

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 Crokot. 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 Crokot, 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 Crokot 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 turn-pike 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 in feffment 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

his tenant was fixed by decree-arbitral in 1793. In 1859 the respondent, Bell, took a mineral lease from the Earl of Buchan of the minerals in and under the estate of Strathbrock, the lease containing a provision that it was granted subject to the whole conditions and provisions applicable to the lands, or to the mines and minerals in the same, contained in the Acts of Parliament or rights and titles obtained by the trustees on turnpike and statute labour roads. The trustees now alleged that Mr Bell had for some time been working the minerals under the road in question, in consequence of which a part of the road had fallen in.

Interim interdict was granted.

After the record in the suspension was closed, a minute was lodged by Bell, in respect of which the interdict was declared perpetual as regards him. A proof was then led, and the case was litigated between the trustees and the other respondents, after which the Lord Ordinary (Barcaple) pronounced an interlocutor finding that it was not proved that these respondents ever authorised or approved of the operations of Mr Bell, whereby injury was caused to the road; that the minerals under the Bathgate and Airdrie turnpike road, where it passed through Stratbrock, did not belong to the trustees; that whatever right the trustees had to be protected against working of minerals calculated to injure the road, they had no right to interdict against the remaining respondents in the terms craved; and, therefore, so far as related to these respondents, recalled the interdict, and found the trustees liable in expenses; reserving, however, to the trustees to take any competent steps that might be necessary for preventing actual or threatened injury to the road.

The Lord Ordinary in his note dealt at considerable length with the question of the trustees' alleged right of property in the minerals underneath the road. He thought they had no such right. It seemed to be contemplated by the Act of 1792 that the trustees might if they chose treat for a purchase of the land, but there did not seem to be any indication that that course had been adopted by the trustees.

The trustees also brought an action of declarator to enforce their rights, in which the Lord Ordinary gave judgment against them.

The trustees reclaimed.

FRASER and DEAS for them.

CLARK and KEIR for respondents.

LORD PRESIDENT—There are two cases before us between these parties, the one a suspension, and the other a declarator. I purpose to give judgment in the declarator, being the more competent form of process for deciding the question, and the judgment in the suspension will follow that in the declarator.

This is a declarator of right of property, and the action concludes that this Court shall declare that the trustees for the Bathgate and Airdrie Road Trust are proprietors of, and have the sole right to all and whole the coals, ironstone, shale, and other minerals or substances below or within the limits of the said turnpike road, where it passes through the lands and barony of Strathbrock and Kirkhill and others, belonging to the defender the Earl of Buchan, lying in the parish of Uphall, and county of Linlithgow: The other conclusions are merely subsidiary and ancillary to the conclusions of declarator.

Now the first important fact to attend to is, that the pursuer of this summons has no title except by

Act of Parliament, and certain proceedings under the authority of that Act. He has not a conveyance of the ground under which the minerals lie, still less of the minerals themselves; he has no infertment in the ground or minerals, and nothing that in any ordinary sense can be called equivalent to infertment. His case is laid on the provisions of the Road Act of 1782, and proceedings which took place under a submission in the same year. Of course, if the Act of Parliament declares explicitly and unequivocally that the ground which is taken under its authority by the trustees for the formation of a road is to belong to them in full property, and to comprehend everything from the surface to the centre, that will be an excellent title to the pursuer. But that depends on a construction of the clauses of the Act, and of three clauses in particular, the 56th, 60th, and 62d. The 56th empowers the trustees to make, widen, turn, and alter roads, and for that purpose it empowers them "to cause to be removed fences, or pull down any houses or buildings, the side walls of which shall not exceed twenty feet in height, or which shall not be of more value than £100 sterling, and to remove any other obstruction: Provided always, that the said trustees shall make satisfaction to the owners of, and persons interested in, the grounds and hereditaments through which such roads shall pass, for the damage they may sustain by making, widening, and altering the said roads, or erecting toll-houses as aforesaid." Now so far there seems to be no contemplation of any property passing from the landowner to the road trustees. All that is given is a power to make, widen, turn, and alter roads, and for that purpose to remove obstructions. That is not like the conferring of a right of property. It is more like the making an invasion on another man's property. They are to make satisfaction to the owner. But then follows this further provision, that "for that purpose 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 aforesaid." And the clause, after a provision about incapacitated persons, goes on to provide that if, after notice, such parties "neglect or refuse to treat, or shall not agree in the premises, or by reason of absence shall be prevented from treating, or shall not show a clear title to the premises of which they are in possession, or to the interest they claim, to the satisfaction of the said trustees, or any five or more of them, then and in every and any such case, and so often as it shall happen, the said trustees, or any five or more of them, or their clerk for the time being, shall and may apply by petition to his Majesty's sheriff-depute or substitute of such of the counties of Linlithgow and Lanark, in which such lands, grounds, or hereditaments do lie, setting forth this Act of Parliament, and the true circumstances of the case, and praying him to fix and ascertain the just amount and value of such lands or hereditaments respectively, and the damage ensuing from making, widening, turning, or altering the said roads, or any part of them." That is all that is of any consequence in the 56th section, and it may be contended that there is a power here given to the trustees in general terms to contract and agree for the purchase of lands. I think there is a good deal in this statute to lead one to doubt whether the thing contemplated in the statute is the proper purchase of lands; but it is not

necessary to solve that question, for that course was not taken here. There was no agreement between the parties as to the sale of the land. No such agreement is alleged, and therefore that part of the section has no application to this case.

We next come to the 60th section, which enacts that on payment of the compensation money, or upon tender and consignment, the trustees shall "thenceforth have a right and be at liberty to take and use the ground, and to pull down and remove the houses and fences, to be laid into and made part of the said road, in such manner as the said trustees, or any five or more of them, shall direct, as fully and effectually ever after as if the respective proprietors had executed regular dispositions of the same, and thereupon infestments had followed."

This is the most important part of the statute for our construction. First, Is the clause directly and immediately applicable to the case before us? There was no conveyance, and what the trustees did was, after payment of the compensation money awarded after Earl of Buchan, to exercise and assume the powers thereby conferred—the right and liberty to take and use the ground to be laid into and made part of the said road, as fully as if the proprietors had executed regular dispositions. These words seem to me to describe something very different from a right of property. A liberty to take and use ground for one limited and special purpose cannot be construed into a full right of property. The purpose, and the only purpose, for which this ground is to be used is, to make a road, nor can the ground be used for any other purpose. The right conferred by the statute is to take and use the ground for that purpose and for no other. Consistently with this, the statute also gives—what it would be ludicrous to give in the case of a proper transfer of property—a power to pull down and remove obstructions. To give that power to a proprietor would be absurd, for a proprietor may do what he likes with his own property. But the trustees, having only a limited right to the property, may interfere with the proprietor's use of it by removing whatever obstructs the use given to them. No doubt there are these words, "as fully and effectually ever after as if the respective proprietors had executed dispositions of the same, and therefore infestments had followed." And it is said that that implies that the right is a right of property, because there would be a right of property and nothing else if there were a disposition and infestment. That is a misconception. What is it they are to have as fully and effectually? It is the limited right to take and use the ground, and that limited right they are to have as fully as if a disposition had been executed, but nothing more. That is all that is given to them, and it is given for the purposes of the Act, and therefore the 60th section does not contemplate any right of property in the trustees.

But there is another section which causes some embarrassment, for it appears to contemplate a sale of the ground and the existence of some right of property in the trustees. It empowers them when the road is completed "to dispose of and sell the grounds constituting or comprised in the old or former road, or any part thereof, and the materials of such old roads or bridges on the same, . . . for the best price that can be got for the same; the proprietor or proprietors of the grounds through which the said old road did pass having always the first offer of the ground comprised in the same."

Now I can quite understand that when the trustees sell an old road to the proprietor of the adjacent property there may be something that in the loose language of road acts may be called a conveyance, but that does not force us to the conclusion that the right which they have is necessarily something different from what the words of the act confer on them. The thing to be sold is the road and materials. If they have a mere right which would in common law be called a servitude, that would be the thing sold, and the ground would be relieved from the servitude, and the renunciation of the servitude or conveyance of all the title of the trustees in the road may sufficiently answer the description of a sale and conveyance of the lands and ground comprehended in the old road, though the form of expression is inaccurate, arising from the blundering phraseology common in acts of this kind. But it is clear that we are not entitled to give such effect to this section as to interfere with the clear meaning of the 60th section, upon which the right of the trustees here depends.

I shall only add, that it appears to me that in 1796 the parties read the Statute as I do now. The trustees took the ground for the road without any sale. But they entered into a submission, and that was for ascertaining the damages to be paid for the use of the ground. The submission submits all claims relating to the quantity and value of the ground then occupied, or that might be taken off for the said road and branch roads, and the arbiters "accordingly decerned and ordained the trustees to pay to the Right Honourable the Earl of Buchan, as proprietor, for the basis of the road taken off his his estate, £642, 16s. 10d.; and to his Lordship, for sundry articles specified in said state, £69, 9d. 10d."

On that money being paid by the road trustees they forthwith took and used the ground. That is all that took place. That was all right and proper under the statute, and the effect was to give a limited use to the trustees, not a right of property. I therefore concur with the Lord Ordinary.

**LORD CURRIEHILL**—This case is very important for the public, because if it were held in this case that the road trustees are owners of the ground over which the roads pass, in virtue of the clauses in this Act of Parliament, then the same rule would be applicable to the greater part of the public highways of Scotland; and there being hardly an estate in the kingdom that is not intersected by highways in all directions, the doctrine would be a rather startling one. I think the whole of the pursuer's argument is founded on a mistake as to the legal character of a highway. A right of highway confers on the public a right to use the surface for the ordinary purposes for which roads are used. It is a kind of right that has long been known in Scotland, as in every civilised country, because there must be means of travelling from one part of the country to another, and unless there were such a right in the public, the power of locomotion could not exist. There has, therefore, always been a right of highway, and that was in the Roman law a *res-publica*, and in our law it is a *res publica*, and is vested in the Crown as a branch of the *regalia* for behoof of the public. But it is simply the use of the surface for the purposes of locomotion. That is the nature of a highway, however acquired, whether by usage or by Act of Parliament, unless it is otherwise expressly agreed. This question was fully discussed in the case of *Gallraith v.*

*Armour* (4 Bell, 347). Lord Cockburn there laid down the law as I have stated it. The other Judges differed, but the House of Lords returned to Lord Cockburn's judgment. That being the case, without going into the clauses of this Act, my opinion is, that all Acts of Parliament concerning roads, whether general or local, conferring rights of highway, are to be construed as conferring the limited right I have stated, unless there be something in the special Act conferring higher powers. In this Act there is nothing to indicate any higher right. As to the clauses indicating that the trustees had powers of selling, that occurs in all such Acts, but care is always taken that the owner of the *solum* shall have the right of pre-emption, that thus his estate may be restored to the same state as before. In other words, the *res-publica* is put an end to, and the proprietor enjoys his estate as before. Holding this view, I am clearly of the same opinion as your Lordship.

LORD DEAS—I am humbly of opinion that there is no general question raised here, but simply a question as to the construction of this Act of Parliament. In the case of *Galbraith* the superior had feued out his ground for building, with a right of egress and entry to his feuers. The consequence was that the public travelled over the private roads as they ran in connection with various public roads, and the road trustees dealt with them as if they were public roads. A gas company proposed to open the roads, with leave of the trustees, but without leave of the proprietor, and the only thing decided by the House of Lords was, that in such a case any right acquired by the trustees or the public was a mere right of servitude, and the superior was not deprived of the right of property, and that the proposed operations could not be done without his leave; and in that decision, if it were an open question, I should concur. Some views of a more extensive character were enunciated, but I don't see anything in these opinions to prevent us from looking in any particular case to the special Act. It was not said that if it were laid down by the Act that the *solum* was to become the property of the trustees, that was not to take effect. Those references to the *solum* were made, on the one hand, for the purpose of drawing the inference that the trustees proceeded on the footing that by the general law they had a right to the *solum*; and it was in answer to that that some of the Lords said that these Acts were framed in a loose way, and that they could not be held to show that the general law was as was enunciated. But the effect of particular statutes was not repudiated.—His Lordship then quoted from the opinions of Lord Campbell and Lord Brougham, and continued—There is nothing in these opinions to show that in every particular case you are not to be guided by the Act alone, and I look at this case on that footing. The question is what it enacts; and that raises a question of some difficulty arising mainly from the 60th section. [*Reads section.*] I don't see any reason to doubt that under this section the trustees might have purchased the ground, and got a conveyance and been infeft, and, in that case, the property would have been in the road trustees. The difficulty is, that one section says the trustees are to be in the same position as if this were done and they had taken infeftment. But I think the true meaning is, not that the trustees shall be in all respects in the position of having a conveyance, but that to the effect of the specified uses they are to have

possession. No doubt the language of the Act is anything but business-like, but it is impossible to read it in any other way than your Lordship has done. There is an additional perplexity from the power of the trustees, if they abandon the road, to convey it to other parties. If this road falls under that provision, the inference is that the *solum* belongs to them, for a disposition to another party is nonsense unless the *solum* is to be conveyed. But I agree with your Lordship that the trustees had the power to have a conveyance and take infeftment, if they agreed on it; but this section applies to that case only. There is a difficulty in construing the Statute reasonably in any view; but here I do not think it was intended that the trustees should have the *solum*.

LORD ARDMILLAN—I agree that the question is to be decided according to the Act of 1792; but we must first dispose of this question, Are we construing an Act which is in accordance with the general law, or which is an exception? I agree with Lord Curriehill in his remarks as to the nature of highways. That right is vested in the Crown. The right of highway is a right of passing over land; it is not a right of property, but the Act is here pleaded to constitute an exception, not to support the general law of Scotland. The right of highway is rather of the nature of servitude than of property, existing only for uses of the surface. It is not in its nature a right *a celo ad centrum*. Looking to this Act, does it give a right different from that which the common law of Scotland gives to road trustees, who are the administrators of highways? I do not think it does. It would require very special terms to do that. If it had given power to purchase lands as property, the law must have read that as meaning such property as road trustees could acquire with road funds, and I don't think that with road funds they could purchase land *a celo ad centrum*. I read the words in the Act, "belonging to" and "property," as meaning property so far as road trustees can possess for statutory purposes of administering highways, but not for the general purposes of landowners, and therefore the statute does not enact any exception from the ordinary rules of the law of Scotland.

Agents for Pursuer—Waddell & M'Intosh, W.S.  
Agents for Defender—H. & A. Inglis, W.S.

Thursday, March 26.

## FIRST DIVISION.

### CARMICHAEL AND OTHERS v. CALEDONIAN RAILWAY COMPANY.

*Agreement—Jurisdiction—Land Clauses Act—Caledonian Railway Company Act—Valuation—Jury—Verdict—Tender—Expenses.* A special Railway Act provided that, where the line passed over a quarry, the Company should pay the value of the stone unwrought under the line, the extent and quality to be ascertained as in ordinary cases of disputed compensation, and the value to be payable from time to time as a face of rock of 130 feet was wrought up to the railway boundary. The Act incorporated the Lands Clauses Act. In 1864 a valuation-jury returned a verdict that the rock under the line was 260 feet, and the value £5272 as at 31st December 1852. The Company had