

dence to shew, that the defender is bound jointly with the pursuer to maintain the hedge and ditch in the terms of the pursuer's 4th plea in law. The pursuer has not adduced a single witness to shew, that the ditch has ever been cleaned at the mutual expense of himself and the defender. Therefore his summons of declarator has altogether failed of proof, and the interlocutor which he has appealed from must be affirmed.

I apprehend, that the effect of this affirmance will be, that the process brought into the Second Division *ob contingentiam* of the action of declarator being remitted to the Sheriff, he will adjudicate upon the question of repairs with reference to the hedge, the question of cleaning and repairing the ditch being entirely removed from his jurisdiction.

LORD KINGSDOWN.—My Lords, I entirely agree with my noble and learned friends. I apprehend, that the decision of the Inner House which we are now affirming is in effect this: It decides, first, that the hedge and ditch are not common property, and in the second place, it decides that the hedge and ditch do not form a march boundary.

Whatever else may be in dispute between the parties, it is admitted, I think, by both parties to this proceeding, that the hedge forms, I do not say a march fence, but at all events the boundary line to divide the one property from the other. That being so, the Sheriff will have to dispose of the question whether this fence shall be repaired, or a new fence shall be made, or what is the justice between the parties under the powers conferred upon him by the Statute of 1661.

*Mr. Brown.*—I trust your Lordships will allow the expenses of this appeal.

LORD CHELMSFORD.—This is almost a matter of course.

*Interlocutors appealed from affirmed, and appeal dismissed with costs.*

*Appellant's Agents*, J. L. Hill, W.S. ; Oliverson, Lavie, and Peachey, London.—*Respondent's Agents*, T. Sprot, W.S. ; W. Robertson, Duke Street, Westminster.

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FEBRUARY 27, 1866.

JAMES BECKETT of Solsgirth, *Appellant*, v. JAMES HUTCHESON, Writer, Glasgow, *Respondent*.

Road—Statute labour Trustees—Liability for non-repair—Remedy—Action against Trustees—*A local Act made all the proprietors of lands of a certain rent trustees for making and repairing roads in the county of D. By § 15 the trustees of each district were to have the direction and cognisance of the roads within their district, with power to appoint the order in which roads should be repaired, and to appropriate moneys thereto, and, in case of difference of opinion, any trustee aggrieved might appeal to Quarter Sessions, which shall finally and conclusively determine the matter. A road being out of repair in one of the districts :*

HELD (affirming judgment), *That an adjoining owner, not a trustee, was not entitled to raise an action against the district trustees to compel them to repair, as no such duty was directly imposed on them, and the only remedy given by the Statute was an appeal to Quarter Sessions, for the duty of the district trustees was not to do the repairs, but to meet and consider how they could be best done.*<sup>1</sup>

This action was raised against the clerk to the trustees for regulating the Statute labour and for making and repairing the highways, roads, and bridges within the county of Dumbarton, under the Act passed for that purpose in 1829, as representing these trustees, and against the clerk to the trustees for these roads within the eighth district of that county. The object of the action was to have the Langmuir road, situated within the eighth district, and forming the access to the pursuer's property of Solsgirth, put in sufficient repair.

The pursuer set forth the powers of assessment and of borrowing conferred on the trustees, and averred, that the assessments they had imposed had been much within their powers, and that they had not exercised their borrowing powers at all. The pursuer's averments as to the condition of the road in the 9th, 10th, and 11th articles of his condescendence were, in substance,

<sup>1</sup> See previous report 2 Macph. 482 ; 36 Sc. Jur. 230. S. C. 4 Macph. H. L. 6. ; 38 Sc. Jur. 229.

as follows:—The Langmuir road is one of the principal Statute labour roads within said district, and the traffic thereon has largely increased within the last few years, and is still on the increase. The trustees have wholly failed to put and keep the road in a sufficient state of repair. The amount expended by them has been inadequate to maintain the road in a state sufficient to accommodate the ordinary traffic of the district, and has been greatly less, on an average, than has been laid out by the trustees on the other roads within the said eighth district. At the date of the present action, and for some time previously, the said Langmuir road, from its state of disrepair, was impassable, or nearly so, and could not be used with safety. The only access to the pursuer's property of Solsgirth from the turnpike road is by the Langmuir road. Since the pursuer purchased the property in 1856, the road has never been in such a state of repair as to be suitable for the ordinary traffic of the district, or to afford to the pursuer a proper, safe, and convenient access to and from his said lands. The pursuer, in 1857, let the coal and ironstone on the lands on a lease for nineteen years. The tenant sunk a pit on the lands near the Langmuir road. After September 1858 he used the Langmuir road for the carriage of his minerals to the station of the Edinburgh and Glasgow railway at Kirkintilloch. If, when he commenced so to use the road, it had been properly bottomed with metal, the mineral traffic would not have caused any injury to the road of an extraordinary nature, and the trustees, with ordinary care and attention, and a very moderate expenditure of funds, could have kept the road in such a state of repair as to be suitable for the ordinary traffic of the district, including the mineral traffic from the pursuer's lands, and from the lands of other proprietors in the district. Notwithstanding considerable repairs on the road by the tenant, it was at all times in a state unfit for regular traffic, and the tenant was frequently compelled to cart large quantities of his minerals by a different and very circuitous route to Kirkintilloch.

The defenders stated, that the road had been made for the ordinary traffic of the district, which was light farm traffic; but that the pursuer's mineral tenant had lately used it for conveyance of his minerals, doing it thereby a great deal of injury. That latterly, however, the mineral tenant had ceased to work the minerals, and that defenders had brought the road into a condition sufficient for the ordinary and agricultural traffic passing along it. That the pursuer's tenant was in the course of sinking a new pit, and had brought the action with a view to compelling the trustees to make and maintain a road for the carriage of his minerals.

The pursuer pleaded—1. The defenders, as trustees under the Act of Parliament libelled, are bound to put and maintain the roads under their management in proper and sufficient repair. 2. The defenders having failed to put and keep Langmuir road in proper and sufficient repair, the pursuer is entitled to have them ordained to do so. 3. The pursuer, having sustained damage through the neglect of the defenders, is entitled to reparation as concluded for. 4. It being the duty of the defenders to put and maintain the said road in such a state of repair as will make it suitable for the general, including the mineral, traffic of the district, the allegation, that its state of disrepair has been caused by the mineral traffic from the pursuer's lands, even if well founded, would not relieve the defenders from the duty so incumbent on them.

The defender pleaded—1. The trustees, under the provisions of their Act, are entitled to exercise their discretion as to the extent of repairs or expenditure to be made on the road in question, and cannot be controlled in the exercise of that discretion by the Court. 2. The road being fit for the ordinary traffic, the action is unfounded. 3. The trustees are not bound or entitled to expend any larger sums on the road in question than are necessary to keep it in repair for the ordinary traffic of the district, and are not bound or entitled to assess the ratepayers for the benefit of the pursuer or his mineral tenant only. 4. The trust funds held by the trustees are not subject to any claim of damages for any alleged failure of duty on the part of the trustees, and no decree for damages can be pronounced against the defenders.

The Court of Session held, that the trustees were entitled to exercise their discretion and that the Court would not control them.

The pursuer appealed against the interlocutor of the Second Division.

The *Attorney General (Palmer)*, and *Anderson Q.C.*, for the appellant.—The interlocutor of the Inner House was wrong. The action was competent, and the Court had jurisdiction to entertain its conclusions. The appellant alleged, that the road was out of repair, and that the district trustees were bound to repair it. *Prima facie*, the Court must have jurisdiction to remedy the injury done to the appellant by this non-repair. There is nothing in the Statute to take away this jurisdiction, for the 15th section applies only to remedy by a trustee, but the appellant is not a trustee. In cases of ordinary turnpike roads the jurisdiction is clearly established—*Walkinshaw v. Orr*, 22 D. 627; *Guild v. Scott*, 21st December 1809, F. C.; *Gordon v. Commissioners of Supply for Banff*, Mor. 7674. The like remedy exists against public bodies—*Edwards v. Cruikshank*, 3 D. 283. The duty to keep the road in repair was clearly imposed by the 15th section of the local Act, though a discretion is given as to the manner of discharging the duty. The words there used are imperative, and not permissive—*Walkinshaw v. Orr, supra*; *Mackintosh v. Stirlingshire Road Trustees*, 12 D. 85; *Threshie v. Magistrates of Annan*, 8 D. 276. As the Court has power to enforce the performance of this public duty, all that is necessary for

the appellant to shew is, that the road is out of repair, and that the trustees have the means of making the repairs, and that the non-repair is an injury to the appellant, all which allegations can be substantiated.

*Rolt Q.C.*, and *Bullar*, for the respondent.—There is no imperative duty imposed on the district trustees to do these repairs, but they have an absolute discretion in the matter. Such is the correct construction of the Statute. If so, then an action against the trustees is incompetent—*Farquharson v. Burnett*, 13 D. 586.

LORD CHANCELLOR CRANWORTH.—My Lords, I believe that none of your Lordships have any doubt, that the decision of the Court below in this case is perfectly right. The action was founded upon a local Statute passed in the year 1829 for regulating the Statute labour, and repairing the highways and bridges in the county of Dumbarton. For that purpose certain gentlemen were constituted trustees. There had been a previous Act which had then expired or was about to expire, of the provisions of which we are not informed; probably in most particulars they were the same as those which were then enacted. We must be guided entirely by this Act.

Now this Act in the 2nd section provides, that certain persons are to be constituted trustees, and it is prescribed, that they shall be hereby nominated and appointed trustees for making and repairing the highways, roads, and bridges within the county, and for executing all the powers by this Act given and granted. I asked the Attorney General what clause he could put his finger upon as being the clause which expressly imposed the duty which is enforced by the Lord Ordinary, of putting the road in repair, and he pointed to that clause.

Now that the meaning of this Act was, that these gentlemen should be appointed for the purpose of making the road, and keeping it in repair, I do not at all doubt—that is to say, it was their duty to execute the duties imposed upon them by the Act of Parliament, which duties the Legislature considered would lead necessarily to the keeping of the roads in repair. The expression in that second clause, “they are hereby nominated and appointed trustees for making and repairing the highways, roads, and bridges within the said county, and for carrying the other provisions of the Act into execution,” it must be observed, applies not to the district trustees who are sued here, but to the whole body of trustees throughout the whole county.

Now we are to see how the Legislature considered, that the duty imposed upon the whole body of the trustees of keeping the roads in repair could be most fitly and adequately performed. By the 5th section they direct this body of trustees to meet at a certain time, and either to retain the districts existing under the prior Act, or to reform those districts, and then they treat all the trustees in those different districts as being what we should call district trustees.

Now what are the duties to be performed by the district trustees? They are found in the 15th section. What they are directed to do is to superintend and have the direction and cognizance of the several roads and bridges within their respective districts, and power to appoint the order in which the same shall be made or repaired, and to appropriate the services and moneys to be exacted and raised by virtue of this Act from each district within such their respective districts only—that is to say, they have been appointed by the Legislature a general body of trustees for the whole county. These trustees are to divide themselves into districts. The district trustees, who have to deal with each particular district, are to superintend and have the direction and cognizance of the roads and bridges in that district, and levy and apply money. Then there is a direction as to the mode in which the meetings are to be summoned, and if any one of the trustees (so the expression is) is aggrieved or shall think any application of money improper, he may complain, and if the trustees do not yield to his complaint, then he may appeal to the whole body of trustees, or, if he is so minded, to the Court of Quarter Sessions, and then their decision is expressly declared to be final.

What, therefore, is the duty which the district trustees have to execute? Evidently the duty to meet and to consider and apply their best mind and skill to seeing what sum of money is to be raised, and what roads are to be repaired. All the roads in the district are to be kept in repair. How shall this sum of money raised be best applied for the convenience of the district in keeping the roads in repair?

I do not hesitate to say, that if the trustees did not perform the duty—that is to say, if they did not meet, or meeting did not exercise their best discretion, and did not direct the mode of application of the money which they thought most convenient to the general good, there would be undoubtedly, upon principles of general law, a right to proceed against them, whether in this particular form or not is immaterial, but there would be a right to compel them to do the duty imposed upon them by the Legislature. But the question is not whether in that case there would have been a right to proceed against them, but whether there is a right to proceed against them to compel them to do that which they are not directed to do, but only to meet and deliberate upon and direct the best mode of its being done. That seems to me to be substantially the ground upon which the Court below proceeded, and it appears to me to be a perfectly sufficient ground.

It is said—Then what remedy have any of the lieges if this duty is not performed? My answer to that is, perhaps they have a remedy under the 64th and 65th clauses by appeal to the Court of

Quarter Sessions. Mr. Anderson has very elaborately and very ably argued with a good deal of plausibility, (as it struck me,) that there may be many things to which that would not apply. It would not apply to the mere non-feasance of keeping the road in repair. But I care not whether it would or would not. If it does apply, then that is the remedy. If it does not apply, it only leads to this conclusion, that the Legislature thought, when they had constituted a body of persons interested in the roads of this district, that to them it should be left finally to decide what roads should be repaired, and to what extent they should be repaired. It seems to me, that there is nothing inconsistent or absurd in that conclusion. Either they have a remedy under the 64th section, or the Legislature did not think it necessary to provide a remedy at all.

I am so strongly of opinion with the Lords of Session, that that is the true construction of the Act, that if there be any other decision at variance with it, I think it will be your Lordships' duty to say, that that decision is not law. But with regard to the case which was very much relied upon by Mr. Anderson, the case of *Guild v. Scott*, reported in the Faculty Decisions, that case has no bearing in my mind upon the present, because that case was evidently brought, and very properly brought, into the Court of Session, and was decided upon the special terms of the Local Act of 1789 for the county of Dumbarton, for in that Act Mr. Rolt read to us a clause in which there is expressly what we should call in this country a popular action given in case the trustees misapplied the money which they were entitled to levy. They did levy money, and there being a large mortgage debt upon the money levied by the tolls, the district trustees applied the whole of the money so levied in paying the interest of that mortgage, leaving the roads utterly unprovided for. Under that local Act, in case of misapplication of money, there was a popular action given to any three, not to any one, but to any three of the lieges, who thought themselves injured and aggrieved by the neglect of duty on the part of the trustees. Three gentlemen did bring an action in the Court of Session, complaining of this, which they treated as a misappropriation of those funds which they said ought to have been applied to keeping the roads in repair even at the expense of the mortgagee. And the question raised was, whether it was a misapplication of the funds. The Court held, that it was a misapplication of the funds, because without going into a minute criticism of the language of the section, the Court held, and I dare say quite correctly, that the evident object of the Legislature in enabling the money to be raised was in the first place, that the road should be kept in repair, and that, inasmuch as it was not kept in repair, there was a misappropriation of the funds. And although the point was raised, that this was a popular action not known in Scotland, the Court paid no attention to that, for this reason, that the Legislature had expressly said, that in that particular case such action should take place.

Equally inapplicable, as it seems to me, are all the cases under the Turnpike Acts, because there is a special mode of proceeding pointed out, and that mode of proceeding is followed, and whether in every case the Court has rightly decided, that that which was complained of was properly complained of under the Turnpike Acts, we have nothing to do with. It was in all those cases a proceeding entirely under those special provisions, and therefore can have no application to the present case.

I have addressed your Lordships very shortly upon this case, but I think the subject is exhausted by the judgments of Lord Cowan and Lord Neaves. Lord Cowan went into the case at considerable length, and Lord Neaves expressed more shortly, but very clearly, the grounds on which he arrived at the conclusion, that the interlocutor which had been pronounced imposing on those gentlemen the duty of putting the roads in repair, was an interlocutor that could not be sustained, and therefore they reversed it. I conceive, that the ground on which the Court of Session arrived at that conclusion was perfectly correct and simple, and I shall therefore move your Lordships, that the judgment be affirmed.

LORD CHELMSFORD.—I entirely agree with the opinion which has been expressed by my noble and learned friend on the woolsack. The question may be of some importance, but it appears to me to be one of no great difficulty. It may be admitted, that under the Statute Labour Act for Dumbarton the body of trustees constituted under that Act have a certain duty imposed upon them of repairing the roads within the district. But that duty was undoubtedly one to a very considerable extent of a discretionary character. And the question is, how that particular duty, so limited and qualified, was to be enforced.

Under the 15th section of the Act these trustees have power to appoint the order in which the roads shall be made or repaired, and to appropriate the services and moneys to be exacted, raised by virtue of this Act within such their respective districts. Now there can be no doubt at all, that, under this portion of the 15th section, the trustees had a discretion as to the order in which the roads should be repaired, and as to the appropriation to particular roads of the services and money to be raised. Then is there any control provided for the proper exercise of that discretion? Yes; the section itself provides that control. For in case any difference of opinion in such district meetings shall arise among the trustees concerning the application of the services or money, any one of the trustees who shall either think himself aggrieved or shall think such application improper, may complain to the next general meeting or to the next Quarter Sessions of the Peace of the said county if joined in such complaint by any one of the other

trustees in such district. Therefore, if any trustee considers, that there has been an improper application of the funds for the repair of particular roads, or that the roads are not taken in the proper order for repairs, he may bring the matter forward at a general meeting, and if a difference of opinion exists, the dissentient trustee may appeal to the next general meeting. Or if he can get any other trustee to entertain the same opinion as he does upon the subject, they may then go to the Court of Quarter Sessions, and the Court of Quarter Sessions will decide whether there is any proper ground of complaint as to the order in which the roads were directed to be repaired, or as to the appropriation of the services or money, and the decision of the Court of Quarter Sessions upon that subject is final. That is the provision which is made for the due exercise of all the duties of the trustees under this Act. This section seems to cover every case in which the trustees are called upon to exercise the powers which are intrusted to them.

But then they may, in the exercise of those powers, commit some wrong or injury to some individual. Well, is there any provision made for that? That provision is to be found, if at all, in the 64th section, which provides, that all actions and complaints for all or any of the penalties and forfeitures imposed by this Act 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, unless herein otherwise provided, be originally brought before two or more Justices of the Peace of the said county, and shall be commenced within a certain time.

Now, Mr. Anderson argues, that this does not apply to a case of nonfeasance or injury consequential upon neglect to perform the duty, but that it applies merely to some Act by which immediate wrong or injury is produced to an individual. I confess, that I do not construe this section in the limited way suggested, because it is perfectly clear, that the object was to redress any wrong or injury which might be suffered in any matter relative to the powers of this Act. Now, what is the meaning of the words "relative to the powers of this Act"? Why, the omission to perform the duties imposed upon the trustees, and the injury consequential upon that is an injury relative to the powers of this Act. And it being admitted, that, supposing the injury which is received is not the immediate effect of the act done, but is the consequence of it, and that for that consequential injury, an action may be brought, I cannot understand why an injury arising from an omission by the trustees to do their duty under the powers intrusted to them by the Act should not be ground upon which a party, under the words of the Act, should be entitled to maintain an action.

If that be so, there is a specific remedy provided for the duty which is cast upon the body newly constituted by this Act. And, therefore, according to the principles laid down in several decisions, which are perfectly well known, it is clear, that that remedy alone can be pursued, and that the parties cannot apply to the Court of Session, it being by the 65th section expressly provided, that upon an appeal from the Justices of the Peace or Commissioners of Supply, the decision of the Court of Quarter Sessions shall be final, without being subject to review in any court by advocacy, suspension, reduction, or otherwise.

This appears to me to be the proper construction of this Statute Labour Act, and I think it is a very strong circumstance in favour of that construction, that for nearly 200 years since the passing of the Statute in 1669 no such action as the present has ever been brought. Under these circumstances, I cannot hesitate for one moment to be of opinion, that the interlocutor of the Second Division is perfectly right, and ought to be affirmed.

LORD KINGSDOWN.—My Lords, I am of the same opinion.

*Interlocutors affirmed, with costs.*

*Appellant's Agents*, J. and F. Anderson, W.S. ; D. M'Luckie, Westminster.—*Respondent's Agents*, J. Forrester, W.S. ; Loch and Maclaurin, Westminster.

MARCH 2, 1866.

MAJOR WELLER and Others (Trustees of the Marriage Settlement of Robert Ker, Junior), *Appellants*, v. Mrs. E. KER or URE and Others (Trustees of the late Robert Ker), *Respondents*.

Trust—Discretion of Trustees—Power to restrict provision in case of misconduct—*K.*, in his trust disposition, directed his trustees, on *R. K.*, his eldest son, (and failing him, the next elder son,) attaining twenty five, to convey to *R. K.* the residue, and, in particular, the estate of *A.* ; but in case any of the children conducted themselves so as not to merit the approbation of the trustees, then the provision should belong to them in liferent only. *R. K.*, on attaining twenty