ton against Lord Gifford's interlocutor, dated 27th October 1874, and also as submitting to review the two previous interlocutors pronounced by Lord Gifford, dated respectively 19th February 1874 and 10th July 1874, adhere to the whole of said interlocutors, and refuse the reclaiming note; find the defenders entitled to additional expenses since 27th October 1874; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Pursuer—Balfour and M'Kechnie. Agent—Robert A. Veitch, S.S.C.

Counsel for the Defender—Solicitor-General Watson) and Hunter. Agents—Skene, Webster, & Peacock, W.S.

Wednesday, January 20.

FIRST DIVISION.

[Lord Gifford, Ordinary.

WATSON *v.* WATSON'S TRUSTEES.

Expenses—Reduction—Testament—Trust-Fund.

Circumstances in which, in an action of reduction of a testamentary trust-deed on the ground of fraud and circumvention and facility, directed, *inter alia*, against the trustees under the deed—the jury having found that the testator was of sound disposing mind, but that the deed had been obtained by fraud or circumvention—the Court allowed the expenses incurred by the pursuers, and also those incurred by the trustees out of the trust-estate.

Opinions—That it is always a question of circumstances whether or not, in such a case, the defenders are entitled to the expenses out of the trust-estate.

This was an action at the instance of Robert Watson and Mrs Agnes Watson or Martin, brother and sister of the deceased James Watson, banker, Airdrie, against the said James Watson's testamentary trustees and Miss Jessie Robertson, for reduction of a codicil executed by Mr James Watson on 27th March 1873, on the ground of incapacity and impetration by fraud and circumvention. It appeared that the said James Watson left three testamentary writings—viz., two trust-dispositions and settlements, dated respectively 19th February and 11th March 1873, and the codicil under reduction, which was a codicil to the trust-deed. The codicil bore that the said James Watson thereby revoked all former settlements executed by him at any time, except the said codicil and the deed upon which it was written.

The pursuer averred that at the date of the codicil the said James Watson was in a weak and facile state of mind, and that the defender Jessie Robertson, taking advantage of his state, obtained the codicil by fraud and circumvention, to the lesion of the said James Watson and of the pursuers.

The case went to a jury on the two following issues:—"(1) Whether the codicil dated 27th March 1873, of which No. 7 of process contains an extract, is not the deed of the said James Watson? (2) Whether at the time when the said codicil was signed the said James Watson was in a weak and facile state of mind, and easily imposed upon; and whether the defender Jessie Robertson, taking advantage of his said facility, did by fraud or circumvention impetrate and obtain the said codicil from the said James Watson, to his lesion?"

The jury found for the defenders upon the first issue, and for the pursuers upon the second.

The case now came before the Court on the question of expenses, and the pursuers asked for expenses, but moved the Court to find that the defenders, the trustees, were not entitled to take the expenses out of the trust-estate.

Authorities cited—*Graham* v. *Marshall*, Nov. 22, 1860, 23 D. 41; *Chalmers' Trs.* v. *Scott*, 8 Sh. 961; *Munro* v. *Strain*, June 18, 1874, 1 Rettie, 1039.

At advising—

LORD PRESIDENT—As I tried this case perhaps your Lordships may expect that I should give my impressions upon it. The jury found for the defenders on the first issue, and so negatived the plea of incapacity; and they found for the pursuers upon the second issue, which was a finding to the effect that Jessie Robertson obtained the deed under reduction by impetration. I think that the trustees stand perfectly free as regards Jessie Robertson's share in this transaction; and I do not think that it is even suggested that they used any undue influence in regard to the legacies. The case was a very narrow one as it came out on the trial, and I should not have been surprised if the jury had returned a verdict the other way. It was thus a fair case for trial; and I think that the trustees were placed in a difficult position when they had to make up their mind whether to defend the action or not. For they had to look not only to the interests of the Robertsons, but of a number of other people, whose rights under the codicil were very different from what they would have been if the second deed had been left standing. The trustees in deciding to defend this action were acting quite within their duty, and I therefore think they are entitled to have their expenses out of the trust-fund. No general rule can be laid down which must govern cases of this sort, but each case must be judged of by its own circumstances; and I think that the circumstances of the present case are strongly in favour of the defenders.

LORD DEAS—I do not think that the fact that the Jury find that the testator was not incapacitated by imbecility or unsoundness of mind affects the question in any material degree, for it is usual in such cases to lay two issues of this nature before the jury, and it does not much affect the question of expenses that the jury find for the defenders upon the first issue and for the pursuers upon the second.

The question before us is altogether one of circumstances, and to try to extract general rules out of the case is calculated to mislead. In the present case I agree with your Lordship that the circumstances are in favour of the defenders, and that they are entitled to their expenses out of the trust estate. [LORD PRESIDENT—I mentioned the fact that the jury returned a verdict for the defenders upon the first issue, because if it had appeared from the result that the testator had not sufficient mental capacity to make a will it might have made a considerable difference, for that was probably a matter which the trustees should have enquired into and known before they resolved to defend the action.] I may explain that my remark was not suggested by anything which had fallen from the Lord President, but was a general remark

applicable to cases of this description, when the jury found that the testator had capacity, but that the deed had been impetrated from him.

LORD ARDMILLAN—I concur. I think that a question of this sort must always be determined by the special circumstances of the case, and that no general rule can be laid down for the guidance of the Court. Upon the circumstances of this case I take the same view as your Lordship.

LORD MURE—I concur with all your Lordships. The question is entirely one of circumstances, and where there is no allegation that the trustees were concerned in the impetration of the deed, and where it is found that the testator was of sound disposing mind, I think the trustees are entitled to their expense out of the trust estate.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the notice of motion for the pursuers, No. 43 of process, to apply the verdict and find expenses due, and also on the notice of motion for the defenders, the trustees of the deceased James Watson, No. 44 of process, to allow the expenses incurred by the pursuers, and also those incurred by the said defenders, out of the trust estate—Apply the verdict found by the jury on the second issue in this cause; and in respect thereof, reduce, decern and declare in terms of the conclusions of the summons; find the pursuers entitled to the expenses incurred by them out of the trust estate of the said deceased James Watson, and find the said defenders also entitled to the expenses incurred by them out of the said trust-estate: Allow accounts of the said expenses to be given in, and remit the same, when lodged, to the Auditor to tax and to report."

Counsel for Pursuers—Balfour. Agent—David Dove, S.S.C,

Counsel for Defenders—Solicitor-General (Watson) and Trayner. Agent—Patrick S. Beveridge, S.S.C.

Friday, January 22.

SECOND DIVISION.

Lord Young, Ordinary.

ANDERSON (WATSON & CAMPBELL'S TR.) *v.* HAMILTON & CO.

Sequestration—Contract—Mora.

A contract was entered into between W. & Co., ironmasters, and H. and Co., shipbuilders, for delivery to H. & Co. of a certain quantity of iron to the specification of H. & Co. within a specified time. Before delivery of the whole iron had been made, W. and Co. became bankrupt. A trustee was appointed in the sequestration in March, and wrote then to H. & Co. refusing to cancel the contract. No further steps were taken until April, when the trustee wrote offering to fulfil the contract, which offer was refused. In an action at the instance of the trustee against H. & Co. for damage for breach of contract,—*held* that the offer to implement the contract was not timeously made, and the defenders were not bound by it.

The summons in this suit, at the instance of William Anderson, trustee on the sequestrated estate of Watson & Campbell, iron merchants, Glasgow, and Colin Campbell, sole partner, with consent and concurrence of certain commissioners on the said estates, against William Hamilton & Company, shipbuilders at Port-Glasgow, concluded for payment of £4000, with interest, in name of damages for breach of a contract with the pursuers.

The facts were as follows—On 4th December 1873 Watson & Campbell, iron merchants in Glasgow, addressed to the defenders a sale note in the following terms:—"Messrs Wm. Hamilton & Co., Port-Glasgow.—*Glasgow, 4th Dec.* 1873.—Dear Sirs,—We have to-day sold you say 2000 tons, more or less, as you may require, best ship plates and angle iron, to your specifications, at the sum of £13 p. ton overhead, also all filling and stanchion iron required for the above quantity of angles and plates, at the sum of £12, 10s. p. ton overhead, all delivered at your works, payable on the following conditions:—Payments to be made after the completion of each specification ('which we guarantee to be delivered *in seriatim*') on the first cash day of the second month following completion of said specifications.—Yours, &c., *pro* WATSON & CAMPBELL, J. C. STEEL. All iron to be delivered not later than six weeks after receipt of specification.—(Initid.) *pro* W. & C., J. C. S." On the same day, 4th December 1873, the defenders addressed to Watson & Campbell a letter in which they said:—"We have your sale note of even date for plate angles, &c., which we hereby accept."

The defenders sent in their first specification of iron on 24th February 1874, and they then specified about 80 tons; on 26th February they specified for about 11 tons; on 7th March for 4 cwt.; on 9th March for about 40 tons; and on 10th March they specified for about 9 tons, making the aggregate quantity specified for about 140 tons 4 cwt.

The pursuer stated that by the 13th of March they had delivered of the 80 tons ordered on 24th February 51 tons: of the 11 tons ordered on 26th February 4 tons; the whole 4 cwt. ordered on 11th March; and no part of the 49 tons ordered on the 9th and 10th March. The aggregate quantity thus delivered was 55 tons 4 cwts., leaving about 85 tons still to be delivered; and such ample time remained, counting six weeks from the receipt of the several specifications, that no difficulty would have been experienced in delivering the whole within the contract period.

On the 14th March the defenders, after having urged upon the pursuer immediate delivery of the floor plate, and receiving no answer to their communication, sent a letter intimating that they had been obliged to cancel the contract.

On 16th March the pursuer wrote the defenders, requesting them to keep the contract on their books for a few days longer, till they should get the necessary arrangements made for its fulfilment; but on the 17th March the defenders wrote stating that they had been obliged to cancel their contract, and place their specifications in other hands. On 17th March 1874 the estates of Watson & Campbell were sequestrated, and the pursuer appointed judicial factor. On 19th March 1874 the pursuer, as judicial factor foresaid, addressed to the defenders a letter in the following terms:—"Gentlemen.—*Watson & Campbell.*—Yours of the 17th inst. addressed to this firm, has been handed