

one of the known servitudes, *altius non tollendi*, and imposed a valid restriction on the petitioners' property. The objectors as owners of their property have thus a title to plead it. It does not appear to me to be necessary that they should have any assignation from the Royal Bank, who made the original contract with the Royal Exchange Company. In the contract of ground annual dated in 1835, under which the objectors' authors acquired right to the property, it was provided that these predecessors should be always entitled to the benefit of the privileges or burdens stipulated or imposed by the contract of sale above referred to. This clause does not appear to me to make the objectors' case better or worse. Their right is as owners of a dominant tenement, and is independent of assignation.

The petitioners, however, argue that the objectors do not aver any damage or injury which will be done to their property by the operations proposed, and are therefore not entitled to plead the servitude. There is no allegation by the petitioners of any change of circumstances. If therefore the petitioners' argument is good now, it must have been equally good immediately after the disposition was granted in 1833. The petitioners say the *onus* is upon the objectors. In my opinion the petitioners' predecessors when they accepted the disposition in 1833 of the servient tenement conceded that the owners of the dominant tenement had an interest to enforce the restriction. It is for the petitioners to aver and prove facts and circumstances sufficient to show that that interest has now been lost. This they are unable to do. The facts speak for themselves. The petitioners' property is to the south, that of the objectors is immediately *ex adverso* to the north. The distance between is only 60 ft. In these circumstances it would be out of the question to say that a servitude *altius non tollendi* is not a benefit to the objectors' property. It is plain that they have an interest, and can therefore enforce the servitude against the petitioners.

The LORD PRESIDENT, who was present at the advising, gave no opinion, not having heard the case.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Dean of Guild, dated 25th April 1912, and remit to him to sustain the appellants' objections, and to refuse the petition, and decern. . . ."

Counsel for the Petitioners—Constable, K.C.—C. H. Brown. Agents—Forrester & Davidson, W.S.

Counsel for the Objectors and Appellants—Dean of Faculty (Dickson, K.C.)—D. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Friday, July 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LANARK COUNTY COUNCIL v. MOTHERWELL MAGISTRATES.

Process—Sheriff—Burgh Extension—Special Case—Competency of Stating Case after Findings Issued by Sheriff—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96—Motherwell Burgh Extension Act 1908 (8 Edw. VII, cap. lix), sec. 17.

Section 50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, provides that the sheriff when making an adjustment of financial relations, consequent on the extension of a burgh, shall be deemed to be a single arbiter, and that he may state a special case on any question of law for the opinion of the Court.

Objection having been taken to the competency of such a case on the ground that it was too late, *held* that the fact that the Sheriff had issued certain findings did not render the case incompetent, he not having given judgment or pronounced any final award.

Johnston's Trustees v. Glasgow Corporation, 1912 S.C. 300, 49 S.L.R. 269, distinguished.

Local Government—Extension of Burgh—Inclusion of Part of County—Adjustment of Financial Relations—Method of Adjustment—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96.

By section 50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, it is provided that in default of agreement between the burgh and the county as to the adjustment of financial relations, consequent on the extension of the boundaries of the burgh, the adjustments may be determined by the Sheriff as arbiter.

Held that in making the adjustment the arbiter was not bound to proceed on the basis of (a) an apportionment of the debt existing at the date of the annexation according to the rateable values of the annexed and remanent areas; (b) a payment by the burgh of the proportion of said debt efferring to the area annexed; and (c) an adjustment of the properties and of the payment, if any, to be made in respect of the transfer or retention thereof; but that he was entitled to adjust matters on the basis of payment by the burgh of (a) any debt efferring to the property taken over along with the area annexed, (b) a sum in respect of the debt on buildings outside of the area annexed,

and which thereafter were in excess of the requirements of the county; and (c) the value of such property as had been directly taken over by the burgh.

Local Government—Extension of Burgh—Inclusion of Part of County—Adjustment of Financial Relations—Salaries of Permanent Officials—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96.

Held that in adjusting the liability for the salaries of permanent officials, consequent on the extension of the boundaries of a burgh, the arbiter was not bound to proceed on the basis of (a) the rateable values of the annexed and remanent areas as at the date of annexation, and (b) payment of the capitalised value of the proportion of such liability effecting to the area annexed; but that he was entitled to adjust matters on the basis of a payment by the burgh in so far as such salaries had been rendered excessive for the requirements of the county, but that only until the staff of such officials had been readjusted.

Local Government—Extension of Burgh—Inclusion of Part of County—Adjustment of Financial Relations—Claim by County for Losing Prospective Income—Tramways—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 96.

A tramway company was bound in the event of their constructing a tramway within a county, and the profits of their undertaking being sufficient to pay five per cent. on the share capital, to pay to the county authorities a sum calculated at the rate of £50 for every mile of road on which the tramway was laid. The sums so payable to the county would have amounted to an annual payment of £67,000. Before the line was constructed a portion of the county within which the company had power to lay tramways was annexed by a burgh which had extended its boundaries.

In an arbitration for the adjustment of financial relations consequent on the extension of the burgh's boundaries the county claimed twenty years' purchase of the annual payment which, in the events narrated, would have been payable by the company. The Sheriff, acting as arbiter, dismissed the claim on the ground that as the line had not been laid down the sums so payable were not income transferred to the burgh at the date of annexation.

Held that the subject-matter of the claim was not "property" within the meaning of section 50 of the Local Government (Scotland) Act 1889, and that accordingly the claim had been rightly dismissed.

The Motherwell Burgh Extension and Sewage Purification Act 1908 (8 Edw. VII, cap. lix), section 17, enacts that "section

50 of the Local Government (Scotland) Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903, shall apply and have effect on the extension of the boundaries of the burgh by this Act."

The Local Government (Scotland) Act 1889 (52 and 53 Vict., cap. 50), section 50, enacts—" (1) Any councils and other authorities affected by this Act, or by any order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement, so far as affected by this Act, or such Order, or thing, and the agreement, and any other agreement authorised by this Act to be made for the purpose of the adjustment of any property, debts, liabilities, or financial relations, may provide for the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment. (2) In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners. (3) The Commissioners when making an adjustment under this Act shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and, further, the Commissioners may state a Special Case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses. . . ."

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), section 96, enacts—"On the formation of any new burgh or extension of the boundaries of any existing burgh, section 50 of the Local Government (Scotland) Act 1889, relating to the adjustment of property and liabilities consequential on an alteration of boundaries, shall apply as if in lieu of that Act, and the Boundary Commissioners, the Burgh Police Acts, and the Sheriff (not being a Sheriff-Substitute) were respectively mentioned therein. . . ."

This was a Special Case, under section 96 of the Burgh Police (Scotland) Act 1903, stated by the Sheriff of Lanarkshire in an arbitration, consequent on the extension of the burgh of Motherwell, between the County Council of the County of Lanark, claimants, and the Provost, Magistrates, and Councillors of the Burgh of Motherwell, respondents.

The Case stated—"By the Motherwell Burgh Extension and Sewage Purification Act 1908 (8 Edw. VII, cap. lix) certain extensions of the burgh of Motherwell were authorised. The areas thus added to the burgh formed part of the Middle Ward of the County of Lanark, and as such were administered by the County Council of the County of Lanark and the District Committee of the Middle Ward of said county. These areas were also partly comprehended within certain special districts for drainage, lighting, and scavenging. The area annexed to the burgh extends to 436 acres, while the extent of the remanent area of the county is 551,727 acres. The valuation of the annexed area at the date of the annexation was £21,765, and the valuation of the remanent area of the county was £1,917,089. . . .

"The County Council of the County of Lanark (hereinafter called 'the claimants') having made certain claims against the Provost, Magistrates, and Councillors of the Burgh of Motherwell (hereinafter called 'the respondents') . . . and the parties having failed to agree as to the same, the claimants made an application to me as single arbiter . . . in order that adjustment of the indebtedness between them and the respondents might be made or determined by me, and answers thereto were lodged by the respondents.

"By their said application the claimants asked me to adjust the indebtedness by ordaining the respondents to pay to the claimants—I. The capital sum of £6399, 13s. 8d., with interest at $3\frac{1}{2}$ per cent. per annum from 1st August 1908 till paid. II. The annual sum of £525, 11s. for sixteen years as from 1st August 1908, or, alternatively, the capital sum of £6570; and III. The capital sum of £1347, 6s. 8d.

"1st August 1908 was the date as at which the extension of boundaries took effect under the private Act.

"I. First Head of Claim.

"This head of claim relates to capital debts incurred by the claimants prior to and outstanding at the date of annexation, and the claimants propose that they should remain liable therefor, and that the respondents should pay to them in respect thereof the capital sum of £6399, 13s. 8d., with interest at $3\frac{1}{2}$ per cent. from 1st August 1908 until payment.

"This claim is framed upon the footing of taking the rateable value of the total area which was liable to be rated in respect of the particular debt immediately prior to the date of annexation, and apportioning the debt upon the portion of such area annexed to the burgh according to the rateable value of such annexed area. The sums thus brought out in each case amount to the sum claimed under this head.

"The claimants, in the second place, proposed that the property such as administrative offices, hospitals, drainage works, &c., which prior to the annexation were common to the undivided areas, fell to be allocated by me as arbiter foresaid either to the claimants or respondents, subject to payment in respect of the pro-

perty so transferred or retained of such sum, if any, as I should adjust in terms of section 50 of the said Act of 1889, and that the basis of the adjustment should be the relative rateable valuations of the transferred area and the remaining county area as at the date of transfer, which should be taken as the measure of the respective use of the property by the transferred and remaining areas prior to the date of transfer.

"The respondents, on the other hand, object to the method of apportionment proposed by the claimants, and maintain that this claim falls to be adjusted on the basis of payment by them to the claimants (a) of any debt existing at the date of the annexation due by the claimants in respect of property under the various heads detailed only so far as such property has been taken over by the respondents; (b) of a sum in respect of the debt on buildings and property outside of the area annexed, which are in excess of the requirements of the diminished county, middle ward, or special district respectively, and were built and acquired for the use of the whole area previous to the annexation; and (c) of the value of the hydrants or other property which have been directly taken over by the respondents.

"II. Second Head of Claim.

"This claim relates to standing charges and other continuing expenditure of the claimants, including the salaries of permanent officials.

"This claim is framed on the footing of an apportionment of the amount of such salaries, charges, and expenditure, according to rateable value on the same lines as proposed in the first head of claim, and of payment by the respondents in respect of the claimants' retention of such liabilities of a sum equivalent to the capitalised value (at $12\frac{1}{2}$ years) of the net proportion of such liabilities (after deducting the proportion of expenditure unnecessary consequent on annexation) as effeirs to the annexed area.

"The respondents object to this proposed method of adjustment, and maintain that such adjustment should proceed on the basis of a payment by them to the claimants in respect of said salaries, charges, and expenditure, in so far only as they are unnecessary for the present management of the affairs of the county, middle ward, or special district respectively, and that only in respect of such period as may be necessary for readjustment of such salaries, charges, and expenditure.

"III. Third Head of Claim.

"This claim arises in the following circumstances, viz.—By the Lanarkshire Tramways Order Confirmation Act 1903 (3 Edw. VII, cap. cliii) the Lanarkshire Tramways Company were authorised to construct certain tramways, *inter alia*, within the county of Lanark. Section 16 of the said Act provides as follows, viz.—'If in any year ending on the 31st day of December the net profits of the undertaking of the company authorised by the Act of 1900 and this Order available for payment of dividends on the share capital of

the company shall be sufficient to pay a dividend at the rate of 5 per centum on such share capital, the company shall pay to the county authorities a sum calculated at the rate of £50 for every mile of highway, road, or street on which any part of the tramways by this Order authorised is laid within the jurisdiction of the county authorities, and after every additional £1 per centum of dividend beyond 5 per centum on the said share capital, an additional sum of £50 per mile calculated as aforesaid.' . . .

"Of the tramway lines authorised by the said Order 53·9 chains were authorised to be laid down within the area now annexed to the respondents' burgh. In the event of that portion of line being laid, and upon the footing that the net profits of the Tramways Company will be sufficient to pay dividends at the rate of 6 per cent. per annum, an annual payment of £67, 7s. 4d. would have been payable to the claimants by the Lanarkshire Tramways Company, but the claimants have lost said contingent right in consequence of the annexation of said area to the burgh.

"The claimants maintain that said contingent right was 'property' affected by the Motherwell Burgh Extension Order within the meaning of section 50 of the Local Government (Scotland) Act 1889, and that they are entitled to a payment in respect of the transfer thereof.

"The respondents deny that this claim forms any part of the 'property' of the claimants in the sense of the said section.

"The parties concurred in asking me to consider and decide the principles on which the adjustment of the various heads of indebtedness should proceed before inquiring into the details of each item, as once the principles were decided the parties might be able thereupon to settle matters between themselves and thus avoid the necessity for such a detailed inquiry.

"After hearing parties I issued proposed findings, against which representations were lodged by the claimants and answers to the latter were lodged by the respondents. After hearing parties thereon I issued the following findings, viz.—'Glasgow, 14th February 1910.—The Sheriff having heard counsel for the parties and considered the representations and whole cause, Finds under the first head of the claim that the respondents are not liable to make payment to the petitioners of a share of the debts of the county at the time of annexation in the proportion of the rateable value of the area annexed to the rateable value of the whole county, but are liable (*first*) to make payment to the county of any debt at present existing due by the county in respect of property under the various heads detailed, which has been taken over by the burgh along with the area annexed; (*second*) a sum in respect of the debt on buildings and property outside of the area annexed which are in excess of the requirements of the county and were built and acquired for the use of its whole area previous to the annexation; and (*third*) for a sum in respect

of value of the hydrants or other property which has been directly taken over by the burgh: Finds under head two of the claim that the respondents are not liable for any sum in connection with the maintenance of the establishment under the various heads which are detailed except to the extent that these are unnecessary for the present management of the affairs of the county, and that the respondents are only liable for their share of the cost of that proportion of the establishment which is unnecessary until that part of it can be readjusted: Finds that the third head of the claim is irrelevant and falls to be dismissed: Under reference to these findings, allows to both parties a proof of their averments, to proceed on a date to be afterwards fixed.'

"My opinion on the questions at issue between the parties is given in the notes to the interlocutors pronounced by me on 8th December 1909 and 14th February 1910.

The notes were as follows:—

Note appended to interlocutor of 8th December 1909, continuing the cause for further hearing—"At the last hearing of this case it became apparent that the parties were not in agreement with regard to the facts of the particular claims which are enumerated in the proposals by the County Council for adjustment of indebtedness. Both parties agreed in asking me to decide the general questions of law which were raised in the debate, and once they had the opinion of the Court upon these matters, the questions of detail necessary for the final decision of the case might be arranged between them so that a final interlocutor should be issued. As this is an arbitration under the Act, I have avoided pronouncing any finding which would be binding on the Court, in order that the parties might have an opportunity of representing against the views which are expressed in this note.

"The questions that are raised depend upon the meaning of section 50 of the Local Government Act 1889, as applied by section 96 of the Burgh Police (Scotland) Act 1903 to the extension of the boundaries of the burgh of Motherwell. Section 96 of the Police Act says that on the extension of the boundaries of any existing burgh section 50 of the Local Government (Scotland) Act 1889, relating to the adjustment of property and liabilities consequential on the alteration of boundaries, shall apply, and section 50 of the Local Government Act says that any councils and other authorities affected by this Act, &c., may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement so far as affected by this Act, and sub-section 2 provides that in default of an agreement as to any matter requiring adjustment, then the adjustment may be made by the Commissioners. The question therefore is whether the claims and the proposals made by the pursuers fall under the terms property, income, debts, liabilities, and expenses. I think it is clear that these words refer to the

period when the extension of the boundaries of the existing burgh takes place, and that they do not refer to any property, income, debts, liabilities, and expenses which may emerge to either of the parties to the case subsequent to that date. It is to be observed that the word used is not compensation but adjustment, and I think it is clear from the decisions in the House of Lords in the cases of *Urban District Council of Caterham v. Rural District Council of Godstone*, [1904] A.C. 171, and *Mayor, &c., of West Hartlepool v. The Council of Durham*, [1907] A.C. 246, that no compensation can be granted for the loss of assessable area for contribution to future rates. I think it is also clear that so far as possible all the property within the area annexed to the burgh which is necessary for the use of the inhabitants there and which formerly belonged to the county authority should be transferred to the burgh under the obligation of making such payment to the county as would relieve the county of the existing debt in connection therewith; and in the same way that the property in the county area should be free from any claim on the part of the inhabitants in the annexed area or of the burgh of which they now form part. The statute does not seem to contemplate that either the county or the burgh should have control or the right to interfere with the property which is outside their boundaries. Of course that necessarily implies that the authority to which property is transferred should relieve the other of any debt in connection with the property transferred.

"Turning now to the proposals by the County Council for adjustment of indebtedness in which the particular claims are set forth, I propose very generally to state the views with regard to them which in applying the principles above explained I have come to entertain.

"The first head is for debts effeiring to the added area prior to annexation. Under this head, the first claim is for highways and new district offices. With regard to new roads and bridges, in so far as the County Council can prove that that debt is for roads and bridges within the annexed area I think that the County Council would have a good claim. But if the debt is for roads and bridges outside of the annexed area, which are now the sole property of the county, I think this claim falls to be dismissed. With regard to district offices, these will in future belong to the County Council. The facts with regard to these offices were disputed, and I find it very difficult in the present state of the case to come to a decision, but it seems to me that if these offices or any considerable part of them were erected with a view to the administration of the district now annexed, and would not have been erected if the annexed area had not at the time been part of the county, then it would be unfair to saddle the county with the whole burden of the debt, and that the burgh must relieve the county of such portion as can be proved to be

unnecessary for the present administration of the present county area. The same principle applies to the public health offices at Hamilton, the Inebriate Reformatory at East Kilbride, and hospitals and public slaughter-houses. With regard to the drainage works, I think the rule which has been already laid down with regard to the new roads and bridges also applies to them. With regard to the lamps and lamp pillars, the defenders admit their liability for the lamps and lamp pillars within their district. With regard to the stables for Dalziel and Netherton scavenging district, I think they fall under the same rule as the new district offices, hospitals, &c. There is also a claim for fire hydrants within the area which has been annexed. The possession of these hydrants was a matter of dispute. The pursuers maintained that these in future would be under the control and management of the defenders, while the defenders stated that they will remain under the authority of the pursuers, as being the authority for water supply. I think this is a matter for inquiry, and if it turns out that they are under the control of the burgh, then the property in them should be transferred to it, and their cost should be paid by it to the county.

"With regard to the second head of pursuers' claim, namely, standing charges and other continuing expenditure, if these charges mean the future cost for salaries, wages, &c. in connection with the maintenance of the establishment under the various heads which are detailed, I think they must be disallowed under the ruling in the cases of *Caterham* and *West Hartlepool*, *supra*. Lord Atkinson in the latter case says—'The whole scheme of the statute, however, is that when administrative urban areas, whether county burghs or not, are created, they shall have power to tax themselves to the extent necessary for carrying out the duties imposed upon them, and shall not be called upon to contribute to the cost of the services rendered outside their respective areas by which they are not directly benefited. According to that view the burgh is to tax itself for the payment of all services which are rendered within its boundary, and they are not to be liable for the payment of any services which are rendered outwith the area. Moreover, it seems to me that this is not a liability which existed at the time of the annexation except to this restricted extent, viz., the county cannot be expected to discharge its officers at once on the occurrence of the annexation. If they can show that their establishment, therefore, was greater than was necessary for their own area, it may be that they would be entitled to a payment of such extra charges as might be necessary until an adjustment could be made. That seems to me to be a liability on the county at the time when the annexation took place which they may call upon the burgh to share.

"The third claim is in respect of the annual payment by the Lanarkshire Tramway Company. The position of this matter is that under the Lanarkshire Tramways

Act, sections 16 and 17, the Tramway Company are bound in the event of their constructing a tramway within the county, and the profits of their undertaking being sufficient to pay 5 per cent. on the share capital, the company shall pay to the county authorities a sum calculated at the rate of £50 for every mile of highway, road, or street on which any part of the tramways is laid, and the same provision is made in favour of burghs. It seems, under the Act, that the Tramway Company have power to lay a line extending to 53·9 chains within the area annexed. No part of this line has been laid. The county claim, however, twenty years' purchase of the annual payment which, in the event narrated, will be due by the Tramway Company to the burgh. I think this claim must be disallowed entirely. The Act seems to contemplate that when the tramway line passes through the territory of the county, the county authorities should receive the sum specified from the company, and that if it passes through a burgh the burgh authority should receive the specified sum in the same way. It is difficult to say what is the exact reason for this payment, and counsel for the pursuers said that it was in respect of the county withdrawing its opposition to the Tramway Company's Act. It seems to me that the more probable explanation is that if the Tramway Company enters upon property of the local authority, as it does when it makes use of the highways and streets, then Parliament thought that the local authority should receive some return for that use after a fair profit had been made by the Tramway Company. That is rendered more probable because by interference with the highway a burden might be placed on the local authority in providing for the passage of the public consequent on the Tramway Company's operations. As no part of this line has been made, it was not income transferred to the burgh at the time of the annexation. For this reason I think the claim should be disallowed.

"Having expressed these opinions, I think it is proper to put out the case for further hearing so that the future procedure may be determined on."

Note appended to interlocutor of 14th February 1910 (vide supra)—"At the debate upon the re-hearing, it became apparent that the petitioners' position was that the whole debt of the county at the time of the annexation was proportionally the debt of the part which had been taken from the county and added to the burgh. Therefore the burgh in taking the annexed part took it with its debt, and in the adjustment of the debt with the county they were bound to make payment to the county of the due proportion. It seems to me that there is a fallacy here in thinking that the debt is a debt of each particular part of the county and is not a debt of the county as a whole for which it can assess the whole district within its area. If that be so, then the burgh in taking over the annexed part does not take over any part of the debt

which remains with the county. To hold otherwise I think would be inequitable, for it would compel the burgh to pay for improvements and property for which neither it nor the part annexed to it could ever make any use. At the same time I think that under the powers given by the section the arbiter has a power to adjust the debt so as to work out an equitable result. Accordingly I think he is entitled to call upon the burgh to make provision for the debt in respect of the property which is transferred to it. It would seem inequitable that the county should go on discharging debt for an improvement which was within the annexed part, and accordingly had become part of the burgh's property. Further, I think that the burgh are bound to make payment for any property such as hydrants which has been transferred to it. The same principle applies to the second head of the claim, which is in connection with the management and administration of roads, &c. If these are outside the limits of the district annexed, I think the expense of management and administration fall upon the county except in so far as the county authorities can prove that they undertook expenditure—in view of the annexed part remaining part of the county—which was now unnecessary. With regard to the third claim, which was still maintained, I am still of opinion that it is irrelevant, and I have nothing to add to what I have already said."

The *questions of law* submitted by the arbiter were as follows—"1. As regards the first head of the claim—(1) Is the arbiter bound to adjust said claim on the basis of (a) an apportionment of the debt existing at the date of the annexation between the annexed area or so much thereof as at the date of annexation formed part of the county, middle ward, or special district respectively, and the remanent portion of the said county, middle ward, or special district respectively, according to the rateable value of said annexed area or part thereof and county, middle ward, or special district as at the date of annexation; (b) a payment by the respondents to the claimants of the proportion of said debt effeiring to said annexed area or part thereof, and retained by the claimants; and (c) an adjustment of the properties and of the payments, if any, to be made in respect of the transfer or retention thereof? or (2) Is the arbiter entitled to adjust said claim on the basis of payment to the claimants by the respondents, (a) of any debt at present existing due by the claimants in respect of property under the various heads detailed which has been taken over by the respondents along with the area annexed; (b) of a sum in respect of the debt on buildings and property outside of the area annexed, which are in excess of the requirements of the county, middle ward, or special district, and were built and acquired for the use of the whole area previous to the annexation; and (c) of the value of the hydrants or other property which have been directly taken over

by the respondents? 2. As regards the second head of claim, so far as relating to salaries of permanent officials, liability for which existed at the date of annexation—(1) Is the arbiter bound to make an adjustment of such liabilities on the basis of (a) an apportionment of such salaries according to rateable value on the same lines as the apportionment referred to in question (1); (b) payment by the respondents to the claimants in respect of such liabilities of a sum equivalent to the capitalised value of the proportion of such liabilities effecting to the annexed area, and of a sum to cover the period of necessary readjustment of the salaries in the remaining area? or (2) Is the arbiter entitled to make such adjustment, on the basis of a payment by the respondents to the claimants in respect of said salaries, in so far only as they are unnecessary for the present management of the affairs of the county, middle ward, or special district respectively, and on the footing that the respondents are only liable for the cost of that proportion of the establishment which is unnecessary until that part of it can be readjusted? 3. Is the subject-matter of the third head of claim 'property' within the meaning of section 50 of the Local Government (Scotland) Act 1889, and falling to be the subject of adjustment under and in terms of said section?"

On the case appearing in the short roll counsel for the respondents objected to the competency of the Special Case on the ground that the Sheriff's decision was final. He argued—A stated case was only competent while the arbitration was pending. Here it was not pending, for the arbiter had issued findings. The Case was therefore too late—*Johnston's Trustees v. Glasgow Corporation*, 1912 S.C. 300, 49 S.L.R. 269; *in re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q.B. 613.

Counsel for the claimants were not called on.

LORD PRESIDENT—This is a Special Case stated by the Sheriff of Lanarkshire acting as an arbiter under section 17 of the Motherwell Burgh Extension and Sewage Purification Act 1908 and section 50 of the Local Government (Scotland) Act 1889 as applied by section 96 of the Burgh Police (Scotland) Act 1903.

The Motherwell Act was, as its title indicates, an Act for the extension of the burgh. The area of extension had to be taken from the county of Lanark, and the sections of the statutes I have referred to provide for questions arising between the county and the burgh in consequence of the extension, and requiring adjustment in default of agreement, being determined by the Sheriff as a single arbiter. Applying sub-section (3) of section 50 of the Act of 1889, the Sheriff "may state a special case on any question of law for the opinion" of this Court.

In an arbitration set up between the county and the burgh various claims were made, and the learned Sheriff issued pro-

posed findings. After hearing parties upon representations by the county and answers for the burgh, he made certain findings and laid down certain legal propositions, and with reference to these allowed a proof. The Sheriff was then asked to state this Special Case.

The Case being here, it is argued for the burgh of Motherwell that it comes too late, and they seek to assimilate the case to that of *Johnston's Trustees v. Glasgow Corporation* (1912 S.C. 300).

All that it is necessary to say upon the law was said in that case, and need not be repeated. I am clearly of opinion that the class of special case which is here presented is of the same character as that in *Johnston's* case, which was presented under the Housing, Town Planning, &c., Act 1909, and that it must be presented during the progress of proceedings. I think that here the proceedings are in progress. In the case of *Johnston's Trustees* there was nothing more to be done when the special case was presented, because the Sheriff had given judgment. Here he has not done so, and though no doubt he has made certain findings, there is no decree and no final award. As matter of purity of expression he might have called them "proposed" findings, but I think it would be a denial of justice to throw the case out if by a slip of the pen he has omitted the word "proposed." He has pronounced no operative decree, and I think it is the intention of the Act that the opinion of this Court may be taken while matters are still inchoate.

LORD KINNEAR—I am of the same opinion.

LORD JOHNSTON—I agree.

LORD MACKENZIE—I also agree.

The Court repelled the objection.

The case was then heard on the merits.

Argued for the claimants—*Head I*—It was not enough to adjust the debt in proportion to the rateable value of the respective areas; there must also be an adjustment of the various items of property in so far as affected by the annexation. If an item became of greater value to the county after annexation, the county ought to pay for that increase in value. Conversely, if the value were diminished and the property became a "white elephant," the county was entitled to compensation therefor—*Mid-Lothian County Council v. Magistrates of Musselburgh*, 1911 S.C. 463, 48 S.L.R. 335. The arbiter was in error in thinking that the debt effectred to the property and not to the ratepayers. He ought to have made a double adjustment. He was also in error in limiting the adjustment to items of property still extant. That was too restricted a view, for the claimants were entitled to compensation for debts incurred in performance of the duties of local government, even though these were not now represented by any tangible asset, e.g., a sum borrowed to erect a temporary hospital. *Head II*—The claimants were entitled to an adjustment

of standing charges and salaries on the basis of rateable value of areas, for a county could not all at once adjust its permanent staff—*Durham County Council and West Hartlepool County Borough*, [1905] 2 K.B. 340. *Head III*—The claim though contingent should have been considered.

Argued for respondents—*Head I*—*Esto* that the Sheriff might have been in error in acting as he had done, he had not erred in any question of law, for the adjustment of debt, &c., was not a question of law but of administration. That being so, the Court would not interfere. The *Musselburgh* case (*cit.*) was distinguishable, for there the arbiter had erred in a question of law. So, too, in the *Caterham* case (*Caterham Urban Council v. Godstone Rural Council* [1904], A.C. 171), and the *West Hartlepool* case (*West Hartlepool Corporation v. Durham County Council* [1907], A.C. 246), for there the arbiter had misconstrued a statute. *Esto*, however, that the question was one of law, the arbiter was right, for where a building was transferred the debt should go with it. This rule was easily applied in practice, whereas the method of adjustment contended for by the claimant was difficult to carry out and not so fair. What Parliament contemplated was an adjustment of debts, not a valuation of properties. If the arbiter had only dealt with tangible liabilities it was because he was not asked by the claimant to deal with any others. *Head II*—The claimants were not entitled to the adjustment craved, for adjustment of salaries was not contemplated by the Act. *Head III*—The claimants were not entitled to an adjustment of future earnings, for such a claim was subject to two contingencies—the construction of the tramways and the earning of dividends. The payment in question was to be made to the county in its capacity as road authority, and this it had now ceased to be. The claim, therefore, had been rightly disallowed.

At advising—

LORD PRESIDENT—This case has been stated by the Sheriff of Lanarkshire, upon a requisition of the parties, for the opinion of the First Division of the Court of Session upon certain questions of law arising in an arbitration in which he is arbiter. The arbitration is in pursuance of a provision in the Motherwell Burgh Extension and Sewage Purification Act, which incorporates the 50th section of the Local Government Act of 1889 as applied by section 96 of the Burgh Police Scotland Act 1903, and by so doing provides that the arbiter “may make an order for the purpose of the adjustment of any property, debts, liabilities, or financial relations,” which order may provide for “the transfer or retention of any property, debts, and liabilities, with or without any conditions, and for the joint use of any property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and

liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment.”

This adjustment follows upon the fact that by the Motherwell Burgh Extension and Sewage Purification Act a certain area which previously formed part of the middle ward of the county of Lanark was taken out of the county and put into the burgh. The clause which deals with the power to state a special case is this—The Commissioners, *i.e.*, the arbiter, “may state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses.”

Now the learned arbiter here pronounced what may be called a set of preliminary findings, in which he dealt with the claims of the parties as raised. In particular, the county claimed that there first must be an adjustment of the outstanding debt in such proportions as the valuation of the part taken away bore to the part retained by the county. The learned arbiter refused to do that, and laid down certain rules according to which he proposed to decide the case; and upon the controversy so raised we are asked, as a question of law, “(1) . . . [quotes first question] . . .”

I am of opinion that questions so stated really involve matters which are not a question of law at all. It would be a question of law if it was an immutable proposition that the arbiter must adjust the debt upon the basis of the apportionment of the debt. No doubt, then, that would be a question of law, and we could tell the arbiter that he must do so. But that position in law is clearly wrong. It is for the arbiter to find out upon what terms the adjustment is to be made. It would be possible to tell the arbiter in certain circumstances that what he proposed to do was quite wrong, and as a good illustration of what I mean I would quote the well-known *Caterham* case, where the arbiter proposed to give an allowance in respect of the subtraction of a valuable rateable area as such. Well that was *ultra vires*, and accordingly you could say of that method that it was wrong and the arbiter must not do it. But I do not think we can lay down any one particular way in which the arbiter is to arrive at an adjustment, because if we did that we should be doing, I think, what the statute has said the arbiter is to do and not this Court.

I think, therefore, the first half of the first question is a question of law and should be answered in the negative. The second half is not a question of law at all; there are various methods of adjustment, and all I can say is that I do not find it here made out that the way in which the arbiter proposes to go is necessarily a wrong way, in which case I could treat it as a question of law and say that he may not do it. I do not think it is necessary for me to say whether I should have proceeded in exactly

the same way or not. But at any rate I think the way in which the arbiter has proceeded, and which, I think, he has clearly explained in the note upon the rehearing, is quite a fair way. I do not think it is the only way he could have chosen; I think he might have proceeded in another way, and he might have proceeded in the way which began with adjustment of the debt according to the valuation, and proceeded upon the other side of the account to make other calculations.

Upon the whole matter, therefore, I am of opinion that we should answer the first branch of the first question of law in the negative, and the second branch in the affirmative.

These remarks really cover also the questions which arise on the second head of claim. I think the arbiter is entitled to proceed as he proposes, though I do not say that he must necessarily do so.

The third question will be answered in the negative.

LORD KINNEAR—I agree.

LORD JOHNSTON—I also concur.

LORD MACKENZIE—I concur. I do not think there is anything to show that the Sheriff has taken a wrong view in law, or that he will take a wrong view in law in any of the questions which may arise in the course of this arbitration.

The Court answered the first and second questions of law in the negative of the first branch and in the affirmative of the second branch of each of said questions; answered the third question in the negative; and decerned.

Counsel for the Claimants—Clyde, K.C.—Hon. W. Watson. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for Respondents—Sandeman, K.C.—D. P. Fleming. Agents—Bruce, Kerr, & Burns, W.S.

Friday, July 12.

FIRST DIVISION.

(EXCHEQUER CAUSE).

HILL v. INLAND REVENUE.

Revenue—Income Tax—Super Tax—Deductions—Farming Losses—Omission to Claim Deductions in Ordinary Income Tax Return—Bar—Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), sec. 66 (2)—Customs and Inland Revenue Act 1890 (53 and 54 Vict. cap. 8), sec. 23 (1).

The Finance (1909-10) Act 1910, sec. 66 (2), enacts—"For the purposes of the super tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions

or abatements under the Income Tax Act. . . ."

The Customs and Inland Revenue Act 1890, sec. 23 (1), enacts—"Where any person shall sustain a loss . . . in the occupation of lands for the purpose of husbandry only, it shall be lawful for him, upon giving notice in writing to the surveyor of taxes for the district within six months after the year of assessment, to apply to the Commissioners for the General Purposes of the Acts relating to income tax for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year, estimated according to the several rules and directions of the said Acts."

A, an occupier of agricultural land, was called upon in 1910 to furnish a return of his income for assessment to super tax for the year ending 5th April 1910—his income for that year being as directed by sec. 66 (2) of the Finance Act his total income from all sources for 1908-9. In making his return A claimed to deduct the loss which he alleged he had incurred in connection with the occupation of certain farms. In making his ordinary return for income tax for 1908-9, A had not claimed any deduction in respect of these losses, but had paid tax on the full assessment.

Held (rev. the determination of the Special Commissioners) that A was not thereby barred from claiming deduction in respect of his farming losses—the six months' limitation imposed by section 23 (1) of the Act of 1890 not being applicable to estimation of income for assessment to super tax.

The Finance (1909-10) Act 1910 (10 Edw. VII, cap. 8), section 66, enacts—"Super Tax on Incomes over £5000.—(1) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April Nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super tax) at the rate of sixpence for every pound of the amount by which the total income exceeds three thousand pounds."

"(2) . . . [The sub-section is quoted *supra* in rubric.] . . ."

The Customs and Inland Revenue Act 1890 (53 and 54 Vict. cap. 8), section 23 (1), which is noted in the margin, "Relief to . . . Farmers in Case of Losses," is quoted *supra* in rubric.

This was an appeal at the instance of R. Wylie Hill, Balthayoch, Perth, against an assessment to super tax in the sum of £5140 for the year ended 5th April 1910 under the provisions of section 66 of the Finance (1909-10) Act 1910.

The Case, which was stated under section 72 (6) of that Act and section 59 (1) of the Taxes Management Act 1880 (43 and 44 Vict. cap. 19), was as follows:—"2. On the 2nd November 1910 the appellant made