shop the bill was made payable would pay the same, but that the Plaintiff in error would himself pay the amount of the bill at that house or shop.

May 17, 1816. BILL OF EXCHANGE.—ERROR.

Judgment *affirmed*, with 134*l.* costs.

May 17, 1816. Judgment.

Agent for Plaintiff in error, BARROW.
Agents for Defendant in error, WHITE and DOWNES.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

HIGGINS—*Appellant.*
LIVINGSTONE and others—*Respondents.*

CERTAIN of the trustees under an act of parliament for making a road, the fund provided by the act being neither sufficient nor available for the object until the completion of the road, raise money on their personal credit to carry on the work, and afterwards bring an action against the other trustees who had attended any of the meetings for payment of an equal proportion each of the whole expense of the road, or at least for a proportion of the expense authorized at the meeting or meetings which they attended. Held at first by the Court of Session that the mere fact of presence at meetings did constitute a *primâ facie* ground of personal liability, and that the *onus* lay on the Defenders to show, if they could, facts and circumstances exempting them from that personal liability. But on an appeal to, and a remit by, the House of Lords, held that the mere fact of presence at meetings did not constitute a *primâ facie* ground of personal liability, and that the *onus* lay upon the Pursuers to show acts beyond mere attendance done by the Defenders to render them personally liable; and there-

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fore the defences of those trustees, against whom nothing was alleged and proved except the mere fact of presence at meetings were sustained; but as to those trustees who signed contracts, they were held personally liable for a proportion of the expense of such contracts as they signed; and this judgment affirmed in Dom. Proc.

Dicente Lord Eldon, (C.) That when trustees confined themselves to the act of parliament and the application of the parliamentary funds, they were not personally liable; but that this also rested on strong principle, that as the trustees must know whether there are funds to carry on the work, when they contract with those who do not know, they shall be considered as representing that there are funds, and shall be bound to provide funds to pay the contractors.

Road act, 1792.

IN 1792, an act of parliament was passed for making a new road from Edinburgh to Glasgow, by Bathgate and Airdrie, and the principal proprietors of land in those parishes of the counties of Linlithgow and Lanark, through which the road was to pass, together with the provosts or chief magistrates of the cities of Edinburgh, Glasgow, and Burgh of Linlithgow, and sheriffs depute of the counties of Linlithgow, Lanark, and Edinburgh, were nominated trustees for carrying the act into execution. The trustees were authorized to hold their first meeting on the first Saturday of June 1792, and half yearly meetings, at which all orders for issuing or borrowing money, for assigning the tolls in security, and for erecting side bars, were to be given. The trustees, or any five or more of them, or persons appointed by any five or more of them, were empowered to levy certain tolls and duties.

Subscription, 3650*l.*

Some proprietors more immediately interested in the object of the act had subscribed a sum of 3650*l.*,

towards carrying it into execution; of which sum, after the expenses of obtaining the act of parliament had been defrayed, 3000*l.* remained applicable to the purposes of the road, and the trustees were empowered to raise this money from the subscribers, their heirs, executors, and administrators; the same to be paid out of, and until paid to remain a lien upon, the tolls and duties. The trustees were also empowered to borrow 10,000*l.* on the security of the tolls; to enter into contracts for making and repairing the road, and to assign the proper powers and a proportion of the tolls to the contractors. Private parties were to be recompensed for the ground taken for the road, out of the tolls or the money borrowed on the credit thereof; and the money raised by toll, and borrowed as aforesaid, was to be applied first, in defraying the charges of obtaining the act; then in defraying the expenses of erecting toll-houses and turnpike gates, and of collecting the tolls, of repairing the roads, and of management; after which the money was to be applied in paying the interest of the debt, and extinction of the principal, &c.

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Power to borrow 10,000*l.* on security of the tolls.

From previous estimates it had been concluded that the sum of 3650*l.* subscribed, and the 10,000*l.* to be borrowed, would have been adequate to the object. But this conclusion turned out to be erroneous, and two other acts were passed, the one in 1795, the other in 1798, by which the trustees were empowered to raise an additional sum of 30,000*l.* on the credit of the tolls, and the expense of the road when completed amounted to 29,400*l.*

Two other acts for the same road.

Several meetings were held under the act, and

Meetings and proceedings.

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committees were appointed to contract for making bridges and parts of the road, and contracts were accordingly entered into, which were afterwards approved and ratified by general meetings. The first tangible fund for carrying these operations into effect was the money subscribed, there being no tolls on which money could be borrowed, until the road should be completed. The Appellant's constituents, who were the trustees chiefly interested, then obtained a cash-credit from the Bank of Scotland for 2000*l.*, for which they granted a bond, binding themselves "not only as trustees, but also each of us for our-"selves, bind and oblige us conjunctly and several-"ly, our heirs, executors, and successors whom-"soever, to content and pay, &c." Additional sums were borrowed by the Appellant's constituents from individuals, to whom they granted bonds, by which "they bound and obliged themselves, conjunctly and "severally, their heirs, executors, and successors "whatsoever, to content and repay the same" to the lenders. From these funds the road contractors, and proprietors whose grounds were occupied or damaged, were paid, and the Appellant's constituents, on payment of the subscriptions and the advance of these sums, were, from time to time, declared creditors on the tolls by regular meetings of the trustees.

Appellant's constituents, the trustees chiefly interested in the road, provide money for the execution.

Tolls assigned to them in security.

Contracts.

The committees appointed by the body of the trustees, upon entering into contracts with road-makers, masons, &c., bound themselves only as trustees, while the contractors bound themselves, their heirs, executors, successors, and representatives, as in the contract with one Creelman, who was made "to bind and oblige himself, his heirs, executors,

"successors, and representatives whatsoever," to complete the road, &c., while the committee "bound "and obliged themselves, and the whole other trus- "tees upon the said road, to make payment, &c."

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When the road was completed, the Appellant's constituents, who had advanced, for the purposes of the trust, the money borrowed on their own personal credit, paid up the balances due to the contractors, land-owners, and others, who had claims against the trustees, taking from these persons assignments of their claims, and then conveyed the whole to the Appellant, who, in their behalf, raised an action in the Court of Session against all the other trustees whose names appeared in the minutes of the proceedings as having attended any of the meetings, concluding to have it found that the other trustees were bound to relieve the Appellant's constituents of a proportion of the whole expense of the road; and should be decerned to make payment of 1000*l.* each, or such sum as should be found to be the proportion, &c. The object of the action was to have all the trustees, who had attended any of the meetings, found personally liable with their whole fortunes for a proportion of the whole expense, or at least for a proportion of the expense of the contracts, &c., authorized, approved, or in any way sanctioned, at such meeting or meetings as each had attended, and so liable, *per capita*, or each for an equal part, without distinction as to their acts, or the interest they had in the concern.

1798. Action, on the part of the trustees who had advanced the money, against the other trustees who had attended meetings, for their proportion of the expense.

Object of the action.

The cause came before Lord Craig (Ordinary) on Feb. 14, 1798, who ordered memorials, and reported the cause to the Court. The Court, on

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Nov. 15, 1799, appointed counsel to be heard in their presence; and, before hearing, appointed the pursuers to give in a special condescendence of the grounds on which they meant to support their claims against the different Defenders, together with copies of the obligatory clauses in the contracts, and the bonds for the money borrowed. The Court, on Dec. 12, 1799, pronounced the following interlocutor: "The Lords having heard the counsel for "the parties, resumed consideration of the cause, "and advised the same, they find it proved by the "minutes referred to, that the trustees assembled at "meetings held under the act of parliament for "making the road in question, appointed commit- "tees of their number, with power to enter into con- "tracts and agreements relative thereto, in con- "sequence of which, and of the contracts and agree- "ments thus entered into, a great expense was "incurred, which made it necessary to borrow con- "siderable sums of money upon the credit of the "tolls, and upon the private credit of the Pursuers' "funds; that the Pursuers are entitled to a propor- "tional relief from the other trustees, called as "Defenders in this action, who were members of "these meetings, and as such either gave their con- "currence in appointing committees with power to "contract as aforesaid, or afterwards homologated "and approved of those contracts and agreements "entered into for carrying the said resolutions of "the said general meetings into execution, and "remit to the Lord Ordinary to proceed accord- "ingly."

Interlocutor of the Court, Nov. 1799, appointing the Pursuers to state, in a condescendence, their grounds of claim.

Dec. 12, 1799. Interlocutor, that presence at meetings made the trustees personally liable.

May 14, 1800. The cause having come back to the Lord Ordi-

nary, his Lordship ordained each of the Defenders to state, in a special condescendence, the particular circumstances by which he alleged he did not fall under the findings of the interlocutor of the Court. Before any further proceedings below, the cause was appealed, and on June 26, 1802, the House of Lords made the following order :—" It is ordered and " adjudged by the Lords Spiritual and Temporal, in " Parliament assembled, that the cause be remitted " back to the Court of Session to review the inter- " locutors complained of, of Dec. 12, 1799, and Feb. " 18, 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 proportional relief, and by " reason of what acts each such Defender became " personally liable, and in what sums the Defenders " are respectively liable to contribute to such relief; " and it is further ordered and adjudged, that the " interlocutor of the Lord Ordinary of May 14, " 1800, be, and the same is hereby, reversed."

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The state of the case, under these judgments, appears to have been this; that the Court of Session at first thought that the circumstance of presence at a meeting was *primâ facie* evidence of personal liability, and that the *onus* lay on each particular Defender to show, if he could, facts and circumstances exempting him; but that the House of Lords, on the contrary, thought that mere presence was not *primâ facie* evidence of personal liability, and that the *onus* lay on the Pursuers to show other facts and circumstances by which each of the Defenders incurred that liability.

State of the question on these judgments.

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The Lord Ordinary, to whom it was remitted to apply the judgment of the House of Lords, accordingly ordered special condescendences to be given in, by the Pursuers, against each Defender. By consent of the parties eight of the cases were selected, the decision of which, it was hoped, would govern the rest, and in these cases the condescendences were given in. Sir Alexander Livingstone, and Mr. Hamilton of Westport, had not only attended meetings, but had been members of committees, and signed some contracts for making parts of the road and building bridges, and also references with landowners, to settle the compensation for ground taken for the purposes of the road; in which they bound themselves, their heirs and successors, to pay the sums that should be awarded.

Distinction in the cases of Livingstone and Hamilton.

Lord Polkemmet's case, and cases of other Respondents—mere presence at meetings.

Lord Polkemmet's name was inserted in the minutes as having attended two meetings, which authorized some works, approved of others, and agreed to references. His property lay chiefly in the line of a rival road; and, though on public grounds he did not oppose the objects of this trust, he took no active part in promoting them. He attended one meeting for the purpose of supporting a proposition that the road should be carried along the north side of a certain bog, instead of the south side, he having understood that the former line would be more beneficial to the public; but the south line was ultimately preferred. His design, in attending the other meeting, was to represent against what he conceived to be an improper practice adopted by the trustees, of demanding toll from those who merely crossed their new road. Sir Wil-

liam Cunningham, Mr. Hamilton Colt, Mr. Buchanan of Ardinconnel, and the father of Mr. Nisbet of Cairnhill (Mr. Nisbet, being, it was contended, liable as representing his father), had merely attended a meeting or meetings where committees were appointed to contract, and contracts approved. Mr. Russel, of Andrew's Yards, had gone to the door of the room where a meeting was holding, to speak to one of the trustees on a matter of private business; and being seen at the door, a trustee proposed that his name should be put down as having attended, upon which, without entering the room, he stated that he did not mean to attend, and had never attended any of the meetings. His name, however, was inserted in the minutes, and this was the only ground of personal liability as to him.

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After answers, &c. the Lord Ordinary reported the cause to the Court; and the Court, on Nov. 13, 1807, pronounced an interlocutor, "*finding*, that no acts "had been condescended upon sufficient to render "the Defenders liable." On advising petitions against this interlocutor, with answers, the Court altered their previous interlocutor so far as to "*find* "that Sir Alexander Livingstone, and Mr. Hamilton "of Westport, were personally liable, in relief to the "Pursuers, for such contracts or deeds as they severally signed, but to no further extent." From these interlocutors the Appellant, Higgins, brought his appeal against Sir Alexander Livingstone, and Hamilton of Westport, in so far as they had not been found liable to the extent of the demand made by the Appellant, and against the rest generally.

Interlocutor, Nov. 13, 1807.

Interlocutor, March 8, 1808. Those who signed contracts are so far personally liable; *secus* as to those who merely attended meetings.

For the Appellant, Higgins, it was contended that

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the trustees must have known that the only tangible fund was the 3000*l.* subscribed, and that no money could be borrowed on the credit of the tolls until the road should be completed, and the expense incurred, and that no contractor would undertake any of the operations on that security; that, under these circumstances, it was optional to every person to accept the trust or not; that such as accepted might have kept clear of individual responsibility by paying the contractors and land-owners with money borrowed on the credit of the tolls according to the act, or, if this could not be done, by giving up the trust; that the trustees did, in fact, occupy the ground, lay open inclosures, and enter into contracts, knowing that no money could then be borrowed on the credit of the tolls, and without any stipulation that the land-owners and contractors should accept the security of the future tolls for their payment; and that, therefore, the trustees themselves became personally liable, and each of them liable for an equal proportion of the whole expense, or at least of that which he authorized by attendance at meetings where the undertakings were ordered, in consequence of which the expense was incurred; that many of the operations had been sanctioned by the trustees before any money was borrowed on the individual credit of the Appellant's constituents; and, that on the same principle on which Livingstone, and Hamilton of Westport, who had, as members of committees, signed obligations, were personally liable, the great body of trustees who appointed the committees, and sanctioned their proceedings, ought also to be personally liable, because the Mandatory, acting within the

limits of his instructions, and having his acts sanctioned by the Mandant, cannot be individually liable without the right of recourse against the Mandant.

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The following reasons, taken from the case of Buchanan of Ardinconnel, are a summary of the arguments for the Respondents.

1st, The Respondent did not bind himself in any written instrument to pay a share of the expense of making the road in question; and neither in virtue of the act which they obtained, nor of any general principle, were the Appellant's constituents, or others, entitled to impose any personal liability upon the Respondent.

2d, When the Appellant's constituents originally expended their money in making the road in question, they did not act under the belief that the Respondent was bound by law or contract to relieve them out of his private property.

3d, The only pretext in virtue of which the Appellant's constituents claimed to be relieved by the Respondent is merely this, that he attended three road-meetings. But that circumstance certainly cannot prove that he attended in any other character than as a trustee, or bound himself personally, and his heirs and executors, to do any thing not sanctioned by the act of parliament under which the meeting was held. The deeds of the majority might bind him as a trustee, but not as an individual, and there is no evidence that he bound himself in this last character.

4th, The meetings, attended by the Respondent, acted merely in an official capacity, as trustees under a turnpike act. Abundance of funds for the execu-

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tion of the project, authorized by the turnpike act in question, were put into the hands of this and other meetings by the Appellant's constituents, who were interested in forwarding the work; and the meetings, or general body of trustees, acted properly, when they lent the sanction of the authority delegated to them by the legislature, for the purpose of carrying into effect an useful public work. By giving their sanction to the lawful operations of the Appellant's constituents, the general body of trustees could incur no personal responsibility. The meetings sanctioned contracts and other transactions merely in the character of trustees. The Appellant's constituents were the only parties who bound their heirs and executors in any transaction.

5th, The demand is most unreasonable, that the Respondent shall repay to the Appellant's constituents a share of the expense of passing the turnpike acts, and which just amounts to a demand that, after they voluntarily subscribed sums for a public purpose upon the security of tolls, the money shall be repaid by their neighbours instead of themselves.

6th, Were this action of the Appellant's to be attended with success, it would prove nearly impossible to find trustees to execute any turnpike act, and nearly the whole of the landed proprietors in Scotland, or their descendants, would find themselves involved in the most perplexing and intricate lawsuits about questions similar to the present.

It was questioned at the bar, though the point was not much insisted on, as both parties had admitted the evidence below, whether the mere circumstance of a trustee's name appearing on the minute book, in the list of those stated to be present, was,

of itself, legal evidence of his having been actually present, as the name might have been inserted by mistake. As to Livingstone, and Hamilton of Westport, who had lodged a cross appeal, it was contended for them that they ought to have been exempted on the same principle, on which the other Defenders had been found not to be individually liable; for a member of a committee, acting as such, bound not himself but his constituents, who authorized him to act; and, if the great body of the trustees were not individually liable, it followed of necessity that those ought to be exempt who acted under their appointment and by their authority.

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The case of *Horsley v. Bell*, (n.) 1 Bro. Ch. Ca. 101. was cited at the bar for the Appellant, in which the commissioners under an act of parliament for carrying on a navigation, as it was called, at Thirsk, in Yorkshire, were held personally liable for orders which they had not signed. But it was answered that, in that case, there was an unqualified personal order, that it was a case of personal profit to the commissioners, and that all the commissioners had signed some orders probably recognising the rest.

Sir S. Romilly and *Mr. Abercrombie* for the Appellant; *Mr. Adam* and *Mr. Leach* for the Respondents.

Lord Eldon, C. (after stating the previous proceedings). When the cause came first before this House, it was attended by two noble Lords (Roslyn and Alvanley) since dead, who felt this to be a matter of infinite importance, and found it very dif-

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ficult to say that a trustee, by the mere act of going into the room at the time when a meeting was held there, should be personally liable for all that was done at that meeting; and even that, if the meeting homologated or sanctioned the proceedings of previous meetings, and matters arising out of them, he, because he happened to be present at that meeting, should be personally liable for the whole. I might mention one or two instances, connected with these proceedings, to enable your Lordships the better to sift that principle, and judge of the extent of its operation. Suppose a man, nominated a trustee in the act of parliament, had gone, as Russel did, into the room, or to the door of the room, to ask for a friend, and had been seen, and his name put down, as the clerk puts down the name of a peer attending whether he votes or not, he would be personally liable for all the proceedings though he took no part in them. And so in the case of a magistrate of a burgh, nominated a trustee during his office, if he had gone into the room at the time of holding a meeting, only one day before the end of his year of office, though he went for no other purpose than to inquire about the health of a friend, he would be in like manner personally liable.

Horsley *v.* Bell (n.), cited in Cullen v.

No case decided in this country applicable to the present has been found, except that of *Horsley v. Bell*,* C. C. Feb. 9, 1778, of which I have been

* The case, as stated in 1 Bro. Ch. Ca. (n.), 101, was this. Bill filed by Plaintiff, the undertaker of a navigation at Thirsk, in Yorkshire, against the commissioners (named in the act of parliament for carrying it on) who had signed the several orders. Three questions were agitated at the bar: 1st, Whether the De-

furnished with an accurate note by my friend (Mr. Cowper) who sits near me. On the authority of one noble Lord, that case was not very satisfactorily decided. But if it is to be understood in this limited sense, that the commissioners in that case were personally liable, not only as to orders which they signed, but also as to those orders which, though they did not sign them, they recognised by other orders which they did actually sign; *that* is different from attaching personal liability to the mere circumstance of presence at meeting, or going into the room.

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Duke of Queensberry. 1 Bro. Ch. Ca. 101.

As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that when persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally liable. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applica-

When parliamentary trustees who must know whether there are funds, contract with those who do

fendants were personally liable, they contending that they were exercising a public trust, and that the credit was given to the undertaking itself, and not personally to them, and that the remedy was therefore *in rem*; 2d, Whether all who had been present at any of the meetings, and had signed some, but not all the orders, were liable as to all the orders, or only as to those which they had respectively signed: 3d, Whether the Plaintiff was right in filing his bill in this Court, or his remedy was merely at common law. Ashurst and Gould, justices, and the Lord Chancellor, giving their reasons *seriatim* (for which see Brown), held the affirmative of all these propositions. Decree affirmed in D. P., March 23, 1787.

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not know, they must provide funds to pay the contractor.

ble to the object, and are then personally bound to provide funds to pay the contractors.

When this case was here before, the House must have been of opinion that the mere circumstance of presence at a meeting of trustees did not subject those so attending as individuals to contribution, or payment of the tradesmen; for the fact of presence was then before the House, by means of the minutes and names put down, as fully as it could, in this case, be brought under your Lordships' view: and the House could never have thought proper to remit the cause, if the Lords had been of opinion that mere presence at meetings did subject the trustees to personal liability. And then, when one considers the difference between giving orders for the execution of any particular work, and the fact of a person merely coming into the room while a meeting on the subject of the trust is there held, it would be going a great way to say that a person, so coming in, should be personally liable for every thing done at the meeting. A person may come in for the purpose of stating his opinion upon a particular point, as Lord Polkemmet did with respect to the question whether the line of road should be carried along the north side, or along the south side, of a certain swamp or bog; and having given his opinion on that point, he leaves the room: and then, when he is no longer present, for the minutes do not distinguish between those who continued present and those who went away, certain contracts are made at that meeting; and if, merely because the meeting gave its authority to these contracts, he is to be held personally responsible, it is

one of the hardest doctrines that can belong to the execution of a public trust of this kind. July 1, 1816.

Then this House made the following order: "It "is ordered and adjudged by the Lords Spiritual "and Temporal, in Parliament assembled, that the "cause be remitted back to the Court of Session to "review the interlocutors complained of, of Dec. 12, "1799, and Feb. 18, 1800, generally, and to find "from which of the Defenders, and in respect of "what particular sums as to each of them, the Pur- "suers, and which of them, are entitled to pro- "portional relief, and by reason of what acts each "such Defender became personally liable, and in "what sums the Defenders are respectively person- "ally liable to contribute to such relief." When the House made this order it was perfectly cognizant of the minutes, and if the House had meant to hold that, because A. B. and C. were at such meetings, and at such periods, that was sufficient to fix them personally, the House should have said so at the time, and not have sent the cause back again to the Court of Session, as the minutes were then before the House.

ROAD TRUSTEES,—PERSONAL LIABILITY. June 26, 1802. Remit.

I would here observe that even at these Scotch meetings, where they have larger powers than are given in this country, though, if the trustees confine themselves to the act of parliament, and the application of the funds provided under the act, they are entitled by a majority to bind the rest; yet, if they enter upon the consideration of what does not strictly belong to the execution of their duty as trustees, the majority cannot bind the others; and then, if the majority contract, before they can bind the minority they must show certain acts of homologation or approba-

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tion, by which each is—not made liable in the execution of the trust—but personally pledged.

Now, the manner in which the remit has been applied is this. The Lord Ordinary, to whom the cause was remitted by the Court of Session, to give effect to the judgment of the House of Lords, appointed the Appellant to state in separate condescendences the facts, in virtue of which each of the Respondents was alleged to be liable, and the extent of the liability. Condescendences were accordingly given in, and the acts, in virtue of which the personal liability was incurred by each, and the extent of that liability were stated; and, as to this second point, the Appellant's constituents persisted in maintaining that each trustee who approved of any part of the road, was liable for a proportion of the expense of the whole road. This was wonderfully large. But they say this, You knew that, though the road was allotted into parts or districts for the facility of contracting, the whole road under the trust was truly and in fact only one road; and therefore, when you authorized the expense of a part, you authorized the expense for the whole. It would be difficult however to bind any person by such reasoning as this. And then they contended that each of the Respondents was liable for a proportion of the expense of every undertaking, of which, as a member of a meeting or otherwise, he had authorized the performance.

Acts in consequence of which the Respondents were alleged to be personally liable.

Sir Alexander Livingstone was at a variety of meetings, was a member of committees, and signed contracts. Lord Polkemmet was present at two meetings, which, among other acts, authorized a com-

mittee to contract for one division of road, approved of a contract for another, and entered into references, by which a great expense was incurred, and, the number present being given, his share was assigned. There is a very able paper on the part of Lord Polkemmet, and it represents his ignorance of the expenditure; that in attending the meetings he had two particular objects in view, and left them when these were disposed of; that the meetings were distant a year and a half from each other; that he took no part in the business beyond the particulars mentioned; and that the demand was a surprise upon him. Sir William Cunningham was present at two meetings: Mr. Buchanan was present at three meetings; and as to him they relied upon an answer written by him to a letter from their agent, which he however sufficiently explains.

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Now, without troubling your Lordships with a further statement of particulars, the result is that, with the exception of the cases of Hamilton of Westport, and Sir Alexander Livingstone, the circumstance from which the liability is contended for is, that the parties were present at certain meetings; and the case of Nisbet is remarkable, as he was said to be liable as representing his ancestor, because that ancestor was present at a meeting.

Then the question here, as I take it, is this; whether, when you consider your own remit, it is possible to say that this last judgment of the Court of Session has miscarried. It is one thing to say that I shall content myself with a condescendence, alleging the mere fact of presence, and another thing to say that, at such meetings, A. B. and C.

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took such parts, with a view not to subject them on account of mere presence, which appears to have been negatived by the remit, but in consequence of some acts done by them. And though presence is not *primâ facie* sufficient, if it had been shown that a trustee was there, and had done so and so, as in the case of Sir Alexander Livingstone, that would have met the idea of your Lordships. But I cannot think that the meaning of the House was, that the circumstance of mere presence at a meeting or meetings should make a trustee personally liable.

Nov, 13, 1807. Interlocutor appealed from.

After further considering the case, the first judgment was this. "On report of Lord Craig, having "advised the memorial for the Pursuer, with the "counter memorial for John Hamilton Colt, Esq., "and whole cause, together with the remit from the "House of Lords, the Lords find that no acts have "been condescended upon sufficient to render John "Hamilton Colt liable in payment of the sums "demanded, or in relief to the Pursuers; therefore "recall their interlocutors of Dec. 12, 1799, and Feb. "18, 1800, appealed from; sustain the defences "pleaded for the said John Hamilton Colt; assoilzie "him from the conclusion of the action, and decern, "and find no expenses due; appoint the con-"descendences, answers, replies, and duplies given "in before the Lord Ordinary to be withdrawn from "process, and make no part of the proceedings." A similar interlocutor was pronounced in the case of each and every of the Defenders. A petition was presented by the Appellant, complaining of the interlocutor as applicable to the case of Sir Thomas Livingstone, one of the Defenders, in which the

merits of the cause were fully argued; and short petitions were presented against the other Defenders, referring to the argument contained in that against Sir Thomas Livingstone. July 1, 1816. ROAD TRUSTEES.—PERSONAL LIABILITY.

Upon advising these petitions, with answers, the following interlocutor was pronounced of this date: March 8, 1808. Interlocutor appealed from.

" The Lords having resumed consideration of this " petition, and advised the same, with the answers " thereto for Sir Thomas Livingstone, and the com- " mon agent in the ranking of Sir Alexander Living- " stone, his father's creditors; and having also re- " sumed consideration of the several petitions for the " Pursuer against Sir William Augustus Cunyngham, " the Honourable William Baillie of Polkemmet, " John Hamilton Colt, William Hamilton, Andrew " Buchanan, George More Nisbet, Defenders, alter " their interlocutors reclaimed against, in so far as " to find that the deceased Sir Alexander Livingstone " was personally liable, and that the said William " Hamilton is also personally liable in payment of " the sums demanded, and in relief to the Pursuer " for the expense of such contracts or deeds as they " severally signed, but to no further extent; and to " that extent they find the Pursuer entitled to have " decreet *cognitionis causa* against Sir Thomas " Livingstone, and remit to the Lord Ordinary to " proceed accordingly; but *quoad ultra* adhere to " said interlocutor, and refuse the prayer of the seve- " ral petitions against these two Defenders; and as " to the whole of the other Defenders above named, " the Lords adhere to their interlocutors reclaimed " against, and refuse the prayer of the respective " petitions, &c."

July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

Now it appears to me that this judgment proceeded on this principle; that, if you state in your condescendence and prove no more than the mere coming into the room, or presence at a meeting, that is not sufficient to render a trustee personally liable: but, on the other hand, if they made themselves parties to the contracts, so as to pledge themselves personally to the other parties with whom they contracted, or so as to be considered as between themselves and those with whom they so contracted, as undertaking that there was a fund sufficient to answer the purpose, that then they were individually liable: and that accounts for the distinction made between the cases of Sir Alexander Livingstone and Hamilton of Westport, and the others: and then the personal liability of these two must proceed, not on the circumstance of presence at the meetings, but on the acts and deeds done by them, the contracts which they executed, and the evidence that they concurred. As to the others, nothing was alleged but the mere fact of their going into the room while the meetings were held, and by the former judgment of this House that was considered as not sufficient to bind the parties personally. And to be sure, nothing could be harder than that Russel, who went into the room, or to the door of the room, while a meeting was holding, merely to ask for a friend, should be personally liable for any contract there entered into; or harder than that if a person in office went, once during the year of his office, into a room where a meeting was holding, he should, on the mere evidence of these minutes that he was present, be considered as therefore personally liable.

The mere fact of presence at meetings not sufficient to render the trustees personally liable.

This does not break in at all on the principle that they might be liable personally if they homologated what had been done. But the condescendences and case carry it no further than mere presence at meetings.

July 1, 1816.

ROAD TRUSTEES.—PERSONAL LIABILITY.

I propose, therefore, that the interlocutors complained of be affirmed generally as they stand.

Judgment of the Court below *affirmed*.

Agent for Appellant, CAMPBELL.
Agents for Respondents, SPOTTISWOODE and ROBERTSON.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

MAULE—*Appellant*.
MAULE—*Respondent*.

SUBMISSION and decreet arbitral in 1782 between A. and B.; the latter taking burden upon him for his son C., a minor, whose interest was concerned. B. dies in 1789, and C. comes of age in 1794, and does various acts under the decreet arbitral, believing it to be a *bonâ fide* submission and award. In 1809, C. discovers the uncorrected scroll of the submission, and letters of one of the arbiters, from which it appears that the arbiters had not been left to the free exercise of their own judgment on the matters referred to them, but had been bound down by a previous agreement or compromise between the parties; so that the transaction was in reality an agreement to be carried into execution under the colour of an award. Held by the House of Lords, reversing the judgment of the Court of Session,

April 9, May 10, 1816.

DECREET ARBITRAL (AWARD), NOT VALID AS SUCH, IF USED AS A CLOAK FOR A TRANSACTION OF A DIFFERENT NATURE.