but the share of capital "of which such daughter may be receiving the income"—that is to say, of which she is the liferentrix. Every line of the deed shows that the testator did not intend that the daughters should have any right to the fee, but only a liferent with a power of disposal "by revocable deed."

If your Lordships concur in this view, the first alternative of the first question will be answered in the negative, and the second alternative in the affirmative.

LORD ADAM—I am of the same opinion. It is the intention of the truster as expressed in the deed that we have to give effect to, and for that reason the construction of one testament serves to throw very little light on that of another. Still we must observe the rules of construction laid down in previous judgments. What, then, was the intention of the truster in this case? In executing a settlement a truster may give a fee and then try to limit and restrict it, but such limitation and restriction will be of no effect if in fact he has given a fee. The question therefore here is, whether the testator has given a fee, for if so the restriction would be of no avail. The case resembles that of *Greenlees' Trustees*, but differs from it in that there is no direction "to pay" to the daughters. The testator says—"I leave and bequeath the residue of my estate . . . for behoof of my children equally, and direct my trustees to pay over to each of my sons." . . . While that is a distinct direction to pay to sons, there is no such direction in the case of daughters. Then the testator goes on to direct his trustees "to hold" the daughters' shares during their life, and to pay in a certain way on their death. We have therefore a direction to pay, but only when the daughters are dead. In this we have a clear direction as to the final disposal of the fee, and not as in *Greenlees'* case. The trustees here are to pay the income to the daughters and the fee to their testamentary or natural heirs. I think there can be no doubt that in this case there was no absolute fee given to daughters on the death of the testator, but that the fee was to be held until their death, and then to be disposed of as they should direct, and failing direction then go to their heirs.

LORD M'LAREN—This case touches, or at least comes very near to, a question that has been frequently commented on, and as to which I am not sure that the highest authorities are agreed — I mean as to the effect of a gift taking the form of an unqualified power to the grantee to dispose when there is superadded a provision as to what is to be done in the event of the power not being exercised. Observations as to this are to be found in the case of *Morris* v. *Tennant* (27 Scot. Jur. 546) by Lord St Leonards, and in the case of *Pursell* v. *Elder* (3 Macph. (H.L.) 68) by Lord Westbury. In *Morris* v. *Tennant* Lord St Leonards had to deal with a liferent with power to dispose either by will or by deed, and a destination-over in the event of failure to exercise the power. So the power there was a most general one, and the judgment of the House supported by Lord St Leonards was to the effect that a liferent with a power of disposal, however general, cannot be construed as a fee if there is a destination-over in the event of failure to exercise it. But in the case of *Pursell* v. *Elder* Lord Westbury said that to give a person an estate "with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, then in any case these words are to be taken as indicating an intention that he should be the absolute owner." Lord Westbury does not directly deal with the case of a destination-over, perhaps because he was not quite in agreement with Lord St Leonards as to the effect of it.

In the present case it is hardly necessary to solve this troublesome question, for here we not only have a destination-over to heirs, but the power itself is not an unqualified power. It is a restricted power to the grantee to dispose of her share after her death by any revocable deed. This may include some deeds that are not strictly testamentary, but practically it means that what is here given is only a power to affect the succession to the estate, and not a power to disturb the trustees in the possession of it during the grantees' lives. The object of this limitation was no doubt that the income of the estate should thereby be secured to the beneficiaries. I have no doubt that under this instrument the daughters take only a liferent with a power to dispose *mortis causa*. I do not comment on the language of the disposition, because I agree with all that your Lordship and Lord Adam have said with regard to it.

LORD KINNEAR was absent.

The Court answered the first alternative of the first question in the negative and the second alternative in the affirmative.

Counsel for the First Parties—Constable. Agents—J. & J. Turnbull, W.S.

Counsel for the Second Parties—Morton. Agents—Skene, Edwards, & Garson, W.S.

Wednesday, November 30.

FIRST DIVISION.

STEWART *v.* CHALMERS.

Trust—Removal of Trustee—Indefensible Conduct of Trustee—Assumption of New Trustees—Objections to Sole Trustee.

Where a trustee, being a solicitor, demanded from his sole co-trustee, who was also the law-agent of the trust, one half of the fees of the agency, and upon refusal declined, without giving any reason, to approve of an investment of the trust funds, and thereafter refused to assume new trustees or to resign, the Court *granted* the prayer of a petition presented by the beneficiaries for his removal, and continued the cause until the sole remaining trustee had lodged in process a deed

of assumption assuming new trustees whose names had been suggested in the petition.

Observations (*per* Lord M'Laren and Lord Kinnear) on the inexpediency of permitting a trust to fall into the hands of a sole trustee.

Peter Stewart, of the Kinnoull Arms Inn, Perth, died on 6th January 1897, leaving a trust-disposition and settlement dated 3rd October 1892, whereby he assigned and disponed his whole means and estate to certain trustees for the benefit of his widow and children. From 18th April 1904 the trustees under the trust were Thomas Chalmers, solicitor, Perth, one of the original trustees, and Robert Stewart, solicitor, Perth, an assumed trustee. Stewart was also law-agent to the trust, having been appointed to that office at a trust meeting held upon the 10th March 1904.

Upon 15th September 1904 Mrs Mary Ann Munro or Stewart, the widow; Ann M'Farlane Stewart, Mary Stewart, and Joan Stewart, the three unmarried daughters; Christina Scotland Stewart or Watson, the married daughter, with the concurrence of her husband; and William Stewart, the son of the testator, being all the beneficiaries under the trust, presented a petition in which they asked the Court to remove the said Thomas Chalmers from the office of trustee, or otherwise to appoint John Anderson Stewart, solicitor, Perth, and John Munro, jeweller, Perth, or such other persons as their Lordships should think fit, to be trustees. They averred—"His," *i.e.* Chalmers', "whole conduct has been improper and unjustifiable and hurtful to the interests of the beneficiaries. He has persisted in preferring his own personal interests to those of the trust. While he will not demit office or assume new trustees, as he has been requested to do, he has continued to hinder trust investments and to obstruct the administration of the trust." The facts relied on by the petitioners are given in the opinion of the Lord President.

Chalmers lodged answers, in which he expressed regret for the terms of his letters, caused, as he alleged, by irritation at Stewart's conduct, and in which he denied that he had impeded the administration of the trust. He admitted that it might be better that a third trustee should be appointed, and expressed his confidence in John Anderson Stewart, who, however, he stated, had expressed unwillingness to assume the office.

Argued for the petitioners—The conduct of the respondent has been such that they, the beneficiaries, could have no confidence in him. He would not resign, so they had no other alternative but to ask for his removal and the appointment of other trustees—*Dick* v. *Dick*, December 16, 1899, 2 F. 316, 37 S.L.R. 232.

Argued for the respondent—The conduct of the respondent might have been injudicious, but did not amount to malversation or gross negligence. These were the only grounds upon which the Court would remove a trustee—*Gilchrist's Trustees* v. *Dick*, October 20, 1883, 11 R. 22, 21 S.L.R. 17; *Harris* v. *Howie's Trustees*, October 20, 1893, 21 R. 16, 31 S.L.R. 33.

Lord President—This is a petition at the instance of Mrs Stewart and others for the removal of Thomas Chalmers, solicitor, Perth, from the office of trustee under the trust-disposition and settlement of the late Peter Stewart, who was the husband of the leading petitioner, dated 3rd October 1892. It is always a serious thing to remove a trustee, and it is not done without good and sufficient reason. But I am clearly of opinion that the conduct of the respondent has been of such a character as to make it unsuitable, if not unsafe, that he should be allowed any longer to remain one of the trustees under this trust.

The trustees nominated in the trust-disposition and settlement were three in number, all solicitors in Perth, and after the death of the truster on 6th January 1897 all the persons nominated trustees accepted office. The trust was not a large one, and there need not have been any difficulty in its administration if everyone connected with it had been reasonably desirous of doing his duty, and not of making profit out of it for himself.

The incidents with which we have specially to deal began in the month of April 1904, when Robert Stewart, who after the death of the respondent's two original co-trustees was assumed as a trustee, and was appointed law-agent to the trust, wrote to the respondent what seems to me to have been a perfectly proper letter expressing his desire to consult him as his co-trustee in regard to the investment of the trust estate. The respondent's answer to that letter was not of a proper or I hope of a usual character. He said in it—"As your position and mine as trustees are now equal, I am to insist on half fees for all business to be done by you for this trust. On hearing from you that you agree to this condition I will consider the question of investing the trust funds." The ruling consideration to which the respondent refers was not the interest of the trust but of the respondent himself. He insists on receiving half fees, for which he had not given and was not to give any professional service, and he makes payment of this indefensible claim a condition of his attending to the business of the trust which he had accepted. It would be difficult to conceive of anything more improper than this proposal, that a trustee should make a profit out of the execution of his trust and at its expense. He insists that if he allows Mr Stewart to receive professional fees for work done by him (Stewart) for the trust, the respondent shall receive half of them. I have seldom known of anything more improper than this proposal by a trustee that he be allowed to pocket a portion of the trust funds. The proposal was quite indefensible, and shows that the respondent is unfit to be trusted with the position of a trustee. Mr Stewart's reply to the respondent's proposal was this—"I presume that I

am to hold your demand for half of the fees as another proof of your generosity, but I am not aware that a gratuitous trustee is entitled to sacrifice the interests of the beneficiaries to his own. I certainly have no intention of being a party to such a bargain."

The correspondence goes on and Mrs Stewart wrote on 4th May to the respondent suggesting that two new trustees should be assumed. And on 6th May the respondent replied that he could not see his way to agree to assume new trustees at present, and on the same date he wrote to Mr Stewart that he has objections to assume any new trustees at present, and upon being asked by Mr Stewart what his objection was he wrote on 7th May that he did not feel called upon to give him any further reason for refusing to assume new trustees. I do not know what his reason could have been unless to create a deadlock in the management of the trust with the view of concussing the trustees to allow him to receive half the fees payable to the agent of the trust.

On 6th May Mrs Stewart wrote to the respondent that her nephew Mr Robert Stewart informs her that "you insist on getting half fees for all the business to be done in my late husband's trust, and unless he agrees to the conditions you will not consider the question of investing the trust funds"; and that she does not "consider this any reason for delaying the business of the trust." In reply to this letter the respondent wrote expressing regret that he could not discuss with Mrs Stewart the question to which she refers, "which is entirely a personal one between Mr Robert Stewart and myself." If anything had been necessary to show that the respondent's object was to get a private profit for himself out of the trust funds, this last letter would have been sufficient to do so. The respondent said that if he was not allowed to commit a breach of trust he would bring the trust to a deadlock. When Mr Robert Stewart wrote on 14th May suggesting a particular investment the respondent replied:—"I do *not* approve of this investment"; but he gave no reason for his disapproval. When on 22nd June he wrote asking Mr Robert Stewart to arrange for a meeting of trustees for the purpose of appointing a law-agent, he said nothing about the proposed investment or his objections to it, and he made no suggestion in regard to it.

I do not think it is necessary to go further into the details of this case except to repeat that the position taken up by the respondent was quite indefensible, and that he not only displayed a total disregard of the benefit of the trust, but also acted in a way contrary to its interests and calculated to bring it to a deadlock, all for the purpose of getting some of the trust funds for himself. If he thought Mr Stewart was acting wrongly with regard to the investment, it was his duty to say so, and to take steps for obtaining a proper investment, but instead of doing this he sought to prevent anything at all being done. Such an attitude on his part was quite indefensible, and it appears to me that the proper course is to remove him from the office of trustee.

LORD ADAM concurred.

LORD M'LAREN—I am of the same opinion. I do not think it would have been incompetent for Mr Chalmers to make an arrangement with his co-trustee, if the beneficiaries did not object, that they should act as joint law-agents to the trust. Although such an arrangement would be unusual, I cannot think that, if it were entered into by agreement between the parties, it would be open to objection on the grounds argued. But here Mr Chalmers' proposal was that he should receive half the fees earned by the law-agent to the trust, and this demand he attempted to enforce by taking up an attitude of obstruction towards the administration of the trust until his demand should be complied with. I think such an attitude as this, insisted upon as it has been here, is quite sufficient to justify the present application to the Court for his removal.

I cannot accept the explanations offered as in any way sufficient. The respondent can have been under no misapprehension as to the nature of his proposal, for every law-agent knows perfectly well that he is not entitled to make a profit for himself as trustee out of the administration of the trust. The attitude of the respondent here towards the trust seems to have amounted simply to the desire to make what money he could out of the trust funds for distribution among the lawyer trustees. If, then, responsible and suitable persons are willing to act as trustees, I think that the respondent should be removed from his position and they should be appointed. It is never a good thing that a trust should be left in the hands of a sole trustee, and, whatever confidence the Court may have in the ability and integrity of the remaining trustee, it is always unwilling to bring about such a state of affairs.

LORD KINNEAR—I entirely agree with your Lordship in the chair and with Lord M'Laren, and I would only add that I do not think that the removal of this trustee for the conduct that has been brought to our notice should depend in any way on arrangements being made for the assumption of new trustees, but that he should be displaced at once irrespective of the new assumption. At the same time I quite agree that it would be well that arrangements should be made to prevent the trust falling into the administration of a sole trustee.

The Court pronounced an interlocutor on 22nd November removing Chalmers from the office of trustee, and continuing the cause to allow Robert Stewart, the remaining trustee, to lodge in process the deed of assumption to be executed by him in favour of the two persons whose names were suggested in the petition, and on 30th November another interlocutor finding in respect that the deed of assumption referred to had been lodged, that it was no longer necessary to continue the cause.

Counsel for the Petitioners—A. J. Young. Agent—Isaac Fürst, S.S.C.

Counsel for the Respondent—Campbell, K.C. — Graham Stewart. Agent — J. T. Donaldson, Solicitor.

Wednesday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

WILSON *v.* MACKAY.

Reparation—Statutory Limitation of Time for Raising Action — Child Killed by Ammunition Waggon on Parade—Action against Person Commandiug Volunteer Regiment—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1.

The parent of a child, who had been killed on a public street by the horses in an ammunition waggon bolting when on parade, brought an action against a regiment of volunteers and against the lieutenant-colonel of the regiment, for himself and as representing the regiment. The averments on which the conclusion against the colonel was based were that he had neglected his duty in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that the harnessing of the horses and the parading them on the street were properly superintended. The action was not raised within six months after the date of the act complained of.

The Lord Ordinary (Kyllachy) dismissed the action as presented against the regiment and against the colonel as representing the same, on the ground that the funds of the regiment belonged to the Crown, and the Crown could not be liable for damages in respect of the wrongful acts of its officers, but he found that the claim for damages might be pursued against the colonel as an individual. The defenders reclaimed against this judgment.

Held (*rev.* judgment of Lord Ordinary) that in respect the alleged neglect on the part of the colonel was solely a neglect of duties lying on him in his public capacity as commander of a regiment of volunteers, the action against him was excluded by section 1 of the Public Authorities Protection Act 1893.

The Public Authorities Protection Act 1893 (56 and 57 Vict. c. 61), sec. 1, enacts—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage within six months next after the ceasing thereof."

On 27th November 1903 William Brown Wilson, tramway inspector, brought this action against the 1st Edinburgh City Royal Garrison Artillery Volunteers, having their office and headquarters at 28 York Place, Edinburgh, and James Francis Mackay, Lieutenant-Colonel of that regiment, as officer commanding the regiment, for himself and as representing the said regiment, concluding for £500 in name of damages.

The pursuer averred that the 1st Edinburgh City Royal Garrison Artillery Volunteers was a volunteer regiment, and that the defender Mackay was the commanding officer of that corps, and as such represented it. He was also, in terms of the Volunteer Regulations and section 25 of the Volunteer Act of 1863 (26 and 27 Vict. cap. 45), vested in its whole property. On 14th March 1903 an ammunition waggon belonging to the defenders, and drawn by two horses hired by them, came along the street at a furious pace and entirely uncontrolled, with the result that the pursuer's daughter Marjory, six years of age, was, while standing on an island platform opposite the Lothian Road Board School, knocked down and so seriously injured that she died shortly afterwards. The parade of the regiment on that day was not a parade for military purposes, but a "march-out," *i.e.*, a parade of the guns, &c., on the public streets merely for the purpose of attracting public attention and securing recruits.

The pursuer further averred (Cond. 3) that Colonel Mackay gave orders to his subordinates for the parade of certain guns and waggons on the public streets of Edinburgh on that date. "(Cond. 4) It was the duty of said defender to take special precautions for the public safety. In particular, it was said defender's duty to see (1) that quiet horses suitable for such work should be used; (2) that experienced and competent drivers able to control the horses drawing the guns and ammunition waggons were employed; and (3) that the arrangements for harnessing the horses to the guns and waggons and parading them on the streets should be superintended by a commissioned officer of experience familiar with such work. But these duties the said defender disregarded, as, having issued his orders for the 'march-out,' which his subordinates were bound to carry out, he left the entire control to the non-commissioned officers and men of the volunteer regiment. (Cond. 5) The horses which the said defender instructed to be used were wholly unaccustomed to such work, and had never been previously engaged in it. The said defender took no steps to ascertain the suitability of the horses or their fitness to be harnessed with the special harness necessary for drawing the guns and ammunition waggons. (Cond. 6) The horses were young and restive and unused to the said wag-