My Lords, both these Acts of Parliament were no doubt very beneficial for their purposes; they gave a security charged only upon the land without any words which would import a personal obligation either upon the part of the original borrower or of the landlord in succession, or, in the case of an advance upon glebe land, which would make either the original incumbent or the next incumbent personally liable. Whilst I feel coerced to agree with the motion which is to be presently put from the chair that the decision of the Court below be affirmed, I do so somewhat unwillingly. If there is any property which would require for improvement purposes the aid of an advance of money upon such easy terms as are provided by this Act it would be such property as glebe lands and residences. I presume that this case is not defended by the present respondent merely in his own interest—probably he may be supposed to represent the interests of a large class; and I see this very clearly, that after the decision of this appeal it will be difficult, if not impracticable, to obtain from the Drainage Company advances of money upon such a security as the present.

My Lords, I concur in the judgment which has been proposed, affirming the decision of the Court of Session and dismissing the appeal.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellants—Sir Horace Davey, Q.C.—Asher, Q.C. Agents—Grahames, Currey, & Spens, for Ronald & Ritchie, S.S.C.

Counsel for the Respondent—Rigby, Q.C.—James Wallace. Agent—John Graham, for Menzies, Coventry, & Black, W.S.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

BINNIE *v.* BROOM AND OTHERS.

(*Ante*, vol. xxv., p. 303; and 15 R. 417.)

Trust—Trust Management—Ultra vires—Process—Proof—Expenses.

The beneficiaries under a trust-deed raised an action against the trustees to make good loss which it was alleged had been caused by their management of the estate, and averred that when the defenders entered office the estate was sufficient to cover the truster's liabilities, with a substantial reversion in favour of the pursuers, and that the defenders had exceeded their powers by borrowing upon instead of selling the heritable property. The First Division remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure by the trust," and disposed of the case upon the basis of the report returned.

On appeal, *held* that the pursuer was entitled to a proof of his averments respecting the value of the heritable property when the trustees entered office and could have sold it, on the ground that he had never renounced probation, or agreed to accept the report as including the evidence he wished to lead, and that it was still within his right to prove in the ordinary way disputed facts which were not proper matters of accounting, but that the appeal must be *affirmed* without costs, as the appellant had not previously asked for the restricted proof which was ultimately allowed him.

Opinion (*per* Lord Watson) that a trustee who has power to sell or borrow is only required to show ordinary prudence in selecting either course, and the question whether or not he acted prudently is one of fact to be solved according to the circumstances of each case.

This case is reported *ante*, vol. xxv., p. 303, and 15 R. 417.

The pursuer appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, I have had an opportunity of perusing the opinion which my noble and learned friend (Lord Watson) is about to deliver, and I entirely concur in it.

LORD WATSON—My Lords, I have come, with much regret, to the conclusion that, notwithstanding the inquiry which has already been made in the Court below, the facts of this case have not been sufficiently investigated to enable your Lordships to dispose of it by a final judgment.

The action was brought in November 1886 by the appellant and two others, sons of William Binnie, builder in Glasgow, who died in October 1857, as beneficiaries under their father's settlement, against the respondents, who are the trustees or representatives of trustees who accepted office and administered the trust created by that deed. The trust-estate chiefly consisted of house property in Glasgow, burdened with an heritable debt of £12,000. The truster left a large amount of personal debt, and the trustees borrowed £26,000 upon the security of the real estate, with which they paid the charge of £12,000 and other debts, leaving a considerable balance unpaid. It is sufficient to say here that the results of their administration, whether prudent or not, were unfortunate, and that in June 1867 the trustees applied for a sequestration of the estate, which was accordingly realised and distributed under the provisions of the Bankruptcy Acts, some of the creditors receiving less than 20s. in the pound.

The pursuers averred that in 1857 and 1858, after the trustees entered upon office, the heritable property was worth and could have been sold for £42,980—a sum sufficient to pay the whole debt and leave a substantial margin for the beneficiaries—and that the trustees exceeded their powers and violated their duty in borrowing money on the security of the property instead of selling it. The defenders denied these allegations, and stated a variety of circumstances which it is unnecessary to detail in explanation and justification of the course of management which was pursued by the trustees.

The Lord Ordinary (M'Laren) allowed the parties a proof of their averments, but his interlocutor was recalled by their Lordships of the

First Division, who remitted to an accountant "to inquire into the amount of the trust-estate from the date of the truster's death, the debts due to the truster and paid by the trustees, and the yearly income and expenditure of the trust, and to report." The course thus adopted in order to prepare the case for judgment was in my opinion an expedient one, because a remit to an accountant of skill is a much more satisfactory method of investigating the details of trust management and its pecuniary results than a general proof. At the same time a remit of that kind does not deprive the parties of their right to prove in the ordinary way disputed facts which are not proper matters of accounting.

The report when completed disclosed the following facts upon which the controversy between the parties came to depend in the Court below—(1) That the heritable property was valued as for a loan, part of it in May, before the truster's death, and part in October 1857, after that event, the sum of the two valuations being £42,980; (2) that in the year 1862, after the sale of one tenement in November 1861 at the price of £7000, the remainder was valued, with a view to sale, at £29,748; and (3) that the entire property was sold in parcels between November 1861 and March 1870, the prices realised amounting *in cumulo* to £41,900. The reporter also stated that "as any sum that may be arrived at as the value of the property at the date of the truster's death must necessarily be a valuation," there would in his opinion be no injustice done to either party if £41,900 were taken to represent its value at that date.

When the case was heard upon the report the pursuers impeached it, without lodging a note of objections according to the usual practice, and insisted that they were entitled to a proof of their whole averments on record.

They offered, however, to waive their demand for proof, and to take the report as the evidence in the case, upon condition of the Court accepting as conclusive the accountant's view with regard to the value of the real property. Both alternatives were very properly rejected by the Court. The first of them was again pressed by the appellant at the bar of the House, but it is clear that a party who has joined issue with his opponents, and has been fully heard before the reporter upon proper questions of accounting, cannot be permitted to re-open these questions in a proof at large.

Neither of the parties having moved for a limited proof, the First Division proceeded to dispose finally of the case upon the basis of the report. Their Lordships assoilzied the defenders upon the ground as expressed in the interlocutor, "that the pursuers have failed to prove that they have sustained any loss through the misconduct of the trustees." It appears from the judgments delivered at the advising of the cause that their Lordships were of opinion that the trustees had been guilty of misconduct which would have involved the defenders in liability had not the pursuer's *injuria* been *sine damno*. But their Lordships, differing therein from the reporter, estimated the heritable property of the trust at £36,748, adopting the valuation of 1862 *plus* the sum received for the part sold in 1861. To that estimate they added £573 as the amount of the personal estate, making the total charge against the trustees £37,321. On the other side of the account their Lordships held that the trustees were entitled to credit for debts and charges paid by them, or by the trustee in the sequestration, to the amount in all of £37,521, the result being that had the real estate been sold at the time when the appellant alleges it ought to have been the liabilities of the trust would have exceeded its assets by £200, nothing whatever being left for the beneficiaries.

Were it now necessary to determine the market value of the property at the commencement of the trust with no other assistance than the information contained in the report, I should hesitate to disagree with the conclusion which was arrived at in the Court below. I certainly do not think that the prices which it fetched when sold in lots between the years 1861 and 1870 can fairly be taken to represent its selling value in the end of 1857, and experience leads me to doubt whether a valuation obtained in 1857 solely for the purpose of a loan can be safely relied on as an approximate estimate of its value for immediate sale. Besides, I do not find anything in the report tending to the inference that the market value of such properties was higher in 1857-58 than in 1862. But the appellant has now insisted before us for a proof of his averments touching the value of the subjects for sale at the time when the trustees entered upon office and could have sold, and seeing that he has never renounced probation, or agreed to accept the report as containing all the evidence which he desires to adduce, I cannot advise your Lordships that he ought not to have the opportunity which he asks for. He may at this distance of time have some difficulty in bringing forward evidence of market value in 1857 of a more direct and less speculative character than that which is to be found in the report, but that circumstance cannot affect his right to make the attempt. The respondents, in the event of the appellant being allowed a proof, expressed their desire to have an opportunity of instructing their averments bearing on the motives which induced the trustees to borrow, and I think their request ought to be conceded.

Besides the main question regarding the value of the real estate, two items in the accounting were fully discussed in the course of the argument. The appellant maintained that the Court ought to have charged the trustees with £562, being the estimated value in 1857 of furniture liferented by his mother, who is still alive. I am of opinion, for the reasons assigned in the judgment of the Lord President (Inglis), that the charge was rightly disallowed. Again, the respondents argued that the trustees ought to have had credit for the sum of £2652 which represents payments made to the widow for the maintenance of herself and the children who lived with her until her re-marriage in 1861, and payments made between 1857 and 1867 towards the maintenance and education of beneficiaries who were not living with their mother. These sums were no doubt in excess of the free income of the trust, but the trustees had under the trust settlement a power of advancement out of capital sufficient in my opinion to validate such payments in any question with the appellant and others beneficially interested. The estimate of the house property which the Court below

adopted made it unnecessary to decide as to this item, but if it were added to the sums with which the trustees have been credited the balance would still be against them if the appellant's statements with regard to the value of the property were established.

I should have contented myself with making these observations, which are sufficient for the disposal of this appeal, had it not been that in the Court below the learned Judges have expressed themselves with regard to the conduct of these trustees and of trustees generally in terms to which I cannot assent. The Lord President, with the concurrence of Lords Mure and Adam, said (15 Sess. Cas. (4th series) 423)—"The conduct of trustees in borrowing money under any circumstances is highly imprudent. If it turns out to be a mistake, it subjects the trustees to personal liability." I do not know whether by these words the Lord President intended to lay down a principle of law or a proposition of fact; the result in either aspect might prove very unfortunate so far as the interests of beneficiaries are concerned. A trustee would incur unnecessary risk (which his duty in no case compels him to do) if he borrowed in order to pay debts prudently and with a reasonable prospect of securing a considerable reversion to the beneficiaries, and he would be justified for his own protection in at once selling, to the destruction of their interests, although no prudent person (himself included) thought it the better course to pursue. But there is really no such rule in existence. All that the law requires from a trustee who has power to sell or borrow is, that he shall follow the dictates of ordinary prudence in adopting the one course or the other, and the question whether he did or did not act prudently is one of fact which must be solved according to the circumstances of each case.

Looking to the terms of Mr Binnie's trust-deed, I see no reason to doubt that the trustees had implied power either to sell or borrow for the purpose of paying debt if the exigences of the trust required it; and I am consequently of opinion that the conduct of the trustees in borrowing and not selling raises a question of prudent management only. If it were not for the unbending rule which they laid down as to the imprudence of borrowing in any circumstances, there might be difficulty in reconciling the views which the learned Judges took of the conduct of these trustees with the considerations which led them to fix the value of the property at £36,748. These were that house property in Glasgow became in the end of 1857 greatly depreciated in value and in many cases unsaleable. In that state of the market I cannot help thinking that prudent men would have been most reluctant to sell if that step could by possibility be avoided. I have thought it proper to make these remarks with no desire to prejudge any question which may arise when the facts are ascertained, but in order to guard against its being supposed that in my opinion the appellant will be necessarily entitled to prevail in this action if he succeeds in proving the value which he has alleged.

I am accordingly of opinion that the interlocutors appealed from, in so far as these concern the appellant, ought to be reversed and the cause remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security. If the appellant had asked in the Court below for the restricted proof which has been allowed him here, I see no reason whatever for supposing either that the respondents would have resisted the motion or that the Court would have hesitated to grant it, and I am therefore of opinion (seeing that the appellant sues *in forma pauperis*) that there ought to be no costs of this appeal.

LORD FITZGERALD—My Lords, I entirely concur in the judgment, and have nothing to add.

The cause was remitted to the Court of Session with directions to allow the appellant a proof of his averments with respect to the value of the heritable property, and to the respondents a proof of their averments relating to the circumstances which induced the trustees to borrow on its security.

Counsel for the Pursuer (Appellant)—Shaw—A. S. D. Thomson. Agents—Scoles & Company, for Marcus J. Brown, S.S.C.

Counsel for the Defenders (Respondents)—Lord Adv. Robertson, Q.C.—J. Shiress Will, Q.C. Agents—Bircham & Company, for Henry & Scott, S.S.C.

Thursday, August 8.

(Before Lords Herschell, Watson, and Fitzgerald.)

WALKER, HUNTER, & COMPANY *v.* HECLA FOUNDRY COMPANY.

(*Ante*, vol. xxv., p. 491; and 15 R. 660.)

Copyright—Design—Infringement—Patents, Designs, and Trade Marks Act 1883 (46 *and* 47 *Vict. cap.* 57)—*Interdict.*

The holders of a certificate under the Patents, Designs, and Trade Marks Act 1883 for the copyright of a registered design for kitchen-range fire-doors, the design being for "a range fire-door with moulding on top, the moulding forming part of range, shape to be registered," applied for interdict against an alleged infringement.

Held (*aff.* the judgment of the First Division) that as the outline of the moulding on the fire-door complained of was an obvious imitation of the registered design, it was an infringement thereof.

This case is reported *ante*, vol. xxv., p. 491, and 15 R. 660.

The respondents in the suspension and interdict appealed.

At delivering judgment—

LORD HERSCHELL—My Lords, this is an appeal from an interlocutor of the First Division refusing a reclaiming-note against an interlocutor of the Lord Ordinary finding it proved that the appellants at your Lordships' bar had infringed the respondents' exclusive privilege of making