plained of, so far as they refuse the desire of the petition to open the sealed deposition of Ann Reid and Agnes Hamilton, and so far as they find no evidence, that a legal vote was given, or tendered, for, or on behalf of Ann Reid, and so far as they find that Charles Stirling, Esq., had no right *qua preses* to a second and casting vote; and so far as they find that the minutes of the proceedings are not entitled, in the way they were completed, to be considered as unexceptionable *prima facie* evidence, be, and the same are hereby affirmed: And it is further ordered, that the cause be remitted back to the Court of Session to review so much of the interlocutors complained of, as repels the objection proponed to the vote of John (James?) Provan, and in case the Court, upon such review, shall sustain that objection, the Court do review so much of the interlocutors as finds that, without deciding on any other of the points brought under discussion, the legal majority of the votes was given in favour of Mr Thomas Lockerby, and that he was duly elected, and ought to be admitted and inducted assistant and successor to Mr Archibald Provan, as libelled, and decerns, and before answer as to expenses, appoints the account to be given in: And it is further ordered, that after such review, the said Court of Session do order and direct as is just in all respects.

For the appellants, *Sir Saml. Romilly*, *Fra. Horner*.

For the Respondents, *John Clerk*, *James Moncreiff*.

NOTE.—Unreported in the Court of Session. Under this remit the Court repelled the objection stated to the vote of James Provan, and held the legal number of votes to be in favour of Mr Lockerby, and that he was duly elected.

JOHN ALEXANDER HIGGINS, W.S., and Others, ... *Appellants*;

JOHN HAMILTON COLT, Esq.; WM. HAMILTON of Westport, Esq.; SIR THOMAS LIVINGSTONE, Bart.; ARCHD. FERRIER, Esq.; Honourable WM. BAILLIE; SIR WM. AUGUSTUS CUNYNGHAME, Bart.; ANDREW BUCHANAN, and GEORGE MORE NISBET, Esqs., . . } *Respondents*.

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House of Lords, 1st, July 1816.

ROAD TRUSTEES—LIABILITY FOR SUMS BORROWED—RELIEF.—Held, that mere presence at meetings of road trustees, at which certain things were authorized to be done, and contracts to be gone into in regard to the formation of a road, does not *per se*, subject such trustees in personal liability for the expense of the execution of these contracts, where the trustees are acting *ultra vires* of the powers conferred by the Act; and that the only acts which could bind trustees in such circumstances, would be the actual signing of the deeds or contracts by which the money was raised and the expenses agreed to be paid to the individuals by them. Affirmed in the House of Lords; the Lord Chancellor ruling, that where trustees, in such cases, confine themselves strictly within the powers conferred, the acts of the majority will bind the other trustees; but where they act *ultra vires*, then, the acts of the majority will not bind the minority, or the other trustees.

This is the sequel of the case reported *ante* vol. 4, p. 401.

It is there seen that this was an action raised by certain of the road trustees of the Edinburgh and Glasgow Road, by way of Bathgate and Airdrie, for advances made by them in the formation and prosecution of the road under the powers of an Act of Parliament, against their co-trustees.

The Lord Chancellor Eldon doubted very much, upon the principles laid down by the Court below, whether these trustees were entitled to relief against their co-trustees. In the first place, the sum authorized to be borrowed by their Act of Parliament had been exhausted, and, in borrowing any sum further, they were clearly not under the powers of their Act. The inquiry then came to be, upon what other principle could these trustees subject their co-trustees in personal liability. Was it by the mere attendance at meetings at which certain acts in regard to the roads were authorized to be done; or was it not only by authorizing the borrowing of money; but by actually signing the deeds or bonds for such money, that was to subject them in personal liability? His Lordship had intimated a very strong opinion, that the mere attendance at meetings by certain trustees, could not, *per se*, subject in personal liability for every and all the acts done by other trustees, and remitted *quoad ultra*.

The cause having thus returned to the Court of Session, the judgment of the House of Lords was applied, after remit by the Court, to the Lord Ordinary for that purpose. And his Lordship ordered the appellants to state, in a condescen-

dence, the *special grounds* on which they meant to contend that the defenders (the respondents) were liable for the expense of making the road.

After the condescendence was lodged, the Lord Ordinary ordered the case to be stated, in memorials, to be reported to the whole Court for their judgment.

The condescendence is specially referred to in the speech of Lord Eldon.

1. It appeared, 1st, As to Sir Alexander Livingstone, who was now represented by his son, Sir Thomas, that he had been present at several meetings of trustees, where committees were appointed to enter into contracts to complete the branch roads. At some of these meetings, committees were appointed to enter into contracts for making certain parts of the road, and for building bridges; that at others of the meetings, contracts already entered into were reported and approved of, and that Sir Alexander was one of those trustees who made some of these contracts, and who had subscribed them. He contended he had only bound himself as trustee. The Court found (13th November 1807) no acts condescended on, sufficient to make him personally liable.*

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* Opinions of the judges:—

Lord Justice-Clerk (Hope).—"Sir Alexander Livingstone was *active* as a trustee. But he had a right to be so in that character. He did not go out of, or beyond that character, or what it entitled him to do. His authorizing contracts was within that character. Suppose the movers in the business had laid down the whole £10,000 on the table, got on their own personal security, or any way, still the trustees had right, as such, to go on contracting on that footing. It would have been necessary to warn the trustees to take care not to exceed the £10,000, under pain of personal responsibility. Even if Sir Alexander Livingstone had contracted himself, it is not to be *presumed* that he meant to exceed the parliamentary fund. I doubt if he was even bound to the contractor beyond that fund, unless the contractor specially warned the trustees contracting with him, that he trusted them personally. The language of the contracts is quite that way. It states them in the character of trustees only, not as individuals; and it binds the subscribers and *whole other trustees*, not their heirs and successors. Now, how *could* they bind the *other* trustees beyond the parliamentary fund? The language of bonds is quite different. It binds them expressly both as trustees, and personally, and their heirs. The distinction at that time was meant, though it has since been overlooked. So I think Sir Alexander Livingstone

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2. John Hamilton Colt was called in the summons as liable for his father, Robert Colt, a trustee. Robert Colt had attended a single meeting of trustees. This meeting appointed a committee, which contracted for making a part of the road and some bridges, and it approved of a prior contract; but he had not signed any contract or bound himself personally in any instrument. The Court (12th November 1807) found no acts condescended on sufficient to make him personally liable.

3. Mr William Hamilton of West-Port, had attended meetings merely as a trustee having power to administer the Parliamentary fund. He was one of a quorum of five trustees who signed a submission or arbitration bond for ascertaining the damage done to lands occupied by the road. He also signed a contract as one of a quorum of three of a committee appointed by the trustees for constructing Torphichen Bridge, but in these, he only bound himself as a trustee. The Court found (13th November 1807) that no acts had been condescended on sufficient to make the said William Hamilton personally liable.

4. Mr More Nisbet was called as representing his father, a trustee. His father had attended one meeting of trustees, but it was contended he could incur no personal liability thereby. The Court found (13th November 1807) that no acts had been condescended on sufficient to make him personally liable.

5. Lord Polkemmet had only been present at two meetings of the trustees for carrying into effect the Acts of Parliament. At each of these meetings, committees were appointed to contract for certain districts of roads, and that contracts made by other committees were approved of. The Court (13th November 1807) found that no acts had been condescended on sufficient to make him personally liable.

6. Mr Buchanan had attended three meetings of trustees

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meant merely to give his personal trouble, and to leave it to the movers to find the money. I am, therefore, for assoilzeing."

LORD MEADOWBANK.—"I have rather a different view of the case. But I think the case still unprepared for judgment."

LORD JUSTICE-CLERK (HOPE).—"My notion was that mere attendance at meetings of trustees did not subject farther than in terms of the Act; yet I had as little doubt, on the other hand, that by certain acts done *privato nomine*, a person might make himself personally liable to a greater extent."

at which committees were appointed to contract to make the roads, but he had not signed these contracts, nor done any other act to render him personally liable. The Court (13th November 1807) found that no acts were condescended on sufficient to make him personally liable.*

The Court, on reclaiming petition, pronounced this further interlocutor as to all the cases:—"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 pursuers *for the* "*expense of such contracts or deeds as they severally signed*, "but to no further extent; but, *quoad ultra*, adhere to said "interlocutors, and refuse the prayer of the several petitions "against these two defenders; and as to the whole of the "other defenders (respondents) above named, the Lords "adhere to these interlocutors reclaimed against, and refuse "the prayer of the respective petitions; but supersede extract "till the third sederunt day of May next."

Mar. 8, 1808.

Against these interlocutors the present appeal was brought to the House of Lords, Mr Hamilton, and Sir Thomas Livingstone brought a cross appeal.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said—

"My Lords,†

"In those cases with respect to the trustees of a road, I am to trouble your Lordships, with reference to some interlocutors, which are appealed from in the case of Higgins *v.* Livingstone. My Lords, some years ago this cause came before us from the Court of Session, upon the appeal of Mr Higgins, who states himself to be assignee in trust of the Honourable Henry Erskine of Almondell, the Honourable Sir William Honyman of Armadale, Bart., one of the senators of the College of Justice; Alexander Majoribanks of Majoribanks; Matthew Sandilands of Couston; Thomas Shairp of Houston; Andrew Stirling, late of Drumpellier; William Sharp of Kirkton; the deceased Sir John Inglis of Cramond, Bart.; the deceased Colonel John Hamilton of Pencaitland, and the deceased William Waddell of Easter Moffat, trustees for making the road from the New Bridge over the water of Almond, on the confines of the counties of Edinburgh and Linlithgow, to Baillieston, in the

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* The case of Sir William Augustus Cunynghame, was dealt with in the same way, as standing in *pari casu*.

† From Mr Gurney's Short-hand Notes.

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county of Lanark, in an action which was brought against Sir Thomas Livingstone, Bart.; Archibald Ferrier; the Honourable William Baillie; Sir William Augustus Cunyinghame, Bart.; Andrew Buchanan; William Hamilton; John Hamilton Colt, and George More Nisbet, Esquires, and Others, also trustees on the said road, who are now the respondents.

"My Lords, an Act of Parliament had passed, which had enabled various persons, to make a road in a part of Scotland, which I need not describe to your Lordships, and it appeared, I think, that the only fund which was provided by the original Act of Parliament for making this road, was a sum of £10,000, which the trustees were empowered to borrow on the tolls and duties, which they were authorized to levy on the road. Your Lordships will recollect, that the proceedings stated a great variety of transactions which had been had, by these trustees, at a meeting on the 2d of June 1792, another on the 14th of July 1792, another on the 27th of August 1792, another on the 6th of October 1792, another on the 10th of November 1792, another on the 28th of December 1792, and at various other periods; and one fact was extremely clear, that the expenses of the roads, and the undertakings which had been contracted for, very much exceeded this sum of £10,000, and those expenses were incurred long before the toll or duties could be collected; those duties could not be collected till the road was made and some parts opened. Certain of those trustees, having paid very large sums of money, after Parliament had, I think, in one or two instances, added to the amount of what they were entitled to raise under the first Act of Parliament; this proceeding was instituted in the Court of Session, for the purpose of having relief against the other trustees, and that was sought in a libel or declaration, which, after narrating the several Acts of Parliament, proceeded to state, that certain persons therein mentioned, trustees under those Acts, did, accordingly, convene for the purpose of putting the same in execution, and held their first meeting at Bathgate, in the month of June 1792, and thereat, and at sundry general and adjourned meetings held by them, the trustees did order and direct surveys and plans of the said roads and others to be made and reported to them; and after fixing upon what appeared to them to be the best line, and most calculated for the purpose of public utility, they appointed several of their number committees, with powers and for the purpose of contracting for the making and upholding particular districts of the said road, with the bridges thereon. That in virtue of the powers so committed to them, the said committees did enter into sundry contracts and agreements, for making and upholding the particular district roads allotted to them, with the bridges thereon, and various necessary particulars connected therewith, by which contracts and agreements so entered into, the said committees bound and obliged

themselves, and the whole trustees acting under the said statute, to make payment to the contractors and undertakers, of several sums of money as the agreed on prices and rates of executing the several parts of the said roads, and others, so committed to them, and which contracts and agreements so entered into, were regularly reported to the said trustees, at their general meetings, and after receiving their sanction, and being approved of by them, were, by their orders, engrossed in the sederunt-book of the proceedings under the trust. The libel then stated the stipulation of the Act of Parliament, by which it was provided, that the owners and occupiers of the lands through which the roads passed, should be indemnified for the damage they might sustain, the manner in which the amount of damage was to be fixed, was narrated, then the borrowing of the money, and the application of it to pay the joint obligations of the whole trustees, the refusal of certain of the trustees to pay their proportions of the common debt, in so far as it had already been made good to the contractors, &c., or to find security for that part of it which might still remain due; and the conclusion was to this effect, that it should be found and declared by decreet of the Lords of our Council and Session, that the defenders, and each of them, were bound to free and relieve the pursuer's constituents of a proportion of the sums borrowed and applied, or to be borrowed by order of the trustees, for the purposes of the trust, and for which they were, or might be bound by the bonds granted, or to be granted for the same, or otherwise, to the creditors of the trust; also of the sums which might still be due to the proprietors or tenants of lands, or others having, or who might thereafter have, claims against the trust. And it being so found, that the defenders ought and should be decerned and ordained by decreet foresaid, to make payment to the pursuer of the sum of £1000 sterling each, or of such other sum as should, in the course of the process to follow thereon, be found to be the proportions thereof effeiring to each of the defenders, or the predecessors of such, whose representatives were called, and that, at and against the term of Lammas next, 1797, with the legal interest thereof since the term of Martinmas 1796, till payment, in order that such sums to be paid up, might be applied towards paying off the principal sums borrowed, or to be borrowed as aforesaid, and interest due or to become due thereon, and the claims that might still be outstanding against the trust, or that might become due by the same, and so the pursuer's constituents be thereby freed and relieved of their obligations for the said borrowed money, and otherwise to the creditors of the trust, and the same cancelled to the extent of the sums so paid up, and failing their paying up their proportions in manner foresaid, then that each of the defenders so failing, should be decerned and ordained by decreet foresaid, to find sufficient security to the pursuer as trustee foresaid, for re-

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lieving his said constituents, and their heirs and successors, of the proportions of said debts, effeiring to each of the defenders as aforesaid, and of all cost, skaith, or damage, his constituents, or their foresaids, might anyhow incur or sustain, by being bound in the said bonds, or otherwise, to the creditors of the trust, in manner before mentioned.

"My Lords, the first judicial proceeding in this action was, that upon the 15th of November 1799. The Lord Ordinary, previous to the hearing, appointed the pursuer to give in special condescendences of the grounds upon which he meant to support his claims against the different defenders, together with copies of the obligatory clauses in the contracts for making and repairing the roads, and in the bonds for the money borrowed by them for that purpose. The different contracts, as some of your Lordships may remember, varied very much in their terms; some of them being contracts which bound the parties contracting, their heirs, executors, and successors; others being contracts which bound the parties describing themselves as trustees, and the first part of this interlocutor seems to have proceeded on this principle, that taking it to be true, in point of law, as it has very often happened in point of fact, that where there are parliamentary trustees, with a power to pledge the funds for carrying on the concern, with relation to which they become trustees; it is, nevertheless, competent for them to bind themselves as individuals; but the Lord Ordinary, thinking that the true principle of law might be, that those who had bound themselves personally, not merely in the character of trustees able to pledge the trust-fund, but that those who had bound themselves personally in aid of the fund, in case the fund was insufficient, or in such a manner, that the parties with whom they dealt, were under no obligation to look to the fund, but to the personal obligation of the party, although they might personally undertake, yet, if they thought proper to come into a Court of Justice to make others relieve them by contributing as if they were liable, it was on the pursuer to show that the other parties had contracted that liability which trustees may be said *prima facie* not to contract.

"When this cause came before the whole Court, on the 12th of December 1799, the Lords found it proved by the minutes referred to, that the trustees assembled at meetings held under the Act of Parliament for making the roads in question, appointed committees of their number, with power to enter into contracts and agreements relative thereto, in consequence of which, and of the contracts and agreements thus entered into, a great expense was incurred, which made it necessary to borrow considerable sums of money upon the credit of the tolls, and upon the private credit of the pursuers; that the pursuers were entitled to a proportional relief, from the other trustees, called as defenders in this

action, who were members of those meetings, and as such, either gave their concurrence in appointing committees, with powers to contract, or afterwards homologated and approved of those contracts and agreements, entered into, for carrying the resolutions of the general meetings into execution, and remitted to the Lord Ordinary to proceed accordingly.

"The defenders gave in a reclaiming petition against this judgment, which was appointed to be answered by the pursuers, and upon advising these, the Court pronounced this interlocutor:— Feb. 18, 1800.
'The Lords having advised this petition with the answers thereto,
'and the minute this day given into Court, on the part of the
'petitioners, they refuse the desire of the petition, and adhere to
'their interlocutor reclaimed against.'

"The cause then went back to the Lord Ordinary, who made the following order:—'Having considered the interlocutor of the May 14, 1800.
'Court of 12th December last, ordains each of the defenders to
'state, in a special condescendence, the particular circumstances,
'by which he alleges he does not fall under the findings of the
'interlocutor, and that against next calling.' Thus the nature of this proceeding was entirely changed, because the Lord Ordinary was entirely of opinion, that it became the pursuers to state the circumstances, from which they inferred the defenders were liable, and that seemed the more reasonable course, because this was not a proceeding against all persons, who had been present at the meetings, but against a considerable number of them, who had not been present at the meetings. It will be in your Lordships' recollection, that this cause was remitted from this House to the Court of Session, and the interlocutor of the Court of Session has given the Lord Ordinary a different rule of procedure, calling on him to consider, that those who were present at the meetings, were to contribute a proportion of relief, to those who made the payments, unless they could show they were not liable, although present at the meetings.

"When the case came to be discussed before us, as it appears by a paper I now have in my hands, your Lordships will recollect this House was attended by two noble and learned Lords now dead, who delivered their sentiments, and it was felt a matter of infinite importance, as well as difficulty, to say, that a man, who went into a room, where trustees were sitting, merely to inquire after the health of a person *there*, was to be taken to be liable, not only to the extent of any trust fund he had to administer, for all the purposes of which that meeting was ordained, but that if it happened, that the meeting should have allowed or homologated any contracts in the course of that meeting, while he was not present, and that if, in the execution of these, other matters arose out of them, he must be considered as personally liable to all the parties that dealt with the trustees, and would have to contribute

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to relieve the trustees who were made liable. Your Lordships will recollect one or two cases that have occurred in point of fact, which tend to show, that this matter ought to be sifted to the bottom, before we act on it.

"There is a gentleman, one of these trustees, of the name of Russell, who, I think, had, in the course of all those proceedings, gone once into the room to ask a friend, who was there, after his health, and the clerk put down his name, just as your Lordships take notice of a Peer's attendance here, whether he votes or not; and there were other trustees, one particularly, who was a trustee merely in respect of an office he held in some burgh, and who held the office for the time being, and if this man, who, I believe, was a provost, had gone into the meeting, on the last day of the year, in which he was serving in his official character, if it was only to have a conversation with a friend he had not seen for years, the clerk would put down his name immediately, and this would render him liable to all the consequences I have before stated.

"My Lords, upon the former occasion I do not recollect that the counsel at the bar were able, nor was I able, to furnish, nor am I now able to furnish any case which has occurred in this part of the Island, on such a subject, though I have made some inquiries, except a case which, in this paper I hold in my hand, which I see is a little misnamed, called Forster *v.* Bell, whereas the name is Horsley *v.* Bell, of which there is a printed note in Brown's *Chancery Cases*, 101, and of which I have a note furnished me by the learned gentleman now at your Lordships' table, in which Lord Bathurst, with Mr Justice Ashurst and Mr Justice Gould, held 'that a bill might be filed by a person who was the under-'taker of a Navigation Association at Thirsk, in Yorkshire, against 'the commissioners named in the Act of Parliament for carrying 'it on, who had signed the several orders." Your Lordships will permit me to beg your attention to that circumstance, that they had signed the several orders. Three questions were agitated at the bar. The first question was, whether the defendants were personally liable; the defendants contending that they were exercising a public trust, and that the credit was given to the undertaking itself, not personally to them, that the remedy was, therefore *in rem.* Secondly, 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, or his remedy was merely at common law? With respect to the third question, the learned judges who advised, the Chancellor and the Vice-Chancellor who was advised by those learned judges, disposed of that, by saying, it was much more convenient to come into equity, than to go to common law.

"My Lords, on the authority of one of the learned lords now dead, I think I am justified in saying, that this case is not very

satisfactorily decided; but I think your Lordships will be ready to concur with me, when I say, that, with respect to the original orders that were given by the commissioners, if you are to hold that the commissioners, who signed the orders, are to be taken personally to contract with the other party, to the agreement into which they entered, and not to pledge the fund, that it is a very different thing to say the commissioners who signed the orders are to be considered as personally contracting, and to say that a person who signed no such contract, is to be held personally to contract also. My Lords, if this case is to be understood, with respect to those orders which were not signed by the commissioners in this limited sense, namely that the commissioners were taken to be bound by orders which they had not signed, but which were recognized in orders they had signed, that is a very different case, to be sure, from holding that parties were bound merely by their presence at these meetings. Now, my Lords, if I had had the honour of attending in that case, in any judicial character, I should have said that persons who are to execute a parliamentary trust, when they meet for the purpose of executing that parliamentary trust, and when they state, on their contracts, that they do mean to act in the execution of that trust *prima facie*, this ought not to be taken to make themselves personally answerable; on the other hand, this stands on the books very strongly, I think, that inasmuch as trustees for the execution of a parliamentary trust, must have a knowledge, whether they have, or have not a fund applicable, and sufficient for the purpose of their trust, when they enter into a contract with other persons, who cannot, or probably do not, know whether they have a fund applicable and sufficient for that purpose or not; that they may well enough, I think, in fair reasoning, be taken to act as if they were representing, that they have a fund applicable and sufficient for that purpose, and, therefore, if there is not a fund applicable and sufficient for that purpose, that they would be personally bound to find such a fund. I think, also, that it is perfectly consistent, in all fair reasoning, to say this, that if they chose to enter into contracts, the terms of which are to make them personally responsible, that is, binding upon themselves personally, they may do so, and this will be binding upon them.

"When this matter came to be discussed before this House, on the former occasion, the House was of opinion—it must have been of that opinion, or I cannot see any reason for which we sent the matter back to the Court of Session—that the mere presence at these meetings was not enough to subject the party to this contribution; or what I take, for the purpose of this cause, to be the same thing, the payment of the tradesmen who had made assignation of their debts: for the fact that there had been minutes of all these meetings, and that the minutes of all these meetings exhibited the names of all these persons, as having been present, as

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well as the names of others, who are not made defenders, was as much before the House as it could be, in consequence of any remit whatever, and, therefore, if it could be taken as a sufficient ground for charging the defenders, that they had been present, it is impossible we could be thought to act rationally, in sending it back by such a remit, as that which I am about to mention to your Lordships, which the House made—and when your Lordships consider the difference between persons signing orders which are to call for and justify the expense, and the fact of persons coming in, in the course of a meeting of trustees, the distinction is most obvious, and most obviously important. I may go into a meeting at the time when that meeting first commences, to state my opinion of a particular thing, as appears in the case of Lord Polkemmet and others, who went in to state that it would be better to go on the north side, instead of the south side of a bog, whereupon those persons immediately leave the meeting, and in the course of that meeting, when they were no longer present (for the minutes do not enable you to guess what part of the meeting they were present at, and what part they were not), and in their absence, contracts, imposing great expenditure, are authorised; and merely because authority was given at these meetings, that those contracts should be entered into, it is said that they are to be made liable. If they are made responsible, in these circumstance, I say it would be one of the hardest doctrines one can imagine, as belonging to the execution of a public trust of this sort.

"For the reasons which were then very much detailed, which I shall not trouble your Lordships with now, this House ordered, 'That the cause be remitted back to the Court of Session in Scot-'land, to review the interlocutors complained of, of the 12th De-'cember 1799, and the 18th of February 1800, generally, and to 'find from which of the defenders, and in respect of what parti-'cular 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 personally liable to contribute to 'such relief,' and the interlocutor of the Lord Ordinary was necessarily reversed.

"Your Lordships will recollect this remit was made by this House, perfectly cognizant of the effect and contents of all these minutes; and if this House meant to say, that because A was at this meeting, and B was at this meeting, and C was at this meeting, or were at the meeting at some particular period during which it was held, therefore the presence of A B and C at such meeting, was sufficient to fix those defenders with this demand of contribution, the House acting reasonably, ought to have said so at the time, and not to have sent it back, merely to state to the Court of Session again, that of which this House was perfectly cognizant,

that the minutes did import so and so; because your Lordships will allow me, with respect to these meetings under trust Acts of Parliament, and with respect to meetings of trustees in Scotland to observe, that meetings of majorities have larger powers than such meetings have in the southern part of the island. Your Lordships observe where trustees are appointed under an Act of Parliament, if they confine themselves to the object of the Act of Parliament, at their meetings, that is, if their meetings, for instance in the present case, had interfered with nothing but the application of the funds, which, as trustees under the Act of Parliament, they were entitled to raise and apply, then the resolutions of the majority of those present would bind the others; but, at such meetings, if they think it proper to enter upon the consideration of subjects that do not belong to the strict execution of the trust, in respect of which they are trustees, *there*, I apprehend, the acts of a majority of the trustees will not bind the minority; and if the majority thought, or any part of it thought fit, to make themselves, by their contracts, personally responsible, it would not be enough to say, that, at such a meeting, the majority had bound themselves; but in order to show the minority were bound, they must go on to show, by what individual acts, by what species of concurrence, by what kind of homologation, by what kind of approbation, these individuals became parties, not for the execution of the trusts of the act, but for the execution of the acts for which they were to be made responsible. If I am right in this interpretation of the remit made, your Lordships will find, by looking at what has since passed, and I begin with that of Sir Alexander Livingstone, the manner in which the remit has been applied, is this, that the pursuers, with respect to Sir Alexander Livingstone, except as to a particularity which belongs to his case, and Mr Hamilton's, which I shall name presently, say, 'The debts in respect of which the 'memorialist claims this relief, the Acts by which Sir Alexander 'became personally liable, and the sums in which it is appre-'hended his representatives are liable to contribute such relief, 'are as follows:—Sir Alexander was present at a meeting of the 'trustees upon this road, held of this date. This meeting ap- Nov. 1792.
'pointed Mr Majoribanks, Mr Gibbon, Mr Sandilands, and Mr 'Young—Mr Gillon, convener, a committee to contract for the 'Linlithgow branch road, there were fifteen trustees present at 'this meeting; this branch road was accordingly contracted for; 'the forming of the whole was executed by James Carlyle, under 'a contract entered into with this committee, and the expense 'amounted to £191, 19s. 2d.; the contract was approved by an 'after meeting, on the 17th of August 1793, where one trustee, 'Mr Sharp, was present, who was not at the meeting which ap-'pointed the committee, so the expense of forming this branch 'road falls to be borne by sixteen persons, and Sir Alexander

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'Livingstone's proportion, accordingly, is £12. The metalling 'was done in small lots; one lot was done under contract with 'John Wardrope, which was approved by a meeting on the 3d 'of August 1793, where there were four trustees present, who 'were not members of the meeting which appointed the com-'mittee, so the expense of the contract with Wardrope, amount-'ing to £189, 13s. 10d., falls to be borne by nineteen trustees, 'and Sir Alexander's proportion is £9, 19s. 3d.,' and then the 'rest of the condescendence, as to the particulars is a condescendence, stating divers and sundry subsequent meetings, together with the number of trustees present at each of those meetings, and dividing the expenditure authorized by each meeting into so many parts, as are equal to the number of trustees present at the meeting, and allotting to each his proportion—Sir Alexander Livingstone was certainly at a great variety of the meetings, and took an active part. With respect to my Lord Polkemmet, it is stated, that he was present; I ought, however, to mention to your Lordships here, that they then further proceed to insist, which they do in all the cases for each of the defenders, that any person who has authorized any part of the road, must be answerable for the whole, a proposition which seems to me wonderfully large, but they say, inasmuch as you knew that the road was to go from A to B, you who authorized a part of that road to be made even though only a mile, or half a mile of it, must have known that the whole of it was to be made, otherwise your half mile was useless, and, therefore, you must be taken to have authorized the making of the whole. It would be difficult on any principle or authority, to bind a man so down. They then further say, that if it shall be found, that others of the defenders are not liable, in the way, in which, by their condescendences, they seek to make them liable, those of the defenders, who are found liable, must be charged more than they are charged, on the supposition, that the others would be liable, because if some of those other defenders are not charged, then the expenses will be divided among fewer persons, and the proportion will be larger than stated in these condescendences.

"My Lords, my Lord Polkemmet was present, I think, at two meetings; he was present at the meeting on the 28th of December 1792; and was one of the thirty trustees who, upon considering the report of the committee appointed to consider of two lines of road, which had been proposed, approved of one of those two lines, and appointed a committee of ten trustees, to carry it into execution, three of whom were to constitute a quorum; and he is likewise stated to have been present at another meeting; and then looking at the number of trustees who were present at those other meetings, and the sums that were expended in consequence of those meetings, they assign to him his proportion of the expenses.

"There is a paper, and a very able paper, printed on the part

of my Lord Polkemmet, and he there states the circumstances under which he had twice attended, and his entire ignorance of this expenditure; he admits his having been at these two meetings, with reference to two particular objects he had in view, but he submits he was not at all cognizant of the nature of these contracts, and says, that when these two objects, on which he attended, were disposed of, he left the place, and the meetings are at a distance of a year and a half, between the periods, at which they were respectively held, in which intervening time, he took no part, and this is a cause of considerable surprise to him.

"Sir William Augustus Cunynghame was present at two meetings. Mr Buchanan was present at three meetings, and there is a letter of his, which seems to import a notion in his mind, that he was not only bound, but that it was reasonable he should make some contribution; he says, it was represented to him as the opinion of counsel, that he was liable, but on better consideration of the subject, he states, he is not liable, and I think I may venture to state, that the general ground on which, with the exception of one defender of the name of Hamilton, and Sir Alexander Livingstone, they are sought to be charged as liable, is, the circumstance of their presence at these meetings. One of them is a very remarkable case—Mr Nisbett's ancestor was present on the 5th of October 1793, and by reason of that presence on the 5th of October 1793, he is sought to be charged with the effect not only of the contracts that were then entered into, but with all the proceedings that meeting had homologated.

"My Lords, the question here is this, whether it is possible for your Lordships to say, that, considering what was the meaning of your own remit, the Court of Session, in the interlocutor I am now about to state, have miscarried. My Lords, it is one way of treating this case to say, I will, after such a remit, content myself with a condescendence which states little more than that the parties had attended these meetings, and another to allege, by way of condescendence, not only that the parties were at those meetings, but that, *de facto*, A took such a part, B signed such a contract, and C transacted such and such business with his brother trustees, with a view to state not that there was a mere presence and liability as resulting from it, of which your Lordships, by the remit, appeared to me to have considerable doubts. It was not thought sufficient to charge the trustees against whom nothing more could be alleged than that they were present at meetings. But your Lordships meant by the remit to proceed, thus:—Sir Alexander Livingstone was *there*, he did *such* and *such acts*, he was a *party* to such a *measure*, and so going through the defenders respectively, this would have met the idea, your Lordships entertained at the time of the remit; but I conceive your Lordships could not have meant to send it back, to say, that the *mere presence*

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would make the parties liable, the House having, as I have before observed, felt, when it made this remit, that these very minutes proved the fact of their attendance, which was just as good authority for the House to decide upon, as leaving it to the terms of such a remit as this.

"My Lords, after this remit, the first judgment, the Court of Session gave, was this:—'On report of Lord Craig, and having 'advised a memorial for the pursuers, with the counter-memorial 'for Sir Thomas Livingstone and for Archibald Ferrier, Writer 'to the Signet, common agent, appointed for carrying on the 'process of ranking of the creditors of the deceased Sir Alexander 'Livingstone, and the whole former proceedings, together with 'the remit from the House of Lords, the Lords find that no acts 'have been condescended upon sufficient to have rendered the 'deceased Sir Alexander Livingstone the predecessor of Sir 'Thomas Livingstone, personally liable in payment of the sums 'demanded, or in relief to the pursuer: Therefore, recall their 'interlocutors of the 12th December 1799, and 18th February '1800, appealed from' (these are the interlocutors that had been remitted), 'sustain the defences, assoilzie the said Sir Thomas 'Livingstone from the passive title as legally charged to enter 'heir, in respect of the renunciation now produced in process: 'And farther, in respect of its being found that Sir Alexander was 'not personally liable, find that the pursuer is not entitled to have 'any decreet, *cognitionis causa*, pronounced in his favour: As 'also assoilzie the said Archibald Ferrier as common agent afore-'said, from the conclusions of the action, and decern: Find no 'expenses due, and appoint the condescendences, answers, replies, 'and duplies given in before the Lord Ordinary, to be withdrawn, 'and to make no part of the proceedings in the cause.'

"My Lords, a similar interlocutor was pronounced by the Court in each and every of the cases of these defenders: Against these several interlocutors so pronounced, petitions were presented complaining of them, and particularly one complaining of the interlocutor as applicable to the case of Sir Thomas Livingstone, one of the defenders in this petition, and 'upon advising these petitions, with answers thereto for Sir 'Thomas Livingstone, and the common agent in the ranking of 'Sir Alexander Livingstone, his father's creditors, and having 'also resumed consideration of the several petitions for the pur-'suer, against Sir William Augustus Cunningham, the Hon. 'William Baillie of Polkemmet, John Hamilton Colt, William 'Hamilton, Andrew Buchanan, and George More Nisbett, Esqs., 'defenders, the Court 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 was '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 found the pursuers entitled to have decreet *cognitionis* 'causa against the said Sir Thomas Livingstone, and remitted to 'the Lord Ordinary to proceed accordingly. But *quoad ultra* 'adhere to the said interlocutors, and refuse the prayer of the 'several 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, but supersede extract till the third sederunt 'day of May next.'

"Now, it appears to me, that if they have proceeded upon this principle, that if you condescend and prove nothing more against the defenders, than merely showing by the minutes of the clerk of the meeting, that at some period of that meeting A B came in where the meeting was held, that is not enough to charge him as personally liable, but if, on the other hand, individuals make themselves *parties to contracts* and deeds, which, in terms, pledge them to personal responsibility, or which ought to be considered as making them personally liable, because if there was a fund, that fund ought to be produced by them, and if there was no fund, they must be taken to have acted with the persons with whom they contracted, as if there was a fund, that they were to apply to the purposes of the contract; I say, if they proceeded on these principles, that accounts for what has been thought unaccountable; for the distinction which Judges below make between the case of Sir Alexander Livingstone and William Hamilton, and those other pursuers and defenders, and the personal liability of these two must be taken in my view of this case to arise, not from the circumstance of their having been present at the meetings, but because their personal liability is founded on the deeds and contracts which they executed, and which deeds and contracts are themselves evidence, that they did concur in those objects of the meeting with reference to which it had been stated the other defenders were not personally liable. I can find nothing with respect to the other defenders, except the mere fact, that they went to the meeting, which mere fact appears to be a fact that was considered by your Lordships' former judgment, as not of itself sufficient to charge them personally. In the instance of Mr Russell, if that was his name, which I think it was, who went into the room to ask a friend how he did, because the clerk put him down, he cannot be considered liable to any contracts then entered into. The circumstance of a man going in once in a year to see an acquaintance, the mere evidence of these minutes, that he was there, and without any evidence that he did any thing else, cannot make him liable; if he had gone to a subsequent meeting, and had homologated or approved of the contracts made at former meetings, that

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would not alter the case as to the contracts made at former meetings, but the condescendences of those individuals do not carry the case further than I have stated.

"My Lords, the difficulty I have really is this, Whether you should now conclude the case, or remit it back to the Court of Session? Because I believe it was the intention of those noble and learned Lords to whom I have alluded, that this condescendence should be of a very different nature from what it is; that it should specify the *acts* and *deeds* in addition to the mere presence at meetings, out of which this right of contribution is claimed. No such thing has been done, and I do not think you can send this back from time to time, and from year to year, to give a second, a third, and a fourth opportunity of considering the case in condescendences. I hope you may be advised to affirm the several interlocutors according to the terms which I have stated, and there are several petitions, which must be noted specially in the terms of the order."

Accordingly, it was ordered and adjudged that the original and cross appeal be dismissed, and that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Sir Saml. Romilly, Henry Erskine.*

For the Respondents, *Wm. Adam, Robt. Forsyth.*

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MAULE *v.* MAULE.

WM. MAULE, Esq. of Killumney, . . *Appellant;*
The Hon. WILLIAM RAMSAY MAULE, . *Respondent.*

House of Lords, 10th May 1816.

This case, which was remitted by the House of Lords for further consideration, with certain findings, is reported along with the second appeal, in 1819.

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MAJENDIE *v.* CARRUTHERS, &c.

Mrs ANN MAJENDIE, formerly ROUTLEDGE, and her Husband, ... *Appellants;*
WM. THOMAS CARRUTHERS of Dormont, and JAS. CARRUTHERS, ... *Respondents.*

House of Lords 29th June 1816.

This case is reported along with the second appeal, which was taken in 1820.