

mated that the income from the bonds would be insufficient to meet the charges for the relief of the poor for the year, and accordingly the meeting directed that the opinion of counsel should be taken upon the point, whether or not the amount of the bonds should be applied to the relief of the poor before an assessment could be legally laid on the parish for that purpose. Accordingly a memorial was laid before counsel, and the question asked at counsel was, whether or not the amount of the bonds must be applied to the relief of the poor before the heritors could lay on a legal assessment for the purpose? That question could only be asked on the footing that the sums in these bonds were for the relief of the poor for whom the kirk-session and heritors were liable, and the question asked was, whether they could assess the parish while they had this available sum? That seems to me a plain negation of the argument that at that time these sums were looked upon as being entirely subject to the will of the kirk-session. It is clear that at that time there was no dispute that these bonds were held for behoof of the ordinary poor of the parish. After that a report was made from time to time by the kirk-session as to the state of the funds, and the heritors assessed themselves from time to time for such sum as was necessary to make up the amount required. This is all in absolute consistency with the case of *Kinglassie*, which was considered by the Whole Court, and decided unanimously. I have therefore no doubt in this case, and following the decisions in the *Kinglassie* and *Aberdour* cases, think that we must answer this question in the affirmative.

LORD YOUNG—I am of opinion that the fund in question was at the date of the passing of the Poor Law Act 1845 vested in the heritors and kirk-session of Pencaitland “for the use or benefit of the poor of the parish.” I do not think it is at all material that one of the bonds was to the kirk-treasurer for the time being for the use and behoof of the poor of the parish, and that others are in favour of the kirk-session for behoof of the poor of the parish, for I think that looking to the whole history of the fund which is given distinctly in the case before us, so far as it was vested in the kirk-treasurer or kirk-session, to use the language of the statute, it was vested “in trustees or other parties on behalf of the heritors and kirk-session.” I think the kirk-session held the funds on behalf of the heritors and kirk-session as the legal guardians of the poor, and the legal administrators of the funds for the use and benefit of the poor, and that if any question of that kind had arisen prior to 1845, it would have been decided that these funds were vested in the kirk-session on behalf of the heritors and kirk-session of the parish as the legal guardians of and administrators for the poor of the parish. If I am right as to this, there is an end of the case, because the statute states that where any property shall, at the time of the passing of the Act,

belong to or be vested in the heritors and kirk-session of any parish for the use or benefit of the poor of such parish, it shall be lawful for the parochial board of each such parish to receive and administer such property. My opinion therefore is, without any doubt or difficulty, and irrespective of any decision in the matter, that the Parochial Board is entitled and bound to receive and administer these funds, and I am also of opinion that the decisions are all to this effect, although there is language in some of the Judges’ opinions which I would not have used.

LORD RUTHERFURD CLARK—I think we must follow the cases of *Kinglassie* and *Aberdour*, and following these cases, I must decide in favour of the Parochial Board.

LORD TRAYNER—Looking to the cases of *Kinglassie* and *Aberdour*, I think the question put to us should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for First Parties—Sym. Agents—W. & J. Cook, W.S.

Counsel for Second Party—Maconochie. Agents—W. & J. Cook, W.S.

Friday, December 8.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

DONALDS v. HODGART’S TRUSTEES.

Trust—Liability of Trustees—Goodwill of Business.

A was for a number of years in business in India as an engineer. During this period he acquired a name in connection with machinery for pressing cotton into bales, and was in the habit of supplying presses to the order of customers in India, getting them manufactured in this country and selling them at a profit to the Indian buyer. He returned to this country in 1867, but continued to supply presses to customers in India until his death in 1879, and made a considerable yearly income out of this business. He had no premises, plant, or establishment, but he kept books, including letter-books. He also left some plans and drawings of machinery.

Sometime after his death, A’s trustees were called upon by certain of the beneficiaries under his will to account for the value of the goodwill of his business. It appeared that no attempt had been made by the trustees to sell A’s business, but that two years after his death one of the trustees had assumed the title of A’s successor. The evidence also showed that a business connection in India was of peculiar value owing to

the great tendency of Indian traders to continue giving their custom to those whom they had been in the habit of employing.

Held (aff. judgment of Lord Kylachy) that the goodwill of A's business was an asset which his trustees ought to have realised, and that they were bound to debit themselves in the accounting with £300 as the value of said goodwill, that sum being equal to the average annual profit made by the deceased during the three last years of his life.

John Hodgart died in 1879 leaving a trust-disposition and settlement whereby he conveyed his whole estate to the trustees therein named, providing that his wife should have a life interest of the whole residue, and that after her death it should be divided into shares, one of which was to be paid to the children of his deceased daughter Mrs Donald. The life interest died in 1889.

In 1891 Mrs Donald's children Jenny and Isa Donald, with the consent and concurrence of their father as their curator and administrator-in-law, brought an action of count, reckoning, and payment against John Hodgart's surviving trustees, as trustees and individuals, and against the representatives of a deceased trustee. The pursuers, *inter alia*, sought to have it declared that they were entitled to credit in the accounting for their share of the value of the goodwill, books, plant, and stock-in-trade of the business carried on by the trust.

The defenders in answer averred—"The only business carried on by the deceased was a commission agency for the sale of cotton presses in India, where the deceased had a number of business acquaintances from whom he procured orders. . . . What business he had depended entirely on his personal influence and exertions, and there was thus no goodwill which admitted of being sold."

Accounts were lodged by the defenders, and various objections were taken thereto by the pursuers, the principal objection being that the account contained no entry whatever in respect of the plant, drawings, books, or the goodwill of the deceased's business, and that a valuable asset of the estate was thus omitted. Other questions were raised in the accounting which it is unnecessary to notice.

On 15th January 1892 the Lord Ordinary, before answer, allowed the parties a proof of their averments relating, *inter alia*, to the above objection. It appeared that the deceased John Hodgart had been in business as an engineer in India from 1841 to 1867. He held various official positions, but also did business on his own account. In 1863 he invented an improved form of cotton press which he patented, and during his stay in India he acquired a name in connection with machinery for pressing cotton into bales. He had a wide acquaintance with persons in the cotton trade in India, and frequently received orders for presses from Indian firms, particularly for his own patent press, the supply of which he kept

in his own hands. He had no works of his own, but got the presses manufactured in this country, and made a profit by charging his customers in India a higher price than he paid the home manufacturers.

In 1867 John Hodgart returned to this country, but he continued until his death in 1879 to receive orders for presses from Indian firms, and to supply them as before, getting them manufactured in this country, and selling them at a profit to his Indian customers. Down to 1871 the presses were manufactured by Messrs Craig & Fullerton of Paisley, and afterwards by their successors Fullerton, Hodgart, & Barclay. The patent presses were stamped "Hodgart's Patent, manufactured by Fullerton, Hodgart, & Barclay," and continued to be so marked after the expiry of the patent and Mr Hodgart's death. The deceased was not a member of either of the firms just mentioned. He had no business premises, and no plant and stock-in-trade, but he kept books, including letter-books, and also left some plans and drawings. His average annual profits from the date of his return from India down to his death in 1879 were, according to one estimate, between £700 to £800, and, according to another, between £400 and £500. His patent expired in 1877, and after that his business decreased to some extent. The pursuers brought witnesses well acquainted with India, who gave evidence that the deceased's business was of great importance and value, and that Indian merchants and manufacturers tended much more than people in this country to employ those whom they had already employed if they had been well served.

There was no evidence that the trustees of Mr Hodgart ever considered the question whether there was a goodwill attached to his business capable of realisation. Two were examined as witnesses, and gave it as their opinion that there was no goodwill to be realised. One of these trustees, however, Mr Jones, who had also been an engineer in India, had started in the same line of business on his own account about two years after Mr Hodgart's death, and had written to his friends in India for orders. He designated himself on his notepaper as "successor to John Hodgart." He deponed that he had received no orders from any of John Hodgart's old customers, but admitted that he had assumed the title of his successor in the hope of receiving orders from them. Of the four other trustees appointed by Mr Hodgart in his settlement, three were members of the firm of Fullerton, Hodgart, & Barclay, which he had employed to make presses for him. They continued after his death to make similar presses for the Indian market, either selling them direct to the Indian buyers, or to agents in this country. Mr Donald, the pursuer's father, who was also an engineer, deponed in cross-examination that he would be willing to give £100 for the books and drawings left by the deceased John Hodgart.

On 11th June 1892 the Lord Ordinary

(KYLACHY), before further answer, ordered the trustees "forthwith to expose to public sale the goodwill of the business carried on by the truster, along with the whole business books of the deceased, including letter-books, and the whole plans or drawings belonging to him. . . .

"*Opinion.*—This is an action of accounting brought against the trustees of the late Mr John Hodgart by certain beneficiaries under the trust, and the main question involved is, whether the trustees are bound to account for a certain alleged asset of the estate, viz., the goodwill of a certain business carried on by the deceased up to the time of his death? The pursuers say that this goodwill of the business if put up to sale along with the books of the deceased and some plans and drawings which he left would have realised a considerable sum, and they complain that in place of doing so the trustees—who were for the most part relatives of the deceased, and had had business relations with him—appropriated, or in effect appropriated, the goodwill to themselves.

"The case has this peculiarity, that the deceased died so far back as 1879, and that the division of the estate has been postponed until now by reason of the survival of his widow, who had a life interest of his estate. This makes it impossible to test by a sale as at the present time the value, if any, of the alleged goodwill as existing at the time of the death. I have been obliged to allow a proof, and that proof has, I think, sufficiently disclosed the nature of the truster's business, and the manner in which the trustees dealt with such goodwill as attached to it.

"I think the result of the proof is shortly this—The truster, who had long held an official position in Bombay, had obtained a name in connection with certain machinery for pressing cotton into bales. In point of fact he was an inventor of an improved form of cotton press, and he held a patent for the invention, and both before and after his return from India, which took place, I think, in 1868, he kept the supply of the patented machinery in his own hands—that is to say, he got the presses manufactured in this country, chiefly, if not altogether, by the firm of which three of his trustees were partners, and he sold the presses so manufactured to firms in India at a large profit. After the patent expired he continued this line of business, selling, however, latterly more of an unpatented press, called a finishing press, which seems to have been used in connection with the patent press. He had no place of business, and no plant or stock-in-trade, but he kept business books, including letter-books. He appears to have for a number of years before his death made a profit which on an average amounted according to one estimate to between £700 and £800, and according to another to between £400 and £500 per annum.

"After his death the business, or such of it as remained, was carried on for a time by one of the trustees—his son-in-law Mr Jones—who had lived in family with him,

and continued to live with his widow after his death. Mr Jones, I have no doubt in good faith, assumed the title of Mr Hodgart's successor, and so designed himself on his letter-paper. After a year or two he discontinued the business, but the firm of which the other trustees were partners, and which firm had all along manufactured the Hodgart presses, continued, and I think still continue, to supply those presses to the Indian market, the presses being still described as 'Hodgart's Patent, manufactured by Fullerton, Hodgart, & Barclay.'

"These are, I think, the facts, and I think support the conclusion maintained by the witnesses for the pursuers, that Mr Hodgart's business as at the time of his death had attached to it a certain element of goodwill, and that that goodwill had a certain marketable value, greater or less. In other words, I think the proof must be held to establish that if the goodwill had been sold at the time of the truster's death, a price, greater or smaller, would probably have been obtained for the privilege of carrying on the deceased's business under his name or as his successor, and for the benefit arising from the possession of his books, and consequent right of access to his customers. Moreover, if I am to accept the evidence of Mr Donald, the pursuers' father, he is prepared even at this moment to give not less than £100 for such goodwill as still survives, and more particularly for the business books and business documents of the deceased, which he says he can turn to valuable account in connection with his own business as an engineer.

"Now, that being so, the question comes to be, am I decide on such materials as the proof affords what is the sum for which the trustees are to account as the assumed value of the goodwill which they failed to realise? or am I in the first place to direct that the goodwill, so far as it still subsists, shall along with the books and documents of the deceased be, *ante omnia*, sold? I have come to the conclusion—especially in view of Mr Donald's evidence, which I must assume to have been given in good faith—that the latter course is the course which I ought to follow. There is here what I hold upon the proof to be an asset of the estate which is admittedly unrealised. The trustees' first duty is to realise the assets, and they will not do so until this goodwill, including the books and papers of the deceased, have been duly sold. It will then be for consideration what additional sum, if any, is to be charged against the trustees in respect of the delay which they have allowed to take place in the realisation of this asset. I reserve that question for after consideration, and in the meantime I say nothing about expenses, and if desired I shall give leave to reclaim."

The defenders reclaimed, and on 4th November the Court adhered to the Lord Ordinary's interlocutor.

On 30th November the trustees exposed for sale by public roup in Glasgow the goodwill, books, plans, and drawings specified in the Lord Ordinary's interlocutor of 11th June. Mr Donald was the

only offerer. He offered £100, and was preferred to the purchase.

On 4th February 1893 the Lord Ordinary found "that the defenders are bound in accounting with the pursuers to debit themselves with the sum of £300 as the value of the goodwill of the truster's business, with interest at the rate of 4 per cent. per annum from the date of the widow's death." . . .

On 17th March the Lord Ordinary, who had previously on 12th November 1892 ordained the trustees to make an interim payment to the pursuers to account of their interest in the trust-estate, gave decree against the surviving trustees and against the other defenders, as representatives of the deceased truster, for the sum of £1186, 11s. as the balance due to the pursuers.

"*Opinion.*—In this case I have already decided, or at least expressed the opinion, that Mr Hodgart's business had at the time of his death a certain goodwill, and that that goodwill had a certain tangible value, greater or less. It now appears from the report of the sale which I lately ordered that such part of the goodwill as still survives has fetched at a public sale the sum of £100. That sum accordingly falls to be now put to the trustees' debit. The question which I have still to decide is, what further sum, if any, falls to be similarly debited so as to satisfy the pursuers' demand for an account of the value of the goodwill as it stood at the truster's death.

"I have come to the conclusion—taking Mr Donald's purchase at the recent sale simply as an element in the proof, and making due allowance for the perhaps somewhat special circumstances which attended that purchase—that I shall do justice between the parties by fixing the value of the goodwill as existing at the date of the truster's death at the sum of £300. That is to say, the beneficiaries under the trust must have credit for £200 in addition to the £100 paid by Mr Donald, and that with interest at 4 per cent. from the liferenter's death.

"I do not propose to go into the details of the proof. The view which I take is, after all, only a jury view, and it is this—I think it is pretty clear that during the three years before the truster's death—that is to say, after the expiry of his patents—his business to some extent fell off. The state No. 54 of process appears to make that clear, and that being so, I do not think that I shall go far wrong if I hold that the profits during those last three years were somewhere about £300 per annum. I shall at all events take them at £300, and I think I deal leniently with the trustees in holding that if the goodwill had been duly exposed to sale, either to public sale or to a sale as amongst the persons interested in the business, it would have fetched at least one year's profits. The pursuers' witnesses say of course that it would have fetched much more, but I think their evidence is rather exaggerated, and in particular they rather overlook the circumstance that Messrs Fullerton, Hodgart, & Barclay were, to say the least, in a very favourable

position to compete with any purchaser. They had not only been in use to manufacture for Mr Hodgart his machines, patented and unpatented, but were probably entitled to continue to use after Mr Hodgart's death the nameplate which they had been accustomed to attach to his machines, the use of that nameplate giving them very considerable advantages.

"I shall therefore find that the defenders are bound in accounting with the pursuers to debit themselves with the sum of £300, with interest from the date of the widow's death at 4 per cent." . . .

The defenders reclaimed, and argued—The Lord Ordinary was wrong in finding that there was a goodwill in the truster's business. His business connection depended entirely upon the confidence which his Indian customers had in his skill and experience. There were no premises or stock-in-trade to which goodwill might attach. His business connection was entirely personal to himself, and was intransmissible—*Austin v. Boys*, 1858, 2 De Jex & Jones, 626, per Lord Chancellor, 635; *Farr v. Pearce*, 1818, 3 Maddock, 74; *Bain v. Munro, &c.*, January 10, 1878, 5 R. 416; *Bell's Trustees v. Bell*, November 8, 1884, 12 R. 85; per Lord Kinnear, 89; *Cooper v. Metropolitan Board of Works*, 1883, 25 Chan. Div. 472; *Labouchere v. Dawson*, 1872, L.R., 13 Equity, 322. If the deceased had had the exclusive right to use the name the name "Hodgart," that might have been of some value, but he had no such right—*Singer Manufacturing Company v. Loog*, 1882, 52 L.J., Ch. 481. The title of "successor to John Hodgart," would have been of no avail in competition with the firm which had always manufactured the presses he sold, or with Mr Jones, who was well-known in India. Before trustees could be found liable for not having realised an asset of the trust-estate, there must be clear evidence of its existence. Such evidence was utterly wanting here. The trustees were better judges, at the date of the truster's death, as to whether there was any goodwill capable of realisation, than anyone could be now, and it never occurred to them that there was anything of the kind.

Argued for the pursuers—The Lord Ordinary was right. A business of the kind carried on by the truster might have a goodwill—*Bradbury v. Dickens*, 1859, 27 Beavan, 53; *Smith v. Everett*, 1859, 27 Beavan, 446; *Mellersh v. Keen*, 1860, 28 Beavan, 453. No one but the truster had a right to sell a machine as "Hodgart's Patent" after the patent had expired, and no one else could use the name of "Hodgart" in connection with machinery for pressing cotton—*Singer Manufacturing Company v. Wilson*, 1876, L.R., 2 Chan. Div. 434; *Singer Manufacturing Company v. Loog*, 1880, L.R., 18 Chan. Div. 395, and 8 App. Cas. 15; *Lindley on Partnership*, 447. The evidence, particularly of Mr Jones' conduct, clearly showed that the deceased's business connection was of value, and

would have fetched a good price if sold. The fact that the pursuers' father had given £100 for it, so long after the truster's death, could not be left out of account. If a sum was realised for goodwill, it was bound to be credited as such, whether any goodwill existed or not. The trustees must make good the loss which had occurred owing to their failure to realise a valuable asset of the trust-estate.

At advising—

LORD PRESIDENT—There is one feature of the case which does not strike me as of great importance, namely, the fact that Mr Donald offered and paid £100 for the goodwill of the deceased's business. In answer to a challenge by the defender's counsel, when in the witness-box, he said he was willing to give £100, and he proceeded to carry out that offer afterwards. I regard that as merely a natural and quite legitimate step for a litigant to take, and it does not affect my mind as an element of evidence in the case.

But when we come to look at the facts, I am inclined to take a broad view of the matter. The deceased John Hodgart for a number of years prior to his death made a good deal of money out of a business he carried on. The business consisting in the supply of cotton presses and other kind of machinery to the order of customers in India. The figures speak to a substantial yield from this business, whatever it may be called. The next fact—and it is of great importance in view of the Indian aspect of the question—is that John Hodgart had been long in India, and had a wide acquaintance among persons in that country who were likely to require presses of the kind which he was ready to supply. Gentlemen acquainted with the facts and the country say that the business was really of great importance and value, and it is not unimportant to notice that they tell us that it is the habit of Indian traders to stick to a merchant who has served them well, and to whom they have been in the habit of resorting, to a much greater extent than is usual with people in this country. That being so, it does not appear to me to be of very much importance to enter on an analysis of the grounds on which the connection rested, or to say to what extent they were logical or sound. The fact remains that it did exist.

Coming to the time of John Hodgart's death, it might, I think, have been debated by the trustees whether there was then a substantial or appreciable goodwill to realise, because the business of the deceased was of a peculiar description, but I do not think the trustees ever considered the position, or were in a condition to do so impartially, and that owing to the position of some of them, for example, Mr Jones. But on the question whether there was a goodwill, I am of opinion that there is real evidence that there was, for while there were no premises, no plant, no establishment, no staff, to which a person might succeed, Mr Jones in fact assumed the title of successor, and addressed his

customers in India as such. This fact seems to me pretty decisive of the question, and really amounts to a declaration on the part of this one of the trustees that Mr Hodgart's business did not necessarily die with him, which is the present contention of the defenders. I am not disposed after that to doubt that there was a goodwill worth getting hold of, and I am therefore disposed to hold that there was a saleable goodwill for which the trustees are bound to account.

That result being reached, it is I think hardly possible to challenge the pecuniary finding of the Lord Ordinary, and no ground has been suggested for overthrowing it, except that there was no goodwill at all, and I hold on real and undisputable evidence that there was one.

The only other point is as to the delay which has occurred in bringing the action. On that point it is to be observed that the pursuers are young girls, and it is idle to say that they could have checked or supervised the action of the trustees. As to their father's conduct, while any earlier action taken by him might have been evidence of his opinion in the question as to whether there was a goodwill or not, it cannot constitute a bar against his children. It is clear, however, that Mr Donald was at arm's length with the trustees, and even were this action to be regarded as Mr Donald's action, the challenge was made within a reasonable time of the winding-up of the estate. I only mention that to meet the suggestion that it was a mere afterthought.

I think there is evidence that there was a goodwill, and I am not prepared to interfere with the Lord Ordinary's finding in the matter of amount.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

Counsel for the Pursuers—C. S. Dickson—Constable. Agents—N. Briggs, Constable, W.S.

Counsel for the Defender—Jameson—G. W. Burnett. Agents—F. J. Martin, W.S.

Friday, December 8.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BARR v. WALDIE.

Sale—Contract—Equal Monthly Quantities—Breach of Contract.

On 5th March 1891 a coalmaster addressed to a buyer a sale-note in these terms—"I confirm sale to you of 2500 tons of Skaterigg cannel coal, for shipment in equal monthly quantities to Brussels, in lots of 300 tons maximum;" and the letter enclosing this sale-note contained the words—"And