

HOUSE OF LORDS.

Friday, November 12.

(Before Lord Chancellor Halsbury, Lord Blackburn, and Lord Watson).

COUNTY ROAD TRUSTEES OF LOWER WARD
OF LANARK *v.* FLEMING AND ANOTHER
(KELVINSIDE TRUSTEES).

(Ante, vol. xxi., p. 743, July 16, 1884).

Road—Road Trustees—Power to Light Roads—Roads and Bridges Act 1878 (41 and 42 Vict. c. 51, sec. 119, and Schedule C—Great Western Road Act (6 and 7 Will. IV. cap. cxxxviii), secs. 14 and 23.

Held (rev. judgment of Second Division) that county road trustees under the Roads and Bridges Act 1878—which declares that such trustees shall be liable in all the debts, liabilities, claims, and demands in which the trustees under previous local Acts were liable, and shall be bound to expend their assessments in “maintaining and repairing” highways under their jurisdiction—are not bound or entitled to expend their statutory funds raised by assessment in lighting roads within their jurisdiction, whether such roads were previously lighted by the former trustees or not, the duty of lighting not being any part of the “maintenance or repair” of roads.

Observations per Lord Watson on section 32 of the Roads and Bridges (Scotland) Act 1878.

This case is reported *ante*, vol. xxi., p. 743, and 11 R. 1097, July 16, 1884.

The second parties, the Road Trustees of the Lower Ward of Lanark, appealed to the House of Lords.

The grounds of appeal were (1) that the Roads and Bridges Act 1878 does not bind or entitle road trustees to light roads; (2) that the provisions of the Great Western Road Act (the material sections of which are quoted in the report in the Court of Session) were not continued as to lighting by the Act of 1878, but on the contrary repealed and extinguished; (3) because the Road Trustees could not competently spend their statutory funds in lighting Hyndlands Road or other road of that description, or indeed any road.

The first parties, the Kelvinside Trustees, made no appearance.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case the learned Judges in the Court below attached a significance to the words “maintenance and repair” which it seems impossible to maintain. The words “maintenance and repair” have been in use both in English and Scottish statutes for a very considerable period, and I am not aware that any contention has ever been urged that “maintenance and repair” include the duty of lighting. Lighting and Watching Acts which have been passed from time to time for particular localities are of a totally different character, throwing upon

the persons who are immediately concerned in the preservation of the localities where the lighting and watching are to be maintained the obligation of maintaining them. Upon the general question, therefore, I must say, with very great respect for the Court below, I am unable to follow them in their judgment that the maintenance of lights is part of the “maintenance” of the roads. “Maintenance and repair of a road” are words which explain themselves without any difficulty at all. I am totally unable to concur in the view that the “maintenance and repair of the roads” vested in the trustees any power or duty or obligation of maintaining lighting; nor have they authority, indeed, to expend money raised for the purposes of “maintenance and repair” upon purposes entirely alien to that duty, although it may be very convenient and proper and necessary in particular places that the roads under their charge should be lighted.

My Lords, with respect to the second question, it seems to me that it is equally clear. A road was in existence with particular duties and particular privileges attached to the persons who were the guardians of that road. Then came the general Act which swept the guardianship away, and swept away the power of raising the rates by which the then guardians were empowered to perform those particular duties which were cast upon them, and it threw into the general law the guardianship of the maintenance and repair of that road. Then came natural and appropriate words to protect such persons as might have entered into relations with those guardians, giving those persons the same remedies against those whom I have described as the guardians of that road as they would have had but for the passing of that Act which so swept their powers and their duties away. But it seems to me to be a very violent construction of that Act to assume that the road trustees are, with reference to that particular road, to have any different duties or any different obligations from those which are cast upon them with respect to the general roads of the country.

I am therefore of opinion, and I so move your Lordships, that the judgment of the Court below should be reversed, and judgment for the appellants entered accordingly.

LORD BLACKBURN—My Lords, I confess it seems to me that the effect of the enactment which we are referred to here is that the decision of the Court below is, as it seems to me, erroneous on the grounds which have been suggested.

The first question comes to be, whether, when there is a power given to light the said Great Western Road, that power is, under the circumstances which are stated in this case, positively continued, and exists notwithstanding that the Great Western Road has under this Act become part of the system of roads which is under the control of the County Road Trustees. Now, as to that it does not seem to me that there is any ground for saying that that is so. The first part of the contention that is raised is whether or no the power of the local trustees of the Great Western Road to light that road in the manner in which they have actually lighted it in this case is continued to the County Road Trustees from what was existing before? It does not seem to me that it is. I cannot quite follow the reasoning of the

Judges below, which seems to go upon that ground. Lord Young gives it as his opinion that that is an unimportant question, and he says that it was continued—that the County Road Trustees were authorised to continue the same duties and powers as their predecessors the old trustees. It does not strike me so. It strikes me that the enactment which was made was that they were to continue to do what was requisite and proper in the way of "maintenance and repair," but that they were not to do what had been done before unless and only so far as the statute introducing the new system made it part of what they were bound to do.

Then upon the second question—whether the County Road Trustees are to have power to expend money in localities where such lighting would seem proper—it does not appear to me that that question is properly raised at all. It strikes me that there is great force in the observations which have been made by the noble and learned Lord who has just spoken. I think that the powers which are given by the statute to the County Road Trustees with regard to the application of their money is to apply it for work which the enactment makes it right and proper to do; and it strikes me very much, indeed, that in this case the work which is required to be done is not within their powers, or such as the Act enables them to do. I therefore come to the same conclusion as the noble and learned Lord who has just moved that in this case the interlocutor be reversed.

LORD WATSON—My Lords, I am bound, with all respect to the learned Judges who constituted the Second Division upon the hearing of this cause, to say that in my opinion the answer to neither of these questions is attended with any difficulty. Both ought, in my opinion, to be answered in the negative. As regards the first of them, it appears to me that the learned Judges have misconstrued the 32d section of the Roads and Bridges (Scotland) Act 1878. The object and effect of the provisions of that clause are simply this, to save all collateral contracts, engagements, and liabilities which have been properly and lawfully created by virtue of the powers of any Act by the trustees who administered it. The intention of the section was not to keep up the statutory obligations as continuing obligations, or the statutory powers as continuing powers. If I could come to the same conclusion as the learned Judges, which I am altogether unable to do, I should also be compelled to come to the conclusion that the power to exact tolls was likewise kept up and carried forward, because it is only from that source that there is any statutory warrant for defraying the cost of lighting and watching.

As to the second question, I entirely agree with your Lordships that it is impossible to hold that lighting is included in the "maintenance and repair" of a road according to any reasonable construction of those terms. I do not say whether or not they might have been altered and expanded if there had been something in the context of the statute to show that the Legislature did intend that the trustees should also light the roads. In that case there might have been some ground for coming to the conclusion of the Court below. But there is not the slightest indication

that such was the intention of the Legislature. On the contrary, the powers which they have conferred upon, and the duties which they have given to the new trustees under the Act of 1878 are so minute as to exclude, in my humble opinion, the supposition that the granting of any such power was intended.

The House reversed the interlocutor of the Second Division, and found that the questions in the Special Case which the Court of Session answered in the affirmative, ought to be answered in the negative.

Counsel for Appellants—Sol.-Gen. Robertson, Q.C.—Horace Davey, Q.C. Agents—Grahames, Currey, & Spens, for Mackenzie & Black, W.S.

COURT OF SESSION.

Friday, November 12.

FIRST DIVISION.

[Lord Shand, Ordinary
on the Bills.

EARL OF GLASGOW, PETITIONER.

Entail—Disentail—Bonds of Provision—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sec. 6.

In a petition for disentail, held that in estimating the amount of security which ought to be provided in respect of certain Aberdeen Act provisions granted by the petitioner in favour of his wife and children—(1) the year of the disentail must be taken as the "year of the death of the grantor" in computing the free rental of the estate; but (2) that no deductions should be made therefrom of the amount of terminable rent-charges affecting the estate, and a subsisting annuity in favour of the widow of a former proprietor, nor (in estimating the security for the children's provision) the amount of the annuity to the petitioner's wife, nor (in estimating the security for the said annuity) the interest on the estimated amount of said provisions; and observed that, as a condition of authorising the disentail, provision ought to be made to secure over the estate the utmost amount which the widow or children might yet have as a claim against it.

This was a petition under the Entail Acts—11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, 38 and 39 Vict. c. 61, and 45 and 46 Vict. c. 53—presented on 1st May 1886 by the Right Honourable George Frederick Rosse and Lindsay Crawford, Earl of Glasgow, heir of entail in possession of the estate of Kelburne, and other lands situated in the counties of Ayr and Bute, with the consent and concurrence of the trustees acting under a trust-disposition and conveyance granted by the said Earl in their favour, for authority to record an instrument of disentail of those estates.

The entail was dated prior to the 1st August 1848. The petitioner was born on 9th October 1825. Deeds of consent by the three nearest heirs consenting to the disentail were produced in process.

The Lord Ordinary (LORD TRAYNER) remitted