

1878 (*ante*, p 593) I held, for the reasons fully stated in my judgment, that a bankrupt could take no benefit from the second part of section 45 where the creditors had declined to grant him personal protection, and accordingly I refused an application for liberation made in these circumstances. In that case, however, I ventured to express a doubt as to the soundness of the view stated by Lord Kinloch in the passage above quoted, and which was necessary to the judgment. My further consideration of the point has confirmed that doubt. It appears to me, for the reasons stated in the case of *Bruce*, that unless the creditors have resolved to grant personal protection against diligence, the bankrupt can obtain no benefit under the second branch of section 45 of the statute, but, on the other hand, I am of opinion that if such a resolution has been passed an application by the bankrupt, with consent of the trustee and commissioners, for liberation may competently be presented and entertained by the Sheriff or the Lord Ordinary on the Bills.

“Accordingly, if this had been an application by the bankrupt with consent of the trustee and commissioners under section 45 of the statute, I would have held it competent in the circumstances. But in that case it would be entirely a matter in the discretion of the judge to give or withhold the warrant of liberation asked. The fact that the creditors had resolved to give a personal protection would be a circumstance material, and indeed in my view indispensable, in support of the application, but the success of such an application would to some extent depend on the conduct of the bankrupt towards his creditors generally, and towards the incarcerating creditor, and the liberation might be granted under such conditions as to caution or otherwise as the judge might think fit to annex.

“As the Sheriff-Substitute remarks, the bankrupt may yet present such an application if he can obtain the consent of the trustee and commissioners. But he will do well to consider whether he can possibly succeed in such an application in the face of the decision against him in the process of *cessio* founded on his own misconduct, and if it be the fact that the trustee intentionally refrained from informing the agent of the incarcerating creditor of the meeting of creditors about to be held to consider the propriety of giving the bankrupt personal protection, as the respondent alleges, his concurrence in the application should have very little weight.”

The appeal was therefore refused.

Counsel for Appellant — Nevay. Agent —
Robert Broatch, L.A.

Thursday, June 5.

SECOND DIVISION.

[Lord Curriehill,
Ordinary.

TRUSTEES OF THE KELVINSIDE ESTATE
COMPANY v. THE TRUSTEES OF THE
GREAT WESTERN ROAD, GLASGOW, AND
DONALDSON'S TRUSTEES.

Property—Conveyance of Heritage—Reserving Personal Right to Compensation for Part previously Disposed of—Act 1 and 2 Will. IV. cap. 43 (General Turnpike Act)—Act 6 and 7 Will. IV. cap. 135 (Special Act)—Act 2 and 3 Vict. cap. 82 (Supplementary Act).

Certain road trustees obtained a Special Act empowering them, after having resolved to take possession of any lands, “to stake out, take, and acquire” such lands on “making satisfaction to the proprietors. . . for the value thereof . . . as shall be agreed on.” The General Act authorised the acquisition of and provided for the lands becoming the property of the trustees. These road trustees in 1838 came to an arrangement with the proprietor of certain lands, and they took possession of a portion thereof extending to four acres, payment of the price being postponed until such time as the road should pay. Subsequently the lands, including the four acres, were sold to an estate company, without any reservation of the ground occupied by the road, or any assignation of the rights of the original proprietor to the price. Held in these circumstances that the price of the ground acquired by the road trustees formed a portion of the estate of the representatives of the original proprietor, as a debt due to him personally, and did not pass with the rest of the lands when they were conveyed to the estate company.

This was an action of declarator raised by Eleanor Montgomerie and others, as trustees of the Kelvin-side Estate Company, against Dr Richardson and others, trustees of the Great Western Road, Glasgow, and against the trustees of the late Mr Donaldson of Gartnavel.

The following narrative of the circumstances of the case is taken from the note appended to the interlocutor of the Lord Ordinary (CURRIEHILL):—
“In this action the trustees of the Kelvin-side Estate Company seek to have it found and declared that under and by virtue of their titles to the lands of Gartnavel, part of the estate of Kelvin-side, they are in right of, and have a valid and sufficient title to sue for and discharge, the sum due by the trustees of the Great Western Road, Glasgow, as the price or value of a piece of ground of about three or four acres in extent, forming part of the said lands of Gartnavel, which piece of ground is occupied and possessed by the said Road Trustees, and now forms part of the said Great Western Road, together with all interest due upon the said price or value from and since 1st August 1838. The parties called as defenders are the trustees of the deceased James Donaldson of Thornwood, who in 1838 was proprietor of the lands of Gartnavel. These trustees, after his death in 1844,

sold Gartnavel to the pursuers, conform to disposition dated 13th, 14th, and 15th May 1845, but they claim right to the price or value of the piece of ground in question, in respect the same had been taken possession of by the Road Trustees during the lifetime of Mr Donaldson; that he thereby became entitled to the price or value thereof; and that the right to the price is now vested in them, as his trustees. The other defender is Colin Dunlop Donald, clerk and treasurer to the Road Trustees, and as such representing them under the various Road Acts to be presently noticed. The Road Trustees have no real interest in this question, and they are willing to pay the price, or at least to grant a bond therefor, to whichever of the parties shall be found entitled to the price.

“The circumstances out of which the present question has arisen are shortly as follows:—The pursuers and their predecessors have for many years been the proprietors of the Kelvinside Estate, which in 1838 appears to have been a purely rural district, although during late years it has by the extension of Glasgow to the west practically become part of that city. It is intersected by the river Kelvin, and at one time it had included the lands of Gartnavel, which, however, in 1838 had become the property of the late James Donaldson of Thornwood, although they have since that date been re-united to Kelvinside, as will be afterwards explained. The whole of these lands are situated in that part of the parish of Govan which is on the north bank of the Clyde, and in 1836 the proprietors of these lands, and of other lands in the neighbourhood, considered that it would be of advantage to the district and to Glasgow to have a bridge over the Kelvin and various new roads constructed—one of these being a road in the line of what is now known as the Great Western Road—and for these purposes they obtained in 1836 a Special Act of Parliament (6 and 7 Will. IV. cap. 135), and in 1839 a Supplementary Act (2 and 3 Vict. cap. 82). By the terms of these Acts, various persons, and *inter alios* all the owners of lands within that part of the parish of Govan and county of Lanark to the north of the river Clyde, were appointed trustees for the purpose of surveying, making, and maintaining the roads in question, and for exercising and carrying into effect the other powers and purposes of the Act. The proprietors, therefore, of Kelvinside estate, and Mr Donaldson as then proprietor of Gartnavel, were Road Trustees under these statutes. The General Turnpike Act for Scotland (1 and 2 Will. IV. cap. 43), and the whole powers and provisions thereof, were incorporated in the Special Act of 1836, except in so far as expressly varied, altered, or repealed thereby.

“It is therefore necessary to examine, in the first instance, the provisions of the General Turnpike Act relating to the acquisition of land required for the formation of turnpike roads in Scotland. By section 60 it is enacted that it shall be lawful for Road Trustees ‘from time to time to enter upon the lands or premises through which or whereupon any road authorised to be made, altered, or repaired by any Act of Parliament, is intended to pass, and also upon any adjoining lands or grounds, and to stake out such road, and to cut and make any drains and ditches, or arches through or into any lands adjoining or lying con-

tiguous to any part thereof, and to make a temporary way or ways through or over any such adjoining lands, . . . as the said trustees shall see fit.’

“By section 63 it is enacted ‘That it shall be lawful for the trustees of any turnpike road to obtain and acquire by purchase, lease, or otherwise, and it shall be lawful for all persons . . . to sell, feu, let, and convey all such lands, buildings, or other heritable subjects as shall by such trustees be deemed necessary to be obtained or acquired by them for making, widening, directing, altering, improving, or repairing such roads, . . . or otherwise appearing to them proper to be used in any way for the purpose of the trust, and to treat, contract, and agree for the value thereof, or for the compensation for any loss or damage occasioned by any operations of any such trustees.’

“By section 64 it is enacted ‘That in case such persons, proprietors, or others as aforesaid shall refuse or delay to treat, or shall not be satisfied with the price offered by the trustees of any turnpike road, it shall be lawful for such trustees to make application to the Sheriff . . . in order to ascertain the value of the lands, buildings, or other subjects necessary to be obtained or acquired as aforesaid, and the loss or damage ensuing from the altering or renewing of fences, or any other loss or damage occasioned as aforesaid.’

“By section 67 it is enacted ‘That all lands, buildings, and other heritable subjects which may be acquired by the trustees of any Turnpike Act, under the authority of the same, shall become the property of the said trustees by the simple discharge of the agreed price or appraised value thereof, or by consignment of the said price or value in the Bank of Scotland, the Royal Bank of Scotland, or British Linen Company, or by all claim of damage for the same being renounced or abandoned, whereupon such trustees may take and use the said lands, buildings, and other subjects, and shall hold the same as validly as if the respective proprietors had executed in their favour regular dispositions of the same, and infestments had followed thereon.’

“Such being the provisions of the General Turnpike Act, it is in the next place necessary to examine the provisions of the Special Act of 1836 with reference to the Great Western Road, in order to see whether these in any respect repeal, alter, or vary the provisions of the General Act. It should here be mentioned that the Great Western Road was intended to cross the Kelvin by a new bridge, and to intersect the lands of Kelvinside, the lands of Gartnavel, and other lands, all lying on the west side of the Kelvin, *i.e.*, the side farthest from Glasgow, as well as certain other lands on the east side of the Kelvin. By section 3 of the Special Act the Road Trustees were authorised and empowered to order and direct the several roads (including the Great Western Road) specified in the Act to be made, repaired, and maintained, ‘and for these purposes to take and use any lands, tenements, or hereditaments, making or tendering compensation to the owners thereof and persons interested therein for the same, or for the damage they may sustain by the execution of this Act as after provided.’

“By section 10 it was enacted ‘That when the said trustees shall have taken or resolved to take into their possession any lands, tenements,

houses, or other heritages, for the purposes of this Act, it shall and may be lawful for them or their surveyors and workmen, from time to time, to enter upon such lands, tenements, houses, or other heritages through which or whereupon any of the said roads and bridges hereby authorised to be made is or are intended to pass or be erected, or through which or whereupon any of the said roads and bridges hereby authorised to be made is or are intended to pass or be erected, or through any adjoining lands, tenements, and heritages, and to stake out, take, and acquire so much of said lands, tenements, and heritages, as may be required for the said roads and bridges, or any of them, or other purposes aforesaid, the said trustees making such satisfaction to the proprietors and occupiers of such lands, tenements, and others for the value thereof and the damages thereby occasioned as shall be agreed on between the said trustees and such proprietors and occupiers, or otherwise, or as the said value and damages shall be ascertained, adjudged, and disposed of in the manner and in the terms of the General Turnpike Act.

[And at a later part of the note]—"On 16th May 1838, at a meeting of the trustees, at which Mr Donaldson of Thornwood (then the proprietor of Gartnavel) was present, and occupied the chair, a committee was appointed—one of whom was Mr Donaldson—for the purpose of procuring estimates for the work, and the minute, which is signed by Mr Donaldson, contains the following declaration:—"As the whole proprietors of land to the west, and the greater part of those to the east, of the Kelvin, have agreed to give the ground necessary for the formation of the road without any payment in the meantime, this meeting now declares that such persons shall be creditors on the funds of the road for the present value or price of their land, and interest to be fixed and ascertained as soon as possible, but which price shall be postponed to the sum to be borrowed on the funds of the trust to finish the road as before mentioned,' &c. At a subsequent meeting on 14th September 1838, at which Mr Donaldson was also present, the following procedure took place—The minute bears that 'The proprietors of ground along the whole line of road having agreed to give their ground gratis, but to be postponed creditors on the funds of the trust for its value, and as it is desirable that the ground should be valued at present so as to ascertain the claims of the different proprietors on the funds of the trust, the meeting think it proper to appoint a valuator or valutors for that purpose, and they therefore nominate Mr John Baird, architect in Glasgow, as the valuator on their part, subject, however, to the approval of the proprietors on the line. Mr Baird is authorised to value both the lands and the buildings.' Mr Donaldson, who was a party to all these minutes as a road trustee, was also, as I have said, proprietor of the lands of Gartnavel to the west of the Kelvin, and it must therefore be held as proved that he gave his lands for the immediate construction of the road without payment at the time, but on the footing that he should be a postponed creditor for the price or value, which was to be ascertained as soon as possible by arbitration. The ground was at once staked off, the bridge over the Kelvin was built, and the road was formed through Kelvinside

and Gartnavel, and the whole was completed and opened for public traffic in or before the year 1842. Missives of reference for the valuation of the ground were entered into between the trustees and several of the proprietors of land on the line of road, and *inter alios* the proprietors of Kelvinside and Mr Donaldson, as proprietor of Gartnavel—the valutors being Mr Baird for the trustees, and a Mr Murray for the proprietors; but beyond the appointment of Mr Nicholson as clerk to the reference, no progress appears to have been made in the valuation up to the date of Mr Donaldson's death in 1844."

The Lord Ordinary pronounced an interlocutor assailing the defenders from the conclusions of the action and finding Donaldson's Trustees entitled to expenses. He added this note—

"Note—[After stating the facts, *ut supra*].—Now, it appears to me that these provisions of the Special Act as to the taking and acquisition of land by the Road Trustees for the purposes of the Act do not repeal, alter, or vary the provisions of the General Turnpike Act, and although there may be a little want of precision in the phraseology of both statutes, I think that the true meaning of neither statute is obscure. The 63d section of the General Act authorises the trustees to obtain and acquire lands by purchase, lease, or otherwise, of the Special Act, and to treat, contract, or agree with the owners for the value thereof, and for compensation for any loss or damage caused by the operations of the trustees; and the 67th section of the same Act provides that all lands 'which may be acquired' by the trustees for the purposes of the Special Act shall become the property of the trustees on their paying to the proprietors the agreed-on price, or consigning the same in bank, or on the proprietors renouncing or discharging all claim for compensation, and that thereupon the trustees may take and use the lands and hold the same as if they had been in- feft therein; and the Special Act, after authorising the trustees by section 3 to make the road in question, and to take and use the lands for this purpose, 'making or tendering compensation to the owner' in manner provided in the Act, goes on in section 10 to authorise them, 'when they have taken or resolved to take into their possession' the lands required by them, 'to enter upon such lands, and to stake out, take, and acquire the same, they making such satisfaction to the proprietors and occupiers' thereof for the value of the lands and damages as shall be agreed upon, or as shall be fixed by the verdict of the jury. What appears to me to be the sound construction of these provisions of the two Acts is, that unless and until the trustees satisfy the proprietors, *i.e.*, the persons who are the proprietors, for the value of the ground, and for any damages which may be occasioned, they are not to be entitled to take and use the lands, or to acquire the property thereof. But I need hardly say, that where the proprietor may be willing to allow the trustees to enter upon his lands, and stake off and form and use the road without insisting for immediate payment, or even for the previous ascertainment of the value and compensation, such proprietor will be held to have been 'satisfied' within the meaning of the Act, and the trustees may lawfully acquire the lands and make the road. In such a case the proprietor who makes such an arrangement becomes the creditor of the trustees for the

amount which may ultimately be ascertained to be the value of the land, and compensation for damage, although he may not be feudally divested of the property of the land. His claim is a personal claim for the price, with which he may deal in any way he pleases. In the words of the Lord President in a somewhat analogous case—*Watt v. The Caledonian Railway Company*, 2 R. 917—‘It is not a claim to have the property restored to its original condition. That was physically impossible. Therefore there comes in place of that a general claim of damages—a claim personal to the individual who happened to be owner of the estate at the time. If a person in that position sell the estate, he does not sell the claim. He may make it the subject of special assignation, but the two rights are separate and distinct. The property is heritable, and as such can only be conveyed by disposition in common form. The claim is personal, and may be conveyed by assignation, and sold separately from the property.’

“Such being the facts of the case, the question arises, What was the legal relation subsisting at the death of Mr Donaldson and the Road Trustees in reference to the land taken by the latter, and to the price thereof? I think that they respectively occupied the position of seller and purchasers of the land, or at least of the use of the surface of the land, under a contract of sale for a price which, although not then ascertained, was to be ascertained as soon as possible by arbitration. Mr Donaldson, though still remaining feudal proprietor of the lands, became by that transaction a personal creditor for the price; and the trustees on paying or consigning the price would not only have discharged their debt, but would *vi statuti* have divested Mr Donaldson or his heirs and successors of the property of the land, or of the surface thereof. Had Mr Donaldson died intestate, the price would have fallen to his executors and not to his heir (Erskine, ii. 2, sec. 17). In short, his claim for the price belonged to him, not as being still the owner of Gartnavel, but as the creditor in the obligation to pay that price constituted by the contract of sale of the ground taken by the trustees. Mr Donaldson, however, did not die intestate; he left a settlement of his whole estate, heritable and moveable, in favour of trustees, who thus became proprietors of Gartnavel, and also took Mr Donaldson's place as creditors of the trustees for the price of the portion thereof now in question.

“In 1845 these trustees sold the estate of Gartnavel to the pursuers or their predecessors, who were then, as now, the Kelvinside Estate Trustees, but they did not assign to these purchasers the claim for the price of the ground taken by the Road Trustees. It is true that in the disposition the lands of Gartnavel are described ‘as measuring 139 acres and 1 rood, Scotch measure or thereby, or 175 acres 2 roods 19 poles and 53 one-hundredth parts of a pole imperial standard measure or thereby, . . . excepting and reserving from this conveyance these parts and portions of the said lands and others sold and disposed or feued by the said James Donaldson to the Glasgow Royal Asylum for Lunatics, consisting of 67 acres 3 roods and 24 perches imperial standard measure, . . . which said lands and others, under the said exceptions and reservations, are hereby disposed with all right,

title, interest, claim of right, property, and possession, which the said James Donaldson, or we, as trustees foresaid, had, have, may, or can claim to the said lands hereby disposed, or to any part or portion thereof, with and under the exceptions and reservations before mentioned.’ The extent of ground sold to the Kelvinside Trustees was thus:—175 acres 2 roods 19 $\frac{53}{100}$ poles, less 67 acres 3 roods 24 poles, or 107 acres 2 roods 17 poles or thereby; and it is admitted that unless the ground taken by the Road Trustees (3 acres 1 rood 27 poles) is included in the measurement, the Kelvinside Trustees did not get the full measurement of 107 acres 2 roods 17 poles. But it must be kept in view that at the date of the disposition the road had been for years open to the public for traffic; that it was not in the power of the seller to convey to the purchasers any beneficial interest in the *solum*, or at all events in the surface of the ground occupied by the road, and that Mr Donaldson and his trustees had become the creditors—the personal creditors—of the Road Trustees for the price thereof. Now, all this was well known to the purchasers; and as that claim which was not a pertinent or accessory of the lands sold was not specially assigned to the purchasers, I am of opinion that it was not carried to them by the conveyance of Gartnavel, or by the general words assigning to them all the right, title, and interest in these lands competent to Mr Donaldson and his trustees, and that it remained and still remains vested in these trustees.

“The pursuers maintained in argument that this was a case of double sale, that Donaldson had first sold the three acres odds to the Road Trustees, but had neither received the price nor had been feudally divested of the land, and that his trustees had afterwards sold the same subjects to the pursuers, and that the latter are therefore entitled either to obtain payment of the price from the Road Trustees or to get full possession of the ground. But I do not think the argument sound. Donaldson's trustees did not sell, and the pursuers did not buy, the ground in question as part of the estate of Gartnavel, of which they were to have the full beneficial occupation and possession. The pursuers bought the whole estate under the actual burden of an already existing public road which had occupied between three and four acres of the estate, but which had been formed under an arrangement with the Road Trustees, with the nature and terms of which they were well acquainted, and in virtue of which Mr Donaldson, the former proprietor, had become a personal creditor of the Road Trustees for the price as the consideration or price of his permitting that burden to be imposed on his property without immediate payment. Donaldson's trustees had two estates, either or both of which they had power to sell, one being the lands of Gartnavel under burden of the existing road, the other being their claim upon the Road Trustees as creditors for the value of that burden. They might have sold both to the pursuers, but they only sold the former, and they remain, as I have said, proprietors of the latter, which they are now entitled to enforce against the Road Trustees. On the whole, therefore, I am of opinion that the pursuers have no title to insist in their present claim, and that the defenders should be assoilzied.”

The pursuers reclaimed, and argued—The Special Act gave authority to purchase and acquire ground, and section 10 provided for matters being arranged to the satisfaction of the proprietors in terms of the general statute—*Watt v. Caledonian Railway Company—Heron v. Espie—Moncrieff v. Milne*. [LORD JUSTICE-CLERK—The question is, whether the price paid by the purchasers to Donaldson's trustees included the ground in question or not.] *Galbraith v. Armour—Alexander v. Bridge of Allan Water Company—Donald v. Nicol*. The pursuers had not acquired a right to this ground, which passed to the defenders (Road Trustees) subject to the payment due to Donaldson's trustees.

Argued for the defenders—The claim was for the price or value of this ground with interest from 1838. That was part of the personal estate of the late Mr Donaldson, and passed as such to the defenders (his trustees). The 10th section of the Special Act drew no distinction between staking out and taking into possession and acquiring. [LORD JUSTICE-CLERK—The Road Trustees are nothing more, really, than servitude holders.]—That was so, but they had a much more exclusive right—*Waddell v. Earl of Buchan*. The Road Trustees never asked, and did not require, a feudal title. [LORD JUSTICE-CLERK—What does the statute mean by saying that they shall become proprietors of the lands?—To obviate the necessity of a conveyance. That was met by *Waddell's case—Locality of Springburn*. Roads were held not liable for stipend, as they were presumed to have been considered in the valuation of the adjoining lands.

Replied for the reclaimers—The case of *Locality of Springburn* had no bearing. The property in the soil remained with the adjoining proprietors. Just as well might it be said that the Clyde was the property of the Clyde Trustees. They relied not merely on the section quoted, but on section 67 of the Turnpike Act. This last section gave the Road Trustees power to sell to anyone, with reservation of certain rights of pre-emption. How could the purchaser get his title save from the trustees having a statutory title.

Authorities—*Watt v. Caledonian Railway Company*, July 9, 1875, 2 R. 917; *Heron v. Espie*, June 3, 1856, 18 D. 917; *Moncrieff v. Milne*, July 16, 1856, 18 D. 1286; *Galbraith v. Armour*, 4 Bell's App. 385; *Alexander v. Bridge of Allan Water Company*, February 4, 1868, 6 Macph. 324; *Donald v. Nicol*, Dec. 12, 1866, 5 Macph. 146; *Waddell v. Earl of Buchan*, March 26, 1868, 6 Macph. 690; *Locality of Springburn*, March 2, 1873, 5 R. 718.

At advising—

LORD JUSTICE-CLERK—The true question here is, Whether the Road Trustees had or had not a right of property in the ground that they were entitled to acquire and did so acquire?

Now, where trustees are authorised to acquire ground, and do so, I should, I confess, have some difficulty in assenting to the general proposition that they do not become the feudal proprietors of it. But in the present case that may be entirely put aside. The point here arises from the fact, that some thirty years ago a road was projected in what was then the neighbourhood of Glasgow, through the property of various persons, and apparently the projectors of this

road were the owners of the property. I may here refer to the Act which authorised the construction of this road—[reads 10th section]. Now, I do not enter into any inquiry as to what the "value" was, nor as to what was the meaning of "acquire," but such was the nature of the possession by the Road Trustees—the trustees who took the ground and have held it ever since. The proprietors agreed to give the ground, and further, it was arranged that the sum of money representing what they had been deprived of was to be a personal debt left due to them, not secured on the road itself, but the payment whereof was postponed for some time—indeed for an uncertain time—until the road paid itself. Surely this was a matter in which these proprietors had a personal interest. In fact, the debt remained a personal debt, and remains so now. Mr Donaldson, however, died in 1844, and he left a settlement by which he appointed certain trustees. These trustees acted in the exercise of their discretion, and sold the property belonging to the trust through which the road passed, and probably they should have excepted this ground from the warrantice granted by them. But they did not do so. Now, in these circumstances the question raised by the purchasers is, whether they are entitled to claim and receive payment of this debt due in 1838 to the late Mr Donaldson? "You shall not have your ground," or "I will not give you a title." Either of these might have been said by the pursuers to the Road Trustees had they been in a position to take up such ground, but they were not, and only say "Pay us what you owed Mr Donaldson."

If the money for this ground had been paid at the time the ground itself changed hands, and if the payment had been discharged by Mr Donaldson, there would then at once have been an end of the whole affair. But putting this aside, we must, I think, ask the question, what it was that the purchasers paid for, and what was it that they got for their money? They paid for the 4 acres, and they got them. The road, no doubt, formed a portion of these 4 acres, but there it was patent to all, and no one knew—at least it was probable that no one knew—what the true position of the title was as regards the road. The purchasers paid their price and got their value.

I cannot say what might have been the result had the right of Mr Donaldson not been completed, but it is clear that by reason of no feudal right have the pursuers any imaginable remedy.

LORD ORMDALE—I have come to the same conclusion. [His Lordship referred to the statements as to the acquisition and possession by the Road Trustees]. So far back, then, as 1838, the trustees of the Great Western Road took possession of the ground, and have held it ever since, and that without challenge. Now, it is not conceivable that the Road Trustees should have acted as they did without a statutory right. Did they then obtain this? The answer is, it seems to me, given by section 10 of the Special Act, taken along with two minutes of the meetings of the Road Trustees, which make it manifest that the matter was settled. I do not think it necessary to turn to section 67 of the General Turnpike Act to make things clear. The 10th section is enough. In the

whole circumstances as now before the Court we have the ground taken, full possession enjoyed, and all that remains is that the owners shall be satisfied by private arrangement or otherwise. This was actually done—Mr Donaldson was himself present and in the chair at the meetings. Accordingly, we must hold that the Road Trustees in 1838 obtained a statutory title to the ground of the road.

What then remains? I cannot think that anything more could have been done. I agree with your Lordship that while the Donaldson trustees did give a disposition to the pursuers without excepting the road, yet in point of fact all parties were well aware that they were not transferring the right to this road, and I may use the illustration of an estate sold with an inclusive acreage, as is commonly done—an acreage embracing all public roads passing through the lands.

LORD GIFFORD—I have arrived at the same result. Though there may be some questions of nicety raised, yet I have not any doubt whatever that Donaldson's trustees and not the pursuers are entitled to receive the bond or the money it represents from the Road Trustees for this portion of the land of the late Mr Donaldson. The minutes of the Road Trustees show that Mr Donaldson was a party to the whole arrangement, and accordingly are very important, as indeed truly constituting the contract. He sold his ground to the Road Trustees for the purposes of the road only; he had agreed to accept a bond from them with postponed payment. He stood in the position of a postponed creditor and nothing else. Had Mr Donaldson died intestate, I think that this debt was moveable, and as such would have gone to his executor, while the estate as heritage would have passed to the heir-at-law. If that heir had sold the estate, he could not have sold a right to this price. Now, of course, there is no difference in the fact that a will actually was made.

Now, what did the Donaldson trustees sell? Did they sell the estate, or did they sell also the personal debt due to them? If we read the disposition we find no reference to this. It is a sale of the estate with the road on it. It is proper enough to include the road in the measurement of acreage, because many rights are left to the proprietor of the *solum*—as, for example, minerals and so forth. I confess that I am not at all moved by the fact that here the full acreage of 4 acres was disposed to the pursuers, for where a very wide road existed, for instance, you might afterwards actually have buildings put up in the road itself were it the absolute property of the Road Trustees, and not included in the titles of adjoining lands. Nothing short of an assignation of the debt would, I think, have been sufficient to transfer it if this had been intended, but I think it never was intended, and further that the debt never was transferred.

The Court adhered.

Counsel for Pursuers (Respondents)—Lord Advocate (Watson)—Trayner. Agent—H. B. Dewar, S.S.C.

Counsel for Defenders (Reclaimers)—Kinnear—Pearson. Agents—Cowan & Dalmahey, W.S.

Saturday, June 7.

SECOND DIVISION.

[Lord Adam, Ordinary.]

M'DONALD v. M'DONALDS.

(*Ante*, Jan. 16, 1879, and March 18, 1879, pp. 271 and 460).

Entail—Petition for Disentail—Expenses—Stat. 38 and 39 Vict. cap. 61 (Entail Amendment Act 1875), sec. 5.

In a petition for disentail, where a number of questions had arisen between the petitioning heir in possession and the second and third heirs in regard to the value of their expectancies in the entailed estate, and a great amount of litigation ensued, in which the petitioner was substantially successful—*Held* that in the circumstances neither party were entitled to expenses.

This case has already been reported (Jan. 16, and March 18, 1879, *ante* pp. 271 and 460), and the present question arose in regard to the expenses connected with the litigation which was the subject of the previous reports. After the proceedings reported *ante*, pp. 460, the case was remitted to the Lord Ordinary to proceed in accordance with the findings of their Lordships of the Second Division, and Lord Adam (Ordinary) after various procedure, and after having obtained reports from men of skill, pronounced the following interlocutor:—"In respect of consignment, in terms of the preceding interlocutor of May 27 current, dispenses with the consent of the respondents . . . Approves of the instrument of disentail: Interpones authority thereto, . . . and decerns; and having heard counsel on the question of expenses, finds no expenses due."

The respondents reclaimed, but afterwards stated that they would not offer argument against it. The petitioner then asked for the expenses of the litigation so far as the respondents had been unsuccessful. The Court held that the questions being novel and difficult, the respondents were entitled to appear in the circumstances, and refused the motion, but the Second Division adhered.

Counsel for Petitioner—Balfour—Pearson. Agent—A. P. Purves, W.S.

Counsel for Respondent—Kinnear—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, June 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

DEWAR v. URQUHART.

Succession—Testament—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), sec. 20—Conveyance of Heritage—"Residue of my Estate."

A person in possession of heritable and moveable property left a holograph settlement in which he appointed an "executor," with power to assume other executors. He then made provision for the payment of certain debts and annuities, and went on to say