them arising out of Mr Salmon's report, the other expenses of improvement to be borne by the subscribers. A committee was appointed to carry out this resolution. The committee then took steps to remove an accumulation of soil from the interior of the church; and having thus reduced the level of the floor of the church by some three or four feet, they then proceeded to remove the soil which had accumulated on the outside of the walls. A dispute then arose between the committee and Dr George Robertson and others, the latter parties complaining that their lairs in the churchyard, where several of their relatives were buried, were being improperly interfered with in the course of the operations by the committee; and in July 1861 Dr Robertson presented a petition in the Sheriff Court of Renfrew against the architect, contractor, and committee, craving interdict against the respondents interfering in any way with the petitioners' lair, or excavating the adjoining lairs, and craving to have them ordained to restore the petitioners' lair to the condition in which it was prior to the commencement of the operations complained of. The defenders, in their answers, offered to remove the remains in the petitioners' lair to a new lair, or to lower them where they then were, and to restore the grave-stones and dress up the graves.

Interim interdict was granted by the Sheriff, and a proof was allowed. After a long proof the Sheriff-Substitute (Campbell) found, *inter alia*, that the defenders had removed a considerable quantity of earth from the top of the pursuers' lair, and removed the top-stone and three of the corner stones, but that the remains of the pursuers' relatives were not disturbed by their operations, and that, though the lair was in an unsightly state, it was still capable of being adapted to the purposes of future interment; that the petitioners were, in the circumstances, entitled to apply for a remedy as they had done, but that such interdict and restorative conclusions could not in law supersede the right of the heritors in regulating the churchyard, consistent with the petitioners' right of maintaining inviolate the remains of their relatives interred in their lair; recalled the interim interdict, but of new interdicted the defenders from further interfering with the petitioners' lair, except as far as might be necessary for the proper dressing of the churchyard, and remitted to an architect to report on the best way of adjusting matters between the parties. The Sheriff (Fraser), on appeal, adhered. Mr Brown, the architect appointed by the Sheriff, gave in a report. Objections were stated for both parties, and thereafter the Sheriff-Substitute (Cowan) sustained certain of the objections stated by the defenders to the plan proposed in the report; approved of the plan submitted with the said note of objections; appointed the lair to be dressed as proposed in the plan, and remitted to Mr Brown to see that operation carried into effect; found the pursuers entitled to their expenses up to the date of lodging the defences, and the defenders to the expenses since that date, except such as were necessary for completing the operations on the lair. The Sheriff, on appeal, adhered.

The petitioners advocated.

Watson and R. V. Campbell for them.

Clark and Adam for Respondents.

The Court adhered.

They held it to be clear that the churchyard was the property of the heritors, subject, no doubt, to certain uses by the parishioners, but the heritors being clearly entitled to improve it, if necessary, by lowering the level or otherwise. In the present case, looking to the accumulation of earth both inside and outside the church, these operations were quite proper in their nature, although, no doubt, they had been executed with a want of proper discretion. But that did not alter the legal rights of the parties, and it was the duty of the petitioners to have put an end to the case long ago by coming to an arrangement upon the basis of one or other of the proposals made by the respondents in their defences. A long, expensive, and unnecessary proof had been led, for which the petitioners were mostly to blame, and which did nothing to advance the cause. The Sheriffs were, therefore, right in laying most of the expense upon the petitioners, and the expenses of the advocation must also be borne by them.

Agent for Advocators—J. Ross, S.S.C.

Agents for Respondents—M'Ewen & Carment, S.S.C.

Thursday, March 26.

FIRST DIVISION.

DALHOUSIE *v.* CROKAT.

Legitim — Executor—Debtor and Creditor—Agent—Mandate—Realized Funds—Negligence. In a claim by a son against a father's executor for legitim, *held* that the amount of the legitim was not diminished by a loss of executry-funds in consequence of the failure of the executor's agent with the funds in his hands, the funds being lost after realisation. The child and the executor stand in the relation of creditor and debtor. Lord Deas *diss.* from the judgment, on the ground that the funds lost had never been actually realised. *Observed*, that executry-funds in the hands of the executor's agent, are, in law, in the executor's hands, and are realised funds.

This was a question between the Earl of Dalhousie and General Crokat as to the amount of legitim payable to the former out of the estate of his father, the late Lord Panmure. General Crokat was appointed by the late Lord Panmure to be his sole executor and one of his residuary legatees, by a letter which contained this passage:—"The papers referable to the disposal of what personal property and assets I may die possessed of, are put up together in a drawer in my business-room. These were prepared by Mr John Blaikie, advocate in Aberdeen, and you will communicate with him with respect to all professional details applicable to the executry, which he will conduct."

After Lord Panmure's death, General Crokat wrote to Mr Blaikie, stating that he had opened the letter which he had received from Lord Panmure, nominating him executor, and, "so far as I am concerned, either as executor or in reference to the instructions contained in that letter, I authorise you to act for me as fully and amply as I could myself do." Mr Blaikie having failed, and a portion of the executry funds collected by him having been thereby lost, the question now arose whether the loss fell to any extent upon the legitim.

Clark and Rutherfurd for the pursuer argued—The pursuer is creditor for his legitim in a question with the free estate of his father. The executor is debtor for the full amount of the legitim. He has the sole right to ingather the estate, and the creditor for legitim cannot interfere with the re-

alization, not having any claim to any specific portion of the estate, but merely a general claim. The son's claim is here for one-half of the free estate as at his father's death. If the debtors to that estate cannot pay, then no doubt the free estate is actually less than the nominal amount. But that is not the case here. All the debtors to the late Lord Panmure's estate were able to pay, and did pay. They paid to Mr Blaikie, who was agent in the executry, and who had been authorised by the executor to ingather the estate and settle claims against it. He was the appointee of the executor, and payment to him was just payment to this executor, and, therefore, the money paid to Blaikie was realized estate. Besides, the executor had been guilty of negligence, in allowing the agent to retain the funds collected by him, without calling him to proper account.

SOLICITOR-GENERAL (MILLAR) and ADAM, for defender, argued—The true inquiry here was not as to the amount of the free estate according to what was received from the debtors, but what ultimately came to be available for distribution among those interested in the estate. The duty of the defender as sole executor was to recover the estate as he best might by the ordinary means, and to invest it on recovery. But he was entitled to employ an agent, and the agent he employed was not only employed in accordance with the wishes of the testator, but was reputed a man of substance and integrity at the time, and besides, the pursuer wrote to Mr Blaikie, expressing entire confidence in him. The money was paid to Blaikie, and though a portion was lost in his hands, the executor had not been guilty of such negligence as to make him responsible.

At advising—

LORD CURRIEHILL—In this case the question is as to the amount of Lord Dalhousie's claim against the executor of the late Lord Panmure, and it is necessary for us to come to an understanding as to the character of a claim for legitim, and the legal position of a child preferring that claim. There was at one time a good deal of difference of opinion on that matter. On the one hand, it was held that the executry left by a defunct was to be divided among his relict, his children, and his proper representatives who had right to the dead's part, and it was maintained that that was a subject belonging to these parties *pro indiviso*, and required therefore to be divided like a right of commonty. On the other hand, it was maintained that the right vested in the executor entirely, and that it was the duty of the executor in his fiduciary character to realize the fund by converting it into cash, and that the widow and children had a claim on the executor to account for the proceeds. In other words, the child for the legitim, and the widow for her *jus relictæ*, had not a right to the funds themselves as real rights, but were creditors of the executor to the effect of his accounting to them for a proportion of the realized proceeds. That question was anxiously discussed in the case of *Dixon* v. *Fisher*. There was a very large interest at stake there, and the case resolved back into a decision of that question, and here and in the House of Lords it was decided that a child for his legitim was in the position of a creditor of the defunct, and the executor and the child stood in the relation of debtor and creditor. No doubt the child's position as creditor was somewhat different from that of stranger creditors. He could not compete with stranger creditors, for if the fund were inadequate to do more than pay the debts, he had no claim for legitim, the other creditors having a preference. The particular amount of the claim of the child depended on the amount of executry that might be realized by the creditor with due diligence, and if there were bad debts or losses before there was an opportunity of realizing, the claim for legitim would be so far diminished. A claim for legitim is in several respects like the claim of a child of a marriage under antenuptial marriage contract for payment of a stipulated provision. He is a creditor among the representatives of the father, but in competition with other creditors, his claim falls to be postponed. I hold it clear that the position of Lord Dalhousie in this accounting is that of a creditor, and there is here no insolvency. On the contrary there is a large surplus after payment of the debts. Whatever is the amount of the free surplus, one-half constitutes the amount of the debt due to him by the executor. The term of payment of the debt is not a definite period, because it depends on realization, but the legitim is payable as soon as the realization takes place, and the executor is not entitled to retain that sum in his own hands, any more than to withhold payment from the other creditors.

Holding these points to be clear, the state of facts is this. The executry funds of the defunct were realized to a large amount, far more than was necessary to pay the debts, and therefore, to the amount which became payable to Lord Dalhousie in virtue of his claim for legitim, he is clearly in the position of creditor. At the time when the funds were realized that claim would have been a large amount. But the executor when he did realise, did not pay the amount to Lord Dalhousie, but allowed the money to remain in the hands of his own agent, empowered to manage the funds, and a considerable amount of the money so dealt with has been lost either by the fraud or the insolvency of the agent. But the time of payment had come before these losses took place, by the funds being realized, and had the executor paid all the creditors, including Lord Dalhousie, this question would not have arisen. One question raised here is, whether there was negligence on the part of the executor in leaving the funds in the hands of his own agent. I shall assume that there was no negligence, but even in that case is Lord Dalhousie to suffer? It was admitted candidly and explicitly by the Solicitor-General in answer to my question whether the other creditors would suffer by this loss, that they would not. Well, if the other creditors are not to suffer, on what ground is Lord Dalhousie to suffer, assuming his position to be that of a creditor, there being no insolvency? No satisfactory answer was given to that. All that was said was, that the amount of the funds was not ascertained. Suppose any other creditor had made a claim, the true amount of which required to be determined by a lawsuit, Would he suffer by such a contingency as befell these funds? Certainly not. The amount of the claim by Lord Dalhousie was one-half of the realized fund, which was in the same position as if it was in the pocket of the executor, but he had afterwards thought proper to put it into the hands of his agent. I think it might be a question, if this executor had to account to any third party, or a legatee, whether the dead's part would suffer. I give no opinion on that, but in reference to a creditor, I see no ground on which his claim can be affected by such a contingency as occured here.

On that ground I think the objection to Lord Dalhousie's claim is not well founded.

Lord Deas—It appears that the late Lord Panmure died on 13th April 1852, leaving a will by which he disposed of his whole personal means and estate, and appointed the defender his sole executor. His eldest son, now Lord Dalhousie, made a claim for legitim, and questions of considerable importance arose as to whether, in the circumstances, looking to his position as heir under the marriage contract of his father and mother, he was entitled to legitim, and it was ultimately decided that he was. The case came before me in the Outer House, and my judgment was afterwards adhered to. He now claims from the executor that legitim, and the question now before us is, whether a loss of somewhere about £2000, which has been sustained through the agent of the executor, Mr Blaikie, is to be deducted from the gross amount of the estate before ascertaining the sum due to the pursuer as legitim, or whether it is to fall exclusively on the dead's part, or on the executor personally if he cannot recover it out of the dead's part. It appears to me that the question comes to be, what is to be held to be the amount of the personal estate left by the late Lord Panmure? Legitim certainly only affects that estate. And that question again resolves itself into this, whether the whole estate, including the £2000, was or was not realised by the executor.

When speaking of the personal estate left by Lord Panmure, we mean not the estate as estimated at the date of his death, but the actual amount which was or could be realised. If it were to be held that the executor, General Crokat, realised the whole estate, including that sum of £2000, it might be difficult to resist the conclusion that Lord Dalhousie was entitled to have the amount of legitim ascertained on the footing of that sum being included in the personal estate. But he is only entitled to have his legitim ascertained by a calculation based on the footing of including all that was, or that ought to have been realised of the personal estate. It is true he is a creditor of the executor for legitim whatever its amount may be, but that leaves untouched the question, what is the amount of the fund out of which he is entitled to legitim. Even Lord Panmure's creditors, before they could get payment of their debts, would require to ascertain what the amount of the estate was when actually realised, not what was the value of the estate, estimated as at his death. Lord Dalhousie is not even in the position of an ordinary creditor, he is only a creditor in questions with legatees and others who succeed in room of the late Lord Panmure. But even in a question between stranger creditors and the executor, the value of the estate actually realised must be ascertained before they can claim.

If the result of our decision is to be that you only require to ascertain that there has been a loss by the agent of the executor in order to authorise you to place that to the debit of the executor, I cannot agree with the opinions held by your Lordships. The first question in this case appears to me to be, Ought the executor to have in his hands this sum of £2000, which admittedly he has not? I cannot see how that is to be determined, except by looking to the circumstances of the case, and not by proceeding on any general doctrines of law. In order to arrive at the true decision here, we must look at the facts and circumstances before us, and satisfy ourselves that the executor ought to have this money in his hands, and if we are not convinced of that, I can see no ground for holding him liable for this claim. We come then to look at the circumstances of this case. Mr Blaikie was agent and factor for Lord Panmure during his lifetime, and fully trusted by him. Accordingly, we have here a testamentary letter from Lord Panmure, addressed to his executor telling him what to do. The letter is dated in February 1850. It says, "The papers referable to the disposal of what personal property and assets I may die possessed of, are put up together in a drawer in my business room. These were prepared by Mr John Blaikie, advocate in Aberdeen, and you will communicate with him with respect to all professional details applicable to the executry, which he will conduct." That is a clear direction by Lord Panmure to his executor, to put the management of his executry estate into the hands of Mr Blaikie. If anything more were wanting to induce the executor to act as he did, in entrusting the affairs of the estate to the hands of Mr Blaikie, it will be found in a letter written by the present Lord Dalhousie in April 1852, and addressed to General Croket, in the following terms: [*quotes*].

This testimony is very valuable, but I do not think it was necessary to justify General Crokat in carrying out as he did the directions of Lord Panmure with reference to the management of the executry. Here then was an executry estate amounting to about £60,000, and which, in 1850, was given up in Inventory as £59,000 odds. The amount in the inventory required to be realised, and I do not think that any one will say that that was the duty of General Crokat, a gratuitous executor. It would have taken up his whole time, and I do not think that he would have been qualified for the task. The items of the estate were very numerous, and could only be realised at a great expense of time and trouble. For example, there were items of improvement debts, compensation due by the Aberdeen Railway Company, and the Dundee Water Company, and rents to the amount of £28,000. There were Policies of Insurance with English Companies to the amount of £4000—all items obviously requiring the attention of a man of business, and which would take years to recover. General Crokat did as directed, and employed Mr Blaikie to realise the estate. It is not alleged that, up to the date of his sequestration in 1860, there was the slightest doubt in the mind of the public, or in the estimation of General Crokat or Lord Dalhousie, that Mr Blaikie was a proper and trustworthy man to whom to commit the conduct of these affairs. During that time, for anything we can see to the contrary, he was just in the same position as when Lord Panmure wrote that letter of instructions. But unless there was some undue delay or some impropriety or irregularity in the conduct of General Crokat in not calling Blaikie timeously to account, it seems to me very difficult to say that he has incurred a liability for any deficit in the money in the hands of Mr Blaikie. Supposing that we were dealing with the question of a general balance in Blaikie's accounts with the executry, I think it would be very difficult to hold General Crokat liable for any deficiency. The executor called on Mr Blaikie to render his accounts. He did so, and brought out a balance due to him, and General Crokat, not being satisfied, did all he could do; he brought an action of count and reckoning against him in order to ascertain the proper balance. It is only necessary to look at that action to see how long and complicated were the accounts in connection with the exe-

cutry estate. Accordingly, the Lord Ordinary in that action, in 1855, remitted to Mr Donald Lindsay to examine into the state of Mr Blaikie's accounts, and to ascertain how the balance stood. It is especially to be observed that not only was this action raised in 1854, and this remit made in 1855, five years before any doubt arose as to the honesty or credit of Mr Blaikie, but that the result is, not that Blaikie retained in his hands any of the large sums which were realised, and which are mentioned in the record, but that the sums there mentioned were all consigned in that process, and that payment has been made of every shilling. It is no use to inquire whether General Crokat was right or wrong in allowing these sums to remain in the hands of his agent, when they could have been put to no other use, and were by him lent out at a high rate of interest. The course taken resulted in gain to the estate, and the sums were all paid. It is only necessary to look at the accounts, to see that the loss here has arisen in a manner that no executor could have avoided. The balance in question here is brought out by a laborious calculation by the accountant; by his disallowing sums actually paid. For example, by disallowing sums paid to servants for legacies, as not properly vouched, and not as not due, and by disallowing the expenditure of large sums, because they fell on the heir and not on the executor. Of the sums disallowed, many are of very small amount, and all of a description that were debateable to the last, and which could not be ascertained as forming deductions within many years. It was in performance of his duty to the estate that many of these objections were taken by General Crokat to Mr Blaikie's accounts. It was on his objection that they were struck off, the only question with regard to them being, not had they been paid, but were they chargeable. The result of that audit is, that there is a balance of £2000 due to the estate. Now was that ever realised? It never was, it never could have been part of the estate; and the question is, Are we to hold that a part of the estate, and to include it in estimating legitim. It is no use to say that the present Earl stands in the position of a creditor. That does not touch the question as to whether this £2000 should be included. I am clearly of opinion that it never was, never could have been part of Lord Panmure's executry estate.

Lord Ardmillan—I take a somewhat simpler view of the case than that taken by Lord Deas. I think the case may be considered independently of the question whether there was any negligence on the part of the executor. On that matter I give no opinion. It appears to me that a child who has a right to legitim is a creditor of the executor to the extent of one-half of the free executry estate. That had to be taken as soon after the death of the father as it can be realised. It is the claim of a creditor—a creditor indeed who is postponed to onerous stranger creditors, but a creditor who has a claim as clear in law as any other creditor of the executor. The measure of that claim is, that it is a claim to the extent of one-half of the whole free executry estate, after deducting the costs of collection and unavoidable losses prior to realisation. The question here is, was the balance ascertained to be due by Blaikie to the executry estate a realised balance in the eye of the law? I think it was. If the fund had been collected by the hands of the executor, it undoubtedly was realised whenever it was got. If the debtors to Lord Panmure's estate had been insolvent, the loss occasioned in that way would have been a loss prior to realisation. If it had been necessary to sue these debtors, that would have been one of the costs of realising the funds; but after the executor by his own hand, or by the hand of any one as his agent, had become in possssion of the fund, that was a realised fund. There is no question here as to personal liability of the executor. The question here is, whether the loss of £2000 falls to any extent on the legitim? If I am right in holding that the child stands in the position of a creditor, then no loss occurring after realisation falls on him. In *M'Murray*, it was decided that profits made on the fund after realisation, are not shared by the child; and I think it follows that as a child claiming legitim cannot share these profits, so he cannot suffer any loss after realisation. If the executors had traded with the funds, as in the case of *M'Murray*, the child could not have been allowed to benefit. If he had purchased stock, and the stock had risen in value, I cannot think the legitim would have been increased beyond the price paid for the stock. The legitim must be taken as at the date of the death of the father, and profit or loss arising thereafter from the dealings of the executor with the fund, do not affect the child.

As to the term realisation, I think that funds which reached the hands of Mr Blaikie as a part of the executory, reached the executor's hands in point of law. It may have been natural and prudent in the executor to trust Mr Blaikie. I say nothing to the contrary. The embarrassments of the Blaikies were suspected by very few persons, and therefore there may have been nothing strange in the degree of confidence reposed in Mr Blaikie by the executor. But after all, it was the confidence of the executor. He trusted his agent, and left the executry funds in his hands; and however natural that confidence may have been, it was the confidence of the executors, and the legitim cannot suffer by the consequent loss. I am, therefore, disposed to deal with this case apart from all questions of negligence or delay on the part of the executor, and simply on the law of the case, which is, that the child is creditor for his share of the free executry funds as realised, and that whenever the funds reach the hands of the agent they reach the hands of the executor, and are realised funds.

Lord President—I concur with the majority. There seems to be some importance attached to the letter of Lord Panmure. Now, in the first place, I don't see how that can be pleaded against a party who is not claiming under the settlement, but adversely to it. No instructions given by the testator can affect him. In the second place, the instructions given by that letter are simply this, that in all details Mr Blaikie is to give his professional assistance. But the gentleman who is to be employed professionally as a law agent is not the proper depository of the realised funds of the executry estate, and therefore this letter could not justify what followed.

But there is another letter, written by General Crokat himself, to which I attach more importance. It is dated 15th April 1852. General Crokat, writing to Mr John Blaikie, refers to Lord Panmure's letter, and says:—"So far as I am concerned, either as executor or in reference to the instructions contained in that letter, I authorise you to act for me as fully and amply as I could myself do; and should this letter not bear sufficient authority,

I am ready to give any more formal mandate that may be required." I presume there cannot be much doubt as to the meaning of this mandate. It is a mandate to Blaikie to do everything that the executor could do. It is a universal delegation of every function of the executor, and it constitutes Blaikie the acting executor in place of General Crokat. It enables him to uplift without any more special mandate the assets of the executry estate. With certain exceptions there is no doubt that it was under this letter that the assets were to a great extent realised by Mr Blaikie. It seems to me, in law, to admit of as little doubt that when an executor or trustee delegates his powers to another, he has to answer for every thing that person does, absolutely, and without exception, and that every act of intromission with the executry funds or trust funds by the person so delegated is in law a personal actual intromission of the executor. That is settled by a long series of cases. What follows this letter? One considerable asset of the estate was a balance due by one of the banks: that was uplifted by Blaikie; but this letter was not judged sufficient by the bank, and Blaikie had to produce a discharge by the executor. When the executor put into Blaikie's hands the discharge for that sum, and allowed Blaikie to uplift it, and left it in his hands, that was a personal intromission by the executor. It was he who in law realised that part of the estate by the hand of Blaikie; but, in law, by his own hand. So also with the sum uplifted from the Atlas Insurance Company. That was uplifted by Blaikie; but that too was a personal intromission of the executor. Then a large sum of rents—about £9000—comes into the hands of Blaikie; and it is admitted that from that time down towards 1854 there continued to be a balance in Blaikie's hands of realised funds of the executry estate, varying from £10,000 to £17,000, but never apparently under the lower sum. This was admittedly the case down to March 1864. This is the state of the matter as averred by the executor. [*Reads from record.*] That I hold to be a statement by the executor, that there was an amount of realised executry in Blaikie's hands at that date of that amount. It was impossible to get it out of Blaikie's hands, and therefore an action of count and reckoning was raised; and there remained, according to General Crokat, still in Blaikie's hands a sum of £2652. Nothing can disturb that fact admitted by the executor. And how did that sum of £2652 come to be in the hands of Blaikie? Just because the executor had delegated to him his whole power as executor, and had allowed him to realise the estate and retain it in his own hands.

On these facts it seems to me to be impossible to say that the executor is not liable for the £2000 as part of the realised executry estate. No doubt it does not exist, just as it would not exist if General Crokat had lost it at play. But he was not entitled to trust any one with the money, or to leave the funds in the hands of any agent. And therefore that sum is part of the free executry estate.

I do not go into the question as to the relation of a claimant of legitim to the executor. It is clear that it is the relation of debtor and creditor; but apart from that, I think the simple question is, whether that sum can be taken from the debit side of the executry account, on the ground either that it was not part of the executry estate, or that, when realised, it had been lost in such a way as not to make the executor liable. I think the money was realised estate and that it has been lost by improperly leaving it in the hands of the agent of the executor.

Agents for pursuer—Gibson-Craig, Dalziel, and Brodies, W.S.

Agents for Defender—Adam, Kirk, and Robertson, W.S.

Thursday, March 26.

FIRST DIVISION.

WADDELL (BATHGATE AND AIRDRIE ROAD TRUSTEES) *v.* EARL OF BUCHAN.

Property—Road Trustees—Minerals—Highway—Servitude—Construction. Held, on construction of a special Act of Parliament, and proceedings following thereon, that certain road-trustees had no right of property in the *solum* of a road. Observations on nature of highways.

The complainer in this case was William Waddell, Clerk to, and on behalf of, the Bathgate and Airdrie Road Trustees, and the respondents were Robert Bell, coalmaster, Broxburn, and the Earl of Buchan and his trustees, and the prayer of the suspension and interdict brought by the complainer was to have the respondents interdicted from excavating any of the minerals below the Bathgate and Airdrie turnpike road adjacent to the lands of Strathbrock, in the parish of Uphall, and county of Linlithgow; and also to have them interdicted from excavating on the property of the road trustees underneath the *solum* of the road, or doing anything tending to injure the surface of the road. The statute under which the trustees act was originally passed in 1792. By that statute the trustees were authorised to make, widen, or change the course of the roads under their management, and for that purpose to take down fences and houses, provided they shall make satisfaction to the owners for the damage they may sustain by these operations, and for this purpose (that is, for making satisfaction to the owners) "it shall be lawful for the said trustees, or any five or more of them, to contract and agree with the owners of, and persons interested in, such grounds and hereditaments, for the purchase thereof, or for the loss or damage they, or any of them, shall or may anyways sustain in manner foresaid." If the owner refused or delayed to treat, the trustees were to apply to the Sheriff "to fix and ascertain the just amount and value of such lands and hereditaments respectively, and the damage ensuing from making, widening, turning, or altering the said roads." For this purpose he was to summon a jury, before whom evidence was to be led "for ascertaining what damages will be sustained by, and that recompense and satisfaction shall be made to such owners, occupiers, or proprietors, for or upon account of pulling down such houses, or of the taking of such lands, ground, or hereditaments with the roads or of turning such roads into the same." The jury were to return a verdict "ascertaining such damage and recompense," and on payment or tender thereof the trustees "shall thenceforth have a right and be at liberty to take and use the ground, as fully and effectually ever after as if the respective proprietors had executed regular dispositions of the same, and thereupon infeftment had followed." Shortly after the passing of the Act, the trustees took a portion of land from the property of the Earl of Buchan, and the sum to be paid to the Earl and