

by the pursuer, but for the purpose of aiding Alexander M'Intosh in his designs against the pursuer. Further, I think that it is clear that the defender must have known, or must be held to have known, that the diligence was illegal, and must be held to have used it with that knowledge. In these circumstances I cannot hold a letter of indemnity to be binding on the pursuer which was taken from him while in prison and without legal advice, and without knowledge either of the facts or of his rights. The parties did not transact with equal knowledge or on equal terms.

The Court pronounced this interlocutor—

“The Lords . . . sustain the action as an action of damages for wrongous imprisonment: Find that the imprisonment complained of by the pursuer was wrongful, that the letter of indemnity founded on by the defender cannot be sustained as a bar to the action: Therefore recall the said interlocutor; find the pursuer entitled to damages; assess the same at £20 sterling; and ordain the defender to make payment of that sum to the pursuer: Find the pursuer entitled to expenses; remit to the Auditor to tax the same and report, reserving the question of modification, and decern.”

Counsel for Pursuer (Reclaimer)—Guthrie Smith—Rhind—Shaw. Agent—Peter Morison, S.S.C.

Counsel for Defender—Campbell Smith. Agent—L. M'Intosh, S.S.C.

Friday, October 19.

FIRST DIVISION.

SPECIAL CASE—FIFE COUNTY ROAD TRUSTEES v. COWDENBEATH COAL COMPANY.

Road—Public Road—Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sec. 32—Agreement for Use of Level-Crossing.

Prior to 1878, road trustees, in return for an annual payment of £20, granted to a mineral company the right to construct a railway on the level across a public road, it being further agreed that the use of the crossing should continue only so long as the public safety and convenience were not endangered, and that its use was to be “discontinued whenever the trustees may desire this to be done.” By the Roads and Bridges Act of 1878 the whole property, powers, and privileges of the road trust were transferred to the county road trustees appointed under that Act. *Held* that the company were bound, in addition to paying the annual assessment for roads made under the statute, to continue to pay the £20 annually for the privilege of the level-crossing to the county road trustees, but that the trustees might at any time bring the agreement to an end on giving reasonable notice, without reason assigned.

This Special Case arose out of an agreement entered into in 1855 between the Trustees of the Great North Road, which passes through the

county of Fife, and the Forth Iron Company, who were the lessees of the minerals in the estate of Cowdenbeath in that county. By this agreement permission had been granted to the Company to construct a railway on the level, crossing the Great North Road at right angles, for the purpose of conveying minerals from their workings on the west side to their principal depôt on the east side of the road.

The annual payment agreed to be made by the Company to the Road Trustees for the use of this crossing was £20.

By an agreement, between the same parties dated 6th September and 25th October 1867, and 15th April 1868, it was further provided, *inter alia*—“The parties, considering that on 18th April 1855 permission was given to the said Company to construct a level-crossing on the Great North Road for the purpose of conveying their minerals across said turnpike road by means of horse traction, and that the attention of the Road Trustees has been drawn to the fact that loaded waggons from the pits of the said Company can be taken across the turnpike road solely by the impetus acquired in coming down the incline from the pits, whereby danger may arise to the public, therefore it is agreed as follows:—*First*, That the permission to use the level-crossing is personal to the said Company, is limited to their mineral traffic from their said pits, and traffic to said pits in connection with said mineral traffic, and shall continue to be used only so long as the said Trustees think that the public safety is not thereby endangered, or the public put to greater inconvenience than the said Trustees consider right, and that the use of the rails across the said turnpike road shall be discontinued, and the rails removed, at the expense of the said Company, whenever the said Trustees may desire this to be done.”

In 1870 the Cowdenbeath Coal Company succeeded the Forth Iron Company as the lessees of the said minerals, and down to 1879 they regularly made use of the crossing in question and paid the Road Trustees annually the sum of £20 for the use thereof in terms of the original agreement.

On the 17th December 1878, the Commissioners of Supply of Fife adopted the Roads and Bridges (Scotland) Act 1878, and at Whitsunday 1879 the tolls in Fife were abolished and the management of the highways was, under the said Act, taken over by the County Road Trustees of Fife.

Section 32 of the Roads and Bridges (Scotland) Act 1878, provides:—“From and after the commencement of this Act, the whole turnpike roads, statute labour roads, highways, and bridges within each county respectively shall form one general trust, with such separate district management as shall be prescribed by the trustees as hereinbefore provided; and all the roads, bridges, lands, buildings, works, rights, interests, moneys, property, and effects, rights of action, claims and demands, powers, immunities, and privileges whatever, except as hereinafter provided, vested in or belonging to the trustees of any such turnpike roads, statute labour roads, highways, and bridges within the county, shall be by virtue of this Act transferred to and vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed, shall be liable in all the debts, liabilities, claims,

and demands in which the trustees of such turnpike roads, statute labour roads, highways, and bridges are or were liable under any general or local Act then in force, except in so far as such debts, liabilities, claims, and demands may under the provisions of this Act be discharged, reduced, or extinguished."

The Cowdenbeath Coal Company continued to use the crossing for the purposes of their mineral traffic, but from and after Whitsunday 1879 they refused to pay the £20 specified in said agreement, contending that there was now no warrant for the exaction, none being given by the statute.

The County Road Trustees, on the other hand, maintained that the Cowdenbeath Company were bound to pay, not only the annual road assessment (which the company regularly paid), but also the stipulated £20, so long as they made use of the level-crossing. They further maintained (and the company disputed) that they were entitled to require the removal of the crossing without reason assigned, or otherwise, on a declaration by them that the public safety was endangered or the public put to greater inconvenience than they (the Trustees) considered right.

The present Special Case was accordingly presented for the opinion and judgment of the Court, the first parties being the County Road Trustees of Fife, and the second parties the Cowdenbeath Coal Company.

The following were the questions stated:—
“(1) Are the Cowdenbeath Coal Company bound to pay to the County Road Trustees of Fife the annual sum of £20, stipulated for in the agreement between the Great North Road Trustees and the Forth Iron Company, in addition to the annual road rate or assessment leviable from them under the Roads and Bridges (Scotland) Act 1878, in respect of ownership or occupancy of lands and heritages in connection with which said crossing exists and is used, so long as the level-crossing, to which said agreement refers, continues to exist? (2) Are the Cowdenbeath Coal Company entitled to demand that said crossing shall be allowed to exist and be used until the County Road Trustees shall declare that in their opinion the public safety is thereby endangered, or that the public is thereby put to greater inconvenience than they consider to be right? Or (3) Are the County Road Trustees of Fife entitled, without reason assigned, to require and compel the removal, at the expense of the Cowdenbeath Coal Company, of the rails and other material forming said crossing? (4) Assuming the said agreement no longer to subsist, or to have been brought to an end, would the County Road Trustees be entitled to stipulate, as a condition of granting permission for the construction or continuance and use of the crossing referred to, that an annual sum should be paid to them therefor, and other conditions and regulations as to the construction, use, and removal thereof should be undertaken by the party asking and obtaining such permission? (5) Are the County Road Trustees bound to treat all the parties who use level-crossings alike in the matter of annual payments where the circumstances are similar in all material respects?”

Argued for the Road Trustees—That the use of this crossing not being of the nature of a public use, the annual stipulated payment was not of

the nature of a “toll or other exaction” within the meaning of the Roads and Bridges Act, sec. 33 of which abolishes all tolls or exactions except such as may be levied in terms of sec. 34; an exaction was something paid by the public *qua* public. (2) It was clearly provided by the terms of the agreement that the arrangement could be terminated by the Trustees at their pleasure. It could also be voided at law as a lease without any definite ish.

Authority—*Dunlop v. Steel Co. of Scotland*, November 27, 1879, 7 R. 283.

Argued for the Cowdenbeath Coal Company—This was just a species of toll or exaction such as the Roads and Bridges Act was intended to abolish, and no warrant could be found in the Act for its continuance. The agreement could only be cancelled if the public safety or convenience required it, and it was not suggested that the public suffered any inconvenience or danger from the continuance of the crossing.

Authority—1 and 2 Will IV. c. 43.

At advising—

LORD PRESIDENT—The parties are already aware that the Court are not prepared to answer questions 4 and 5 for obvious reasons, and there only remains, therefore, to be disposed of question 1, and the matter raised alternatively in questions 2 and 3.

As to question 1 there can be no doubt that while this agreement subsists, the annual payment specified in it must be made to the Road Trustees. For there can be no objection in law to an agreement such as this so long as it is the desire of both parties that it should subsist. It might be a question how far Trustees appointed under the recent Roads and Bridges Act could enter into such an agreement, but we are dealing here with an agreement lawfully entered into by the old Trustees, and it is provided by sec. 32 of this Act that all the power exercised by these old Trustees shall be transferred to the new. Therefore any claim made under such a contract is good, and accordingly the first question falls to be answered without any qualification whatever. But the second question is attended with more difficulty. It has reference to whether the crossing in question is to be allowed to exist until the Road Trustees think the public safety is endangered, or the public put to inconvenience, or whether they can without reason assigned compel the Cowdenbeath Coal Company to remove at their own expense the material forming the crossing.

The answer to this depends not only upon the terms of the agreement itself, but also upon the legal construction which falls to be put upon it.

Now, the use of the level-crossing is limited by the agreement to the mineral traffic from the company's pits, and that use is to be continued only so long as the public is not inconvenienced or its safety endangered, and the crossing is to be discontinued and the rails removed at the expense of the company whenever the Trustees desire that this may be done. The first parties contend that this use of the level-crossing shall not be allowed to continue if the public safety is endangered or the public inconvenienced, and they further claim that they may without reason assigned require the removal of the material of the level-crossing. The second parties, on the

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