

sary to consider whether John B. Neilson took the bills of lading in *mala fide*. I think it clear that on 23rd September he knew that M'Dowall & Neilson were on the brink of bankruptcy; but it is fair to assume that he thought that he was giving up a valid equivalent security.

2. The next question arises with the trustee on M'Dowall & Neilson's sequestrated estates. I am of opinion (1) that the cargo was still *in transitu* when delivery was refused; (2) that the bills of exchange granted by the buyers were not approved bills in the sense of the contract; and that therefore the pursuers as unpaid sellers were entitled under section 44 of the Sale of Goods Act 1893 to stop the goods *in transitu* and retain them until payment or tender of the price. We recently decided practically the same points in the case of *Snowball & Company, Limited v. M'Dowall & Neilson's Trustee* in regard to another cargo consigned to M'Dowall & Neilson. I find it unnecessary to say anything in addition to the reasons which were given in disposing of that case. I am therefore for affirming the Lord Ordinary's judgment.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court adhered.

Counsel for the Reclaimer J. B. Neilson—Ure, K.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Reclaimer Reid (M'Dowall & Neilson's Trustee)—Campbell K.C.—MacRobert. Agents—Drummond & Reid, W.S.

Counsel for Respondents—Salvesen, K.C.—C. N. Johnston, K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Thursday, December 22.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.]

### ARMSTRONG v. WILSON'S TRUSTEES.

*Trust—Administration—Liferent—Management of Heritable Property—Rebuilding and Repairs—Subsequent Depreciation of Subjects—Liability of Trustees—Goodwill.*

A testator bequeathed to his sister the liferent of his whole heritable and moveable estate. The estate included considerable moveable property as well as certain buildings in Hawick in which he and his sister had carried on a bakery business. At the time of the testator's death the property was old and dilapidated, and worth little or nothing apart from the site. No express powers were given to rebuild or repair the subjects.

The trustees, having arranged with the liferentrix that she should carry on the business, sold the stock-in-trade

to her at a valuation and rebuilt the premises. In rebuilding and repairing the heritable subjects they expended in all £1499. Of this sum £793 was borrowed by them from the liferentrix, the balance being paid out of the trustor's moveable estate. On the death of the liferentrix the subjects were sold for £1400. The sum borrowed from the liferentrix was repaid in full, and the resulting loss to the trust estate was £100 plus the value of the site. There was evidence that a considerable fall had taken place in the interval in the value of similar heritable property in the locality.

Certain of the beneficiaries objected to the trustees' accounts on the ground that the trustees were not entitled to credit for the sum spent on the heritable property, in respect that in rebuilding it they had acted *ultra vires* as well as speculatively and imprudently; that no credit was given for any sum as the value of the goodwill of the bakery business; and that the trustees had acted unfairly in the interests of the liferentrix at the expense of the trust estate.

Held that in the circumstances as disclosed in a proof, it had not been proved that in the management of the trust estate the trustees had acted imprudently, negligently, or unfairly, or that loss to the trust estate had been caused by their fault, and accordingly that the beneficiaries had not made out a case of liability against the trustees.

This was an action of count, reckoning, and payment brought by Ann Henderson Armstrong, 25 Weemsland Road, Hawick, and others, beneficiaries under the trust-disposition and settlement of the deceased Walter Wilson, baker, Hawick, against Andrew Ker, agent of the Commercial Bank of Scotland, 32 Warrender Park Road, Edinburgh, and others, the trustees, original and assumed, acting under the said trust-disposition.

The following narrative of the facts in the case is taken from the opinion of the Lord President:—"This is an action of count, reckoning, and payment at the instance of beneficiaries having right to four thirteenth shares of the estate left by the late Walter Wilson, baker in Hawick, under his testamentary settlement, and the question presented for decision is, whether they have established against the defenders, who are the trustees under that settlement, personal liability in respect of loss which they allege to have been incurred by their (the trustees) rebuilding certain property in Hawick which belonged to the trustor, as well as by their failing to give credit for what they allege to have been a saleable goodwill in a baking business in Hawick, and otherwise favouring the liferentrix of his testamentary estate at the expense of the fiars.

"Walter Wilson died on 6th July 1878 leaving a testamentary trust-disposition and settlement dated 11th February 1876, by which he disposed of his means and estate. Under that settlement Miss Wilson, his sister, had right to the liferent of his free

means and estate, and the present action was not raised till 30th September 1902—more than twenty-four years after his death.

“The first meeting of the trustees appointed by him under his testamentary settlement was held in Hawick on the 16th July 1878, four of the trustees, Messrs Wilson, Ker, Dryden, and Grierson, being present. Miss Wilson, though nominated a trustee under her brother's testamentary settlement, was not present at any of the first three meetings of his trustees.

“At that (the first) meeting the trustees appointed Mr Thomas Dryden, one of their number, to be factor on the trust, with power to manage the heritable property, to collect the rents and interests of the trust estate, and to account to the trustees half-yearly for his intromissions.

“Mr Haddon was appointed law-agent for the trust, with the usual powers, and he was instructed to take the necessary steps for ascertaining and realising the personal estate, and completing the title of the trustees to both it and the heritable property left by the truster.

“The trustees present at the meeting resolved to make over to Miss Wilson the stock-in-trade, shop and bakehouse furniture, fittings, utensils, &c., in the premises in the Howgate, Hawick, in which the truster had carried on his business as a baker, and such portions of the book debts as she might wish to acquire at a valuation. Miss Wilson had long assisted her brother in the conduct of that business.

“The formal business appropriate to a first meeting of trustees was transacted and recorded in the minute, and I understood that the pursuer's counsel did not complain of anything which is recorded as having been done at that meeting.

“The next meeting was held on 21st October 1878, when an inventory and valuation of the stock-in-trade, shop and bakehouse furniture, fittings utensils, etc., in the baking premises, made up in terms of the instructions given at the last-mentioned meeting, were submitted. That inventory and valuation amounted £116, 2s., and the trustees directed that these assets should be made over to Miss Wilson at that price. A list of the book debts due to the deceased considered good, amounting to £226, 3s. 10d., was also submitted, and the trustees directed that these debts should be made over to Miss Wilson on payment of that amount.

“The minute of the next meeting of the trustees, held on 24th March 1879, bears that Mr Dryden stated that in consequence of the property number 10 Howgate, which formed part of the trust estate, being thatched, the expense of upholding it was very great, and that the property was besides old and dilapidated, and that the meeting had been called to consider an application by Miss Wilson that the trustees should rebuild the premises. Plans and specifications directed to carry out this proposal were submitted, the total estimated cost of the proposed rebuilding being £692, 19s., exclusive of painting and extras, which it

was expected would raise the total cost to £850. Mr Dryden explained that the then present rental of the property was £32, 10s., and that it was believed that after being rebuilt the property would yield a rental of upwards of £85. The minute bears that the meeting having carefully considered the proposal, three of the four trustees present were of opinion that the rebuilding of the property was necessary and expedient and in the whole circumstances offered a fair and legitimate investment for the balance of the trust funds which would be available for investment at the following Whitsunday, and that they resolved to proceed with the rebuilding forthwith, on condition that Miss Wilson bound herself to observe and perform the terms and conditions therein mentioned, the first of which was that she should undertake the whole responsibility in connection with the rebuilding, and the whole management of it. It was resolved that the trustees should expend the whole trust funds available for investment, after payment of the truster's debts, and the legacies and other bequests payable in terms of his settlement in rebuilding the property, on the express condition and understanding that Miss Wilson would provide whatever further sums might be necessary for fully completing the property after the available trust funds had been exhausted.

“The minute further bears that it was arranged that an agreement should be entered into between the trustees and Miss Wilson containing the conditions and provisions mentioned, and that the law-agent was instructed to have the necessary agreement prepared and executed at once, so that the work might be proceeded with. Mr Grierson, one of the trustees, stated that he did not consider the rebuilding of the property either necessary or expedient, and he consequently resigned the office of trustee and executor, and his resignation was accepted.

“A meeting of the trustees was held on 10th February 1880, the minute of which bears that an account of charge and discharge of the trustees' intromissions with the proceeds of the estate as at 3rd February 1880 was submitted, and that after examination it was found to be correct and sufficiently vouched. That account closed with a balance of £597, 16s. 3d., due to the trustees, which sum, the minute bears, “falls to be borrowed from Miss Wilson on bond as formerly arranged,” and the agent in the trust was instructed to have the bond for that amount in Miss Wilson's favour prepared, executed, and delivered forthwith.

“Mr Dryden, who had superintended the erection of the new buildings, reported that the total cost of rebuilding the property was £1223, 14s. 10d., this cost having been much less than was anticipated owing to the fact that the cost of labour and material was considerably less than it had been for many years. He also stated that the rental of the new buildings was £123, which might be considerably increased, that the annual value of the old buildings was £32, 10s., and that as the old property was dilapidated and

covered with thatch, considerable expense was annually incurred in repairing it.

"The minute further bears that the trustees after carefully considering the whole circumstances expressed themselves as extremely gratified with the result of the rebuilding, and recorded their opinion that it had very considerably enhanced the value of the deceased's estate. The trustees further resolved, as the whole trust estate then consisted of the properties numbers 8 and 10 Howgate and 7 Buccleuch Street, Hawick, and with the view of avoiding expense, to permit Miss Wilson to uplift and receive the rents and annual produce of the estate until her death or marriage, and they authorised her accordingly. Instructions were also given to Mr Thomas Dryden to see that Miss Wilson kept the properties in good and sufficient repair, and also that the insurance in name of the trustees over the properties was maintained in force.

"A fire occurred at the Howgate property in 1882, and after the buildings destroyed by it had been reinstated by the insurance company with whom they were insured, it was found necessary to take down the back gable and replace part of the roof of the back house owing to its insecure and dilapidated condition, the cost of these works being £66, 11s. 4d. In 1884 the local authority called upon the trustees to put water-closets into the Howgate property, and they were consequently obliged to do so. It appears that a washing house was also erected, as being absolutely necessary for retaining good tenants, and that in 1886 the sum of £53, 12s. 3d. was incurred in increasing the accommodation in the Howgate property, and these sums, amounting together to £146, 14s. 1d., were paid by Miss Wilson. It was stated at the meeting that all these works were in the circumstances necessary, and formed permanent improvements on the property and increased its value by more than the cost. The trustees granted a promissory-note to Miss Wilson for the £146, 14s. 1d. above mentioned, payable at her death, without interest during her life.

"It appears from a minute of the trustees of 7th March 1894 that the tenant of a shop and dwelling-house in the property No. 10 Howgate, belonging to the trust, had represented that it was subject to various inconveniences, and alterations and additions were made to it at the cost of £129, 8s. 6d., which sum was paid by Miss Wilson. The trustees accordingly granted a promissory-note for that amount in her favour, payable on her death, and not to bear interest during her life.

"The total value of the estate left by the truster in the United Kingdom was ascertained to be £1949, 2s. 6d.

"Miss Wilson died on 23rd January 1901, and the truster's estate consequently became available for division amongst the beneficiaries under his testamentary settlement."

The trustees having lodged their accounts objections were stated by the pursuers, who maintained (1) that the trustees were not entitled to take credit for the three sums of

£1223, 14s. 10d., £146, 14s. 1d., and £129, 8s. 6d., amounting in all to £1499, 17s. 5d. expended on the property; (2) that credit ought to have been given for the value of the goodwill of the business, which the pursuers estimated at £150; and (3) that in their administration the trustees had sacrificed the trust to the interest of the life-rentrix.

By the testator's trust-disposition and settlement the following, amongst other powers, were conferred on the trustees—viz., power to borrow, power to sell and dispose of all or any part of the trust-estate, and power to invest the whole or any part of the trust funds in the purchase of, *inter alia*, heritable property, feu-duties, ground annuals, or other heritages.

There was no express power to repair or rebuild.

In support of their objections the pursuers averred, *inter alia*, as follows:—The trustees had no power to expend the moveable estate in rebuilding the property, or to borrow money for that purpose. It was a speculative investment. The site and buildings might have been sold for about £900. The rebuilding carried out was not in the interests of the trust, but in that of the life-rentrix. The outlay on the buildings was extravagant. The sums borrowed from Miss Wilson and spent on the property (viz., £597, £146, and £129) were repaid her in full from the price realised for the property, viz., £1400. The result was a loss to the trust estate of about £100, plus the value of the site, which was worth £500 apart from any buildings. The goodwill of the business was worth £150. That could have been obtained if the business had been realised as a going concern.

The defenders lodged answers, in which they averred, *inter alia*—The pursuers' estimate of £500 as the value of the site was grossly exaggerated—£200 was about the value. If the trustees had sold the property they would have got very little for it, as it could only have been sold for the purpose of being pulled down and rebuilt. It was more prudent and more in the interests of the trust estate to rebuild. The outlay of £146 was partly due to a fire. The rest was spent in ordinary administration and in executing necessary improvements and repairs. The sum of £129 was also expended in alterations and repairs, all of which were expedient in the administration of the property. No goodwill was obtainable. The business was under the management of Miss Wilson, who personally knew all the customers, and the trustees took the best course possible in selling to her the stock-in-trade at a valuation, as it would otherwise have had to be sold at break-up value for a much smaller sum.

A proof was allowed.

The evidence showed that after Mr Wilson's death in 1878 the property No. 10 Howgate was old and dilapidated; that the walls were built of clay and river stones; that the roof, which was of thatch, was in a ruinous condition; that apart from the value of the site the property was worth little or nothing; that the trustees resolved to re-

build the property; that before the rebuilding was completed a fire occurred, in consequence of which the back buildings, including the bakehouse, granary, and hay-loft, were burned to the ground; that the sums thereafter expended on the property were £1223, 14s. 10d., £146, 14s. 1d., and £129, 8s. 6d., in all £1499, 17s. 5d.; that the two sums of £146, 14s. 1d. and £129, 8s. 6d. were spent in putting in water-closets and washing-houses and other conveniences, without which the property could not have been satisfactorily let; that including the two last-mentioned sums the trustees borrowed from Miss Wilson in all a sum of £873, 18s. 10d.; that the Howgate property was sold for £1400; that the sums borrowed from Miss Wilson were repaid her in full out of that sum; and that the operations referred to had resulted in a loss to the trust estate.

On 30th June 1904 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Having considered the proof, productions, and whole cause, finds that it has not been proved that in the management of the trust estate of the late Walter Wilson, baker, Hawick, the trustees acted imprudently, negligently, or unfairly, or that loss to the estate has been caused by their fault: Therefore assolvies the defenders from the conclusions of the summons," &c.

*Opinion.*—"This is an action of count and reckoning brought against the trustees of Walter Wilson, baker, Hawick, who died on 6th July 1878. The pursuers are beneficiaries under the trust-deed. They are children of Jane Wilson or Armstrong, the truster's sister, and their interest in the estate is, as I gather, about two-thirteenth parts of the residue after the death of the truster's sister Elizabeth, liferentrix of the whole estate, heritable and moveable. She died on 23rd January 1901.

"The trustees lodged their accounts, and the pursuers have lodged objections, which have been twice amended. The accounts, objections, and the trustees' answers have not been printed, and on that account the case is not brought out so plainly as it might have been; but the objections seem to me to fall under three heads—firstly, the pursuers say that the trustees are not entitled to take credit, as they have done, for three sums, £1223, 14s. 10d., £146, 14s. 1d., and £129, 8s. 6d., amounting in all to £1499, 17s. 5d., being money expended on the property; secondly, they object that no credit is given for any sum as the value of the goodwill of the business; and thirdly, they charge the trustees with sacrificing the trust to the interests of the liferentrix. I think these objections cover the whole of the pursuers' attack on the management and accounts of the trustees. Certain strictures are made about the trustees borrowing money from the liferentrix and granting her a bond and promissory-notes. But whether in doing so they violated the trust or not that does not appear to me to enter into the case.

"In considering these objections it is necessary to keep in view the position of

the liferentrix Miss Wilson. She managed the truster's baking business, which was a large business for the place, and she was the person who dealt with all the customers, and latterly it appears that it was she rather than the truster who carried it on. In point of fact she continued it after his death, the whole stock-in-trade having been made over to her by the trustees at a valuation. The pursuers take no objection to this transaction, which appears to have been the most advantageous course which the trustees could have followed for the trust. Miss Wilson was herself nominated a trustee. But she did not attend the earlier trust meetings. At least she does not sign the earlier minutes, but on 1st April 1879 she signed a contract as a trustee. That was after a meeting held on 24th March 1879, when the trustees resolved, on consideration of a communication from her, to rebuild the premises.

"This case is somewhat unusual, for it does not proceed on any allegation of investment of the trust funds on bad security, or on any allegation of negligence with which apparently the trustees were not at all chargeable and are not charged, but on questions arising in their management of the trust heritable property, consisting chiefly of buildings in Hawick. It is a case to which the observations of Lord M'Laren at section 2140 (on Wills) apply—where he says that 'a less rigorous view of the responsibilities of trustees has been taken with reference to charges of alleged omission or neglect in the collection of arrears of rents or debts prestable during the continuance of the trust. . . . Where the Court is satisfied that it has been on the whole beneficial, it will not, and it would be unjust that it should, enforce the rules of strict diligence against trustees in respect to such arrears of moderate amount as they may have failed to reduce into possession.'

"These observations have no precise bearing on the facts of this case—and in particular I do not see that it can be affirmed that the trustees' management was on the whole beneficial—but still they show the manner in which the Court is in use to regard such cases of the management by trustees of trust property.

"I think that the objection that no price for goodwill has been entered in the account should not be sustained, for I think it has not been proved that anything could have been got for goodwill, and it seems to me that an endeavour to recover a separate sum for goodwill would have been inconsistent with the transaction of the trustees with Miss Wilson, and the proof appears to be that the trustees got more by their transaction with her than they could have got by a public sale or in any other way. It was she who dealt with the customers, and any goodwill which could be ascribed to the business must have been created to a large extent by her own dealings with customers in the conduct of the business. I think the fair conclusion from the proof is that she paid the trustees a full price for all she received. On this point reference may be made to the case of *Bell's Trustees*

v. *Bell*, November 8, 1884, 12 R. 85. The allegation that the trustees favoured Miss Wilson and sacrificed the interests of the trust to her interests raises a question of evidence, and I am of the opinion that that allegation or insinuation is quite unproved as matter of fact. No doubt, whatever money was spent on the trust property may have benefited her as liferentrix and as continuing the business, and probably it did, but I think that the motive of the trustees was not to benefit her but the estate. Two of them were examined as witnesses, and I think they seem to have been honourable men and to have managed the trust property carefully and conscientiously. I cannot affirm that their management was beneficial or successful, but I think that the want of success arose mainly from the facts that there occurred a dulness in the staple trades of Hawick, and that the establishment of co-operative stores in the town affected very adversely such properties as were held by the trustees.

"At the same time I think that the objection of the pursuers which I have mentioned first, that namely to the expenditure of £1499, 17s. 5d., raises questions of very considerable difficulty. I do not know that it raises questions of legal difficulty. It regards the trustees' management of the property and depends on the special circumstances.

"The property of which the trustees found themselves in the management was of a special character—at least that part of the property to which the pursuers' objections relate. It consisted of buildings in which the truster had lived and carried on his business. That business was well established, good, and lucrative, and I cannot think that the trustees were bound or would have been entitled to let it drop. They might reasonably have thought that the site was of value.

"Now, in regard to this branch of the case, it is worthy of some notice that none of the pursuers (being beneficiaries) who come into Court complaining of the mismanagement of the trustees are witnesses. There are four of them. One seems to be resident in London, but the other three appear to reside in the neighbourhood. They have not appeared to explain as witnesses their discontent with the management of the trustees, or their views as to what the trustees should have done in the circumstances which occurred.

"Now, the case which the defenders have made or endeavoured to make is of this nature. They say that the buildings were old and dilapidated, and were indeed dangerous and liable to fall from their age and decay. I do not say the evidence is wholly satisfactory, but it is hardly met by the evidence of the pursuers. What the trustees did was to take down the old buildings and erect new ones. And on the whole, and without going into details, I am not prepared to say that in doing so they were grossly imprudent or over-speculative. Certainly I do not think that they were negligent or that they acted in the interests of Miss Wilson, and in disregard of the interests of the trust.

"I am inclined to think on the evidence that they were justified in taking down the old buildings. They might perhaps have lasted a few years longer, perhaps not. But I do not consider that their conduct was such as to give rise to liability for breach of their trust.

"Having taken down the old buildings, what were the trustees to do? Was it their duty to leave the ground a barren site, or were they entitled to continue the property as old well-established baker's premises? I have great difficulty in dealing with this question. The pursuers maintain that it was wholly *ultra vires* of the trustees to employ the trust money in such a way, seeing that the trust-deed contains no power to build, and that it was not within their authority to employ the trust money in such a manner. If the fact in this case had been that the trustees found a vacant piece of trust property, and had built on it premises for the conduct of some business, such as a baker's business, I would have held such an application of trust funds wholly beyond their powers, and would have held them liable for any loss that might have happened. I would have held it an investment of trust money quite *ultra vires*. But the very special circumstances of this case require consideration. Suppose it was necessary (not only expedient) to take down the whole buildings, or that the trustees were justified or excusable (which might be enough) in thinking so, are the trustees liable for replacing the old buildings which they were compelled to take down? I think that no case was quoted going that length. This, as I have observed, is not a case about unauthorised or imprudent investment of trust money. Several cases were quoted relating to such investments. But I think such cases (as, for example, the cases about investing in Greenock Harbour shares) are not at all in point. It was argued that investing trust money in building was *ultra vires* without express power. But I think that argument puts the proposition too high. In more than one case power to build has been implied and held to be *intra vires* of trustees without express power—*Sprot's Trustees v. Sprot*, 1830, 8 S. 712; *Drake v. Trefusis*, 1875, L.R., 10 Ch. 364; *Conway v. Fenton*, 1888, 40 Ch. 515. I am not prepared to hold that in the circumstances the expenditure of the trust money in rebuilding the baking premises must needs be disallowed as wholly *ultra vires* without regard to the special circumstances. I think they have to be examined, and that in this case the trustees must have the benefit of all presumptions arising from care in management and honest intentions.

"But then it is said that this scheme of rebuilding the premises was speculative, imprudent, and unsuccessful. The pursuers say that the trust money was thrown away. At first the trustees certainly did not think so. There is a minute of trustees dated 10th February 1880 (No. 178), from which it appears that the buildings had been completed at a cost of £1223, 14s. 10d. (there were additions afterwards), and it

bears that 'the trustees, after carefully considering the whole circumstances, expressed themselves as extremely gratified with the result of the rebuilding, and recorded and do hereby record their opinion that the rebuilding of the property has very considerably enhanced the value of the deceased's estate.'

"It is not unfairly suggested that those of the pursuers who lived in the neighbourhood must have thought the idea of the trustees at least plausible and hopeful, seeing that they allowed the demolition of the old buildings and the erection of the new ones to proceed without objection. But I am afraid this observation cannot be brought up to a defence of bar.

"I have no doubt that this was an honest opinion by the trustees, and if it was it has some bearing on the present question. I fear, however, that the trustees could not have long retained their favourable opinion of the building operations, because there were two sums spent afterwards, £146, 14s. 1d. and £129, 8s. 6d., bringing the total cost up to £1499, 17s. 5d., and when the property was sold on 10th October 1901 no more was obtained than £1400 (see minute, 10th October 1901) for the buildings and the site. This price was obtained by private bargain after the property had been exposed on several occasions to public sale.

"The pursuers maintained that this showed a loss on the whole transaction of £100 plus the value of the site, which they maintained was of itself, apart from all buildings, worth £500.

"If this fall of price could not be accounted for on some special ground, then it certainly would appear that the operations of the trustees had resulted in a considerable loss.

"But the trustees say, and I think they have proved, although the proof is not all one way, that a great fall in the value of such property had taken place in the meantime, in consequence partly of dulness of trade in Hawick, but chiefly in consequence of the establishment of co-operative stores there, in consequence of which (some of the witnesses say) the value of other shops had been much diminished. I do not know how far the opinions of these witnesses are well founded. But it is a circumstance which requires to be taken into account in considering both the action of the trustees and the apparent loss to the trust estate. It was argued that what was apparently loss caused by the trustees' operations was really not so at all, but was the result of certain definite adverse circumstances which the trustees could not control or foresee. If that was so, then I think that loss to the trust by the buildings would not have been proved.

"With regard to the two smaller sums, £146, 14s. 1d. and £129, 8s. 6d., I do not think there are sufficient materials in the proof to admit of treating them on a different footing. Both were additions to the cost of the new building. The former sum is mentioned in the minute of the trustees, dated 3rd December 1889, from which it appears that the expense had been defrayed,

when incurred, by Miss Wilson, and that the factor on the property, Mr Dryden, had reported that the works as permanent improvements should be charged against capital, but should not be repaid until Miss Wilson's death, she getting the benefit of the improvements and bearing the burden of them during her life.

"The other sum, £129, 8s. 6d., is mentioned in the minute of date 7th March 1894. This is in much the same position as the former sum, only the necessity of this expenditure is not so clearly made out. I have to regret on this part of the case the absence from the proof of the factor Mr Dryden, who was indisposed at the date of the proof. As the proof stands I do not find that I have sufficient grounds for separating these two additions to the cost from the rest, and I think the case must be dealt with as if the primary cost had been £1499, 17s. 5d. instead of £1723, 14s. 10d.

"On the whole case I think that the pursuers have failed to make out a case of liability against the trustees."

The pursuers reclaimed, and argued—The rebuilding was *ultra vires* of the trustees, as no power to do so was conferred by the trust-disposition and settlement, and they had no power to do so at common law—*Ersk.* Inst. ii, 9, 60; *M'Laren on Wills*, sec. 2195; *Lewin on Trusts*, 10th ed. 679; *Bleazard v. Whalley*, 1854, 2 Eq. R. 1093; *Sprot's Trustees v. Sprot*, March 11, 1830, 8 S. 712 (5 F.C. 559); *Brunskill v. Caird*, 1873, L.R. 16 Eq. 493; *in re De Teissier*, 1892, [1893] 1 Ch. 153; *Wallace v. Braid*, March 14, 1900, 2 F. 754, 37 S.L.R. 569. Even if rebuilding was *intra vires* it was in the circumstances a speculative investment, and as it had resulted in a loss the trustees were liable to replace the sum so spent—*Alexander v. Johnstone*, March 3, 1899, 1 F. 639, 36 S.L.R. 453; *Hutton v. Annan*, February 28, 1898, 25 R. (H.L.) 23, 34 S.L.R. 641; *Henderson v. Henderson's Trustees*, July 20, 1900, 2 F. 1295, 37 S.L.R. 976; *Knox v. Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 752; *Raes v. Meek*, August 8, 1889, 16 R. (H.L.) 31, 27 S.L.R. 8. It was the duty of the liferentrix to keep the property in repair. The trustees had expended the whole estate on the new building, and had allowed Miss Wilson the full value of the money expended on improvements which had been paid out of capital. In that way they had benefited her at the expense of the fiars of the estate, which they were not entitled to do—*Ker, Petitioner*, March 3, 1855, 17 D. 565; *Perston v. Perston's Trustees*, January 9, 1863, 1 Macph. 245; *Molleson v. Hope*, May 26, 1888, 15 R. 665, 25 S.L.R. 506.

Argued for the respondents—The evidence showed that the condition of the property was not merely ruinous but also dangerous. It had been practically condemned. The trustees had exercised a wise discretion in retaining and rebuilding it. The original scheme of rebuilding had only involved an expenditure of £850; the further expenditure was due to a fire, a *damnum fatale*. The repairs and improvements were necessary and were permanent improvements. Without this the property could not have been satis-

factorily let. The fall in the value of the property had been due to circumstances which could not reasonably have been anticipated. The administration of this property by the trustees had been careful and prudent in all respects, and they were not in any way liable to the pursuers. In addition to the authorities already cited, reference was made to *Menzies on Trustees*, 1, 133; *Barns v. Barns' Trustees*, March 5, 1857, 19 D. 626; *Brotchie v. Stewart*, July 10, 1869, 7 Macph. 1031; *Drake v. Trefusis*, 1875, L.R. 10 Ch. App. 364; *in re Hotchkys*, 1886, L.R. 32 Ch. D. 408; *Conway v. Fenton*, December 1, 1888, L.R. 40 Ch. D. 512.

On the question of goodwill the respondents referred to the case of *Bell's Trustees v. Bell*, November 8, 1884, 12 R. 85, 22 S.L.R. 59. The respondents also argued that the pursuers were barred by *mora* and lapse of time, but the Court found it unnecessary to deal with this point.

LORD PRESIDENT—[*After stating the facts as quoted supra*].—The question which we have now to decide is whether the beneficiaries under the truster's testamentary settlement have established grounds for holding his trustees personally liable for the losses to the trust-estate which they maintain to have been incurred by the trustees, especially with respect to the Howgate property, and I concur with the Lord Ordinary in thinking that they have not.

The action of the trustees in regard to the heritable property of the trust turned out in the result to be unfortunate, but I do not think that it was in any way dishonest or blameworthy. They had to consider a difficult question as to the best mode of dealing with the Howgate property, and I cannot say that the course which they followed was *ultra vires* or even injudicious. It appears that the property never was structurally of a good class. It was an old property, apparently constructed of boulder stones and thatched, and it was altogether unsuitable for the purposes of a dwelling-house and baker's shop according to modern ideas. The truster and Miss Wilson seem to have been successful in the business, and it was not unreasonably thought desirable to preserve the goodwill of it in so far as that depended upon customers continuing to resort to the old shop. It appears that the heritable goodwill might have remained of value had it not been that Hawick has suffered from depressed trade conditions, and that the competition of co-operative stores has proved detrimental, as it has done to many shops throughout the country. No doubt rebuilding involved elements of risk, and perhaps of speculation, but it was practically forced upon the trustees by circumstances, and I see no reason to doubt that they acted honestly and intelligently, and therefore I do not think it would be reasonable to make them personally liable for the consequences of circumstances over which they had no control. A considerable fall appears to have taken place in the value of property in the locality, partly due to dulness of trade in Hawick and perhaps

still more to the establishment of co-operative stores there, by which the business of individual shopkeepers, including bakers, has been seriously affected, but I do not think that the trustees could have foreseen this in the exercise of an honest and intelligent judgment. I see no evidence of any desire or intention on the part of the trustees in any way to favour Miss Wilson at the cost and risk of the estate and the other persons beneficially interested in it.

Upon the whole matter I think that the Lord Ordinary is right in finding that it has not been proved that in the management of the trust estate the trustees acted imprudently, negligently, or unfairly, or that loss to the estate has been caused by their fault, and I am therefore of opinion that his Lordship's interlocutor of 30th June 1904 should be adhered to.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Young—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for Defenders and Respondents—Wilson, K.C.—Steedman. Agents—Steedman & Ramage, W.S.

Thursday, December 22.

## SECOND DIVISION.

[Sheriff of Lanarkshire.]

AIRD & COGHILL v. PULLAN & ADAMS.

*Sale—Machinery—Disconformity to Contract—Payment of the Price—Rejection—Reasonable Delay in Rejecting.*

A firm of printers' engineers contracted to supply a Marinoni printing machine to a firm of stationers at the price of £190. The contract provided that the machine should be set up by the sellers' firm in the works of the purchasers, and should be left by them "in thorough good working condition." The machine was delivered in December 1900 and set up in the following March, and two instalments of the price amounting to £150 were paid. The purchasers attempted to use the machine for their business but from the outset found it defective, and at their request the sellers attempted time after time to put it in good working order, but without success. These attempts were continued down to July 1902, when the purchasers intimated their final rejection of the machine.

*Held* that the purchasers were entitled to reject the machine as disconform to contract, and were not barred from exercising this right either on the ground that they had paid part of the price or on the ground that the rejection was not timeously made.