

ciples of law to any person interested. But here it is sought to make them do that which they are not directed to do; and it is asked what remedy there exists for such a state of circumstances? Perhaps a remedy is furnished by the sixty-fourth and sixty-fifth sections, which enact that all actions or complaints for any wrong or injury done or suffered in any matter relative to or in consequence of any of the powers by the Act given and granted, shall be originally brought before two or more justices of the peace, from whom an appeal lies to the next general quarter sessions. Mr Anderson argued very elaborately, very ably, and with some degree of plausibility, that these sections supplied no remedy for a mere non-feasance; but if that be so, it is simply all the more clear that the Legislature intended that there should be no control over the discretion of those trustees. With regard to *Guild v. Scott*, I am of opinion it has no bearing upon the present case, founded as it was upon a special Act of 1789. The same remark applies to the case of *Walkinshaw*, and to all the other cases decided under the General Turnpike Acts, because they were all specially authorised by those Acts. I have addressed your Lordships thus shortly, because the subject has already been exhausted by the judgments of Lord Cowan and Lord Neaves, with whom I entirely concur. I therefore beg to move your Lordships to affirm the interlocutor of the Court below, and to dismiss this appeal with costs.

Lord CHELMSFORD—I entirely agree with my noble and learned friend. The question is of some importance, but of no great difficulty. It is admitted that those trustees have a duty, but it is of a discretionary character, and the question is how it is to be enforced and limited. Now the fifteenth section confers upon them the superintendence of the roads in the district, and gives them power to appoint the order in which the same shall be repaired, and to appropriate the service and monies exacted by the Act. There is no question as to those powers being conferred upon them; but is there any control provided for their proper exercise? Yes; that control is given by the same section. It provides that if any trustee shall think himself aggrieved, or that the monies are improperly applied, he may complain to the next general meeting, or to the next general quarter sessions of the peace, which general meeting or quarter sessions are empowered to determine the same, and their determination is declared to be final and conclusive. That is the only provision made for controlling the trustees, and would seem to cover every case in which they are called on to exercise their powers. Then the sixty-fourth section provides for cases in which they inflict injury in the exercise of their powers. It enacts that all actions and complaints for any wrong or injury done or suffered in any matter relative to, or in consequence of, any of the powers by this Act given and granted, shall be brought before two or more justices of the peace. It was argued, however, that this had no reference to cases of non-feasance, but only to acts of immediate wrong. I cannot so construe the clause, because its object was to redress any wrong suffered in any matter relative to or in consequence of any of the powers given by the Act. I do not see why in the present case an action should lie in the Court of Session because the injury complained of is consequential instead of immediate. I think the section refers to all injuries of either kind; and if that is so, then we have a specific remedy provided; and according to a well-known principle, that specific remedy can alone be had recourse to. My Lords, this appears to me to be the proper construction of the Act; and it certainly is a very strong argument in its favour that for two hundred years it has never been sought to control the trustees in the manner now attempted. I cannot hesitate to concur with the noble and learned Lord on the Woolsack.

Lord KINGSDOWN—I concur.

Interlocutor affirmed, and appeal dismissed with costs.

Thursday, March 1, and Friday, March 2.

WELLER AND ANOTHER v. KER'S TRUSTEES  
AND OTHERS.

*Trust—Clause—Construction—Power of Trustees.* A trustor having given his trustees power to limit the provisions in favour of his children to a liferent in the event of their marrying or so conducting themselves as to merit the disapprobation of the trustees—held (aff. Court of Session) (1) That this clause applied to the trustor's heir as well as his other children; (2) That the power was validly exercised before the heir attained 25 years of age; (3) That the trustees had not surrendered their power by approving of the heir's marriage. *Opinion*—That the power having been conferred on the trustees for the benefit of children, they were not entitled to surrender it.

Counsel for Appellants—The Attorney-General (Palmer), the Lord Advocate (Moncreiff), and Mr Bruce. Agents—Mr William Sime, S.S.C., and Messrs Domville, Lawrence, & Graham, London.

Counsel for Respondents—Mr Rolt, Q.C., and Mr Anderson, Q.C. Agents—Mr Wm. Waddell, W.S., and Messrs Dodds & Hendrie, London.

This is an appeal against two interlocutors of the First Division of the Court of Session, pronounced in an action of multiplepounding and exoneration, at the instance of the respondents, the testamentary trustees of the late Robert Ker, Esq., of Argrennan, in the stewardry of Kirkcudbright, against the trustees under the marriage settlement of Robert Ker, jun., Esq., and Miss Hester Rosetta M'Alpine. Those interlocutors decide certain questions of construction arising upon the trust-disposition of the late Mr Ker; and also upon the effect of the exercise by trustees of a discretionary power, upon their right to exercise relative discretionary power.

The late Robert Ker, Esq., of Argrennan, executed a disposition and deed of settlement, dated 23d September 1839, whereby he directed his trustees *inter alia* to hold his whole means and estate, with exception of a sum of £15,000, for the benefit of his eldest son Robert, and the heirs of his body, whom failing, of his second son, with remainder to his daughters according to seniority, and to make over such means and estate to his eldest son upon his attaining his majority, or in case of his death, to the person next entitled, upon his or her attaining the like age. The deed further provides that, "In case any of our said children shall marry, or otherwise conduct themselves, so as not to meet the approbation of my said trustees, or a majority of them accepting and surviving at the time, the provisions hereby made in favour of said children so marrying or acting, shall belong to them in liferent only, for their liferent use alienarily, and to their heirs or issue above-mentioned in fee; but it is hereby provided that a regular minute must be entered in the sederunt book of the trustees, expressing their disapprobation of the conduct of any said children, to restrict them to a liferent as aforesaid." On the 26th of January 1847 Mr Ker executed a codicil to his will, whereby he directed his trustees that they should not convey to his eldest son Robert, or failing him, any other heirs-male or female of his body, his estate of Argrennan, or the residue of his means and estate, as he had directed by his disposition and deed of settlement to be done upon his or her attaining the age of twenty-one years, but should postpone such conveyance in the case of his son until he had reached the age of twenty-five years, and in the case of his eldest daughter, until she should have reached the age of twenty-eight years. The testator died on the 23d of March 1854, and the trustees he had nominated—viz., Mrs Elizabeth Ure or Ker, his widow; James Stewart, Esq., of Cairns-

more; David Maitland, Esq., of Barcaple; and the late Lord Handyside—proceeded to manage the trust, appointing Mr William Waddell, W.S., their factor and commissioner. In July 1858 Mr Robert Ker, the truster's eldest son, proposed marriage to Miss Elizabeth Hester Rosetta M'Alpine, the youngest daughter of James M'Alpine, Esq., of Windsor, in the county of Mayo, and a colonel in Her Majesty's service. Proposals for a marriage settlement on the part of Mr Ker were prepared by Mr Waddell (who was also agent for the late Mr Ker's trustees), and in these proposals Mr Ker stated that, with the consent of his father's trustees, he would convey his interest in the estate of Argrennan to trustees for himself in liferent and the heirs of his marriage in fee; that Miss M'Alpine should be provided with a jointure of £400 per annum out of the estate; and that the contingency of Mr Ker's dying before attaining the age of twenty-five years should be provided for by an insurance on his life. Miss M'Alpine was entitled at her marriage to a sum of £15,000 under her father's will, and it was agreed with reference to the proposed marriage that a deed in the English form should be executed, under which her fortune should be settled upon herself and her children with a liferent to Mr Ker. Considerable discussion ensued on the terms of their marriage contracts, but eventually Messrs Skene & Peacock, who acted as the lady's advisers, sent to Mr Waddell a draft of the proposed deed, accompanying it with a letter, in which they said—"We send you the draft for revision on behalf of Mr Ker, his mother, and the late Mr Ker's trustees." Mr Waddell, in a letter of subsequent date, said—"Mr Ker places the lady's jointure and the provisions for the children in such a position that no deed or act of his can ever deprive them of their rights," and "I must remark that in all my experience I have never seen a case in which a gentleman gave such ample security for the provisions of his intended wife and the children of the marriage." Messrs Skene & Peacock, aware of the discretionary power conferred on the late Mr Ker's trustees, to declare that Mr Ker jun. should be entitled to a liferent estate, suggested at first that those trustees should be parties to the marriage settlement, but this proposal being refused on their part by Mr Waddell, insisted that the trustees should at all events insert a minute in their sederunt book expressly approving of the marriage, and this was accordingly done. Mrs Ker, one of the trustees, was a party to the English deed, and as regards the Scotch deed, the only provision it contained, not already mentioned, was for the payment of Mr Robert Ker's debts as at the date of the marriage, the same being declared not to exceed the sum of £2000. These settlements having been executed, the marriage was duly solemnised on the 21st of September 1858 (Mr Ker being then twenty-three years of age) and there have been born, and are still surviving, two children of the marriage. In the interval between Mr Robert Ker junior's marriage and his attaining the age of twenty-five years—which he did on the 2d of July 1861—he granted various deeds purporting to affect his rights and interests in his father's succession; and apparently, on that account, two out of the three surviving trustees under his father's settlement met in Mr Waddell's chambers on the 18th of June 1861—a fortnight before Mr Ker attained the age of twenty-five years—and by minute declared that they were unanimously of opinion that Mr Robert Ker had so conducted himself as to merit their strongest disapprobation, and that they therefore considered it their duty to restrict his interest in his father's means and estate to a liferent only. The deeds so granted were in particular—a security to Mr William Swanson, formerly of the Edinburgh Friendly Insurance Society, for the sum of £700; a similar security for the sum of £800 to Samuel Ghymes, of Gloucester Place, Portman Square; and a second to the same person for the sum of £400; a disposition and conveyance in favour

of Mr Walter Justice, solicitor, of Bernard Street, Russell Square, whereby Mr Ker conveyed to him the estate of Argrennan, and all the household furniture, silver plate, &c., which then belonged to him or might belong to him, and also his entire interest in the residue of his father's estate. Mr Justice alleges that in consideration of that conveyance he has paid Mr Ker £2000, discharged the debts due to Mr Ghymes, and paid off a bond for £2100 held by Charles Henry Latouche, of St Paul's Churchyard. Mr Justice also alleges he is in right of a debt and security for £700, assigned to him by Mr William Swanson; the sum of £211 due upon a bill dated 19th July 1858, drawn by Mr Waddell, W.S., and accepted by Mr Robert Ker; a sum of £50, contained in Mr Ker's acknowledgment; a sum of £21, 9s. 7d., being the amount of sums advanced by Mr William Waddell, and a further sum of £194, 7s. 8d. due to the same gentleman. On the 15th of May 1861 Mr Justice borrowed the sum of £6500 from the Caledonian Insurance Company, in further security for which he assigned to them the securities granted in his favour by Mr Robert Ker.

Upon Mr Ker's attaining the age of twenty-five years, the trustees under his father's settlement were immediately applied to by the various claimants of his property, and they accordingly instituted an action of multiplepoinding and exoneration. In December 1861 Lord Kinloch, Ordinary, found that the trustees were only liable in once and single payment and delivery of the estate and effects in their hands, and appointed all parties having interests therein to lodge condescendences and claims. Condescendences were accordingly lodged for the trustees of the late Mr Ker (the respondents); for the trustees under the marriage settlement of Mr Ker junior (the appellants); for Mr Walter Justice; and for the Caledonian Insurance Company. On the 13th of February 1863 the Lord Ordinary found that Mr Robert Ker and all claiming under him were entitled only to a liferent estate in the property and funds in which he was interested. Against the interlocutor the appellants reclaimed to the First Division of the Court, but their Lordships (Lord Deas dissenting) adhered to the interlocutor of the Lord Ordinary.

The ATTORNEY-GENERAL, on behalf of the appellants, after narrating the above facts, said he was authorised by his learned friends who represented the respondents to say that, if their Lordships thought they could approve the judgment of Lord Deas, the respondents would at once submit to that approval.

Lord KINGSDOWN—Are all the parties interested represented here?

Mr ANDERSON said they had all been served with notice of the appeal.

The LORD CHANCELLOR—And they do not appear because they are satisfied with the interlocutor appealed against.

Mr ANDERSON said, on the contrary, those other parties were excluded from all benefit by the interlocutor.

Mr ROLT said it would be necessary for him in the interests of his clients to see their Lordships' order framed in a particular way, and thought that the case on that account had better be gone into fully.

The ATTORNEY-GENERAL accordingly proceeded with his argument, and submitted (first) that it was to be inferred from various clauses of the deed that the testator did not intend that his heir, as distinguished from his other children, should be subjected to the discretionary power of the trustees; second, that even if the heir was so included the discretionary power of the trustees was only to be exercised during minority or pupilarity. It did not at all follow that because the testator had postponed the time at which his son should be put in possession of the estate to his attaining the age of twenty-five years, that he intended that the discretionary power of the trustees over him should also be continued for that time. The power in question, if confined

within the limit he submitted it was intended to be, was a most reasonable one—extended beyond that period, it became inconvenient and mischievous. With such a power vested in the trustees, it was impossible for either the son or daughter of the testator to form a suitable marriage until the one had attained the age of twenty-five years and the other of twenty-eight. Such a state of things must have been very far from the intention of the testator. He referred to *Doc v. Harrell* to show that if an absolute gift was at first made but afterwards justified, the words of justification would not be extended by implication. He begged to press this proposition most seriously upon the attention of their Lordships, and thought it had been too easily passed over in the Court below. Thirdly, he submitted that this power was, at all events, one which the trustees could release. Supposing they had expressly covenanted in the marriage-settlement that they would not exercise it, would there have been anything wrong in their doing so? The doctrine of the release of powers for a valuable consideration was thoroughly established in this country, and it was in no way antagonistic to the law of Scotland. Now, the conduct of the trustees had been such as to show their perfect knowledge of the marriage-settlements. He regretted that in the present case, as in many others coming from Scotland, the parties were content to go to a hearing merely upon the admitted facts; and it was therefore impossible for their Lordships to know precisely what position Mr Waddell occupied in the negotiation of the marriage-settlements. Mr Attorney then examined the correspondence upon the subject between Mr Waddell and Messrs Skene & Peacock, and submitted it was to be inferred that Mr Waddell acted as agent both for Mr Ker and for the trustees, and that the latter must have been made fully aware of all the details. Mrs Ker, one of the trustees, was made a party to the marriage-settlements, and she was therefore most certainly precluded from objecting to them.

Lord KINGSDOWN—Would the children of the marriage take as fully under the marriage-settlement as under the late Mr Ker's will?

The ATTORNEY-GENERAL said they would; the provisions both of the settlement and of the will would be precisely the same, with exception that they first burdened the estate with an annuity of £400 to Mr Ker's widow, and also with the payment of £2000 to go in discharge of his debts.

Mr ANDERSON said that there were several remainders in the conveyance contained in the will which, if the settlement were to be given effect to, might be evacuated by Mr Ker.

The ATTORNEY-GENERAL further referred to Mr Waddell's bill of costs against Mr Ker, and said the position of that gentleman was at all events singular, since he had received payment of that bill from Mr Justice on the faith of Mr Ker being in a position to burden the estate, and a fortnight after that payment he had acted as legal adviser to the trustees in declaring that Mr Ker was entitled to a life interest only. He submitted that the marriage settlement in question was made with the sanction of the trustees, and that it was now incompetent for them to do anything in derogation of their act. Fourthly, it was necessary that in the exercise of so serious a power that all the trustees should concur, whereas the minute which deprived Mr Ker of his estate was signed by two only; the testator could never have intended that.

The LORD CHANCELLOR—Did the misconduct imputed to Mr Ker take place previous to his marriage or subsequently?

The ATTORNEY-GENERAL said he had no precise information on the subject, but believed the misconduct consisted in extravagance subsequent to marriage. He submitted, lastly, that this power was conferred only for the purpose of cutting down Mr Ker's interest in the estate to a life interest, and that was accomplished by his marriage-settlement; it was not intended that after that had been done the trustees should exercise their powers over the son

merely to defeat the rights acquired by innocent third parties—his wife and children.

Lord KINGSDOWN—Lord Advocate, supposing Mr Ker had died before reaching twenty-five, would the settlement have been effectual?

The LORD ADVOCATE said it would not, because the condition upon which the vesting of the estate depended was resolute and not suspensive.

The ATTORNEY-GENERAL concluded by examining the opinions of the Judges in the Court below, and submitted that the judgment of Lord Deas was right.

Lord KINGSDOWN—Do you think that the Lord President means that if the trustees had consented to the settlement, that would have operated as a bar to the exercise of their power?

The ATTORNEY-GENERAL said he certainly thought so.

The LORD ADVOCATE then followed upon the same side, and having commenced by saying that he begged to qualify his answer to the question put to him by Lord Kingsdown, and to admit that had Mr Ker died before reaching twenty-five, the settlement could not have been given effect to, adopted and enforced the propositions and arguments of the Attorney-General.

The LORD CHANCELLOR, without calling on the respondents, rose and moved the judgment of the House. He said:—My Lords,—The question which the parties to this appeal have submitted to your judgment arises upon the settlement of a gentleman named Ker. Amongst other directions to his trustees, he directs them to hold the residue of his means and estate, and the produce thereof, in trust for the use and behoof of Robert Ker, his eldest son, and the heirs of his body whomsoever, whom failing, to his other sons in succession, then to his daughters, and so on. Then there is a provision that upon his said eldest son attaining majority, the trustees shall convey to him the said residue, and failing him, to other members of his family in the order of succession mentioned. Then there occurs this passage—“Declaring that in case any of our said children shall marry or otherwise conduct themselves so as not to merit the approbation of my said trustees, or a majority of those accepting and surviving at the time, the provisions hereby made in favour of said children so marrying or acting shall only belong to them in life interest, for their life interest use alienably, and to their issue or heir above mentioned in fee. But it is hereby declared that a regular minute must be entered in the sederunt-book of the trustees, expressing their disapprobation of the conduct of any of my said children to restrict them to a life interest as aforesaid.” The settlement was to a certain extent varied by a codicil which declared that his trustees should not convey the residue of his means and estate to his eldest son until he had attained the age of twenty-five years, nor to his eldest daughter, should the succession open to her, until she had attained the age of twenty-eight. The trust died in 1854; the eldest son, Robert, attained his majority in 1857, and four years later—namely, in 1861—the age of twenty-five years. In the meantime—in 1858—Robert married, and for the present purpose we may assume that he did so with the consent of the trustees, and that they approved of the settlements executed upon the occasion. By the settlement of the Scotch estate he conveyed it to trustees for himself in life interest and the children of the marriage in fee, for the purpose of paying his wife, should she survive him, an annuity of £400, and for the purpose of paying off her debts to the extent of £2000. I think there is no doubt but that the trustees did approve that settlement. The question therefore arises whether, in consequence of misconduct on the part of the eldest son subsequent to his marriage, the trustees were entitled to exercise the power vested in them to confine his estate to a life interest only. A majority of the Lords of Session are of opinion that the trustees were so entitled—that the power took effect, set

aside the settlement, and made the son a liferenter. Now, as against that opinion the appellants relied on three propositions—first, that the power was not intended to be exercised over the heir, but only over the other children. If not formally abandoned, however, that point was not seriously insisted in. The second proposition, in which there was considerably more probability, was that the trustor intended that the power should be exercised during the minority of his children only, and not after their majority. It was said that although the codicil postponed the time at which the estate was to be conveyed to his eldest son from his attaining majority, as provided by the settlement, until he had attained the age of twenty-five years, it did not follow that it was intended also to extend the time during which the power might be exercised to the same period. I was at one time considerably impressed with that argument, but have since seen that it was not well grounded. Had the will declared that the power should only be exercised up to majority, the codicil would not have extended its exercise beyond that period; but the will speaks of that power only with reference to the time at which the estate is to be conveyed. It therefore follows that, according to the true construction of this settlement and codicil, the time for the conveyance of the estate having been extended to the son's attaining the age of twenty-five years, the time during which the power might be exercised was extended to the same period. Now, in the third place, as to the effect of the approval of the trustees. It is quite clear that by the law of England the trustees could not divest themselves of the power, and I believe there is no difference in the law of Scotland. It certainly seems a very strange proposition that a power which is given to trustees for children could be given up by them. I pass on, however, from this, because I think the trustees never did divest themselves of this power. They consented to the settlements, but what are they? Why, simply a conveyance by the eldest son of all his interest under the trust-settlement of his father. On these short grounds I beg to advise your Lordships to affirm the interlocutor, and to dismiss the appeal with costs.

Lord CHELMSFORD—I entirely agree with the Lord Ordinary and the majority of the Judges of the First Division. Three propositions have been submitted in opposition to it. First, that the exercise of the power was not to extend over the eldest son—a point which was not insisted upon. Secondly, to what time was the exercise of this power limited? The settlement declared that time to be the son's majority; but then came the codicil, which declared that the estate should not be conveyed to the son till he had attained the age of twenty-five. It was argued that though the term for conveying the estate was thus postponed, the exercise of the power was not extended. But the time at which the trustees were to divest themselves of the estate was that at which they were to determine whether it should be conveyed to the son in liferent or in fee. Nor does there seem any reason why it should have been in the power of the trustees to exercise the power finally before the son had attained majority. His conduct up to that time might have been such as to resolve them to confine his interest to a liferent; while before he reached twenty-five and could take the estate his conduct might have been of a perfectly opposite character. The most important question, however, which arises is, whether the trustees could divest themselves of their right to exercise this power, and if so, whether they did do so in fact. I am of opinion that such a power as this—a power coupled with a duty—could not, under any circumstances, be surrendered by them. Even assuming that they could, however, I think they did not consent to that settlement, their names as consenting parties having been purposely omitted. Even if they did so consent, however, that would make no difference, because all the parties knew that these settlements

were subject to a contingency. I therefore agree that the interlocutor should be affirmed.

Lord KINGSDOWN—I concur.

Interlocutor affirmed, and appeal dismissed with costs.

## COURT OF SESSION.

Tuesday, Feb. 27.

### FIRST DIVISION.

THORBURN *v.* THORBURN.

*Husband and Wife—Expenses.* Although a husband is liable for his wife's expenses in an action against himself, he is not liable to pay the expense of unnecessary litigation on her part.

Counsel for Pursuer—Mr Fraser, Mr Mair, and Mr Rampini. Agent—Mr William Officer, S.S.C.

Counsel for Defender—Mr Alexander Blair. Agents—Messrs Hunter, Blair, & Cowan, W.S.

This is an action of aliment by a wife against her husband. The pursuer claimed £100 a year, and the defender alleged that in consequence of the intemperate habits and violence of his wife he had been obliged about a year ago to remove her from his house, and that he had since paid her £1 a week which was sufficient for her comfortable support and maintenance as his wife. The pursuer pleaded that the defender's statements as to her intemperance and violence were irrelevant. The Lord Ordinary (Mure) repelled this plea *hoc statu* "reserving to consider, when the proof is being led, whether any portion of the defender's statement is irrelevant or not pertinent to the defence." The pursuer reclaimed, but the Court adhered.

On the motion of the defender the Court farther found that the expenses incurred by the pursuer since the date of the Lord Ordinary's interlocutor should not form a charge against the defender, the Lord President observing that though a husband must pay his wife's expenses in such actions as this, that was no reason why he should be made to pay the expense of unnecessary litigation on her part.

BRITISH FISHERIES SOCIETY *v.* HENDERSON.

*Police Assessment—Exemption.* Suspension of a general police assessment in a county on the ground that the parties charged appointed and paid, under special Acts, police constables of their own, *refused*, there being no exemption in their favour either express or implied.

Counsel for Suspenders—Mr Clark and Mr Duncan. Agents—Messrs Horne, Horne, & Lyell, W.S.

Counsel for Respondent—The Solicitor-General and Mr Millar. Agent—Mr G. L. Sinclair, W.S.

This is a suspension of an assessment sought to be levied from the complainers as owners of the harbour of Pulteneytown by the Commissioners of Supply for the county of Caithness, in virtue of the powers conferred by 20 and 21 Vict., cap. 72, to establish a police force in the county. The ground of suspension was that under various private Acts under which the complainers are incorporated, they had the power to appoint, and had in point of fact appointed, police constables of their own. But neither the private Acts nor the public Act conferred any exemption on the complainers from the assessment complained of, and the Lord Ordinary (Jerviswoode) refused the suspension, there being no presumption in favour of special pleas of exemption from taxation. He was unable to observe any statutory provision adequate to secure the exemption claimed. It might be that under this view the complainers were more heavily burdened as respects the matter of police than others around them; but the local causes, the existence of