FEBRUARY 8, 1860.

ROBERT MALCOLM KERR, *Appellant*, *v.* JAMES WILKIE, &c. *Respondents.*

Statute—Qualification of Trustees—Assessment—Reduction—Adjournment of meeting—*A local act authorizing assessments for the construction of a bridge described the qualification of those who were to be trustees, who were also defined to mean "those who acted as trustees." Before assessment was made, a notice was to be sent to each proprietor intended to be assessed.*

HELD (affirming judgment), *That K., a qualified but not an acting trustee, was not entitled to reduce the proceedings on the ground of want of notice.* (2.) *That notice was not required of an adjourned meeting, for it was only a continuation of the original meeting.*[1]

By the "Kelvin Bridge (Glasgow) Act," (Local Act, 15 Vict. c. 62,) entituled "An Act for constructing a bridge across the river Kelvin, near Hillhead, Glasgow, in the county of Lanark, with approaches and works," power was given to assess various parties for the construction of the bridge, and trustees were authorized to be appointed. The Statute enacted:

"§ 34. That no rate or assessment to be made under the authority of this act shall be valid, unless notice of the *intention* of making such rate or assessment, and of the *time* at which the same is intended to be made, and of the *place where a statement* of the proposed rate shall be deposited for inspection, shall be given by the *clerk of the trustees* by circular to *all the proprietors* and *feuars* intended to be charged with such rate, or their *respective agents*, and posted at Glasgow at least *seven days* previously to such rate being made.

"§ 92. That in this act the following words shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction:

"'The word 'Trustees' shall mean the trustees acting by virtue of this act.''

The appellant raised the present action of reduction against James Wilkie, accountant in Glasgow, one of the trustees appointed by the act, on behalf of the trustees, concluding that the defender should exhibit and produce, in order to be reduced, the minutes and proceedings of the trustees of dates specified. Reduction of the assessments and other procedure following thereon was concluded for, and there was also a general conclusion for repetition of any sums paid, or to be paid, in name of assessment imposed by the minutes.

The pursuer is proprietor of the lands of Hillhead, which, or part thereof, are comprehended among the lands subject to assessment under the act; and from these lands subject to assessment he derives more than £100 sterling of annual feu-duties or rents. He averred, that in virtue of his property he was one of the trustees appointed under the provisions of the act for carrying its purposes into effect.

The meeting of 24th June 1852, it was averred, was called by circulars, which were sent only to the sixteen trustees mentioned by name in the Act, but circulars were not sent to other parties, who, though they held the £100 qualification, were not set forth by name in § 1, and, in particular, no circular was sent to the pursuer or to John Kerr, writer in Glasgow, his father, who was also alleged to possess the proper qualification. At that meeting, Mr. Bain was appointed clerk to the trust, Mr. Wilkie treasurer, Mr. M'Lean surveyor, and certain gentlemen were appointed a committee of management, and on them were devolved all the powers which the trustees were allowed by the act to devolve on a committee.

The meeting of 24th December 1852 was called by a circular subscribed by Mr. Bain as clerk, and sent to the sixteen trustees mentioned by name in the Act, and to Mr. Corbett, merchant in Glasgow, a gentleman not so named, but possessing the £100 qualification. The circular was not, however, sent to the pursuer and various other parties (not named) who also possessed that qualification. The purposes for which the meeting was called were stated in the circular to be, *inter alia*, to impose an assessment in terms of the 32d § of the act. The meeting was attended by some of the trustees named in the act, and also by a Mr. Paterson not so named, but who was stated in the minute to be "a qualified trustee having £300 of rent." The minute bore that the treasurer produced a scheme of assessment proposed to be made, and referred to in a notice (engrossed in the minute) sent to each person named in the scheme. The notice bore that the trustees intended at this meeting to make an assessment, and that a scheme of the proposed rate might be seen in Mr. Wilkie's hands. It appeared that this notice was sent to Mr.

[1] See previous reports 20 D. 696: 30 Sc. Jur. 354. S.C. 32 Sc. Jur 272.

Kerr. The assessment was not imposed at this meeting; but other matters were disposed of; and the minute of meeting bore: "The meeting to be adjourned till Wednesday the 5th day of January next, for the purpose of transacting the other business before them to day, and, in particular, for the purpose of their imposing the assessment for which notices have been given as above, if judged expedient." No special power to adjourn is conferred by the Statute.

The adjourned meeting was held on the 5th January 1853; notices were sent to the sixteen trustees named in the act, and to Messrs. Corbett and Paterson, but none to any other parties, though they held the £100 qualification. The meeting was attended by thirteen of the trustees specially named, and by Mr. Corbett. No new notice was given to the ratepayers; and an assessment was imposed for the year ending 17th June 1853, at the rate of £1 10*s.* per imperial acre.

The same parties were called to a meeting on 3d November 1853. Five of the Trustees mentioned by name in the act attended, and an assessment was imposed at the same rate, for the year 17th June 1853 to 17th June 1854. The pursuer was not summoned to this meeting, and he averred that he received no notice of any kind, but the minute of meeting bore that notice of the proposed assessment had been sent to each proprietor and feuar mentioned in the scheme.

In these circumstances the pursuer pleaded that, the meetings above mentioned having been neither duly called, nor held in terms of the act of parliament, and the statutory notices of an intention to assess not having been given, the whole proceedings, and, in particular, the assessments of which the pursuer complained, were null and void, and ought to be reduced.

The defenders pleaded,—(1.) that the action was excluded by the clauses of the act providing that disputes as to assessment betwixt proprietors and trustees should be finally settled by the Sheriff. (2.) That it was excluded by § 37, giving a power to appeal, to the Sheriff, to any party aggrieved by any rate; and by the § 88, which provided that no proceeding under the act should be set aside for want of form, or removed to a Superior Court. (3.) The meetings of the trustees were duly called and held in terms of the act, and the assessments were legally imposed at meetings of the trustees.

The Court of Session repelled the reasons of reduction and assoilzied the defenders.

The pursuer appealed against the judgment of the Court of 26th February 1858, maintaining in his *printed case* that it ought to be reversed for the following reasons:—1. Because none of the meetings were called or held in terms of the act of parliament. 2. Because the proceedings at the first meeting, including the appointment of a clerk, being invalid for the reason above stated, all the subsequent meetings and the proceedings were invalid, and ought to be reduced, on this farther ground, that they were not called by the clerk to the trustees in terms of § 4 of the act. 3. Because the assessment made at the meeting held on 5th January 1853 was invalid under § 34 of the act, no notice having been given in terms of said section to the proprietors or feuars intended to be charged with said assessment, of any intention of making such assessment, on the said 5th January, or at the said meeting. 4. Because if it should be held that the said meeting of 5th January 1853, was held by virtue of an adjournment, the proceedings thereat were also invalid, in respect that the adjournment was unauthorized by the act of parliament under which the meetings of the "Kelvin Bridge Trustees" could alone be constituted:—*Caledonian Railway Company* v. *Ogilvie*, 2 Macq. 239; *ante*, p. 474.

The *respondents*, in their *printed case*, supported the judgment for the following reasons:—1. Because the meetings of the trustees were duly and formally convened in terms of the Statute. 2. The minutes of the first meeting cannot be reduced on the ground of informality in calling it, because no formalities were directed in the Statute. 3. In no view can it be a valid ground of reduction that circulars calling the meetings were not sent to the Kelvin Bridge Trustees not specially named, because there is no provision in the act that the proceedings at meetings held without such circulars shall be null. 4. The assessments were imposed after the proper statutory notices, and there was no ground for reducing them. 5. All the proceedings sought to be reduced were duly and formally conducted in compliance with the provisions of the Statute. 6. The grounds of reduction were trifling and technical, and contrary to reason and equity. 7. The action is excluded by the 88th section of the Statute, inasmuch as it seeks to reduce, on the ground of want of form, proceedings in pursuance of the act. 8. The action should be dismissed, because the jurisdiction of the Court of Session, as to such questions, is excluded by the act.

Rolt Q.C., and *Anderson* Q.C., for the appellant.—Nothing is better settled than that a Statute of this kind, especially where it gives powers of assessment, must be strictly construed, and its provisions must be followed out to the letter. Hence, when the Statutes said that a circular notice should be sent to all the trustees, the omission to send it to the appellant was fatal. The appellant being one of those having the statutory qualification stated in the 1st section was constituted by the Statute one of the trustees, and as such, was entitled to notice of the meeting—*R.* v. *Langhorne*, 4 A. & E. 538; *Maule* v. *Moncreiff*, 5 Bell's Ap. 345; *R.* v. *Croke*, 1 Cowp. 26; *Frend* v. *Bennett*, 4 C. B. N. S. 576; *Winter* v. *Magistrates of Edinburgh*, 16 S.

276. Moreover, there was no notice given to any of the parties interested of the adjourned meeting which imposed the assessment. The notice of the original meeting cannot be held to extend to the adjournment.

The *Attorney-General* (Bethell) Q.C., and *Bovill* Q.C., for the respondents.—The interpretation clause shews that the term "trustees" must mean the acting trustees. And that is the only construction consistent with the other enactments. Now the appellant was never an acting trustee, and therefore he was not entitled to any notice. As to the objection that the notice of the original meeting could not extend to the adjourned meeting, the objection was bad. If there was a power of adjournment, as must be admitted, and it was therefore competent to adjourn a meeting to another day, the notice of the first meeting must apply equally to the adjournment, for both constituted only one meeting, and the parties at the first meeting had ample knowledge of the adjournment. In *Scadding* v. *Lorant*, 3 H. L. Cas. 418, a similar objection was raised, and was rejected.

LORD CHANCELLOR CAMPBELL.—My Lords, I am of opinion, and must so advise your Lordships, that there is no ground whatever for this appeal.

The first ground taken, and which is, as I think, the ground mainly relied upon on the part of the appellant, seems to me to be wholly untenable. That was, that no notice was given to the pursuer, or to those who may be denominated the qualified trustees of the adjourned meeting, at which the rate was made. Now, my Lords, I am of opinion that it was not necessary to give notice to that class, they never having acted as trustees; and with reference to that, I look to the definition of the word "trustees" in the 92d section of the act of parliament, where we are desired to consider that "the word 'trustees' shall mean the trustees acting by virtue of this act." These trustees (if they are to be considered as trustees) never have acted; and it would be most preposterous to suppose that the legislature intended that notice should be given to each one of that indefinite body of everything that was to be done at any meeting, and that if any one of them did not receive notice it would nullify the proceedings. Their qualification is given in these terms,—"And all other parties who hold, or derive in their own right, or who may hereafter hold, or derive in their own right, the sum of £100 sterling of annual feu duties, or annual rents, out of or from any part of the lands hereinafter described." Now, who is to find out who were so qualified by having £100 derived in their own right, or hereafter to be derived, not only of annual feu duties, of which there is some record, but of annual profits, of which there are no means of forming any judgment? In order to exclude that, the definition says, that none are to be considered as trustees, except they have acted as trustees; and these gentlemen, who now appear as appellants, never having acted as trustees, no notice was necessary to be given to them. I abstain from giving any opinion upon the question, whether, they being trustees, and having acted, if there were, without any bad faith, an accidental omission to serve any of them with notice, that would or would not have nullified the proceedings. I abstain from giving any opinion upon that question, for it does not seem necessary for the House to consider it.

Then, we come to the other objection, that there was no notice of the adjourned meeting as regards the purpose for which that meeting was to be held. Now, my Lords, whether that is a good objection or not, depends entirely upon this, whether the adjourned meeting was to be considered as part of the original meeting; that is to say, whether there is an identity between the two meetings. If the adjourned meeting were a separate and independent new meeting, certainly new notice should be given; and, according to the 34th section of the act of parliament, without such notice no rate can be made. It seems to me quite clear that this meeting, having the power of adjournment, and having exercised that power *bonâ fide* when the adjournment took place, it was part of that meeting just as much as if it had been a meeting held on the same day. Supposing that there had been a debate, as has been suggested during the argument, and that, during the debate, the clock had struck twelve at night, could there not have been an adjournment till the following day at nine o'clock; and would not the meeting that was then resumed have been part of the meeting which had taken place the day before? I cannot doubt it for a moment. Whether the adjournment were only for three hours or for three days, if the proceeding is *bonâ fide*, it can make no difference. Mr. Rolt very properly admitted that the moment you admit identity of meeting, no more is to be said; and the notice that was given for the first meeting holds good for, and includes, all the other meetings following upon it. There has been a great deal of argument as to whether the case of *Scadding* v. *Lorant*, relating to the parish of St. Pancras, applies to this case. It seems to me that it does completely apply to it, both in its principles and in its circumstances. But independently of that case, I hold it to be quite clear, that upon general principles, an adjournment, where there is power of adjournment, if *bonâ fide*, is only a continuation of the meeting. And that being so, it seems to me to be quite unnecessary to consider more minutely how far that case does apply to the present. It is not pretended that there is anything in that case contrary to this general principle. I think that it does apply to this case, even in its circumstances as well as in its principle; but if there had been no such case to be found in the books, I should, without hesitation, have given my opinion to your Lordships, that this was the same meeting, and that the notice that was given for the

original meeting, as to the purpose of making a rate, applied, until the rate was actually made.

For these reasons, I must advise your Lordships to dismiss this appeal with costs.

LORD BROUGHAM.—I entirely agree with my noble and learned friend. The decision in the case of *Scadding* v. *Lorant* by this House was not necessary in order to throw light upon this case; but it greatly assists us. The opinion of the learned Judges there taken lays down that which amounts to a general principle; but it was unnecessary to have it laid down, for I agree with my noble and learned friend, that if a meeting is held, and there is a power possessed by those who hold the meeting to adjourn it, except under peculiar circumstances which do not exist in this case, the original meeting and the adjourned meeting must, generally speaking, be taken to be absolutely identical.

LORD WENSLEYDALE.—I entirely agree with my noble and learned friends, that this appeal ought to be dismissed. I entirely concur with my noble and learned friend upon the woolsack upon the construction of this act of parliament. I think it is clear that this act of parliament, though extremely ill drawn, meant something more to constitute a person an acting trustee than that he should be the proprietor of lands yielding £100 sterling in feu duties or annual rents.

I abstain from giving any opinion whether it was necessary to summon the present appellant, supposing he had been a regular trustee. The inclination of my opinion certainly is, that it would have been necessary to summon all those who were acting trustees; and that every proceeding before the board of trustees would have been *coram non judice*, if they did not summon all the acting trustees. However, it is not necessary to give a final opinion upon that point.

The second question which struck me at first, in the argument of Mr. Rolt, as entitled to a good deal of weight, was, that the persons who were liable to be assessed had a right to have notice of the precise day upon which the meeting for making the assessment was held. That is under the 34th section. It occurred to me at first that there was a distinction between this case and *Scadding* v. *Lorant*, that case not having decided this particular point; and, on that account, I wished to hear counsel argue that case, because there is a considerable difference between the case of persons affected by the rate and the case of those who are themselves a component part of the body which is to act. With reference to those, no doubt, there is a general power, although it is not given by the act of parliament, to adjourn. If such an adjournment took place, those who were members of the body so adjourning would be bound to take notice of their own proceedings. They might have objected to the adjournment if they were present; or if the adjournment were made by the chairman of the meeting, as it is done in some cases, those who were not present ought to have been present and take notice of it. But, with regard to third persons affected by the rate, they would not necessarily be parties to what took place at the meeting; and the question occurred to my mind, whether there ought not to have been notice given to them, if nothing was done on the previous day, of the adjournment of that meeting. However, the argument in the case of *Scadding* v. *Lorant* completely satisfies me that there is no weight in that point which struck me at first, because, though that point was really not taken in the Court below, it was taken in the Court above, in your Lordships' House; and, on that occasion, it was decided that there was no weight in that objection. The notice required, in that case, to be given of the object of the meeting by the clerk, after the second session, in the church, is just equivalent, and in the same position as the notice required by this § 34, which is a notice to be given by the clerk of the trustees by circular to all the proprietors of feu rights. And it was, in that case, found by the special case, that notice was given of the original meeting, but that there was no notice in the church of the adjourned meeting; and your Lordships expressly decided that there was no occasion for such notice. It appears to me, therefore, that that point is overruled by the case of *Scadding* v. *Lorant*, so that the objection altogether fails. I concur, therefore, in the opinion of my noble and learned friend, that this appeal must be dismissed with costs.

LORD CHELMSFORD.—I concur in the first point, though the act of parliament is extremely perplexed and confused. With regard to the other point I also agree entirely. I think that the case of *Scadding* v. *Lorant* decided the question. But, independently of that case, I should have thought, when a meeting is to be held, and business to be transacted, and where it is possible that, at the original meeting, the whole of the business may not be got through, that there must be the power to adjourn that meeting, and that the adjourned meeting is to be considered as part of the original meeting. If that be so, I apprehend that that gets rid of the whole question; because, if the adjourned meeting, in this case, is part of the original meeting, then there was ample notice to the parties. And in this case more particularly so, because there is not, as in the case of a poor's rate, a mere notice that the vestry are to assemble and to make the rate; but there is no notice of the rate which is proposed, and the proprietors themselves are entitled to attend the meeting of which they have notice, for the purpose of objecting to the rate or assessment upon their property. Therefore it must be assumed, that if any person had an objection to make to the rate to be imposed, he would attend the original meeting; and that

he would there state his objection, or if he found that the business could not be got through at that meeting, he would have notice of the adjournment of his case, and distinct and personal notice upon the subject of the adjournment of the question of the rate. Therefore it appears to me that, upon this point, the case of *Scadding* v. *Lorant* is conclusive; but, without the case of *Scadding* v. *Lorant*, I should be clearly of opinion that there was not the slightest objection here, on the ground of the want of notice of the *agenda* or purpose of the adjourned meeting.

Affirmed, with costs.

For Appellant, Durnford and Co. Solicitors, London; Auld and Chalmers, W.S. Edinburgh. —*For Respondents*, Deans and Rogers, Solicitors, London; J. F. Wilkie, S.S.C. Edinburgh.

FEBRUARY 10, 1860.

THE COMMERCIAL BANK OF SCOTLAND, *Appellants*, *v.* JOHN RHIND; *Respondent.*

Banker—Evidence—Payment—Probative Writ—Bank Pass Book.—*A brought an action against the bank, with which he dealt, for payment of* £66 8s. 10d., *as the balance shewn by his pass book with the bank to be due to him since the last balance was struck. The bank, in defence, stated, that while the entries in the debit and credit side of the pass book generally were correct, an error had been committed by a clerk in entering a sum of* £80 *twice to the credit of A on the same day; and that, deducting one of these sums, A was their debtor in* £13 11s. 7d. *The bank brought no reduction of the erroneous entry in the pass book, but pleaded, in the action for payment, that nothing was due; that the pass book did not afford sufficient evidence to substantiate A's claim; that the* onus *lay on him to prove his case, or, at all events, that they were entitled to a proof in order to shew the error.*

HELD (reversing judgment), *That the pass book was not a probative document* in re mercatoriâ *equivalent to a receipt, but was only* primâ facie *evidence liable to be rebutted, and that the bank were entitled to proof* prout de jure *of their averments.*[1]

This action was raised by the pursuer, who is a farmer at Tomich, near Invergordon, against the Commercial Bank, for payment of the sum of £66 8s. 10d., being the balance alleged to be due on his cash account.

The defence was, that, instead of anything being due, the pursuer had really overdrawn his account to the amount of £13 11s. 2d.

The point at issue between the parties was, whether a sum of £80, entered to the pursuer's credit in his pass book on 5th June 1855, was to be taken into account or not.

The entries on the last page of the pursuer's pass book to his credit were as follow:—

"1855.		Forward,		£467	2	6
June 5.	Eighty pounds,	,,	A. M. G. MacG.	80	0	0
	Eleven pounds,	,,	A. M. G. MacG.	11	0	0
6.	Eighty pounds,	,,	A. M. G. MacG.	80	0	0
19.	Twenty pounds,	,,	A. M. G. MacG.	20	0	0
July 12.	Twenty-five pounds & 10d.	,,	A. M. G. MacG.	25	0	10"

These entries were all averred by the pursuer to be genuine *bonâ fide* entries, verified by the initials of the two proper bank officials.

The statement by the defenders was:—"The entries in the pass book of the cash paid into bank by or on account of the pursuer, after the 31st of October 1854, are correct, with the exception of the entry of £80, under date the 6th of June 1855. No such sum was paid into the bank, or was received by the defenders, or any of their officers or clerks, at Invergordon, either from the pursuer or on his account, on that date, and the entry was a mistake committed by Mr. George M'Gregor, the defender's accountant at Invergordon, who inserted it in the pursuer's pass book, with reference to a sum of £80, which had been paid in on account of the pursuer on the evening of the 5th of June 1855, after bank hours, and which the accountant did not observe had been already credited to the pursuer in the said pass book, on the said 5th of June.

Then further details as to the mistake were set forth.

---

[1] See previous reports 19 D. 519; 29 Sc. Jur. 254. S.C. 3 Macq. Ap. 643; 32 Sc. Jur. 283.