

have been incompetent before the passing of this 54th section; and as it complies with the provisions of that section, I can therefore see no objection to it whatever.

The other Judges concurred.

Objection repelled.

Agents for the Reclaimer—Macbean & Malloch, W.S.

Agents for the Respondent—Gibson-Craig, Dalziel, & Brodies, W.S.

Tuesday, January 30.

SECOND DIVISION.

BRITISH FISHERIES SOCIETY v. MAGISTRATES OF WICK.

Road Trustees—Assessment—23 and 24 Vict. c. 201.

The magistrates of a burgh were under a local Act empowered to levy an annual assessment for "maintaining, keeping in repair, and improving" the roads and bridges—held that a ratepayer was not entitled to interdict the levying of the assessment on the ground that the magistrates had imposed a greater assessment than was necessary for the year's expenses, in order to accumulate a fund to rebuild a bridge.

The questions raised in this suspension and interdict sufficiently appear from the Note which the Lord Ordinary (GIFFORD) appended to his interlocutor granting the interdict:—

"Note.—The question in this case turns almost exclusively upon the terms of the Statute 23 and 24 Vict., c. 201 (Aug. 20, 1860), which is a local statute applicable to highways, roads, and bridges in the county of Caithness.

"By the 33d section of the statute, the management of the roads and bridges within the boundaries of Wick (meaning thereby the parliamentary boundaries, as defined by the Reform Act) are transferred from the road trustees to the Magistrates and Town Council of Wick, who are to have the same powers as the trustees for the county roads, except the right of levying tolls.

"By section 26, the Magistrates and Town Council of Wick are empowered to levy an annual assessment, not exceeding 6d. per pound, for the purposes expressed in the Act, and these purposes are defined in section 48 of the statute. The clause is quoted in reason 2 of the record.

"The question raised in the present case is whether the respondents, the Magistrates and Town Council of Wick, are entitled to levy the assessment complained of, and sought to be suspended, not for the purpose of defraying the current expenses of "maintaining, keeping in repair, and improving" the roads and bridges within Wick, and the current expenses of the trust, but for the purpose of accumulating a large fund, which at some future and undefined period they intend to apply in effecting either a renewal of the bridge of Wick, or some costly and extraordinary improvement thereof, the exact nature of which the respondents have not defined, either on record or at the Bar.

"It is admitted that the respondents have in hand an accumulated fund of upwards of £800; that the expenses of the current year will not ex-

ceed £800; and therefore the assessment in question can only be justified if the respondents have a right to accumulate.

"The Lord Ordinary is of opinion that, under the statute, the respondents are not entitled to assess for the purpose of accumulating a large and indefinite fund, to be expended at some future and undefined period on operations or improvements on the roads and bridges under their charge. He has therefore granted suspension and interdict, as craved. The grounds of his opinion are, shortly—

"1st. The power to make an annual assessment must be fairly limited by the probable annual expenditure. The Magistrates are statutory trustees, and their powers to assess must be strictly construed so as not to exceed the limits of the statute. The statute limits the assessment to be 'for the purpose defined;' and as the assessment is annual, it is fair to read the statute as meaning that it shall be for 'the annual expense' of maintaining, keeping in repair, and improving the subjects of the trust.

"Hence it is thought the respondents could not make the assessment biennial or quinquennial, and levy two years' expenses or five years' expenses in one year. Each year must bear its own burdens. Of course there must be a wide margin allowed for contingencies or estimates, and, if it were merely this, the discretion of the trustees will not be lightly interfered with.

"Still the estimate must be made, and there must be no deliberate attempt to lay the expenses of one year upon the ratepayers of another.

"2d. This is still more manifest when it is considered that one-half of the assessment is borne by the tenants, or merely temporary occupants of lands and heritages in the burgh. It would be unfair to tax a tenant of one year for an improvement which is not to begin for ten or fifteen years after he has left the town or the district. Exact adjustment is impossible, but there must be a reasonable attempt to give the benefits of the repairs and improvements to the ratepayers who actually pay for them.

"3d. The respondents have power to borrow on the credit of the assessment two years' gross amount thereof. This seems intended to limit the extraordinary expenditure which the respondents may disburse. Practically they must not exceed three years' assessment at once. Two years' they may borrow, and a third year's they have in hand. This is quite fair, and the interest of the borrowed money will fall justly and equitably upon the ratepayers of subsequent years who have got the benefit of the expenditure.

"4th. The magnitude of the proposed operation, and the time required for accumulation, is unreasonable. According to the statement of the respondents themselves, they will require between £3000 and £4000, besides the expense of a temporary bridge. Admittedly it will take twelve or fifteen years to accumulate the amount, current expenses requiring to be provided for. Virtually the respondents propose to tax proprietors and tenants for fifteen years for the benefit of those who may be proprietors and tenants fifteen years hence. The Lord Ordinary thinks this is *ultra vires*. Had the matter related to one or two years only, he might have hesitated to interfere, as there must be some discretion and latitude in such cases, but the present case is beyond all reasonable latitude. If the respondents can accumulate for fifteen years, it would be difficult to prevent them accumulating

for forty years, or from creating a permanent sinking fund.

"5th, and lastly. The contemplated operation of the respondents are themselves of very doubtful competency. The respondents are empowered to maintain, keep in repair, and improve existing roads and bridges. They are not authorised to make new roads or new bridges. If such are required, further powers must be obtained.

"But substantially the respondents must be held as proposing a new bridge, or alterations so extensive as to be equivalent thereto. They say the present bridge, if meddled with (Ans. 6) would likely fall to pieces, and require in great part to be rebuilt; but they do propose to meddle with it to the tune of £4000. The very vagueness of their contemplated operations is against them. They do not, and probably cannot, say exactly what will be required.

"The Lord Ordinary thinks that the respondents are attempting to extend a limited trust into a trust of a different and more extensive kind. He does not doubt the entire *bona fides* of the respondents, but even, with the purest motives, and for the best of purposes, they must not act *ultra vires* of the statute."

The Magistrates reclaimed.

WATSON and BLACK for them.

SOLICITOR-GENERAL and ASHER for respondents.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has very clearly explained the circumstances in his note, but I am unable to concur with him in this interlocutor. The assessment sought to be suspended was regularly imposed in point of form by the competent authority, and of an amount within the statutory limit. It was therefore *ex facie* legally imposed. The grounds of suspension relate not to the manner of its imposition, but to the object to which the produce of the assessment, when collected, is intended to be applied. It is said this object is illegal, and beyond the powers of the magistrates, inasmuch as (1) the money is not required for expenditure within the year; and (2) it is intended to be applied to the building of a new bridge, which is beyond the power of the magistrates.

I doubt very much the relevancy of such grounds as these to stop the collection of a public assessment of such a character. That ratepayers may by action prevent the malappropriation of the produce of the rate I do not doubt; and the illegality of any special application of the funds once established, may affect the right to assess or recover for the future. But when the plea truly resolves into a question of due administration, the executive powers of the administrators must be upheld in the mean time, and their statutory action cannot be suspended or paralysed on such allegations.

On the grounds of suspension themselves, I think it enough to say that they seem to me entirely insufficient for the success of the present application. The respondents here are the trustees of part of a great thoroughfare, which they are bound to maintain, and they hold a statutory power of assessment up to a fixed limit to enable them to defray the cost of maintenance. They are the proper judges, at least in the first instance, of what is necessary for that purpose, and as long as they exercise that discretion reasonably, and do not exceed their limit in amount, we should certainly not interfere to prevent the annual assessment from being paid. I cannot affirm the

proposition that all the funds raised within the year must be expended, or be intended to be expended, within the year. If works are required for the maintenance of the thoroughfare which require more than one year's assessment will yield, I see no illegality in applying the produce of two or more years' assessment to that purpose. This is a question of fair and reasonable administration, and although cases may be supposed which would be unfair or unreasonable, I see nothing in the proceedings of the respondents which bears that character. The assessment is laid upon the land—on its owners and its occupiers—and although the latter are a fluctuating body, more or less, the proposed operations are clearly for the benefit, and indeed are essential to the value of the adjacent property.

As regards the powers of the magistrates to rebuild a bridge, if they have statutory funds sufficient for that purpose, that also seems to be a question of administration, depending partly on the necessity for such an operation, and partly on the cost to be incurred. There is clearly no such absolute illegality in the proceeding as would be necessary to induce us to sanction the non-payment of the rate. If the thoroughfare cannot be maintained without rebuilding the bridge, this operation, like all other operations necessary for that purpose, would seem to be a proper application of the funds. I have looked through the Statute 59 Geo. III., but I do not think that the clause to which we were referred gives us any assistance. It related (1) to the application of a specific capital fund; and (2) to destruction by accident, and not by natural decay. On the other hand, it clearly recognised the right to apply even the capital sum to the rebuilding of bridges, which were part of the general system of roads. Without absolutely pronouncing on the legal character of the proceedings of the magistrates, I am very clearly of opinion that they are entitled to collect their money, and that no legal ground has been established under which the complainers can refuse to pay.

LORD COWAN—The Lord Ordinary has, in my opinion, taken too narrow and restricted a view of the statutory provision under which the respondents have acted in the management of the roads and bridges within the Wick district. The object of this statutory local trust was to keep open those thoroughfares, as it was of the public trust which it superseded. This being so, the principle of construction to be applied to the case is one favourable to the powers conferred for the due fulfilment of the important public benefits contemplated by the statute.

By the Act mentioned in the record the respondents are empowered (§ 36), for the purposes therein mentioned, to impose an annual assessment on the proprietors within the burgh of Wick not exceeding 6d. on each pound of yearly rent or value of lands and heritages. In exercise of this power an assessment has been imposed for the year 1869-70, at the rate of 4d. per pound on the rental. This assessment is complained of as beyond their powers, having regard to the circumstances in which it has been imposed by the suspenders, who are proprietors within the burgh, and liable to the assessment.

The statutory purposes, to accomplish which this power to assess has been conferred, are set forth in the 48th section of the statute, and are generally

for the "maintaining, keeping in repair and improving the roads and bridges within Wick, at present maintained and kept in repair" by the Trustees and Commissioners for Highland Roads and Bridges. Forming part of one of these roads connecting Wick and Pultneytown, is the bridge of Wick, which is alleged by the respondents to have been for a long time insufficient, and in such a defective state as to require to be renewed or rebuilt. Having in view this expenditure, the respondents have for a few years assessed to an extent somewhat in excess of what was required for the annual expenditure, which is about £300, and the surplus fund thus in their hands amounted in 1869 to about £800. The annual expenditure is not of such amount as to require an assessment of 4d. per pound, and it is not disputed that that rate of assessment, fixed for the year 1869 and 1870, will leave a surplus to be added to the sum already in the hands of the respondents from £100 to £150. Thence arise the grounds of the present suspension. The suspenders, however, are not content with resisting the assessment to the extent of the excess rate above the sum required for the annual expenditure, but ask for suspension of the rate imposed on them *in toto*. Their plea is, that until the amount now held by the respondents as the surplus of previous years' assessments shall be expended on the ordinary requirements for repairs and otherwise for years to come, the respondents are not entitled under the statute to levy any thing whatever from the ratepayers. In other words, because in past years without objection the respondents have levied more than the ordinary annual cost of the roads and bridges, (which the suspenders say was illegal) they are to be entitled to exemption from all assessment even for the year's ordinary expenditure.

The first question is, Whether this is the proper process for trying the question of the legality of the past proceedings of the respondents, and whether the suspenders, as parties liable to be assessed for the year 1869-70, can be listened to in pleading exemption from all assessment on the ground stated.

The second question is, whether it was beyond the power of the respondents to act as they have done, and, with a view to the prospective expenditure required for the maintenance of the bridge, to raise a somewhat larger sum annually, so as to provide for that expenditure,—the assessment being still kept within the maximum rate allowed to be imposed by the statute.

On the first of these grounds I am of opinion that in no view can the suspenders be permitted to plead exemption from the assessment, so far as regards the ordinary expenses required for the year 1869-70; and that—as regards any excess that may arise from the rate actually imposed beyond that amount, in accordance with what had for years been done without objection—they cannot in this form be permitted to object to the assessment, even to that extent, in this suspension.

And on the second ground, it appears to me, in the first place, that the only competent mode of trying the question as to the £800 having been wrongously assessed for and accumulated for the past year is by declaratory action. And, in the second place, supposing this matter to be competently raised in the present suspension and interdict, no sufficient grounds have been stated to support the plea of illegality on which the suspenders rely.

That the respondents have been acting through-

out in the *bona fide* administration of this burghal statute is not disputed; and the question is, whether they have the discretion, for which they contend, of looking forward prospectively to a large expenditure on the bridge, and provide for it to some extent by proportioning the amount over a series of years. I think this was fairly within their power, and that it was not necessary to apply to Parliament for additional powers, if they saw their way, as they do, of providing for the necessary expenditure out of the assessment, by borrowing on the credit of it within a reasonable time. Now there is a power to borrow to the extent of two years' proceeds on the credit of the assessments. The effect of the exercise of that power must be to impose the amount so far on the ratepayers of future years. To pay the sum borrowed the maximum assessment of 6d. per pound may certainly be levied, and upon liquidation of the debt, in whole or in part, the respondents have power to reborrow, from time to time, to the full statutory amount. By following that course it cannot be said that they would have acted other than within the express powers of the Act, and this, although it might require some time to pass before the full amount could be paid off. Now, if so, I cannot think it beyond the powers conferred, that in the exercise of a sound discretion there should prospectively be levied a somewhat larger amount than what is actually required for the year. It is vain to say that one set of ratepayers are thereby called on to pay what ought to be imposed on a different set. Every year has its own body of ratepayers within the burgh no doubt, and inequalities may occur, but keeping within a sound discretion in the exercise of their powers in maintaining the roads and bridges, and taking care not to exceed the maximum rate, there seems to me great expediency in the course which the respondents have followed. At all events, I cannot think that, unless the actual assessment for the years complained of has been illegally imposed, its payment can be resisted by one of the ratepayers of 1869-70, because from the ratepayers of former years more money has been levied than the actual yearly expenditure of those years required.

The suspenders indeed say, that as the money in the hands of the respondents is now admittedly to be expended in renewing the bridge, this is altogether *ultra vires*, and not within the only purpose for which they can assess, viz., the maintaining, repairing, and improving the roads and bridges. I am not of that opinion, inasmuch as it appears to me that under the word "maintenance" there must be fairly held to be included the renewal or rebuilding, in whole or in part, of a bridge, similar to what had existed, that has become ruinous and dangerous to the public, and which cannot be repaired. Unless this power existed the communication would be in danger of being entirely interrupted by parts of the roads, or by the bridges, or viaducts over streams or rivulets in its course, giving way. And such power is, I think, fairly to be inferred to have been possessed by the Trustees and Commissioners, by whom the management of the roads has been transferred to the respondents in virtue of this statute. This, I think, must fairly be inferred, not less from the nature of the trust-management committed to those parties—which was to keep up the several lines of communication for the benefit of the public—than from the terms of the proviso at the close of the 4th section of the Act 59 Geo. III., c. 135. And if so,

then by section 33 of the existing statute all the powers, rights, and privileges, in reference to the roads and bridges transferred to the respondents, are declared to be thenceforth possessed and exercised by them.

I shall only add that the recent report of Mr Doull, engineer, procured by the respondents for the information of the Court, is important as showing their actings to be consistent with the exercise of a sound discretion, assuming that the statute is not wholly adverse to the proceedings they have adopted.

The other Judges concurred, and the Court refused the interdict.

Agents for Complainers—Horne, Horne, & Lyell, W.S.

Agent for Respondents—D. Curror, S.S.C.

Wednesday, January 31.

FIRST DIVISION.

SPECIAL CASE FOR GEORGE YOUNG HENDRY AND OTHERS (JAMES HENDRY'S TRUSTEES) AND OTHERS.

Succession—Vesting.

Where a testator made a destination of his property to certain persons in succession, who should be alive on the occurrence of a certain event, but on another event, which necessarily evacuated the previous destination, and which did actually happen, directed it, on the falling in of certain annuities, to be divided equally among his three nephews, the children or other next of kin succeeding to the share of any nephew who should predecease the term of payment or division:—

Held, that, though under the first destination the period of vesting was postponed till the time of payment, yet, under the second, the change of terms manifestly showed that vesting was intended on the purifying of the condition, though the term of payment might be postponed.

The late James Hendry, of Cambridge Terrace, Hyde Park, London, who died in 1849, by trust-disposition and settlement dated 27th September 1843, and two codicils thereto dated 21st September 1847, and 23d October 1848, conveyed to James M'Gavin, then residing in Glasgow, and certain other trustees, and to any person they might assume, two properties in Brunswick Street, Glasgow, adjoining each other, occupied as warehouses and offices. The said trust-disposition and settlement contained one set of purposes as to the property which was thereby first conveyed, and another set of purposes as to the property which was thereby second conveyed. The present Special Case referred only to the property second conveyed by the said trust-disposition. The clauses and provisions on which the present question arose are as follows:—“*Second*, with regard to the subjects in the second place before conveyed, I hereby direct and appoint my said trustees, out of the first and readiest of the rents and proceeds of the same, to pay to Mrs Barbara Roxburgh or M'Gavin, spouse of the said Robert M'Gavin, and sister of my deceased first spouse, Martha Roxburgh, of a free annuity during all the days and years of her life,

of one hundred and fifty pounds sterling, payable at two terms in the year, Martinmas and Whitsunday, by equal portions . . . and after her decease I direct and appoint my said trustees to pay to each of her three unmarried daughters, Mary M'Gavin, Martha Roxburgh M'Gavin, and Barbara M'Gavin, out of said rents and proceeds, a free annuity of fifty pounds sterling during all the days and years of their respective lifetimes, payable in manner above mentioned . . . and on the decease of any two of them, I direct my said trustees to increase the annuity to the survivor to one hundred pounds sterling, and I leave and bequeath said respective annuities accordingly. And I appoint the remainder of the said rents and proceeds accruing after my decease as aforesaid, after deduction of all charges and expenses, and of the three annuities of twenty pounds sterling each, after bequeathed, to be paid over to the said James M'Gavin, my trustee, yearly and termly, until the decease of his said mother and the whole of his said sisters, and failing him by decease to his eldest son; whom failing to his next son or other sons in succession, the eldest alive being always preferred; whom failing, then to his eldest daughter or other daughters in succession, the eldest alive being always preferred for the time; and on the decease of the said Mrs Barbara Roxburgh or M'Gavin, and of her said three daughters, should the said James M'Gavin be then alive, I direct and appoint my said trustees to pay over to him during his lifetime the whole free rents and proceeds of said subjects, under deduction of said three small annuities, and should he, at the said period of the decease of the last survivor of his said mother and sisters, have a son or sons, daughter or daughters, or should he at any subsequent period have a son or sons, daughter or daughters, then I direct and appoint my said trustees to convey and make over the full fee and property of the said subjects second described, under the burden always of the said James M'Gavin's own liferent and said small annuities, to and in favour of his the said James M'Gavin's eldest or other son in succession then alive, and failing sons at that period, then to his the said James M'Gavin's eldest or other daughter in succession then alive . . . Farther, in the event of the death of the said James M'Gavin before that of the last survivor of his said mother and sisters, I direct and appoint my said trustees, upon the death of such last survivor, should the said James M'Gavin have left a child or children, to convey and make over the full fee and property of the said subjects second above conveyed, under the burden always of said three small annuities after bequeathed if then subsisting, to and in favour of his eldest or other son in succession then alive, the eldest alive being always preferred, and failing sons, then to his eldest or other daughter in succession then alive, the eldest alive being always preferred . . . Farther, in regard to the fee and property of the subjects second before conveyed, in the event of the said James M'Gavin having no children, or in the event of his own intermediate death, leaving no children alive at the death of the last survivor of his mother and sisters as aforesaid, I direct and appoint my said trustees, on the death of such last survivor, to sell and dispose of these subjects either by public roup or private bargain, for such price or prices as they can obtain for the same, and after deduction of all charges and expenses, to pay over and divide the free proceeds with any inter-