

of their Lordships of the other Division, concurred in by Lord Rutherford Clark. If in the present case there had been a similar difference of opinion I should not have thought it would have been right to decide the case without consulting our brethren, and having a re-hearing before seven Judges, although I should have greatly regretted such a course, seeing that the parties come here after all on a question of expenses. But having regard to the circumstance that, as I understand, the judgment which we are to pronounce is a unanimous one, and that one of our brethren in the other Division entertained the view to which we are now to give effect, I can see no difficulty in our entertaining this question on its merits. And upon its merits I have only to say that as it is clear that in the case of public officials failing to do their duty, or a Judge of the Sheriff Courts or Justice of Peace Courts failing to do his duty, the complaint would necessarily lie to one of the Divisions of this Court, so, I think, on the ground so very clearly stated by your Lordship—in which I entirely concur—and by a close analogy, the same very delicate power of compelling an arbiter to fulfil his duty must be exercised by this Court, and by this Court alone. If the case had been one in which there was not really a proper *lis* or dispute between the parties where arbiters were called upon to exercise their function, but had been one simply where persons had agreed to purchase a subject, it may be, at the valuation to be put upon it by a third party, and the person so nominated had agreed to act, I am not prepared to say that in a case of that kind the Sheriff might not have jurisdiction to entertain a proceeding to compel performance of that duty. All I desire to say is, that I think that case may be distinguishable from such a case as a proper arbitration, and upon that I desire to reserve my opinion. Otherwise I entirely concur in the views which have been expressed by your Lordship.

LORD ADAM—I concur, and can add nothing to what your Lordship has already said.

The Court pronounced the following interlocutor:—

“On the appeal of the defender Underwood, Recal the interdict of the Sheriff and the Sheriff-Substitute in so far as they find him liable in expenses; sustain the defence for Underwood; assoilzie him and decern: Find him entitled to expenses in both Courts . . . And on the motion of the defender Winton, availing himself of the appeal by Underwood, Sustain the first plea-in-law stated by the defender Winton, and in respect thereof recal all the interlocutors of the Sheriff and the Sheriff-Substitute after closing the record: Dismiss the action *quoad* the defender Winton, and decern: Find no expenses due to or by either party as between the pursuer and the defender Winton.”

Counsel for Forbes—Mackintosh—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Counsel for Underwood—Jameson—Begg. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Winton—Kennedy. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Friday, January 22.

SECOND DIVISION.

DUMBARTONSHIRE ROAD TRUSTEES *v.* ORR
EWING AND OTHERS.

Road—Roads and Bridges Scotland Act 1878 (41 and 42 Vict. c. 51), secs. 30 and 93—Road Trustees—Powers and Rights of Road Trustees—Pontages.

At the passing of the Roads and Bridges Act 1878, the Dumbartonshire Road Trustees acquired two bridges over the Leven, with the right to levy pontages thereon, all under the 93d section of the Act, which provided that the value to be paid for these rights to the proprietors of the bridges was, failing agreement, to be decided by arbitration, and to be provided by the trustees as follows—“One-half thereof in the same manner as is by this Act provided with respect to road debts, and the other half by means of the pontages levied at the said bridges . . . and these pontages shall be levied by the trustees until the moneys which they shall have borrowed in terms of the provision hereinafter contained, so far as required for the purpose of paying such last-mentioned half to the proprietors, with interest, together with one-half of the expense of maintaining the bridges, and the whole expense of collecting the said pontages shall have been paid out of such pontages, whereupon the said bridges shall become highways and be free of toll. The said County Road Trustees may borrow the money required for paying the said values to the proprietors on the security of the pontages.” *Held*, in questions between the trustees and the proprietors of heritages in the Vale of Leven, that on a sound construction of the 93d section—(1) the trustees were entitled to charge against the Bridge Revenues (a) one-half of the expense of arbitrations entered into to fix the values of the bridges and pontages to be paid to the proprietors; (b) the expenses connected with a loan to pay off half of the values of the bridges directed to be paid out of Bridge Revenues, both of these items being a necessary and incidental appropriation of the funds for the purposes of the section, although the statute was silent as regards them; (c) (*duob.* Lord Justice-Clerk) the annual expense of letting out the pontages; (d) the expenses incurred in connection with litigations on the question whether the bridges ought to be rated; (e) the owners' proportions of county, parish, and road rates; (f) the expenses of fees paid to engineers for inspecting and reporting on the condition of one of the bridges, and the expenses incurred in consequence of extra precautions adopted for regulating the traffic; (g) expenses of litigations with the general public as regards the right to levy pontages; (2) That the salaries payable to the county and district road clerks and treasurers and the district road surveyor were not chargeable against Bridge Revenues, but as part of the cost of the

maintenance of highways: (3) That one account was in the discretion of the trustees to be kept for both bridges, and the nett revenues of both applied to payment of the whole bridge debt, so that the whole debt should be extinguished and both bridges become highways and free of toll at the same time: (4) That the trustees on erecting a new bridge in place of one of the existing bridges were entitled to levy the same dues and pontages as were leviable at the existing bridge.

The late Admiral Smollett of Bonhill was proprietor of an heritable right of ferry across the river Leven at Bonhill. In 1834, under the authority of the Justices of the Peace and Commissioners of Supply of the county of Dumbarton, as Conservators of Ferries, he erected a bridge in substitution of the ferry-boat, and he and his successors by the same authority levied for passage of the river by the bridge the dues, under certain modifications, which he had previously levied for passage by the ferry-boat.

The late Sir James Colquhoun of Luss, Bart., was proprietor of an heritable right of ferry across the Leven at Balloch. He also in 1842, under the same authority, erected a bridge, and he and his successors levied (under certain modifications) the same dues as those levied previously for passage by the ferry-boat.

On 3d January 1883 the Roads and Bridges (Scotland) Act 1878 came into operation in Dumbartonshire, and the County Road Trustees appointed in terms of section 12 a County Road Board, and divided the county into districts with district committees. In addition to Bridge Revenues, the County Road Trustees had three funds under their charge—(1) The Road Debt Assessment levied over the whole county from proprietors alone, in terms of sections 71 and 74 of the Act. (2) The fund applicable to general expenses. This fund was contributed by the districts into which the county was divided, out of the respective district assessments for maintenance and management of highways, in proportion to valuation, and was applied in payment of the general expenses incurred by the trustees and County Road Board in supervising the district committees, and in transacting the business of the trust so far as that was not delegated to the district committees. (3) The fund for district expenditure for maintenance and management of highways. This fund was provided by assessment on owners and occupiers of heritages in each district." The County Road Trustees appointed a county road clerk and treasurer and a county collector, in terms of section 28 of the Act, with fixed salaries, and each district committee appointed a district clerk and treasurer, and with consent of the trustees, a district collector and surveyor, also with fixed salaries, in terms of section 29 of the Act. Section 30 provides "that the salaries and allowances of the several officers and servants appointed and employed by the trustees and the board, and all other necessary general expenditure in the execution of the Act, shall be paid out of the several funds and revenues at the disposal of the trustees, in such manner, at such times, and in such proportions as the trustees shall from time to time fix and determine."

In reference to the bridges and rights of ferry the Act by section 93 made the following provision:—"Upon the expiration of six months after

the commencement of this Act [*i.e.* six months after 3d January 1883] in the county of Dumbarton, the bridges and rights of ferry over the river Leven, at the ferries of Balloch and Bonhill respectively, and the pontages or duties leviable thereat, shall vest in the County Road Trustees of that county, and those bridges shall be maintained and managed by them, and the right of the proprietors of the said bridges and ferries to levy such pontages or duties shall thereafter cease; and the said County Road Trustees shall, at the said date of vesting, pay to such proprietors respectively the values of the said bridges, rights of ferry, pontages, and duties as at the date of the commencement of this Act in the said county, with interest at the rate of five per centum per annum from and after the said date of commencement until payment, under deduction of the net proceeds of such pontages or duties during the said period of six months, of which the said proprietors shall keep an account; and such values shall, failing agreement, be determined, in the option of the said proprietors respectively, by arbitration or by jury trial, conducted in either case in manner provided by the Lands Clauses Consolidation (Scotland) Act 1845, and that Act, so far as the same regulates procedure with respect to arbitrations or jury trials, is incorporated with this Act. . . . The values so ascertained and determined shall be provided for by the said County Road Trustees as follows, that is to say—One-half thereof in the same manner as is by this Act provided with respect to road debts; and the other half by means of the pontages or duties levied at the said bridges as specified in the existing tables of charges, but subject to the modifications thereof allowed prior to the commencement of this Act in the said county, and those pontages and duties shall be levied by the said trustees until the moneys which they shall have borrowed in terms of the provision hereinafter contained so far as required for the purpose of paying such last-mentioned half to the said proprietors with interest thereon, together with one-half of the expense of maintaining the said bridges, and the whole expense of collecting the said pontages and duties shall have been paid and discharged out of such pontages or duties, whereupon the said bridges shall become highways and be free of toll. The said County Road Trustees may borrow the whole or any part of the money required for paying the said values and interest to the said proprietors on the security of the said pontages or duties, and of the assessments by this Act authorised, or any of them."

The proprietors of the ferries and bridges having failed to come to an agreement with the trustees in reference to the values thereof, these were submitted to arbitration, with the result that (the arbiters having differed in opinion) the oversman found that the sum payable to Mr Smollett and Sir J. Colquhoun in respect of their rights were £27,926 and £5775 respectively, which with £3078, 1s. 7d. interest amounted to £36,785, 1s. 7d. He further found the trustees liable in expenses to these gentlemen, and to the clerk to the proceedings, &c., in a sum of £2411, 4s. 8d., the whole sum amounting to £39,190, 6s. 3d. In order to pay this sum the trustees borrowed sums amounting to £39,000, whereof £18,000 (being the sum estimated as sufficient to meet the half of the

values directed by the 93d section of the Act to be paid out of the pontages levied at said bridges, after deduction of the nett proceeds of pontages received) was secured on the pontages or duties leviable at said bridges, and also on the County Road Debt Assessment, and £21,000 was secured on the County Road Debt Assessment alone. The trustees regarded the expenses paid by them in connection with these loans as part of the debt, and they proposed to charge the expenses of the loan of £21,000, amounting to £141, 18s. 2d., against the Road Debt Assessment, and the expenses of the loan of £18,000, amounting to £124, 17s. 10d., against Bridge Revenues.

In the County Valuation Roll of 1883-84 the bridges were, as they had been when private property, entered as "lands and heritages" at an annual value. On appeal by the trustees the Commissioners of Supply, and subsequently the Court of Session, confirmed these entries. In connection with these appeals the trustees incurred and paid expenses amounting to £37, 1s. 4d.

When the bridges came into the possession of the trustees they let them by public auction to tackmen.

The pontages and duties were let by the trustees under the condition that if local rates were exigible they would pay the occupiers' proportion thereof. The county rates were payable wholly by owners. The parish rates and road maintenance rates were payable one-half by owners and the other half by occupiers. Rates for road debt were payable wholly by owners. The trustees had paid from 1883 to 1885, as owners, £330, 14s. 10d., as occupiers, £303, 16s. 1d.

In the course of the arbitrations the trustees were advised, from inspections then made, that Balloch Bridge was not in safe condition for heavy traffic. They therefore had it inspected by two civil engineers, who reported that in their opinion it would be more expedient to erect a new bridge than to repair the existing structure, and they took precautions for regulating the traffic over the bridge, stationing a watchman to superintend the traffic, and taking additional precautions. The wages of the men so employed and extra expenses were defrayed by the trustees, one-half from the assessment for maintenance of highways, and the other half from the pontage revenues of Balloch Bridge, and the engineers' fees were defrayed in like manner.

This Special Case was presented by the trustees as first parties, and the proprietors and occupiers of heritages in the Vale of Leven, persons using the bridges, as second parties, for the opinion of the Court on questions between them arising on the facts already stated. (1) As regards the expense incurred incident to the compensation found due under the arbitration to Mr Smollett and to Sir J. Colquhoun, the first parties considered them as incident to the compensation, and proposed to recover one-half thereof from the revenues of the bridges. The second parties maintained that no part of the said half of the expenses was payable from the revenues of the bridges, and that the whole fell to be dealt with and paid as part of the general or district expenditure under the Act out of the funds raised to meet such expenditure. (2) As regards the expenses of the loan of £39,000, the first parties, as above stated, proposed to charge the expense of the £21,000 thereof, which was secured

on the County Road Assessment alone, which expense amounted to £141, 18s. 2d., against the Road Debt Assessment, and the expenses of the £18,000, secured on the pontages and duties leviable at the bridges, as well as on Road Debt Assessment, and which expenses amounted to £124, 17s. 10d., against the Bridge Revenues, while the second parties did not object as regarded the £141, 18s. 10d., but they maintained that the sum of £124, 17s. 10d. was not chargeable against Bridge Revenues, but must be dealt with as forming part of the general expenditure under the Act or charged against Road Debt Assessment or the cost of the maintenance of highways. As regards (3) the expenses connected with the letting by auction of the pontages, and (4) the expenses of the appeals to the Commissioners of Supply and to the Court of Session on the question of the Valuation Roll of 1883-84, the first parties proposed to charge them against the Bridge Revenues, while the second parties maintained that they were chargeable as the general expenditure under the Act or part of the cost of the maintenance of highways. As regards (5) the owner's proportion of the county, parish, and road rates on the bridges, (6) the expenses and fees of regulating the traffic on Balloch Bridge, and the fees of the engineers who inspected it, the parties maintained the same views as on the previous questions between them. (7) Expenses had been incurred in litigations between the trustees and members of the public regarding the right of the trustees to levy pontages and duties at the bridges, and the amounts. These expenses the trustees proposed to charge, or as much thereof as might fall on them, against Bridge Revenues, while the second parties contended that they ought to be payable from the assessment for maintenance of highways or the funds raised for the general expenditure of the trust. (8) The trustees kept a separate account for each bridge, crediting each with its own revenues, and debiting it with one-half of its cost or value paid by them and with the proportions of clerk's and treasurer's salaries above-mentioned, one-half of expense of regulating the traffic of the bridge, and the whole of the rates and taxes payable in respect of it; and also its proportion of one-half of the expenses of the arbitrations, its proportion of the whole cost of the valuation appeals, and of rousing the pontages, so that each bridge should separately become clear of debt, and be a highway and so free of tolls, whenever one-half of its own debt was paid out of its own revenues. The said proportions of expenses borne by the bridges were allocated between them in proportion to rental. The second parties contended that the bridges formed one property, and must be so dealt with by the trustees, and that they had no authority to keep separate accounts of the pontages or duties leviable at the bridges, and that the meaning of the said 93d section of the Act was that the bridges should be freed of debt and become highways contemporaneously. (9) It having become possible that Balloch Bridge might have to be rebuilt, a question had been raised as to the right of the trustees to levy pontage in respect of the new bridge when erected by them. The second parties maintained that if the existing bridge was removed the trustees would not be entitled to charge pontage dues on

any new bridge, in respect that by the 58th section of the Act it was declared that all new roads and bridges constructed by the County Road Board should be "highways." The trustees accordingly desired to have their right to levy such dues ascertained before incurring the heavy expense of erecting a new bridge.

The following were the questions submitted to the Court:—(1) Whether £1205, 12s. 4d., being one-half of the said £2411, 4s. 8d., the expenses of the arbitrations paid by the trustees, falls to be charged against the revenues of the foressaid bridges, or whether said sum is to be dealt with and charged as part of the general expenditure under the Act, or of the cost of maintenance of highways? (2) Whether the sum of £124, 17s. 10d., being the expenses incurred and paid by the trustees in connection with the said loan of £18,000, to pay the half of the values of the bridges, directed by section 93 of the Act to be paid out of Bridge Revenues, falls to be paid from said Bridge Revenues, or whether it falls to be paid out of Road Debt Assessment, or whether it forms part of the general expenditure under the Act, or of the cost of maintenance of highways? (3) Whether the annual expense of letting the pontages and duties leviable at the bridges is chargeable against the said Bridge Revenues, or whether it forms part of the general expenditure under the Act, or part of the cost of the maintenance of highways? (4) Whether the sum of £37, 1s. 4d., being the amount of the expenses incurred and paid by the trustees in connection with the said Valuation Appeals, falls to be paid from said Bridge Revenues, or whether said sum is to be paid as part of the general expenditure under the Act, or part of the cost of the maintenance of highways? (5) Whether the owners' proportions of the county, parish, and road rates on the bridges are chargeable against Bridge Revenues, or whether they form part of the general expenditure under the Act or part of the cost of the maintenance of highways? (6) Whether proportions of the salaries of the county road clerk and treasurer, and of the district road clerks and treasurers, and of the district road surveyor, are chargeable against the Bridge Revenues, or whether they are chargeable respectively as part of the general expenditure under the Act, or part of the cost of the maintenance of highways? (7) Whether any, and if so, what portion of the expenses of regulating the traffic on, and of the said fees paid to engineers for inspecting and reporting upon Balloch Bridge, is chargeable against the Bridge Revenues, or whether it is chargeable against the funds raised for the general expenditure under the Act or the assessment for the maintenance of highways? (8) Whether expenses of litigation incurred by the trustees in reference to the bridges, or the pontages and duties leviable thereat, are chargeable to said Bridge Revenues, or whether such expenses are chargeable as part of the general expenditure under the Act, or part of the cost of the maintenance of highways? (9) Whether only one account for both bridges ought to be kept by the trustees, and the nett revenues of both be applied to payment of the whole bridge debt, so that the whole debt shall be extinguished, and both bridges become highways and free of toll at the same time, or whether a separate

account must be kept for each bridge, and its nett revenues applied in payment of the proportion of debt applicable to it until such proportion be extinguished? (10) Are the trustees on their erecting a new bridge in place of that presently existing at Balloch entitled to levy the same dues and pontages as are leviable at the existing bridge?"

Argued for first parties—(1) The scheme of the 93d section was, that the costs and charges connected with the transfer of the bridges, and the rights of the proprietors, which had existed previous to the Act, should be divided into two equal parts, the one-half to be made a debt on the roads of the county, and the other half to be paid out of the pontages, which were to be continued till the other half should be paid. Now, though there was no special provision for expenses of the arbitration, yet if the section was to be construed soundly, it must be held to have authorised such expenses and costs as were necessarily incidental to the arbitration. (2) They were authorised by the section to raise the money by loan, and the expenses of that loan formed part of the debt on the pontages payable out of the Bridge Revenues. (3) The trustees had exercised their discretion in letting out the pontages as the best means of making them lucrative, and the expenses of this were just "part of the expense of collecting the said pontages and duties" in the sense of the statute. (4) The unsuccessful attempt to get the rates diminished also fell on the Bridge Revenues. (5) Their coffers were diminished by the payment of owner's proportions of rates, and they were entitled to continue the pontages till the bridge dues *minus* the rates paid out of them had paid off the half of the debt. (6) The expenses of the establishment were clearly debts on bridges, as were also (7) the expenses of engineers' fees, and of regulating the traffic on the bridges; and (8) the expenses of litigations with reference to pontages. (9) The bridges ought to be kept separately, and each bridge ought to be debited with one-half of its cost or value paid by them, so that each should become separately free of debt. (10) In the event of a new bridge being built at Balloch they were entitled to continue to pay pontages as before at the old one in terms of section 93, the provision of the statute as regards free tolls where a new bridge was erected being no bar to the working off of the debt by continuing the pontages of the old bridge.

Argued for second parties—On a sound construction of the 93d section there was a special appropriation of the bridges, and every expense not falling within it must be paid out of other funds in other sections of the Act. If this construction was adopted, then the matters referred to in the first eight questions formed part of the general expenditure under the Act, or part of the cost of the maintenance of highways. (9) A sound construction of the section suggested that the bridges should not be separately dealt with, but dealt with as one bridge, the pontages being levied till one-half of the debt was paid. (10) The 58th section of the Act declared that all new roads and bridges constituted by the County Road Board should be "highways," and therefore if the old bridge were removed the old pontages must cease.

At advising—

LORD JUSTICE-CLERK—We have heard this case very fully, and while the questions presented to us undoubtedly admit of two views, I shall state the impression which the argument has made upon my mind and the opinion I hold in a few words. My opinion I may add is a pretty strong one.

I. In the first place, I think there is a clear distinction as I have indicated in the course of Mr Mackintosh's speech between the expense incurred in placing the trustees in the position of being owners and collectors of these pontages and what may ensue afterwards in the management of this new fund which the Road Trustees are to be the masters of. The first and second questions regard that point:—"Whether £1205, 12s. 4d., being one-half of the said £2411, 4s. 8d., the expense of the arbitrations paid by the trustees, falls to be charged against the revenues of the foresaid bridges, or whether said sum is to be dealt with and charged as part of the general expenditure under the Act, or of the cost of maintenance of highways?" And "Whether the sum of £124, 17s. 10d., being the expenses incurred and paid by the trustees in connection with the said loan of £18,000, to pay the half of the values of the bridges, directed by section 93 of the Act to be paid out of Bridge Revenues, falls to be paid from said Bridge Revenues, or whether it falls to be paid out of Road Debt Assessment, or whether it forms part of the general expenditure under the Act or of the cost of maintenance of highways?" Now, in regard to the queries so put to us, I think that until the trustees have done all that they were required to do in the way of taking up their new position, that is, being vested in their new title so as to receive these pontages, all the expenses necessarily or rightly incurred in that operation must be charged against the funds which they thus acquired. They are properly incidental to the carrying out of the statute as provided by the 93d section thereof. The trustees are bound to acquire the pontages. They are bound to acquire the bridges themselves, and to a certain extent they are instructed by the 93d section how they are to deal with the funds. Now, the valuations—the arbitrations by which the value of the pontages or bridges were determined—seem to me to have been a necessary proceeding in order to find out how much was to be paid to the proprietors. I am therefore of opinion that that expense is very properly charged against the Bridge Revenues, because that was a necessary proceeding in order to establish the title of the trustees. The second question which I quoted along with the first falls under the same rule. It is quite true that the trustees were not bound to raise this loan for the purpose of paying these two proprietors. But it was necessary all the same that they should do that—that is to say, their funds did not admit of its being done in any more convenient way. The 93d section of the Act authorised them to raise the money by loan in terms which I need not repeat, if they thought proper to do so. Therefore on these two questions—which really raise the cardinal principle in this discussion—I am of opinion that the trustees are right. It is said, no doubt, that under the 119th section, sub-division 2, all funds coming into the hands of the trustees which are not otherwise provided for or appropriated are to be applied in

the way therein expressed. I do not think, however, that that gives us any assistance, because if I am right as to the principle of charging one-half against the revenue of the bridges, then that is a necessary appropriation of the funds for the purposes authorised by the statute.

III. The next question is, "Whether the annual expense of letting the pontages and duties leviable at the bridges is chargeable against the said Bridge Revenues, or whether it forms part of the general expenditure under the Act, or part of the cost of the maintenance of highways?" Apparently this question is not in dispute, and I pass on to question

IV. "Whether the sum of £37, 1s. 4d., being the amount of the expenses incurred and paid by the trustees in connection with the said Valuation Appeals, falls to be paid from said Bridge Revenues, or whether said sum is to be paid as part of the general expenditure under the Act, or part of the cost of the maintenance of highways?" In regard to this question I should have had difficulty in saying that the trustees are right. It is not a matter on which practice or general principle aid us much. It was only incurred once, and it is questionable whether it is worth while to struggle about that comparatively small sum which the trustees incurred in trying to relieve the Bridge Revenue. Failing to relieve the Bridge Revenue of this charge is an immaterial matter. My impression is that it barely falls under the general view I have been suggesting, because they entirely failed. It was a reasonable expense incurred as in a question with the general funds, but whether it was specific as regarded the bridge to which in the end it was found not to relate I have doubts.

V. Question 5—"Whether the owners' proportions of the county parish and other rates on the bridges are chargeable against Bridge Revenues, or whether they form part of the general expenditure under the Act, or part of the cost of the maintenance of highways?"—ought I think to be answered in favour of the trustees, because the rates on the Bridge Revenues are a proper deduction from the sum paid over into the coffers of the trustees.

VI. The sixth question relates to the salaries of the county and district officials. I do not think there should be any allocation against the Bridge Revenues of the salaries of the county road officials.

VII. and VIII. These questions we were hardly asked to consider.

IX. As to keeping one account for the whole bridges, I do not think that is a matter that the statute regulates one way or another. I think the trustees may do as they find most convenient and most conducive to public interest. Indeed, I should say that is more like the principle on which the whole case turns than anything to be learned from the statute. It is a matter not specifically regulated by statute, but a matter of general convenience for the community of the county and of the different districts. The trustees therefore in my view are entitled to hold the funds as one fund if they find that the most convenient thing for them to do.

X. The tenth question is of rather greater importance—"Are the trustees on their erecting a new bridge in place of that presently existing at Balloch entitled to levy the same dues and pont-

ages as are leviable at the existing bridge?" I have no doubt in regard to the answer which should be given to this question. If this bridge were destroyed by a *damnum fatale*, I do not doubt that the right to levy pontages would not cease. The trustees would build another bridge on whatever foundation they might choose, and in respect to that bridge so built they would be entitled to charge pontages just as they were entitled to charge duties upon the old.

These are the general views that occur to me upon these questions.

LORD YOUNG—I am generally of the same opinion and upon the same grounds. I have a slightly different view upon the second of the particular questions submitted to us. I do not however entertain any very strong opinion upon any of them, and this may be satisfactory in the view that the questions are almost all of them insignificant.

The case turns in my opinion entirely on the construction of clause 93 of the Act of Parliament. That clause not only admits of, but eminently requires construction; just as we construe it one way or other, our answers to these questions must be.

There were here two bridges. They were public bridges, in the sense that the public were absolutely entitled to use them; so they were in my opinion highways, that is, they were open to the Queen's subjects, and to all who were at peace with the Queen. Therefore I consider they were highways in the proper sense of the term. These bridges were in the county of Dumbarton, and both of them spanning the river Leven—one of them at Balloch, which belonged to Sir James Colquhoun, and the other at Bonhill which belonged to Mr Smollett. Both of these gentlemen had private rights in connection with these bridges of an exactly similar nature, the one to the other, and it is in that respect I say they were proprietors of the bridges. Prior to forty years ago there had been ferries across the river Leven at those points, and the gentlemen I have named were proprietors of the ferries, and entitled to levy dues from those who passed by means of the ferry. They built bridges as affording a more commodious means of passing from one side of the river to the other than boats afforded. When they built those bridges they were authorised to levy pontages upon those taking advantage of this less cumbrous mode of transit. In 1878 the bridges, together with the right to levy pontages thereat, which had theretofore been vested in Sir James Colquhoun and Mr Smollett respectively, were transferred by Act of Parliament to the County Road Trustees. I say, not only were the bridges transferred, but all the rights which those two gentlemen had possessed, were with the bridges transferred to the Road Trustees—the Road Trustees being bound by Act of Parliament to pay to these gentlemen the value of their respective rights, as the sum should be ascertained by arbitration failing an agreement between the parties. The trustees, I say, were absolutely bound to do that. Singularly enough the parties could not agree upon the value of the pontages and bridges that had existed for forty years, and it took no less than a sum of £2400 of law charges to ascertain the value of the pontages and bridges. That, in my view, is a very remarkable

fact. I do not understand it at all. I say I do not understand how the money value of the pontages and of the bridges which had existed for forty years should require £2400 of law charges to ascertain. But so it was.

Now, the scheme, as Mr Mackintosh very properly expressed it, of the Act was that the costs and charges connected with the transfer of these bridges and the rights of the private proprietors theretofore existing should be divided into two equal parts—the one-half to be made a debt on the roads of the county—that means a road debt—and the other half to be paid out of the pontages which the statute authorised to be transferred—that is, that the pontages should continue to be levied until that other half imposed on them should be paid. Of course I am speaking generally now, and perhaps in a way that may be taken exception to in the view of the argument maintained upon one side in this case. It is quite true that the bridges are to be open at last. It seemed wise to the Legislature, however, to divide the expense of acquiring the rights to them into two halves, and to constitute the one-half a road debt and the other a debt to be extinguished out of the pontages levied for that purpose upon the bridge until that half should be extinguished, and no longer. The trustees were authorised to borrow the whole of the money necessary for that purpose, and to continue the pontages as I have mentioned. I repeat that I have been using language in expressing myself thus generally which may be taken exception to in the view of the case presented to us by one side here. For that argument is, that it is only the values of the pontages, that is to say, the values of the private proprietor's right to levy the pontages at the respective bridges, only one-half of these that is to be defrayed out of the pontages—all the expenses connected with ascertaining the values, and borrowing the money under the statute to pay the values, being thrown along with the road debt constituted by the other half. In short, you are not to take the cost of acquiring the bridges and pontages from the private proprietors and vesting them in the Road Trustees, as the kind of cost with which clause 93 deals; but you are to except out of the actual cost properly incurred and defrayed, according to clause 93, so much as is paid to the private proprietors, and continue the pontage until one-half of them is paid, leaving the whole of the other costs and charges, quite properly and necessarily incurred under clause 93, to constitute a road debt. Now, I understand the argument upon which that is maintained, but I do not sympathise with it. And the first observation I have to make—I made it in the course of the discussion, and I repeat it now—is, that that clause 93 is the warrant for incurring the costs and charges, although it says nothing about it. The provisions of clause 93 saying nothing about the costs and charges, but authorising the ascertainment of the values, the costs, and charges incidental to that, and the borrowing of the money necessary to defray the charges, were necessarily incurred. The clause authorised the arbitrations, and it authorised the borrowings, and the arbitrations and borrowings being impossible without cost, this clause of the statute which authorised and required the thing to be done necessarily authorised and required the cost incidental thereto to be incurred. There is, I

repeat, total silence as to these costs and charges in that clause. Nevertheless, upon rules with which we are familiar, there is statutory authority and requirement to incur them. It is said, however, that there may be statutory authority to incur them, but no warrant for dividing them; but proceeding upon the same rules and principles of construction with which we are familiar, and which deduce power and duty to incur such charges, although there is absolute silence regarding them, I infer a direction to divide them, although there is silence also on that subject. For I think the scheme of the statute is to divide the cost equally, and I asked if there is any suggestion of reason or good sense which could lead to another conclusion. The only answer I got was that the statute says nothing on the subject. But the statute saying nothing on the subject leaves the costs nevertheless, well and properly incurred, to be regarded as incidents and accessories of the matters with reference to which they were incurred, and therefore to be divided in the manner in which the statute directs it to be divided—that is, equally, the one-half to go to a road debt, and the other half to be defrayed out of the pontages which are to be continued. My opinion, therefore, upon the first of these questions is in favour of the trustees. I think they have properly borrowed the money necessary to pay the values to the proprietors under the deduction of six months' pontages. I assumed they have borrowed as much as will do that, and also cover the expenses of ascertaining these values, which is first part of the cost paid for the acquisition of those bridges and pontages; and I think they are entitled to continue to levy the pontages as before until that half is paid. The question is a bagatelle after all; it is a half of £2411, 4s. 8d. of expenses of litigation and arbitration, and a half of £124, 17s. 10d. of expenses connected with the loan. It does not imply, I suppose, the continuance of these pontages for more than six months. It was hardly worth a litigation. It is a very trifling matter. The pontages must continue to be levied until the £18,000 are paid, and the paying of £124, 17s. 10d. more will make very little difference indeed—it will be only just appreciable. But my opinion, be the consequences material or not, is what I have stated on the first or second questions.

III. Upon the third question, whether the annual expense of letting is to be charged, I should be of opinion that it ought to be charged. I am of that opinion upon clause 93, which I think determines the whole matter. It says that the pontages are to be continued until, *inter alia*, the whole expense of collecting said pontages shall be paid. The "whole expense of collecting," but that is just a clumsy way of saying that the pontages are to be continued until the proceeds of them shall defray the one-half of this debt of borrowed money, the proceeds being the gross amount, under the deduction of the expense of ingathering it. As to the expense of collecting, the trustees, I assume in the proper discharge of their duty, quite reasonably determined that the most commodious and profitable mode of collecting pontages was to farm them out to tacksmen, who paid a rent and took their chance of the pontages being more or less profitable. I assume that that was quite lawful, there being no argument addressed to

us to the contrary. It is the practice in regard to the tolls of many road trusts, it being quite the exception for road trustees to keep the collection in their own hands. And so the trustees here, in whom these pontages or bridge dues are vested by statute, and who are charged with the duty of collecting them, collecting them by farming them out, taking the proceeds in the shape of rent. I think the expense of farming them out, assuming that to be the most commodious mode of collection, is part of the expense of collection, and the revenue they derived from the pontages is the revenue under deduction of that. It must necessarily be a bagatelle, but still it is presented to us for decision, and was solemnly argued before us. The inclination of my opinion would be rather in favour of the trustees there also.

The fourth question relates to the magnificent sum of £37, 1s. 4d. I daresay we had upon that something approaching to an hour's argument—four speeches upon it—and I almost shrink from adding to it. It has, however, produced an impression upon my mind, and I must state it. These pontages were vested in the trustees with the duty of collecting them, to make the most of them for the public purpose with which they are charged—that is, to pay off this borrowed money. The question arose whether these were subject to rates—that is to say, to local and imperial taxation. Now, I think that was a shrewd question, and it depended entirely upon this, whether these bridges were to be regarded as rent-yielding heritages or not. If they were rent-yielding heritages, then they were subject to be rated, and I suppose otherwise not. It is not a question of income-tax. The question was, were these bridges a rent-yielding-subject? The tax-gatherers say they are, for you collect dues in respect of being the owners of them; these pontages are just rents, and you let the bridges to farmers, who pay you rent for them, and take their chance of the dues as crops to pay their rent with. The trustees as public trustees vested with these pontages, and having a duty to make the most of them, tried that question at a cost of £31, 1s. 4d. The question is, whether they are to pay that cost out of the pontages, being part of the revenue which the litigation concerned, or out of other revenue in their hands which the litigation had no concern with. I confess I rather incline to the opinion that the litigation being proper and reasonable to public trustees, which indeed was not questioned, who must pay it out of some revenue, ought, according to the view that commends itself to my mind, to pay it out of the revenue which alone the litigation concerned, and not out of a revenue which was not interested in the litigation, although drawn by the same trustees. But I am sorry we have had so much argument on so small a matter, and it is a matter almost of indifference how it is answered.

V. The fifth question regards the rates themselves. The trustees were unsuccessful in the litigation, and they had to pay rates. Now, the rates would be levied (as all such rates are) upon the tenant, who would bear his own half and deduct the landlord's half from the rent; therefore to the extent of the rates deducted from the revenue from these bridges—that is, the bridge dues in the hands of the trustees would be diminished. They would have so much less to pay off the

borrowed money with. I should therefore think it clear that they are entitled to continue the pontages until the bridge dues *minus* the rates that have been paid out of them have paid off the half of the debt borrowed as the statute provides.

VI. Upon question six I altogether agree with your Lordship. I do not sympathise with the view that a proportional part of the expense of the general establishment of the Road Trustees ought to be apportioned on these bridge dues in the absence of any evidence to show that the expense was increased by these bridge dues being handed over to trustees.

VII. Question 7, and the objection to the conduct of the trustees which it imports, was not insisted in, and that question therefore will be answered in favour of the trustees.

VIII. The question also which applies to the expense of litigation incurred by the trustees in reference to the bridges and pontages or duties leviable thereat, the conduct of the trustees not being questioned, will have to be answered in favour of the trustees.

IX. On question 9 I sympathise with your Lordship's view, and would be inclined to state it more decidedly. I think the statute favours the continuance of pontages at these bridges until one-half of the debt is paid, and that the bridges are not to be dealt with separately but as one bridge—the pontages on both continuing to be levied until one-half of the debt is paid.

X. That leaves me only the tenth question to mention, and even on it I have perhaps sufficiently indicated my opinion in the course of the argument. Whether the existing bridge is upheld or, as the more proper thing with reference to all interests, new bridges are built, bridge dues and pontages must continue to be levied thereat until one-half of the statutory debt is paid as thereby provided. I do not assent at all to the argument if a new bridge is built that shall become a highway free of toll. The provision of the statute as regards free tolls was not intended to operate, and does not operate, in this matter. Freedom from tolls was not intended to interfere with the provision in clause 93 that bridge duties and pontages were to be levied at these old bridges until a particular sum was paid off. Therefore I should answer that question accordingly.

LORD CRAIGHILL—I concur in the opinion which your Lordship and Lord Young have expressed. I do not think it necessary that I should repeat the reasons your Lordships have given for your judgment. I had some doubt and hesitation at first with regard to the answer which should be given to questions 6 and 9, but on the whole I think that the conclusion at which you have arrived is that which ought to be adopted. It is not of great importance one way or another any more than any of the other questions, but I am not prepared in respect of my reading of those questions to differ from your Lordship's judgment.

LORD RUTHERFURD CLARK — I was a good deal impressed in the course of the discussion with the argument presented by the second parties as to the special appropriation of these funds—I mean on the pontages—but on the whole I

am disposed to agree with the judgment proposed.

LORD JUSTICE-CLERK—Then upon all the questions excepting No. 6 we find in favour of the trustees.

The Court answered the questions as follows:—

“*First*, that the sum of £1205, 12s. 4d. mentioned in the first question is chargeable against the Bridge Revenues mentioned in the Special Case. *Second*, that the sum of £124, 17s. 10d. mentioned in the second question is chargeable against the said Bridge Revenues. *Third*, that the annual expense of letting the pontages and duties leviable at the bridges is chargeable against the said Bridge Revenues. *Fourth*, that the sum of £37, 1s. 4d. mentioned in the fourth question is chargeable against the said Bridge Revenues. *Fifth*, that the owner's proportion of the county, parish, and road rates on the bridges is chargeable against the said Bridge Revenues. *Sixth*, that the salaries of the county road clerk and treasurer, and of the district road clerks and treasurers, and of the district road surveyor, are chargeable as part of the general expenditure of the road trust. *Seventh*, that one-half of the expenses of regulating the traffic on Balloch Bridge, and of the fees paid to engineers for inspecting and reporting on the said bridge, mentioned in article 18 of the Special Case, are chargeable against the said Bridge Revenues, and that the other half is chargeable against the assessment for the maintenance of highways. *Eighth*, that the expenses of litigations incurred by the trustees in reference to the bridges or the pontages and duties leviable thereat, mentioned in article 19 of the Special Case, are chargeable against the said Bridge Revenues. *Ninth*, that only one account for both bridges ought to be kept by the trustees, and that the nett revenues of both bridges ought to be applied to payment of the whole bridge debt, so that the whole debt shall be extinguished and both bridges become highways and free of toll at the same time. *Tenth*, that in the event of the trustees erecting a new bridge in place of the present Balloch Bridge, they will be entitled to levy dues and pontages thereat in the same way and under the same conditions as the same are now leviable at the present Balloch Bridge, until the whole existing bridge debt is paid: Find and declare in terms of the foregoing answers.”

Counsel for First Parties—Gloag—Jameson. Agents—C. & A. S. Douglas, W.S.

Counsel for Second Parties—Mackintosh—Low. Agents—J. & J. Ross, W.S.