

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GOLDIE—*Appellant*.OSWALD and others—*Respondent*.April 1, June
1, 1814.ROAD ACTS.—
POWERS OF
TRUSTEES.

ACTION against the trustees, under a road act, for having, in the occupation of the Pursuer's grounds, deviated from the line prescribed by the act, and entered upon his lands without taking the proper previous steps, in terms of the act, to give him notice, and settle the compensation. The House of Lords held that the line taken was authorized by the act, but remitted to the Court below to review its judgment with reference to the question, whether the proper previous steps had been taken in terms of the act; and, if not, to consider what damages had been sustained in consequence.

Dicente Lord Eldon, that the trustees, under these road and canal acts, ought to be kept strictly within their powers, that they ought not to deviate in the smallest degree from the line prescribed by the act; that though an injunction would not be granted where there was *laches* in applying for it, the trustees, if they deviated, would be liable in damages; and that if they entered on a person's lands without taking the previous steps incumbent on them under the act, they would be liable, upon trespass, in damages and costs. (*Vide Shand v. Henderson, ante; also Agar v. Regent's Canal Company.*)

Ayrshire
Road Act,
passed 1805.

THIS cause commenced by an action of declarator, molestation, and damages, brought by the Appellant against the Ayrshire road trustees, under an act passed in 1805, for having illegally entered upon his lands, and made a road over it in a line not authorized by the act. A bill of suspension

had been previously presented and refused, and therefore an action of reduction of the interlocutors and certificate of refusal was brought, lest these proceedings in the Bill Chamber should be founded upon as a *res judicata*, which, it was contended, they could not be, because such a plea can only be established by a decree *in foro*, which could not be pronounced in the Bill Chamber. That plea did not appear to have been seriously insisted upon; but some objection was made to the competency of these actions, (which had been conjoined,) on the ground that the act had appointed a particular jurisdiction for the decisions of all questions arising in the execution of it. To this it was answered, that the conduct complained of was not in execution of the act; that the trustees had exceeded their powers; and that in case of the smallest excess of power, the ordinary jurisdiction was the proper one.

The particular grounds of complaint were—1st, That the trustees had deviated from the line of road prescribed in the act. 2d, That they had entered on the ground, and commenced their operations, without previous notice to the proprietor, and without ascertaining and settling the damages according to the terms and provisions of the act.

The Lord Ordinary pronounced an interlocutor, finding among other things, “ that the line of road “ adopted by the trustees, where it passed through “ the Pursuer’s lands, *and which appeared from the “ plan to be a very small deviation from the line “ marked Old Road*, was throughout warranted “ and authorized by the description in the act,

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Countess of
Loudon v.
Ayrshire Road
Trustees, Fac.
Coll. May,
1793.
Grounds of
complaint.

May 30, 1807.

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May 17, 1809.

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Observations
in judgment.

Trustees,
under road
act, not au-
thorized to de-
viate from the
line prescribed
by the act.

Shand v.
Henderson,
ante; Agar v.
Regent's Ca-
nal Company.

No injunction
will be granted
where a man
stands looking
on without
interposing in
time, but
trustees will
still be liable
in damages.

“sustains the defences, &c. and finds the Pursuer
“*liable in expenses.*” To this interlocutor the
Court, after some farther procedure, adhered; and
thereupon the Pursuer appealed.

Lord Eldon (Chancellor.) The interlocutor said,
that this was *a very small deviation from the line
marked Old Road.*” If the old road was the line
settled by the act, then, whether the deviation was
great or small, they had been in the habit, in this
country, of saying, “No, you have no right to
“deviate at all;” and it would be dangerous to
leave it to the discretion of Courts to say what was
a large or what a small deviation with respect to
these road and canal acts. Then as to the notice
and tender—suppose the fact were clear that none
such had been made or given—if a man stood by
for some time without interposing, it was too much
to say, applying to the equitable jurisdiction at
least, that an injunction should issue after the ope-
rations had proceeded; but still the liability for
damages would not be affected, though the *quantum*
might. It appeared impossible here to say that the
trustees had no right to carry the road over Goldie’s
land. One however could not help entering into
Goldie’s feelings, the value of whose property would
be very much depreciated; but still their Lordships
had nothing to do with that, and could not prevent
the trustees from doing what, under the act, they
were authorized to do.

Goldie had delayed longer than they would have
liked in England in case of an application for an

injunction. But there was another point to be considered which the Court below did not appear to have attended to. The trustees ought not to have begun their operations upon this ground till the terms upon which they were to have it had been settled with the proprietor; and if the parties could not agree, a jury ought to have been called in to settle them. Without these previous steps the trustees were not authorized to enter upon the land. He had always considered it of great consequence with respect to these turnpike and canal acts, that if his Majesty's subjects were to be exposed to their operation, the parties obtaining them should take care to take the steps incumbent on them. Here, if they entered without authority, an action of trespass might be brought, and some damages must be given, and the whole of the costs. Goldie then had been in some respects wrong, and in some respects right, and yet he was saddled with the whole of these expenses.

What he should then propose would be to declare that the line of the road was warranted by the act, and with this declaration to remit to the Court below to review the judgment, having regard to the provisions of the act as to the entry on the ground, and to consider whether these provisions had, in this respect, been observed, and, if not, what damage had been sustained by the Appellant in consequence of their not having been attended to.

He hoped, however, the parties would have the good sense to come to some arrangement which would render farther proceedings unnecessary. But

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If trustees entered on the land without taking the steps necessary under the act to give them authority, they were trespassers, and liable in damages and costs.

June 1, 1814. as matters stood, he did not see any other way of getting at the dry justice of the case.

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Judgment.

Cause remitted with a declaration as above.

Agent for Appellant, RICHARDSON.

Agent for Respondents, MUNDELL.

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APPEAL FROM THE COURT OF SESSION.

SMITH AND OTHERS—*Appellants*.

MACNEIL AND OTHERS—*Respondents*.

Nov. 8, 1813;
July 28, 1814.

INSURANCE.

INSURANCE on some hogsheads of tobacco, from Greenock to Bremen :—vessel deviates from stress of weather, and puts into Korshaven, on the coast of Norway, Nov. 30, 1798; where she remains till April 24, 1799; then sails, and in three days arrives at Bremen, and delivers the tobacco, which was not examined till the 25th of May; when it was found that 40 hogsheads were damaged, and seven sound. The 40 hogsheads sold at $10\frac{1}{4}$ grots per lb.; the sound hogsheads (though instructions to sell had been sent) retained unsold in expectation of a better price; but valued by a broker at $17\frac{3}{4}$ grots per lb. The only evidence of the deviation being occasioned by stress of weather consisted of letters from the Consignees, stating that the master had written to a house at Bremen, that such was the fact; and a copy of a judicial examination of the master at Bremen; but no protest produced—no letter from the master. Held by the House of Lords, affirming a decision of the Court of Session, that the underwriters were liable for the partial loss, though on evidence which would not be admitted in England.

Sentiente Lord Eldon, that though the sale of both the sound