good to the said Countess of Rothes, and her heirs and successors, all damage which may be occasioned to her or them by reason of or in consequence of any bursting or flood or escape of water from any reservoir," and so on. Now, it being assumed there was a flood, the Lord Ordinary has found that this case is not within the clause I have referred to, and the ground upon which he has proceeded is that it does not appear that if the reservoir had not been there this damage would not have been caused. The only question in the first instance is, whether the contingency expressed in the clause has occurred—that is, whether the pursuer has suffered injury by reason of the discharge from this reservoir, whether by bursting or escape or flood. On this question there can be no doubt whatever so far as the circumstances are concerned. It is proved that on the 18th, 19th, and 20th August 1877 a large body of water was continuously discharged from this reservoir at a height of 60 feet above the bed of the stream, tearing up the solid masonry of the byewash—a structure about 100 yards in length—and spreading over the banks of the stream below, where it inflicted the damage now complained of on the property of the pursuer. Now, in my opinion, that is quite sufficient to found this action, and I do not think any further inquiry either necessary or relevant. It is said, however, to be immaterial that the water was so discharged from the reservoir, unless it can be also proved that if the reservoir had never been there the same amount of water, at the same height and under the same conditions, would not have flowed down the same channel and inflicted the same injury. It is needless to say that there is not a word in the statute to this effect. I see no reason for applying this singular condition to the right to recover damage done by flood any more than to injury done by bursting or escape. But if from some unavoidable cause the reservoir had been burst through—from lightning, or a waterspout, or any other singular cause—it might quite as reasonably have been contended, had a flood existed at the time, that the same or a greater amount of water would have come down had the reservoir not been there. But this view of the case, in my opinion, is entirely fallacious—first, because it places on the pursuer the burden of proving a fact which never can be proved, and, secondly, because whatever the result might have been if the reservoir had never been made, it is quite certain, on the simplest natural laws, that the result must have been different from what actually occurred. To foretell before the event, or to assume in the absence of the event, the effects which might be produced by an unusual rainfall on a given stream, is a problem wholly beyond the range of calculation. Water in flood is one of the most capricious of natural agents. When in 1829 three days' rainfall in the month of July produced what are historically known as the Morayshire Floods, no one could have foretold—or if anyone had been told he would not have believed — the extraordinary and eccentric results which that rainfall caused. So here, if this *novum manufactum* had not been placed in the bed of the stream, a hundred contingencies might have been the result of the rainfall which occurred. The water might have forced other channels—it might have spread over a larger surface—it might have damaged the lands of others—it might have inflicted less injury on those of the Countess of Rothes—or numberless other contingencies might have occurred, all equally incapable of demonstration. These are chances of which a Court of law cannot take cognisance, and which the statute was intended, in my mind, to exclude. Science can give us no aid, as the proof has conclusively shown, for science, in the shape of four eminent engineers who were examined, is hopelessly at variance with itself as to the simple problem of the effect of the wind on a large sheet of water, nor do I think that any deductions of our own are likely to add force to their reasonings. The only thing that to me appears certain is, that the result with the reservoir there must have been different from what it would have been if the reservoir had not been there.

These are, generally, the grounds upon which my difficulty rests. I also think that with the sluices which the Commissioners were bound to keep some effort might have been made to moderate and regulate the discharge of this unusual flood. Danskin admits as much as that he ought to have done it, and that if he had foreseen the flood he would have done it, and that he only did not do it from the fact of laziness—that he could not be at the trouble to go back for his boat in order to reach the sluices, while on the other hand, on a larger sheet the sluices were opened with great advantage, and no damage was done there.

On the whole matter, I thought it right to express that opinion, because I think this inquiry into what might have happened if the reservoir had not been there is wholly irrelevant, and moreover is inconsistent with the true construction of the 43d section of the statute, which, in my opinion, makes it an absolute condition of the right to make the reservoir that damage arising from it shall be paid without inquiry into the contingencies of which your Lordships speak.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Trayner—Graham-Murray. Agents — Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Respondents)—Asher—Mackintosh. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

Saturday June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

DOWNIE AND ANOTHER (CAMPBELL'S TRUSTEES), PETITIONERS.

Trust — Power to Sell—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 3 *— Where Building left for Charitable Purpose becomes Unsuitable.*

Section 3 of the above Act empowered the Court to grant authority to trustees to sell the estate under their management "on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." In 1863 a truster, on the narrative that he had a desire to promote the education and religious instruction

of children of the poorest class belonging to the Roman Catholic Church, disponed to trustees a certain building in Edinburgh, to be used in all time coming as a Roman Catholic school for girls; and declared that this purpose was to be inserted as an express condition in all future transmissions of the subjects thereby disponed, and that if such a condition should not be inserted or should not be observed in the use and occupancy of the subjects, it should be in the power of the disponer or his heirs to declare his disposition, and all that had followed thereon, to be void without declarator or other process of law. There was no power of sale conferred on the trustees. In 1879, the buildings having from change of circumstances become unsuitable for their original purposes, the trustees presented a petition for authority to sell and apply the price in the purchase of new premises. *Held* (*rev.* the decision of Lord Adam, Ordinary) that a sale was expedient, and was not inconsistent with the main design and object of the truster — petition therefore granted.

Observed (*per* Lord President Inglis) that where a building was declared to be appropriated to the uses of a particular society or church, and had become unsuited to that purpose, it was within the ordinary powers of the Court to authorise the trustees to sell the building and to purchase a new one; and all that the Trusts (Scotland) Act 1869 did was to substitute the more summary form of a petition for an action of declarator.

The petitioners were the trustees acting under the trust-disposition of the late Robert Campbell of Skerrington, dated 4th and recorded 8th July 1863, by which, on the narrative that he had a desire to promote the education and religious instruction of children of the poorest class belonging to the Roman Catholic Church, of which Church he was a member, he disponed to his trustees certain buildings in Edinburgh—"Declaring always, as it is hereby expressly provided and declared, that these presents are granted to the trustees herein named and their foresaids in trust always for the Roman Catholic Church or congregations in Edinburgh and its vicinity, and for the purpose following — That is to say, the said trustees shall hold and maintain in all time coming the subjects hereby disponed, now converted into a school, as a Roman Catholic girls' school, which shall include an infant department, the children of which infant department shall include boys of the usual age admitted into infant schools: Declaring, as it is hereby specially provided and declared, that the said purpose is an express condition and stipulation of these presents, and that such purpose, condition, and stipulation shall, in all future transmissions of the subjects hereby disponed to be made to the trustees to be assumed as aforesaid, be fully inserted or validly referred to in terms of law: Declaring further, that if the said purpose, condition, and stipulation are not inserted in any disposition or other writing transmitting the said subjects, or validly referred to as aforesaid, or if the said purpose, condition, and stipulation shall not be observed in the use and occupancy of said subjects, it shall be in the power of the disponer or his heirs to declare this disposition and all that has followed thereon null and void, and of no avail, force, or effect whatever, without any declarator or other process of law to that effect, it being hereby declared that these presents are expressly granted under said condition and stipulation, and no otherwise: And it is also hereby further provided and declared that the subjects above disponed, and now converted into a school as aforesaid, shall in all time coming be designed and called by the name of 'St Anne's Catholic School, which school shall in all time coming be under the direction and control of the Roman Catholic bishop or Vicar-Apostolic officially in the Eastern District of Scotland for the time, or those delegated by him for that purpose for the time being." No power of sale was given to the trustees.

After the buildings so conveyed had been used for a considerable number of years for the purposes and in the manner provided by the trust-deed, it was found impossible to carry on the school in them any longer. The petitioners accordingly, with the consent of the truster's heir-at-law, made this application to sell the subjects, proceeding under section 3d of "The Trusts (Scotland) Act 1867 (30 and 31 Vict. c. 97), which provided—"It shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof; and the Court shall determine all questions of expenses in relation to such applications; and where it shall be of opinion that the expense of any such application should not be charged against the trust-estate, it shall so find in disposing of the application;" and the first of the acts so to be authorised was "To sell the trust-estate or any part of it."

The petition set forth that "The accommodation is insufficient for the number of children attending the school, and the building cannot be enlarged upon its present site. It is, moreover, built close up to a large and high tenement, which interferes with its proper ventilation, and the teachers complain of its being unhealthy. The premises are so unsuitable for the school that the Education Department have intimated to the managers of the school that unless better premises are provided the Government grant will be withdrawn." In these circumstances the petitioners prayed the Court "to grant authority to the petitioners, as trustees foresaid, and the survivor of them, and their successors in office, to sell all and whole the trust subjects before described, and that either by public roup or private bargain, and to grant and deliver in favour of the purchaser or purchasers a valid disposition, or such other deed or deeds of conveyance as may be necessary for completing his or their title to the said subjects, and containing all the usual and necessary clauses, and also all other deeds that may be requisite and necessary for carrying into effect the foresaid purpose; and to authorise the petitioners to pay the expenses of and attending this application, and of the procedure to follow hereon, and of the sale, and titles to be granted by the petitioners out of the price to be received by them from the sale of the said subjects; and to apply the balance of the said price in payment *pro tanto* of the price of the new feu acquired by the petitioners, and of erecting the school buildings to be erected thereon in place of and in substitution for the present school, and to decern; or to do further or other-

wise in the premises as to your Lordships may seem fit."

The Lord Ordinary (ADAM), after a remit for inquiry into the facts and circumstances of the case, pronounced an interlocutor refusing the prayer of the petition, but authorising the petitioners to charge the expenses against the trust-estate. He added this note:—

"*Note.*—It is to be kept in view that the Court is not dealing with the case of granting powers to a factor or other officer of Court. The Court can only grant or refuse power to sell. If power to sell shall be granted, the Court has nothing to do with the application of the price. It is beyond the province of the Court to see that the price is invested in the purchase of other subjects for the purpose of carrying out the intentions of the truster, as is suggested in this case.

"The application is presented under the 3d section of the Trusts (Scotland) Act, 1867. The Lord Ordinary is satisfied that it would be expedient that the power of sale craved should be granted, but he thinks that to do so would be inconsistent with the intention of the trust.

"By the trust-disposition the trustees are directed to 'hold and maintain in all time coming the subjects hereby disponed, now converted into a school, as a Roman Catholic girls' school . . declaring that the said purpose is an express condition and stipulation of these presents, and that such purpose, condition, and stipulation shall in all future transmissions of the subjects hereby disponed, to be made to the trustees to be assumed as aforesaid, be fully inserted or validly referred to in terms of law.' It is further declared 'that the subjects above disponed, and now converted into a school as aforesaid, shall in all time coming be designed and called by the name of "St Anne's Catholic School."'

"Nothing can be clearer than that it was the intention of the truster that the subjects in question should not be sold. If that be so, it appears to the Lord Ordinary that authority to sell cannot be granted under the 3d section of the Trusts Act on the ground which is relied on in this case, that it is highly expedient that the subjects should be sold in order that the school may be carried on in more suitable premises, which it is proposed to buy with the price.

"The Lord Ordinary cannot grant authority to the trustees to sell in the face of the express direction of the truster that the subjects are to be held and maintained by them in all time coming as a school. The Lord Ordinary was referred to the cases of *Hay's Trustees*, June 13, 1873, 11 Macph. 694; *Oliver's Trustees*, May 13, 1876, 3 Ret. 639; *Weir's Trustees*, June 13, 1877, 4 Ret. 876."

The petitioners reclaimed, and argued—(1) The case was within the 3d section of "The Trusts (Scotland) Act," for it was admitted that the proposed sale was "expedient for the execution of the trust," and it was "not inconsistent with the intention thereof." That meant "not inconsistent with the main design and object of the trust"—*Weir's Trustees*. Now, here the main design and object was to promote "the education and religious instruction of children of the poorest class belonging to the Roman Catholic Church" by having a school for girls in Edinburgh; and the stringent clauses of the trust-disposition had no other design than to secure that the trust property should not be diverted in some other direction. But it was not the truster's object that this particular building should be used in all time coming as the means of carrying out his intention, no matter how unsuitable it might become for its original purpose. In *Hay's Trustees* and *Oliver's Trustees* the sale of the trust property was expressly prohibited; here there was no such prohibition. The case was within *Weir's Trustees*. But (2) even independently of the Trusts Act, the Court could grant authority to sell a building bequeathed for a purpose like the present, when through a change of circumstances it became unsuitable for that purpose—*Johnstone* v. *Magistrates of Canongate* and *The Presbytery of Aberdeen* v. *Cooper*. (3) As to the difficulty suggested by the Lord Ordinary regarding the application of the price, it was the intention of the petitioners to expend the price as the Court should direct, and the Court had power to direct what should be done. If necessary, the prayer of the petition would be amended.

Authorities—*Weir's Trustees*, June 13, 1877, 4 R. 876; *Oliver's Trustees*, May 13, 1876, 3 R. 639; *Hay's Trustees* v. *Miln*, June 13, 1873, 11 M. 694; *Johnstone* v. *Magistrates of Canongate*, May 30, 1804, M. 15,112; *Presbytery of Aberdeen* v. *Cooper*, March 20, 1860, 22 D. 1053.

At advising—

LORD PRESIDENT—The Lord Ordinary says that he "cannot grant authority to the trustees to sell in face of the express direction of the trustees that the subjects are to be held and maintained by them in all time coming as a school." Now, I confess that I am not prepared to concur in the legal proposition involved in that opinion, because it means, if I understand it rightly, that whenever a truster has left a building to a particular purpose and has declared that it is to be appropriated to that purpose in all time coming, it is impossible to sell that building and acquire another for the same purpose. If there were any such rule in the equitable practice of this Court, it would be extremely inconvenient. It might be that the building has become totally unsuitable, so that the keeping of it would be to defeat the whole objects which the truster had in view. But I think it is quite settled by the cases which have been cited that when a building is declared to be appropriated to the uses of a particular society or church, and becomes unsuited for that purpose, it is within the power of the Court to authorise the trustees to sell it and to purchase a new one in its place. All that was settled previous to the passing of the Act of 1867; and I think that the only novelty which that Act introduces is that it enables trustees to come to the Court in a more summary form for power to sell, and in a more convenient manner, for previously to the Act the power could be obtained only by an action of declarator.

The 3d section of the Trusts Act provides that "it shall be competent to the Court of Session, on the petition of the trustees under any trust-deed, to grant authority to the trustees to do any of the following acts, on being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof," and one of these acts is "to sell the trust estate or any part of it." Now, no doubt in the present case to sell is inconsistent with the provision that the trustees shall hold this particular building as

a Roman Catholic girls' school in all time coming. But then that is not the main purpose of the truster. His main intention is, not that this particular building shall be so held in all time coming, but that there shall be a good Roman Catholic girls' school in this particular town which he desired to favour. That principle is the foundation of the judgment in the case of *Weir's Trustees*, in which we thought it right to take the opinion of the other Division, and which consequently must be regarded as a very authoritative decision. I think that the present case is entirely ruled by *Weir's Trustees*. I therefore must say that I cannot agree with the Lord Ordinary, and I am not in the least moved by his Lordship's argument as to the impossibility of the Court seeing to the application of the price. He seems to think that it would be a very awkward thing to leave the price to be applied according to the discretion of the trustees. But the petition does not contemplate that. It contemplates that the price shall be applied in accordance with the intention of the truster. Whether the prayer is quite properly expressed or not, it is hardly worth while to inquire. It is quite plain that it means that. I am therefore for recalling the interlocutor of the Lord Ordinary.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court, after allowing the following addition to be made to the prayer of the petition,—viz. "the titles to the said [new] feu, and school buildings to be created thereon, containing such clauses and conditions as may be appointed by your Lordships to be engrossed therein, in accordance with the present titles and constitution of the trust; and in the meantime, and until the said free price shall be required to be so applied, to grant to the petitioners leave to consign the said free price in bank in name of the petitioners and their successors in office, and to uplift the consigned fund when required for the purposes foresaid"—recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to authorise the petitioners to sell and to proceed further in terms of the prayer of the petition.

Counsel for Petitioners—Kinnear—W. Campbell. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, June 7.

FIRST DIVISION.

[Lord Adam, Ordinary.

ALLAN AND OTHERS (SMITH'S TRUSTEES) *v.* M'CHEYNE.

Bankrupt—Expenses—Caution—Where Bankrupt was Defender and Decree of Constitution only was sought.

The defender in an action of damages for the non-fulfilment of a contract of sale became bankrupt during the dependence of the action. He did not offer caution for expenses, and the trustee on his sequestrated estate declined to sist himself. The Lord Ordinary decerned against the bankrupt for the damages concluded for, but "to the effect of granting a decree of constitution only." *Held* that the bankrupt having no interest to resist such a decree, was not to be permitted to continue his defence without finding caution.

In November 1877 the pursuers, the trustees of the late Andrew Smith, upholsterer in Dundee, agreed to sell to the defender John M'Cheyne, and the defender agreed to purchase from them, certain heritable subjects in Dundee belonging to the trust-estate, at the price of £2400, with entry at the term of Whitsunday 1878, when the price was payable, all conform to the conditions specified in certain missives of sale. The pursuers averred that on the faith of this contract they had made alterations on the adjoining trust-property still in their hands; and that the defender entered upon possession of the subjects, made alterations thereon, removed tenants, and in February 1878 advertised the property for sale, but that he refused to pay the price. In consequence they raised this action, concluding for specific implement, or alternatively for £1000 damages. M'Cheyne lodged defences, and on 3d December 1878 the Lord Ordinary (Adam) pronounced this interlocutor—"Having heard counsel, decerns against the defender for implement in terms of the first conclusion of the summons, and *quoad ultra* continues the cause." The defender afterwards became bankrupt, and on 30th January 1879 the Lord Ordinary pronounced the following interlocutor—"In respect it is stated at the bar that the defender has become bankrupt, appoints intimation of the dependence of this process to be made to the trustee on his sequestrated estate, and ordains him to sist himself as a party thereto, if so advised, within the next eight days." The trustee did not sist himself as a party to the cause, and in consequence the Lord Ordinary on the 25th February ordained the defender to find caution for expenses within the next eight days. This the bankrupt failed to do, whereupon, on the 8th March, the Lord Ordinary pronounced this interlocutor—"In respect the defender has failed to implement the decrees of 30th January and 25th February 1879, decerns against him for £1000 of damages as concluded for: Finds the defender liable in expenses, and allows an account thereof to be lodged for taxation, and remits the same to the Auditor, but that to the effect of granting a decree of constitution only of the said damages and expenses."

The defender reclaimed, and argued—It was not a universal rule that a bankrupt pursuer even should find caution for expenses—*M'Alister* v. *Swinburne*; and so where a pursuer sued for damages for defamation. The case of a defender was *a fortiori*—*Taylor* v. *Fairlie's Trustees*. Since *Taylor* no bankrupt defender had in any reported case been found liable to find caution for expenses, and there were cases in which the defender had not been so found liable—*Russell* v. *Crichton*—*Ferguson* v. *Leslie*.

Authorities—*M'Alister* v. *Swinburne*, 7th November 1873, 1 R. 166; *Taylor* v. *Fairlie's Trustees*, March 1, 1838, 6 W. and S. 301; *Russell* v. *Crichton*, March 5, 1839, 1 D. 617; *Ferguson* v. *Leslie*, October 31, 1873, 11 Scot. Law Rep. 16; *Bell* v. *Forrest*, July 17, 1840, 2 D. 1460.

Argued for the pursuer—The defender had no