1825 in regard to the allocation of *cumulo* debt by the Trustees on particular

districts of roads, the Trustees being empowered to allocate to each line or portion of road a fair and proper share of debt. It was argued that this implied that the whole debt *in cumulo* was chargeable on the whole roads, and that the Trustees might allocate it as they pleased for the purpose of regulating the tolls.

"The Lord Ordinary, however, cannot so read the clauses. They do not make the whole debt an aggregate debt; they only provide that when a debt is aggregate it may be apportioned with a view to the regulation of the tolls. It is to be observed, however, that creditors and their securities are noways affected by such allocation (see section 16), which is a mere matter of book-keeping for the Trustees for regulating the raising and the lowering of toll-duties when the interests of creditors are not affected.

"It is unnecessary to consider the other clauses of the statute of 1825, or the provisions of the subsequent statutes. It was hardly maintained that if the Act of 1825 does not affect the accumulation and aggregation of the whole debt, and establish a *pari passu* ranking, any of the subsequent statutes do so.

"The Lord Ordinary, by the findings in the preceding interlocutor, has endeavoured to define, as far as he safely can, the rights of the pursuers. He does not mean to foreclose the question whether the pursuers may not have a subsidiary ranking, or a ranking *secundo loco* or *ultimo loco*, on roads free of debt, or after the creditors thereof are all paid or provided for. This question scarcely arises, and can scarcely be competently settled in this action. The Lord Ordinary's present leaning is against any such right, but it may depend upon other considerations or provisions which have not been presented to the Lord Ordinary, or brought under his notice.

"The Lord Ordinary has appointed the case to be enrolled. His present impression is that all he can do in the present action is to give decree of constitution to the pursuers in the precise terms of their bonds, decerning against the Trustees only *qua* Trustees of the Barnsford and Houston road, and only so far as they have funds of that road applicable to the pursuer's debt. The Lord Ordinary's present view also is, that as the defenders have never resisted such decree, they will be entitled to expenses."

"17*th June* 1873.—LORD GIFFORD—*Act.* Balfour, *Alt.* Crawford.—The Lord Ordinary having heard parties' procurators on the remaining points in the cause with reference to the findings in the interlocutor of 25th July 1871—Decerns against the defenders, as clerks to and representing the Trustees on the turnpike roads mentioned in the bonds founded on by the pursuers, for payment of the sums concluded for, but that only so far as they have or may have funds in their hands derived from the tolls or revenues of the said roads available for such payment, and saving and reserving always the rights of all parties who have or may have prior claims or *pari passu* claims, as holders of portions of the said bonds or otherwise, upon the said tolls and revenues: Finds the pursuers liable in expenses, appoints an account thereof to be lodged, and remits the same to the Auditor of Court to tax and report."

The pursuers reclaimed.

At advising—

LORD BENHOLME—In this case there is a long series of Acts of Parliament which appear to me to disclose a state of things gradually arriving at last in a sort of county community in regard to the turnpike roads. The commencement of this series was by Acts relating to one or two roads, and appropriating to the creditors upon these roads the tolls authorized to be levied upon them. Amongst these earlier creditors seem to have been the predecessors of the present pursuers, who had advanced their money upon the earliest turnpike roads in the county, and their bonds, on which the present action proceeds, in the hands of their successors, gave them security over the tolls on these particular roads. The county was not even formed into districts at that time, and these parties had securities granted to them only over the tolls on the particular roads. But ultimately the county was mapped out into districts, and then creditors advancing money, instead of having their security confined to particular roads, had it extended to the roads in the district. This went on for some time; and two Acts of Parliament, the one of 1804, and the other of 1825, appear to me to have indicated the intention of the Legislature to establish a greater intercommunion between these roads and the interests of the creditors upon them than has been quite apprehended by the Trustees themselves; for the very important power was given to them, more particularly in the Act of 1825, of borrowing a large sum of money under a general security, and paying off the whole existing debts, and introducing a system of equality, if I may so call it, between the rights of all the creditors upon these roads. I think £80,000 was the limit of it, in 1804 as well as in 1825. The original intention of the Legislature never seems to have been exactly followed out by the Trustees, but their intention is disclosed, I think, very distinctly. The object of it was by this large sum of money, which they were empowered to borrow upon security of the tolls of the county generally, to reduce to an equal position the existing debt upon which the earlier, although inadequate, securities had been granted, and the later debts, as well as prospective debts, which might be found necessary yet to be incurred. Now, although we do not find that either the minutes of the Trustees or any of their proceedings disclose an actual execution of this important power that was given to them, I think we are very well entitled to take into consideration that intention of the Legislature and provided we steer clear of interfering with any securities hitherto granted—any existing securities—that we should act on the *cumulo* character of the other creditors not secured, or inadequately secured, in the way that was intended by the Legislature. The interlocutor which we have to review contains several findings at its commencement that are, I think, quite unobjectionable; but I doubt whether it carries out the views which I hold in such a way as would be available to the pursuers. The Lord Ordinary finds "that the pursuers, as in right of the bonds libelled, or part thereof, are not entitled to a *pari passu* ranking with the other creditors of the whole roads under the charge of the Renfrewshire Road Trustees." Now, to my mind that would not be satisfactory unless it were followed by some such limiting clause as this—"to the prejudice of any creditors having special securities over the tolls of particular roads." I think the interest of existing real securities must be saved in any

findings that we adopt. They must have their preference reserved to them so far as it goes, whatever comes of the claims of other creditors. But excepting to that extent, I think we may now go the length of holding that the other creditors unsecured or inadequately secured are now entitled to a *cumulo* ranking over such tolls as are not exhausted by special securities, to a finding that would, on the one hand, be perfectly innocuous to the secured creditors, and would, at the same time, justify and in fact render it a duty upon the whole Trustees, and upon their clerk or manager against whom this might operate, to employ the funds that do not form the subject of these special securities to satisfy the debt of the unsecured creditors. That is to say, that in the first place the roads are to be kept up; in the second place, whatever secured creditors there are upon any particular road or set of roads, that the interest of these secured debts should be regularly paid. As to the capital, I don't think that the creditors would either require or have any right to have them partially paid off; in short, the capital may be allowed to rest unless the creditors give their notice, when of course their debts will be paid off, and money will be obtained from other persons who are to become assignees to these bonds. But except the interest of the secured debts, I think that the surplus of the whole tolls should be devoted to the equitable and *pari passu* satisfaction of the interest of the other creditors. And I am the more inclined to take this view that the present pursuers, or some of them, are assignees to the original holders of these earlier bonds, and must be supposed to have come forward for the common behoof, for the benefit of the roads within the county—probably at some risk to themselves, being in fact individual trustees upon the roads—and that they have advanced their money in order to relieve their co-trustees from an embarrassment which might otherwise have existed. For these reasons, I am of opinion that our interlocutor should do somewhat more than the Lord Ordinary has done, and should affirm the duty on the part of the trustees to employ their surplus funds, if I may so speak—the funds that do not form the subject of special securities—in paying the interest of the unsecured debts. I quite see that there is a certain advance to be made here on the understanding of the trustees in this county. I think they have probably not quite understood the situation in which they are placed, or rather the intentions of the Legislature as to what their situation should be, and what their duty is. But if your Lordships agree with me, I think we may now advance a little farther, and distinctly point out to them how these duties, in a more matured form, and a greater inter-communion of all the districts *inter se*, should be carried out.

Lord Neaves—I substantially agree with the views that have been expressed by Lord Benholme. It appears to me that the defect of the Lord Ordinary's interlocutor is in overlooking that real community of interest which must always subsist between general systems of roads in a county. Every road contributes to the revenue of every other road, and every road is a feeder to other roads. It is very plain, and to this extent I quite go along with the Lord Ordinary, that no general claim of this kind can interfere with special securities over special subjects, whether roads or whatever else it may be. That I think is plain. But all I understand the pursuers are expecting or asking is that where no special competing interest interferes, or is injured, the revenue of these roads is not to be thrown away without meeting the obligations of those gentlemen who interposed, not as original creditors, but in a position that entitled them to expect that they would receive fair treatment, or rather, that there would be a reasonable regard for their position, because I do not mean to suggest that there was anything unfair. And, accordingly, we see that after a number of them had interposed, the interest on their debts was paid. I think they are still entitled to put a spoke in the wheel to a certain extent, and to say that the fund out of which the interest may be paid shall not be frittered away or diminished unreasonably while these claims are to be met, with the exception of those special securities already referred to. To that special effect, therefore, I think we should sustain this action, which is a just and equitable one, for I look on these parties as having interposed not merely to invest their money for profit; they are not only assignees of the original bonds, but they are also interposed parties for the benefit of their co-trustees in the general trust of which they were active administrators, and to which I am convinced their interposition has lent substantial service. Consequently, after providing for all the cases of special securities, I think they have a right to demand that the funds shall remain there for their benefit, to the extent of relieving them. As to the system of paying off the principal by parts, I don't see my way to that. I think that is a gratuitous act to a certain extent in the trustees. I don't understand it to be the law in general that a creditor can demand partial payment, or a debtor offer partial payment of his debt. He may call up the whole, or the debtor may offer the whole; but I don't understand that a partial payment of principal and interest can be gone into as matter of right. If the whole debt is to be paid off, these gentlemen themselves might perhaps take assignations to it, and be enabled to work it in a manner satisfactory to the trustees and beneficially for all concerned. But after special securities are provided for, so that they shall not be in the least degree impaired, these gentlemen have a claim on the funds for the relief of the obligations which they have undertaken in the way I have stated.

Lord Cowan was absent, but his opinion was read by the Lord Justice-Clerk, as follows:

There are certain findings in the interlocutor of the Lord Ordinary to which no exception was taken by the reclaimers (pursuers), and which are in themselves unexceptionable. I allude to those findings by which (1) the bonds are held to constitute a security only over the tolls on special roads therein mentioned; and (2) that the pursuers, as creditors in the bonds, are not entitled to payment thereof from the tolls or revenues of any other roads in competition with the creditors in such other roads holding securities over the tolls or revenues thereof. But I am not satisfied with the result at which the Lord Ordinary has arrived, viz., that the pursuers are not entitled to a *pari passu* ranking with the other creditors of the whole roads under charge of the Trustees, whatever may be the funds at their disposal for distribution among the creditors, and that their debts do not form part of the *cumulo* debt chargeable on the whole roads

and revenues under charge of the said Trustees, in the event of there being surplus funds in their hands arising from the revenues of the whole roads under their charge, after satisfying the preferable right and security held by the creditors respectively over the revenues and tolls of the roads specially mentioned in their respective bonds. On the contrary, it appears to me that, under the provisions of the Act 1825, taken along with the enactment of the Act 1804, the pursuers, as creditors under their bonds stand in a more favourable position, inasmuch as their debts have been recognised to form part of the *cumulo* debt referred to in the provisions of the statute 1825.

The bonds were granted under the authority of the Act 1792, and it may be assumed that, but for the subsequent statutes, the holders of these bonds would have been entitled to have payment from no other source than from the revenues of the particular roads mentioned in the bonds. Laying aside the Act of 1803, which is not alleged to have any material bearing on the question, the first statute to be attended to is that of 1804, to the provisions of which the Lord Ordinary's attention does not seem to have been specially drawn. It is the first of a series of Acts by which the several road trusts then existing in the county were consolidated, with a view to the management of the roads in the county being simplified, and a community of interest being established among the creditors on the whole roads of the county.

By the 23d section of that Act power is conferred on the Trustees to borrow money to the extent of £80,000 "upon the credit of the tolls, to be levied on the roads intended to be made and repaired by this Act, including the money already borrowed," and the sum to be so borrowed is directed to be applied and disposed of in making and repairing said roads. The Act 1792, over which bonds held by the pursuers were constituted as debts, was one of the statutes thus consolidated, and the debt existing on the road mentioned in these bonds when the Act 1804 was passed, cannot, as I think, but be held as included in the money already borrowed, and which is declared to form part of the *cumulo* debt of £80,000 upon the credit of the tolls of the whole road which the Trustees were empowered to contract. By the 25th section the Trustees are empowered to divide the roads into districts, "and divide and proportion the money authorised to be borrowed, and the tolls and duties authorised to be levied by this Act among the respective districts of roads according to their necessities," provision being made to protect the securities already constituted or to be constituted over the revenues and tolls of each several district of roads; and farther, for protection of the interest of parties holding securities constituted under former Acts of Parliament.

The Act of 1804 was repealed by the Act 1825. It is understood thet the existing debt upon the Renfrewshire Road Trust was all contracted prior to the passing of this Act 1825, and that no sums of money have been borrowed since the passing of this statute. No special power of borrowing is provided for by this Act, the general Road Act having passed previous to its date, under which road trustees are empowered to borrow money for the purposes of the roads under their management; but there is given by section 14 the form of the bond to be granted by the Renfrewshire Trustees for whatever moneys they might actually borrow. By section 15 the Trustees are empowered to divide the roads of the county into districts, and to assign the several tolls and duties to be levied on the respective districts in security to the parties lending money for the use of the districts of roads, the preferable right of prior securities being reserved. And by section 20 the Trustees are directed, within eighteen months after passing of the Act, to "make an allocation of the *cumulo* debt affecting the said roads, apportioning to each line, or portion of the roads, a fair and proper share of the same," and so forth. And then, by section 21, it is provided, that where the tolls upon any line or portion of roads shall, after paying the expense of maintenance, redeem or amount to the sum or share of the *cumulo* debt allocated thereto," and there shall nevertheless be tolls levied thereon exceeding what is requisite for maintenance, "for the purpose of providing in the meantime for the remainder of the *cumulo* debt;" then such redeemed lines shall be creditors of the other lines to the effect and in the manner therein enacted. Farther, by section 22, special application of tolls levied on the respective roads to the maintenance of the same, and to the payment of the allocated debt thereon, is provided for; and it is farther enacted, "and thereafter the same (tolls) shall be reduced on the said lines respectively, but without prejudice to the said Trustees, in so far as it shall be absolutely necessary to keep up and apply the said tolls, or any part thereof, for the payment and security of the general creditors aforesaid."

These several provisions are referred to, that it may be seen that while the special securities constituted in favour of the several creditors over the revenues and tolls of the roads or districts of roads are preserved, there is a recognition of the *cumulo* debt, as requiring to be met and provided for by the Trustees out of any surplus funds left in their hands after the special security creditors are satisfied. This *cumulo* debt, I apprehend, consists of the debts due to the several creditors, and by which, in so far as not covered by their special securities, power is by these provisions conferred to make provision for payment, whether of principal or interest. And on the grounds I have explained, I consider that the pursuers are by force of the statutes 1804 and 1825 placed in the same situation with the general creditors, and entitled to rank *pari passu* for whatever surplus funds to meet the *cumulo* debt may come to be in the hands of the Trustees in their due management of the roads, in view of their statutory powers and duties.

This reasoning, however, is said to be inconsistent with the provision in section 13. The terms of this section are certainly ambiguous and inconsistent with the marginal notice. I think they must be read in connection with the other enactments as to the *cumulo* or aggregate debt. There is, no doubt, room for the construction to which the Lord Ordinary, from the repeated use of the word "respective," considers its terms to be subject; but I cannot hold a construction of its terms to be sound by which the existence of a *cumulo* or aggregate debt on the Renfrewshire roads is to be held annihilated. That would be inconsistent with the other provisions of the statute, which seem to me to recognise, saving always special securities over particular roads, not only the existence of such debt, but of powers in the Trustees to allocate such debt and to provide in certain circumstances for its payment out of surplus funds.

It appears to me more consistent with the purview of the statute to hold this provision to be declaratory merely of the securities upon the revenue of the tolls, constituted by their bonds in favour of those creditors who have lent money respectively on the credit of these roads in their bonds, and over the revenues and tolls assigned to them in special security. And this view of the limited object of the section and of the statutory provisions, in 1825, taken as a whole, in so far as they relate to the *cumulo* or aggregate debt, is alone consistent with the minutes of the Trustees themselves having reference to this matter, whether before or after the passing of the Act, and which may be fairly enough referred to in order to clear up the latent ambiguity in the terms employed.

Further, it is objected that this view cannot receive effect in consequence of the Trustees not having allocated the *cumulo* debt upon the several districts of roads, as required by the statute 1825. But, in the first place, I do not think this neglect of the Trustees to do what the statute required can be effectually pleaded against creditors in the *cumulo* debts. And, in the second place, the only result of this state of matters, as it seems to me, is that the whole creditors are to be ranked *pari passu*, in so far as their debts are not covered by their special securities, upon whatever surplus funds shall from time to time be in the hands of the Trustees.

For these reasons, I think the interlocutor of the Lord Ordinary should be modified to the effect that, saving special securities, the pursuers are entitled to be ranked *pari passu* with the other creditors in the *cumulo* debt on whatever surplus funds may from time to time be in the hands of the Trustees.

Lord Justice-Clerk—I concur in the whole of the very elaborate and clear opinion just read, and I have only an observation or two to make upon the position to which it reduces the present contention. In the first place, it is not, I think, perhaps, sufficiently kept in view in the Lord Ordinary's judgment that if the rights of creditors are wholly reserved—I mean the rights of other creditors who are not here, for this is a question solely between the pursuers and the Renfrewshire Road Trustees—there are no other interests or rights, properly speaking, that have a title to compete with the holders of these charges over certain portions of the roads. The surplus funds, the other creditors being out of the way, can only be applied to two purposes—to reducing the tolls, or to paying off debt which may not be specially secured upon them. Now, without saying anything absolutely as to how far the trustees have a discretion in regard to reducing the tolls, it is quite plain that the public, who have the interest in the use of these roads, are not represented here in any sense, in competition with or as antagonistic to the creditors who have advanced money on certain portions of the roads. And, therefore, they are dealing in this matter, not with creditors in any sense whatever, but solely and entirely with the trustees of the very roads in respect to which these gentlemen, who were themselves trustees, and came forward for the purpose of supporting the credit of the roads by taking up these bonds, were acting. I think we must read these Acts of Parliament in the light of that observation, and where we find that certain roads are appropriated in connection with the creditors who have special securities therein, I think it reasonable to limit these expressions to the object which the Legislature had in view, and that it is not reasonable that if the trustees of the whole roads have surplus funds in their hands, not appropriated by any onerous cause to creditors, they must be held excluded from applying these funds to the payment of creditors who have advanced the money on the security and for the benefit of the tolls. I have gone through the Acts of Parliament with very great care. They are by no means clearly or consistently drawn; but it is quite plain that the Act of 1804 put powers in the hands of the trustees to make the whole debts catholic debts if they thought fit, because that sum of £80,000 might have been borrowed on the security of the whole tolls, and the debts specially constituted over certain portions of the roads might have been paid off then. But that power was not exercised. I think Lord Cowan's observations on the Act of 1804 are entirely sound. But then a General Road Act was passed, which gave a certain general power of borrowing over the tolls and revenues of the roads, and then came the Act of 1825, which was unquestionably intended to effect a certain operation, which was an operation of this kind—that the whole *cumulo* debt, by which I can understand nothing but the whole debt chargeable upon any portion of the roads—for in no other way can the term be intelligibly used—was to be allocated and spread over the different trusts in proportion to their revenue, so that, if that had been done, this district would have started with precisely the same proportional amount of debt as it had revenue. No doubt the 15th clause appropriates the revenue of each district so formed to its own particular debt; but I imagine that goes no farther than the security of the existing creditors, and that it does not limit the power of the trustees in regard to the appropriation of any surplus which might arise after providing for the current interest on the existing bonds. That was not done. The allocation was not made; but in the question which we have here, which is substantially what is to be done, or what powers the trustees have over the surplus funds not required for the payment of interest of debts specially charged, I think we must hold that the allocation clearly implies that community of interest which imposes a duty as well as gives a right to the trustees in the administration of that surplus. I don't know that I have anything farther to suggest, except to express my concurrence with the views that your Lordships have stated, and particularly with the very full opinion of Lord Cowan. The Lord Ordinary has bestowed great care on the case, and the first part of his interlocutor is entirely beyond exception; but I think it would be more convenient, after the views we have expressed, that we should embody our findings in one interlocutor.

The Court pronounced the following interlocutor:—

> "Recall the interlocutors of Lord Ordinary reclaimed against: Find that the defenders, Messrs Andrew Hoggan and William Finlay Hill, writers in Glasgow, are clerks to the Trustees on a great number of roads in the county of Renfrew, being, *inter alia*, the roads enumerated in the third section of the Act 6 George IV., cap. 108, and, as such, the said defenders represent the Trustees on the whole

of the said roads: Find that the pursuers are in right of certain bonds, or parts thereof, being the seven bonds mentioned in the conclusions of the summons, granted by the road trustees, acting as trustees on certain special bonds; Find that, besides and apart from any personal obligations created by the said bonds against the granters thereof as individuals, the said bonds respectively, by their terms, convey in security only the tolls of the special roads therein mentioned, and do not convey in security the tolls leviable on other roads not specially mentioned therein: Find that the Acts of Parliament and minutes of the road trustees founded on by the pursuers do not entitle the pursuers, as creditors in the bonds founded on by them, to payment of the said bonds, or any part thereof, from the tolls or revenues of any other roads than those specially mentioned in the bonds, in competition with creditors holding securities over the tolls of such other roads; and that the pursuers, as in right of the bonds libelled, or part thereof, are not entitled to rank *pari passu* with creditors holding such securities over such other roads under the charge of the Renfrewshire Road Trustees: But Find that, after providing for the construction, maintenance, and repair of the whole roads under their charge, and the annual interest of debt specially secured thereon, and all other preferable charges, the Renfrewshire Road Trustees are entitled and bound to apply any surplus of the whole tolls and revenues of the said roads which may be in their hands, annually to payment of the interest due on the several bonds sued on, in so far as the tolls leviable upon the roads specially mentioned in the said bonds may be insufficient for that purpose, *pari passu* with any other creditors who may have advanced money to the said trustees for behoof of the said roads, but who hold no special security over the same: And to this extent and effect, and no further, decern against the defenders, as clerks to and representing the Trustees of the Renfrewshire Roads, for payment of the sums concluded for; but reserve to all creditors holding securities over all or any of the revenues of the said roads their whole rights and interests therein: Find the pursuers entitled to expenses, and remit to the auditor to tax and report."

Counsel for Pursuer—Watson and Crawford. Agents—W. & J. Cook, W.S.

Counsel for Defenders—Solicitor-General (Clark), Kinnear, and Balfour. Agents—Morton, Neilson & Smart, W.S.

---

*Friday, December* 12.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

### MACBRIDE *v.* CAMPBELL.

*Multiplepoinding—Mandatory.*

In a case where an Englishman, against whom a claim was made by a Scotchman, deposited a sum of money in the hands of a third party in Scotland to satisfy that claim in the event of the debt being constituted, and the claimant thereupon raised an action of multiplepoinding,—*held* (*diss.* Lord Deas), that this was incompetent, and the Englishman was not bound to sist a mandatory in an incompetent process.

James Campbell, horse-dealer in Newcastle, and James Clark, horse-dealer in Glasgow, had various business transactions, in the course of which they incurred certain liabilities to each other. Campbell had sold Clark a brake, and Clark had sold Campbell some horses, and a difference having arisen as to the payments under these sales, it was mutually agreed that Campbell should abandon an action which he had raised against Clark for £50, the price of the brake; should get the brake back, and should deposit in the hands of James Macbride, writer in Glasgow, the sum of £26, 10s. 6d. to meet Clark's claim against him, in the event of the latter constituting his debt. This was done, and Clark then proceeded to raise an action of multiplepoinding in the Sheriff-Court of Glasgow, in name of Macbride as nominal raiser, seeking to be preferred to the fund *in medio*. On February 21, 1873, the Sheriff-Substitute, on Clark's motion, ordained Campbell to sist a mandatory, and on his failure to do so, on March 17, preferred Clark to the whole fund *in medio*. Against this interlocutor Campbell appealed, and on June 6, 1873, the Sheriff (Bell) pronounced the following interlocutor:—

"*Glasgow, 6th June* 1873.—Having heard parties' procurators on the appeal of the claimant Campbell, and reviewed the process,—finds that said claimant, not being entitled to appeal against the interlocutor of 21st Februry last, ordaining him to sist a mandatory, allowed decree by default to go out against him on 17th March last, that he might then have an opportunity of bringing both interlocutors under review; finds that the said claimant, being admittedly domiciled in England, is not entitled in this multiplepoinding to maintain his preferable right to the fund *in medio* over the claimant Clark without sisting a solvent mandatory; therefore adheres to the first of said interlocutors; but, in respect he now undertakes to sist such mandatory, recalls the interlocutor of 17th March last, and prorogates the period for the mandatory being sisted for eight days from this date."

Campbell still failed to sist a mandatory, and the Sheriff having given decree against him, he appealed to the Court of Session.

It was argued for him that the action was incompetent, there being no double distress, and that, in any case, a defender was not bound to sist a mandatory.

Authorities—*Dennistoun* v. *Stewart & Co.*, Dec. 8, 1853, 16 D. 154; *Simla Bank* v. *Hume*, May 21. 1870, 8 Macph. 781; *Russell* v. *Johnstone*, June 1 1859, 21 D. 886.

At advising—

Lord President—We have now to dispose of the objections to the competency of this action of multiplepoinding. The circumstances of the case are simple enough. An action was raised in the Sheriff-Court of Glasgow, at the instance of James Campbell against James Clark, for payment of the price of a brake. As a defence to this action, Clark stated a counter claim against Campbell, and an arrangement was made between them, the condi-