with, and your Lordships have said enough in the circumstances to show that the defender has caused some expense in stating the defence which he has abandoned. On the general question, I find that the Debts Recovery Act, section 5, incorporates the 36th section of the Small Debt Act, with the result that it is in substance enacted by the Debts Recovery Act that in all causes and prosecutions wherein the debt, demand, or penalty shall not exceed the value of £50, exclusive of expenses and dues of extract, which shall in future be brought or claimed on before any Court, not according to the summary form herein provided, it shall be lawful for the judge in such Court notwithstanding to allow no other or higher fees or expenses to be taken or paid than those above mentioned. Taking that as the general provision of the statute, it is clear that the Legislature intended that in certain cases which were brought in the Court of Session, or in the ordinary Sheriff Court, full expenses should not be allowed if the case should have been brought under the Debts Recovery Act. I will go even further, and say, that in the general case, where the action is proper to the Debts Recovery Court, the intention of the Legislature was that a higher rate of expenses should not be allowed than that fixed by the statute. It is a matter, however, which must be very much in the discretion of the Judge. There might be cases which raised difficult points of law, or where foreigners required to be convened, and which therefore the pursuer might be entitled to bring in the ordinary Sheriff Court, or even in the Court of Session. But in the absence of any specialties, the general rule is that the pursuer is limited to the expenses allowed by the Debts Recovery Act; although the conduct of the defender may make a difference. In this particular case, however, I think that we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas was absent.

The Court adhered.

Counsel for Pursuer — Strachan. Agents — Mack & Grant, S.S.C.

Counsel for Defender — Goudy — Salvesen. Agent—Thomas M'Naught, S.S.C.

Wednesday, July 16.

SECOND DIVISION.

SPECIAL CASE—FLEMING AND ANOTHER (TRUSTEES OF THE KELVINSIDE ESTATE COMPANY) *v.* THE COUNTY ROAD TRUSTEES OF THE COUNTY OF THE LOWER WARD OF LANARK.

Road—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. c.* 51), *secs.* 32 *and* 119—*Duties of Road Trustees under Roads and Bridges Act in respect of Road formerly Regulated by Local Act—Great Western Road Act* (6 *and* 7 *Will. IV. c. cxxviii*)—*Lighting of Suburban Road.*

Trustees of a certain road, acting under a private Local Road Act, were prior to the Roads and Bridges Act of 1878 bound to light out of the tolls levied by them the road under their jurisdiction. That Act abolished tolls and placed the road under the County Road Trustees, who were declared to be liable in all the debts, liabilities, claims, and demands in which the trustees of the local Act were liable, and to be bound to expend their assessment in maintaining and repairing the highways under their jurisdiction. *Held* that they were bound to light the road.

Road—Roads and Bridges (Scotland) Act 1878—*County Road Trustees—Power to Light Roads under their Jurisdiction.*

Held (*dub.* Lord Rutherfurd Clark) that County Road Trustees may, where satisfied that it is desirable for the safety of the public using a much frequented road under their jurisdiction, lawfully provide for its being lighted out of their statutory funds.

This was a Special Case, the first parties to which were the trustees for the Kelvinside Estate Company, and as such proprietors of the lands of Kelvinside, lying within the county of the Lower Ward of Lanark; and the second parties, the road trustees of that county, in whom the roads therein were vested by the Roads and Bridges (Scotland) Act 1878. The first parties were therefore liable in the assessment for the maintenance of roads and bridges imposed by the second parties in respect of the roads on their property.

The Great Western Road, which extends from St George's Road in the city of Glasgow to where Anniesland Toll-Bar formerly stood in the county of the Lower Ward of Lanark, was at the date of this case partly within the jurisdiction of the city of Glasgow, partly within that of the burgh of Hillhead, and partly within that of the second parties. So far as within the jurisdiction of the second parties, that is, from the Botanic Garden Gate to the site of the Anniesland Toll, it extended 1 mile 4 furlongs and 200 yards. With the exception of about 250 yards, this portion of it extended entirely through the first parties' lands of Kelvinside.

For some years prior to the passing of the Roads and Bridges Act 1878, a part of that portion of the Great Western Road which lay within the jurisdiction of the second parties—and after its passing, but shortly before the Act came into operation, the remainder of the road within their jurisdiction—was lighted by the local trustees acting under The Great Western Road Act (6 and 7 Will. IV. c. 138), under the following provisions:—

Section 14 of the Great Western Road Act (6 and 7 Will. IV. c. 138) enacted—"That it shall and may be lawful to and for the said trustees, and they are hereby authorised and empowered, to cause the said main line of the Great Western Road from Anniesland to St George's Road to be watched and lighted after sunset and during the night, and to pay and defray the costs and charges thereof out of the tolls, rates, and duties, and other monies authorised to be levied and raised under and by virtue of this Act on or for the said road herein authorised to be made."

Section 23 enacted that the trustees should, *inter alia*, apply "the tolls to be levied as aforesaid towards the making, completing, and keeping in repair, and watching and lighting, the said roads

and bridges, and putting this Act into execution, and thereafter towards the payment of the interest of the sum or sums subscribed or to be subscribed, borrowed, and advanced under and by virtue of this and the said recited Act."

The Roads and Bridges (Scotland) Act 1878 contained the following provisions:—Section 32—"From and after the commencement of this Act, the whole turnpike roads, statute-labour roads, highways, and bridges within each county respectively shall form one general trust, with such separate district management as shall be prescribed by the trustees as hereinafter provided, and all the roads, bridges, lands, buildings, works, rights, interests, monies, property, and effects, rights of action, claims and demands, powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads, statute-labour roads, highways, and bridges within the county, shall be, by virtue of this Act, transferred to or vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed, shall be liable in all the debts, liabilities, claims, and demands in which the trustees of such turnpike roads, statute-labour roads, highways and bridges are or were liable under any general or local Act then in force, except in so far as such debts, liabilities, claims, and demands may, under the provisions of this Act, be discharged, reduced, or extinguished."

Section 119 enacts, *inter alia*—"All moneys received by the trustees on account of assessments or penalties, or otherwise, for the application of which no special provision is made in this Act, shall be applied as follows—. . . (2) In payment of the expense of maintaining and repairing the several highways."

In these circumstances the first parties contended that, in virtue of the provisions of the said Great Western Road Act, and of the Roads and Bridges Act 1878, and especially of section 32 of that Act, the second parties were bound to light the Great Western Road so far as within their jurisdiction. They had therefore called upon the second parties to make provision for so doing, and the first question in the present Special Case was—"Are the second parties bound to light the said Great-Western Road?"

Besides the Great Western Road the first parties were interested in an adjacent road known as the Hyndland Road. This road extended from the Great Western Road southwards, and formed an important communication with the burgh of Partick. It was entirely within the jurisdiction of the second parties. It was not affected by the provisions of the Great Western Road Act. It was partly situated upon the lands of the first parties, was in a populous district, and was considerably used at night.

The first parties also contended that the second parties were entitled, in their discretion, to apply the funds in their hands to the purpose of defraying the expense of lighting any road or part of a road within their jurisdiction, if in their opinion it was desirable in the interests or for the safety of the public that such road or part of a road should be lighted. They had called upon the second parties to light the Hyndland Road.

The second parties contended that they were precluded by the terms of the Roads and Bridges Act 1878 from expending any of the funds in their hands in lighting roads, and were neither bound nor entitled so to expend them.

The second question in this Case was—"Have the second parties power to expend funds raised by assessment, under the powers of the Roads and Bridges Act, in lighting or contributing to light roads or parts of roads in localities where, from the extent of the traffic or other ordinary causes, such lighting may appear to them a proper precaution with the view of avoiding the risk of accident, or otherwise desirable in the general interests of the public using the roads?"

It appeared from the statements in the Case as to the practice of the road trustees of the district, that for some years previous to the passing of the Roads and Bridges Act 1878, the trustees of the Glasgow and Renfrew, and the Glasgow and Three Mile House (Paisley) Roads, which are thoroughfares leading into Glasgow through populous districts, had been in the practice of giving contributions from the turnpike road funds towards lighting portions of the roads within their respective jurisdictions, but on other thoroughfares leading into Glasgow, also through populous places, no such practice obtained.

Argued for the first parties—The Roads and Bridges Act transferred the whole powers and duties of former road trustees under local Acts to those under its own jurisdiction. There was no enumeration in section 32 of different duties, such as repairing, lighting, or watching; the provision was quite general. Lighting the Great Western Road was therefore one of the duties thereby transferred to the second parties from the old trustees under the local Act of William IV. (2) A parity of reasoning applied to the power to apply their statutory funds to the lighting of the Hyndland Road (sec. 52). Lighting was an ordinary work of management and maintenance in suburban roads like these, which the Roads and Bridges Act laid on the second parties as an obligation in the case of the Great Western Road, and as a faculty depending on their discretion in that of the Hyndland Road. The first parties' contention was not thus inconsistent with sec. 119.

Argued for the second parties—The enumeration of the powers and duties of the road trustees under the Roads and Bridges Act was contained, not in sec. 32, but in sec. 119, which limited them to repairs and maintenance (and lighting was neither), and in Schedule C, which incorporated certain sections of the General Turnpike Act (1 and 2 Will. IV., c. 43), and neither an obligation nor a power of lighting was to be found in these. Unless the obligations were clearly imposed on them, or the power conferred, persons situated as the second parties were, being statutory trustees, were not to go out to seek it. It meant that they were to assume the task of lighting the whole of the suburbs of large towns. That was a matter for these inhabitants of the large towns who frequented them—not for the county road trustees. To light these roads, which were really part of the town, would involve a large increase of rates on the county ratepayers. (Roads and Bridges Act, sections 92, 94).

At advising—

Lord Young—This is an interesting rather than an important question.

There are really two questions. One relates to the Great Western Road, which prior to the Roads and Bridges Act of 1878 was vested in the Great Western Road Trustees, the road trustees acting under the Great Western Road Act (6 and 7 Will. c. 138), which contains this provision respecting it—[*His Lordship here read section* 14, *quoted above*]. That was the law of this road when the Act of 1878 came into operation, and the actual condition in which it was under that law when the Act of 1878 came into operation was that it was lighted and, I understand, watched by the trustees in whom it was then vested, and who had charge of it. The Act of 1878 divested those trustees and relieved them of all their duties with respect to it, and invested the new trustees under the Act of 1878 with it, and charged them with all the duties in respect of it which theretofore were on their predecessors. I therefore cannot assent to Mr Jameson's view, that the effect of the transfer of the road when the Act of 1878 came into operation was necessarily to put it into darkness—to extinguish the lamps and leave it an unwatched and unlighted road. I think the meaning of the Legislature was to leave it just as it was before under the law then operating—under new guardians, no doubt, but guardians with the same duties and the same powers—not that it was to be maintained, not as an unwatched and unlighted road, but maintained as it was before. That is sufficient in my view for an answer to the first question, and it is really a very small matter; it is really paying for gas to light the road, for there is no question raised about watching it, although that would only be the wages of a watchman, or it may be two.

The second question relates to the Hyndland Road, as to which there is no such provision as formerly affected the Great Western Road, because it was not under the Great Western Road Act. The Hyndland Road runs between the Great Western Road and Partick, and I understand that when the Act of 1878 came into operation it was not lighted. But as Glasgow was extending in that direction, this road was rapidly advancing to the condition of requiring to be lighted—and the question is whether the road trustees who have now charge of it have authority to light it. It is not said that there is any obligation upon them as in the case of the Great Western Road, the law as to which is declared by the special clause to which I have called attention. It is said merely that they have a power, if they see fit, in the discharge of their duty as road trustees, to maintain the road safely for the use of the public, and to expend the statutory funds in their hands upon the lighting of it. The question is very carefully put—[*His Lordship here read the second question*]. Now, there is reasonable safety certainly in allowing the trustees to expend statutory funds upon this, if they think it necessary for the safe use of the road under their charge. There is great safety in that. They will not do it unless they think it necessary, and if they think it necessary the conclusion is that it ought to be done; and if nobody else is doing it—if there is no other authority to do it—then a thing in their opinion proper to be done for the safe use of the road is omitted to be done. And why? Because of a difficulty about the expense. Where do the funds in their hands come from? Why, from the very people for whose safety they are, *ex hypothesi*, of opinion that the thing ought to be done; and which if this locality were constituted into a municipality, these people would have to get done, and would have to pay for it. I had that in my mind really when I said that the question was more interesting than important; for it really comes to this, whether the road trustees, who are very capable of judging of this matter, and who applied their judgment to the matter, being of opinion that the thing ought to be done for the safety of those with whose interests they are specially charged, and at their expense, may so do it at the expense of those people. Therefore, although the question has never before been presented to us for our judgment, whether the road trustees might apply the road funds to lighting a road where they think it necessary, I am of opinion that we lawfully and quite safely may answer this question in the affirmative—that they may apply these funds to this purpose, assuming that in their judgment the purpose is a reasonable one, and must be served in order to render the road safe for the use of those at whose expense it is to be put into this safe condition.

Lord Craighill—I concur in your Lordship's opinion. The answer to the first question is not attended with any difficulty. The road was lighted by the Great Western Road Trustees, not merely by virtue of the powers, but under pressure of the obligations imposed by the Act 6 and 7 Will IV., and according to my reading of section 32 of the Roads and Bridges Act, the powers which were possessed by the Great Western Road Trustees, and the obligations under which these trustees lay, were transferred to the second parties in the present Special Case. That being so, according to my view of the matter, those second parties have the power to do the thing submitted to our consideration. In the second place, apart from the power, they are under obligation to do that. That being so, it would indeed require a most strict limitation of the purposes to which assessments that are to come into their hands are to be applied before we should be warranted in coming to the conclusion that they are not entitled to expend any of it in execution of the power and fulfilment of the liabilities which the statute itself has imposed upon them. I do not think that section 119, which was commented upon by Mr Jameson, creates any real difficulty—[*reads*]. Now, what is here contended for appears to me to belong to the reasonable management of roads; and when we look at that which is accomplished by section 32, it would be unreasonable to put a different interpretation upon the words under consideration.

The answer to the second question is attended with greater difficulty, for, as your Lordship has said, it is a new point. It does not appear that the powers of road trustees in the matter of lighting have been submitted to the judicial determination of the Court; but I think the question is really a general one, and it comes to this, whether road trustees—*ex hypothesi* not limited by any restrictions which exclude the power of lighting—may not do all that in their opinion may be considered reasonable for

the safe conduct and traffic of the road. It is not matter of obligation. The thing is not to be taken out of their hands or imposed upon them in consequence of the views that may be taken by us. They are the judges in the matter. If, when the thing is forced upon their notice, they come to the conclusion that it is reasonable that the particular road should be lighted in order that the traffic may be conducted safely, there does not seem to me to be anything by which the exercise of that discretion is restricted. If they may light, they may expend that which is requisite for the purpose of lighting. I think this is the true meaning of their position in the administration of their trust. I therefore concur in thinking that both questions should be answered in the affirmative.

Lord Rutherfurd Clark—I have a good deal of difficulty, I confess, upon the second question, which is the more important, and my doubts are not altogether removed even yet; but I am not disposed to differ from the judgment your Lordships have pronounced.

The Lord Justice-Clerk was absent.

The Court answered both questions in the affirmative.

Counsel for Parties of the First Part — Mackintosh—Graham Murray. Agents—H. B. & F. J. Dewar, S.S.C.

Counsel for Parties of the Second Part—J. P. B. Robertson—Jameson. Agents—Mackenzie & Black, W.S.

Friday, July 18.*

FIRST DIVISION.

[Lord Adam, Ordinary.

STRACHAN *v.* AULD AND ANOTHER.

Sale—Sale by Auction—Judge of Roup—Exclusion of Court of Law—White Bonnet.

The duties of the judge of the roup extend only to the decision of questions arising during the sale.

By the conditions of a roup it was provided that the highest offerer should be purchaser; that a person named therein "is appointed judge of the roup, to whom are hereby submitted all disputes and differences of every kind which may arise in relation to the sale either between the exposer and offerers or among offerers themselves, and his decision shall be final and binding on all parties." Some time after the sale one of the bidders who had not been preferred to the subject, claimed it as being the highest *bona fide* bidder, on the ground that the offers higher than his own were not *bona fide* bids, but were made by persons bidding in collusion with the exposer in order to raise the price. *Held* that this question did not fall to be decided by the judge of the roup.

In August 1883 Robert Campbell Auld, a farmer and breeder of Angus polled cattle at Alford, advertised a sale of a herd of 50 polled cattle to be held at Aberdeen on 13th September. Catalogues were issued describing the animals, and stating that the auctioneer would be James Farquhar, and the judge of the roup would be James Reid, Greystone. The catalogue contained these conditions of sale—"(1) The stock will be exposed separately, according to the numbers of the following catalogue, and the highest offerer on each lot will be preferred to the purchase. (2) The statements in the catalogue are correct so far as known to the exposer, but he shall not be bound by them in any respect. (3) All purchases shall be settled for immediately after the sale in ready money. Parties failing so to settle will in the exposer's or judge's option either forfeit the purchase and be liable in one-fifth part of the price as the stipulated damage, or be bound to abide by and implement their purchases. (4) Immediately after each purchase is declared the risk of the animal shall be exclusively with the purchaser; and it is declared that until a settlement shall be made in terms of these conditions the delivery of the animal shall be suspended. (5) Mr James Reid, Greystone, is judge of the roup, to whom are hereby submitted all disputes and differences of every kind which may arise in relation to the sale either between the exposer and offerers or among offerers themselves, and his decision shall be final and binding on all parties."

On 13th September the sale was held. One of the animals exposed was a two-year-old heifer, described as "Pride of Aberdeen 30th, 5209, got by Knight of the Shire, 1699, dam Pride of Aberdeen 9th, 3253." Of this animal James Walker was declared the purchaser at 510 guineas, the last offer before his being 505 guineas, offered by George Wilken.

In December following John Strachan raised this action against the exposer Auld and against Walker for declarator that the pretended purchase by the defender Walker was for and on behalf of the defender Auld, was fraudulent, and *funditus* null and void; that the Marquis of Huntly was the true purchaser of the heifer at 300 guineas, and entitled to the heifer on payment thereof; that pursuer was now in right of the Marquis of Huntly, as such purchaser; or otherwise, as might be determined in the course of the process, that the pursuer in his own right was the true purchaser of the heifer at 325 guineas, or at such other price as might be fixed and determined by the Court in the process, and entitled on payment of that or such price to delivery of the heifer; further, he concluded against Auld for decree of delivery of the heifer on payment of 300 guineas, or otherwise for £300 as damages.

He set forth in his condescendence the advertisement and issue of catalogues as above narrated; further, that immediately before the sale the auctioneer stated to the company assembled, in presence and by authority of the defender Auld, and as an inducement to offer, that the sale was "entirely unreserved." He then set forth the bidding as above narrated, and then—"(Cond. 4) The bidding was begun by the Most Honourable Charles Gordon Marquis of Huntly, who offered 200 guineas, and after several other offers had been made he offered 300 guineas, whereupon the defender James Walker, farmer, Westside of Brux, offered 320 guineas. The Marquis of Huntly then

*Decided 19th March.