

sideration that the rails are laid down on a highway which is public, and that consequently the Company are bound to use their right consistently with the use of the streets for public traffic. Now, the Sheriff-Substitute has found that on the occasion in question the driver of the car was not bound to have stopped his car when he saw the stationary obstruction on the rails in front of him, and that is the whole question. I think that, however great the fault of the cabman might have been, there can be no doubt of the duty of the car-driver. He was not entitled on any pretence whatever to drive the car against the cab, as it stood at the time upon the rails, if he could have avoided it; and it does not matter how the obstruction came to be there if he could with reasonable care have avoided it, he was bound to have done so. Now, it is certain that he could have done so, for he saw the cab with the off hind wheel resting on the edge of the rail, and the incline of the street was a dangerous one. It was his duty then to have stopped till the obstruction had been removed; no doubt he did whistle and call out, but he must have seen that the obstruction was a temporary one, and for the reasonable use of the thoroughfare. On the simple ground therefore that the driver ought to have stopped the car till the cab was removed, I am of opinion that the Sheriff-Substitute is wrong. As to contributory negligence, I am not prepared to say that there was any. There must arise occasions on which vehicles may stop for a temporary purpose, and I do not see that in a crowded thoroughfare such as this, and in the circumstances of the case, there was anything amounting to such negligence. There would have been no accident if the defenders' driver had done his simple duty. It would be a dangerous precedent if the Court were to sanction the notion that because a cabman did not get out of the way as quickly as a car-driver thought he ought to do, the latter was entitled to drive his car against the cab. It is said he could not stop the car, but that does not improve the respondents' case because in a city like Edinburgh, where there are so many steep gradients, the Tramway Company are bound to have vehicles so constructed that they can stop—as the car did not do in this case—in obedience to their own rules.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD
CLARK concurred.

The Court pronounced the following interlocutor—

“Find that on the occasion in question the driver of the tramway car, on turning it into Leith Street, which at that point slopes rapidly downwards, came in sight of the pursuer's cab standing at a short distance across the rails of the tramway: Find that it was the duty of the driver of the tramway car to have stopped the vehicle until the obstacle was removed, but that he proceeded, and the car therefore came into contact with the cab and upset it, causing the damage libelled: Find that the defenders are liable for the damage thereby occasioned: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute appealed against; ordain the defenders to make payment to the pursuer of £40 sterling, with interest as libelled,” &c.

Counsel for Pursuer (Appellant)—Galloway—Rhind. Agent—George Hutton, L.A.

Counsel for Defenders (Respondents)—Trayner—Guthrie. Agents—Paterson, Cameron, & Co., S.S.C.

Saturday, October 25.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DALGETY AND OTHERS v. THE LORD
PROVOST AND MAGISTRATES OF
GLASGOW.

Road—41 and 42 Vict. c. 51 (*Roads and Bridges (Scotland) Act 1878*), secs. 66, 67, and 89.

The roads under a road trust existing before the Roads and Bridges Act 1878, were situated in the counties of Stirling, Dumbarton, and Lanark, some portions of the roads in the latter county being within the bounds of the city of Glasgow. The Act was adopted by the county of Stirling in April 1880, before it had been adopted in Dumbartonshire or had come into operation in Lanarkshire under section 89. One of the debt commissioners appointed under the statute allocated a certain portion of the debt due by the former trust on the county of Lanark including Glasgow, another portion on Dumbarton, and the remainder on Stirling, leaving the ultimate allocation as between Glasgow and Lanark to be effected by section 89, sub-section 1. *Held*, on a construction of sections 66, 67, and 89, that this allocation was unobjectionable.

This was an action by Mary Dalgety and others against the Lord Provost and Magistrates of Glasgow, as Local Authority having the management of the streets of Glasgow, and power to levy assessments in respect thereof, and as such the Local Authority of Glasgow in the meaning of the Roads and Bridges Act 1878. The pursuers concluded for declarator that they were creditors of the Cumbernauld Road Trust at 15th May 1880 in the sum of £7866, 1s. 2d., and £6592, 0s. 5d. unpaid interest, and that by virtue of the Roads and Bridges Act 1878 they were creditors of the defenders in so much of the value of this debt, ascertained in the manner prescribed by the Act, as had been or should be, allocated upon the burgh of Glasgow, and that to the extent of £803, 12s. 7d. the said debt was a charge against the defenders and their assessments. They concluded for delivery of a certificate of debt for that sum, or otherwise for payment thereof with interest from 15th May 1880.

It was not disputed that the pursuers were at the passing of the Act creditors of the Cumbernauld Road Trust, the roads comprised in which were situated in Stirling, Dumbarton, and Lanark. Part of their roads in Lanarkshire were situated within the burgh of Glasgow.

The Roads and Bridges Act was adopted in Stirlingshire in April 1880.

The section of the statute relating to the allocation of road debts in such circumstances is the

66th, which is fully referred to by the Lord Ordinary, *infra*. The statute, by section 89, makes this special provision as to the counties of Lanark and Renfrew—"Whereas it is expedient to make special provisions in this Act in regard to the highways within the counties of Lanark and Renfrew, Be it enacted as follows, 'This Act shall commence to have effect within the counties of Lanark and Renfrew (including the burghs situated or partly situated therein) on the first day of June One thousand eight hundred and eighty-two, but subject to the provisions following—that is to say (1) The debts affecting the turnpike and statute-labour roads within the counties of Lanark and Renfrew, including the burghs therein situated, after having been valued as hereinbefore provided, shall be charged, and are hereby allocated upon, the said counties and burghs therein situated, in the proportion of their respective valuations at the commencement of this Act as appearing from the valuation rolls then in force. The debts so allocated shall in all respects be deemed to be debts allocated in terms of this Act, and all the provisions of this Act with respect to debts which have been valued and allocated shall have effect with reference thereto.'"

The other facts of the case and the contentions of the parties are narrated in the following opinion of the Lord Ordinary:—"At the passing of the Roads and Bridges Act the pursuers were creditors of the Cumbernauld Turnpike Road Trust. The roads under the trust were situated in the counties of Stirling, Dumbarton, and Lanark, some portions of the roads in the latter county being within the bounds of the city. When the Roads and Bridges Act came into operation it became necessary that the debt should be valued and allocated under the provisions of that statute, and it is not disputed that it was duly valued; but the defenders deny that it has been effectually allocated so as to impose liability for any part of it upon the city of Glasgow.

"The sections of the statute which require consideration are the 66th, 67th, and 89th. The 66th section provides for the allocation of the debts affecting existing trusts which may comprise roads in two or more counties; and enacts, that after the debts have been valued in terms of the statute, the proportions in which they shall be allocated upon such counties respectively may be adjusted by the trustees of such counties; and failing such adjustment within a month after the date of the valuation, that any debt commissioner, on the application of the clerk of any such trustees, or of any creditor, shall proceed 'to ascertain and determine the proportions in which, according to equity, and taking into consideration all the circumstances of the case, the debts aforesaid ought to be, and shall be, allocated upon and be a charge against the several counties respectively, and the decision of such debt commissioner shall be final.' The 67th section contains a similar provision for the allocation of debts between landward parts of counties and burghs, the only difference being, that the duty which in the case of counties is committed to the county trustees, is committed in the case of burghs to the local authority. The 89th section makes special provisions for the highways within the counties of Lanark and Ren-

frew, and enacts that for these counties the Act shall have effect on the 1st of June 1882, subject to certain provisions, one of which is (sub-section 1), that the debts affecting statute-labour and turnpike roads within these counties, including the burghs therein situated, instead of being allocated by a debt commissioner according to equity, 'shall be charged, and are hereby allocated, upon the said counties and the burghs therein situated, in the proportion of their respective valuations at the commencement of the Act, as appearing from the valuation-rolls then in force.'

"The Act was adopted by the county of Stirling in April 1880, before it had been adopted in Dumbartonshire, or had come into operation in Lanarkshire under the 89th section. But the 66th and 67th sections enable a county which has adopted the Act to have its debts allocated, in the cases to which these sections are respectively applicable, whether all the counties among which the debts are to be apportioned shall have adopted the Act or not; and the 7th section provides that when the Act has been adopted in one county, and has not been adopted or is not in force in the adjoining counties, all rights, privileges, and duties in regard, *inter alia*, to the debts affecting turnpike roads, which, had the Act been adopted in the latter county or counties, would have fallen upon the county road trustees or burgh local authority or authorities thereof, shall fall upon or belong to the commissioners of supply thereof. The Stirlingshire County Trustees therefore were entitled to have the debts of the Cumbernauld Road Trust allocated as soon as they had adopted the Act, notwithstanding that it had not yet been adopted or come into force in the counties of Lanark and Dumbarton, the commissioners of supply of these latter counties being charged in the meantime with all the duties in that matter which would otherwise have fallen upon the county trustees or local authorities. Accordingly, an application was made for the allocation of the debt to Mr Wyllie Guild, one of the debt commissioners, and it appears from the record of his decision that the County Trustees for the county of Stirling, and the Commissioners of Supply for the counties of Dumbarton and of Lanark and Renfrew, attended before him and submitted such statements and arguments as they thought proper for his consideration. All the parties interested were therefore duly represented before Mr Guild; and after hearing them, and considering the various matters which he was required to take into account, he issued a decision by which he allocated a certain portion of the debt upon the county of Lanark, including the burgh of Glasgow, another portion upon the county of Dumbarton, and the remainder upon the county of Stirling.

"It appears to me that the course so followed by Mr Wyllie Guild was not only perfectly competent, but that it was the only course open to him under the statute. It is said that his allocation is bad, because he was not entitled to lay a lump sum upon Lanarkshire and Glasgow. But he was required to apportion the debt as between Lanark, Stirling, and Dumbarton, and although a part of the Lanarkshire portion of the road was situated within the bounds of the burgh of Glasgow, he had no power to apportion as between Glasgow and the landward part of Lanark; and

he was just as little entitled to lay any part of the debt which was properly applicable to Glasgow upon Stirling or Dumbarton, or to lay the whole upon the landward part of the county of Lanark to the exclusion of Glasgow. The only possible course, therefore, in order to do justice to Stirling and Dumbarton, and give effect to their undoubted right to obtain an immediate allocation, was to fix the amount which should fall upon these two counties, and the amount which should fall upon Lanark including Glasgow, leaving the ultimate allocation as between Glasgow and Lanark to be effected by the operation of section 89, sub-section 1, when the Act should come into operation in that county. It follows that as soon as the Act came into operation the debt which the debt commissioner had so allocated upon Lanarkshire including Glasgow was farther allocated by force of the statute itself in the proportion of the respective valuations of the county and burgh.

"But then it is said that Mr Guild's allocation excludes the operation of sub-section 1, because that enactment applies only to debts affecting turnpike and statute-labour roads, and Mr Guild's allocation had converted the debt which had previously affected the roads in question into a charge against the County Trustees and the assessments to be imposed by them. If this means that the entire Lanarkshire portion of the debt is to remain a charge upon the County Trustees of Lanarkshire to the exemption of Glasgow, it is an argument to which I could not give effect in the absence of the County Trustees; and the defenders have abstained—and it was stated at the bar that they had abstained advisedly—from stating a plea that all parties are not called. But the argument appears to me to be altogether unsound. The decision of the debt commissioner had of itself no such operation as the defenders ascribe to it. All that he could do was to ascertain and determine the proportion in which the debts should be allocated and made a charge against the county trustees or the local authorities as the case might be. The actual conversion by which the debt is made a charge upon the county trustees is not affected by his determination alone, but by the coming into operation of the Act within these counties and burghs respectively, so as to bring into effect the 68th section in ordinary cases, and the 68th and 89th sections together in the case of Lanark and Renfrew. Mr Guild's determination had no effect in converting the debt into a charge upon the Lanark assessments, and no effect at all as regards Lanark, except that of fixing the amount which should be a charge upon the road authorities of that county when the Act came into operation.

"It must be observed that the 89th section has no operation except with regard to Lanark and Renfrew; so that where a trust comprises roads situated in these counties, and also in any adjoining county, the 89th section cannot come into effect for the purpose of allocation until the portion of the gross amount properly chargeable upon Lanark or Renfrew has been ascertained and separated from the portion chargeable upon other counties. The only method therefore by which an effectual allocation can be obtained is by the combined operation of the 89th section and the sections applicable to other districts. The total debt must first be divided and appor-

tioned by a debt commissioner as between Lanark or Renfrew and the adjoining counties, and it is only after that has been done that the 89th section comes into operation to complete the allocation as between the burghs and the landward part of Lanark and Renfrew.

"The case was argued on the assumption that parties were agreed as to the facts. But the amount of the pursuers' claim is not admitted; and until it has been ascertained, by admission or otherwise, no judgment can be pronounced.

"The case will be continued to give the parties an opportunity of adjusting the amount."

The defenders reclaimed, and argued that section 89 was special in its application; and that the terms of the clause "highways within the counties of Lanark and Renfrew" were ambiguous and therefore required construction. Section 89 was limited in application to highways situated wholly within the counties of Lanark and Renfrew, and was therefore inapplicable to the road in question.

At advising—

LORD JUSTICE-CLERK—I am quite satisfied that the judgment of the Lord Ordinary is right. Indeed, to adopt the argument of the Magistrates of Glasgow would be to stultify the intention of the Legislature. One knows that the cause of such an Act was the relation in which Glasgow stood to the provinces in respect of such roads. Conflicts might well arise if the provisions affecting road trusts in other places were to be applied in these complicated relations.

The Legislature by this 89th section provided that it should not be necessary to call in a debt commissioner for the allocation of debt as between the counties and burghs respectively, but that the allocation should be made according to the valuation rolls. It is a very simple provision, and as far as this 89th section is concerned I cannot see a shadow of a doubt.

The section relates—"Whereas it is expedient to make special provision in this Act in regard to the highways within the counties of Lanark and Renfrew;" and then various provisions follow. It has been said that the application of that section is thus limited to highways which are wholly situated within the counties of Lanark and Renfrew. I am unable to spell any such conception out of that clause, and if I am right, to give effect to any such conception would be to defeat the main object of the Legislature. It is provided that this Act "shall commence to have effect within the counties of Lanark and Renfrew" . . . on the 1st of June 1882, and that "the debts affecting the turnpike and statute labour roads within the counties of Lanark and Renfrew, after having been valued as hereinbefore provided, shall be charged, and are hereby allocated, upon the said counties and the burghs therein situated, in the proportion of their respective valuations at the commencement of this Act, as appearing from the valuation rolls then in force." And then comes the sub-section providing in regard to the allocation of debt that the city of Glasgow, and certain other burghs in Lanark and Renfrew, &c., should jointly contribute the sum of £12,500 towards the cost of maintaining the roads, highways, and bridges within the counties of Lanark and Renfrew. That sum of £12,500 must be contributed in proportion to the valuation whether the roads are wholly within

these counties or not. I do not entertain any doubt upon the whole case, and I merely make these observations in order to indicate my view.

LORD YOUNG—I am of the same opinion, and have really nothing further to add. Section 67 contains a general provision regarding the allocation of debts between the landward parts of counties and burghs, and that shall be applicable generally where the statute contains no special provision. But section 89 contains special provisions limited in their application to the counties of Lanark and Renfrew. The introductory words are—"Whereas it is expedient to make special provisions in this Act in regard to the highways within the counties of Lanark and Renfrew," . . . and then it proceeds to make special provision for the division of the debt between the burghs and landward parts of Lanark and Renfrew. I cannot for a moment think that this special provision is limited to roads wholly situated in Renfrew or Lanark, or to roads which before the passing of this Act were under trusts locally limited to those counties. No reason could be suggested for, nor could any object be served by, establishing a distinction between roads under trusts beyond and roads under trusts within these limits.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court adhered, and remitted the case to the Lord Ordinary.

Counsel for Defenders (Reclaimers)—J. P. B. Robertson—Lang. Agents—Campbell & Smith, S.S.C.

Counsel for Pursuers (Respondents)—Mackintosh—Pearson. Agents—Dove & Lockhart, S.S.C.

Wednesday, October 22.

SECOND DIVISION.

[Lord Lee, Ordinary.]

DOUGLAS v. TAIT AND ANOTHER.

Diligence—Pointing of the Ground—Process—Instance—Joint Summons of Pointing the Ground at the instance of Two Heritable Creditors holding Separate Grounds of Debt—Community of Interest—Personal Bar.

Two creditors of the same debtor, holding separate bonds and dispositions in security granted over the same subjects, combined in raising against their debtor a summons of pointing of the ground. The debtor made no appearance, and decree having been pronounced against him in absence, letters of pointing and, in due course, a warrant of sale of the moveables on the ground were obtained. He thereupon sought to suspend the warrant and to have the threatened sale interdicted on the ground that the pinders not having that community of interest which made it competent for them to combine their diligences in one summons, the pointing of the ground and proceedings following thereon were

inept. The Court (*disc.* Lord Rutherford Clark) *repelled* the ground of suspension, being of opinion that the debtor having allowed decree to go against him without objection in the action of pointing the ground, was barred from challenging the proceedings following thereon on a technical objection.

On 26th December 1883 Mrs Tait and William Donaldson raised in the Court of Session an action of pointing of the ground against Miss Barbara Douglas. Mrs Tait's title consisted of two several bonds and dispositions in security over Miss Douglas' property at Corstorphine, one of which was granted by Miss Douglas' father in 1871 for the sum of £100, the other having been granted by Miss Douglas herself in 1878 for the sum of a further £150. William Donaldson's title consisted of a bond and disposition in security granted over the same property by Miss Douglas in 1882 for the sum of £54. Miss Douglas paid £30 to account of Mrs Tait's debt, and the interest in that debt up to Martinmas 1883. She did not enter appearance in the action, and on the 15th January 1884 decree was obtained against her directing letters of pointing at the instance of the pinders to be issued and executed, and the same were accordingly obtained. Under these letters, in terms of the decree and letters, the moveable goods, gear, and effects belonging to Miss Douglas, situated on the ground of the subjects described in the said several bonds, and of which she was proprietor, were pointed in payment of the debts. The schedule of pointing was dated 1st February 1884. On the 11th of February the pursuers obtained the warrant of the Sheriff of the Lothians for the sale by public roup of the pointed effects.

On 14th February the usual statutory notice calling up the bonds and giving notice of sale of the subjects failing payment was given.

Miss Douglas on 22d February presented this note of suspension and interdict, the prayer of which was "to interdict, prohibit, and discharge the said respondents and each of them from proceeding or acting upon a warrant of sale, dated 11th February 1884, granted by the Sheriff of the Lothians at the instance of the respondents, the said Mrs Marion Brodie or Tait and William Donaldson, against the complainer, for the sale of certain goods, gear, and effects belonging to the complainer, and which were pointed by the said respondents in virtue of letters of pointing obtained by them under a decree in an action of pointing of the ground raised at their instance against the complainer."

The complainer pleaded, *inter alia*—"The summons of pointing the ground and the proceedings following thereon are incompetent and inept in respect the same are at the instance of two pursuers having separate grounds of action."

The Lord Ordinary (LEE) pronounced this interlocutor:—"Finds that the pointing in question was irregular and incompetent: Thereupon suspends the proceedings complained of: Interdicts, prohibits, and discharges the respondents each of them as craved: Declares the interdict formerly granted perpetual, and decerns."

"*Opinion.*—The complainer objects to the sale of certain moveable effects belonging to her, and alleged to have been pointed by the respondents in virtue of letters of pointing the ground,