

appellants, argued—This is a contract of sale. The appellants were justified in not taking delivery of the goods, as the respondents broke the contract; at least, no damages are due, or only nominal damages.

Authorities—*Watt v. Mitchell*, 1 D. 1157; Addison on Contracts, 1373; Sedgwick on Damages, 318, 319; *Watson v. Abergele Railway Co.*, 15 English Jurist, 448.

CAMPBELL (with him WATSON, who was not called on), being told to speak only to the question of damages, replied—The question is, are the damages to be nominal or such as the Sheriff contemplates? The contract is the measure of the damages.

Authorities—*Corrie v. Thames Iron Co.*, 3 Law Reports, Q.B., 181; *Inchbald v. Western Neilgherry Railway Co.*, 17 Law Reports, C.B., 733.

At advising—

LORD PRESIDENT—This is not a contract of sale, but a contract of a composite character. It is a mixture of sale and agency. The parties to it had each an object in view. The respondents selected the appellants, as an old-established firm in Glasgow, to sell for them. The appellants, on the other hand, as godfathers to the machines, stipulated—"If we are to have the sale, we must have the character of being the only firm selling them." It is not therefore, a contract of sale. The appellants were to have 33 per cent. on the sale, which is almost a contract of agency. But then, it differs from it in this respect, that they were to take the risk of the sale. It is said that after the hundred machines were sold, the contract was to cease. But whether or no this be true, makes little difference—the contract is still the same. So long as the hundred machines were with them, they alone were to be able to sell. But, on the other hand, might they lock them up? Surely not. Of course this, like many other things, is not expressed in the memorandum. But I think they were bound to push the sale. Mr Wilson says—"The inducement held out by the defenders to us, to give them the sole agency in Glasgow, was that they promised to put the machines into the hands of their travellers, advertise them largely, and make them a prominent article for sale. In consequence of this we abstained from advertising, or in any other way pushing the sale of the machines in any part of this country." There was no stipulated time when the machines were to be delivered, but there was an interest on both sides that delivery should be made as early as possible. Mr Wilson, it is alleged, was four weeks in Glasgow, and yet made no delivery of the machines. Of this the appellants justly complain. But then, they unjustifiably say—"You are breaking the contract; you are selling to all and sundry." This assertion was unfounded. Several witnesses expressly state that when they called at the Glasgow agency of the respondents to get machines, they were directed to apply to the appellants, who alone had right to sell them; and that the machines exhibited in the window were there only as samples, and for sale to country purchasers.

Yet the appellants broke up the contract and refused to accept delivery of the goods. If this had been a contract of sale, all the respondents had to do would have been to sell the machines at once and claim the difference from the appellants. But, as I have said, this is not a contract of sale. The claim is of the loss arising to the respondents from the appellants, as parties to this contract, not

getting the machines pushed in the Glasgow market. It was, we are informed by witnesses, a good opportunity for their sale; and the only machines that were sold were well thought of by the purchasers.

In consequence of the appellants' action in this matter the respondents lost the Glasgow custom they thought they had secured under the contract. There was no loss on the hundred machines. They were actually sold for a higher sum than the appellants were to have paid for them. But Mr Wilson tells us, in consequence of the loss of the Glasgow market, they were left at Christmas with an extra supply of machines in hand, to the extent of 200; and that in consequence, they, in December, reduced their production of machines by 10 per week.

The only question, then, I think, is what is the amount of damages to be paid. The Sheriff assesses it at £25. Had this been a jury case, and I been requested to withdraw the case from the jury, I should not have done so. They might quite probably have given £25; and if they had, I do not think your Lordships would have been for setting aside their verdict. I am, therefore, for adhering to the Sheriff's interlocutor.

The other Judges concurred.

Agents for Appellants—J. & R. D. Ross, W.S.

Agents for Respondents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, October 27.

SECOND DIVISION.

GRANTS *v.* BAILLIE & OTHERS.

Trust—Unauthorised Investment of Funds—Disposal of Profits accruing thereon. Trustees under a marriage contract having invested trust-funds in bank shares, which was not authorised by the trust-deed, they were ordained, in an action by the trusters, to sell the shares and invest the money in terms of the deed. Profits having accrued on the unauthorised investment, held that these must be applied in the same way as the trust-funds themselves; but circumstances in which held that a portion of the sum which had been invested was not trust-money but the property of one of the spouses, and that she was entitled to payment of that portion, and the proportion of the profits corresponding thereto.

The pursuers, Mr Patrick Grant and his wife, executed, in the year 1838, an antenuptial contract of marriage, by which the defenders were appointed trustees for the purposes therein expressed. By the said contract, *inter alia*, Mrs Grant conveyed to the trustees a sum of £4000, part of the fortune which she was entitled to under her father's testamentary settlements. The trustees were directed to invest this sum in *heritable or personal security*, and to pay the *interest or yearly profits thereof* to Mrs Grant during her lifetime, exclusive of the *jus mariti* of her husband. In the event of Mrs Grant surviving her husband, £3000 of the said sum were to be paid to her for her own right and use, and subject to her own absolute and uncontrolled disposal, and the remaining £1000, along with certain policies of insurance, were to be paid to the children of the marriage after her death. In the event of the husband's survivance, the interest or yearly profits were to

be paid to him during his life, and the principal sum was to be paid to the children.

The trustees deposited the £4000 in a bank at Bristol, where it remained until 1850. During this time Mrs Grant did not claim, as she might have done, the interest payable to her, and in 1850 the sum had increased by accumulation of interest to £7000. This sum of £7000 was then invested in two securities for £2000 and £5000 respectively; but £3000 of the sums so invested, which consisted of interest, was of course not trust money, but the private property of Mrs Grant.

In 1859 the security for £2000 was realised, and Mrs Grant received payment of the money. The security for £5000 was also realised about the same time, and in 1861 the money was re-invested in the following manner: Mr Grant granted in favour of the trustees a bond for £2506 over certain heritable property belonging to him, and with the remainder (£2496) there were purchased twelve shares of the British Linen Co. Bank. This last investment was of a character unauthorised by the contract of marriage; but it has turned out a very profitable one, as the shares, if now sold, would, it was said, yield a profit over the purchase price of £576 or more.

In these circumstances the pursuers raised this action for the purpose of having the securities held by the trustees restricted to the sum of £4000, for which alone they were responsible, and they contended that they were entitled, after that sum was so set apart, to receive payment of the balance, including the profit on the bank shares. The trustees, on the other hand, maintained that they were bound to hold not only the sum of £4000, but also the whole profit on the shares for the purposes of the trust.

The conclusions of the summons were for declarator (1) that "the sum of £4000, part of the fortune of the said Mrs Emilia Baillie or Grant, conveyed in trust by the said contract of marriage, for the purposes therein and hereinafter specified, is the only part of her fortune, means, and estate which was so conveyed, or which now falls to be administered by the defenders, and that, in so far as the said defenders hold funds or securities of a greater amount or value than are required for securing and making effectual the said sum of £4000, conveyed in trust as aforesaid, they hold the same for behoof of the pursuers, or one or other of them, absolutely and are bound to pay or make over the same to the pursuers on being required so to do: And (2) that the defenders, the said trustees, had and have no title to or right or interest in the sum of £2000, at one time invested in their names but belonging to the pursuers, and of which the pursuers received payment from the now deceased James Murray Grant, Esquire of Glenmoriston: Or otherwise, and whether it shall be so found and declared or not, the defenders, as trustees foresaid, ought and should be decreed and ordained, by decree foresaid, forthwith to sell and dispose of twelve shares of the capital stock of the British Linen Banking Company, now held by them as trustees foresaid; and after retaining out of the price thereof such a sum as, with the sum of £2506 contained in the bond and disposition in security mentioned in the condescendence hereunto annexed, held by the defenders, as trustees foresaid, will make up the sum of £4000, being the true amount of the trust-fund conveyed in trust as aforesaid, to make payment of the balance of the said price to the pursuers, on receiving their discharge or receipt therefor."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 6th April 1869.*—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings,—Finds that, under and in terms of the trust constituted by the pursuers' antenuptial contract of marriage, they are not entitled to payment as concluded for of the increased value of that portion of the trust-estate which consists of stock of the British Linen Company Bank arising since said stock was purchased; Appoints the case to be enrolled, in order that decree may be pronounced and the conclusions of the action disposed of in conformity with this finding.

"*Note.*—The only question as yet debated before the Lord Ordinary, and the only one about which, as he understood, any serious dispute had arisen, was whether the increased value of that portion of the trust-estate which consists of British Linen stock is to be held as belonging and payable to them as liferenters. The Lord Ordinary is of opinion that the pursuers, as liferenters, have no right to the increased value of the stock in question. By the terms of the trust, the right of the pursuers, as liferenters of the £4000, with part of which that stock was purchased, is expressly limited to the interest or the yearly profits thereof. Now, it is impossible to say that the increased value of the stock arising since the purchase was made is of the nature of interest or yearly profits. On the contrary, it was admitted that the whole yearly interest or profits arising on the stock, in the shape of dividends, have been regularly paid to, and received by, the pursuers. To the extent to which these dividends exceed the ordinary rate of interest, the pursuers have therefore reaped all the advantage; and it appears to the Lord Ordinary that any advantage arising from the increase in value of the stock itself must be held to accrue to the capital or fee. That the pursuers may be entitled to the yearly interest of the capital so increased, supposing the British Linen Bank stock were sold, and the proceeds invested on heritable or good personal security, is probably not intended to be disputed, although nothing was said on this point at the debate.

"The Lord Ordinary is not aware of any case precisely similar to the present, and he was not referred to any. There is, however, some analogy—favourable, he thinks, to the view he has adopted—derived from those cases in which it has been held that a liferenter of funds invested in bank stock has no right to a bonus declared on that stock, although it has in reality arisen from defined dividends.—*Bell's Principles*, § 1050, and cases there cited."

The pursuers reclaimed.

MILLAR, Q.C., and BURNET for them.

Solicitor General (CLARK) and MACDONALD for the defenders.

The LORD-JUSTICE CLERK was of opinion that the investment in bank shares was one which the trustees were not entitled to make; and it followed that, so far as the trust-funds were so invested, they should be at once realised and invested in terms of the trust. It was also clear that when trustees violate a trust, by making investments not authorised by it, they are responsible for any loss which may result, while on the other hand any benefit must go to the trust. It followed that the increase in the value of the shares must be applied in the same way as the sum itself which had been invested. But in this case £1000 of the money

was not trust-money, but Mrs Grant's private funds, and the pursuers were therefore entitled to £1000 worth of the stock and the proportion of the profits effecting thereto, which was about two-fifths of the whole.

LORD COWAN—I regard the question raised by this record in a light somewhat different from that in which it has presented itself to the Lord Ordinary. I do not think it can be satisfactorily decided merely upon the principles applicable to the rights of liferenter and fiar, or by reference to decisions which have fixed that bonuses declared on bank stock belong to the fiar and not to the liferenter. The solution of the case must, I think, be sought in principles well settled in the law of trusts.

The trust-fund with which we have to deal is the sum of £4000, vested in the marriage contract trustees for behoof of the spouses and their children, if any, in liferent and fee respectively. This sum was placed under the exclusive management of the trustees, who were appointed to lend out and invest the same "on heritable or good personal security, taking the securities to themselves, for the purposes of the trust." It is clear that, under this direction to invest, the trustees had no power to employ the funds in the purchase of bank stock, any more than they could have employed them in any other trading or speculative business. Such an investment might be profitable or the reverse; and, whether the one or the other result occurred, the principles of accounting are free of doubt. On the one hand, had loss arisen, the trustees must have been responsible to the beneficiaries, and been bound to make good to them the full amount of the trust fund; and, on the other hand, the whole profit realized in the trading concern, in which the funds were wrongously embarked, behoved to be accounted for to the whole parties interested in the trust, whether in liferent or fee, according to their respective interests. I apprehend these principles to be clearly established. But in this case, in the purchase of the British Linen Company's stock in 1861, the trustees acted with the sanction and under the direction of the pursuer, Mr Grant, and, as I think cannot but be held, with the approbation also of Mrs Grant. She could not have been ignorant of the investment, for, from 1861 downwards, the dividends on the stock were paid to her, as in virtue of her exclusive right. This sanction of the liferenters however cannot affect the principles by which the question here at issue must be ruled. Had there been loss on the purchase of the bank stock, Mr and Mrs Grant, as interested in the liferent, might have been barred from claiming any indemnity from the trustees, seeing that they had sanctioned the investment. But the parties interested in the fee of the trust-funds would still have had their claim for the full amount of the trust-funds as against the trustees. In like manner, the profits realized from the purchase of bank stock will enure to the whole parties interested in the trust. These profits cannot be claimed by those interested in the liferent merely, for they had no right to trade with the trust-funds any more than the trustees. The amount, therefore, can only be disposed of by being added to the capital of the trust-funds, which are to be held and administered as directed by the trust-deed. This, no doubt, will enlarge the trust-estate beyond the original amount of £4000; but the enlargement has arisen from the use of the capital in which they are exclusively interested. The same result would have

happened if the trustees had been empowered to purchase bank stock, and profit been realized. And because this enlargement has arisen from unauthorised investment is no reason why the increase should not be treated in the same way.

Supposing, therefore, this question to have arisen regarding the investment of the £4000 in whole or in part in the purchase of this bank stock, I think it must have been solved in the manner which I have explained. The fact, however, is, that in addition to the £4000, there was £1000 more in the hands of the trustees, belonging to Mrs Grant, at the time of the purchase in 1861. At that date the trustees, as permitted by the trust-deed, made advances to Mr Grant to the extent of £2506, and obtained from him heritable security for its repayment. This was clearly a loan out of the trust-funds, and the bond specially sets forth that it was made by the trustees "in virtue of the powers conferred upon them by the contract of marriage above narrated." There thus remained of the trust-fund of £4000, in the hands of the trustees in 1861, £1494 for investment. But in addition to that balance of trust funds they had £1000 which belonged in exclusive right to Mrs Grant. And these two sums of £1494 and £1000 make up the amount employed in the purchase of the British Linen stock. Mr and Mrs Grant had full power to direct their own £1000 to be thus invested, and for any profit that may arise on the stock to that extent they alone have a just claim. But the remainder of the price paid for the stock—£1496—forms part of the trust estate, and the profit realized on the stock to that extent will fall to be disposed of by being added to the capital under the trust administration. And the fund thus increased must remain in the hands of the trustees, there being no vested interest in the children, or in any of them, having regard to the terms of the trust created by the marriage contract.

Farther, the pursuers are entitled to insist upon having the bank stock realized, so that, on the one hand, they may uplift their own £1000, with the profits effecting to it arising from the increase in the value of the stock; and, on the other hand, that the £1496, with the profits therefrom accruing, may be duly and properly invested for the purposes of the trust in heritable or good personal security.

LORDS BENHOLME and NEAVES concurred.

The following interlocutor was pronounced:—

"*Edinburgh, 27th October 1869.* The Lords having heard counsel on the reclaiming note for Mrs Emilia Grant and spouse against Lord Ormidale's interlocutor of 6th April 1869, recal the interlocutor of the Lord Ordinary: Find that of the sum of £2496 which was invested in the name of the defenders, in 1861, in the purchase of stock of the British Linen Company Bank, the sum of £1496 formed part of the capital sum of £4000 held by the defenders as trustees under the marriage-contract of the pursuers, and that the remaining sum of £1000 was the exclusive property of the pursuers: Find such investment to the extent of the said sum of £1496 was contrary to the provisions of the marriage-contract and to the powers thereby conferred, in regard to the investment of the trust funds: Find that any increase in the value of the stock purchased with the said last-mentioned sum must be added to the capital sum of £4000, and held by the defenders under the provisions of the said contract: Ordain the defenders forthwith to sell and realise the whole of the stock purchased

with the sum of £2496, and to pay over to the pursuers so much of the proceeds as shall correspond to the proportion of £1000 to £1496; and to hold the balance as part of the capital sum, under the provisions of the said contract. Further, in regard to the sum of £2000 which was lent on bond to Mr Grant of Glenmoriston, and subsequently paid up to the pursuers: Find and declare in terms of the second conclusion of the summons: *Quoad ultra* sustain the defences: Find both parties entitled to their expenses out of the share of the proceeds of the said stock falling to the defenders under the above findings, and decern, and remit to the auditor to tax the expenses now found due, and to report."

Agents for Pursuers—Adam & Sang, S.S.C.

Agents for Defenders—Horne, Horne, & Lyell, W.S.

Friday, October 29.

FIRST DIVISION

BREADALBANE *v.* BREADALBANE'S TRS.

Charter Room—Inventory—Trustees. The trustees of a deceased nobleman held possession of the key of the charter room of what was formerly his residence, but now that of the next heir of entail. The latter had in a previous action resisted the petition of an opposing claimant to get access to the documents in this room; but now sought to get the keys for himself. The Court *refused* to order the trustees to give up the key; but suggested the appointment of some one by the parties to inventory and separate the documents.

This was an action brought by the Earl of Breadalbane against the trustees and executors of the late Marquess, who are in possession of the key of the charter room of Taymouth Castle, craving that they should be ordained to deliver the key to him, and interdicted from allowing any of the documents to be changed, or the custody of the key transferred to other hands. At present there is under appeal, before the House of Lords, a decision of the Court refusing to Donald Campbell, one of the claimants to the Earldom, an order on the trustees to exhibit the documents and titles concerning the Earldom and estate of Breadalbane before an examiner appointed by the Court of Chancery. The present pursuer appeared in that action as a respondent, and resisted the application. In respect of the dependence of this appeal, the Lord Ordinary (BARCAPLE) reported the case to the Court without decision; but expressing a strong opinion that the pursuer should prevail.

LORD ADVOCATE and ADAM, for the pursuer, argued—The pursuer has been served heir of entail to the last proprietor, and is in possession of the title and estates, as well as of Taymouth Castle, in the charter-room of which the documents are. In such a position he is entitled to the key of the charter-room of his own dwelling; and the writs and documents are really in his custody. No question has yet arisen, and no averment been made, of any difficulty about the papers.

DEAN of FACULTY and WATSON, for the defenders, replied—A question may arise as to whose property the documents are. The other claimants must be called before the defenders are in safety to surrender the key to the pursuer. The defenders

have an unimpeachable title to the custody of the documents in the charter-room; or, at least, to these documents other than those relating to the succession under the entail, and to the title and dignities. Authority—*Crawford v. Campbell*, 2 W. & S. 440.

At advising—

LORD PRESIDENT—We are none of us inclined exactly to agree with the views of the Lord Ordinary. We are not prepared to pronounce judgment in terms of the pursuer's conclusions. Nor are we prepared to pronounce a judgment at once transferring the control of the muniment room to the pursuer. The writings in it are of a very unusual kind and amount. They are of great historical value—a value not to be measured by money. There is therefore a great responsibility on the defenders, who, I think, are not unwilling to have this responsibility transferred to the pursuer. The only arrangement, I think, is to have a separation of the documents made; and my only regret is, that such a laborious undertaking was not begun long ago. If the parties do not choose to agree to it among themselves, I think there is no resource but for us to take the matter into our own hands, and appoint an officer of the Court to do so. I think we should give them a reasonable time to make some such agreement; but if they do not, we must take the steps I have indicated.

LORD DEAS—I quite concur with what your Lordship has said; and would only say that it is a great matter for regret that seven years have elapsed without any steps being taken in this direction. And let me point out this, that if this is done by an officer of court there will probably be a far more minute inventory made than there would be if it is done by a gentleman of the parties' own choosing. He can, if he likes, inventory the documents in bundles.

LORD ARDMILLAN concurred.

LORD KINLOCH—I concur; and let me remark, the charter-room is just in fact a charter-chest, and that, though the defenders have the key of the charter-room, the pursuer has the key of the out-door,—the door of the house, and thus he is quite safe.

The case was accordingly dropped, with the view of an arrangement being made.

Agents for Pursuer—Adam, Kirk & Robertson, W.S.

Agents for Defenders—Davidson & Syme, W.S.

Friday, October 29.

SECOND DIVISION.

LOGAN *v.* LOGAN & OTHERS.

Executry—Testament—Homologation—Jus relictae—Repudiation—Election. Held that a widow could not be held to homologate her husband's testament so as to bar her from claiming her legal rights in lieu of the provision made for her by the will, without proof that she knew what her rights were under the will, and what her legal rights were apart from it.

This was an action of reduction brought by Mrs Cecilia Forrester or Logan, widow of the deceased John Logan, schoolmaster of the parish of Mordington, in the county of Berwick, against the executors of her late husband, and certain other parties interested in her husband's executry, for