there was no right of way existing; none asserted, none recognised—nothing but ordinary good feeling and good neighbourhood appealed to. If that be the correct view, I cannot ascribe that to right which may be and is reasonably accounted for, not by any exceptional goodness, but to the mere fact of a disposition to prevent others from taking a use which does no harm, and which is so infrequent as, even at the period when the most frequent use was made of it, not to exceed twice a year.

It is, I should think, very far from being in the interests of those who wish to maintain public rights of way to proclaim to all landed proprietors of hillsides and barren country—"Now remember, that—although people are doing you no harm by taking this occasional use of your property, really affording society to your people who live in this remote and out-of-the-way place, and who are willing to afford hospitality to them—although it will do you no harm, although even a tourist wishing a picturesque view, climb up a hillside without you even knowing it, certainly doing you no harm, and with which a good-natured man would not interfere—unless you set watchers, unless you take precautions to prevent it, there will be a public right-of-way established and declared which will eventually prejudice you in the event of your desiring to use your property in a way which this would interfere with." I should think that a very undesirable proclamation to make to all landed proprietors, and, besides, we must have some consideration for this, that to watch a road over a barren country, extending to 14 miles, to turn off trespassers—assuming them to be trespassers—is entirely out of the question. You cannot do it, and what I proceed upon here, therefore, is that there was a very occasional and rare and harmless use made here, such as no ordinary proprietor or tenant would under ordinary circumstances dream of interfering with, and that if the character of a public road depends upon usage, assertion openly made and openly assented to, that there is no such case established here. I therefore not only think that the case is narrow in the sense of there being very little usage, but that there is no evidence of usage at all, or, I should say, evidence of very little. So far as my judgment goes I think the conclusion that by such evidence a public right is established is absolutely hurtful and prejudicial to the public, because it will set all proprietors upon their guard to stop innocent, and to them perfectly harmless, use as the only way in which they can prevent a public right being established. The Lord Ordinary, in the passage which I have already read, says the question is whether such use as has been proved is to be ascribed to right or tolerance by the proprietor. Why is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered by applying to a court of law to prevent it on any of the occasions referred to? He would have got a very bad character among his neighbours, and I think deservedly so. And why? Because he was intolerant. But if he is not intolerant, and does not appeal to a court of law to stop what is affording innocent amusement, however rare and occasional, to some, and also convenience, also very rare and occasional, to others—if he is not intolerant, and does not appeal to a court of law—he is to be told: "It is not toleration at all, it is matter of right, and the use you may think right hereafter to make of your property will be interfered with by declaring a public right along a particular line. The absence of intolerance on your part shall not be ascribed to tolerance, but to a right asserted and yielded to." I think it right to make these observations because they are expressive of the opinions and views that press upon my mind, although I repeat what I began by saying that the question is one of fact, and your Lordships agreeing with the Lord Ordinary have given an answer to it. I can have no confidence in my own opinion to the contrary.

The Court adhered, and remitted the case to the Lord Ordinary for further procedure.

Counsel for the Reclaimer—Sol.-Gen. Robertson—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Counsel for the Respondents—Graham Murray—W. C. Smith—A. S. D. Thomson. Agent—Andrew Newlands, S.S.C.

Friday, July 8.

FIRST DIVISION.

THE COUNTY ROAD TRUSTEES OF THE COUNTY OF THE LOWER WARD OF LANARK *v.* MAGISTRATES OF GLASGOW AND OTHERS.

Road—Bridge partly in a Burgh and partly in a County, and Accommodating Outside Traffic—Liability for Maintenance—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 88.

In the case of a bridge which was locally situated partly in a county and partly in a burgh, and which accommodated traffic from an adjoining county and an adjoining burgh, *held* that under the 88th section of the Roads and Bridges (Scotland) Act 1878 the Secretary of State had power to determine, if he saw fit, that the bridge should be deemed to belong in common to the two counties and the two burghs, and to apportion among them, in such way as he should think right, the expense of managing, maintaining, repairing, or rebuilding the bridge.

Right to Participate in Management.

Held that the two districts within which the bridge was not locally situated were entitled, as they were liable for its maintenance, to be represented in its management.

On the line of the Dalmarnock Road, between the city of Glasgow and the burgh of Rutherglen, the river Clyde was crossed by a bridge called Dalmarnock Bridge. The northern half of the said bridge was locally situated within the burgh of Glasgow, and the southern half was situated in the county of the Lower Ward of Lanark. The bridge was in a bad state of repair, and, owing to its construction and condition, required to be replaced by a new bridge. The County Road Trustees of the Lower Ward of Lanark applied

to the Secretary for Scotland, hereinafter referred to as the Secretary of State, under the 88th section of the Roads and Bridges (Scotland) Act 1878, to determine that Dalmarnock Bridge, in respect of its accommodating other traffic than that of the county of the Lower Ward of Lanark and the city of Glasgow, should be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination.

Section 88 enacts—"Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county or of other counties and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and if need be, rebuilding such bridges, and of paying the debt affecting or which may affect the same, should be imposed upon the county or burgh within which they are so situated: Be it enacted that in respect of such bridges the following provisions shall have effect:—

"(1) The trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situated, and may agree as to the proportions in which the debt (if any), and the cost of maintenance, and if need be of rebuilding such bridge, shall be borne and defrayed by the county or counties and burgh or burghs to which it is common; and such agreement, when confirmed by a resolution of the trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an order by the Secretary of State, as provided hereinafter.

"(2) It shall be lawful for the county road clerk or clerk of supply of any county, or for the town-clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be decreed to belong in common to the county or counties and burgh or burghs to be named in his determination.

"(3) Upon such application being presented to the Secretary of State, he may, if he shall think fit, by any writing under his hand, appoint any two persons as commissioners to institute a local inquiry as to the circumstances of the case, and after hearing all parties interested, to report thereon to the Secretary of State, and for the purposes of such inquiry the commissioners shall have power, after such public notice as they may think sufficient, to examine witnesses on oath, and to call for such documents as they may consider necessary, and to do all such matters and things as may seem expedient to them for the purposes of the inquiry.

"(4) If the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and if need be rebuilding the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Secretary of State should make, setting forth therein the proportions in which such burden should be borne by the county or counties which, as part or parts, or district or districts of such county or counties, or by the burgh or burghs named in the determination.

"(5) The Secretary of State after such further inquiry, if any, as he shall deem necessary, may approve of the draft submitted with or without alterations, and any determination made by him under his hand and seal shall have the same effect as if it were contained in this Act, &c. . . ."

In terms of said section Christopher N. Johnston, advocate, Edinburgh, and Alexander Moore, chartered accountant, Glasgow, were appointed Commissioners to institute the local inquiry, and to make the report provided for by the said section of the Act.

In the course of the inquiry a difference between the parties as to the construction of the Roads and Bridges (Scotland) Act 1878 came under the notice of the Commissioners, and as the true construction of that statute was a question which fell to be settled by a court of law and not by them, they stayed procedure to enable a Special Case to be prepared and submitted to the Court.

A Special Case was accordingly adjusted, to which the County Road Trustees of the County of the Lower Ward of Lanark were the *first* parties, the Magistrates and Town Council of Glasgow were the *second* parties, the County Road Trustees for the County of the Middle Ward of Lanark were the *third* parties, and the Magistrates and Town Council of the Burgh of Rutherglen were the *fourth* parties; and the judgment of the Court was craved upon these questions—"I. Has the Secretary of State power under the Roads and Bridges (Scotland) Act 1878 to determine, if he sees fit, that Dalmarnock Bridge shall be deemed to belong in common to the County of the Lower Ward of Lanark, the City of Glasgow, the County of the Middle Ward of Lanark, and the Burgh of Rutherglen, and to apportion among them in his determination, in such way as he thinks right, the expense of managing, maintaining, repairing, and, if need be, rebuilding said bridge? or, Has the Secretary of State power to determine only the proportions of said expense to be borne by the third and fourth parties, and does the balance of said expense fall to be borne equally by the first and second parties?

"II. In the event of it being determined by the Secretary of State that the County of the Middle Ward of Lanark and the Burgh of Rutherglen are bound to contribute to the expense of rebuilding and maintaining Dalmarnock Bridge, are said county and burgh entitled to take part in the management of said bridge and to appoint representatives on the Joint Bridge Committee thereof?"

For the purposes of the Case parties were agreed that Dalmarnock Bridge accommodated in the sense of the said 88th section, not only the traffic of the County of the Lower Ward of Lanark and of the City of Glasgow, but also that of the County of the Middle Ward of Lanark and of the Burgh of Rutherglen.

As regarded liability, the first, third, and fourth parties maintained that on a sound construction of the statute the Secretary of State fell to declare that Dalmarnock Bridge should be deemed to belong in common to the whole parties hereto, and to apportion the expenses among them severally in such proportions as might be right, having regard to the extent of the use of said bridge by the respective localities and other similar considerations; and that the Commissioners ought to submit a draft determination giving effect to this view.

The second parties maintained that the relative liabilities of the first and second parties for the expense of maintaining, managing, repairing, and if need be rebuilding the bridge, were settled by sections 11 and 37 of the Roads and Bridges (Scotland) Act 1878, and that such liabilities must remain equal to each other, and that section 88 of the said Act made provision whereby "the adjoining county, or other counties or burgh or burghs" (other than those whose liability is fixed by the local situation of the bridge), whose traffic was accommodated by the bridge, might be called upon to contribute towards such expense.

Further, they maintained that the duty of the said Commissioners was confined, and the determination of the Secretary of State was accordingly limited to fixing the contributions to be made by the county of the Middle Ward of Lanark and the burgh of Rutherglen towards such expense, leaving the balance thereof to be defrayed by the first and second parties equally in terms of section 37.

Section 37 (1) (*d*) enacts—"Where a bridge is not situated wholly within one county or burgh, the expense of maintaining, and if need be of rebuilding the same, shall, failing agreement, be a charge equally against the trustees of the county or counties and local authority or authorities of the burgh or burghs within which it is partly situated. The management of the bridge shall, failing agreement, be vested in a committee (hereinafter called a joint bridge committee), to be appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding."

As regarded management, the second parties contended as against the third and fourth parties, that in any case they had no right to share the management of the bridge.

The second parties referred to the case of *Magistrates of Glasgow* v. *Police Commissioners of Hillhead*, March 20, 1885, 22 S.L.R. 580, 12 R. 864, *affd.* 23 S.L.R. 620, 13 R. 110, 11 App. Ca. 699.

At advising—

Lord Mure—In this Special Case a question is raised between four different parties, or sets of trustees, who are subject to the liability of maintaining a bridge over the Clyde at Dalmarnock under the provisions of the Roads and Bridges (Scotland) Act 1878, and those parties are the Road Trustees of the Lower Ward of the County of Lanark as the first party, the Town Council of Glasgow as the second party, the bridge being situated partly on ground within the bounds of the town of Glasgow, and partly on ground within the bounds of the County Road Trustees of the Lower Ward of Lanarkshire, and the other parties to the case are the County Road Trustees of the Middle Ward of Lanarkshire, and the Magistrates and Town Council of the burgh of Rutherglen, as parties in the situation of being accommodated for their traffic by that bridge in passing and repassing the Clyde, although no portion of the bridge is built upon their property, and the question is as to the power of the Secretary of State to deal with the claims of those parties in the apportionment of their liability.

Now, there is no question raised here as to the circumstances of the case bringing these parties within the operation of the 88th section of the statute. They are agreed that in the circumstances their respective rights are to be regulated under the provisions of that section. But the town of Glasgow, the second party, maintain that although their liability is to be regulated by the provisions of that statute, it is to be done so subject to this qualification, that whatever portion of the expense of maintaining and rebuilding this bridge is laid upon the burgh of Rutherglen, and the trustees of the Middle Ward, the shares of the town of Glasgow and the Lower Ward respectively must be equal, because the 37th section expressly provides that where a bridge is locally situated, as regards the situation, in the same way as this bridge is, the town and the county respectively shall bear an equal share of the expense of maintaining or rebuilding it, and that that being so, the way in which the liability is to be dealt with under the 88th section is, that the Secretary of State shall fix what in the circumstances of the case is a proper amount of contribution to be made by the town of Rutherglen and the Middle Ward of Lanarkshire, for the accommodation which is afforded to them by this bridge, and having fixed that, shall then divide equally the balance which remains between the town of Glasgow and the Lower Ward. That is the contention of the town of Glasgow. The Lower Ward of the county and the third and fourth parties, that is, Rutherglen and the Middle Ward, maintain on the other hand that when a bridge comes within the operation of the 88th section of the statute, it is competent for the Secretary of State, in dealing with the application which may be made to him for the fixing of the expense, to fix those proportions in any way that to him may seem just.

Now, the case substantially must be ruled by the 88th section, because there is no provision under the 37th section for burghs in the position of Rutherglen here, or Road Trustees in the position of the Middle Ward Trustees, because having no property in the bridge, they are to be called upon to pay for the accommodation that it is supposed to afford to them, and the expense they thereby incur in the maintenance and keeping up of that bridge. But after reading this 88th section with careful consideration, although it is attended with some little dubiety, I have come to the conclusion that the contention of the town of Glasgow is not well founded. When a bridge is situated as this is, and there are only two parties interested in it and so liable for its maintenance, there is no doubt that their respective liability is fixed equally between them by the express provision of the 37th section. But where in addition to the parties upon whose property the bridge is

built, there are outlying portions of the county or separate burghs that are largely accommodated by the bridge, and it becomes necessary to have recourse to the 88th section of the statute, it appears to me that it is by the provisions of the 88th section that the responsibility of parties so situated is intended to be regulated, and that the words of the 88th section are sufficiently broad to entitle the Lower Ward of the county and burgh of Rutherglen, and the Middle Ward to maintain what they do maintain. Now, the section runs thus—"Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county or of other counties or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and if need be rebuilding such bridges, and of paying the debt affecting or which may affect the same, should be imposed upon the county or burgh within which they are so situated: Be it enacted that in respect of such bridges the following provisions shall have effect." And sub-section 1 is as follows:—"The trustees of counties and burgh authorities may agree that any such bridges accommodate other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which the debt, if any, and the cost of maintenance, and if need be of rebuilding such bridge shall be borne and defrayed by the county or counties and burgh or burghs to which it is common; and such agreement, when confirmed by a resolution of the trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an order by the Secretary of State." Power is given to the trustees there to agree as to the proportions in which the debt and the cost of maintenance is to be borne.

Then the section goes on to provide for the case where the trustees do not agree. Under the first sub-section it is plain they may fix amongst themselves what proportions they like, but when they do not agree then they come under the operation of sub-section 2, which provides that "it shall be lawful for the county road clerk or clerk of supply of any county, or for the town-clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination." Now, the general power given to the Secretary of State by that second sub-section is that he shall declare that each particular one of these burghs or portions of counties has a common property in the bridge—that it shall belong in common to the county and the burgh. That is what he has power to do.

Then the machinery is provided by which that power is to be carried out; and that is done by the third and fourth sub-sections. Under the third, when an application is made to the Secretary of State, he is to appoint commissioners to report to him. And then the fourth sub-section provides—"If the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and if need be rebuilding the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Home Secretary should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs, named in the determination." Now, in the view I take of that fourth sub-section, following upon the words in which the general nature of the inquiry is said to be to ascertain the rights and the uses the respective parties make of the bridge,—its object being to enable the Secretary of State to decide upon the common property and use of the bridge,—it appears to me that the general words which are used in sub-section 4 put it in the power of the Secretary of State, by the directions he gives to these commissioners, to decide what the proportions are that each party, however numerous they may be, who come before him, is to bear in the expenses and the burden of that bridge. I cannot read these general words in any other sense. The contention on the part of the town of Glasgow implies the writing into the fourth sub-section words which I do not find there, and for the use of which I think there is no authority, because what the town of Glasgow maintains is this, that the provision for adjoining counties and burghs in that section shall be read with these words introduced—"other than those whose liability is fixed by the local situation of the bridge." Now, there are no such words to be found in sub-section 4 of section 88, but the contention of the town of Glasgow would involve the writing in of those words at the end of sub-section 4, instead of being in the general terms in which it now is. That is to say, taking the very words of their contention from the case, they would read in after the word "determination" the words "other than those whose liability is fixed by the local situation of the bridge." That is just what the section does not contain, and it is the omission of any such special provision of that sort, keeping up what they maintain as the general provision of the 37th section, that makes me think that sub-section 4 is conclusive against the claim of the town of Glasgow in this case.

We were referred to the decision of the House of Lords in *The Magistrates of Glasgow* v. *Police Commissioners of Hillhead*, March 20, 1885, 12 R. 864; May 14, 1885, 23 S.L.R. 620; 11 App. Cas. 699, on this point, and though it was admitted that it did not rule this question, it was argued that some of the opinions of the Judges, particularly of Lord Herschel, pointed at a construction favourable to the town of Glasgow. I have looked carefully into this question, and taking the expressions precisely as they are used, they are *obiter* of this question, but the expression of Lord Herschel founded on was where his Lordship dealt with the 37th section, dealing with those cases where there were only two parties,—where equal liability had to be fixed. But that leaves open the question where four sets of parties enter into the case. I agree with his Lordship in thinking that that section is con-

clusive on the kind of cases that alone are dealt with; but whenever that section does not rule, and it does not rule here any more than it ruled in the case of *Hillhead*, I do not think you can import into it a general provision of that sort, made to meet a set of circumstances very different from that for which the 88th section provides. On that ground I come to the conclusion that the contention of the town of Glasgow is not well founded, and that the first alternative of the first question should be answered in the affirmative.

There still remains the second question, as to management. If I am right on the first question, the Secretary of State will hold that this bridge is the common property, not of the town of Glasgow and the Lower Ward, but of the town of Glasgow, the Lower Ward, the Middle Ward, and the burgh of Rutherglen; and that being so, it appears to me that if they are jointly responsible in certain proportions for the expense of maintaining or rebuilding that bridge, it seems to follow as a necessary consequence that these new proprietors who are brought in shall have a say in the management of the bridge that they are to pay for, and therefore the Magistrates of Rutherglen and the trustees of the Middle Ward are entitled to be represented on the board of management of this bridge which is provided for by the earlier sections of this statute. As they are to have a considerable burden laid upon them, they are entitled to have a voice as to how the management expenses are to be applied, and I think we must answer the second question by saying that they are entitled to take part in the management, subject to the rules of the statute.

Lord Shand—I think it is the result of the decision in the case of the *Hillhead Commissioners*—as I am of opinion that it is also the effect of this statute—that section 37 applies only to a case where the liability for the maintenance and repair of a bridge rests on the authorities within whose localities or districts the bridge is situated, and does not apply to what in the former case was described as outside traffic, by which I mean a case in which the authorities who furnish outside traffic, and who have no property in the bridge, may be called upon to contribute to the maintenance of it. Where you have, as under section 37, the liability confined to the local authorities within whose districts the bridge is situated, the statute expressly provides for equal liability. I suppose that provision will have effect in almost every case in Scotland as directed against two parties, and two only, where outside traffic is not brought in; but there may be cases in which a bridge may be locally situated within three districts, as, for example, if there be such a case, where the centre line of the bridge goes to a turnpike road, part of which is in one county and part in another. There again section 37 applies, because the bridge is locally within these different localities, and again the provision of the statute applies so that in that case there would be equal liability, which in the case I have figured would be a tripartite liability. Again, in regard to the management of such bridges, you have also as part of section 37 a provision that the management, failing agreement, shall be vested in a committee (called the joint bridge committee) to be appointed by the trustees or local authorities chargeable with the cost of maintenance or rebuilding. The management is to be co-ordinate and commensurate with the liability, and if there be no outside traffic, then the liability being equal upon the part of those who are owners of the bridge, the management must be represented in the same way, and we find that by section 39 there are provisions for the appointment of a joint bridge committee to be appointed annually, in which it is provided that each road authority may appoint not more than five persons to be members of that committee, but further that in the event of any question falling to be determined by votes, each road authority shall jointly have one vote, and one vote only on the board.

Now, that rule, which is limited to the case where the liability arises from the local situation of the bridge only, seems a very reasonable rule to be adopted in that general case. The statute might have provided that there should be commissioners in every case to determine whether there should be a measure of liability because one of these authorities took rather more use of the bridge than another; but one can very well see that it was a much more expedient and a much better plan in a case of that kind, where you had the marked feature of direct property in the bridge, that a somewhat rough-and-ready rule should be taken, and that the liability should be declared to be equal. When we come to the other set of provisions, which are intended to regulate not merely the case of traffic such as I have figured but the case of outside traffic—where counties that have no real property, or burghs that have no real property in a bridge are yet using it extensively, so extensively that it may be they are taking the chief use of it—when we come to deal with that, I think we have an entirely new set of provisions as to liability altogether; and there, I think, comes in the provision of the statute, that as there are different elements to be taken into view, the Secretary of State, with the benefit of a report by commissioners, shall settle the proportions in which the different contributors of traffic shall bear the expense of maintenance and management of the bridge. And the general view I take of section 88, which I think is entirely borne out by the decision in the case of the *Hillhead Commissioners*, is simply this, that while section 37 is intended for the class of bridges I have first referred to, so section 88 is intended to form in itself practically a code with reference to the bridges which are in this position, that outside counties or burghs are to be called upon to contribute.

Now, taking that to be so, I am entirely of the opinion which my brother Lord Mure has expressed, and I adopt entirely the observations which his Lordship has made. It appears to me that the contention of the parties to this case, other than the town of Glasgow, is sound, and that this arises upon several grounds, which may be gathered from the provisions of section 88. In the first place, it is of importance to notice that under sub-section 2 it becomes the duty of the Secretary of State, where there is an application made to him to determine that a bridge is accommodating other traffic than that of the county or burgh in which it is situated—it is his duty, in the order which he makes, to name in

his determination the whole of the bodies that are to contribute to the building and maintenance of the bridge. I say that is of importance, because it will be observed that the words with which sub-section 2 concludes, "to be named in his determination," are again to be found at the end of sub-section 4, where their importance is great. The application having been presented to the Secretary of State, what he is called upon to determine is this, "to determine that any bridge locally situated within a county or burgh, in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination." The determination will not be complete by merely naming the two outside burghs or counties that contribute outside traffic. The clause is so framed that he must name all the parties in his determination to whom this bridge is to belong in common, because if you proceeded only to name two of these, you would not be stating the persons to whom the bridge is to belong in common. You require to exhaust the whole of them. Well, in the next place, you not only get the authorities within whose district the bridge is situated so named, and the authorities contributing traffic, but you get this further declaration by the Secretary of State, that the bridge shall be deemed to belong in common to these different parties. Of course that determination does not transfer the property of the bridge. The property remains as before; but for the purposes of this statute in reference to maintenance and contribution it shall be deemed to belong in common to these as well as to the bodies to whom it really does belong. But it seems to me to go a very long way in the determination of this case, upon the question of expense of building, maintenance, and management, if you find that there is a determination that the bridge belongs in common to these four different parties—is to be deemed to belong to them, so that they shall have at all events the responsibilities, if not the full rights, of proprietors of the bridge; so there again you have a second feature which is of importance here. But there, of course, the question ultimately comes to turn upon sub-section 4. Sub-section 3 provides that the Secretary of State shall have the assistance of two persons as commissioners, who shall institute a local inquiry; and sub-section 4 provides that "if the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and if need be rebuilding, the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Secretary of State should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh and burghs, named in the determination." Now, I have shown that all of the parties have been named in the determination, and if the commissioners are to report to the Secretary of State, and the Secretary of State is to report to Parliament, the names of those who are to contribute, he is further to report the proportions in which such burden should be borne by those different bodies so named. How is it possible to read that in this way, that in regard to two of those—the two who are proprietors of the bridge on each side—the proportions are already fixed? That would be introducing into the statute an element for which there is no warrant. The Secretary of State, through those commissioners, is to fix the proportion of each of them, and as Lord Mure has observed, in order to give effect to the argument for the City of Glasgow, one would require to introduce limiting terms indicating that the proportions of two of them have already been fixed, and fixed irrevocably, by the statute. I think it is impossible to take, and so far as I am concerned I cannot take, that view. I think that in regard to the whole of this class of bridges the statute has introduced a new and different element—probably an element in which there is greater equity than that which applies to section 37, viz., the element of what is fair and reasonable in the circumstances, looking to the traffic which each of these four bodies contributes; and I think it is clear, on the grounds I have now stated, that the Secretary of State has the power to fix the proportions in which each of the different bodies shall contribute, upon principles which shall commend themselves to his mind as fair and reasonable. He may very well, so far as he thinks right, take into view the previous provision in section 37 as applicable to bridges in the position to which that section applies, as an element in his mind in fixing what is reasonable as a proportion when he comes to deal with such a case as we have before us, but I hold that under this statute he is absolutely entitled and bound to exercise a reasonable discretion in fixing the fair burden as applicable to each of these bodies, and I think that is a very fair and reasonable thing to be done in such circumstances.

I have only to add upon this part of the case that I think the view which Lord Mure has stated of the statute, and with which I concur, is very much borne out by sub-section 1 of section 88, which gives the whole of the different bodies in such a position as the present the power of making agreements, and, instead of resorting to the Secretary of State, of arranging amongst themselves to avoid the expense and delay in bringing the machinery of the other sub-sections into operation, and themselves arranging the proportions. I can see nothing to prevent any of these bodies from entering into an arrangement by which they may fix the amounts at any proportion they think fit, or bind themselves down to this, that the contributions of two of them shall stand in a certain proportion.

The only other question in the case is that which relates to management, and here undoubtedly we are confronted with the difficulty—I do not think it a serious or important one—that in section 88 we have no direct provision for management. On the other hand, we start with this, from section 88, that if, as in the present case, four different bodies are deemed to hold this bridge in common, and, in the next place, are to be obliged to contribute in certain proportions which may be fixed by the Secretary of State to the building and maintaining of the bridge, each of these parties should have a voice in the manage-

ment; and that being so, I do not think that there is much difficulty in finding that the previous provision in sub-section 1 (*d*) of section 37 may be held to be fairly applicable to this matter of management. The words that are used are these—"The management of the bridge shall, failing agreement, be vested in a committee (hereafter called the joint bridge committee), to be appointed by the trustees or local authorities chargeable with the cost of maintenance and rebuilding." If that had been in a substantive clause by itself instead of merely in a sub-section of section 37, there would have been no difficulty about it. The very language of it applies to the case we have been dealing with. The management of the bridge there shall be vested in a committee to be appointed by the local authorities chargeable with the cost of maintenance and rebuilding. Well, the language being wide enough, I do not think that it is controlled so as to be entirely applicable to what goes before. If we can fairly read that general language as applicable to the case of bridges which have to be maintained by more than one local authority, then it directly applies to this case, and my opinion is that it can be so read. It appears to me that each of these parties is entitled to have representation upon this Bridge Committee practically as under section 39, which I think applies to the case. I have said that even in a case where the management is confined to those who really have the property you may have three different bodies, each represented by five commissioners, but each having only one vote when a question arises. In this case there is the addition of another party, because four of them have used the bridge, and four of them have to contribute to its maintenance, and I am therefore of opinion that as the burden of rebuilding and maintenance will lie upon these four parties, so the right of management will be vested in them also.

I am therefore of opinion with Lord Mure that we should answer the questions as his Lordship proposes.

Lord Adam—This Dalmarnock bridge is locally situated partly in the county of the Lower Ward of Lanarkshire and partly in the burgh of Glasgow, and therefore beyond all doubt it falls under section 37 of the Roads and Bridges Act. Now, so long as it is allowed to remain under that section there is no doubt whatever that the expenses of managing, maintaining, and rebuilding this bridge must be borne equally by the county and burgh in which it is locally situated, and that irrespective altogether of the amount of traffic from the county or burgh respectively which that bridge accommodates. There is no doubt that is the provision of section 37. Now, I think the reason why that is left undisturbed by the Act is this, that before the Act the situation of matters was that half of that bridge belonged to the burgh and half of it belonged to the county, and the expense of maintaining and repairing that bridge must have been borne equally by them, because the expense would be presumably the same, and I take it that so long as matters remained in that position it was not the intention of the statute to interfere with the existing state of matters. These parties were equally liable before the passing of the Act, and I think the Act meant to leave them in that position so long as the bridge was left to be the property of these two owners. Therefore I think that was a sufficient reason why what may have been, as Lord Shand said, a more equitable change and distribution of the expense was not made between the two bodies so long as it was left under section 37, and I think the only change which the 37th section operated upon the rights of the parties was this, that instead of leaving the half of the expense to be borne by each separately, it declared that the bridge should from that time thereafter be joint property and provided for joint management, but presumably it did not interfere with the previous liability as to the expense, because, as I have said, presumably the expense was equal before.

But then we have here an application, and what is admittedly a competent application, to bring this bridge under section 88 of the statute. It cannot be disputed, after the decision in the *Hillhead* case, that this bridge is one to which the provisions of section 88 apply, because it was held in that case that although a bridge may be locally situated in more than one county or burgh, in two or it may be three, in such a case it nevertheless falls within the 88th section provided it accommodates what was called in the *Hillhead* case outside traffic. Now, it will be observed that section 88 for the first time introduced what I think was an entirely new element into the matter, because it introduced for the first time a liability on the part of other parties, burghs or counties in which the bridge was not locally situated, to contribute to the expense of maintaining such a bridge; and that introduced an entirely new set of circumstances, as it appears to me, from any that existed before. Now, the Legislature has thought that in such circumstances, where in point of fact a bridge, although locally situated, it might be in one district or it might be in two districts, did in point of fact afford accommodation to outside districts,—that is to say, to districts in which it was not locally situated,—in such cases the outside authorities should contribute to the expense of the bridge. That might have been done very simply by leaving the property of the bridge in the single proprietor as it was before, or in the joint proprietors as it was before, and merely calling upon the outside parties to contribute by way of toll, or money, or otherwise, to the support of that bridge. That would have been a simple way, and if the Legislature had adopted that way, as the City of Glasgow thinks, then it would undoubtedly have left the mutual liabilites as between the first and second parties here undisturbed. But then it was liable to this objection—and we see from this case that it was a serious objection—that it would have left these outside parties to contribute, it might be, large sums of money over the expenditure of which they would in that view have no control, and that that might be a heavy burden we see from this case, because we are told in the case that this very bridge over the Clyde at Glasgow requires to be immediately rebuilt, and I suppose it will not be rebuilt for any small sum of money; and if, as the City of Glasgow maintain, all that the outside authorities have to do is to contribute to the expense, they would have been called upon to contribute large sums of money without having any control or say in the disposal of it.

Now, that being so, it does not appear to me that that is the mode which the Act has adopted to meet the case. I think the mode which the Act has adopted to meet the case is this: Instead of leaving the bridge as being the property of the one or two proprietors as it was before, the Act has declared that this bridge shall be deemed common property to all those who are bound by the Act to contribute to its support. I think that is very clearly the mode which the Act has adopted to meet the circumstances. It has declared that the bridge in future shall belong in common to all the parties who contribute to it, and as the amount of traffic passing over that bridge might not be equal in all the four cases, it has been left to the Secretary of State in express words to determine the proportion in which each proprietor shall contribute to the expense of the bridge. Now, I think that depends, as Lord Mure has pointed out, upon the construction particularly of the 2d and 4th sub-sections of the 88th section. By the 2d sub-section the clerk to the county or burgh authority is to apply to the Secretary of State to determine that any such bridge shall belong in common to the county or counties and burgh or burghs to be named in his determination. I think it is beyond doubt that if the Secretary of State is so to determine, he must name in his determination all the authorities of the county or counties and burgh or burghs who contribute to the maintenance of the bridge, or are to be liable for it. I cannot understand his omitting from the declaration as to the common proprietors the name of any one of the four. Well, if the Secretary of State on considering the matter thinks that outside counties or burghs are bound to contribute, what he is to do is set forth in sub-section 4. He is to determine "the proportions in which any such burden"—that is, the burden of maintaining, repairing, and if need be rebuilding the bridge—"should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination." Now, what are the county or counties or burgh or burghs named in the determination if they are not those, and those only, and all of those who the Secretary of State considers are bound to contribute. Well, then, if the effect of that is to declare—and I think it is to declare—that the bridge which was previously the property of one burgh or county in which it might be locally situated, or of the burgh and county, as in this case, in which it might be locally situated, is to be no longer their property, but is to become the common property of all the contributors, then, if that be so—and I think it is so by the Act—I think that leads to the solution of the second question here, because if this bridge is to belong in future to all the four as their common property, it appears to me that there is no difference in the quality of the rights of these four. They are all proprietors. It is not that two of them are proprietors, and two contributors. The Act does not point at that at all. I cannot see how, if it belongs in common property to them all, you can say they have not all equal rights over it, unless there shall be something in the statute saying they shall not have equal rights. But there is nothing to that effect in the statute. I think it is clear upon the statute that they are all four common owners, and not that two of them are owners and two of them merely contributors as is the view of the City of Glasgow. Now, if that be the position of matters, and if they are all common owners, then I think it follows that no one of these common proprietors or common owners has more right than another to the exclusive management of the bridge. If they are all common owners, why should one or two have the exclusive management and the others not? I think that follows as a consequence if the first proposition be right—I mean always apart from something in the Act to the contrary, and I think there is nothing in the Act. Well, if they are all entitled, and as I think necessarily entitled, to the management of this bridge, I think it follows they are entitled to appoint representatives, and though it is quite true that in section 88 there are no special provisions as to a joint committee, you will observe that difficulty or presumed difficulty might have arisen, quite as much as if we were dealing with a bridge only situated in one county or one burgh; I mean there is no special provision in the section itself as to the extent to which each of them shall send members to any joint committee of management. But I think that is a difficulty which, as Lord Shand says, we ought to get over by going back to see what the rights of the joint committee are under this Act, where a joint committee is necessary and is provided for; and accordingly, on the whole matter, I agree with Lord Mure that the first alternative of the first question should be answered in the affirmative, and that the second question should be answered in the affirmative also.

Lord President—The contention of the Magistrates of Glasgow is that the Secretary of State has only the function of determining in what proportions the county or burgh or counties or burghs, brought in for the first time to contribute under section 88 are to be burdened with the expense, and that as regards the two original owners of the bridge their liability is to be equal, as it was before the 88th section was applied, and that they are to bear equally the balance of the expense not provided by the other two districts of roads. In the former case of *The Magistrates of Glasgow* v. *The Police Commissioners of Hillhead*, I was of opinion that the 88th section of the statute did not apply to a bridge jointly owned and maintained by two bodies of road trustees, and one of the reasons which induced me to form that opinion, and to express it pretty strongly, was this—that if the 88th section was held to apply to bridges so owned and maintained, the Secretary of State would have power, if he thought it equitable and just, to disturb the equality of the burden which was established in such cases by the 37th section of the statute; and I understand that the foundation of your Lordships' opinion in this case is that it is quite open to the Secretary of State to apportion the liability among the four different bodies of road trustees that are here before us in a way that is just and equitable, without any reference whatever to the quality of liability established by section 37. Now, I am bound to give effect to that judgment here, and therefore to concur with your Lordships in that construction of the 88th section, it being now conclusively deter-

mined that the 88th section does apply not only to bridges owned by one party, but to bridges owned and administered and maintained by two bodies of road trustees jointly.

The result will be to answer the first alternative of the first question in the affirmative, and the second question in the affirmative.

The Court pronounced this interlocutor :—

"Find and declare that the Secretary of State has power under the Roads and Bridges (Scotland) Act 1878 to determine, if he sees fit, that Dalmarnock Bridge shall be deemed to belong in common to the county of the Lower Ward of Lanark, the City of Glasgow, the County of the Middle Ward of Lanark, and the Burgh of Rutherglen, and to apportion among them in his determination, in such way as he thinks right, the expense of managing, maintaining, repairing, and if need be rebuilding said bridge, and the County of the Middle Ward of Lanark and the Burgh of Rutherglen are entitled to take part in the management of said bridge, and to appoint representatives on the Joint Bridge Committee thereof, and decern : Find the second party liable in expenses to the first and third parties," &c.

Counsel for the First Parties—D.-F. Mackintosh—Jameson. Agents—Mackenzie & Black, W.S.

Counsel for the Second Parties — Balfour, Q.C.—Ure. Agents—Campbell & Smith, S.S.C.

Counsel for the Third Parties—D.-F. Mackintosh—Dykes. Agents—Bruce & Kerr, W.S.

Counsel for the Fourth Parties—Davidson. Agents—Mackenzie & Black, W.S.

Friday, July 8.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

CARSWELL & SON *v.* FINLAY.

Shipping Law — Bill of Sale — Part-Owners—Liability for Disbursements.

The registered owners of a vessel were C to the extent of 42/64th shares, and H to the extent of the remaining 22/64th shares. H executed a bill of sale in favour of F of his shares. This bill of sale was not registered, and was not intimated to C. The vessel thereafter started on a voyage, became a total loss, and no freight was earned. C then sued F for a proportion of the repairs, wages, and other disbursements made by him in connection with the ship, prior to the date of the bill of sale. *Held* that F was not liable.

Process — Additional Proof — Amendment of Record—Court of Session Act 1868 (30 *and* 31 *Vict. cap.* 100), *sec.* 72.

Proof having been allowed by the Sheriff-Substitute, the parties put in joint-minutes of admissions, and thereafter renounced probation. In an appeal one of the parties moved to be allowed to amend the record, with the view of leading additional proof. Motion *refused*, following *Picken* v. *Avondale & Company*, July 19, 1872, 10 Macph. 987, on the ground that the parties had entered into a contract to renounce probation.

James Carswell & Son, timber measurers and shipowners in Greenock, were the managing owners of the barque "Arran" of Greenock.

The vessel was chartered to take a cargo of timber for the voyage back from Mobile to the United Kingdom, and upon the 3d day of February 1886 she was totally lost on her voyage from Greenock to Mobile. Messrs Carswell & Son disbursed and paid the sum of £707, 2s. 11d. for outfit, provisions, repairs, wages, and other necessary supplies made to and for the vessel. Thereafter they presented a petition in the Sheriff-Court of Renfrew and Bute at Greenock craving that Alexander Henry Finlay, wine and spirit merchant, Greenock, should be ordained to pay £243, 1s. 7d. being his proportion, as owner of 22/64th shares in the vessel, of the sum of £707, 2s. 11d. disbursed by them.

Finlay lodged defences in which he denied his liability, and stated that Duncan Stewart Hendry, sometime ship-carpenter and blockmaker in Greenock, was one of the registered owners of the vessel. He alleged that in December 1885 "Hendry resolved to leave Greenock and proceed to London to start business there. At that time Hendry explained to the defender that the shares held by him in the said barque 'Arran' had been partly paid for by accommodation bills between Hendry and the pursuers. One of these bills was an acceptance by Hendry to the pursuers, and it amounted to £174, 10s. Hendry desired the defender to take up the said bill at maturity. The defender agreed, and for his protection Hendry at the same time handed the defender a bill of sale, dated 5th December 1885, for the twenty-two shares in the 'Arran,' but the defender, while accepting the bill, never registered it."

The bill of sale was never intimated to John Carswell, sole partner of Carswell & Sons, the owner of the remaining 42/64 shares. The defender offered to pay "the proportion of the disbursements for said ship properly disbursed subsequent to 5th December 1885, effeiring to the shares registered in the name of Hendry."

The defender, *inter alia*, pleaded—"(2) The defender not being a registered owner of any shares in the said vessel, he is not responsible for any disbursements incurred by the managing owners thereof. (3) In any case, the items contained in the account sued for not having been incurred on the instructions, or on the credit, or by the authority of the defender, he is not responsible therefor, and ought to be assoilzied, with expenses."

On 14th May 1886 the Sheriff-Substitute allowed a proof before answer. Thereafter the parties put in a joint minute of admissions, and renounced probation under the reservation therein contained. In the joint minute they concurred in stating —"1. That the defender admits that he became owner, and assumed the rights of ownership of 22/64ths of the barque 'Arran,' on the 5th day of December 1885, the date of the bill of sale. 2. The registry of ownership of said ship is admitted to be correct. 3. That it is admitted