the lease must necessarily in the present case fall back to the landlord. Some nice questions might perhaps have arisen (looking to the terms of the lease) as to whether the landlord could have objected to an additional partner being assumed on the ground that assignees were excluded. This point however is not raised by the present case. On the question before us as to the sequestration of the copartnery terminating the lease, I agree with your Lordship, and I think that the other point is settled by the case of *Scott*.

LORD ADAM—I am quite clear that this was a lease to the copartnery of M'Knight & Company, and it is equally clear in law that bankruptcy operates a dissolution of the copartnery. As therefore there is no tenant here, and as assignees are excluded, there is clearly no existing lease. Nor can I see upon what grounds there can be any claim for meliorations.

LORD MURE was absent on circuit.

The Court adhered.

Counsel for Pursuers—Dickson. Agent—T. Carmichael, S.S.C.

Counsel for Defender—Rhind—Baxter. Agent—L. M'Intosh, S.S.C.

Wednesday, February 24.

SECOND DIVISION.

[Lord Trayner, Ordinary.

CRAIG *v.* PICKEN'S TRUSTEES.

Entail—Money Directed to be Entailed—Succession—Vesting—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 27.

A truster directed his trustees to carry on after his death till the termination of the leases the farms of which he might be tenant at his death, and to sell the stock, &c., at the respective terminations thereof. He further directed them, "after providing for payment" of an annuity, "and fulfilling the foregoing purposes," to apply the residue of his means to a certain extent in the purchase of heritage in Ayrshire, to be entailed strictly on a certain series of heirs, the first person to be called being his only daughter. At his death he was tenant of farms the leases of which would not expire for about 12 years, and his estate was liable to fulfil the obligations of these leases. A petition was presented by his daughter under sec. 27 of the Rutherfurd Act, praying that she, as the person who in the circumstances would be entitled if the entail were made to disentail and acquire in fee-simple, might be found entitled to the estate as far as realised, and the value of the stock still on the farms, as money directed to be employed in purchasing lands to be entailed. Petition *refused*, because the entail was not to be made till the expiry of the leases, which had not yet occurred.

Opinion that the petitioner had yet no vested interest under her father's trust-deed.

Opinion that sec. 28 of the Entail Amendment Act 1848, providing that the date of an entail directed to be made shall be held to be the date of the coming into operation of the deed directing it, was intended only to fix the date of an entail for the purpose of ascertaining the powers of the heir in possession to disentail.

John Picken, farmer, Mansfield Mains, New Cumnock, died on 12th March 1884. By his trust-disposition and settlement dated 7th February 1884, he conveyed his whole estate to certain trustees for certain purposes. The *third* purpose of this settlement was—"In the event of my decease during the currency of my present leases of the farms of Lethans and Clocklowie in the parish of New Cumnock, and of Boghead in the parish of Auchenleck, or of any of them, or during the currency of the lease or leases of any other farm or farms whatsoever that I may be in possession of at the time of my decease, I direct and appoint my trustees to carry on, conduct, and manage the whole businesses and concerns of said farms until the respective leases thereof shall expire, and on the terminations thereof, or as soon thereafter as it can be accomplished, to sell and dispose of the whole stock, crop, and farming implements pertaining and belonging respectively thereto." The *fifth* purpose provided that "after providing for payment" of an annuity left to his widow by the *second* purpose, "and fulfilling the foregoing purposes," his trustees were "to apply the residue of my means and effects, to the extent of a sum not exceeding £10,000 sterling, in the purchase as opportunity offers of such lands and other heritages situated in the county of Ayr as my trustees shall consider eligible, and to convey and make over said lands and other heritages by a valid and effectual deed of strict entail to and in favour of my only child Mrs Jane Watt Picken or Craig, wife of John Craig, ship and insurance broker, Greenock, whom failing to the heirs-male of her body, whom failing to my nephew John Picken, divinity student, son of the said James Picken [his brother, who was one of the trustees nominated], whom failing to the heirs-male of his body, whom failing to the heirs-female of his body, whom all failing to my next nearest heirs and assignees whomsoever, the eldest heir-female and the descendants of her body always excluding heir-portioners and succeeding without division throughout the whole course of succession." By the *sixth* purpose his only child Mrs Jane Picken or Craig was appointed residuary legatee in liferent, and by the *seventh* purpose her children were appointed to the fee of the residue of his estate.

At the date of the truster's death (12th March 1884) he was tenant of the farms of Mansfield Mains and Hill, the leases of which expired at Whitsunday 1885, and of the farms of Lethans and Clocklowie, the leases of which were not to expire till Whitsunday 1897. The trustees on entering on their office sold the farm stock, &c., on the farms of Mansfield Mains and Hill for about £3500, and proceeded to manage and carry on in terms of the truster's directions the farms of Lethans and Clocklowie. The value of stock on these farms was considerable, but the precise amount was not admitted in these proceedings.

This was a petition by the testator's only child before mentioned, Mrs Jean Picken or Craig (who was of full age, and not subject to any legal incapacity) for warrant of payment of the price (which she stated was £3500) of the stock on Mansfield Mains and Hill, which the trustees had sold, and of £7000 as the value of the sheep stock, &c., on Lethans and Clocklowie, or otherwise for delivery to her of that stock. She had one son, John Picken Craig, who was the next heir entitled to succeed to her under the entail directed by her father to be made, and who was a pupil. The next heir entitled to succeed was her cousin John Picken above designed, who was of full age. She prayed that a curator *ad litem* be appointed to John Picken Craig, and the value of his interest ascertained. The petition was based on the 27th section of the Rutherfurd Act 1848 (11 and 12 Vict. cap. 36), which provides—"That where any money or other property, real or personal, has been or shall be invested in trust for the purpose of purchasing land to be entailed, or where any land is or shall be directed to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who, if the land had been entailed in terms of the trust, would be the heir in possession of the entailed land, and who in that case might by virtue of the Act have acquired to himself such land in fee-simple by executing and recording an instrument of disentail as aforesaid, to make summary application to the Court, as hereinafter provided, for warrant and authority for the payment to him of such money, or for the conveyance to him of such land in fee-simple, and the Court shall, upon such application, and with such consents, if any, as would have been required to the acquisition of such land in fee-simple, have power to grant such warrant and authority." Section 28 of the Act provides—"And be it enacted, that for the purposes of this Act the date at which the Act of Parliament, deed, or writing placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail."

The petitioner averred that she was "the party who, if the directions of the said trust-disposition and settlement were carried out, would be the heir in possession of the lands to be purchased, and who in that case might, by virtue of the Entail Statutes, acquire to herself such lands in fee-simple by executing and recording an instrument of disentail thereof in terms of the Entail Statutes."

Answers were lodged by the trustees, who maintained that the petition was incompetent, in respect the period at which the trustees were directed to entail had not yet arrived, and would not arrive till the termination of the whole leases. "Till the leases of these two farms expire—to wit, at Whitsunday 1897—the free proceeds of the trust-estate cannot be ascertained, nor the trust purposes become capable of fulfilment. It will be observed that it is only 'after providing for payment of said annuity to my widow, and fulfilling the foregoing purposes,' that the trustees are directed to entail. The foregoing purposes referred to are—payment of debts; giving to the widow the liferent of the household furniture; paying her legacy of £500 and her annuity of £150; carrying on, conducting, and managing the whole business of the farms until the respective leases thereof shall expire, and on the termination thereof, selling and disposing of the whole stock belonging respectively thereto." In the second place they objected that the Rutherfurd Act did not apply, because there was no sum in their hands representing subjects to be entailed.

The Lord Ordinary (TRAYNER) refused the petition.

"*Opinion.*—[*After stating the facts*]—The trustees (who also represent the interest of John Picken, the heir next called to the entailed succession after the petitioner and the heirs of her body) object to the petitioner's demand on the grounds (1) that no right under the trust-deed has yet vested in the petitioner, and (2) that there is not now any entailed estate in fact or by implication of law which can be disentailed.

"With regard to the first objection, it has to be observed that under the trust-deed of the late John Picken there is no direct conveyance or gift in favour of the petitioner. The whole estate of the truster is conveyed to his trustees with directions to them at a certain period to make an entail of land to be bought by the proceeds of a part of the estate, under which entail the petitioner will be institute if she survives that period. Unless she survives that period she will take no benefit under the trust-settlement of John Picken—*Bryson's Trustees* v. *Clark*, 8 R. 142; *Stodart's Trustees*, 8 Macph. 667. As she has therefore at present no vested interest under the trust-deed, and the time has not arrived at which the trustees are directed to convey any right to her, I am of opinion that she has no title to insist in the present petition.

"The second objection stated by the trustees appears to me also to be well-founded. I am of opinion that the 27th section of the Rutherfurd Act is not applicable to the circumstances of the present case. That section provides—[*His Lordship here quoted the clause*]. I think this clause presupposes the existence of a sum of money in the hands of trustees with which they are directed to purchase land to be entailed. In such a case the money represents the subjects to be entailed, and the person who would be entitled to disentail the lands (if the entail had been made) is declared entitled to the money itself, thereby saving the expense of entailing and disentailing. But there is no such sum of money in the hands of Mr Picken's trustees or elsewhere at this moment. What the trustees in this case are directed to expend in the purchase of land to be entailed is 'the residue' of Mr Picken's estate, but not exceeding £10,000; but what that residue may be, or who the person entitled to get it, can only be ascertained after the purposes of the trust have been fulfilled. Mr Picken's trustees could not be called upon just now to expend any part of the trust-estate in the purchase of land to be entailed, because at this moment they do not hold any money dedicated to that purpose; and if they have not money to purchase land to be entailed, they have no money which the petitioner (assuming that otherwise she had a title to it) can demand under section 27 of the Rutherfurd Act.

"The petitioner urged alternatively that if she

was not entitled to the stock, &c., on the farms, or the value of it, she was at least entitled to the sum of £3500, now in the hands of the trustees, realised by the sale of a part of the estate. I cannot distinguish in this manner between parts of the trust-estate. The reasons I have already given for deciding against the petitioner's claim as a whole are applicable also to this alternative demand. In managing the farms under their charge in terms of the truster's directions the trustees may incur obligations which they are entitled to meet out of the trust-estate. To deprive them of the power of doing so might so reduce the ultimate residue of the truster as to defeat the leading purpose of his trust-deed. But apart from this, I repeat that it is 'the residue' of his estate which the truster directed to be expended on the purchase of land to be entailed when that had been ascertained and realised, and not any part of his estate which in the course of management or realisation might happen to come into his trustees' hands."

The petitioner reclaimed, and argued—(1) The trust-deed came into operation for the purposes of the disentailing clauses of the Rutherfurd Act at the date at which the deed placing the money under trust came into operation as a deed for placing money under trust for the ultimate purpose of buying land to be entailed, and that of course was the truster's death. At his death, then, there came into existence an entailed estate and an heir of entail. The time in the circumstances had therefore arrived for making this application—*Dickson* v. *Dickson*, June 8, 1855, 17 D. 814; *Black* v. *Auld*, November 5, 1873, 1 R. 133, opinion *per* Lord President, p. 146; *Gordon* v. *Gordon*, March 2, 1866, 4 Macph. 501. (2) She had moreover a vested interest *a morte testatoris* in the trust-estate—*Lindsay's Trustees*, November 26, 1880, 12 R. 964; *M'Alpine, &c.*, March 20, 1883, 10 R. 837; *Ross' Trustees*, December 18, 1884, 12 R. 378. In *Stodart's Trustees*, March 5, 1870, 8 Macph. 667, cited by the Lord Ordinary, there was no immediate interest given as here in the estate.

The trustees replied—They had been directed to make an entail when the leases of the farms came to an end. If the petitioner survived that period she would be institute under the entail, and then she might make her application. If she did not survive, she would take no interest under the trust-deed—*Bryson's Trustees* v. *Clark*, November 26, 1880, 8 R. 142; *Stodart's Trustees*, March 5, 1870, 8 Macph. 667. This application, then, was premature. In 1897, when the leases had expired, but not sooner, *Black* v. *Auld* would be an authority for the petitioner. (2) There could not in the above circumstances be any vesting.

At advising—

Lord Justice-Clerk—I am clearly of opinion that we cannot give the petitioner what she asks. The petition is founded on the Rutherfurd Act, but it seems to me that the petitioners have failed to make out a case under the Rutherfurd Act. I do not think that any question upon the construction of these clauses properly arises here. The testator directed his trustees in certain circumstances, and if they were in funds to do so, to entail a certain proportion of the estate which he left. He directed that certain funds should be invested in the purchase of estates. He placed a limit to the amount to be expended in purchasing estates for that purpose. But all that I think is subsidiary to the other or prior purposes of the trust-deed being carried out. Now, it so happens that that cannot be done for a considerable period of time, because one of the essentials is that the farms which were in the hands of the testator shall be carried on till the termination of the lease. The termination of the lease is in 1897, ten years after this time. Now, I think the direction to carry on these leases must be carried out according to its terms unless the parties concerned otherwise agree. How far the trustees are entitled to make an agreement subject or not to the landlord, I am not prepared at this moment to say until we have some proposal before us. But I am very clear that unless something happens to interrupt the operation of those clauses in the trust-deed to which I have referred, the trustees must simply follow in the steps marked out for them by the deed in question, and that nothing can be done in the way of purchasing lands to be entailed, or in disposing of the money that would be so applied, until the leases of these farms have run out, or at all events until the trustees are relieved of the obligation of doing so.

Now, if that is a sound view to take, there is no further question here as to vesting. I do not think that that makes much difference in the question we are here considering, because I am of opinion that the injunctions of the testator are quite specific and must be obeyed. It would, however, be very difficult to make out that any right had vested, seeing that there is a whole series of destinations to other persons in the event of failure of the party who would be the first institute in the proposed entail. I think that is a most material consideration, and that probably no vesting could take place under these circumstances.

Accordingly I think the petition must be dismissed.

Lord Young—I am of the same opinion, and on the same grounds, and I only desire to add a few words on what is really not within the case which we have to decide here, although that case suggests them. The testator here directed certain farms which he had leases of to be carried on by his trustees after his death, until the leases terminated. *Prima facie*, and in the absence of any good reason against it, that direction of his must be carried out. What I wish to observe, however, is this—that I have a strong impression, and commend it to the consideration of the parties themselves, that if experience has shown, or in the immediate future shall show, indeed, if experience at any time shall show, that it is certainly to the detriment of the trust-estate, and those who are interested in it, that this business of farming should be proceeded with, I think there must be some way of terminating it. It would not, I think, be held necessary that the trustees should prosecute a losing business to the detriment of the interests with which they are charged simply because there may be unborn people who are interested. I merely suggest that, while I am at the same time of opinion that no means can be taken of the nature suggested in this petition under the Rutherfurd Act. If the

trustees, as well as the beneficiaries, however, are satisfied that it is not in the interest of those concerned, but would be pernicious to the interests of those concerned, to carry on those farms, there must be some way of obtaining authority for discontinuing that losing business with safety to those who are primarily responsible.

Lord Rutherfurd Clark—I am of the same opinion. This application is made under the 27th section of the Entail Amendment Act of 1848, for the purpose of getting authority for the purchase of estates to be entailed on a series of heirs. Now, looking at the trust-deed, I do not doubt that the time for purchasing lands and entailing them upon a series of heirs has not yet arrived. Therefore I think it plain that the petitioner is not entitled to present a petition under the section of the Act to which I have referred.

The Act is an Act which is intended to enable heirs in possession of entailed estates to disentail. The only persons under the leading sections of the Act who are entitled to get powers for the purpose of disentailing are heirs in possession. But in certain cases there is money directed to be paid, and the 27th section gives certain powers by which money may be obtained, but as I read the clauses which are here applicable, the person who applies to disentail money must be with respect to that money in the position of an heir of entail in possession. Now, the petitioner cannot possibly be in that position by reason of the simple circumstance that the entail cannot be executed at this time. Therefore she cannot be in any sense in possession of the entailed estate. It is for that reason I think the petition must be dismissed.

Something was said with respect to the date, and the bearing upon that matter of the 28th section of the Act of 1848. I think it is plain enough from the decision in the case of *Black* [*sup. cit.*] that the meaning of that section was to fix the date of the entail for the purpose of ascertaining the powers of heirs in possession to disentail, for these depend on the date of the entail, whether before or after 1848. That is the only purpose which that artificial date produced by the 28th section was intended to serve.

We have had a good deal said in regard to the question of vesting under this trust-deed. From what I have said it is obvious enough that that question of vesting, if it exists at all, is quite subsidiary.

Lord Craighill was absent.

The Court adhered.

Counsel for Petitioner — Pearson — Guthrie. Agents—Smith & Mason, S.S.C.

Counsel for Trustees—Goudy. Agent—John Macmillan, S.S.C.

Thursday, February 25.

FIRST DIVISION.

[Lord Fraser, Ordinary.

THE GLASGOW CITY AND DISTRICT RAILWAY COMPANY *v.* MACGEORGE, COWAN, & GALLOWAY.

Arbiter — Ultra fines compromissi — *Railway — Compensation—Structural Damage, Mode of Estimating—Glasgow City and District Railway Act* (45 *and* 46 *Vict. cap. ccxvi.*)

A railway company was taken bound by its Act as follows—"If by reason of the construction of the said . . . tunnel any structural damage shall be caused to any buildings, . . . the company shall make compensation therefor to the owners." The award of an arbiter in a reference under this Act was impeached on the ground that he had incompetently and illegally taken into account in estimating the damage what was not structural damage at all. *Held*, after a proof by the examination of the arbiter, at which he deponed that he had allowed only for structural damage, and that he had estimated it in a particular manner, and in which it was not shown that he really misunderstood the meaning of the expression, that there was no ground for setting aside the award.

This was an action of reduction of a decree-arbitral pronounced by Mr William M'Jannet, writer, Glasgow, as oversman in a reference under the Lands Clauses Act entered into between the Glasgow City and District Railway Company and Messrs MacGeorge, Cowan, & Galloway, writers, Glasgow.

MacGeorge, Cowan, & Galloway, the defenders, were owners of a dwelling-house in West Regent Street, Glasgow, with a bleaching-ground behind the same, used by them as their writing chambers, and the title to which was in the names of the individual partners as trustees for their firm. The house fronted West Regent Street.

The pursuers the Glasgow City and District Railway Company were empowered by their private Act (Glasgow City and District Railway Act, 45 and 46 Vict. cap. ccxvi.), *inter alia*, to construct a tunnel underneath certain streets in Glasgow, including West Regent Street. Section 48 of that Act provided that "if by reason of the construction of the said covered way or tunnel any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which Railway No. 1 is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land over or by the side of the tunnel, or to the foundations of any such buildings, the company shall make compensation therefor." The defenders gave notice to the railway company that they claimed in respect of structural damage to their property, including depreciation in marketable value caused by pursuers' operations, the sum of £1400, and £100 for damage which they sustained as occupiers.