Saturday, July 13.

AITON *v.* ABERDEEN COUNTY ROAD TRUSTEES.

Public Road—Duties of Trustees—Petition and Complaint—General Turnpike Act (1 *and* 2 *Will. IV. c.* 43), § 117—*Aberdeenshire Roads Act*, 1865 (28 *and* 29 *Vict. c.* 240, *Local*). A petition and complaint under section 117 of the General Turnpike Act was presented by a proprietor interested, setting forth that a certain road under the management of the trustees acting under the Aberdeenshire Roads Act, 1865 (which abolished tolls on turnpike roads in the county, and substituted an assessment on owners and occupiers in each district), was badly kept, and almost impassable. Form of inquiry *directed* by the Court.

This was a petition and complaint presented by William Aiton, Esq. of Boddam, against the Aberdeen County Road Trustees. The statements of the petitioner were as follows:—

By the Aberdeenshire Roads Act, 1865 (28 and 29 Vict. c. 240), all tolls on turnpike roads in the county were abolished, and in lieu thereof an assessment was imposed for the maintenance and repair of the roads—one half on owners, and one half on occupiers, in their respective districts.

The county was divided by section 10 into eight districts, and for the management of the roads in each district trustees were appointed.

The provisions of the General Turnpike Act, 1 and 2 Will. IV., c. 43, were incorporated with the Act, so far as not inconsistent therewith. Section 119 of the General Turnpike Act provides—"That if the repairing or maintaining of any turnpike road shall be neglected, or such road so badly kept that travellers are injured, impeded, or obstructed in using the same, any person having paid toll-duty thereon, and finding caution to pay expenses of process, may present a petition and complaint against the trustees of such road to the Court of Session, and the said Court is hereby authorised to receive the same, and to adjudge and determine therein in a summary manner, without abiding the course of the roll, and to pronounce such orders and decrees as to the repairing or keeping of the roads, or otherwise, as the justice of the case shall seem to them to require, having due regard to the funds of the trust, and particularly to determine whether the road is in such a state of repair as to justify the levying of the toll-duties, or any proportion thereof, levied by the said trustees, and also to determine as to the expenses of such complaints and proceedings thereon; and if any such complaint shall be found to be without probable cause, the complainer shall be found liable, over and above the expenses of process, in a penalty of £20, to be paid to the trustees for the purposes of the trust; and it shall not be lawful to present any such complaint, or institute any proceedings, on any of the grounds above mentioned, before any other Court, or in any other manner than as aforesaid."

The petitioner then set forth that one of the roads in the First or Deer District, described in the Act as "Boddam Junction, from Aberdeen Turnpike to the village of Boddam," which was the only road leading to Boddam, a seaport village of 800 inhabitants, is in extremely bad repair, and almost impassable; that the petitioner is the proprietor of the harbour and village of Boddam, and of lands in the neighbourhood, and as such interested in the condition of the road and in the execution of the statute; that he has duly paid the assessments imposed on him, that he has made repeated complaints to the Trustees on the subject, and that in consequence of their refusal to put the road in proper condition, the present application has become necessary.

The petition and complaint was directed against Mr Newell Burnett, clerk to the general body of trustees, and Mr Patrick Irvine, clerk to the trustees for the Deer District.

The prayer of the petition was "to find that the road above specified, leading from the Aberdeen and Peterhead turnpike road to the village of Boddam, is neglected and so badly kept that travellers are injured, impeded, or obstructed in using the same; to remit to such skilled person or persons as your Lordships shall see fit to appoint, to examine the said roads, with reference to the grounds of complaint above particularised, and to report thereon, or to direct such other investigation relative to the facts of the case as your Lordships shall consider expedient or necessary, and after receiving such report, or being informed of the result of such investigation, to direct and appoint the respondents, the said trustees, to execute such repairs upon the said road as may be necessary to put the same in a proper and sufficient condition, and to maintain the same in proper condition and repair in time to come, or to give such instructions for repairing the said road, at the expense of the said trustees, as may be found necessary; farther, to find the said trustees liable to the petitioner and complainer in the expenses of process."

The respondents stated that the road in question had been made in 1820 by the then proprietor of Boddam; it was roughly made with boulders got from the sea-shore. Badly formed originally, it could never be made a first class road without entirely re-forming it. The trustees had not neglected it, but had spent as much money on it as their finances would allow. They had already been obliged to exact the maximum assessment on the district. On 23d March last the district trustees resolved to spend £5, 11s. 4d. on the road. The petitioner, if aggrieved by this resolution, should have appealed to the general body of trustees, in terms of section 31 of the statute, which provides that "All proceedings of the district trustees shall be subject to the control of the trustees, to whom any person or persons who may think themselves aggrieved by such proceedings may appeal, and the trustees shall have power to consider and finally decide such appeal; and in case the district trustees shall fail to comply with the orders of the trustees, the trustees shall have power to appoint a committee of their own number to carry the said orders into execution." Until the petitioner had exhausted his remedies by application to both sets of trustees, he was not justified in calling them into Court as if they had neglected their statutory duty.

KINNEAR, for the petitioner, cited *Walkinshaw*, Jan. 28, 1860, 22 D. 627; *Reid* v. *Knox*, June 14, 1861, 23 D. 1095.

FRASER, for the respondents, cited *Beckett*, Feb. 27, 1866, 4 Macph., H.L. 6; and founded on section 31 of the Aberdeenshire Roads Act.

LORD PRESIDENT—If the petitioner had taken the course you suggest, of appealing to the general body of trustees, you would have got him into a trap, for their decision is declared to be final.

The Court pronounced the following interlocutor:—

"16*th July* 1872.— . . . Remit to Mr Cullen, surveyor of the Forfarshire roads, to examine the road referred to in the petition with reference to the grounds of complaint set forth in the petition, and to report *quam primum* as to the condition of the said road, and the cost of the operations which may be necessary for putting it into a proper and sufficient state of repair; and appoint the respondent Patrick Irvine, as clerk to the trustees of the First or Deer District of Roads, in the county of Aberdeen, to prepare and report a state of the funds of the said trust, showing the income, expenditure, and debts of the trust.

Agents for Complainer—Hamilton, Kinnear, & Beatson, W.S.

Saturday, July 13.

CHARLES ROBERTSON, ESQ., OF KINDEACE, PETITIONER.

Entail—Provisions to Children—Statutes 11 *and* 12 *Vict. c.* 36, § 21, *and* 16 *and* 17 *Vict. c.* 94, § 7—*Assignation.*

An heir in possession of an entailed estate paid the amount of provisions which had been made by the previous heir in possession in favour of younger children, and took an assignation in his own favour to the bond of provision. *Held* that he was entitled, under 11 and 12 Vict. c. 36, § 21, and 16 and 17 Vict. c. 94, § 7, to grant a bond and disposition in security over the entailed estate for the amount of the provisions in favour of himself, as assignee of the said provisions.

The petitioner's father, the late Major Robertson, to whom the petitioner succeeded as heir in possession of the entailed estate of Kindeace in October 1868, granted in 1841 a bond of provision for £2400, under the Aberdeen Act, in favour of his younger children. Major Robertson had then five children in all, but he was survived only by the petitioner and two daughters. The provisions of the daughters had been restricted by a subsequent deed to £600 each, to be paid to their respective marriage-contract trustees.

On 20th January 1870 the petitioner paid the two sums of £600 to the marriage-contract trustees of his two sisters. Instead of taking discharges, he took assignations in his own favour of the bond of provision, to the extent of these two several provisions of £600, these being the only sums payable by him as heir of entail in respect of the bond for £2400.

He now presented the present petition, under § 21 of 11 and 12 Vict. c. 36, to charge the fee and rents of the entailed estate of Kindeace with the amount of these two provisions, viz., £1200. By section 21 it is enacted that, in all cases where an heir of entail in possession of an entailed estate "shall be liable to pay or provide by assignation of the rents and proceeds of such estate," for any provisions granted to younger children under the Aberdeen Act, or the deed of entail, he may charge the fee and rents of the estate with the amount thereof, by granting bond and disposition in security for the same over the estate.

The Lord Ordinary (MACKENZIE) reported the case on the question, whether the petitioner could be held to be an heir of entail "liable to pay or provide by assignation of the rents and proceeds" of the estate for the provisions to his sisters granted by his father.

WATSON and ASHER for the petitioner.

At advising—

LORD PRESIDENT—The peculiarity of the case is that the petitioner is to grant a bond in favour of himself. But the apparent anomaly is got over by considering that Mr Robertson appears in two capacities—First, as an heir of entail in possession; Second, as a creditor *qua* assignee of the provision of £1200. In the first capacity he will be succeeded by the next heir of entail, in the second by his executors. This appears a case within the 21st section of the Act. As heir of entail in possession, he is at this moment liable to pay or provide for the provisions in question. No doubt he is liable to himself in his individual capacity, but that does not matter. There might have been a doubt, and there was a doubt, whether it was competent to grant a bond and disposition in security for children's provisions, except to the children themselves. But it was to remove this doubt that the 7th section of the subsequent statute was enacted (16 and 17 Vict. c. 94), which authorises the bond and disposition in security to be granted to any party advancing the amount. Suppose the heir of entail in possession, instead of taking an assignation to the provision, had advanced the money out of his own funds, he could have granted the bond to himself as creditor in that sum. It follows that, having taken an assignation, and come not only into the position of a party advancing the money, but having purchased the provision and come into the place of the younger children, he is the proper recipient of the bond and disposition in security.

LORD DEAS—The terms of the assignation are important. It proceeds on a narrative, not of payment of the provision, but of a specific sum of money by the petitioner as an individual; then there is an assignation of the provision to the petitioner as an individual, and that is the whole deed. The difficulty is solved by attending to this, that the petitioner has not only two characters, but he deals in this deed with both these capacities.

LORDS ARDMILLAN and KINLOCH concurred.

The Court pronounced the following interlocutor:—

"13*th July* 1872.—Find that, in the circumstances disclosed in the petition and report of Mr Arthur Campbell junior, W.S., the petitioner, as heir of entail in possession of the entailed estate of Kindeace, is entitled, under the provisions of the 21st section of the 11th and 12th Vict. c. 36, and the 7th section of 16th and 17th Vict. c. 94, to grant bond and disposition in security over the said entailed estate for the amount of the provisions settled by the last heir of entail in possession on his younger children, in favour of himself, as assignee of the said provisions."

Agents for Petitioner—T. & R. B. Ranken, W.S.