rents, and it is under that title that they demand the rents which the defenders have received for the chairs. If the claim of the pursuers is well founded, they must show that the chairs are pews or seats. Within the meaning of the clause which I have cited I do not think that they can. It appears to me that these pews or seats referred to in the Act can only mean the pews or seats which are put into the church by the owners or administrators of the building. It is true that St Giles' was seated at the expense of Dr Chambers. But in restoring the church he was acting with the authority of the owners and administrators, and in seating it as it was actually seated he was in my opinion performing their function. Thus the pews and seats which were placed in the church, though at his expense, must in my judgment be held to be placed therein by the body responsible for the seating of the church, and therefore that in the nave there are no pews or seats within the meaning of the Act.

If any one of the public desired to attend divine service in St Giles' Church I think that he might have brought his chair with him, and sat in the nave free of charge. The pursuers cannot charge for the use of the building. They are only entitled to draw the rents of the pews or seats which are furnished by the body responsible for the proper seating of the church. Neither they nor any other person, so far as I can see, could exclude an intending worshipper from the church, or prevent him from making provision for his comfort during the service. But what each individual might do for himself has been done by the kirk-session. They have provided chairs, and they draw a money payment or rent, if the word be preferred, for the use of them. But as in my opinion these chairs are not pews or seats within the meaning of the Act, the defenders are not bound to account to the pursuers for these moneys.

We are not called on to decide whether the pursuers are entitled to seat the nave, or even to put chairs therein in order that they may draw rents for them. That point cannot be decided in this case, nor can it be decided without calling other parties than the present defenders. For the purposes of this action I think that I am bound to take the church as it is, and while it remains in its present condition the defenders are in my opinion bound to account for such rents as they receive for the pews and seats in the area of the former High Church and Old Church, but they are not in my judgment bound to account for the rents which they receive for chairs which they have placed in the nave.

The Court adhered, with expenses from the date of the Lord Ordinary's interlocutor, and remitted the cause to the Lord Ordinary.

On 20th July 1888 the Lord Ordinary pronounced this interlocutor :—

> "In respect the pursuers do not insist in the remaining conclusions of the summons, assoilzies the defenders therefrom and decerns: Finds the pursuers entitled to expenses."

Counsel for the Reclaimers—Sir C. Pearson—Graham Murray. Agent—Lindsay Mackersy, W.S.

Counsel for the Respondents—Gloag—Gillespie. Agent—Sir John Gillespie, W.S.

Thursday, July 19.

FIRST DIVISION.

(Before Seven Judges.)

[Lord M'Laren, Ordinary.

MACLEAN *v.* TURNBULL.

Trust—Personal Liability of Trustee for Imprudent Investment.

Trust funds, amounting to £3000, which were left by will primarily for the purpose of making payment of the interest as an alimentary provision, were lent in 1881 by the sole trustee, who acted as law agent in the trust, upon a bond and disposition in security over an estate. The trustee did not, before making the loan, obtain a report from a man of skill in regard to the estate. There were, at the date of the loan, fourteen prior bonds over the estate, amounting in all to £49,525, the interest upon which was about £1845. There was also an existing annuity of £260, and a contingent annuity of £300, the capitalised value of both of which in 1885 was £7700. The trustee had acted as agent for the lenders in five previous loans, between 1865 and 1879, for the total amount of £12,000. In 1881 a statement of particulars in regard to the estate had been prepared with a view to a sale, which was sent to the trustee by his country correspondent, who was factor for the proprietor. The rental as appeared from this statement was £3137. This included £200, the annual value of the mansion-house and shootings, and £650, the rent of a farm, which were in the proprietor's hands. It also included £650, the rent of another farm, the lease of which was to terminate by arrangement at the following Whitsunday. In the case of other farms the rents had been fixed before the agricultural depression commenced. The statement made no deduction for property tax, prospective assessments under the Roads and Bridges Act, or expenses of management and upkeep. The estate was exposed for sale in 1881, previous to the loan being granted, at the upset price of £100,000, and in 1882 at the upset price of £90,000. Sums of £85,000 in 1881 and £80,000 in 1882 were mentioned as possible prices by parties desirous of purchasing, but these figures were considered by the proprietor to be too small. The rental of the estate fell so much that in 1884 payment of interest on the bond stopped.

Held, in an action at the instance of the beneficiary, that the investment was not a safe one for trust money, and that the trustee was personally liable to replace the sum of £3000.

This was an action at the instance of Mrs Camilla Soady or Maclean, wife of John Dalziel Maclean, residing at 5 Spring Gardens, Kelvinside, Glasgow, with consent of her husband, and John Dalziel Maclean for his interest, against John Turnbull, Writer to the Signet, Edinburgh, sole accepting and surviving trustee under the last will and testament of the late Mrs Dickson Soady, mother of the female pursuer, dated 29th January 1863, as such trustee and as an individual,

the conclusions of the summons being for declarator "that the defender has incurred personal liability for the sum of £3000 belonging to the trust-estate of the said Mrs Dickson Soady, together with interest thereon at the rate of five per centum per annum from and after the term of Martinmas 1884 until payment, and that the defender in his accounts with the said trust-estate, and with the pursuer Mrs Camilla Soady or Maclean as beneficiary under her mother's said testament, is bound, out of his own funds, to replace and make good the said sum of £3000, with interest thereon as aforesaid, to the said trust-estate, and thereafter to invest and to administer the said sum, with the accruing interest thereon, in terms of the said testament, and in accordance with his duty as trustee: And the defender ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer the said Mrs Camilla Soady or Maclean of the interest of the said sum of £3000 at the rate of five per centum per annum for the period from and after the said term of Martinmas 1884 until the said sum of £3000 shall be duly invested on proper security or securities, in terms of the conclusions herein written: And the defender ought and should be decerned, by decree foresaid, to deposit and consign in any Scottish bank having its head office in Edinburgh the sum of £3000 as belonging to the said trust-estate, and subject to the trust purposes set forth in the said testament, and thereafter to invest the said sum on such security or securities as may be approved of by our said Lords, or as may be found and selected to the satisfaction and at the sight of any man of business to be appointed by our said Lords, the said security or securities to be taken and expressed in such terms as are usual and necessary for the due administration of the said sum of £3000, and the interest that may accrue thereon, for behoof of the female pursuer, in terms of the said testament, and in accordance with the defender's duty as trustee foresaid: Or otherwise, the defender ought and should be decerned and ordained, by decree foresaid, to pay to the female pursuer the sum of £4000 in name of damages."

Mrs Soady's will directed that the interest of the trust funds should be paid to the female pursuer for life, for her sole and separate use and benefit without power of anticipation, the fee, if not otherwise appointed by the testatrix, to go to Mrs M'Lean's children. The amount of the trust funds falling under the will was £2500. There was a further sum of £500 left by Mrs Soady for the same purpose, which the defender, though not named as a trustee, administered in terms of an *inter vivos* trust-deed granted by Mrs Soady in 1862. Mrs Soady died in 1863, and the defender's co-trustee died in 1865.

The defender acted as sole trustee after that date. He also acted as law agent in the trust. Prior to 1881 the trust funds were invested as follows:—The sum of £2500 on the security of the lands of Tandlaw in Roxburghshire, and the sum of £500 over houses in Merchiston Avenue, Edinburgh. In 1881 the defender purchased the lands of Tandlaw, and paid up the bond for £2500 on 6th September 1881. About the same time the bond for £500 was also paid up, so that the defender had the whole £3000 in his hands. That sum he then lent at 4 per cent. to Mr F. L. Roy upon a bond and disposition in security over the estate of Nenthorn in the counties of Roxburgh and Berwick, the bond being dated 7th and recorded 8th September 1881. The interest on this bond was paid up to and including Martinmas 1884, but after that date no interest was paid. In the beginning of 1885 Mr Roy, finding his financial position embarrassed, granted a trust-deed in favour of Mr James Haldane, C.A., Edinburgh, who thereafter continued to manage the estate, and was managing it at the date of this action.

The pursuers pleaded—"(1) The sum of £3000, belonging to the trust-estate of Mrs Dickson Soady, having been improperly lent out, owing to the negligence and breach of duty of the defender (1) as trustee, and (2) as law agent for the trust, the defender is personally liable for the said sum, with the arrears of interest thereon from and after Martinmas 1884."

The evidence led in the case showed that at the time the loan in question was made there were the following burdens on the estate of Nenthorn:—

1. Fourteen prior bonds, amounting in all to	£49,525
2. An annuity of £260 to Mrs Roy senior, the capital value of which in 1885 was	2,700
3. A contingent annuity of £300 to Mrs Roy junior, the capital value of which in 1885, on the assumption that it came at once into operation, was .	5,000
	£57,225

The interest on the prior bonds varied from 3½ to 4 per cent., and amounted in all to about £1845. The estate was exposed for sale in August 1881, just before the loan in question was made, in 1882, and in 1884. In 1881 the upset price was £100,000, in 1882 £90,000, and in 1884 there was no upset price. Overtures with a view to purchase were made by one party early in 1881, and by another in 1882. The price suggested by the party desirous to buy in 1881 was from £80,000 to £85,000, and by the party in 1882, £80,000. The negotiations did not result in a definite offer, Mr Roy thinking the prices suggested too low. The defender had between 1865 and 1879 acted as agent in making five loans to Mr Roy over Nenthorn, amounting in all to £12,000. In making the loan in question he had the rentals used in connection with these former loans to guide him, and in addition a statement referred to as "Particulars of Sale," which was prepared with a view to the property being exposed for sale in August 1881. With reference to the "Particulars" the defender had been consulted in certain matters by his country correspondent Mr Tait, the agent for Mr Roy, but without such information being given him as would have enabled him to revise the rental. In regard to the "Particulars" Mr Turnbull in his evidence said—"I did not revise that document. I saw it after it was prepared, but I cannot say I revised it. I had no knowledge wherewith to revise it. Mr Tait asked me to look it over for him. It is referred to in the correspondence. I did not look it over as under any professional responsibility to Mr Roy, simply as a friend of Mr Tait, and making no charge for what I did." The rental of the estate as appeared from the "Particulars" was £3137. This

rental included £200, the value of the mansion-house, policies, and shootings, which was in the proprietor's occupation; £650, the rent of the farm of Whitehill, which was in the proprietor's hands, and which had previously been let at £840; and £650, the rent of the farm of Blinkbonny, the lease of which, by an arrangement with the tenant, was to terminate at Whitsunday 1882.

With reference to the giving of the loan and his reasons for giving it the defender deponed—"I made the loan in September 1881, because Mr Roy wanted it in consequence of his having been unable to sell Nenthorn. I did not act as agent for Mr Roy, he was not my client. I negotiated with Mr Tait, Mr Roy's agent, in the matter of the loan. I was Mr Tait's correspondent in Edinburgh. . . . I was satisfied with the 'Particulars.' I have no doubt I examined them with a view to this loan. I was the sole person who determined whether the loan should be given. I don't think I consulted with any of the beneficiaries, at least I can find no trace in writing that I did so, but Mr Maclean was often in my office and I probably spoke to him about it. I looked for a margin of income from the estate after providing for the prior bonds. I thought there was enough to pay interest on this bond and still leave a margin. After providing for everything before this bond there was a margin of £1000. I have no doubt I made a calculation at the time bringing out that, but I have no record of the calculation. My information was derived from the 'Particulars.' . . . I assumed the statement of public burdens in the 'Particulars' to be correct. There is no entry of any charge for roads or bridges under the Roads and Bridges Act, the Act had not then come into force. The Act had been passed. I don't think the charges under that Act required to be in the contemplation of a lender, because proprietors were paying tolls and statute labour, which came in place of the assessments under the Roads and Bridges Act. . . . I did not take into account the property tax, or any taxes not stated in the 'Particulars.' I made an allowance from the rental for management, repairs, insurance, &c. I cannot state what the allowance was; I made no note of it. I should think I made a calculation as to what margin there would be after this loan was given, but I have no note of it. I assumed that the whole of the statements in the 'Particulars' were correct. In doing so I relied on the statements of Mr Tait. . . . (Q) Is it the case that the loan was made only in consequence of your confidence in Mr Tait's management?—(A) If I must tell it, I will. Mr Roy was a most troublesome individual to deal with, and a man with whom it was most difficult to get on, and unless the estate had been in the management of some one in whom I had confidence, and who I was sure would pay the interest without objection when the term came, I would have recommended my clients not to lend the money whatever the security was. . . . I think Mr Tait must have intimated to me that he required a loan if the estate was not sold, and knowing that the loan was in the market, I considered it an eligible security for the money which I had to invest. In making the loan I did not act for anybody but Mrs Maclean. Mr Tait acted for the borrower, and he alone. I had before me in making the loan all the usual information, and in dealing with that information I proceeded in every respect in the usual way, applying my mind to the question as to whether the margin was or was not sufficient. I did not go over every item in the rental and criticise it, but I satisfied myself upon an examination of the rental that there was an ample margin, otherwise I would not have given the loan. In deciding as to whether there was an ample margin I had recourse to all the knowledge which was then available as to the prospects of agriculture and of rents in that county. I have no doubt that I took all the knowledge that I had at the time into account in deciding upon the loan and judging of the rental." Mr Turnbull was a landed proprietor in Berwickshire, and had bought and sold land in that and the neighbouring counties. "In considering as to the loan in question I took the interest on the prior bonds at 4 per cent., which gave £1981. Adding to that the amount of the annuity to Mrs Roy senior, £260, the total annual burden on the estate was £2240. In that way there was upon the rental of 1881, as appearing upon the 'Particulars,' a margin of £900, and taking the actual rates of interest paid, the margin was £1032. I had no doubt as to the existence of that margin, and I had no reason to suppose that it was likely to diminish. . . . Mr Roy is not a friend of mine, he is merely an acquaintance. I had no notion of accommodating him or Mr Tait in the matter of this loan. I had no motive in making the loan except to get what I considered a good investment for my client." It appeared from the evidence that the £3000 was to stock the farm of Whitehill, which had fallen into the proprietor's hands. The defender had at first intended to make the advance from funds in the hands of the trustees of the late Lord Majoribanks, and a draft bond was prepared in their favour. The proposal, however, was never submitted to them, and the loan was made by Mr Turnbull as Soady's trustee instead. Two bonds over Nenthorn were subsequently granted, one for an advance of £3000 at 4¼ per cent. by Longmore's trustees in 1883, clients of the defender, and one for the sum of £1250 in favour of the National Bank. By March 1885 the rental of Nenthorn had fallen, owing to the agricultural depression, to £2512, and the burdens were £225, leaving a net rental of only £2287.

Mr Molleson, chartered accountant, who was examined for the pursuers, stated that a fair and moderate estimate of the income as shown by the "Particulars," when properly criticised, was £2579, a reduction of £558. "With a margin like that there was no room for a loan of £3000. I should have felt very anxious indeed if I had held any of the more recent of the prior loans."

The estate of Nenthorn possessed great amenity, and Mr John Clay of Kerchester, who was examined for the defender, deponed that residential amenity often made a difference of five or ten years purchase in the price of an estate.

The Lord Ordinary (M'Laren) on 25th January 1888 pronounced the following interlocutor:—"Finds that the investment on the estate of Nenthorn was not a safe or suitable investment for trust money: Finds that said investment was accepted by the defender as trustee without due inquiry having been made as to the sufficiency and suitability of the security as a security for the investment of trust money, and that the

defender has incurred personal responsibility by reason of negligence, whereby loss has accrued to the trust-estate: Finds that the defender is bound to replace the said sum of £3000, he being always entitled to an assignation of the bond in order that he may effect his relief if possible: Therefore finds and declares and decerns against the defender in terms of the conclusions of the summons other than the conclusion for damages: Finds the pursuers entitled to expenses, &c.

"*Opinion.*—This case was heard in October last, and was allowed to stand over because of the dependence of a case involving similar considerations in the Inner House. But the case referred to has been put out for a re-hearing, and one of the parties to the present case, in answer to my inquiry, has expressed the wish that it should now be disposed of. It is also my own impression that I ought not to leave the decision longer in suspense.

"The pursuer Mrs Maclean, who sues with her husband's concurrence, has a beneficiary interest in the trust-estate, consisting of £3000, whereof the defender is sole trustee. As regards the sum of £2500, part of this fund, the defender derives his authority from the will of Mrs Maclean's mother, Mrs Soady. As regards the remaining £500, which is part of a sum provided to meet a marriage obligation, the defender has no formal title of administration, but he states that he agreed to act as trustee of this fund to oblige the pursuer, and he does not raise any distinction as to the degree of his responsibility for the two sums which make up the £3000. It is necessary to notice that the defender, who is a Writer to the Signet, has also, with the approval of Mr and Mrs Maclean, undertaken the duties usually performed by a law agent in relation to the investment of the trust funds. The case maintained against the defender is that the trust fund has become irrecoverable by reason of its being lent out on insufficient security under circumstances which amount to negligent administration. It is therefore contended that the defender is under obligation to replace the unpaid capital and interest, subject to a right on his part to an assignation of the security in order that he may work out his own relief or indemnification in the event of the security becoming productive.

"It is always with the greatest reluctance that a judge must approach a question involving the personal responsibility of a trustee who has been acting in good faith, and except for the purpose of clearly defining the conditions of the question, it would be unnecessary to state that such is the character of the present case.

"In the argument before me no imputation was made regarding the professional skill of the defender, or his attention to the interests of his clients. All that is said against him is that he too easily accepted statements put before him regarding the value of the security on which the £3000 was lent instead of instituting an independent inquiry, and exercising his own judgment on the facts as they would have appeared had proper inquiry been made.

"The money was lent in September 1881 on the security of the estate of Nenthorn, Berwickshire, the property of Mr F. L. Roy. According to the defender's evidence—'The prior bonds on the estate amounted to £49,525, and in addition there was a jointure to the widow of the late proprietor, and a contingent jointure to the present Mrs Roy if she should become a widow. The jointure actually payable was valued at £2700, and the contingent jointure, supposing Mr Roy were to die at the moment, was taken at £5000.' (Mr Roy's life, it is added, was not considered a good life.)

"The sum of these incumbrances, together with the £3000 lent from the trust-estate in question, is £60,225, and the first question is as to the sufficiency of the security. The defender considers that the value of the estate for the purposes of a security holder was £90,000 in September 1881.

"Mr Roy became in 1885 unable to meet his engagements, and granted a trust-deed. Since then it has not been found possible to effect a sale of the estate at a price which will cover the heritable debt affecting it. It is proper to notice that the loan in question is the fifteenth bond over Nenthorn, a circumstance which would naturally suggest to a man of business that the proprietor was gradually eating up his estate, and which ought at all events to have induced caution in making an advance from trust funds.

"It is not easy to give a definition of what is a proper security for the investment of trust funds. It may, however, be assumed that a security is not shown to be a good security for trust funds by proving that other persons were willing to lend on the same security. A prudent man of business, dealing with his own money, may be willing to lend it on doubtful security, either because he is offered a special rate of interest, or even without this inducement, because he is willing to incur some risk rather than leave his money uninvested. Indeed we know that persons of good commercial credit have no difficulty in obtaining money from the banks without security of any kind. But I understand it to be the law that a trustee may only lend the money of the trust on safe security, and the only meaning which I can attach to the rule is that the security must be such as offers reasonable assurance that the principal and interest will be recovered out of the estate in case the obligant should be unable to meet his engagements. It is in all cases desirable that the rental should exceed the annual incumbrance. I do not say that this is essential, because an estate may be entirely in the proprietor's hands, as is the case with many Highland properties, and may yet be a safe security for a first bond.

"I. In a case like the present, looking to the amount of the previous incumbrances and other circumstances, I conceive that the trustee was not justified in lending on 'amenity value,' or the prospects of a good price being eventually obtained under a sale, but ought to have seen that the current return in the shape of rents was sufficient to meet the interest on heritable debt.

"On this point the facts are easily stated. The defender founds upon the rental given in a 'Statement of Particulars,' prepared in 1881 with a view to sale; in other words, an advertisement prepared for general circulation, and intended to call the attention of purchasers of land to the suitability of Nenthorn as a residential and rent-yielding property. According to

this paper I make out the nominal rental to be £3560, and I understand the net rental (according to the same paper) to be £3327. In such a paper it is not to be expected that anything would be said suggesting doubts as to the permanence of the rental. That is a matter which the pursuer is supposed to consider or to find out for himself. The defender, if he had applied his mind to the question, would have seen that under the conditions which existed in 1881 the nominal rental could not possibly be maintained, and that a statement of nominal rental was no true criterion for determinating the sufficiency of the security. Mr Molleson, C.A., a witness for the pursuers, gives reasons for reducing the nominal rental by the sum of £558. In these reasons I fully concur, and I must add that as the farm of Whitehill was in the natural possession of the proprietor I do not consider that the supposed rental of this farm ought to be reckoned at all in an estimate of rental as a security for payment of interest, and for this reason that it would not be possible for the heritable creditor to make this rental available as a security by means of an action of maills and duties. This is a very material element in the case, because this farm, the profits of which went directly into the proprietor's pocket, is set down in the particulars, or at all events was treated by the defender, as a security for interest to the extent of £840 per annum, when, according to the actual mode of management, it was not available as a security for interest at all. This was found out as soon as Mr Roy's affairs became embarrassed, but I think it ought to have been foreseen. On this point of the case I am clearly of opinion that the annual return from Nenthorn in the year 1881 was insufficient to sustain a new loan of £3000, or to provide for the punctual payment of the interest on such a loan.

"II. I have next to consider the question whether the capital value of the estate in 1881 was such as would constitute a safe security. As before observed, the defender estimates its value at £90,000 for sale at that date. It is satisfactorily proved that the price of from £80,000 to £85,000 might have been obtained for it had the proprietor been willing to sell. But now this possibility of the proprietor refusing his consent to a voluntary sale is one of the things which a postponed bondholder has to consider before advancing his money. It is not said by any one that Nenthorn if put up to sale by a bondholder would have brought £80,000 or anything like that sum. But it seems that Nenthorn is a very desirable residential estate, and it is in evidence that £80,000 might have been got for it by private bargain from a gentleman of fortune who was on the look-out for a residence, and also from a body of trustees who were directed by their trust to purchase lands in the south of Scotland. Therefore the position to be taken by the proprietor was vital to the security, so far as depending on the probability of a sale before the market for heritable property had become still further reduced, as was at least probable in 1881.

"Now, what is Mr Turnbull's opinion of Mr Roy as a gentleman whose co-operation in such a matter was to be depended on? I give it in his own words—'Mr Roy was a most troublesome individual to deal with, and a man with whom it was most difficult to get on; and unless the estate had been in the management of some one in whom I had confidence, and who I was sure would pay the interest without objection when the term came, I would have recommended my clients not to lend the money, whatever the security was.'

"In point of fact Mr Roy took up the position that he would not allow the estate to be sold under £100,000, or something near that figure—a very unreasonable position no doubt, but a position for which I think the defender would not be altogether unprepared, according to the opinion which he thus frankly expressed in his evidence.

"Apart from this speciality I must say that amenity value is not the kind of value on which it is proper that trustees should lend when the chance of obtaining repayment depends on the fancy of a purchaser. In the case of a first mortgage I do not say that it may not legitimately enter as an element of the margin. The question whether a postponed security should be accepted as a trust investment is a question of circumstances, and here I think that the aggregate of all the circumstances—insufficiency of cash rental, speculative value, large prior incumbrances, and a proprietor difficult to deal with, and verging on embarrassment, ought to have stamped the transaction in the judgment of a professional man as one lying outside the limits of safe investment of trust moneys.

"III. There remains for consideration the question of negligence. If this were a kind of trust investment prohibited by some positive rule of law the mere infringement of the rule would create personal liability. But it is not so. The law of Scotland does not as at present interpreted prohibit trustees from lending on the security of a second bond. If a second bond may lawfully be taken, I see no reason why a fifteenth bond (which is the present case) may not also be accepted by trustees, always assuming that there is an ample margin. The question is then one of circumstances in which the law requires a trustee to use his best judgment, assisted where necessary by professional advice, and I am not of opinion that a trustee is personally responsible for the consequence of a mere error of judgment. A man may be appointed a trustee who has neither professional skill nor average ability, and if such a trustee, after due inquiry, and making the best use of the limited faculties which nature has given him, makes an investment of the trust money which turns out to be unsound, I see no sufficient reason why the loss should be thrown upon him.

"But in the present case my opinion is that the defender did not make due inquiry. He is a man of ability and of professional experience, but in this case, from some error or oversight, he just trusted to the statement of particulars of Nenthorn, and agreed to give the loan because that statement showed an apparent surplus. This is the kind of negligence for which the law holds trustees responsible. I cannot look upon this as a case of misadventure arising from unforeseen causes, because I think that the defender had the means of procuring more reliable information regarding the worth of Nenthorn as a security, and that if he had been fully informed he would

not have lent the trust money on the security of that already heavily mortgaged estate.

"No question has been raised as to the computation of damages. The judgment will find the defender accountable for the £3000, he retaining the present security for his personal indemnification."

The defender reclaimed, and argued—In considering whether this was a prudent investment of trust funds the question must resolve itself into one of margin. The defender's estimate of the value of this estate was £90,000, and the proprietor had an offer of £85,000, which left a margin of about £35,000, an ample cover for £3000. Margin divided itself into (1) margin of rental for payment of interest, and (2) margin of capital value for payment of the sum lent. As to the former—margin of rental—it was urged that because the farm of Whitehill was in the proprietor's own hands it therefore was not a good security for trust funds, but though the rents could not be attached, yet the stock might be poinded. [LORD PRESIDENT—If the rent of the land in the proprietor's hands and the value of the mansion-house be deducted the rental is reduced to £1700, and you say the interest on the prior bonds amounts to £1800.] It was not fair to put the land in the proprietor's hands and the mansion-house in his occupation down at nothing; these were lettable subjects, and if let would put money into the creditors' pockets. In negotiating this loan the defender could not be said to have acted without full information; he had lent previous sums over the estate shortly before, and he had then made the fullest inquiries. He had all that information before him, and in addition he had personal knowledge, which, as a neighbouring proprietor, was considerable. With all these details before him could the defender be said to have been so culpably negligent as to render him personally liable for the loss that had taken place? In considering the evidence of Mr Molleson it was clear, on his own showing, that his estimate of the rental of the mansion-house was a random one, because he knew nothing about the estate and had never been there. The farms were taken at the current rents which, except as regarded one or two small items, were being received. In considering how far unlet subjects could be looked upon as productive, there were three categories, into one or other of which they fell to be classed—1st, shops, which were the worst class; 2nd, a mansion-house in the proprietor's occupation, which, though it did not yield any actual return, yet might be let, and so could fairly be looked upon as a source of revenue; and 3rd, farms worked by the proprietor which yielded produce if not rent. It was nowhere laid down that if a proprietor farmed a portion of his own land a lender was not entitled to estimate this at a reasonable sum in considering a proposed loan over the estate, otherwise no money could be lent over houses in town in the occupation of the borrower. Taking this into account, the defender considered he had a clear margin of £900 per annum, and taking this as the basis of his calculation, could it be said that no man of ordinary prudence would have lent on this margin? The pursuers must bring their case up to this. The objection to Mr Molleson's evidence was that he treated the whole transaction in the light of the present day and argued back. Even if the defender's action was viewed as an error of judgment he was entitled to be freed, because all that he could be called upon to show was that he acted with ordinary prudence and foresight. He was law agent for the trust, but made no charges, and acted solely for the lender. In such a case he was limited to a certain class of investments—this was one of the sanctioned class—and as far as the sufficiency of the investment appeared from the rental sheet there was a fair margin. If the capital value of the security was such as to make the capital and interest of the loan safe, then the question of whether or not the loan should have been made was one of discretion. The question of security arose when the interest ceased to be paid, but there was no absolute rule requiring that in trust investments there must be a margin of rental as well as a margin of value. As regards the margin of capital value—The property was estimated as being worth from £80,000 to £90,000 and £85,000 was offered for it. At the time of the loan in question the state of the property was as follows:—

Lent in cash over the estate .	£49,525
Capitalised value of annuities .	7,700
Total burdens .	£57,225
Offered for estate .	85,000
Margin . . .	£27,775

or less the amount of the loan in question, and as security for it £24,775—*Kennedy* v. *Kennedy*, Dec. 9, 1884, 12 R. 275. Money was subsequently advanced upon this security. There might have been error of judgment, but error of judgment was not *culpa*. The Lord Ordinary thought the defender had not made sufficient inquiry, but being a local proprietor he was in a peculiar position, and had peculiar and ample sources of knowledge. He had full information before him, and after making all reasonable and necessary deductions he applied his judgment and came to the conclusion there was security for the loan. He might have committed a mistake, but it was in full knowledge of the facts, and after full consideration of all details. There was no vestige of *culpa* or negligence here. In considering whether this was a judicious loan at the time when it was made, subsequent events must be kept out of view, and the actings of the defender considered in the light of the information then before him, and so considered, the judgment of the defender in 1881 was sound—*Learoyd* v. *Whiteley*, L.R., 12 App. Cas. H. of L. 727, and Lord Watson, 733; *Godfrey* v. *Faulkner*, L.R., 23 Ch. Div. 483.

Replied for the respondents—This was a postponed bond taken by a trustee at a period of commercial depression, when any prudent man might have suspected things had not reached their worst, and should have made allowance accordingly. Special caution was required in such a case, but the evidence showed that the defender had not looked into this matter as he should have done. In determining the question as to the margin of security, both as to capital and interest, the defender took as his guide a state drawn up to induce a sale of the property, and which he himself had assisted the proprietor to prepare.

At the time of this loan one-half of the estate was in the proprietor's own hands, the rental of this portion being £1500, and if amenity was not taken into account, little or no margin could be shown. The fault the defender committed was in taking matters too easily. Seeing that he was acting without any skilled advice, he ought to have been the more careful and vigilant. The very object for which this loan was required—to stock a farm—ought to have put the defender on his guard. In order to make a loan of this kind secure there should have been 30 per cent. of free income. It was urged that the defender's actings in this case fell under the category of errors of judgment, but what the pursuers complained of was that this was a case of positive negligence, as the defender had omitted to take into account circumstances well within his own knowledge. The contention on the other side was that little heed needed to be paid to the interest so long as the capital was safe. But trustees were bound to look at the productive value of a subject so as to enable them to hold the balance fairly between a liferenter and a fiar. The true position of the defender was he was financing this estate over which he had lent a great deal of money, and the interests of the pursuers were sacrificed for this purpose. It was the defender's duty to have taken the advice of a valuator before making this loan; he did not do this, and must be held liable for all that had occurred through his negligence—*Sanders* v. *Sanders' Trustees*, Nov. 7, 1879, 7 R. 157; *Raes* v. *Meek*, June 29, 1886, 13 R. 1036; *Forsyth*, Jan. 28, 1853, 15 D. 345; *Millar's Trustees* v. *Millar's Factor*, Nov. 2, 1886, 14 R. 22; *Fry* v. *Lapsley*, L.R., 28 Ch. Div. 278; *Whiteley* v. *Learoyd*, L.R., 33 Ch. Div. 347; 12 App. Cas. 727; *Olive* v. *Westerman*, L.R., 34 Ch. Div. 70.

At advising—

Lord Justice-Clerk—This is a case involving the liability of a trustee under a testamentary trust-deed—a gratuitous trustee—on the ground of improper investment of trust funds.

The circumstances out of which the question arises may be very shortly stated. The defender Mr Turnbull is the only surviving trustee under the settlement of a Mrs Soady, dated in January 1863. Under that settlement the lady, who died the same year, provided that after the conversion of the estate into money the trustees should invest the sum and pay the interest or annual produce thereof to the female pursuer Mrs Maclean for her lifetime, and afterwards divide the principal in the manner pointed out in the testamentary trust-deed. Mr Turnbull is the only surviving trustee. There were other trustees, but Mr Turnbull has substantially taken the whole management of the trust affairs under the settlement in question. There was also an *inter vivos* trust-deed under which Mr Turnbull has administered a fund of £500.

Mr Turnbull, I need hardly say, is a man of well-known professional ability, and has attained a high position among his brethren, and he was perfectly qualified to discharge the duties of such a trust without any assistance. The charge against him is that he invested £2500 of the testamentary trust funds, and £500 of the *inter vivos* trust funds, in a way which has led to loss—indeed the loss of the whole sum—and that he is therefore liable to make the money good to the trust-estate. The ground on which this challenge is made is not the ordinary one of want of sufficient skill or knowledge, but that, having the means of sufficient knowledge, and undoubtedly possessing sufficient skill, he permitted himself to overlook the most manifest elements of safety in making the investment in question, and that if he had only exercised—I do not say the care of a prudent man in his own affairs—but if he had only exercised the most ordinary prudence, this catastrophe never would have happened.

It is with great regret that I find myself obliged to give effect to that view. One sees quite plainly how the matter drifted into the position in which it ultimately stood. It did so mainly from Mr Turnbull having had his attention directed almost exclusively to another object, and from his exuberant confidence in the knowledge which he himself had of the facts—a confidence which, as it turned out, was very ill-founded.

In the year 1881 Mr Turnbull was a correspondent of Mr Tait, W.S., of Kelso. Mr Tait was factor for Mr Roy of Nenthorn. There was a sum of £2500 invested in Mr Turnbull's name as trustee over a property in the county of Roxburgh, the proprietor of which property had got into difficulties through the City of Glasgow Bank failure. Mr Turnbull bought the estate with that bond upon it. I believe that was a perfectly good security. It so happened that the proprietor of the estate of Nenthorn had got into considerable difficulty about the same time. That estate was exposed for sale in the month of July or August 1881. The position in which Mr Roy and Mr Roy's estate stood financially was a matter that ought to have received the greatest attention on the part of Mr Turnbull. The estate was covered with bonds to the amount of some £50,000. Of these bonds there were fourteen, each of them postponed to the one immediately preceding it. As I have said, the difficulties arising out of the restriction of income were so great that in the month of July or August 1881 Mr Roy wished to dispose of his estate to a purchaser. But unfortunately other things also supervened. The farms, or some of them, upon the estate were falling out of lease. One farm valued at £840 a-year was in the hands of the proprietor. Another farm—Blinkbonny—was renounced by the tenant. And these things happened before the events took place in which the present pursuers have an interest.

In September 1881 Mr Tait wrote to Mr Turnbull to say that he wished a loan of over £3000 to be found for Mr Roy, and he suggested that he might apply to the trustees of the late Lord Marjoribanks. Mr Turnbull not thinking it right, and probably in that matter judging properly and wisely, that the bond for £2500 held by himself as trustee should remain as a burden on his own estate, paid it up, and with the £500 then uninvested this made a sum of £3000 in his own hands. Accordingly, although he had prepared a bond in favour of the Marjoribanks' trustees, the loan was not made by them, but it was made by Mr Turnbull as Soady's trustee to Mr Roy on the security of his estate of Nenthorn. Now, without going further into the details, I think I have said enough to show that this was a matter that ought to have had the

greatest amount of deliberation. This bond which was ultimately taken in favour of the trustee of Mrs Soady was the fifteenth bond over the estate of Nenthorn. The Lord Ordinary has said, and I agree with him within certain limits, that there is nothing in the law of Scotland contrary to trustees taking a postponed security over landed estate; but when it comes to the fifteenth bond, each bond being postponed to the one before it, that seems to me to be a matter requiring very great thought and inquiry, because an investment of this kind is not an investment for capital only and mainly, but an investment for income. Therefore the main thing to be ascertained, and that all the more when the trustee was acting for alimentary beneficiaries, was to see that the rental or income of the estate was sufficient and left a sufficient margin. On the other hand, times and prices were bad. Land had been going down, and rents were going down, and the whole landed interest was in a state if not of collapse at least of difficulty. In short, it was not quite a good time to take postponed securities. I should say, although that would not be a ground on which I would proceed in this case, that the fact that there were so many prior bonds—bonds prior to that which was taken in this case—was I think a material element to be taken into consideration by the trustee.

But what was the result of all these difficulties that ought to be have been taken into account in this transaction? The estate was exposed for sale without an offer being received for it. Times went on as bad as ever for four years, and indeed down to the present time; but from one source or another interest continued to be paid for four years upon the bonds and then the whole affair collapsed, and in the year 1885 Mr Roy had to put himself under trust. The estates were handed over to Mr Haldane, the accountant. I fancy that from that time to this no more interest has been paid. According to the statement of the pursuers therefore the whole of this trust money for which responsibility is sought to be fixed on Mr Turnbull is lost. It does, I think, appear that if a sale could have been effected at a lower sum than £100,000, which was the price asked for the estate, the capital might have been saved. But that was not done. From 1885 therefore until now the estate has remained unsold, and I fancy that as far as the beneficiaries are concerned the money in question is a total loss.

The narrative which I have given, and which I do not think is highly coloured, is a very depressing one. Mr Turnbull had acted as Mr Tait's correspondent in regard to this estate for many years. Mr Turnbull had lent £12,000 of the £50,000 that burdened it himself. He knew all about it. But as I have said his attention was not so much directed to the question whether the income which would or ought to reach the beneficiaries under Mrs Soady's trust-deed was prefectly safe, so as even to leave a margin, as to the effect which the transaction would have upon the estate of Nenthorn. It is not a case for saying that a man should exercise the same prudence that he ought to in his own affairs. Knowing Mr Turnbull as I do, I cannot doubt that if the case had been his own he would have acted exactly in the same way. But then he had a confidence in the elasticity of the subject which has turned out to be fallacious. The result was that he did not inquire into the chief matter which he ought to have inquired into, namely, how the rental of the estate stood. We have the information now. Mr Molleson, an accountant, has gone fully into the matter, and he reports that instead of there being a margin of income for this £3000 in question there is none at all. The income will not suffice to pay the whole of the interest on the bonds, and if that is the case it will not suffice to leave a margin as every such security ought.

Those are the whole details of the case as it has been shown to us. I have failed to see any ground on which Mr Turnbull can escape from liability. I have found no ground, I am sorry to say, on which the claim made in this action can be resisted. In the circumstances, and under the pressure which I have already described, and probably with a too sanguine expectation that the financial condition of landed property would revive and improve, he allowed himself to make this investment, which has had the disastrous result to which I have referred. Mr Turnbull makes no disguise at all about it. He says in his own evidence—"I made the loan in September 1881 because Mr Roy wanted it, in consequence of his having been unable to sell Nenthorn." Then he says about the loan from Marjoribanks' trustees, that he probably intended to give a loan from those trustees, but he cannot recollect that he ever communicated either with them or with the beneficiaries under this trust on the subject of this advance.

Now, I do not wish to detain your Lordships further. I have indicated very shortly the grounds on which I think we must come to the conclusion that the pursuers are entitled to the decree which they seek against Mr Turnbull, to replace the £3000 in question. The pursuers are willing to give an assignation of the security, and possibly, although not probably, it may in the end turn out to be of some value.

Lord Mure—I have come to the same conclusion as the Lord Justice-Clerk. I do not see my way to differ from the Lord Ordinary. There are some of the grounds upon which he seems to have gone with which I am not sure I entirely concur, but it is unnecesssary to go into that matter.

It appears to me that in taking securities of this sort trustees are bound to look at the interest—to security for the interest as well as to security for the capital. An argument was strongly pressed upon us by the Dean of Faculty, founded upon the fact that the estate was quite sufficient to cover this sum and the large sums that had already been lent on the security of the estate. But it seems to me that the existence of those other bonds itself showed that the trustee was taking a wrong course in investing the money on the security of this estate. If trustees were only bound to have regard to the sufficiency of the security for the capital the defence that the Dean urged upon us might in certain circumstances be a good defence. But here it was, as has been pointed out, necessary to find security for the interest as well as the capital. The money to be invested formed the whole trust-estate. There was no fund available of any description for the benefit of the beneficiaries except the interest on

this sum of £3000. Now, looking to the rental of the estate and to the fact that nearly one-half of the property was in the hands of the proprietor, I am bound to think that it did not afford sufficient security for the interest as well as the capital. The admitted rental was about £3100. Then there was an annuity and a contingent annuity as burdens on the estate, which reduced the £3100 very considerably indeed. When in addition you look to the fact that two of the farms were in the hands of the proprietor, who was not a person skilled in farming, there was no security that I can see for the payment of the interest to these beneficiaries in the event especially of the fall in the value of land continuing. Mr Turnbull evidently made a mistake, and he must be held responsible for it.

Lord Shand—The Lord Ordinary has said in his opinion that it is with great reluctance that he comes to deal with a case of this class in which a gratuitous trustee is sought to be held responsible for want of due care in making an investment. I may say for myself that if I could see any grounds for differing on the facts from the Lord Ordinary I should willingly have done so, but I have come to the conclusion that there are no sufficient reasons for disturbing his Lordship's judgment.

Mr Turnbull, it need hardly be said, acted with the utmost *bona fides*, but it seems to me to be the result of the evidence as a whole that he failed to exercise due care in making the investment complained of. He had himself carried through a number of different loan transactions on the estate of Nenthorn prior to the loan in question, and it may be that as most of these had been for sums of not very large amount he had not realised that the aggregate burdens on the estate had become so large, and that in the special circumstances into which the estate had gradually come it was highly imprudent that any further loans should be granted. But whatever it was that misled him, I have reluctantly come to the conclusion that he showed a want of that care in looking to the material points with reference to the security which any prudent man would have shown in investing the money of another. The rule to be applied to the case is that the defender was bound to exhibit the reasonable amount of care in arriving at a judgment which a man of ordinary prudence would do in his own affairs. The rule is thus expressed by Lord Watson in the case of *Learoyd*, L.R. 12 App. Cases, 733—"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So long as he acts in the honest observance of these limitations, the general rule already stated will apply."

Mr Roy was confessedly in a position of embarrassment, and this was known to the defender. He had borrowed sum after sum on the security of his estate until it was burdened with upwards of £50,000. There was one annuity then current, the capital value of which was £2700. There was a contingent annuity which might begin to run at any time, the capital value of which was £5000. That brought up the debt or charges on the estate to nearly £60,000. No fewer than fourteen prior securities existed on the property, and though it may be true that such a number of prior bonds is not of itself conclusive against the propriety of granting a fifteenth loan, still it is such a peculiarity as should lead to a very deliberate and careful consideration of all the other circumstances affecting the security. The gradually increasing number of burdens showed a proprietor running steadily into debt, and the holder of a security postponed to so many others was liable to considerable disadvantages if the earlier loans came to be called up and a new lender should not readily be found. Then it is not to be thrown out of view that the defender was aware that Mr Roy was a difficult man to deal with—one who, if a fair offer were got for the estate, might be expected to throw difficulties in the way of its sale.

Again, if you take the annuities into account, as I think they ought to be, the rental, even upon Mr Turnbull's own view, was extremely narrow, and at the best did not show a sufficient margin. Mr Turnbull took the rental without making certain deductions which a good many witnesses tell us ought to have been made at that time, looking to the agricultural depression, which although of course not nearly so bad as it has since become, was yet sufficiently serious to have led a man of ordinary prudence to make some deductions. But above all, the material, and to my mind the determining, consideration is this, that with a rental of about £3200 a-year the proprietor had already in his hands a farm of the estimated annual value of £650, and the mansion-house of the value of £200; while another farm of a rent also of £650, the lease of which was then current was about to fall in, the tenant having renounced the lease as at the succeeding term. That was no doubt subject to a possible rearrangement of terms if the landlord and tenant agreed, but if there was no such arrangement that farm also would fall into the proprietor's hands. So that out of a gross rental of £3200, about £1500 would be in the hands of Mr Roy, who had such large burdens already on his estate, and therefore large claims of interest to be met annually from the rental. That gave an element of serious risk to the transaction which should have prevented a man of ordinary prudence acting with reasonable care and not willing to run unusual risks from entering into the transaction. It was maintained that it might be no disadvantage to have even two farms in the hands of the proprietor, and that at least the stock and cropping might be made available by diligence if necessary on the part of the security holder. To that argument, at all events in this case, I cannot accede in judging of the propriety of the security. Any such view is entirely weakened, if not destroyed, by the circumstance that the proprietor Mr Roy was a man of no means whatever, having no income beyond what his estate afforded. As soon as the farm of Blinkbonny fell in, the

return from the estate depended on the proprietor, then in impecunious circumstances, being able to make profit from about half of the estate in his own possession, while if Blinkbonny were again let there is every reason to believe it must be let at a reduced rent.

The circumstance most favourable to the defender is that apparently two opportunities occurred for a sale of the estate—one late in 1880, or early in 1881, when a price of £80,000, or possibly even of £85,000, might have been got; and another in 1882 or 1883, when the trustees of a Mr Grieve seem to have been willing to negotiate for a purchase at a price of about £80,000. The former of these opportunities for a sale occurred some time before the loan in question. It was not known to Mr Turnbull, and was therefore not a circumstance in his view in agreeing to make the loan, but his counsel very properly founded on what is proved as to the proposed negotiations on both occasions as showing that the property had a value which would much more than cover the burdens, including the additional £3000 in question. The first observation to be made on this is that it leaves out of view what would happen if Mr Roy were to decline, as he was likely to do, and did, to sell at these prices. In that case there was a very serious risk that the return from the estate would not meet the interest on the securities, and the defender was, I think, bound to have carefully in view that the regular payment of interest was of vital consequence to his clients. But it was further a matter which a man of ordinary prudence exercising reasonable care should have taken into view that Mr Roy was a gentleman not likely to act on sound advice in the sale of the estate, but would in all likelihood insist on holding it for an extravagant price, acting on a speculative view very unfavourable to the security holders at a time when property was falling in value.

It was strongly pressed upon the Court in the argument for the defender that the utmost that can be imputed to him here was that with full information before him he committed an error of judgment in taking the security, and that his *bona fides* and confidence in the security was such that he would himself have advanced the money had he desired to make an investment.

It may be true that the defender might have taken such an investment for himself, but assuming this to be so, I am humbly of opinion that in doing so he would not in the circumstances which I have stated have acted as a man of ordinary prudence seeking an investment free from unusual risk would do. As Lord Watson observed in the passage above quoted—"A trustee is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. It is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard."

If, again, I had been of opinion that with full information before him the defender merely committed an error of judgment, I should have held that he could not be responsible for the result, provided that it appeared that he had exercised reasonable care in forming a judgment. It appears to me, however, that looking to the burdened condition of the estate, the large part of which was in the proprietor's hands, and the probability of an additional farm falling in, it would have been a proper and reasonable precaution, which ought not to have been omitted, to have had a report from a man of skill after visiting the estate and examining the farms as to the probability of the rents being maintained. Had this course been followed I think the defender would have been advised in estimating the rental to make allowances or deductions of larger or smaller amounts such as were spoken to by several of the pursuer's witnesses, and his special attention would have been directed to the risk attending the falling in of the lease of Blinkbonny. He acted on his own views without taking any professional assistance, but in doing so I think his responsibility must be judged of in the light of the advice which he would in all probability have received had he taken the proper step of consulting a man of skill who had visited and examined the property. There was, I think, want of due consideration and care of the whole matter which, if given, would have resulted in the defender's resolution not to make the investment. I am therefore, with regret, of opinion that he is legally responsible for the loss which has been sustained.

Lord Rutherfurd Clark—I also think the defender is liable.

Lord Adam concurred.

Lord President—I am of the same opinion. I wish only to add that this was a case in which the trustee was bound to be specially careful about the security being sufficient for the interest of the loan, because the primary purpose of the trust was to secure an alimentary annuity.

Lord Young concurred.

The Court adhered.

Counsel for the Pursuers and Respondents—R. V. Campbell—Lorimer. Agents—Maitland & Lyon, W.S.

Counsel for the Defender and Reclaimer—D.-F. Mackintosh—Low. Agents—Romanes & Simson, W.S.

Thursday, July 19.

FIRST DIVISION.

[Lord Fraser, Lord Ordinary in Exchequer Causes.

LORD ADVOCATE *v.* CROOKSHANKS.

Revenue—Customs—Customs Consolidation Act, 1876 (39 *and* 40 *Vict. cap.* 36), *sec.* 202—*Forfeiture.*

The Customs Consolidation Act, 1876, provides by section 202 that all ships, carriages, and other conveyances, together with all horses and other animals and things used in the importation, landing, removal, or conveyance of uncustomed goods liable to forfeiture under the Customs Acts, shall be forfeited.