

other hand, say that the Trustees may desire the removal of the crossing if any one of the contingencies mentioned in the first section of the agreement should arise, that is, that public safety be endangered, or the public put to greater inconvenience than the trustees think right. I must say that I prefer the former of these interpretations, because otherwise this agreement would be of the nature of a perpetual obligation—a perpetual lease, subject only to being terminated by public danger or inconvenience, and containing no ish—a kind of agreement which the law does not recognise. This is an agreement which can be terminated not upon reasonable cause shown, but upon reasonable notice given. I greatly doubt whether road trustees would have the power to bind themselves in perpetuity subject only to contingencies such as are specified here, but I do not think that in the present case the Trustees have done this, and am therefore for answering question 2 in the negative, and question 3 in the affirmative.

LORDS DEAS and MURE concurred.

LORD SHAND—I am clearly of the same opinion, and have nothing to add to what your Lordship has said regarding question number 1. But with reference to question number 2, I can see no obligation on the Road Trustees to continue to the Cowdenbeath Company the use of this crossing for an indefinite time. I think, on the other hand, that they are entitled to terminate the arrangement whenever they think fit, upon reasonable notice. The only payment is an annual rent; there is no premium of large amount suggesting or representing long use. I therefore conclude that the Road Trustees are entitled to terminate this agreement without reason assigned.

The Court answered question 1 in the affirmative, question 2 in negative, question 3 in affirmative, but declined to answer questions 4 and 5.

Counsel for Road Trustees—Mackintosh—Lorimer. Agent—William Black, S.S.C.

Counsel for Cowdenbeath Coal Company—Trayner—Pearson. Agent—R. W. Wallace, W.S.

Saturday, October 20.

FIRST DIVISION.

GILCHRIST, PETITIONER.

Trust—Petition for Removal of Trustee—Irregularity in Administration of Trust—Bona fides.

In an application for the removal of a marriage-contract trustee from office, and the appointment of a judicial factor on the trust-estate it appeared that the trustees had employed the trust-funds in good faith in carrying on a business for behoof of the beneficiaries, and that they had derived benefit therefrom. *Held* that the proper remedy was not to have the trustee removed, but to have the trust-funds restored and administered in accordance with the trust, and petition refused.

This was a petition for the removal of a trustee

appointed under a marriage-contract, for sequestration of the trust-estate, and appointment of a judicial factor thereon. John Kerr, manufacturer, Glasgow, and Margaret Bruce Dick, Maybole, entered into an antenuptial contract of marriage, dated 1st July 1850. By this contract there was, *inter alia*, made over to Henry Kerr, William Bruce Dick, the respondent (Mrs Kerr's brother), and William Gilmour, who did not accept office, as trustees, two policies of insurance on John Kerr's life, each for £499, 19s. The proceeds of the policies were to be used, first, to secure to the widow the provisions contained in the marriage-contract, and second, for behoof of the children of the marriage.

John Kerr was a partner of More & Kerr, Clyde Rivet Works. He died on 8th June 1856, and was survived by his widow and four children. The present petition was at the instance of the marriage-contract trustees of Mrs Gilchrist, one of these children. At the time of his death his interest in the firm, according to a state made up by his partner, was £1290. The marriage-contract trustees uplifted the amount of the policies, amounting with bonus additions to £1074, 3s. The petitioners averred that the trustees in breach of their duty invested the funds in their hands in the rivet business formerly belonging to More & Kerr, but of which Mr Dick had become a partner, and which was carried on under the name of More & Dick, and subsequently of W. B. Dick & Co.; that from time to time down to 1875 various payments were made to Mrs Kerr in name of profits realised by the said business, and also in repayment of capital invested for her behoof, but that after 1875 no payments were made; and that Mrs Kerr's provision under the marriage-contract had never been met. They further alleged that William Dick, though often asked, had declined to give any explanation as to his intromissions with the trust-funds.

Of children of the marriage of Mr and Mrs Kerr other than Mrs Gilchrist, two had gone into business and had failed, and had not been retrocessed in their estates. The fourth, a daughter, had died.

William Bruce Dick, the surviving trustee, lodged answers. He explained that during the life of Henry Kerr the business of the trust had been conducted by him. He denied that he had refused any necessary explanations. He explained that the estimate of the value of John Kerr's interest in the firm of More & Kerr at £1290, made by Mr More, was much overstated, and that the business, which was conducted for a short time after John Kerr's death under Henry Kerr's supervision, was then making no profit; that though applied to to become a partner of More & Kerr for the purpose of supporting the family he had declined to do so at the time in consequence of his own business engagements, but had afterwards given up his own business, and entered into the new firm of More & Dick to continue the rivet business of More & Kerr, he himself also conducting a separate oil business; that at Mrs Kerr's credit in the new firm was £500, which had not formed part of the marriage-contract fund. He further set forth that the rivet business was sold in 1869, and that thereafter he assumed Mrs Kerr as his partner in his oil business for the purpose of giving her a better interest for herself and family, but she put no

capital into this partnership, which subsisted till 1875, and during the period from 1869 to 1875 she drew sums of from £200 to £500 per annum out of the business. He expressed his willingness to assume new trustees, but submitted that the petitioner's averments were irrelevant to support the prayer for his removal. He submitted that his sister and her family had received far greater benefits than in any view he was bound as trustee to make good to them.

At the hearing of the case the petitioner argued that the trustee should be removed—(1) Because he had mixed up the marriage-contract funds with other funds; (2) because he had misappropriated the funds by applying them in a business, which was an illegal manner of application of trust-funds.

It appeared from an account lodged by the respondent that the executry and trust funds had never been separated.

At advising—

LORD PRESIDENT—I am for refusing this application, and shall state very shortly the grounds of my opinion. There can be no doubt that there has been a breach of trust here in using trust-funds for an unquestionably illegal purpose, but while this has been admittedly done by Mr Bruce Dick and his co-trustee, yet it is equally clear that both acted in perfect good faith, and the proper remedy in such a case is to have the trust-funds restored, and for the future held and administered in terms of the marriage-contract. In order to warrant us in adopting so extreme a measure as to remove a trustee, there must be something more urged against his conduct than mere irregularity; there must be such illegality as would warrant us in taking so strong a step. There is no suggestion that both trustees have not acted in good faith, and it is well for them that the investment of the trust-funds has turned out so favourably. The widow and her family have been maintained in competency and comfort, and in that state of matters I cannot assume anything against the trustees to warrant their removal from office.

LORD DEAS—I can see no cause for or benefit which is to arise to the estate by granting this application. The only result would be the substituting of an expensive and cumbrous for a cheap and gratuitous mode of managing these funds.

LORD MURE—I am clearly of the same opinion. I think that the removal of a trustee is only warranted by a very decided malversation of office. Not only is there no allegation to that effect here, but, on the contrary, the money was so invested as to bring in a large return to the widow and her family.

LORD SHAND—I think that the trustees acted with great irregularity in the manner in which they dealt with the proceeds of these policies; but then it must be kept in mind that they acted throughout from the best motives, and endeavoured to get the £1074 invested to the best advantage so as to secure the largest return for the widow and her family. In these circumstances I should be very unwilling to do anything so invidious as to remove this trustee. I think that the facts show that the respondent acted in good faith throughout, and if the peti-

tioner still desire to insist against the trustee, it must be done by means of a direct action against him, all the more as he alleges that there is now no fund in existence.

The Court refused the application.

Counsel for Petitioners—Lang. Agents—W. & J. Burness, W.S.

Counsel for Respondent—Pearson. Agents—Dove & Lockhart, S.S.C.

Saturday, July 14.

OUTER HOUSE.

[Lord Fraser.

TAYLOR v. TAYLOR.

Husband and Wife — Divorce — Jurisdiction — Domicile.

A man whose domicile of origin was in India, and who had at the time acquired no other domicile, married a Scotswoman, and resided with her in India for some years. Thereafter the wife came to Scotland, and lived there for some time with the children of the marriage, during which time the husband wrote various letters to her, in which he intimated his desire to settle in Scotland. He came to Scotland on furlough of two years, in the course of which he brought an action of divorce for adultery in the Court of Session. It was proved that he intended (except in the event of his succeeding to property, of which he had expectations) to return to India for three years with a view to earning a larger pension, to which he would then be entitled, and immediately on the expiry of that time to return to Scotland, and to reside permanently in Scotland. *Held* (by Lord Fraser, Ordinary) that he had acquired a domicile in Scotland at the time of raising the action, and that the Court had therefore jurisdiction.

Lieutenant Colonel James Best Taylor, Madras Staff Corps, who was born in India, and was the son of a gentleman born in Bombay of a foreign mother, but whose father was of Scottish extraction. Colonel Taylor's own mother was an Armenian. In 1870 Colonel Taylor, having his domicile in India, married in London Mrs Anne Cordelia Philipps or Taylor, a Scotswoman. After their marriage the spouses proceeded to India, where Mrs Taylor resided with her husband till 1878, with the exception of a visit she made to Scotland in 1874. In 1878 she came to Scotland with the children of the marriage, and lived in various places in Scotland till May 1883. Colonel Taylor came to Scotland on 2d March 1882, having obtained two years' furlough, and resumed cohabitation with his wife till he discovered (as he alleged) that on 28th November 1882 his wife had committed adultery, and in consequence of this information he ceased to cohabit with her. She left her husband's house on 21st March 1883. Colonel Taylor then raised this action for divorce on the ground of his wife's alleged adultery.

The defender pleaded "No jurisdiction."

In his condescendence the pursuer averred