of the power of sale is indispensable to the execution of the trust.

The present case seems to be substantially the same as that of the *Lord Advocate* v. *Blackburn's Trustees*, in which Lord Fullerton held that the trust could not be executed without a sale, and therefore that there was conversion. I have not observed nor have I been informed that in any subsequent case his decision has been questioned. It was fully under the notice of the House of Lords in *Buchanan* v. *Angus* when the decision of the Court of Session was reversed. Lord Fullerton's judgment was quoted with approval as correctly expressing the law, and it was not said that he had applied it erroneously. I think that we must follow it.

The LORD JUSTICE-CLERK and LORD KYLLACHY concurred.

LORD YOUNG and LORD TRAYNER were absent.

The Court answered the first question in the negative, and the second question in the affirmative.

Counsel for First and Third Parties — Jameson — Grahame. Agents — Fraser, Stodart, & Ballingall, W.S.

Counsel for Second Party — Rankine — Napier. Agents — W. & F. C. MacIvor, S.S.C.

Friday, May 25.

FIRST DIVISION.

FRASER'S TRUSTEES *v.* FRASER AND OTHERS.

Succession—Trust-Disposition and Settlement—Option to Take Over Premises at Specified Price — Value Enhanced by Meliorations after Date of Settlement—Implied Revocation—Recompense—Mora.

By his trust-disposition and settlement dated in 1868, with relative codicil dated in 1871, a testator provided that his trustees should after his death carry on his business in partnership with his eldest son, that they should, when they thought proper, assume his second and third sons as partners, and that his said sons should have the option of taking over the business premises at a price specified. In 1872 the business premises were entirely destroyed by fire, and in 1873 the testator died. Prior to his death he had approved of plans, and had partially carried a scheme for the reconstruction of the business premises. After his death his trustees expended a large sum out of the testator's general estate in completing the scheme of reconstruction. The new premises were of considerably greater value than the old. The second son was assumed in 1884 and the third in 1891. Upon the latter's assumption the three eldest sons intimated that they desired to take over the premises in exercise of the option conferred upon them by the settlement.

Held (1) that the said sons had not lost the right to take over the premises by delay in exercising it; (2) that they were entitled to take them over at the price specified in the settlement; and (3) that they were under no obligation to compensate the general estate for the meliorations effected on the premises at its expense.

Hugh Fraser died on 12th February 1873, leaving a trust-disposition and settlement and codicil, dated respectively 24th November 1868 and 20th January 1871. He was survived by eight children, five sons and three daughters; with the exception of the eldest all the sons were under age.

At the date of his death the testator carried on business as a warehouseman in property belonging to him in Buchanan and Argyle Streets, Glasgow. This property had been acquired by the testator in April 1867 at the price of £26,000, and at the time of the purchase he had borrowed £20,000 on the security of the subjects. This loan still subsisted at the date of his death, and had not been discharged when this case was presented. Shortly after the acquisition of the property the testator enhanced its value by taking down a back building and erecting a new building in its place at a cost of about £3500. Early in 1872 the property was entirely destroyed by fire. The testator recovered £11,550, 13s. 6d. from insurance companies, and he gave security to the bondholders that he would rebuild the premises. Shortly after the date of the fire the testator had plans of a new building prepared, and having approved of them, he began to reinstate the premises, and at the date of his death on 12th February 1873 the work of re-erection had proceeded to a considerable extent (but not to such an extent as to render the buildings then inhabitable), and contracts had been concluded with tradesmen for the re-erection of the whole buildings conform to the said plans. The offer for the mason and joiner work was merely to execute the work at stipulated schedule rates, and the testator and the trustees might, as in a question with these contractors, have restricted the work to any extent they thought proper, the contractors being entitled merely to payment at scheduled rates for work actually done. The acceptance of the offer for the subordinate contracts contained a special proviso that the testator should be entitled at any time to "make alterations, and to increase, lessen, or omit any part of the work as he might think proper." The reconstruction was on a much more expensive scale than the original construction.

When the testator died work to the value of £5987, 4s. 3d. had been done on the new buildings, and had been paid for to the amount of £3987, 4s. 3d. by the testator. The trustees resolved to complete the buildings according to the plans which had been approved of, and were in course of

being carried out at the date of the testator's death. This was accordingly done, and necessitated a further expenditure from the general funds of the trust-estate, which, including interest on the bond and insurances while the buildings were being erected, amounted to £18,578, 15s. 7d. The testator and his trustees thus spent on re-erecting the subjects a sum of £13,015, 6s. 5d. in excess of the insurance money received. The rebuilding of the premises was completed in 1874, and they were valued in 1884 at the sum of £57,000.

By his trust-disposition and settlement the testator conveyed his whole estate, heritable and moveable, to trustees. By the 4th purpose he left and bequeathed to his children equally, share and share alike, in liferent, and to their respective issues in fee, the heritable subjects which formed his business premises, with the declaration that in the event of any of his sons entering into his business, and being desirous to hold said subjects in their own name for the purpose of business, they should have the option of having said subjects conveyed to them upon payment of the sum of £8000 as the value thereof beyond the heritable burden thereon, which sum should then be invested in separate sums in heritable securities in the names of his children in liferent and their respective issues in fee. In the sixth place, he left and bequeathed to each of his daughters in liferent, and their children equally in fee, the sum of £3000 in addition to the foresaid heritable liferent provision of £1000, and in the seventh place he bequeathed £3000 to each of his sons in addition to the heritable liferent provision of £1000. In the seventeenth place, the testator left the residue of his estate among his sons and daughters. The testator authorised and directed his trustees to carry on his business with his partner Alexander M'Laren, and his eldest son James Arthur Fraser, until the expiry of the existing contract of partnership with M'Laren, and longer if thought advisable, and provided that the share of the profits falling to them should, after payment of certain annuities, form part of his general estate. By the codicil to his will the testator further directed the trustees, in addition to his son James Arthur Fraser, to assume his other two eldest sons John and Hugh as partners in the business with a share of the profits, when and so soon as they might consider proper, and to retain the balance of the profits for the general purposes of the estate.

After the testator's death the trustees continued to carry on his business, and were still carrying it on when this case was presented. James, the eldest son, was assumed as a partner as from the testator's death, John was assumed in 1884, and Hugh in 1891. When the latter was assumed as a partner the three brothers intimated their desire to hold the business premises in their own names, and that they exercised the option given them by the fourth purpose of the settlement of having the said subjects transferred to them upon payment of the sum of £8000. The other children of the testator objected that, in the circumstances which had occurred, James, John, and Hugh were not entitled to exercise the option given them of taking over the business premises on the terms therein specified.

To settle this and other questions connected with the administration of the trust a special case was presented to the Court by (1) the trustees under the testator's trust disposition and settlement; (2) James Arthur Fraser; (3) John and Hugh Fraser; (4) the testator's remaining sons; (5th and 6th) the testator's daughters and their issue. The opinion of the Court was craved on, *inter alia*, the following question—"(2) Are the second and third parties entitled to demand that the said heritable property be conveyed to them in terms of the fourth purpose of the settlement and first codicil?"

Argued for the second and third parties—The testator having approved and partially carried out plans for the re-erection of the buildings, the trustees were bound to complete the work, and the amount necessary to complete the restoration of the buildings was heritable *destinatione*—Bell's Prin. section 1492; *Robson* v. *Macnish, &c.*, February 2, 1861, 23 D. 429; *Malloch* v. *M'Lean*, January 29, 1867, 5 Macph. 335. No doubt the value of the buildings had been increased, but that did not deprive these parties of the right to exercise the option, because this increase of value was evidently in accordance with the testator's intention, as he had approved the plans which were carried out by his trustees. These parties were therefore entitled to get the land subject to the existing burden, but with all the buildings upon it, at the price of £8000, and they had not lost the right to exercise the option given them in the settlement by delay, for the option had been exercised immediately after the assumption of the third son as a partner.

Argued for the fourth, fifth, and sixth parties—In the circumstances which had occurred, and apart from the question of *mora*, the second and third parties were not entitled to exercise the option given them by the will without recompensing the general estate to the extent to which their value had been increased at its expense. This followed from the principle of implied will, for the testator having fixed a sum at which the old buildings might be taken over, the presumption was that he did not intend the new buildings, which were of much greater value, to be taken over at the same price. The same result followed from the principle of recompense. Further, the right of the second and third parties to exercise the option given them had been lost by delay. Such a right could not be exercised after a delay of nearly twenty years.

At advising—

LORD PRESIDENT—As regards the heritable subjects, which are the business premises, the primary bequest is, "to my children equally share and share alike in liferent;" and the option conferred upon the sons to buy those subjects is ancillary

and subordinate to that bequest. But at the same time the option is one which so far is very clearly expressed. The testator wishes the business continued; he directs his trustees to carry on the business; he has already assumed one of his sons, and his contemplation is—I am taking the settlement now as a whole—that two of the others may yet come into the business, and then he provides that, if these sons like, they may take over the business premises. So far all is clear enough, but the matter is complicated by two considerations. In the first place, even if nothing had occurred to the premises by way of fire, the scheme of the settlement, taken in connection with the ages of the young men, is such that it was plain that intervals of time might elapse between the assumption of one son and the assumption of another. Now, taking the question apart from the occurrence of the fire, I am disposed to think that the sound view is that the first son assumed could not by declining to buy exclude the younger son who might thereafter be assumed, from having the benefit of that option, and the only way of relieving the management of the estate of the difficulty which would arise from the disparity of ages would seem to be that which was adopted by the trustees, because in the conduct of the trust it appears to have been assumed that it was not until matters were matured—not until the trustees had made up their minds which of the sons were to come in—that this option could be effectively exercised. And accordingly, had there been no fire, I think that one could not say the trustees were wrong in the view which they seem to have acted on—that they must wait until they had exercised their powers of assuming the sons as partners in order to see whether the option might or might not be exercised.

Then the other complication in the case is that after the settlement was executed, and before the testator died, a fire had occurred, and the testator had proceeded to rebuild the premises, and had expended a certain amount of money in that work. At his death, however, the premises were far from being completed, and in the scheme of rebuilding which was adopted a sum of £18,000 was after his death expended by the trustees.

Now, the suggestion of the trustees is, that while they admit—or, at least, while for the sake of argument they may admit—that there is still an option in the sons, so far as the lapse of time is concerned, they can only exercise their option by paying the sum that the testator directed in his will. Now, I think it is impossible at one and the same time to hold that the option is exercisable now by the three sons who have come in, and at the same time that they are to pay more than the amount fixed in the deed. It is quite true that the course of events to a considerable extent dislocates the apportionment of this gentleman's goods among his family, and although we might do what was competent to us to redress that, at the same time I find myself unable to hold either that the sons are precluded from exercising the option, or that they are bound to give more for the property than is expressed by the testator in his definition of the option which he confers upon them. And I am reconciled to some extent to that view of the situation by seeing that the testator does not seem to have been diverted from his intention of giving them the option on these terms by the circumstance that the value of the property had considerably altered between the date of his settlement and the date of his death. What I mean is this, that when he said—"You shall pay £28,000" (for that is the plain English of it) "for a conveyance of those lands," he was speaking of subjects more valuable than those which he offered at his death by adhering to his will, inasmuch as the premises had been burnt down and only partially rebuilt. But then in that state of circumstances I cannot imagine very well how a son could have claimed more than what his father bade his trustees give him, and that was a conveyance to the lands. A further circumstance, as was pointed out to us, had taken place in the diminution of the value owing to the fire, yet these were the terms upon which alone the sons were to be entitled to buy the property.

Now, the other case which has occurred is that there has been a change of value to the better in the premises, and that is owing to the action of the trustees in spending this money. Can I, who think that the price for the depreciated property would have been £28,000, say that the price for the appreciated property is to be more? Then again, if the trustees treat the question as one of implied intention, I must confess that I think the simple and plain-sailing theory of intention is to hold that the man read over his will before he died, and said—"I am not going to cut or carve upon this; I may have my own opinion about the value of the property; but, say anything you like, I adhere to £28,000 as the price which these men shall pay if they want to have the buildings." In like manner I should suppose it eminently likely that he should be willing that they should have a fairly good bargain if the property should improve in value before the option came to be exercised. But I cannot find material out of his will for constructing a theory that in this state of matters we are to fix another price than that which he has expressed in his will.

But then it was said that the trustees have a claim of recompense for this expenditure of theirs. I suppose the way in which that would work out would be this:—"If you say you are entitled to exercise the option to buy, pay down your £28,000, but we have expended on the property £18,000, and you must make that good to us before we quit hold of the property." But then there is this to be considered. It is not the case that the trustees were holding for behoof of the partners as the ultimate owners of the

property. On the contrary, the option might be exercised, or might not be exercised, and in the event of its not being exercised, the refusal to exercise it might, on the hypothesis of the case which I adopt, viz., the legality of the course of the trustees' administration—that refusal might only be declared twenty years after the buildings were put up. Then we would have to consider whether this re-building by the trustees, if within their powers—which for the present I assume—was done for the general behoof of the estate, and in the view possibly that the buildings might belong not to the partners but to the eight children. But there is more than that—even in the event of the option being exercised, it is to be observed that the trustees were largely interested for the other beneficiaries in the prosperity of this business; because after Mr Johnston's examination of the effect of the codicil it is quite plain that in any event a part of the profits would belong to the trustees for the purposes of the general settlement. Now, that shows that the trustees were interested in this business, not merely for the people who might eventually become partners, but were interested also for the general estate. And the law of recompense cannot apply to a case where a man is interested himself in the property, because it is presumed that the expenditure is made for his own interest primarily, and only incidentally for the interest of others. Accordingly, I think that plea of recompense cannot be sustained.

My opinion upon the whole is (1) that the option is not excluded by the events which have happened; and (2) that, if that be so, it is impossible for us to prescribe other conditions than the payment of the £8000 above the bonds.

Lord Adam—Two questions are raised. The first is, whether it is too late for the three sons, who are partners, now to exercise the option given them by the trust-deed to purchase the premises in which the business is carried on at the sum named by the testator? Now, if this option had been exercisable after the succession opened, and there had been unreasonable delay in exercising it, I should have said there was great force in saying that it was too late now to exercise it, because a party is not entitled, if he has an option to take, to say when he is to exercise it. The subject of the option might increase or diminish in value as time went on, and if it turned out to be valuable, the party to whom the option was given would not be entitled to say—"I will take it over;" or if it turned out the reverse, to say—"I don't desire to take it." But I do not think that is the case we have got to deal with here, because, if my interpretation of the deed is the right one, then it is not too late to exercise the option. The deed says—"In the event of any of my sons entering into my business and being desirous to hold said heritable subjects in their own name for the purpose of business," they are to have the option of taking them over; then follow provisions, the effect of which is that the sons may not be in a position to join the business except after a lapse of years. They were young when this will by the father was executed; one of them, I think, was assumed into the business as late as 1891, and the option of assumption necessarily remained open to him all that time. If we are to give effect to these words, "if any of my sons shall join the business," I cannot think it is too late now for the sons who have joined the business to exercise the option given them because they allowed a couple of years or so to expire after the assumption of the third son before declaring that they would exercise it. People are not so very sure of their rights all at once, and I do not think the other children are right in saying it is now too late to exercise the option.

If, then, there is a right to exercise an option, what is the option they are to exercise? That option is of taking over these premises at a particular sum, viz., £28,000. There is no other option given to them. If that is so, and if the option is still open, I do not see that we have any alternative other than to give effect to it. We are not empowered to say—"Oh, but the value is very much increased." That might have been a reason for saying that the testator did not intend the option to continue all through this long time; but if the option is still exercisable, can you say anything else than that the option given by the deed is to take the premises at the sum named and no other. Now, if that is so, I think that is all we have to answer upon the subject. It is said that they may take, but take under conditions, the terms and conditions being, as I understand, that they shall pay the value of the meliorations or improvements which are said to have been made by the trustees upon the premises. Now, I do not think myself that this is a case for the application of the doctrine of recompense at all. It is quite true that if a person builds on another man's property and the property is taken from him, he, of course, must be paid for what he has expended on the property. That is the sort of case where the doctrine of recompense comes in. Or if a person, thinking he has a good title to property himself, expends money upon it, it may be that if the true owner claims it he is bound to pay for the improvements made upon it. That is the class of case where the doctrine of recompense applies. But that is not the class of case we have to deal with here. The case we have to deal with here is this—The trustees were in the occupation of these premises; they knew, and were bound to know, that a certain party had a right to purchase them at a certain price; they possessed the property upon these terms all along, and knew exactly what position it was in; and before the time came for the exercise of the option they thought it right to build those premises at a certain expenditure. We must therefore hold that they knew that these sons could at any time come and say "We require to

have those buildings at a certain sum." It was, I presume, with their eyes open that they performed all this work. It may be —I say nothing about it, and it is not even suggested in this case—that the trustees in the knowledge of these facts should not have spent so much money in the erection of these buildings. It is not suggested by anyone that they were not right in doing so, and thence arises the difficulty I have. If they chose to expend this money with their eyes open, what right have they to come and say to the sons who have been assumed into the business—"We know that the deed directs us to convey this property to you, but we shall not do as the testator directs us; we shall not give you this property for the sum of £28,000, because we have made it better."

I therefore concur with your Lordship in this part of the case also.

LORD M'LAREN — When a testator dies leaving a building or undertaking which he has begun unfinished, and his trustees proceed to complete the building according to the testator's scheme, I think that their action should always be regarded with the greatest consideration and indulgence, and especially should that be the case where, in completing the work which the testator has begun, they are carrying out, or taking means to carry out, the scheme of administration prescribed by his settlement. Now, in the present case the scheme of administration was certainly not one of realisation and division of realised value. On the contrary, we see in the anxious directions contained in this gentleman's will that he contemplated the continuance of this business for the benefit of his family, first through the administration of the trustees, and eventually, but only if his sons desired it, through the introduction into the partnership of certain members of his family. It was impossible that the trustees could carry out the directions given to them to continue to carry on the testator's business if they had allowed the premises to remain unfinished, or had sold them as unfinished buildings to other parties. On these considerations I have not the smallest doubt that in completing the buildings, and providing for their completion out of the trust-moneys, the trustees were strictly fulfilling their trust obligation, and that they had no option or discretion in the matter.

Now, in what they did it is not alleged that they wasted the money in any way, or that they paid more than what was necessary to the proper completion of the testator's design. The effect of their action was to increase the value of one part of the estate, because a new building is generally more valuable than the old one which it replaces. But what they did was done, not in virtue of any line of action or idea originating with the trustees themselves, but in fulfilment of the trust which was committed to them. When the time came for the two sons of the testator, to whom a right of entering the business was given, to declare their option and to take over the business-premises if they thought proper, I think that in determining the conditions on which they were entitled to take over the premises, no claim of recompense arose, and that their right was to receive a conveyance of the heritable subjects on payment of £8000. I read this settlement as prescribing that as the sum to be paid irrespective of the value of the subjects for the time being, whether deteriorated by change of fashion or depreciated or increased in value by improvements. It is quite intelligible that the father of a family should, in order to avoid disputes or ill-feeling, think it proper to name a sum, not as representing the actual value of the subjects, but as the sum for which he thinks proper in the exercise of his will to declare that certain of his family shall take over the property. Or, it may be that the sum was fixed after considering the probable ability of the sons to furnish the money with the funds they might have at the time. But whatever the reason may be, I have no doubt that they are entitled to the property on payment of £8000. I agree with your Lordships in considering that the option certainly existed up to the time when the younger of the two next oldest sons was taken into partnership, and that that option has not been lost from the delay of somewhat less than three years which has occurred. I rather think that it was not intended that there should be an indefinite power of purchasing the property at any time during the sons' lives. I think it was to be exercised in connection with the scheme by which the two sons, or one of them, should enter the business. But as this case shows that there was a question between those two sons and the other members of the family as to the terms on which the property was to be taken over, and as, of course, nothing could be done until that question was settled, I cannot say that a delay of about a couple of years is such as to lead to the forfeiture of this valuable right of acquiring the heritable property.

LORD KINNEAR was absent.

The Court found that the second and third parties were entitled to demand that the heritable property should be conveyed to them in terms of the fourth purpose of the settlement and first codicil.

Counsel for the First Parties — Ure. Agents—Webster, Will, & Ritchie, W.S.

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Counsel for the Fourth Parties—H. Johnston — W. C. Smith. Agents — Cairns, M'Intosh, & Morton, W.S.

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