in such circumstances ought to have been dictated by the good feeling which every proprietor and every man should exhibit—the Dunse Trustees ought to have said "You have given offence by what you have done, and you must give us your assurance that you will not come back." But that was not what happened; this petition for interdict against Young was served upon him without any further communication, and in presenting it the petitioners must have known quite well that Young was not in the least likely to come back to dig again, and I think that they acted from irritation at the discovery made by Young. This will not, however, give a good ground for interdict; indeed, I am of opinion that there was not a shadow of foundation for the application, and I never saw a case in which there was less.

Lord Ormidale—I entirely agree. People should know when and when not to apply for such a remedy as interdict. I think that the rules upon this subject are very tersely and very accurately stated by the Sheriff-Substitute in his interlocutor. If a wrong was done here at all it was all done and over a month before the petition was served. Again, the petitioners must show that a violation of their rights was intended. No doubt a person may do one act of wrong in the circumstances which lead to the conclusion that it may be followed by another similar act, but that is not the case here. Trespass is the nature of the wrong alleged, and this is a serious delict almost in the nature of a crime—[*His Lordship referred to Bell's Principles*, § 961]. But the Sheriff-Depute here in the note appended to his judgment has in my opinion entirely mistaken the true meaning of an interdict for trespass when he says—"This is not an action to punish the respondent for an offence, but to prevent him from committing a trespass." He also remarks that whether Young acted in *bona fide* or not was of no importance; it appears to me that in such a case *bona fides* is of the utmost consequence. This party was perfectly entitled to defend himself against this application for interdict. Was he then there as a trespasser or not? If ever there was a case in which it most clearly appears that no offence was intended, this is it. Whether Young was right or wrong in proceeding to do what he did, I cannot doubt that he acted in *bona fide*, and that he cannot in any sense be regarded as a trespasser, and his whole subsequent actings illustrate this. There never was a case so ill founded for interdict as the present.

Lord Gifford—I concur. The remedy of interdict by a court of law is a serious one, and not to be given without reasonable ground. The petitioners here do not even say they apprehend a repetition of the offence. Now, that is the essence of such an application. The offence may be going on or there must be apprehension of its recurrence. Here Young had no idea of doing wrong; he even took the Dunse overseer and labourers with him, and then when he was pulled up for what he had done he made an apology; that I regard as an implied assurance that the action on his part would not be repeated. There is a failure in the relevancy of the petition and in that apprehension of wrong which is the essence of the application.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the appeal, Sustain the same: Recal the judgment complained of: Dismiss the petition: Find the petitioner liable to expenses in both Courts; and remit both these accounts to the Auditor of this Court to tax and to report."

Counsel for Petitioners—Keir. Agents—Renton & Gray, S.S.C.

Counsel for Respondent—Mackintosh—Jameson. Agents—Dundas & Wilson, C.S.

Wednesday, January 31.

SECOND DIVISION.

DOW AND OTHERS *v.* MILLER AND OTHERS (KILGOUR'S TRUSTEES).

Succession—Trust—Annuity.

A truster directed his trustees to invest the whole residue of his estate in the purchase of an annuity for each of certain beneficiaries. The whole beneficiaries having demanded payment of the capital from the trustees, *held* that the latter were bound to pay—the direction being one which, if carried into effect, could immediately be undone by a sale of the annuities.

This was a Special Case, presented by Miss Mary Ann Dow and Miss Ellen Dow, residing at Oporto, Portugal, and Misses Mary Dick, Marjory Dick, and Catharine Mitchell, all living in Scotland, of the first part; and the trustees of the late John Cunningham Kilgour, merchant, Dundee, of the second part. The truster died on 15th July 1875; leaving a trust-disposition and settlement, dated 29th May 1875, by which *inter alia* he directed his trustees after the residue of his estate should be fully realised to divide the same into three equal shares, one of which should be invested by them in the purchase of a Government annuity, an annuity by the Scottish Widows' Fund and Life Assurance Society, and an annuity by the Scottish Provident Institution, each of these annuities being in favour of and payable to his cousins Mary Ann Dow and Ellen Dow, both daughters of the late James Dow of Oporto, in Portugal, his mother's brother, and then residing at No. 4 Entre Quintas, Oporto, jointly, and the survivor of them; another of the shares to be similarly invested by his trustees in purchasing similar annuities in favour of and payable to his cousins Mary Dick and Marjory Forbes Dick, both daughters of the late Catharine Dow or Dick, his mother's sister, and then residing at No. 1 East Adam Street, Edinburgh, jointly, and the survivor of them; and another of the shares to be invested by his trustees in the purchase of similar annuities in favour of and payable to his housekeeper Catharine Mitchell. He directed that in purchasing the annuities each of the three shares should be divided into three equal parts, and one of the said parts should, in the case of each of the said three sets of annuitants, be invested in the purchase of each kind of annuity. The truster further directed his trustees, "in purchasing the foresaid annuities, to provide as far as possible that the same shall be payable to the said annuitants, exclusive of the

jus mariti and right of administration, and all other rights and interests which the husbands any of them may have married or may marry might have by the law of this or any other country, so that the same may be payable to themselves on their own simple receipt, without the consent of their said husbands."

The trustees invested two third parts of the residue in the purchase of annuities as directed. But on making application to the proper department for the purchase of Government annuities with the remaining third part of the residue, the Government Annuity Office declined to grant an annuity to the Misses Dow, on the ground that they were resident out of the United Kingdom, and they made certain special requirements upon the Misses Dick which it was difficult and inconvenient for them to comply with. In consequence of this, all these intended annuitants requested the trustees, instead of purchasing any Government annuities, to pay them their respective shares of the remaining third part of residue which was directed to be so invested. The first parties maintained that they were entitled to payment of the money directed to be invested in Government annuities for their behoof, in respect that the annuities, if purchased, could be immediately converted into money by them. The Misses Dow further maintained that they at least were entitled to payment of the money, in respect that the Government declined to grant such an annuity on account of their residence abroad. The second parties maintained that, in so far as regards the shares falling to the Misses Dick, they were bound to purchase for them Government annuities. In regard to the share of residue falling to the Misses Dow, they doubted their power to pay it to them, notwithstanding the refusal of the Government; and they maintained that they were bound to purchase another annuity for their behoof.

The following questions were submitted for the opinion and judgment of the Court—"(1) Are the first parties entitled to demand payment of the respective portions of the said remaining third part of said residue, which were directed to be invested in the purchase of Government annuities for their behoof, irrespective of the possibility of obtaining such annuities? (2) Assuming that the direction to invest the several shares of said one-third of the residue in the purchase of Government annuities has become imprestable, are the trustees bound to see that the said shares are invested in the purchase of annuities from a responsible life office, or are they entitled to pay the money to the legatees discharged of the condition of being invested in the purchase of life annuities."

Argued for the first parties—The payment of the fund should be made directly to us (*Kippen* v. *Kippen's Trs.*). They could if purchased at once be sold so that the testator's object would be defeated (*Tod* v. *Tod's Trustees*).

Argued for the second parties—The annuity although defeasible affords a species of protection, and it is a question whether the Court will interfere. The English rule is, that if a legatee demand it, a trustee must pay in money which has been by the truster's direction laid aside to provide for the purchase of a specific article. The Scotch decisions do not go so far, though perhaps they tend that way. The Misses Dow can obtain their annuities by simply complying with the condition as to residence (*Gordon* v. *Gordon's Trustees*).

Authorities—*Tod* v. *Tod's Trustees*, March 18, 1871, 9 Macph. 728; *Kippen* v. *Kippen's Trustees*, Nov. 24, 1871, 10 Macph. 134; *Dunbar* v. *Scott's Trustees*, July 18, 1872, 10 Macph. 982; Jarman on Wills, i. 367; *Power* v. *Hayne*, May 7, 1869, L.R., 8 Eq. 262; *Gordon* v. *Gordon's Trs.*, March 2, 1866, 4 Macph. 501; *Menzies* v. *Murray*, 2 R. 507; White and Tudor's Leading Cases, vol. ii., p. 266.

At advising—

Lord Gifford—We have here the whole beneficiaries to whom the residue of this estate is destined—all parties in fact for whom this investment in the purchase of Government annuities was to be made. Those annuities were to be taken "so far as possible exclusive of the *jus mariti*." I suppose that could only be done by inserting in the body of the bond of annuity a condition to that effect.

Now the question comes to be, are these annuities to be bought when all the intended annuitants wish otherwise. There is not here any limitation upon the powers of the legatees, and accordingly this case must be distinguished from those in which an alimentary provision is made, and where the powers of the beneficiary are limited. It is not so here, and I think we should recognise the English rule. Both parties have admitted that the annuities could be sold, and the Court will not require the trustees to do that which could instantly be undone.

Lord Ormidale—I am of the same opinion. If we had here the element of aliment, or of an express prohibition against assignation, that might alter matters, for then the power of realisation would be denied to the beneficiary. But such elements being awanting, we may follow the rule well-established in England, and I think now recognised here. To do otherwise would only entail on the annuitant an expense, and a loss upon the original fund, in having to buy and then sell the annuity, so that in reality we by preserving the fund from such dilapidation aid the true purpose of the testator.

Lord Justice-Clerk—I hope that the reports will bear, and that it may be clearly understood, that we decide this case upon the general principle that where a testator directs that thing to be done which can at once be undone, it need not and should not be done. The principle was recognised in the cases of *Kippen* and of *Todd*, and in England has received the fullest sanction.

The Court answered the first question in the affirmative.

Counsel for the First Parties—Moncrieff. Agents—Thomson, Dickson & Shaw, W.S.

Counsel for the Second Parties—M'Laren. Agents—Fyfe, Miller, Fyfe & Ireland, S.S.C.