

fender) had no probable cause for acting as he did, and that he himself was not a thief. It is not according to principle, I think, and certainly not according to precedent, to throw out a case such as this, and not to enter into an inquiry at all.

LORD CRAIGHILL—I am of the same opinion. I think there is a great deal to be said for the view that the defender had probable cause for acting as he did, but I am not quite satisfied that he has made out such a case on the statements of the pursuer himself in the record. If it is the fact that the train started while these two parties were engaged in a dispute about the amount of the bill, and before they had expected that it would start, then I think that it is not conceivable on the face of it that the pursuer intended to steal the defender's money after he had called him up to the train on purpose to pay him his account. I therefore concur with your Lordship.

LORD RUTHERFURD CLARK—I am sorry to differ from your Lordships. The case is a peculiar one, and probably enough it is unique in the particular to which Lord Young has alluded—that the pursuer's averments are such that the defender founds his case of probable cause upon them. I am of opinion, however, that the pursuer has not stated a relevant case. We are concerned only with the case that the pursuer makes upon record, and as the alleged charge of theft was made to a public authority, it is clear that he has no case unless he can show that the accusation against him was made maliciously and without probable cause. If the pursuer had said that the defender had made the accusation with probable cause, then he would not have stated a relevant case, and although he has not used those words, I think it quite plain from the statements he does make upon record, that the defender had probable cause for acting as he did. In the first place, it is not said by the pursuer they were acquainted; so far as the record goes they must be taken to be total strangers. The pursuer lived in the defender's hotel, and left without paying his bill. He did not return, and the next proceeding in the case is that while the pursuer was in the train and the defender was on the platform, the pursuer beckoned to him to come to the carriage. Now the result, according to the pursuer's own statements, was this. The pursuer asked what his bill was and produced a one-pound-note, the defender gave him the change after deducting the amount of his bill, and then a dispute arose as to what the amount of his bill really was. While this dispute is going on the train moves away, carrying off the pursuer, who calls out to the defender that he will send him the amount from home; he does not say where his home is. He does not say that there was any difficulty in returning the defender's change to him. I see no difficulty in his doing so, but he chooses to keep both sums without giving any explanation. Such is the case on the pursuer's own statements. He does not say that he told the defender where his home was, and how could the latter, seeing his money carried off in this way, do anything but suspect, and with probable cause, the dishonesty of the pursuer? It may be quite true that he was not dishonest, but that he laid himself open to the strongest sus-

picion of his honesty is what his statement on record itself shows. And strongest suspicion of dishonesty is just probable cause, and I think the defender had, on the pursuer's own showing, a right to have the strongest suspicion of his honesty.

It is said that the defender denies that he ever made the charge of theft, and that that denial is of importance. I do not think so. We are only concerned here with the relevancy of the pursuer's case on record, and it seems to me that the case is just as clear as if the pursuer had put upon record the statement that the defender made a charge of theft against him with probable cause, which would not have been a relevant charge. I think his explanations amount to the same thing.

The Court refused the reclaiming-note, with expenses, and remitted the case back to the Lord Ordinary for jury trial.

Counsel for Pursuer—Rhind—A. S. Paterson. Agent—J. D. Macaulay, S.S.C.

Counsel for Defender—Jameson—M'Lennan. Agent—Wilson & Mackay, S.S.C.

Thursday, October 14.

OUTER HOUSE.

[Lord Fraser and Lord Trayner.
Bill Chamber.]

ROBERTSON *v.* THE TRUSTEES FOR THE
ESKDALE DISTRICT OF DUMFRIES
COUNTY ROADS.

Road—Obstruction—Public Monument—Interdict—Popularis Actio—Title to Sue—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), secs. 27, 32, and 123.

The Road Trustees of Eskdale District of Dumfriesshire, acting under the Roads and Bridges (Scotland) Act 1878, proceeded to remove a statue, which had been erected by public subscription in 1842, from its site in the market-place of Langholm to a new site on which they had got leave to place it. The Court *refused* to grant to ratepayers and residents in the town, and to subscribers to the monument erection fund, interdict against the proceedings, *holding* that they had no title to sue, and that under the 27th section of the Act of 1878 the complainers should have sought redress by appeal to the County Road Board.

William Easton Robertson, residenter and ratepayer in Langholm, and manufacturer there, raised this process of suspension and interdict against the Trustees for the Eskdale District of Dumfries County Roads, to prevent them removing a statue of Admiral Sir Pulteney Malcolm from the market place of Langholm to a site within the Library grounds of that town. He set forth that he had been appointed at a meeting of the inhabitants of Langholm to take steps to prevent the removal of the statue.

The following facts appeared from the pleadings in the case:—Langholm was a burgh of barony. The inhabitants had adopted the Burgh Police Act, 3 and 4 Will. IV. c. 46 (1833), but only as

regarded cleaning, lighting, and water supply. The Police Commissioners were the local authority in virtue of the Public Health Act 1867; the Roads and Bridges Act 1878 had been adopted in the county of Dumfries, and the respondents had charge of the roads and streets of Langholm in terms of the Act.

In 1842 the monument in question was erected in the market-place, by public subscription, to Admiral Sir Pulteney Malcolm, a native of Langholm, and it occupied the same site down to the year 1886. The respondents, at a meeting held in March 1886, considered that it was expedient, in view of the traffic on the streets, and of the monument being an obstruction to the thoroughfare, to remove the statue to a new site, and resolved that this should be done. They obtained leave from the proprietary members of a library in Langholm to place the monument within the library grounds, and gave orders for its removal to certain builders, who began operations by taking the statue from its pedestal and laying it in the market place. Thereafter in August 1886 a meeting of the inhabitants of Langholm was held, at which disapprobation at the intended removal of the monument was expressed, and the present process was the result.

The complainer pleaded—(1) “The respondents having acted illegally and unwarrantably, suspension and interdict, as well as an order for restoration, should be granted as craved. (2) The respondents in the circumstances should be found liable in expenses.”

The respondents pleaded—“(1) The complainers have no title to sue. (2) In respect of the provisions of the Roads and Bridges (Scotland) Act 1878 the present proceedings are incompetent. (3) The respondents having acted within their legal powers, the note should be refused, with expenses.”

On 10th September 1886 the Lord Ordinary on the Bills (FRASER), in respect the complainer had no title to sue, refused the note.

“*Note.*—The monument in question was erected in the year 1842. At that time the General Turnpike Act (1 and 2 Will. IV. c. 43) was in operation. It contains two sections in regard to obstructions upon turnpike roads, viz., sections 90 and 91. By the first of these it is enacted ‘that if any person shall encroach by making any dwelling-house or other building . . . on any turnpike road . . . without the consent in writing of the trustees of such road or of their surveyor, such person shall forfeit for every offence a penalty not exceeding £5, and it shall be lawful for the trustees of such road to cause such dwelling-house or other building to be taken down . . . at the expense of the person so offending.’ The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), by section 123 enacts, *inter alia*, that sections 87 to 92 of the General Turnpike Act ‘shall be and are hereby incorporated with this Act, and from and after the commencement of this Act in any county, shall extend and apply to all the highways made or to be made within such county.’ Consequently the Road Trustees, acting under the Roads and Bridges Act 1878, as the respondents do, are entitled to remove obstructions in the highways. It is not said in the answers by the respondents that consent to the erection of the monument on the street of Lang-

holm was not obtained from the former Road Trustees, and it may be assumed that such consent was given, looking to the acquiescence in the existence of the monument for forty-four years. Whether after having given such consent to its erection they could now remove it on the ground of its alleged inconvenience, as against a challenge by a person having a title to state such challenge, is a question that need not be answered, because I am of opinion that the complainer in the present case has no such title. He has no patrimonial interest whatever in the monument, or its retention in its present situation. He was not a subscriber (it was erected by public subscription) to the fund gathered for its erection. His connection with Langholm is simply that of a residenter within the last few years, and long after the monument was erected. The present action therefore is as purely a *popularis actio* as well can be imagined, and as Lord Cottenham explained in *Ewing v. The Glasgow Commissioners of Police* (M’L. & Rob. 860) ‘What is known under the denomination of a popular action forms no part of the law of Scotland.’ The supposed exceptions to this rule, such as the vindication of a public right-of-way, are not in reality so, for the ground upon which the title was sustained in *Torrie v. The Duke of Atholl*, 12 D. 328, was that the pursuers, although strangers to the district, averred that ‘they had used, and plainly imply that they mean to use, the road; and why should they not be at liberty to have their right to use the road declared when it is stated that the defender has hindered them from doing so, and openly declared his right to prevent them and everybody else from travelling by that road’ (*per* Lord Mackenzie).

“The grievance of the complainer, on the other hand, is that a monument, which he looks upon as an ornament to the village in which he is a residenter, is about to be desecrated by being removed from the conspicuous position it now holds in Langholm. This sentimental grievance gives him no right as one of the public to ask for the interdict of the Court. An application of this kind is one of the purest cases of the *popularis actio* which our law refuses to sanction.

“The 32d section of the Roads and Bridges Act vests in the trustees under that Act the whole roads within each county respectively, with all the powers, immunities, and privileges belonging to the former trustees whom the Act superseded. The respondents, as the existing trustees, have the administration and management of the roads within their district; and the 27th section of the Roads and Bridges Act provides a means of remonstrance and redress against their resolutions by enacting that any person who shall consider himself aggrieved by the decision of any district committee may appeal at any time within one month after such resolution to the board. The word ‘board’ is by the interpretation clause defined to be ‘the county road board appointed and acting under this Act.’ Although the complainer has no title to apply to a court of law for interdict, he seems to be entitled under this section to appeal to the County Board, which is declared to be the final judge as to the propriety of road administration when that does not touch on private patrimonial right.

“I was desirous of ascertaining whether there was any municipal or local body that had charge of the streets of Langholm, but it appears from

the addition made to the answers that there is none such. Langholm is a burgh of barony, and the only statute under which it is governed is the old Police Act of 1833 (3 and 4 Will. IV. c. 46), and this only as regards lighting, cleansing, and supplying with water. It is plain that the Commissioners of Police acting under this statute, having such limited powers, have no concern with, or title to interfere with, the removal of the monument."

II. Thereafter on 28th September 1886 a note of suspension and interdict was presented at the instance of thirteen complainers, four of whom were stated to have been subscribers to the fund for the erection of the monument in question, the other nine being described as ratepayers and residents in Langholm. This note contained the same averments as appeared in the preceding process, with certain amplifications, and the prayer included an additional crave "to interdict, prohibit, and discharge the said respondents from erecting the said monument, or any part of it, in the plot of ground belonging to the proprietary members of the Langholm Library, Langholm.

The complainers pleaded—“(1) Having consented to the erection of the said monument in 1842, the respondents are not now entitled to remove it. (2) In any case, they are not entitled to remove it *brevi manu*, and without the consent of the persons interested, or authority from the Court or Parliament. (3) Not being an obstruction, the respondents have no power to remove the monument. (4) The respondents having acted illegally and unwarrantably, suspension and interdict, as well as an order for restoration, should be granted as craved. (5) The respondents not having given any notice, or, at all events, any proper notice, of their intention to remove the monument, and also to erect it in private ground, the complainers are entitled to interdict. (6) The respondents having charge only of the roads and streets, have acted *ultra vires* in seeking to improve private property by the proposed removal of the monument, and interdict should be granted as craved. (7) The plot of ground adjoining the library being private property, suspension and interdict ought to be granted against re-erection of the monument there as craved, with expenses.”

The respondents, in addition to their former pleas, pleaded—“(3) The complainers' statements are not relevant or sufficient to support their crave.”

On 14th October 1886 the Lord Ordinary on the Bills (TRAXNER) found that the complainers had no title to insist in the present suspension, and refused the note.

“*Note.*—A note of suspension and interdict was recently presented to the Bill Chamber containing the same averments (at least as regards the merits of the question raised) and the same prayer as that now before me. The note I have referred to was at the instance of Mr Robertson, one of the present complainers, against the same respondents. That note was refused by Lord Fraser on the ground that the complainer, in the character of a residenter and ratepayer in Langholm, had no title to insist in the suspension. The present suspension is at the instance of thirteen complainers, four of whom are said to have

been ‘subscribers to the fund for the erection of the monument’ in question, while the other nine are described as ‘ratepayers and residenters in Langholm.’ So far as the present suspension proceeds at the instance of the nine complainers last referred to, I am of opinion that it must be refused on the grounds stated by Lord Fraser, in which I concur. The fact that nine residenters and ratepayers have combined to bring this suspension does not confer upon them in combination any title which they have not separately as individuals. Separately they have no title, and that multiplied by nine would just give the same result. The feature which distinguishes this note from the previous one is that four persons now complain of the removal of the statue who are alleged to have been contributors to the fund for its erection. This as a matter of fact is denied by the respondents. But I regard it as immaterial to the decision of the question before me whether these four complainers were subscribers as alleged or not. I assume that they were, and assuming that I am of opinion that they have not thereby any title to insist in the present note. Giving a subscription towards the erection of a monument or statue does not, *per se*, confer on the subscriber any right of property in the thing erected. He is entitled to see that his money is expended for the purpose for which he gives it. But that being done, he has no further right in the money given or the object on which it has been expended. This at least is the general case. There may be cases where, by special agreement or by conditional subscription, a right is conferred on the subscribers in the thing subscribed for, whether monument or anything else. There is, however, here no special case. It is not said that the complainers' subscriptions were given on any condition as to site or otherwise. Even if the complainers could qualify any right in the statue, that right is not invaded. No one proposes to injure or alter the statue. The whole thing complained of is, that the site of the statue has been changed, and it appears to me a conclusive answer to that complaint to say that the complainers never, by subscription or otherwise, acquired any rights in the original site.

“If the complainers have a grievance to remedy, it appears to me that they can only find that remedy under the appeal provided by the Roads and Bridges Act 1878. The time prescribed within which such appeal must be taken is now past, but the respondents stated that they would take no objection to the appeal on that ground.”

The complainers reclaimed, but subsequently withdrew their reclaiming-note.

Counsel for Complainers—Craigie. Agent—Robert D. Ker, W.S.

Counsel for Respondents—Carthew Yorstoun. Agents—Duncan & Black, W.S.