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, i, 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.

This was an action raised in the Sheriff Court at Glasgow by Aird & Coghill, printers and stationers, against Pullan & Adams, sometime printers' engineers, and the individual partners of that firm, in which the pursuers concluded (1) for authority to remove from their premises in Glasgow a certain Marinoni printing machine supplied by the defenders, and to have the same sold by public roup, and to have the proceeds of the sale consigned in Court; and (2) for decree against the defenders for £150 with interest, being the sum which the pursuers had paid to the defenders to account of the price of the machine in question.

By contract entered into between the pursuers and defenders on 9th November 1900 the latter undertook to supply the former with a perfecting duplex Marinoni machine, and to erect it in the works of the pursuers, and leave it in thorough good working condition for a sum of £190.

The pursuers averred that on or about 14th December 1900 the defenders delivered and fitted up the said machine, but that it was found to be disconform to contract, and unfit for the purpose for which it was ordered; that the defenders had been repeatedly called upon to put the machine into good working order, but had failed to do so, and in consequence all the work to which it was applied was spoiled and rendered useless; and that they (the pursuers) had never accepted the machine as conform to contract, and had rejected it, but that the defenders refused to remove the machine from their premises.

The defenders denied that the machine was disconform to contract, or unfit for the purpose for which it was ordered, and averred that the pursuers by retaining the machine between March 1901, when the machine was erected, and July 1902, when it was rejected, and by making alterations on it when in their possession, were barred from objecting to it

The pursuers pleaded—"(1) The pursuers having rejected the said machine as disconform to contract, and the defenders having refused to take it back, warrant to remove it should be granted as craved. (2) The pursuers having paid a portion of the price of said machine are entitled to be reimbursed, and decree for the sum concluded for should be granted as craved."

The defenders pleaded—"(2) The pursuers having accepted and paid for said machine cannot now reject same. (3) The pursuers' pretended rejection not having been made *tempestive*, the action should be dismissed. (4) *Esto* that pursuers were entitled to reject, they are barred by *mora* and taciturnity. (5) The defenders having carried through their contract of 9th November 1900 in its entirety, are entitled to absolvitor."

The Sheriff-Substitute (BALFOUR) allowed the parties a proof of their averments, which proceeded on 14th October and 9th November 1903. The material facts established at the proof are stated in the interlocutor of the Sheriff-Substitute, *infra*.

On 22nd February 1904 the Sheriff-Substitute pronounced the following interlocutor:—"Finds . . . that by letter dated 9th November 1900 the defenders contracted to supply the pursuers with a perfecting duplex Marinoni printing machine at a price not to exceed £190, and the defenders undertook to erect the machine at the pursuers' works at Douglas Street, Glasgow, and leave it in thorough good working condition: Finds that the pursuers had inspected the said machine at the works of Malcolmson, Limited, Redhill, near London, but the machine was not then working and was dismantled, and the defenders, after the said inspection, contracted to put it in good working condition at the pursuers' works: Finds that the machine arrived at the pursuers' works in December 1900, and it was erected in March 1901, and the pursuers commenced working with the said machine, but they found it defective on account of its not giving what is called a good register, and the printing appeared slurred, and it was not found to be in good order and condition: Finds that the pursuers from time to time complained to the defenders of the defects in the machine, and the defenders attempted to remedy them, but without success, and after they had attempted to print twelve different jobs, nine of which were defective, they ultimately, in July 1902, requested the defenders to remove the machine and reimburse them for the loss sustained: Finds that while these jobs were being printed the defenders did not object to implement their contract to put the machine in good working condition, but without demur they applied themselves to the remedying of the defects, and made additions to and alterations upon the machine from time to time, and in November 1902 they admitted in their letter of 7th November that the machine was not in order, and they made a proposal for repairing the machine and putting it in thorough good working order on payment of their jobbing account, but except on that footing they never offered to make any further alterations on the machine, and they have made no further alterations: Finds that on 20th April 1901 the pursuers paid £50 to account of the machine, and on 17th August 1901 they paid £100 to account of it, and in addition to these payments the defenders have credited the pursuers with the price of certain articles, viz., a guillotine and a hand-press amounting to £39, which three sums amount to £189, and these payments have been appropriated by the defenders to the price of the printing machine, £190, leaving a balance of only £1 due on that machine: Finds that the defenders have failed to prove that the defects in the machine, which ultimately led to the machine breaking down, were caused by the pursuers driving the machine at a greater rate of speed than it was capable of performing, or that the workmen employed by the pursuers were incompetent and unable to manipulate the machine in a skilful manner: Finds that the real defects in the machine have apparently been caused by the carriage and roller not working in unison, and this has led to defective register

and slurring, and the defenders notwithstanding all their attempts have been unable to remedy the defects, and they have not implemented their contract to erect the machine in the pursuers' works and leave it in thorough good working condition: Finds therefore that the defenders are in breach of contract, and the pursuers are entitled to have the machine removed and sold as craved: Grants warrant to the pursuers to remove the said machine to the premises of Messrs J. & R. Edmiston, licensed auctioneers in Glasgow, and also grants warrant to such auctioneers to sell the same by public roup, and appoints the proceeds of sale, after deducting the expenses thereof, to be consigned with the Clerk of Court to abide the orders of Court.

The defenders having appealed to the Sheriff (GUTHRIE), he, by interlocutor dated 3rd June 1904, adhered to the interlocutor of the Sheriff-Substitute, and remitted to him to proceed with the cause.

Thereafter the machine having been sold and the price realised having been consigned in Court, the Sheriff-Substitute by interlocutor of 18th August 1904 found the pursuers entitled to uplift the consigned money and to payment from the defenders of the balance of the £150 which the pursuers had paid the defenders to account of the price of the machine.

The defenders appealed to the Court of Session, and argued—The machine was in fact conform to contract, but even assuming that it was not so, it was received by the pursuers in December 1900, and was set up in their premises in the following March. The pursuers used the machine for their business and executed contracts with it, and did not reject it until July 1902, and even after that date used the machine for their business. The pursuers made alterations on the machine at their own hand, and also instructed the defenders to make alterations on it, and therefore the pursuers must be held to have elected to keep it, or in any case they must be held to have failed to reject it timeously. The pursuers having paid the price must be held to have accepted it as conform to contract, and are therefore barred from now rejecting it—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 14 and 35. The right to reject arose when the machine appeared to be defective for the first time, and as it was not then exercised, it could not be exercised afterwards. The alternative courses open to the pursuers were either to keep the machine and claim damages or to reject it at once, neither of which they did—Sale of Goods Act 1893, sec. 11, sub-sec. 2; *Morrison* v. *Mason & Clarkson*, January 14, 1898, 25 R. 427, 35 S.L.R. 335; *Electric Construction Company* v. *Harry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295.

Argued for the pursuers and respondents—The contract of sale was here qualified by a condition that the machine should be erected and left in good working condition. The fact was that it was never in good working condition. Payment of the price was not in itself equivalent to acceptance. In this case only two instalments of the price were paid, amounting to £150 in all. These payments were made only at the urgent request of the defenders, and on the understanding that the defenders would put the machine in thorough working order. The delay in rejecting it was reasonable, for what was reasonable delay depended on the facts of each particular case—*Fleming & Company* v. *Airdrie Iron Company*, January 20, 1882, 9 R. 473, 19 S.L.R. 405; *Pearce* v. *Irons*, February 25, 1869, 7 Macph. 571, 6 S.L.R. 372. In the present case dissatisfaction was intimated at the outset, and the delay in final rejection was merely an indulgence to the defenders in order to give them every opportunity of putting the machine right, and therefore the defenders were personally barred from pleading that the rejection was not timeous.

LORD JUSTICE-CLERK—I have arrived at the conclusion that the judgments of the Sheriff-Substitute and the Sheriff were right. This machine was ordered for a particular work to be done and was bought under an agreement whereby the defenders were to put it into, and leave it in good order in, the pursuers' premises. Now, I think the evidence is quite clear and distinct to the effect that that was never done.

It is quite true that there was a very long time occupied between the time when the machine was first put in and the time when the pursuers rejected it, but during the whole of that time the defenders, through Mr Pullan, were professing their ability to put matters right and to bring the machine the pursuers had paid for into such working order that they could not reject it. Time after time efforts were made to put it into working order and the results were always unsatisfactory, and I think we must take it to be the fact on the evidence (now hardly disputed) that at the time the pursuers gave intimation and rejected the machine and asked their money back, the machine, in spite of all the pursuers had done, was not in a condition to work properly. It is not a case at all of defects by which the machine breaks or anything of that kind, but it is just this, that the adjustment of the machine, however good the material it is made of, cannot be effected so as to produce the only satisfactory result for which such a machine was intended.

I cannot hold that the time was too long and that the rejection was not timeous. We were referred to a case in which the time extended to a period of over more than a year, and if the defenders for a time of this length were professing that they were able to bring it right, I do not think it is against the pursuers that they gave, time after time, further delay in the hope that the matter might be settled to the satisfaction of both parties.

But then it is said that apart from timeous rejection the pursuers have lost right because they altered the machine themselves. I think there is no ground whatever for saying that. It appears that certain cups, which in one part of the evidence are called oil-cups—and I suppose

there must have been oil-cups of certain sizes—were taken away and larger ones substituted. That had nothing to do with the sufficiency of the machine. It may have had something to do with the running of the machine in giving it a better supply of oil, but as to the working of the machine, which might be lubricated by hand lubricator or any other way, it had nothing to do with that.

Then it is said that the shaft was altered, because the engine, instead of being driven by belt as at first, was to be put into connection with an electric motor for the purpose of being driven by the motor shaft direct. All that was done there was I suppose to add something to the shaft so as to enable the motor to be fitted. That was a mere detail and had nothing to do with the working of the machine. It is what must be expected of a machine when it first comes to a shop in which it is proposed to put it at a particular place, that it might be found that the shafting was slightly too short and would require to have a piece welded on to it. That does not, in my opinion, in the least affect the right of the pursuers to reject the machine itself, as they did.

I do not think it is of the slightest weight that they paid the price at the request of Mr Pullan, who was anxious to get the money; but rights of rejection do not depend on whether the article has been paid for or not. You may reject an article you have paid for on the spot on delivery of the goods if it turns out that the goods are not conform to the contract.

The only remaining question is the liability of Mr Adams, and with regard to his liability I have no doubt whatever. He was a member of the firm that supplied the machine, and as long as it was a question whether that machine was to be accepted as being in fulfilment of the contract or whether it was to be rejected on the footing that it was not satisfactory, and that some question of damages might arise for the machine not being what it ought to have been—as long as these questions were open, Mr Adams, of Pullan & Adams (who were the firm responsible for the final working-out of that matter between the parties), was liable. Whatever the transactions the firm had entered into the partners could not escape from liability for fulfilment of these transactions simply by dissolving the partnership. It is quite plain that if they dissolved partnership altogether they could not escape, as no partner who leaves the firm escapes liability for those things done under his obligation as a member of the firm.

Therefore on the whole matter I agree with the decisions pronounced.

LORD YOUNG concurred.

LORD TRAYNER—I think the Sheriffs are right.

The parties here entered into a contract, which is binding on the defenders, to erect a certain machine at the pursuers' shop, and to leave that machine in thorough good working condition. Now, as a matter of fact, I think it has been established, and indeed seems to have been admitted before the Sheriff, that that contract was never fulfilled. The machine never was left in the defenders' premises in good working condition. Accordingly we start the case with this—that the defenders are guilty of a breach of contract, and that the defenders who were guilty of this breach of contract were Pullan & Adams, the then existing firm. If the contract was not fulfilled the buyer had a certain option either to reject the insufficient article that had been furnished or to keep it for what it was worth and make a claim of damages. In this case he is not making a claim of damages but is standing on his right to reject. That right is undoubtedly a buyer's right, but it must be timeously exercised or it will be lost. The defenders maintain that the right has been lost by the pursuers, and there are two particulars, I think, on which the defenders particularly rely in support of that view.

The first is that there was payment of the price, and the second that there was too long retention of the machine on the part of the defenders. Now, payment of the price may in some cases be an extremely strong element against the person who desires to reject the thing furnished to him as not conform to contract, and I do not know where we could get a better instance of the effect of payment than the case of *Morrison* cited to us. In that case a defective pump was delivered, accepted, tested, and after testing was paid for. But the payment in that case was equivalent to saying—"You have fulfilled your contract, and I am now to make payment in fulfilment of my obligation under the contract of sale." Now, that could never be said of the payments made here, for these payments by the pursuers were not made under any circumstances indicating that they were satisfied—that they were under an obligation to pay the price. We have it ascertained as a matter of fact that these payments were made by the pursuers not because they were satisfied, but, on the contrary, at a time when they were complaining that the contract had not been fulfilled and that the defenders were in breach of it. The payments were made as matter of favour at the urgent request of the defenders, who were needing money at the time. No inference therefore can be drawn here from payment of the price, or part of the price (for only part was paid), to the effect that the parties who paid it were paying it in discharge of an obligation to pay it when they did.

The next objection was that the machine was retained too long. If the machine had been kept as accepted for the period stated, it would certainly have been too late to reject it. But why was it kept so long? From the very outset it was apparent to the pursuers that the contract of the defenders had not been fulfilled, and they called on the defenders time after time to fulfil the contract by putting that machine into thoroughly good working order. The defenders accepted liability for doing that, and

they tried to do it month after month, and when the pursuers had lost their patience over these innumerable trials which were of no avail, and intimated to them that they would wait no longer for the machine, the defenders again asked, "Give us another chance and we will see what we can do. We are certain that we can put it right." That was done. Well, the thing could not be accomplished. But the reason for the retention of that machine was not to enable the pursuers to make up their mind whether they were to keep it—for it would have been too long a time to retain merely for that purpose—but to enable the defenders to fulfil their obligation.

In these circumstance I think there is no room for saying that there was abandonment on the part of the pursuers of their objections or any ground whatever from which the defenders could infer that they had accepted the machine as in proper fulfilment of their contract. Accordingly it seems to me that as against the case on the merits there is no valid defence stated in this case.

LORD MONCREIFF—We have had a full argument in this case, but I have come to the conclusion without any difficulty that the judgments of the Sheriffs are right.

Two questions were put to us—first, whether this machine was conform to contract; secondly, whether looking to the whole circumstances there was an unreasonable delay on the part of the pursuers in rejecting the machine. Now both these questions must, I think, be answered in the negative.

As to the first question I think it is clear on the evidence that the machine never at any time was conform to contract. The defender's counsel contended only in a very half-hearted manner that it was; but on the evidence I think it is quite clear that it was not.

The next question is the only one which to my mind raises any kind of difficulty in the case; and that is whether there was unreasonable delay in rejecting the machine. I think the case is exceptional. The delay was great—a year and a half—but the reason for that delay and the excuse for it, which I think was a sufficient excuse, was that the delay was not on the part of the pursuers but on the part of the makers of the machine. Under the contract they undertook to erect the machine and leave it in good working order on the premises of the pursuers; and the evidence shows this, that throughout the whole of that year and a half workmen from the defenders, or the defenders themselves, endeavoured frequently to get this machine to work properly and failed to do so.

As to payment of the price, that was made at the request of the defenders and before the delivery of the machine; and in that respect the case differs altogether from the case of *Morrison & Mason* v. *Clarkhouse & Others*, 25 R. 427, because in that case the machine was delivered in March 1895, tried and found satisfactory, and the pursuer thereafter paid the price on 31st May, while later on he wished to reject it; and I think that very properly it was found that it was too late to do so.

On the whole matter I agree with both your Lordships that the decision of the Sheriff should be affirmed.

The Court affirmed the judgment appealed against.

Counsel for the Defenders and Appellants—Wilton. Agent—William Douglas, S.S.C.

Counsel for the Pursuers and Respondents—Ure, K.C.—Graham Stewart. Agents—Dove, Lockhart, & Smart, S.S.C.

Saturday, December 24.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

FOREMAN AND ANOTHER *v.* DUKE OF BUCCLEUCH.

Expenses — Taxation — Account Incurred to English Solicitors as Local Agents—Remit to English Taxing Officer.

The pursuers in an action for damages obtained decree with expenses. Appended to their account of expenses was an account of expenses incurred by them to English solicitors, which they moved should be remitted to the Taxing Officer in London. The defender stated that large portions of this account were not chargeable against him, and moved that the account should in the first instance be sent to the Auditor in order that he might state what items were properly chargeable against the defender as between party and party. The Court *held* that the account incurred to the English solicitors fell to be taxed as between party and party according to English rules, and *remitted* the account to the Taxing Officer in London.

On the 21st February 1903 David Wallace Foreman, master mariner, St Andrews, Fifeshire, and John William Bell, farmer, Kilconquhar, Fifeshire, the registered owners of the ketch "T. W. Ashton" of Hull, raised an action against the Duke of Buccleuch and Queensberry, the proprietor of the harbour of Granton. In it they sought to recover £1000 in name of damages for loss suffered by them in consequence of the grounding of their vessel on a reef of rock in the harbour, through the fault of the defender or those for whom he was responsible.

On 9th December 1903, after a proof, the Lord Ordinary (STORMONTH DARLING) issued an interlocutor granting the pursuers decree for £395, 15s. 3d., finding them entitled to expenses, and remitting the account thereof to the Auditor to tax and report. The defender reclaimed to the First Division, but the interlocutor of the Lord Ordinary was adhered to with additional expenses, the account of which was remitted to the Auditor.