

the services rendered by the pursuers were of the simplest and slightest kind, and could have been performed by one of the ship's own boats. This last fact, of course, affords no reason for refusing the pursuers a fair remuneration for their services, but it explains the view which appears to have been taken by the Sheriff that these services were of the slightest kind.

I accordingly concur with your Lordship, although I regret that the result of our decision is that the pursuers must be found liable in expenses. That, however, is not a consideration which we are entitled to take into account.

The Court dismissed the appeal with expenses.

Counsel for Pursuers—M'Kechnie—Dove Wilson. Agents—Wishart & M'Naughton, W.S.

Counsel for Defenders—Comrie Thomson—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, January 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

SIMPSON AND OTHERS v. BEGG AND OTHERS.

Trust—Sale of Trust Property—Ultra vires—Title to Sue—Relevancy.

In 1885 a working men's institute was erected in a town of 2000 inhabitants from funds obtained by voluntary contribution. Trustees were elected and an annual subscription for membership was fixed.

In 1890 a townsman bequeathed the residue of his estate to trustees for the establishment of a similar institute, the benefits of which would be available without subscription. The trustees of the existing institute, concluding that it could not compete with the proposed free establishment, sold at cost price to the endowment trustees the building under their charge for the purposes of the new institute, with the consent of the original subscribers and the paying members, and proposed to raise an action of multiplepinding for distribution of the proceeds of the sale. Certain working men of the town sought declarator that the transactions of both classes of trustees were *ultra vires*, and interdict against payment of the proceeds of the sale to the original subscribers, but the Court dismissed the action, holding that the actings of the defenders were legal and reasonable, and that as they proposed to distribute the price under decree of the Court there was no occasion for interdict.

In 1885 certain persons resident in Moffat and the neighbourhood subscribed for the purpose of establishing there an institute,

the primary object being to afford facilities to working men for social intercourse, mutual improvement, instruction, and rational recreation.

A provisional committee was appointed, a site was obtained, and buildings, including a reading-room and gymnasium, were erected at a cost of £1745. Thereafter the subscribers appointed twelve of their number to be trustees, and a constitution was framed. The Institute was opened in 1886, and carried on till March 1891. Under the constitution only paying members were entitled to the privileges of the Institute, although the Institute Committee had power to admit *bona fide* working men above eighteen years of age who were not members to the reading-room at a small charge for each visit. The trustees had power to revise the constitution, and to re-adapt it when necessary to the general purposes of the Institute. It appeared from the third head of the trust that the rules of the constitution might be altered by the trustees on due notice being given.

In 1890 Mr William Proudfoot, a native of Moffat, who had settled in Natal, died leaving a last will and testament, which contained, *inter alia*, the following residuary bequest—"Any money remaining after payment of my debts and the above legacies I leave at the disposal of the Provost and Bailies of the town of Moffat, Dumfriesshire, Scotland, to be applied to the benefit of the working men of Moffat. My wishes will be complied with if this money is laid out on a reading-room in connection with which refreshments on temperance principles are supplied at a low cost."

It was plain that two reading-rooms, one of which depended on annual subscriptions, and the other was intended to be free, could not co-exist in a town of 2000 inhabitants. Accordingly, communications passed between the Institute trustees and the Magistrates of Moffat with a view to the existing Institute being transferred to a mixed trust. The Magistrates felt difficulty in agreeing to share the control and responsibility of the Institute with any other body of trustees. But they proposed that the Institute should be made over to them unconditionally on payment of its cost price, on the understanding that it should be carried on by them on the same lines though on a more extensive scale than before. In the end, after consulting the subscribers, who unanimously agreed, the Institute trustees sold the subjects to the Magistrates of Moffat for the cost price of £1745, which was paid to the Institute trustees. The paying members were also favourable to the sale. The Magistrates practically undertook that the Institute should be used in like manner as before.

In June 1891 certain persons who alleged that they were working men resident in Moffat, and a committee of working men appointed at a public meeting held on 2nd May 1891, raised the present action of reduction against (1) the Institute trustees, and (2) the Magistrates of Moffat, as Proud-

foot trustees, for reduction of the sale of the Institute as *ultra vires* of both trusts, and for interdict against payment of the price by the Institute trustees to the subscribers to the Institute, and against applying any part thereof otherwise than in terms of the constitution and rules of the Institute.

The pursuers averred—“(Cond. 5) The defenders the Proudfoot Endowment Trustees have thus paid away out of the funds which they hold for the benefit of the working men of Moffat, a sum of £1745 for a property which already belonged to or was held for the benefit of the working men of Moffat, and this they have done in spite of very strongly expressed opposition thereto by the working men of the town. The working men being desirous, if possible, to avoid disputes that might end in litigation, tried to get a guarantee that the proceeds of the sale of the institution, which was built by public subscription for the benefit of the working men of Moffat, should be applied for their behoof. They have ascertained, however, that the Magistrates have paid over this large sum of money to the Institute trustees without any restriction as to the purposes to which it would be applied, and their suspicions that the fund would be misapplied have been confirmed by a statement which has been issued by the said Reverend A. R. MacEwen on behalf of the Institute trustees, in which he says that the said sum of £1745 belongs to the subscribers, and may be claimed by them, and it is believed that the Institute trustees are about to raise an action of multiplepoinding to distribute the said sum among the subscribers. In the said action the only competent claim that could have been put forward by the present pursuers would have been to have the Institute trustees ordained to keep and apply the said sum for the purposes of the trust. (Cond. 6) . . . The price paid by the Proudfoot trustees for the Institute was much beyond its value, and known by both sets of defenders to be so. The sale was never consented to or approved of by the working men of Moffat, who alone had the beneficial interest in the subjects. Indeed, they were strongly opposed to it, and that in the knowledge of all the defenders. The subscribers have no interest at all in the Institute, as the trust that was formed was an absolute and unconditional one, excluding any interference on the part of the subscribers with the actings of the trustees . . . The Magistrates were well aware, in dealing with the Institute trustees, that the latter treated the money as belonging to the subscribers, and even if they had a right to buy the property in question, they should have dealt with them as strangers, and given no more than the actual value of the subjects, which is believed to be under £1000.”

The Institute trustees averred that the arrangements for the sale of the property were completed in August 1890, and that from that date no members were enrolled, that they considered it impossible that an institution kept up by subscription could exist beside one fully endowed, and that in

the exercise of their discretion they had sold the property to the Proudfoot trustees. They also alleged that they intended to raise a multiplepoinding with a view to the distribution of the proceeds of the sale. They further averred that every step in connection with the sale was known to the working men of Moffat, and that no dissatisfaction was expressed in any quarter until after the sale had been concluded and the price paid.

The Proudfoot trustees averred that they purchased the said Institute after very careful consideration, and with a view to carry out the testator's intentions; that it was conveniently suited for the purpose as being in a central situation and containing suitable accommodation for the purpose contemplated by the testator; and that the price paid was what the building originally cost.

The pursuers pleaded, 1 and 2, that the actings of both bodies of trustees were *ultra vires*. “(3) The defenders, the trustees of the Moffat Working Men's Institute, are bound to apply the whole funds and property of the Institute to the benefit of the working men of Moffat, in terms of the constitution and rules of the Institute trust, and decree of declarator to that effect ought to be pronounced. (5) The said sale being set aside, the defenders, the trustees of the Moffat Working Men's Institute, are bound to repay the price of the subjects to the trustees of the Proudfoot Endowment, and decree of repetition ought to be pronounced as concluded for. (7) The subscribers to the said Institute have no right to payment of the funds to the Institute, and the defenders the Institute trustees ought, in any event, to be interdicted from paying over to them any part of the price of the Institute, and from applying it otherwise than for the benefit of the working men of Moffat.”

The Institute trustees pleaded -- (1) No title to sue. (2) Irrelevancy, and (3) that the transaction challenged was within their powers.

The Proudfoot trustees pleaded in similar terms.

On 11th August 1891 the Lord Ordinary (WELLWOOD) dismissed the action, reserving to the pursuers all claims competent to them as to the application of the purchase price of the subjects,

“*Opinion.*—[After a statement of facts from which the above narrative is mainly taken]—The case is peculiar, and I think a broad view must be taken of it. The pursuers have plainly no interest to object to the sale of the Institute to the Proudfoot trustees taken by itself, because the Institute is still to be carried on as before, free of charge, I understand, and by a body of trustees possessed of ample funds.

“The pursuers' interest, if they have a title to enforce it, lies in the application of the purchase price. The defenders maintained that the Institute was merely a voluntary association, which could be dissolved at any time with the consent of the subscribers and the paying members, if indeed the consent of the latter was required.

This is a doubtful proposition, because the subscribers appear to have created what *ex facie* is a permanent trust for the benefit of working men. But I do not think it necessary to decide this point, which involves a question with the original subscribers, because I hold that the pursuers have no interest, and therefore no title to object to the transference alone, or, to put it otherwise, that they have not stated any relevant grounds for setting the sale aside.

“In judging of the reasonableness of the sale, it is right to remember that it was effected with the unanimous consent of all who for the time had a voice in the management or share in the benefits of the Institute, viz., the trustees, the subscribers, and the paying members of the Institute; that the pursuers were none of these; they never even availed themselves of the opportunity of becoming members of the Institute; that the purposes of the constitution did not include the unconditional admission of working men, payment being essential even to membership, and that the trustees could, at any general or special meeting, have raised the annual payments as they thought fit, or in other ways revised and re-adapted the constitution when necessary to the general purposes of the Institute; thus even, if strictly speaking, the trustees had no power to sell without authority of the Court, the circumstances were such as would in all likelihood have insured such authority being given. Owing to the threatened formation of a rival free reading institute, the trustees found themselves obliged to abandon the particular scheme which had been selected for the improvement and recreation of working men. If the Proudfoot trustees had established another reading-room, the Institute trustees could not have carried on the Institute, because subscribers would naturally have dropped off. They therefore made the best bargain they could, and succeeded in recovering the cost of the Institute. What is to be done with that money is another matter which I do not mean to prejudge. The pursuers have an interest, and may have a title, to be heard hereafter as to its application.

“2. In regard to the demand that, standing the sale, the Proudfoot trustees should replace the money, a separate or additional view may be taken as to the pursuers' position. They are entitled, no doubt, to see that the Proudfoot residuary funds are administered for their benefit, but their averments of misappropriation of the funds on the part of the trustees are not in my opinion relevant. What is the practical result of the transaction complained of? The working men of Moffat have, as I have said, not only still got the full benefit of the Institute, but they have got it, I understand, free of charge. So far they have actually benefited by the change, and have no interest to complain. But they say the Proudfoot trustees need not have spent £1745 or any other sum in buying the Institute. They should have co-operated with the other defenders, and arranged some joint scheme by which this outlay should have been

saved. The question, however, is not whether the Proudfoot trustees would have acted more judiciously and more beneficially for the working men had they done so, but whether they acted illegally in doing what they did. Now, the trustees thought that they were virtually directed and certainly entitled to apply the residue as suggested by the testator, and they have also thought that they were not entitled, in so doing, to divide the control of the reading-room to be established with any other body of trustees. Assuming that the Institute trustees had full power to sell, and were willing to do so, could the Proudfoot trustees have been restrained from buying? Would a court of law have compelled the two sets of trustees to frame a joint scheme? I think not. I think it was fairly within the discretion and powers of the trustees to resolve not to content themselves with simply supplementing the existing Institute and not to join a mixed trust of doubtful legality. If so, no loss was caused by the purchase of the Institute which could legally have been prevented. Two rival institutes could not have existed together, the non-paying establishment would have ruined the other, which in that case also would have had to be sold in the end.

“3. Assuming that the pursuers have a title to question the actings of the Institute trustees in regard to the future application of the £1745, no sufficient grounds exist for, at present at least, granting interdict as craved, because the Institute trustees do not intend to pay the money back to the subscribers without the order of the Court. A multiplepointing may perhaps be necessary if any of the subscribers demand repayment of their subscriptions. But, so far as I can see, most of the subscribers are anxious, even though not bound, to apply the money for the good of the working men. I venture to repeat the hope which I formerly expressed, that instead of prolonging this litigation, parties may amicably arrange as to the application of the money.”

The pursuers reclaimed, and argued—The sale of the Institute was an illegal act on the part of the trustees. It was not an alteration of an investment, but it was an extinction of the trust, and as such was *ultra vires*—*M'Laren on Trusts*, p. 392. These trustees held not for the original donors, but for the working men of Moffat. If the trust from any cause became unworkable, the trustees' duty was not to terminate it, but to come to the Court for directions—*Downie*, June 10, 1879, 6 R. 1013; *Ewart's Trustees v. Andrews*, June 29, 1886, 13 R. (H. of L.) 69. Though the pursuers were not enrolled members of the Institute they belonged to the class which the Proudfoot bequest was intended to benefit, and they had therefore a title to see that the funds of the bequest were not squandered—*Ross v. Governors of Heriot's Hospital*, February 14, 1843, 5 D. 589.

Argued for the Institute trustees—The pursuers had no title to sue. They might be working men of Moffat, but they were not

subscribers to the Institute, nor had they derived any benefit from it. They had not contributed to the maintenance of the Institute, and could not now interfere with the discretion of the trustees as to its management or sale. What the trustees had done was of the nature of a change of investment, as they proposed to devote the price they had received (if they were not prohibited by the Court) to some kindred object, such as the erection of a cottage hospital. The subscribers to the Institute were a voluntary body, and there was no dedication of the money to any special object; the donors could take back their money, while the trustees were free if they chose to alter the nature of the trust, and to divest the funds to some other more useful purpose—*Bain v. Black*, July 12, 1849, 11 D. 1286; *Connal v. Ferguson*, March 6, 1861, 23 D. 683.

The Proudfoot trustees adopted, so far as applicable, the argument submitted for the Institute trustees, and submitted that if the Institute trustees were entitled to sell the property, they were carrying out the intention of the trust in becoming the purchasers of it—*Milne's Trustees v. Cowie*, January 25, 1853, 15 D. 321.

At advising—

LORD PRESIDENT—Various interesting and important topics were touched upon in the debate before us although not very fully argued, but the questions requiring discussion under the summons are comparatively limited. With the exception of one conclusion, the summons is directed solely against the sale of the building of the Working Men's Institute of Moffat by the trustees, to whom it belonged, to the trustees of the Proudfoot Endowment. Now, I cannot say I think that the legality of this sale is open to successful attack, even if there had been conceded to the pursuers for the sake of argument almost all the trust law upon which they found.

I shall take first the case of the trustees of the Working Men's Institute, who are the sellers. Let it be that a perpetual trust has been constituted for the purpose set out in the printed rules, let it be that the pursuers have a good title to insist for fulfilment of these trust purposes, although I pronounce upon neither proposition, even upon these assumptions it seems to me that in the event which has happened and which is set out by the pursuers, namely, the establishment of the Proudfoot Endowment, the continuance of the Working Men's Institute as a reading-room was demonstrated to be impossible, and that if the trustees had not made the bargain they did they would very soon have had to close the Institute, probably after losing money or running into debt. This conclusion seems to me irresistible, for the simple reason that in this very limited community it would be idle to expect that the Proudfoot Endowment, which afforded for nothing to exactly the same class exactly the same thing only on a larger scale, would not extinguish the paying membership of the

Working Men's Institute. The trustees of the Institute did, what I think judicious trustees were bound to do, when they looked the facts in the face and realised the trust property, whatever might become their resulting duty as regards the proceeds. Up to this point, therefore, I think, so far as they are concerned, their conduct is unassailable. If, as is suggested, they have made a good pecuniary bargain, that is so much the better for them and their trust.

Turning now to the Proudfoot Endowment Trustees, I say that it became their duty under their trust to find a habitation for their Institute, and seeing one ready to hand, owing to the vicissitude already stated as actuating the Institute trustees, they seem to have acted very prudently in seeking to buy it instead of building a new one with the certainty of the other soon standing empty. Moreover, looking to the terms of their trust's direction, I think they were quite entitled to take into account, after they did so, the desirableness of preventing what would have been a foolish and wasteful rivalry injurious to the interests of the workingmen of Moffat, for whose benefit Mr Proudfoot had left his money. Accordingly, even if the Proudfoot trustees did not drive a hard bargain with their sellers, I can find no legal objection to their thereby concurring to the furtherance of the testator's object. Here again, therefore, so far as the purchase goes, I see no breach of trust on the part of the Proudfoot Endowment Trustees. To complete the case as regards them, I may add that I do not think they had any concern with the application of the price by the Working Men's Institute Trustees, being entitled to assume that it would be dealt with as the law directs. So far therefore as those conclusions of the summons go which dealt with the sale of the building as distinguished from the application of the price, I think that on the merits the pursuers have no case on their own showing of the facts.

Now, largely as the question of the application of the price figured in the argument, there is only one conclusion of the summons which deals with the matter, and that is the conclusion for interdict against the trustees of the Working Men's Institute paying over any part of the price to the subscribers (by whom is meant the original contributors to the capital). But before considering the legal merits of this question, we must be satisfied (this being a conclusion for interdict) that the defenders are in course of doing or propose to do what is sought to be interdicted. Now, so far is this from being the case that the defenders have not done this, and disclaim any intention of doing it unless under the decree of Court. Under these circumstances the only course we can take in regard to this conclusion is to dismiss it, and for this reason we have no occasion to discuss the legal grounds upon which this application of the money can be challenged or supported. I am therefore for adhering to the Lord Ordinary's judgment.

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

The Court adhered.

Counsel for the Pursuers—Jameson—Watt. Agent—G. Brown Tweedie, Solicitor.

Counsel for the Institute Trustees—D.-F. Balfour, Q.C.—Ure. Agents—Davidson & Syme, W.S.

Counsel for the Proudfoot Endowment Trustees—Asher, Q.C.—Craigie. Agents—Cuthbert & Marchbank, S.S.C.

Wednesday, January 20.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BARTON v. KINNING PARK COMMISSIONERS AND OTHERS.

Reparation—Burgh—Police Commissioners—Street—Negligence—Man Injured by Stumbling over Mud-heap—General Police Act 1862 (25 and 26 Vict. c. 101).

The General Police (Scotland) Act 1862 provides that the commissioners shall cleanse the streets and remove sweepings "at such convenient hours and times as they shall consider proper."

The commissioners of police of a burgh employed a servant to clear the streets of mud and collect it in heaps for removal by a contractor. The mud on a certain street had been brushed to the side, and on the following morning the commissioners' servant attempted to collect it in heaps, but owing to its watery state he could only gather it together in liquid accumulations. He had to stop work owing to a dense fog. The day was frosty and the mud became partially frozen. The contractor's men were on their way to remove the mud, but had to return on account of the fog, which continued all day. In the afternoon, a carter, while leading his horse and cart along the side of the road to avoid the traffic, tripped over the mud and fell and was injured.

In an action for damages at his instance, held that the commissioners were not liable, as the mud had been collected according to a reasonable custom, and as the accumulations were of ordinary size, and had not been removed because of the fog; and that the contractor was not liable, as his duty was to remove the mud when prepared for removal; that owing to the fog the mud was not so prepared, and that his duty had not begun at the time of the accident.

John Barton, van-driver, Glasgow, sued William Lucas, clerk to and as representing the Commissioners of the burgh of Kinning Park, and William John Graham, contrac-

tor, for payment of £500 damages for bodily injury sustained by him through falling over a heap of mud.

About 4 p.m. on the 24th December 1890 the pursuer was leading his horse and van along Shields Road, Kinning Park, Glasgow. There was a dense fog at the time, and the pursuer, to keep clear of other vehicles, was keeping near to the left side of the road. After proceeding a short distance up the road both horse and man stumbled over a heap of mud lying by the side of the road, and fell, the pursuer sustaining serious injury. He raised an action in the Sheriff Court of Lanarkshire, in the first place against the Police Commissioners, and on their inserting in their statement of facts an account of their contract with Graham, he raised a second action against the latter, the two actions being conjoined. The pursuer alleged that the accident had been caused by the culpable negligence of the Commissioners or the contractor.

Lucas pleaded—" (3) The accident being either a pure mishap, or being caused by the pursuer attempting to drive his horse and cart in the circumstances condescended on, and as he solely or materially contributed to his own injury, is not entitled to reparation from the defender."

Graham pleaded—" (3) The danger through the fog being so great, the defender was justified in stopping the removal of the street sweepings. (4) The said accident having happened through no fault of the defender, he is entitled to absolve."

A proof was led, and conflicting evidence was given as to the position and dimensions of the mud-heap. The effect of the evidence is sufficiently given in the findings of the Sheriff-Substitute, who on the 30th October 1891 assoilized the defenders from the conclusions of the action.

Upon 30th October 1891 the Sheriff-Substitute (BALFOUR) pronounced this interlocutor:—" Finds that the pursuer met with an accident on Shields Road on the afternoon of 24th December last by falling, along with his horse, at the west side of the road close to the paling; that the pursuer had come from his master's bakery in St James Street, and had proceeded across the bridge in Scotland Street, and had turned round the corner of the bridge along Shields Road to the extent of about fifteen yards when he and his horse fell; that the pursuer was leading the horse at the time on account of its being a very dark foggy afternoon, and he was keeping unusually close to the west paling in order to avoid traffic, and he and his horse slipped on some mud which was lying at the side of the road, and the pursuer sustained serious injuries; that the locality in question is under charge of the Kinning Park Commissioners, and they have a contract with the defender Graham for the removal of the dirt and rubbish in the streets; that according to the Police and Improvement (Scotland) Act, which regulates the Commissioners in the performance of their duties, they are bound to remove the dirt