or pastoral, beyond a period of nine years, I think the Court could under this statute give permission to let a lease for nineteen years; though not inferring an act of alienation in the ordinary sense. To hold anything else would at once involve the absurdity, that the Court could give authority for a lease of ninety-nine years, but could not authorise a lease for nineteen. The absurdity could be avoided by the very simple evasion of taking authority for ninety-nine years and then limiting the lease to nineteen. What the parties could thus accomplish indirectly, I think the statute allows the Court to do directly and openly.

The application now before us is for permission to grant a lease of Ballochbuie Forest for nineteen years, under such terms and conditions as are set forth in a draft lease laid before us. By the terms of the entail such a lease could only be granted "from year to year," so that, relatively to the entail, the lease sought to be granted is substantially a "long lease."

There cannot be any doubt, that at the large rent proposed to be paid, this transaction will be of the highest benefit to the heirs of entail. And I think that no reason can be stated or conceived sufficient to warrant us to refuse the application.

The main difficulty suggested is, that this is in substance a game lease or lease of shootings, which it is suggested cannot be granted by an heir of entail, or authorised by the Court, because, however named in common parlance, it is not legally a lease at all, but a mere assignation or devolution of a personal privilege, falling at the death of the granter. I am of opinion that this objection is ill founded. The proposed lease is not in words a lease of shootings. It is a lease of a large tract of land, comprising a power to shoot and hunt, but not in form limiting the use or occupation. At the same time, as admittedly the only real use of the ground is that of a deer forest, it is right that the question should be faced. And I have no hesitation in giving it as my opinion that, supposing the lease had been one of shootings merely, I should think it competent for an heir of entail to grant it. Whatever was at first held theoretically, I think the progress of society and the practice of the country have now placed shootings in the common category of property, and given to a lease of shootings the proper character and legal effect of leases generally.

It may be still an open question for what length of endurance an heir of entail may grant a lease of shootings, and therein not go beyond an act of ordinary administration. What I have said merely goes to this, that a lease of shootings is not *eo ipso* void because granted by an heir of entail; and does not necessarily fall at the death of the granter of the lease. Having regard to the nature of the case, I am not prepared to say that a lease of shootings for nineteen years would be an act of ordinary administration like the lease of an arable farm for that period. A lease for three or five years would probably be clearly such. In the present case the entailer has indicated that in his view the lease should not be in duration beyond a year.

The doubtfulness of this point is exactly that which gives edge and propriety to the present application. The statute under which it is presented is intended for the very case in which, under the entail, the lease could not be granted, but in which the Court can give permission for its execution if satisfied that the transaction will be for the advantage of the heirs of entail. What is asked I conceive substantially to be authority for a long lease of shootings not permitted by the entail, but proper to be authorised for the advantage of the entailed estate. I think it fairly made out that the ground will not exceed one-eighth of the value of the estate; and I am clearly of opinion that the prayer of the petition should be granted. I do not perceive any grounds for thinking that either the absence of a contradictor, or any other conceivable objection, can lay our judgment open to an effectual challenge.

Agents for Petitioner—Tods, Murray, & Jamieson, W.S.

Wednesday, November 2.

THE DUKE OF ATHOLE *v.* THE POST MASTER GENERAL AND ANOTHER.

Toll—Turnpike—Exemption from Toll of Her Majesty's Mails—General Post-Office Act, 1 *Vict. c.* 33, § 19. The said section provides "that no turnpike tolls shall in Scotland be charged on carriages with two wheels, conveying only the mail or packet with their driver, and any horse or horses drawing the same." A two wheeled carriage conveying the mails between Dunkeld and Kenmore, carried also passengers and parcels between Inver (a place about one mile on the other side of the Dunkeld Bridge) and Kenmore. When crossing the bridge it carried nothing but the mails and driver, and claimed exemption under the above mentioned statute. *Held* unanimously that the pontage levied at Dunkeld Bridge, under the Private Act 43 Geo. III. c. 33, is a turnpike toll within the meaning of the General Post Office Act, 1 Vict. c. 33. *Held* by Lords Deas and Kinloch, altering the Lord Ordinary's interlocutor (dissenting the Lord President, Lord Ardmillan absent), that the said mail carriage was not entitled to exemption from toll under the Act, even though at the time of passing through the toll it carried nothing but the mails and their driver.

Opinion by Lord Kinloch—That in order to bring it within the exemption the carriage must be *constructed* so as only to contain the mails and driver.

Contra opinion by Lord President—That if the mail carriage, having two wheels only, passes the toll bar carrying the mails and driver only, it is entitled to exemption.

This action was raised in January 1852 by the trustees of the late Duke of Athole against the Postmaster-General, and also against James Taylor, contractor for conveying the mails between Dunkeld and Kenmore. The summons, *inter alia*, concluded for declarator that the pursuers were entitled to levy tolls or pontage, in terms of the Act 43 Geo. III. c. 33, at Dunkeld Bridge on all carriages used for the conveyance of the mails. There were also conclusions for certain sums due as pontage in respect of the passage over the bridge of the mail-cart between Dunkeld and Kenmore.

In 1803 a Private Act (43 Geo. III. c. 33) was obtained by the then Duke of Athole to enable him to build a bridge across the Tay at Dunkeld. This Act, proceeding on a recital of the expenses to be incurred in erecting and maintaining the bridge, empowers the Duke and his heirs to levy

toll or pontage "on any person or persons, or any coach, chariot, ferlin, landau, calash, chaise, curricle, gig, waggon, cart, or other carriage whatever, or any horse, mare, gelding, mule, ass, or any cattle, sheep, goats, or swine" crossing the bridge. There was no exemption in said Act in favour of carriages or horses conveying mails, or otherwise employed in the service of the post-office.

The defenders pleaded exemption from toll in virtue of certain statutory enactments in favour of the post-office. Moreover, they pleaded generally that the Duke of Athole and his heirs had failed to implement certain conditions imposed by the Dunkeld Bridge Act, and had therefore lost the right of imposing tolls on the defenders or on the public. By an interlocutor of the Lord Ordinary (ANDERSON), which was acquiesced in, the latter plea was repelled. In May 1868 the present Duke of Athole sisted himself as pursuer, and the process was wakened in respect of a joint minute as against the Postmaster General, but not as against the other defender. The only question now before the Court was whether the statutes in favour of the post-office applied to the Dunkeld Bridge pontage.

The Postmaster General founded chiefly on the 19th sec. of 1 Vict. c. 33, which provides that "no turnpike tolls shall in Scotland be charged on carriages with two wheels, conveying only the mail or packet with their driver, and any horse or horses drawing the same." The Duke of Athole, on the other hand, contended (1) that the exemption only applied to tolls upon ordinary turnpike roads; that the Dunkeld Bridge pontage was created by a private statute which contained no exemption whatever; that the right to the pontage was patrimonial, and was a right in which the Duke had a direct pecuniary interest, and such as could not be affected by any general exemption applicable to the public thoroughfares. (2) He maintained that, supposing the exemption to extend to the Dunkeld Bridge pontage, it was inoperative, in respect to the carriage conveying the mails having been also used for the conveyance of passengers and parcels for a part of the route, though not actually across the bridge. With respect to the matter of fact involved in this plea, the following joint minute for the parties was put into process:—

"Burnet, for the Postmaster-General, admitted that the carriages used by the defender Taylor were constructed with seats for passengers, and with accommodation for parcels, and that the defender Taylor was in use to carry passengers and parcels between Kenmore and Inver; and

"Lee, for the pursuer, admitted that no passengers or parcels were conveyed over Dunkeld Bridge, or nearer to the bridge than Inver, which is more than 500 yards, and nearly a mile, from the said bridge."

The Lord Ordinary (GIFFORD) *held* that the process was only wakened against the Postmaster-General, and on the ground of the exemption contained in 1 Vict. c. 33, assoilzied him from the conclusion of the action.

The Duke of Athole reclaimed.

MILLAR, Q.C., and LEE, for him.

LORD ADVOCATE, SOLICITOR GENERAL, and BURNET, for the Postmaster-General.

At advising—

LORD PRESIDENT—The first question in this case is whether the Dunkeld Bridge pontage is a turnpike toll in the sense of the Post-office Act. It appears to me that it is. A turnpike toll is a toll levied at a turnpike, and a turnpike is an obstruction for securing the toll. A turnpike toll may be exacted at a bridge as well as on a road. But it is further maintained by the Duke of Athole that the vehicle in question is not the vehicle which the statute exempts from toll, or at least that it is dealt with in such a way as to deprive it of its right of exemption. The facts in this case are clearly stated in a joint-minute. The Postmaster-General entered into a contract with Mr Taylor to convey the mails between Dunkeld and Kenmore. The mail carriage started from Dunkeld, passed along the bridge to a place called Inver, about a mile from the bridge, and thence to Kenmore, and so with the return journey. The carriage was constructed with two wheels, but had accommodation for passengers and parcels, and did carry passengers and parcels between Inver and Kenmore, both going and returning. It is admitted for the Duke that no passengers or parcels were carried across the bridge or nearer the bridge than Inver. I think that the statute gives exemption to a mail carriage on two conditions. First, It must have only two wheels. Second, When it passes the toll bar it must contain only the mails and driver. It does not appear to me necessary, that the vehicle should be incapable of carrying anything but the mails and driver. If the statute had meant this, it would have been easy to express it. It is said by the Duke that the vehicle is performing but one journey between Dunkeld and Kenmore. But the mails may be carried in a variety of vehicles, all under one journey and one contract. Suppose the mails brought from Kenmore to Inver in a common carrier's cart, with a number of other articles, and then put into a two-wheeled carriage, with nothing else, and to cross the bridge in that state, would the toll-keeper at Dunkeld have any right to enquire into the past history of the mails? The condition of the mail carriage must be ascertained as at the moment of passing the toll bar.

LORD DEAS—I am also of opinion that the Dunkeld Bridge pontage must be regarded as a turnpike toll. It is not a due which the Duke of Athole is entitled to levy in perpetuity for his own benefit. It is in reality collected by him for the public, though he has a certain interest in the toll for a limited time. As to the second point, I am not able to come to the same conclusions as your Lordship in the chair. By the contract between the Postmaster-General and Mr Taylor the latter is bound "to provide a sufficient number of good and substantial mail carts, to be so built and constructed as not to admit of any person but the driver being conveyed by the same, and also a sufficient number of able and sound horses for the use of the said mail carts;" and Mr Taylor is further taken bound that "the riders and drivers shall not permit any person or persons to ride or travel with them respectively on horseback, or in the mail carts, either while employed in the service of the said post-office in conveying the said mail bags, or on returning from conveying the same to their place of destination." Now I do not say that the terms of the contract tie down the Postmaster-General to a particular interpretation of the statute, but they shew very clearly what interpretation was put upon the statute by him at the time the contract was entered on. I hold this to be the true construction. The statute must be construed fairly

and reasonably, *i.e.*, to take away the revenues of tolls no more than is necessary for the purposes of the Act. It is obvious that if a mail carriage were allowed to set down passengers at a short distance from a toll, and then pass through the toll free, and perhaps pick up passengers on the other side, the revenues of the toll would be diminished to a greater extent than if the mail carriage had been entirely prohibited from carrying passengers. Ingenious cases have been supposed by which this or any other toll could be defeated, such as the use of different vehicles; but suppose these devices were successful, that is no reason why we should not apply the fair construction of the Act to a case where they have not been employed.

LORD ARDMILLAN gave no opinion, having been absent in the Registration Court during the debate.

LORD KINLOCH—The question raised before us is whether, for a certain specified period the Postmaster-General is liable for the tolls payable at the Bridge of Dunkeld in respect of a vehicle employed during that period for the carriage of the mail; or whether, as the Lord Ordinary has found, he is legally exempt from such tolls.

I agree with the Lord Ordinary in thinking that the tolls leviable at Dunkeld Bridge are "turnpike tolls" in the sense of the Act 1 Vict. cap. 33, which declares "that no turnpike tolls shall in Scotland be charged on carriages with two wheels conveying only the mail or packet, with their driver and any horse or horses drawing the same." If, therefore, there was no question in the case except whether these tolls were or were not turnpike tolls, I would arrive at the same conclusion with the Lord Ordinary, that an exemption holds in favour of the Postmaster-General. My reasons for holding the tolls to be turnpike tolls in the sense of the Act are substantially those stated by the Lord Ordinary. These are tolls leviable from the public at a turnpike or toll-gate for the use of a certain passage. They in this way meet the words of the Act, and are properly "turnpike tolls." I think the policy of the Act infers the same construction; for its intention, as I think, was in all cases whatsoever to exempt a certain class of vehicles employed for conveying the mail at once from the delay and expense of paying the tolls leviable for passage from the public generally.

But the peculiarity of the case, to which I think sufficient effect has not been given by the Lord Ordinary, is that this privilege is not given to all manner of vehicles employed in carrying the mail, but only to "carriages with two wheels conveying only the mail or packet, with the driver, and any horse or horses drawing the same." I am of opinion that in these words there is a statutory description of the kind of vehicle to be exempted from toll. It is first of all a carriage on two wheels; about this there is no difficulty. It is, secondly, a vehicle "conveying only the mail or packet, with their driver." I conceive these words, not less than the former, to import a description of the vehicle. What the statute, I think, means is a vehicle which is constructed only to carry the driver and mail bags. It specifies, if I may so speak, the tonnage of the exempted vehicle. I do not think the meaning of the statute was to exempt a vehicle of any size or construction, provided that in passing the turnpike it was at the moment conveying only the driver and mail-bags; which, of course, implied an examination by the tollman at the time the carriage passed the toll. Its meaning was to exempt a vehicle constructed only to carry the driver and mail-bags, and which should pass the turnpike without stop or examination by virtue of its obvious identification as the statutory carriage. The vehicle intended to be exempted was a light carriage fitted by its construction for speed, and kept by its nature apart from all occupation by passengers or employment in coaching speculations.

In the present case it would appear that the conveyance of the mail between Dunkeld and Kenmore expressly began on this footing. A contract was made by the Postmaster-General with James Taylor for the conveyance of her Majesty's mails from the post office Dunkeld to the post office Kenmore, seven days in each week; and by this contract Taylor is stated to have been taken bound to provide "a sufficient number of good and substantial mail-carts to be so built and constructed as not to admit of any person but the driver being conveyed by the same;" and he was specially prohibited against taking passengers. In point of fact, however, matters were not so arranged during the period embraced by the summons. It is admitted in the joint minute for the parties "that the carriages used by the defender Taylor were constructed with seats for passengers, and with accommodation for parcels." It is not disputed that on leaving Dunkeld for Kenmore, and in passing the turnpike at the bridge, there was only the driver on the carriage, with the mail-bags within; but admittedly after reaching Inver, a mile from Dunkeld, passengers and parcels were taken in, and conveyed the remaining 21 miles of the journey; and this traffic, to and fro, between Inver and Kenmore was in use to be maintained during the time embraced in the summons.

I am of opinion that, in these circumstances, there was no exemption from the bridge tolls possessed in respect of this vehicle. There was a failure of the essential condition of the exemption, that the carriage should be on two wheels, and constructed so as to carry the driver and mail-bags only. The vehicle, according to my apprehension, was not the statutory mail-cart. It failed to be so in respect of construction; which I think sufficient. But farther, it was employed in the very way which the statute, as I think, intended to exclude namely, as the means of maintaining a coaching business to the necessary delay of the mails, and the involvement of the contractor in the engrossments and risks of a coaching speculation. I am of opinion that for a vehicle so circumstanced the statutory exemption cannot be claimed.

It is said that if this were held it would follow that the mail-cart would lose its exemption, however strictly the statute might be observed in passing the bridge, if at any point, however distant, the vehicle was changed into a carriage for passengers; and the supposition is made that this happened so far off as Aberdeen or Inverness. My answer is, that what I deal with is a fixed journey between Dunkeld and Kenmore, for which, by contract, the vehicle was got up and used; and it is to this, the actual state of things, not to any imaginary or hypothetical case, that the principles of the case are to be applied. The appointed mail stage was between Dunkeld and Kenmore; and if for 21 miles out of the 22 passengers were conveyed in the mail-cart, this appears to be as much at variance with the substantial meaning of the statute as if they went the whole 22 miles. It is not necessary to dispute that even in the jour-

ney between Dunkeld and Kenmore, much more on a larger journey, arrangements might be made materially affecting the legal position of matters; as, for instance, if half way on the journey, or say at Aberfeldy, the mail bags, having up to that point been carried in the strictly statutory vehicle, were removed into another carriage constructed for passengers. But the case with which I have to deal is not that of a change of carriage. It is where the same carriage performs the whole journey from Dunkeld to Kenmore, being from the first a carriage constructed for passengers, and taking these in a mile out of Dunkeld for the whole remaining 21 miles. It is to a carriage so constructed and so employed that I think the statutory exemption inapplicable.

If I am right in supposing that the Act requires not merely the employment, but the construction, of the carriage to be such as excludes its occupation by passengers, there arises no difficulty from considering either the length or character of the journey. In that view the point of time to be taken may be assumed to be that at which the carriage passes the toll-gate on the bridge. The carriage now in question was at that moment a carriage constructed for passengers, and not a carriage constructed for merely carrying the driver and mail-bags. It was so before the eyes of the tollman, without the necessity of any minute investigation. I consider this to have been the very case in which the tollman was entitled to exact his tolls, and to reject any plea of exemption.

I am of opinion that the Lord Ordinary's interlocutor should be altered; that the pleas in defence should be repelled; and the Postmaster-General found liable in the bridge tolls claimed for the period in question.

The Court accordingly recalled the Lord Ordinary's interlocutor, and decerned in favour of the pursuer as against the Postmaster-General.

Agents for Pursuer—Tods, Murray, & Jamieson, W.S.

Agent for Defender—John Cay, W.S.

Thursday, November 3.

SECOND DIVISION.

LOCALITY OF CAMERON.

Teinds—Locality—res judicata—*Bishop's Teinds.* In 1817 final localities of a parish were approved of by the Court, which were regulated on the footing that all the teinds in the hands of the Crown were bishop's teinds, entitled to postponement in the allocation for stipend to the teinds of the parish which were held upon heritable rights. In a subsequent locality, in 1840, one of the heritors contended that these teinds were not bishop's teinds, but prior's teinds, and brought a reduction of the former decrees of locality of 1817. It was pleaded that the question was *res judicata*, in respect of the decree in the locality of 1817, and the plea was sustaind. In a subsequent locality, the successor of the heritor objected to the scheme of division, on the ground that the teinds in question, not being bishop's teinds prior to the Reformation, were not entitled to be postponed. *Held* that that question had been decided by the judgment of 1846, and the plea of *res judicata* sustained. *Opinions* by all the judges, that general questions decided in one locality would regulate future localities of the parish.

This was a question between Mr Bonar of Greigston, and the Lord Advocate on behalf of Her Majesty, in the locality of the stipend of the parish of Cameron. The present parish of Cameron was formerly included in the landward part of the parish of St Andrews. It was disjoined therefrom and erected into a separate parish by the Act of Parliament 1592, chapter 20. The Act provided that the new parish thereby erected should be called in time to come the parish of South St Andrews, but the name was afterwards changed to Cameron, which it bears to this day. Prior to the Reformation, the teinds of the said parish of Cameron, in common with the other teinds of the parish of St Andrews, as then constituted, belonged to the Priory and Abbacy of St Andrews. By the Act 1587, chapter 29, the teinds of the parish of Cameron, then forming part of the parish of St Andrews, were annexed to the Crown. They were in the year 1606 granted by King James VI. to the Duke of Lennox, and, along with the greater part of the lands and other properties which had formerly belonged to the said Priory and Abbacy of St Andrews, erected into a temporal Lordship in his favour. The subjects of the grant to the Duke of Lennox, including the teinds of the present parish of Cameron, were by him resigned into the hands of King Charles I., who, by charter under the Great Seal, dated 21st May, in the year 1635, mortified and disponed the same to the use of the Archbishopric of St Andrews. On the abolition of Episcopacy by the Act 1689, chapter 3, the teinds of the present parish of Cameron reverted to the Crown, and the Crown is now titular of the teinds, and proprietor thereof, in so far as not held by the heritors under heritable rights. The teinds, in so far as not held under heritable rights, or allocated for payment of the minister's stipend, are regularly uplifted by the Crown, and form part of the hereditary revenue of Her Majesty, which are subject to the control and administration of the Commissioners of Woods and Forests.

Mr Bonar alleged that the teinds were not bishop's teinds, and, in so far as held by the Crown, were not entitled to the privileges of bishop's teinds in a question of allocation. The objector, Mr Bonar, was proprietor of the lands of Greigston, situated within the said parish of Cameron, under titles importing an heritable right to the teinds of the said lands, and also importing an obligation on the part of the Crown to free and relieve him from any payment of teind or stipend which might be exacted therefrom.

The objector further alleged that it was on all hands believed that the proprietors of Greigston had right, under the terms of their Crown titles, to exemption from payment of teind and stipend in all time coming, at least so long as there were free teinds in the hands of the Crown which had formerly belonged to the Priory and Abbacy of St Andrews, and accordingly no part of the stipend was ever allocated upon the lands of Greigston, or paid by the proprietors thereof to the minister of Cameron, except a small sum of 10s. 6d. sterling in name of vicarage. This exemption continued until the localities were prepared in the augmentations of 1795 and 1808.

By decree of the Lords Commissioners of Teinds, dated 14th January 1795, the minister