ment of the balance or residue of the said revenue or income equally between the parishes of Kilmarnock and Riccarton, to be paid to and expended by the ministers of said respective parishes in charitable and benevolent purposes connected therewith." The question is, Whether under that clause the ministers are to receive the money to be paid to them and thereafter to administer it at their discretion, the trustees being exonerated from all liability after they have paid over the money and got a voucher therefor from the ministers?

It is maintained by the trustees that the ministers are the administrators of the fund but that they are bound to account to the principal trust as to their mode of spending the money. We are not dealing with any question of maladministration, there is no suggestion that the ministers are defeating the intentions of the testatrix, or applying the money to purposes different from those which she intended it to be applied to. The only question is whether the main body of trustees are entitled to demand from the ministers an account of the way in which they have discharged their duty by expending the money, upon the footing that they have paid to proper recipients. It is purely a question of construction, and my opinion is that, under this deed, after the money has been paid over and duly vouched for by the ministers, the trustees are exonerated and are not entitled to call on the ministers to account as to their mode of administration or its details.

LORD YOUNG—I am substantially of the same opinion. The legal question before us is, whether it is the legal right of one party to demand from the other, and the duty of the other party to make to the first, an annual account of their administration. I am of opinion on the case that there is no such right and duty. The case is substantially the same as if a testator directed his trustees to hand over annually during a limited period or during a general period a sum to the minister of a parish or church to be expended by him, according to his discretion, on charitable or benevolent purposes connected with the parish or church. Trustees so directed would discharge their duty by handing over the sum to the specified recipient to be applied by him according to his discretion, and it would be no part of the latter's duty to give details of the objects of his charity or the mode in which he exercised his judgment. The present case is in exactly the same position. The deed indeed does not say that the ministers are to apply the fund "in exercise of their judgment and discretion," but I am of opinion that these words are implied though not expressed.

The only thing I wish to add, is that I should not at all approve—indeed I should disapprove—of the conduct of any one of these ministers who maintained an absolute secrecy as to what he did. I think that would be exceedingly indiscreet, and if any case were presented to this Court indicating that such concealment was practised in order to hide a questionable exercise of discretion in the matter, I think this Court would give all the aid requisite to let in all the light needed to have the charge cleared up, and, if necessary, to see that the money was rightly expended. But there is no suggestion of that kind here, and I assume that there is no reason for supposing that these ministers were expending the money in any other way than was reasonable according to their discretion.

I agree in the opinion that these questions submitted to us should be answered in the negative.

LORD RUTHERFURD CLARK—I am not by any means free from doubt as to the proper course to be followed in this case. But as all your Lordships are of opinion that there is no obligation to account, I shall not dissent.

LORD TRAYNER—I take these questions as questions of construction of the terms of the deed. I am of opinion that there was no duty on the part of the ministers entrusted with the direct duty of spending the money to account for the exercise of their discretion, either in a general or detailed manner, to the trustees. I therefore agree that the questions should be answered in the negative.

The Court answered the questions in the negative.

Counsel for the First Parties — Asher, Q.C.—C. S. Dickson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Second Parties—Salvesen —Guy. Agents—Wallace & Pennell, W.S.

---

*Wednesday, May 29.*

## SECOND DIVISION.

[Sheriff of Lanarkshire.

## PINI & COMPANY *v.* SMITH & COMPANY.

*Contract—Sale—Timeous Rejection.*

A manufacturer, from whom a quantity of iron pipes had been ordered by a merchant in London, delivered them, as required by his contract, to the shipping agent of the buyer at Glasgow, and forwarded the invoice to London. The merchant having objected that the goods described in the invoice were not the same as had been ordered, the London agent of the manufacturer wrote a docquet upon the invoice to the effect that the goods were "in every respect the same as ordered," and the merchant then paid the contract price. The pipes were sent by sea to Liverpool, transshipped there, and forwarded to Buenos Ayres. No examination of the pipes was made either at Glasgow or Liverpool. When they arrived at Buenos Ayres they were rejected by the cus-

tomers of the London merchant as disconform to contract. The merchant did not inform the manufacturer of this fact until a month after it had been communicated to him, and gave no detailed information of the grounds of rejection until seven months later.

In an action for repayment of the price and for damages, the Court *assoilzied* the defender, *holding* that the goods had not been timeously rejected.

*Opinion per* Lord Justice-Clerk, Lord Young, and Lord Trayner, that the assurance given by the manufacturer's agent that the goods were conform to contract did not absolve the buyer from the duty of examination, and that the goods ought to have been examined either at Glasgow or Liverpool, and there rejected if not conform to contract.

*Opinion per* Lord Rutherfurd Clark, that the safest ground of judgment was that the goods had not been timeously rejected after their arrival at Buenos Ayres.

Upon February 13, 1893, Henry Pini & Company, commission merchants, London, sent an order to George Smith & Company, ironfounders, Glasgow, in the following terms:—"*Soil-pipes* to W. Macfarlane & Company's pattern, No. 32, 1500 pipes, 4 in. dia., 6 ft. long, ¼ in. metal, to weigh 60 lbs. each, coated, at 1s. 3¾d. per yard. . . . Both soil-pipes and R.W. pipes guaranteed equal in all respects to Macfarlane's goods . . . Extra care to be given to the coating of the soil-pipes and painting of the R.W. pipes. Where delivered—F.A.S. Glasgow, in four weeks. Terms—5 per cent. discount monthly."

Upon 1st March Pini & Company directed Smith & Company that the pipes were to be consigned to the order of R. Mackill & Company, Glasgow, and the mate's receipt to be handed to that company. Upon 23rd March Smith & Company sent an invoice to Pini & Company, intimating that 1500 No. 39 pipes of certain dimensions had been shipped free alongside the s.s. "Fire King" at Glasgow, c/o Messrs Robert Mackill & Company, 29 Waterloo Street, Glasgow. Upon March 25th Pini & Company wrote—"We know nothing of No. 39 pipes . . . . and cannot accept this description. If you will please refer to our order you will see that we specified Macfarlane's patterns." In consequence of this letter the London agent of Smith & Company called upon Pini & Company and wrote this docquet upon the invoice "Above pipes are same in every respect as ordered and estimated for." Upon March 27th Pini & Company paid Smith & Company £257, 19s. 8d. as the contract price of the goods ordered.

The goods were sent to Liverpool, there transhipped, and sent to Buenos Ayres. Neither at Glasgow nor Liverpool was any examination of the pipes made on behalf of Pini & Company.

When the goods arrived at Buenos Ayres Pini & Company's buyers refused to take delivery on the ground, as they stated in a letter of May 20th 1893, that the pipes were "different in weight and shape from those of Macfarlane, contrary to what had been ordered." Upon 8th June they wrote finally declining the pipes. Pini & Company received their customers' letter of 20th May about the middle of June, but they did not inform Smith & Company that the pipes had been rejected until July 11th, upon which date they wrote that their customers in Buenos Ayres had refused to take delivery, and that the pipes were lying for Smith & Company's account. No detailed information of the particulars in which the pipes were said to be disconform to contract was given to Smith & Company until 18th January 1894, when Pini & Company sent them a letter containing details of the points in which they considered Smith & Company's pipes differed from Macfarlane's pattern.

In February 1894 Pini & Company raised an action in the Sheriff Court at Glasgow (1) for repayment of the price of the pipes; and (2) for payment of £250 for freight, insurance, &c., and loss and damage to their reputation.

The pursuers pleaded—"(1) The defenders having obtained payment for the soil pipes on the false representation that they were of the description ordered, are bound to return the money so obtained, with interest and expenses incurred. (2) The defenders having failed to supply soil pipes in terms of their contract, are bound to make good to the pursuers all loss sustained through their failure to fulfil their contract."

The defenders pleaded—"(3) The pursuers having taken delivery of the goods and having used and dealt with them as their own property, the defenders are entitled to absolvitor. (4) The goods in question having been delivered to and received by the pursuers in the port of Glasgow, the defenders have no concern with what happened to them in Buenos Ayres. (5) The goods not having been timeously rejected, the pursuers' claim is barred."

Upon 28th January 1895 the Sheriff-Substitute (GUTHRIE), after certain findings in fact, found "that the pursuers' rejection was not timeous, and that they are not entitled to repayment of the price or to damages as concluded for: Therefore assoilzies the defenders, and decerns."

"*Note.*—The pursuers call themselves commission merchants, and it was no doubt well known to the defenders that they were probably purchasing for some correspondent in South America. They were, however, the only persons with whom the defenders contracted, or whom the defenders knew about in the matter. There was in the contract or the negotiations no reference to a foreign principal, the goods were not as in some examples that occur in practice enclosed or packed so as to make examination in this country difficult, or injurious, or impossible, and there was no condition at all qualifying the natural inference from the terms of the contract, that on delivery to the pursuers and payment by them the matter ended. Neither usage of trade nor the course of dealing between the parties

supports the contention that the question of performance should remain open till the buyer in Buenos Ayres had examined and approved. It is said that Mr Brown, the defenders' agent in London, wrote a guarantee upon the invoice and got payment of the price a month before the stipulated time of payment. It was argued in effect that that was a guarantee that the pipes would pass inspection at Buenos Ayres—in other words, that it added a new condition to the contract, making it equivalent to a sale with delivery at Buenos Ayres. In the light of what took place at the time, it seems to have been intended only to remove an objection that had been taken to the terms of the invoice, and there is no ground for holding that Mr Brown had power to make so serious a change on the original agreement. The defenders, if one may draw an inference from the large additional discount they offered for this early payment, were anxious to get their money, but it was not argued, so far as I understood, that they would have been willing to allow so serious an alteration of the contract as the pursuers' view of this representation involves, that Mr Brown had express authority so to vary it, or that they were aware that the money had been obtained upon the footing that a further guarantee as to the goods had been given. All this argument, however, seems to be futile wh n we notice that what Mr Brown wrote is but an expression of the defenders' original obligation, and that it does not bear to relieve the pursuers of the duty of examining and rejecting the goods within a reasonable time, which is, as I read the contract, before or immediately after delivery to them, the buyers.

The pursuers appealed, and argued—The question was whether the defenders had timeously rejected the goods when they were found disconform to contract, so as to entitle them to repetition of the price they had paid under the idea that they were conform to contract. It was admitted that the goods were not examined at Glasgow, nor at Liverpool, but no duty lay upon the pursuers to make such an examination. The general rule was, if the buyer had no opportunity of examining the goods before they were sent to their destination abroad, he must reject them on discovering the defect. In this case the buyer was in London, and Mackill his agent was only agent for receiving the goods on board the vessel. He could not bind his principal to anything else—Bell's Comms. i. 464; *Stevenson* v. *Dalrymple*, June 28, 1808, M. *voce* Sale, App. i. 5. In that case the Court proceeded upon what followed the buyer's discovery that the goods were not conform to contract, not upon the ground that he had not examined them before he used them—*M'Cormick & Company* v. *Rittmeyer & Company*, June 3, 1869, 7 Macph. 854. In the second place, if it was considered that the pursuers ought to have had the goods examined and rejected at Glasgow or Liverpool, the defenders had put them off their guard by their agent's action in writing the docquet he did upon the invoice, the effect of that docquet being that the goods were guaranteed to be conform to contract, and the obligation to examine was therefore taken off the pursuers.

The defenders argued — The defenders were bound to deliver the goods "free alongside" the ship, and it was not denied that they had carried out that part of the bargain. It was then the duty of the pursuers to examine the goods for themselves, and to reject them if disconform to contract. To say that they were excused from that duty because they themselves resided in London, and the agent they employed in Glasgow was not capable of examining the goods, was absurd. In the second place, the docquet upon the invoice could not have thrown them off their guard, because all that it referred to was the difference between the number under which the pipes had been ordered and the price that appeared in the invoice. The pursuers must have known that the defenders' London agent could not have any personal knowledge that the pipes were according to contract. Even if no duty lay upon the pursuers to examine the goods upon shipment, they were not timeously rejected by them when the buyer in Buenos Ayres refused them, because, although he let the pursuers know he would not take them by a letter dated May 20th 1893, they did not acquaint the defenders with that fact until July 11th, and did not furnish them with specific details of the objections to the pipes until January 18th 1894.

At advising—

LORD JUSTICE-CLERK—From the record it is plain that, when the goods were delivered in Glasgow, they were capable of undergoing an examination there to see if they were made in conformity with the order which had been given. It would not have been possible probably to have examined each particular pipe, but it would have been possible for the pursuers to have had such an examination of them that the person who made the examination could say that all the pipes he looked at were in conformity with the order, and that, if the consignee afterwards found that any quantity were not in conformity with the order, he would have been entitled to refuse the whole. That was exactly the case that was referred to, of the boots that were supplied for the French army, when some of the bales were examined and found correct, but on their being sent on, large quantities being found to be disconform to contract, the consignees were found entitled to reject. I have no doubt of the justice of the decision. Now, here no attempt at examination at all was made, and the goods were shipped without anyone finding out whether any of the goods were conform to contract or not.

The only suggestion that is made why no proper examination of the goods took place is this, that the buyers of the goods—the pursuers in this case—were thrown off their guard by something that was said to them by an agent of the defenders in London,

and by an opinion he gave. What took place was this—The goods had been ordered by the pursuers as being a certain number on the defenders' list of manufactured articles. When the invoice was sent to London it was noticed that the goods shipped were described as being of a different number from that which had been ordered, and all that the London agent did was to put a docquet in the invoice to the effect that the goods shipped under the one number were as good in quality and practically the same as those ordered under the other number. I therefore think that the Sheriff-Substitute came to a right decision, and that there was not timeous rejection of the goods on their delivery at Glasgow.

I have come to the decision I have stated upon consideration of the record and pleadings alone, but when we come to the proof it is plain, even if we could not hold there had not been timeous rejection at Glasgow, that after the goods had reached Buenos Ayres there was inexcusable delay in letting the defenders know that the pursuers rejected the goods after they had had full opportunity of inspecting them and knowledge of the alleged disconformity. No notice was given for two months, and no ground for objection stated for eight months.

LORD YOUNG—I am quite satisfied with the Sheriff-Substitute's judgment and the grounds he states in support of it, and think the pursuer has stated no case for repetition of the price of the goods. I should be disposed to substitute for the Sheriff-Substitute's finding "that on arrival at Buenos Ayres the pursuers' buyers there rejected the pipes as disconform to order, and that the pursuers on 11th July intimated this to defenders and rejected the pipes," some such finding as that "the pursuers bought and took delivery of the pipes in Glasgow without complaint and sent them on to Buenos Ayres." I think that is an end of the case, and that some other person in Buenos Ayres objected to the goods sent is of no importance whatever in a case between the present pursuers and defenders.

The only speciality in the case founded on was this. It is said that the pursuers got an assurance in writing from the defenders' agent in London that the goods were according to contract. I agree with the view that the Sheriff-Substitute takes of that incident—although the explanation given at the bar may confirm the view—that it does not affect the contract at all, as it was for the pursuers at the time of the delivery of the goods to examine them and reject them if that was found to be necessary. I therefore think we should refuse the appeal.

LORD RUTHERFURD CLARK—I think that it is the safest ground of judgment that the goods were not timeously rejected after they reached Buenos Ayres.

LORD TRAYNER—I agree in the judgment proposed. The contract in this case was to deliver the goods alongside the ship at Glasgow, and in that respect the contract was fulfilled.

The pursuers cannot say that they had no opportunity of examining the goods merely because they were in London and had a shipping agent to act as their agent in Glasgow. They had an opportunity of examining the pipes at Glasgow by themselves or by any qualified agent, and if they did not do so *sibi imputent*. But if the goods, not having been examined at Glasgow, had been examined at Liverpool (where they were sent to be shipped for Buenos Ayres, the port of destination) and had there been rejected as disconform to contract, I am not prepared to say that such rejection would not have been timeous.

It is that view which in my opinion gives importance to the assurance given in London to the pursuers by the defenders' agent that the goods were in all respects as specified and ordered. If that assurance, contained in the docquet added to the invoice, had been intended to have, and had had, the effect of preventing the pursuers from making an examination, and if the pursuers had thus been put off their guard or induced to accept or ship the goods without examination, I am not sure that they would have been barred from subsequently rejecting the goods as disconform to contract and recovering the price which they had paid. I do not think, however, that that was the meaning or purpose of the assurance. It appears to me that it was an assurance only to the effect that, as the pursuers had ordered pipes under a certain number in an advertisement list, and the goods named in the invoice bore to be of a different number, yet, notwithstanding that seeming difference, the goods supplied were the same in character and dimensions as those which had been ordered. The assurance was not intended by the defenders' agent to relieve the pursuers of their duty of examination, nor was it so understood by the pursuers.

Even if the pursuers had a right to reject the goods on examination after their arrival at Buenos Ayres, I am of opinion that there was not timeous rejection on the part of the pursuers, because, although the pursuers' buyer objected in writing to accept the goods in May, and upon June 8th wrote that the pipes must remain at the defenders' account, no communication was made to the defenders until July, and no details of the objection given until the following January. I think it was then too late to reject the goods.

The Court pronounced the following interlocutor:—

"Recal the interlocutor appealed against: Find in fact (1) that the parties agreed that proof should in the meantime be taken, and judgment given with reference only to the defenders' 3rd, 4th, and 5th pleas-in-law: Find (2) that the pursuers in February 1893 ordered of the defenders a quantity of soil-pipes of specified dimensions, weight, and finish, to 'W. Macfarlane & Company's

pattern, and guaranteed equal in all respects to Macfarlane's goods,' and that the pipes were to be delivered free alongside at Glasgow: Find (3) that said pipes were made and delivered alongside the 'Fire King' at Glasgow. carried to Liverpool, and there transhipped for Buenos Ayres, and that the pursuers paid the price thereof to the defenders on delivery in March 1893: Find (4) that it is neither averred nor proved that the pursuers could not have examined the pipes so as to ascertain whether they were conform to contract either at Glasgow or Liverpool: Find (5) that previous to 20th May 1893 the pipes had been examined at Buenos Ayres, and that up to and including 10th July thereafter the said pipes were not rejected as disconform to order, and that no details of such disconformity were given before January 1894: Find in law that the pursuers did not timeously reject said pipes, and are not entitled to repayment of the price, or to damages, as concluded for: Therefore assoilzie the defenders, and decern,' &c.

Counsel for the Pursuers—Asher, Q.C.—Younger. Agents — Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Ure—Clyde Agents—Simpson & Marwick, W.S.

---

## HOUSE OF LORDS.

*Thursday, May 30.*

(Before the Lord Chancellor (Herschell), Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Shand.)

### INGLIS *v.* GILLANDERS.

(*Supra*, p. 164.)

*Succession—Trust-Disposition and Settlement—Entail—Direction to Entail Lands on Heirs of Entailed Estate—Disentail.*

In his trust-settlement a testator directed his trustees to execute a deed of entail of his estate of Newmore to and in favour of a series of heirs therein specified, "whom failing to my nephew J F G, Esquire, of Highfield, and failing the whole persons above specified, then from respect to my deceased grandfather G G, Esquire, of Highfield, to the heir in possession of the estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in said entail in the order set down in said entail successively, declaring that my object and intention is that, failing the above series of heirs named by me, then the said lands and estate hereby conveyed are to be held by the heir of entail of the estate of Highfield along with the said estate of Highfield."

In a codicil the truster expressed the desire that it should be understood that the destination to J F G, "who is now in possession of the estate of Highfield under the entail thereof," as well as the "subsequent destination to the heir of entail in possession of the said estate of Highfield under the entail thereof for the time, and to the other heirs-substitute in the said entail," was made by him out of respect to the memory of his late grandfather G G of Highfield.

The trustees executed a deed of entail by which they disponed the lands of Newmore to the series of heirs other than the heirs-of-entail of Highfield in the words of the destination contained in the trust-deed, "whom failing to J F G, Esquire, of Highfield, who is the heir now in possession of the estate of Highfield under the entail thereof executed by G G, Esquire, of Highfield, . . . and failing the said J F G, then to the other heirs-substitute in said entail of Highfield in the order set down in said entail respectively, viz." — the heirs-substitute in the Highfield entail being then enumerated in their order.

The heir of entail who succeeded to the estate of Highfield after J F G, disentailed that estate, and conveyed it to trustees for behoof of a series of heirs different from those called to the succession in the original entail.

*Held* (*aff.* judgment of Second Division) that the testator, in directing the estate of Newmore to be entailed on the heirs-substitute in the Highfield entail, had not made it a condition of their right to succeed to Newmore, that when the succession opened to them they should be in possession of Highfield as heirs of tailzie, and therefore that the trustees had acted in conformity with the testator's directions in making the destination to the heirs of entail of Highfield in the terms above specified, and that that destination did not become inoperative when the estate of Highfield was disentailed.

Reported *supra*, p. 164.

The pursuer appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, I have had an opportunity of considering the opinion which my noble and learned friend Lord Watson is about to express, and it is only necessary for me to state that I entirely concur in the views contained in that opinion.

LORD WATSON—My Lords, the appellant and pursuer of this action is the heir in possession of the estate of Newmore in the county of Ross, under the fetters of an entail executed in October 1869, and thereafter duly recorded by the testamentary trustees of the late Francis Mackenzie Gillanders of Newmore, in pursuance of directions to that effect contained in his trust-settlement dated the 5th August 1858, and relative codicil dated the 9th July 1860.