Young v. *Robertson* the scheme of the destination was that the testator made a division amongst a family of grandchildren, and then he proceeded to deal first with the case of a member of the family who might die without leaving issue, and then with the case of a member who should die leaving issue. In the first case he gave that person's share to the survivors exclusively, therefore excluding the issue of any other member of the family from participation. But in well-drawn destinations of this kind it is provided that on the death of a child leaving issue, the issue shall take the same share which the parent would take if he survived, or, as it is sometimes put, the parent's share whether original or by accretion, or, again, the principle is sometimes carried out by dealing with the case of a person who shall die childless and stating that his share shall go to the remaining members of the family and the issue of those who have predeceased.

Now, if we are to consider what words are to be inserted in this deed by implication, it seems to me that we ought to give the issue of this family of grandchildren the right which we may assume to have been in the testator's mind. In the passage relating to the event of the death of all the members of this family without leaving issue and bringing in the destination-over to collaterals, the testator plainly contemplates that if any members of the family die before the distribution of the residue, their issue are to come in their place, and I agree that the true implication is that issue are to succeed to whatever the parent would have taken had he survived. That construction receives support from the passage in which the testator ineffectually attempted to provide for the event of children dying without issue. That clause is not strictly applicable to the event which has happened. Nevertheless we get some insight as to what the intention was when we find the testator saying that "such child or children shall succeed equally to the share of my said estates which would have fallen to his or her deceased parent if he or she had been alive." It appears to me that we cannot be wrong in holding that the testator meant to give the same right in the event for which he only provides by implication, as he has expressly given in the event of any of his grandchildren predeceasing himself.

LORD KINNEAR—I agree, for the reasons given by Lord Adam. I also agree that the question which we should have to consider as to the share which the grandchildren of Mrs Shepherd are to take would have been entirely different if their interest had depended on the *conditio si sine liberis*. I do not consider what the share would have been in that case. But in the case as it stands we are relieved of the question which might have arisen had it been presented upon the *conditio*.

The LORD PRESIDENT concurred.

The Court answered the first question in the negative, and the second question in the affirmative, finding Mrs Neville's children entitled to one-half of the residue of Dr Gloag's estate.

Counsel for First and Third Parties—Balfour, Q.C. — Cook. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for Second Party—H. Johnston —Wilton. Agent—Arthur S. Muir, S.S.C.

Saturday, December 21.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

GRAHAME AND ANOTHER *v.* DUKE OF ARGYLL AND OTHERS.

Road—Roads and Bridges Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 90—*Road Debt—Valuation and Allocation of Debt—Consignation.*

A turnpike road was constructed out of money borrowed partly from Government and partly from private persons. In 1852 a railway company bought up and took over the private creditor's debts, under an agreement with the road trustees, by which all surplus revenue, or other funds to which the Government might abandon its claim, should be divided equally between the company and the private creditors.

In course of time there had accumulated (1) a sum representing surplus revenue for three years down to 1848, due to and unclaimed by sixty-three of the private creditors; (2) a sum representing unclaimed dividends accruing and allocated to certain private creditors before 1852; and (3) a sum representing one-half of a fund abandoned by the Government in 1887, the other half having been paid in terms of the agreement to the railway company.

In a competition for the whole fund *in medio* between (1) the road authorities, (2) the railway company, and (3) certain private creditors, *held* (*a*) (*aff.* judgment of Lord Moncreiff) that the compearing creditors were entitled, as against the railway company, and as against the road authorities, to the shares of the first and second funds standing in their names, and to a share of the third fund proportionate to their original subscriptions, and that their claims, being to money specifically appropriated to meet them, did not require to be valued and allocated under the Roads and Bridges Act, sec. 90; and (*b*) (*rev.* judgment of Lord Moncreiff) that the balance of the sums in question was not to be consigned, but must remain in the hands of the road authorities as statutory successors of the road trustees, subject to any claims upon it by future compearing creditors.

Proof—Road—Determination by Secretary of State — Report by Commissioners Appointed under the Roads and Bridges Act 1878, *sec.* 90—*Competency.*

Where under the Roads and Bridges Act 1878, sec. 90, commissioners had reported, and the Secretary of State had issued a determination on their report, *held* that it was competent to look at the report in order to discover what questions were raised before the commissioners, and so to enable the Court to construe the determination itself.

James Grahame, C.A., Glasgow, late treasurer of the Glasgow and Carlisle Turnpike Road Trust, and William Henry Hill, LL.D., Glasgow, late clerk of the same trust, raised an action of multiplepoinding and exoneration against the Duke of Argyll and others, concluding for decree that they were liable in only once and single payment of the sums of (1) £232, 16s. 3d., (2) £4165, 10s. 3d., and (3) £740, 17s. 8d.

Under the private Act of Parliament, 56 Geo. III., cap. 83, 1st July 1816, the road from Glasgow to Carlisle was constructed partly out of public moneys granted by the Exchequer, partly out of the subscriptions of private persons, who thereupon became creditors of the Glasgow and Carlisle Road Trust. In terms of the Act, the revenue of the trust, after defraying the expenses of maintenance and management, was applicable (1) to the payment of interest on the sums subscribed, (2) to the payment of interest on the money advanced by the Exchequer, and (3) ultimately to the extinction of the whole debt by means of a sinking-fund.

In 1846 an agreement was entered into by the Caledonian Railway Company, the Road Trustees, and certain persons acting as trustees for the private creditors, whereby the Railway Company purchased the debts due to the private creditors, amounting to £23,803, for the sum of £15,000, payable at Martinmas 1846, when the right of the purchasers was to take effect. The agreement contained the following stipulation:—"(*Fifth*) The said second parties bind and oblige themselves and the said trustees and creditors, to concur with the said Railway Company in endeavouring to induce Government to abandon their claim to the accumulated surplus revenue funds now in the hands of the treasurer, and in the event of the same, or any part thereof, being so abandoned, the amount shall be divided between the Railway Company and the present creditors on the said road, who, it is understood, are to participate equally with the Railway Company in any benefit which the trust creditors or railway may derive by the abandonment in any way whatsoever by Government of the claims against the trust now or at any future period." There followed a declaration, that, as soon as the Road Trustees or creditors had recovered an amount equal to the difference between £15,000 and £23,803, the railway company should be entitled to the whole benefit of any further sums recovered from railway or other companies, or abandoned by Government.

As a matter of fact, the purchase price was not paid, and the debts were not taken over by the Caledonian Railway Company till Whitsunday 1852.

At that date there were certain unsatisfied claims for past due interest, and also claims for dividends outstanding against the Road Trust. Among these was a sum amounting with accumulations up to December 1883 to £232, 16s. 3d., representing the amount unclaimed by sixty-three of the private creditors of their shares of the surplus revenue of the trust for the three years ending 30th June 1848. The total surplus revenue for that period amounted to £3115, 10s. 11d., whereof one-half had in terms of the agreement been paid to the Railway Company. Of the remaining half, £1426, 8s. 6d. had been claimed by and paid to private creditors. The balance was deposited in bank to meet claims not yet brought forward, and was the sum amounting, as above stated, to £232, 16s. 3d., first specified in the summons.

The sums carried to the credit of individual creditors' accounts amounted between April 2nd 1842 and Whitsunday 1852, with balance brought forward at the former date, to £11,677, 11s. 10d. The unpaid and unclaimed balance thereof amounted to £1573, 16s. 3d. To this there fell to be added £77, 17s. 6½d., being the balance not allotted of the sums carried to the credit of the general dividend account during the same period. These two sums with interest amounted at December 1883 to £4165, 10s. 3d., being the second sum specified in the condescendence. It did not appear in what terms these funds were originally deposited. On the termination of the Road Trust under the Roads and Bridges (Scotland) Act 1878, sec. 4, in 1883, they were deposited on deposit-receipts taken, the first in favour of "The creditors of the Glasgow and Carlisle Roads, per James Graham, Esq., Treasurer," the second in favour of "Glasgow and Carlisle Roads Dividend Account, per James Graham, Esq., Treasurer."

In 1846, in the course of certain negotiations with the Government with regard to the repayment of advances made from the Exchequer, the Road Trustees reserved in their hands a sum of £600 to meet certain old outstanding debts and claims in Dumfriesshire. The sum was not applied to that purpose, nor was it claimed by Government. In 1887, however, its existence was brought under the notice of the Treasury, which, after some correspondence, resolved to abandon any claim upon it. On 15th June 1893 it amounted to £1481, 15s. 4d., one-half of which was paid to the Caledonian Railway Company in terms of the agreement of 1846, while the remaining half, amounting to £740, 17s. 8d., formed the fund third specified in the summons.

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. c. 51), sec. 11, vested the management of highways in counties in county road trustees, and in bugrhs in the burgh local authority.

Sec. 32 enacts that all the roads, bridges, buildings, works, rights, interests, moneys, property, and effects, rights of action,

claims, and demands, powers, immunities, and privileges vested in or belonging to road trustees in a county shall, in virtue of this Act, be transferred to and vested in the county road trustees appointed under the Act [now the County Council under the Local Government (Scotland) Act 1889].

Sec. 47 makes similar provisions as regards highways within burghs.

Sec. 108 is as follows:—"All persons acting or who have acted under any of the general or local Acts in force at the commencement of this Act as trustees of any of the turnpike roads, &c. within the county, or as clerks or officers of such trustees who shall, at the commencement of this Act, have in their custody, power, or possession, any moneys collected by virtue of such Acts, or any books, deeds, papers, writings, property or effects belonging to the said turnpike or statute labour trusts respectively, or relating to the execution of such Acts, shall pay and deliver up the same to the county road trustees, or to such person as they shall appoint to receive the same, who shall hold them and be liable to pay them over or make them forthcoming subject to the provisions of this Act.

Secs. 59-70 provide machinery for the valuation and allocation of road debts.

Sec. 69 enacts—"No debts except those valued and allocated as hereinbefore provided shall be a charge upon the trustees of any county or the local authority of any burgh, and all road debts, except as aforesaid, shall be extinguished, but without prejudice to any claim otherwise competent to the creditors therein against any individual or individuals who may have given any personal or collateral obligation in regard to such debts."

Sec. 89 makes special provision for valuing and allocating the road debt in the counties of Lanarkshire and Renfrewshire.

Sec. 90 provides that when any trust existing at the commencement of the Act comprises a road, highway, or bridge, which is situated partly in Scotland and partly in England, the Secretary of State shall, after a local inquiry by commissioners into the circumstances of the case, determine the manner in which such road, highway, or bridge shall be managed, maintained, repaired, and (in the case of a bridge), if need be, rebuilt, and also the debts affecting such trust, and the property and assets belonging thereto shall be valued and allocated upon or among, as the case may be, the county or counties and burgh or burghs in Scotland, and the road authority in England, to be named in the determination. The section further provides that the determination shall be laid before both Houses of Parliament, and shall come into operation at the expiry of forty days, unless either House within that time resolve that it ought not to take effect.

As a portion of the Glasgow and Carlisle road lies in England, commissioners were appointed under the above section of the Roads and Bridges Act, and they reported to the Secretary for Scotland and the Home Secretary in February 1892. From that report it appears that the Caledonian Railway Company appeared at the inquiry before the commissioners, and claimed these several funds as sole creditors of the Road Trust. The trustees disputed this contention, on the ground that these funds were expressly excluded by the company's title, and that they formed no part of the trust property, but were held by the trustees for behoof of the private creditors whose property they were. The commissioners ultimately found with regard to the third fund, that it should be left with the holder of the fund for distribution among the parties entitled to receive it, and, with regard to the first and second funds, that they "do not fall to be paid to the road authorities as forming assets of the trust, and therefore do not fall to be taken into computation in valuing the debt."

On 9th February 1893 the Home Secretary and the Secretary for Scotland issued a joint determination by which they found that the three funds in question "do not form assets of the trust to be taken into computation in valuing the debt." This determination duly came into force.

The present action was subsequently raised by Mr Grahame and Mr Hill to ascertain the rights of parties in the various funds.

On 7th December 1893 the Lord Ordinary (WELLWOOD) repelled certain objections taken to the competency of the action by the Corporation of Glasgow, and this decision was acquiesced in. In the competition there appeared (1) the Lord Provost and Corporation of Glasgow, the corporation or commissioners of sundry other burghs, and certain county councils through whose district the Glasgow and Carlisle Road passes; (2) the Caledonian Railway Company; (3) William Alston Dykes and certain other private creditors; making 14 in all out of 154, and representing original contributions to the road of about £13,000; (4) Lord and Lady Rossmore's marriage-contract trustees, private creditors.

(1) The Corporation of Glasgow and others claimed to be ranked and preferred to the whole funds *in medio* under liability to satisfy all subsisting legal claims, or alternatively to the balance of the funds *in medio* after the private creditors had been ranked for their legal claims.

(2) The Caledonian Railway Company claimed to be ranked and preferred to the whole funds *in medio*.

(3) The private creditors submitted claims for each of four groups into which they divided their number. Class A claimed shares of surplus revenue for the period ending 30th June 1848 with interest. Class B claimed the unclaimed dividends specifically allotted to them in the books of the trust from its commencement to Whitsunday 1852 with interest. Class C (embracing all compearing private creditors) claimed a share, in proportion to their original contributions to the Road Trust, of (*a*) the sum of £77, 17s. 6d., and (*b*) the sum of £740, 17s. 8d. Class D (embracing all

compearing private creditors) claimed, after the creditors claiming in classes A, B, and C had been satisfied, to share the whole fund *in medio* in so far as it might avail to repay to each of them respectively the amount originally subscribed by each of them in so far as not already repaid, with interest.

(4) Lord and Lady Rossmore's trustees claimed a share with other private creditors who might come forward in the first and second funds, proportionate to their original subscription, in so far as these funds were unclaimed by the private creditors primarily entitled thereto. They further claimed a share of the sum of £77, 17s. 6½d., and of the third fund in proportion to their original contribution, and, alternatively, a share of the balance of these two sums, proportionally with other compearing creditors, after the claims of the private creditors primarily entitled thereto had been satisfied.

On 20th June 1895 the Lord Ordinary pronounced the following interlocutor:—"Repels the claims for the Caledonian Railway Company, and the Town Councils of Glasgow and Hamilton and others, being the road authorities of their respective districts: Sustains the claim for the private creditors or representatives of private creditors, William Alston Dykes and others, to the extent of classes A, B, and C of their claim, and *quoad ultra* repels their said claims: Further, as regards the claim for Lord and Lady Rossmore's trustees, sustains the second branch of their claim, comprising both subdivisions, and *quoad ultra* repels their said claim: Finds that on the said claimants satisfying the Court as to their title to represent the original creditors, they will be entitled to be ranked and preferred accordingly: Further, as regards the balance of the fund *in medio*, finds that it must remain consigned in bank to await the orders of the Court, and decerns: Finds the said claimants William Alston Dykes and others, and Lord and Lady Rossmore's trustees, entitled to their respective expenses out of the said balance of the fund *in medio*."

Note— . . . "No doubt great zest has been given to the competition by the fact that the bulk of the fund is found money, consisting as it does of unclaimed dividends which though originally small are swollen by interest to a respectable sum. I refer particularly to the 'dividends unclaimed and unpaid' amounting to £1573, 16s. 3d., which with interest form the bulk of the sum £4165, 10s. 3d. The parties who are really entitled to these sums have, with the exception of the claimants Lord and Lady Rossmore's trustees and William Alston Dykes and others, not thought fit to come forward, or perhaps are not aware of their rights. Looking to the improbability of any claim being now made by them, I should be glad to allow the balance which is still unclaimed to be uplifted for aught yet seen. But as it is candidly admitted by the compearing private creditors, who alone of the claimants are in my opinion entitled to any part of the fund *in medio*, that if the non-compearing creditors had come forward their claim for a proportional share would have been unanswerable, I do not think that as regards that balance there is room for a ranking for aught yet seen.

"I shall now explain shortly my views on the different claims.

"To deal first with the claim for the new road authorities who are now substituted for the old trust on the Glasgow and Carlisle Road, I shall not attempt to examine in detail the ingenious series of pleas stated on their behalf in the record. Their claim in substance is, that these funds were assets of the old trust, which should have been handed over to them under section 108 of the Roads and Bridges Act of 1878, and allocated among them, leaving the creditors to sue for their debts. It seems to be a sufficient answer to this claim that the only authority (the Secretary of State) who, under section 90 of the Roads and Bridges Act of 1878, is empowered to value and allocate the debts affecting such a trust as this and the property and assets belonging thereto, has refused to deal with the funds in question on the ground that they are not assets of the trust. It is said that the private creditors were not parties to the proceedings before the commissioners appointed by the Secretary of State and the Secretary for Scotland, who was conjoined with him. But it seems to me that the whole provisions of the Act dealing with the valuation and allocation of debts and assets point to the valuation and allocation being made once for all; and if the private creditors' debts and the funds in question can no longer be valued and allocated upon and among the various counties and burghs, I see no means by which the private creditors could make good their claims if the funds were handed over to the road authorities collectively as they now demand. If they sued as creditors, they would probably be met with the objection that they have failed to have their debts valued under the statute, and cannot now have that done. Accordingly, the creditors claim the funds as set apart for and belonging to them. And this position is justified by the determination of the Secretary of State for the Home Department and the Secretary for Scotland, which proceeds on the footing of excluding these funds from the assets allocated, and has now the force of a statutory enactment (section 90 (4).

"Apart from this objection to the claim of the road authorities, I am inclined to be of opinion that, looking to the way in which these funds were dealt with ever since they were first deposited, they were, at least in any question between the trust and the private creditors, as completely separated from the assets of the trust as if they had been deposited in bank in an account in name of the private creditors.

"To deal next with the claim for the Caledonian Railway Company: The Railway Company now admits the claim of the compearing creditors and representatives of creditors to their own proportions of un-

claimed dividends, and other sums set aside for private creditors; but it claims the balance effeiring to those creditors who have not appeared as an accessory of the debt which it purchased. In the view which I take, neither the Railway Company nor the compearing creditors are entitled to that balance. It seems to me that by conceding the right of the compearing creditors to their proportions of the funds, the Railway Company has admitted away its claim to the balance. It admits to that extent the claim of the compearing creditors, because the unclaimed dividends and other funds were set apart for the private creditors before the Railway Company's purchase of the debt was completed, and it seems to me that the same reason applies to the balance still unclaimed.

"As to the one-half of the sum given up by Government, that by express agreement (the agreement of 1846) belongs to the private creditors; and if the compearing creditors have no claim to the balance now unclaimed, *a fortiori* the Railway Company has none. The Railway Company has claimed and received its proper half in the proceedings before the debt commissioners, and in regard to this fund, as well as the others, its claim is specially barred by its actings.

"Lastly, to deal with the case of the private creditors I have no doubt that they are entitled to the sums specially allotted to them. I am also of opinion that they are entitled to share in the two sums of £77 and £740 not specially allotted to individual creditors, but set aside for the private creditors as a body in the proportion which their debts bear to the total original debt. But as I have indicated as regards the balance which would have fallen to be paid to the other private creditors, had they appeared, in the same proportions, I do not feel justified in allowing them to share in that.

"Before pronouncing a decree of ranking the private creditors must produce satisfactory evidence of title."

The Corporation of Glasgow and the Caledonian Railway Company reclaimed.

At an early stage of the argument in the Inner House the question was raised whether it was competent for the Court in considering the determination of the commissioners to look at their report of the proceedings before them. The Corporation of Glasgow argued that it was not competent; *contra* the private creditors.

LORD PRESIDENT—I am of opinion that the report of the commissioners may be looked at for certain purposes, in order, namely, to ascertain what were the questions submitted to them, and what was their determination of them. That being so, we cannot prevent Mr Graham from founding arguments upon it as to the effect and extent to which it shall avail.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

Argued for the claimants the Corporation of Glasgow—The Lord Ordinary was wrong. The Roads and Bridges Act, sections 32, 47, and 108, had vested the whole property formerly in the hands of the Road Trustees in the respective local authorities, who were bound to apply the assets they took over for general road purposes — *Perthshire County Road Trustees* v. *Committee for Perth District*, March 10, 1880, 7 R. 686. The Caledonian Railway Company was excluded under sec. 69, except in so far as its debt had been valued and allocated; and in so far as its debt had been valued and allocated it had been paid. The private creditors also were excluded by sec. 69, for valuation and allocation were conditions precedent to any claim being sustained, and their claims had not been valued and allocated—*Duke of Hamilton* v. *Lanarkshire Road Trustees*, July 9, 1885, 12 R. 1249. The appropriation to them of certain sums in the books of the Road Trust was not binding—*Mellish* v. *Brooks*, 3 Bev. 22. In any event, interest was not due—*Dinham* v. *Bradford*, L.R., 5 Ch. App. 519, and the provision of the Companies Act 1862 (25 and 26 Vict. cap. 89), Table A (77).

Argued for the claimants the Caledonian Railway Company—The Railway Company was not within sec. 69 at all. It founded entirely on the agreement of 1846. Under the third head thereof it was entitled to the first and second funds, as assignee of all the private creditors, who had no right in the debt generally, having transferred it to the company. The claiming private creditors could at all events never extend their right so as to get someone else's share of the debt, for that someone else had assigned his debt to the company. Besides, undivided and unallotted profits accresced to and became part of the original shares transferred to the company—*Carron Company* v. *Hunter*, June 25, 1868, 6 Macph. (H.L.) 106. Under the fifth clause of the agreement the company had a joint interest with non-compearing creditors in the third fund, and the compearing creditors' claim to the whole of it was not good.

Argued for Mr Dykes, Lord and Lady Rossmore's Trustees, and the other compearing private creditors, claimants and respondents—(1) With regard to the claims under classes A, B, and C, this was not a debt requiring to be valued and allocated under the Roads and Bridges Act—*Lanarkshire and Linlithgowshire Road Trustees* v. *Lady Torphichen's Trustees*, July 9, 1885, 12 R. 1252. (2) With regard to the balance of the fund *in medio*, the compearing creditors were entitled to divide it so far as not claimed until they got back twenty shillings in the pound of their original subscriptions. In a multiplepoinding, claimants who failed to appear until after decree of preference were only allowed to claim on certain conditions, and might be excluded altogether —*Geikie* v. *Morris*, June 14, 1858, 3 Macq. 347; *Stodart* v. *Bell*, May 23, 1860, 22 D. 1092; *Duncan's Factor* v. *Duncan*, June 3, 1874, 1 R. 964. The proper decree in this case

might be one "for aught yet seen"—*Johnston* v. *Elder*, January 17, 1832, 10 S. 195; Beveridge on Forms of Process (1826), 383; the Act 1584, cap. 3; Bell's Comm. 7th ed. ii. 277; Ersk. Inst. iv. 3, 23.

At advising—

LORD KINNEAR—The history of the three sums which form the fund *in medio* in this action is given, as the Lord Ordinary observes, very clearly in the condescendence attached to the summons, and I do not understand that there is any difference between the parties as to the material facts.

It appears that the roads between Glasgow and Carlisle were constructed partly out of public moneys and partly by the subscription of private persons, who thereupon became creditors of the Glasgow and Carlisle Road Trust, and the revenue of the trust, after defraying the expenses of maintenance and management, was accordingly applicable to the payment of interest on the sums subscribed, and the payment of interest on the money advanced by Exchequer, and ultimately to the extinction of the debt by means of a sinking fund. In 1846 an agreement was made between the Caledonian Railway Company and the Road Trustees and certain trustees for the private creditors, by which the Railway Company agreed to buy the debts of the Road Trust to the private creditors for the sum of £15,000, payable at Martinmas 1846, when the right of the purchasers was to take effect. The agreement contained a stipulation that if the Government should be induced to abandon their claim to the surplus revenue funds accumulated in the hands of the treasurer of the Road Trust, the amount so abandoned should be divided equally between the Road Trust and the private creditors. But the Railway Company did not pay at the stipulated time, and the debts were not in fact taken over until Whitsunday 1852. This was the result of a variety of transactions which it is unnecessary to consider in detail, because the parties are agreed as to the material fact. The pursuers state in the 10th article of the condescendence that the debts were taken over by the Caledonian Railway at Whitsunday 1852, and this statement is adopted and held as their own by the Railway Company. But at that date there were certain unsatisfied claims for past due interests, and also claims for dividends which were not carried by the agreement to the Railway Company, and the funds specified first and second in the conclusions of the summons are, with accumulations, sums set apart to meet these unsatisfied claims. The fund first described of £232, 16s. 3d. represents the amount unclaimed by sixty-three of the private creditors of their shares of the surplus revenue of the trust for the three years ending 30th June 1848. Half the suplus revenue was payable under the agreement to the Railway Company, and the other half to the private creditors, and the parties are agreed that the portion payable to each amounted to £1557, 15s. 5½d; that a scheme of division showing the several debts and the respective shares of the various creditors was prepared by the Road Trust or its officials; that £1426 was claimed and paid according to this scheme, and that the balance was set apart or deposited in bank to meet the claims which had not been brought forward.

The second fund consists of unclaimed arrears of dividends which had been carried to the credit of the accounts of individual creditors between the 2nd of April 1842 and Whitsunday 1852, with the addition of a sum of £77, 17s. 6½d., which had been carried to the credit of the general dividend account during the same period, and which had not been allotted. These sums amounted together to £1651, 13s. 9d., and with interest to 4th December 1883 they amount to £4165, 10s. 3d.

These two funds are thus much in the same position. We are not told where or in what terms they were first deposited, and this is probably immaterial. It is clear that they were special sums set apart to meet specific claims. There can be no question as to the purpose to which they were appropriated, or that they would have been paid long ago to the creditors entitled to receive them if they had come forward to make their claims.

When Mr James Grahame was appointed treasurer of the Road Trust in 1864 he found them to be funds set apart for the special purpose already mentioned. When the trust came to an end by the operation of the Roads and Bridges Act, they were deposited with the interest which had accrued on deposit-receipts, the first being taken in favour of "the creditors of the Glasgow and Carlisle Roads, per James Grahame, Esq., Treasurer," and the second in favour of "The Glasgow and Carlisle Roads Dividend Account, per James Grahame, Esq., Treasurer."

The fund third described in the summons arose in a somewhat different way. In 1887 the attention of the Treasury was directed to this sum, which had accumulated then to £1148, 17s. It was part of a sum set aside to meet old claims and debts in Dumfriesshire. The Government had a claim upon it, but after some correspondence with the Caledonian Railway Company their claim was withdrawn, and the sum left in the hands of the Road Trustees. The sum third described is one-half of the sum so abandoned, the other half having been already paid to the Caledonian Railway Company in terms of the agreement that one-half of the sums to which Government might abandon their claim should be divided equally between the Railway Company and the private creditors.

It appears to me that if the competition had arisen before the Roads and Bridges Act came into operation, there could have been no reasonable dispute as to the rights of the competing parties. Each of the private creditors must have received his own share of each of these funds, and nothing more, and the unclaimed balance, if any, must have remained in the hands of the Road Trustees subject to the emerging claims of the unpaid creditors. The creditors who first came forward could have no

right to the share of the others who had not yet appeared to claim, either because they did not know of the rights arising to them out of long past transactions, or because they did not know that funds were available for distribution. On the other hand, the trustees could not appropriate the funds to other purposes so as to relieve themselves of their liability to meet such claims as might afterwards be established, because the deposit shows that they had money in hand to meet the claims in question, and also that no preferable claim existed. The claims of the compearing creditors to their several shares must therefore have been sustained, and the remainder of the fund must have been left in the hands of the Road Trustees subject to the legal claims affecting it. The Railway Company, so far as I can see, could have had no right to participate in any one of the three funds. They could have no more claim to dividends accruing before they took over the debt than the purchaser of land would have to arrears of rent accruing before the date of his entry, and they could have no claim to more than one-half of the surplus revenue or special fund set free by the abandonment of the claim of the Treasury, because the agreement was that the amount so abandoned should be divided equally between them and the private creditors.

The question therefore is, whether the rights of parties have been in any way altered by the Roads and Bridges Act of 1878, and it appears to me that the statute and the procedure which has followed upon it make no difference whatever, except that the Lord Provost and Magistrates of Glasgow and certain town councils and county councils have come in place of the Road Trustees. I agree with the Lord Ordinary that the rights of parties have been fixed by the determination of the Secretary for State and the Secretary for Scotland in so far as they fell within their jurisdiction, but I do not quite agree with him as to the effect of that determination. It appears to me to leave the rights of parties exactly as they were before the Act came into operation. The determination was made under the 90th section of the Act, on a report of commissioners appointed to value and allocate the debts of the trust, because the roads were partly in England and partly in Scotland. The only debt valued or which was subject to valuation under these proceedings was that of the Caledonian Railway Company, who had purchased and taken over the rights of the private creditors. They accordingly appeared before the commissioners as sole creditors, and in the course of the inquiry a question arose between the Railway Company and the Road Trustees in regard to the funds now in dispute, and we my look at the report of the commissioners for the purpose of seeing what was the question raised for their decision so that we may be enabled to construe the determination itself. It was argued for the Caledonian Railway Company that "in so far as the creditors did not come forward to claim these several funds they passed to the trust; and being trust assets are available for payment of the debts, which now belong to the Caledonian Railway Company." On the other hand the Road Trustees maintained that "as the funds consisted of unclaimed shares of capital and dividend existing prior to the settlement with the Railway Company, their title to these sums was expressly excluded, and that any rights they acquired were only rights subsequently emerging; that the money must be held in trust for the creditors who may claim it; that it has ceased to be part of 'corporation finance,' and is only in the trustees' custody to be held for behoof of the parties to whom it may ultimately be found to belong." That was the position maintained by the Road Trustees, and it appears to have expressed the contention put forward by them for the benefit of the private creditors. The commissioners' report on this point was in these terms:—"The commissioners find that the three funds referred to do not fall to be paid to the road authorities as forming assets of the trust, and therefore do not fall to be taken into computation in valuing the debt." The Secretary of State and the Secretary for Scotland did not adopt this report in terms, and the variation which they made upon it appears to me to be significant. Their determination was that the funds in question "do not form assets of the Trust to be taken into computation in valuing the debt." There may not be any substantial difference between the two findings, but the determination of the Secretary of State and the Secretary for Scotland expresses with greater precision and accuracy the point really decided, and makes it clear that the determination is limited to the question which was within the jurisdiction of the statutory tribunal. They decided that the funds did not form assets of the trust to be taken into computation in valuing the debt. They gave no decision on the question—it was not within the scope of their inquiry to decide—whether the Road Trustees had a title to continue to hold the funds or to what purposes they might be applicable in their hands. But the determination proceeded on the plea put forward by the Road Trustees that the three funds were not available to meet the claims of the Caledonian Railway Company, because they were not part of the funds of the corporation available for the general purposes of the trust, but had been set apart to meet particular debts; and indeed it is obvious that they could only be excluded from the computation on the ground that they were appropriated to a particular purpose excluding general creditors, and there can be no question at all as to what that particular purpose was. The effect, therefore, of the determination of the statutory tribunal was, it appears to me, to leave the rights of parties exactly where they were before the Roads Act came into operation. They have decided absolutely that these funds do not belong to the Caledonian Railway Company, for that is the meaning and effect of their determination, that "they do not form assets of the trust to be taken into consideration in valuing

the debt." The Caledonian Railway Company are therefore excluded, and it appears to me that the rights of the private creditors are confirmed, not by the direct operation of the determination, but because the determination of the statutory tribunal proceeds upon the acceptance of the contention put forward by the Road Trustees for behoof of the private creditors, and acted upon in such a way as to make it impossible for the Road Trustees to withdraw it if they desired to do so.

I think the right of the compearing creditors to share in each of the three funds must be maintained, and the claim for the Lord Provost and Magistrates of Glasgow and the other authorities repelled. They maintain that the private creditors have no substantial claim, because their rights were not valued in terms of the statute and are therefore excluded by the statute. But the conclusive answer to that contention is that the claims in question are not claims upon the general funds requiring or capable of valuation, but specific claims to particular funds appropriated to a special purpose. These funds therefore could not pass to the new authorities created by statute except subject to the claims arising from the special appropriation previously made. If there were any question as to the effect of that appropriation, I think it is removed by the procedure which took place under the Roads and Bridges Act, in which the trustees came forward to plead that the effect of the manner in which these funds had been treated was to give to the creditors for whose benefit they had been set aside exclusive right to the funds, so as to render them unavailable for the general creditors of the trust. The only question which seems to me to remain is what is to be done with the balance after payment of the compearing creditors' shares. I agree that neither the compearing creditors nor the Railway Company have any claim upon it. The compearing creditors have no claim, because their right is only to a proportionate share of the funds which are to be divided equally between them and those creditors who have not appeared to claim. They have no accruing right owing to the non-appearance of other creditors. The dividends were set apart for the private creditors separately and individually, and I agree with the Lord Ordinary that the sums not specially allocated to the different creditors stand in the same position. The Railway Company has no claim, both for the reason already given, and because they could have no claim except through their right as purchasers of the debts due by the trust, and the extent of that right has been finally determined by the statutory tribunal, and on the footing that they have no right to these funds.

The only question then is, whether the balance should remain in Court or be paid to the local authorities. It appears to me that the balance came into the hands of the real raisers as treasurer and clerk of the Road Trust and in no other capacity. There is no evidence that they held the funds except as officials of the trust. The funds were held no doubt by the officials for payment of the particular claims to which they were appropriated, but nevertheless they were held by them as representing the Road Trust. If the Roads and Bridges Act had not been passed, the proper holders would have been the Road Trustees. If the creditors had come forward they would have received the shares of the money to which they were entitled. If they did not come forward, there was no one else entitled to a dividend. I think the sums stand in the same position now as they did before the Act passed. I see no advantage in keeping the funds in Court, because if that were done none of the creditors could obtain payment except by lodging a claim in this multiplepoinding. The Lord Ordinary has directed that the funds should remain in Court, because if they were handed over to the road authorities creditors coming forward hereafter might be met with the objection that their debts had not been valued under the statute. But if that were a good objection the claims already made for the compearing creditors should have been repelled. In the reasons which I have given I consider that the view of the Lord Ordinary on this point is not sound, and that the private creditors who have not come forward to claim have not lost their right to claim. I think, therefore, that we should recal the Lord Ordinary's interlocutor so far as he repels the claim of the road authorities, and that the balance must be consigned in bank. Otherwise, I propose that we should adhere to the Lord Ordinary's interlocutor, and in place of the finding which I have suggested should be recalled, find that the road authorities are entitled to payment of the balance of the fund subject always to their liability to meet the claims of creditors who may establish that they had a good claim against the Road Trustees.

The LORD PRESIDENT and LORD M'LAREN concurred.

LORD ADAM was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against in so far as it repels the claim No. 27 of process for the Town Councils of Glasgow and Hamilton and others, being the road authorities of their respective districts, and in so far as it ordains the balance of the fund *in medio* to be consigned in bank to await the orders of the Court: Find that the said road authorities are entitled to the balance of the fund *in medio*, subject always to their liability to meet the claims of such creditors as may hereafter establish their rights, and to that extent rank and prefer them in terms of the second alternative branch of their claim: *Quoad ultra* adhere to the said interlocutor except in so far as regards the finding for expenses, and decern; and in regard to which, find the said road authorities entitled to repayment from the private creditors of

their proportionate shares of the sums found due to the pursuer in the interlocutors of the Lord Ordinary of 8th March and 20th June 1895, being expenses incurred by the pursuer in raising the action: Find the claimants W. A. Dykes and others and Lord and Lady Rossmore's trustees entitled to two-thirds of their respective expenses, on two accounts in the Outer House, and on one account in the Inner House, against the said claimants and reclaimers, the Lord Provost, Magistrates, &c., of Glasgow, and others, the road authorities foresaid: Find the said road authorities entitled to two-thirds of their expenses in the competition against the Caledonian Railway Company, and remit," &c.

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Counsel for Claimants and Reclaimers the Corporation of Glasgow and Others—R. V. Campbell—J. Wilson. Agents—Bruce & Kerr, W.S.

Counsel for Claimants and Reclaimers the Caledonian Railway Company—Sol.-Gen. Murray—W. C. Smith. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Claimants and Respondents Dykes and Others—Graham. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Claimants and Respondents Lord and Lady Rossmore's Trustees—Macfarlane. Agents—Mackenzie & Kermack, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, January 7.

(Before the Lord Justice-Clerk, Lord M'Laren, and Lord Kincairney).

GREEN *v.* LEITH.

Justiciary Cases—Sea Fishery—Bye-Law—Complaint—Penalty—Herring Fishery (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 7—*Sea Fisheries Regulation (Scotland) Act* 1895 (58 *and* 59 *Vict. cap.* 42), *sec.* 10.

By the Herring Fishery (Scotland) Act 1889, sec. 7, the Fishery Board for Scotland were empowered to make a bye-law prohibiting beam trawling within certain limits, under a maximum penalty of £5 for the first offence and £20 for the second or any subsequent offence. In 1892 the Board accordingly passed a bye-law fixing the limits and declaring the above penalties. By the Sea Fisheries Regulation (Scotland) Act 1895, sec. 10 (the provisions of which with regard to penalties were declared to be substituted for those of sec. 7 of the Act of 1889), the Board were authorised to make bye-laws prohibiting trawling within certain other limits under a maximum penalty of £100. A complaint charging a contravention of the bye-law contained a reference to the Act of 1895, and concluded for the penalties imposed by that Act. The accused was convicted and sentenced to pay a fine of £50.

Held that the conviction was bad, in respect that the penalty concluded for in the complaint was in excess of that specified in the bye-law.

Justiciary Cases—Sea Fishery—Beam Trawling—Bye-Law—Ultra vires.

The Herring Fishery (Scotland) Act 1889 by section 7 provides that "the Fishery Board may, by bye-law or bye-laws, direct that the methods of fishing known as beam trawling and otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined in such bye-law . . ."

Held that it was *ultra vires* of the Fishery Board under this provision to issue a bye-law prohibiting trawling within the whole limits indicated, the power entrusted to them being to deal, in the exercise of their discretion, with particular areas within the limits.

John Green, master of the steam trawler "Countess," A 642, was convicted in the Sheriff Court at Wick, at the instance of the procurator-fiscal for the county of Caithness, of a contravention of bye-law No. 10, made by the Fishery Board for Scotland, under power conferred on them by certain statutes recited in the complaint, dated 27th September 1892, and confirmed by the Secretary for Scotland 22nd November 1892.

The complaint was in the following terms — "That John Green, master or skipper on board the steam trawler 'Countess,' A 642, and residing at 20 Craigie Street, Aberdeen, did, on 12th October 1895, at a part of the sea off the coast of Caithness, in Scotland, with Lothbeg Point bearing north 85 degrees west, and Donald Mountain bearing north 52 degrees west, and distant from Clythness 11 miles or thereby, and within a line drawn from Duncansbay Head in Caithness, to Rattray Point, in Aberdeenshire, he being then the person actually in command of the said steam trawler, and not in the service or possessing the written authority of the Fishery Board for Scotland, use the method of fishing known as beam trawling or otter trawling for taking sea fish, in contravention of bye-law No. 10 made by the said Fishery Board for Scotland under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act 1885, the Herring Fishery (Scotland) Act 1889, and the Herring Fishery (Scotland) Amendment Act 1890, dated at Edinburgh 27th September 1892, confirmed by Her Majesty's Secretary for Scotland 22nd November 1892, and published in the *Edinburgh Gazette* of 25th November 1892, an extract from the said *Edinburgh Gazette* being produced herewith, whereby the said John Green is liable on conviction to a fine