all claims of damage in certain cases. The question to be tried is, whether the defender is within the exception, and it is quite impossible that we can, antecedently to all inquiry, prejudge the question and give the defenders the benefit of the statute if the circumstances are as alleged by the pursuer.

I agree also that the case, being an action for *solatium* for the loss of a relative, ought to be sent to a jury, because it is our practice to send all cases of that description to the jury court.

LORD KINNEAR—I quite agree that if the averments of the pursuer are proved, the defenders were not acting within the statute, and are therefore not entitled to the privilege of the exception which it provides for them.

I also agree that the pursuer is entitled to have this case tried by a jury.

LORD ADAM was absent.

The following issue was thereafter approved for trial of the cause without objection on the part of the defenders:—"Whether, on or about the 21st day of July 1892, the defenders, or either and which of them, wrongfully removed James Main Mitchell, the pursuer's only child, now deceased, from the pursuer's dwelling-house in Torry aforesaid, to the loss, injury, and damage of the pursuer?"

Counsel for the Pursuer—Orr—A. S. D. Thomson. Agents—W. & J. L. Officer, W.S.

Counsel for the Defenders—Lord Advocate Balfour, Q.C.—Salvesen—Broun. Agents—T. J. Gordon & Falconer, W.S.

Saturday, December 17.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

HERITABLE SECURITIES INVESTMENT ASSOCIATION, LIMITED *v.* MILLER'S TRUSTEES AND OTHERS.

Trustees — Personal Liability — Improper Payments — Payments by Trustees to Beneficiaries while Debts Unpaid, in bona fide Belief that Debts amply Provided for—Interest.

The trust-estate left by a testator consisted almost entirely of three heritable properties, which were burdened with debt to a large amount, due under personal bonds granted by the testator to an investment association. Part of this debt was repayable by instalments, the last of which was not due until 1889. At the date of the testator's death the security for the debt was believed to be ample, both by the trustees and by the heritable creditor, and in 1877 and 1878 the creditor allowed two of the properties held by him in security to be sold, and part of the price in each case to be paid to the trustees. The sum so received by the trustees in 1878 was handed over by them to a son of the testator, who was at the time largely indebted to the trust-estate for the price of heritable subjects taken over by him in terms of his father's settlement. The creditor was aware that this payment was being made, but not of the state of accounts between the parties. In 1885 the creditor called upon the trustees for the first time to pay up the debt. Prior to this date the trustees had from time to time paid various sums to the beneficiaries under the testator's settlement. The trust-estate having proved insufficient to satisfy the creditor's claim, *held* (*rev.* decision of Lord Wellwood) (1) that the payment made to the testator's son, he being a debtor of the trust-estate, was an improper payment, and that the trustees having failed to prove that the creditor had consented thereto, must replace the sum so paid away; (2) (*diss.* Lord M'Laren) that the trustees must replace the sums paid to the beneficiaries, it being no defence for them to say that when these payments were made they had good reason to believe that the heritable debt was amply secured and provided for; and (3) that the trustees, having not made nor attempted to make any profit for themselves, were not liable in a higher rate of interest on the sums improperly paid away by them than 3 per cent., that being the average rate of trust interest.

This action was raised by the Heritable Securities Investment Association, Limited, against William Miller and others, the surviving and acting trustees under the trust-disposition and settlement, of the deceased John Stevenson Miller, as such trustees and as individuals, and against the trustees and executors of certain trustees of the said John S. Miller who were deceased, for payment of the sum of £40,373, 8s. 2d., being the balance of principal and interest due to the pursuers under bonds granted by the deceased John S. Miller to them, or at least of such a sum as should be equal to the amount or value of the trust-estate wrongfully paid or conveyed by the defenders to the beneficiaries under John S. Miller's settlement, or to other parties. The pursuers concluded in any event against the surviving trustees, as trustees, for payment of the foresaid sum of £40,373, 8s. 2d.

The pursuers averred that the defenders had improperly paid away a sum of £25,035 in 1877, and a sum of £2163 in 1878, to the testator's son William Miller; that from time to time they had improperly paid away various sums, amounting with interest to £11,677, 14s. 9d., to the beneficiaries under the testator's settlement, without making any provision for payment of the debt due to the pursuers, and that they had also lost part of the trust-estate by culpably neglecting to exact from the

testator's son William the full interest upon a sum due by him to the trust-estate, for lands and works at Springfield, Dalmarnock, which he had taken over at a valuation in accordance with the provisions of his father's will.

The defenders averred that the sum of £25,035 had not been paid to William Miller, but, with the knowledge and approval of the pursuers, to the creditors of the firm of William Miller & Sons, of which the deceased was a partner, and to which he was indebted at the date of his death to the amount of about £37,000. They admitted that £2163 had been paid to William Miller, but averred that this payment had been made in terms of an arrangement between the pursuers and William Miller. They further admitted that various sums had been paid to the beneficiaries under the deceased's settlement, but averred that these payments had also been made with the pursuers' approval, it being the opinion of all parties that the security which the pursuers held for their debt was ample, and that the provisions of the settlement might be implemented without in any way endangering the interests of creditors. The defenders denied that they had failed to exact from William Miller any payment which they were entitled to demand from him. They tendered (Ans. 13) to the pursuer in full of their claims (1) the whole of the trust estate remaining in their hands, being a villa at Ardrossan called Glenfoot, and a bond for £1200, (2) the amount of the payments made to beneficiaries since 1885, the date when the interest on the pursuers' bonds began to fall into arrear, and (3) the expenses of process.

The defenders pleaded, *inter alia*—The payments libelled having been made with the full knowledge and assent of the pursuers, or at least in *bona fide* and without any claim being made by them, they are now barred from objecting to the same.

The facts of the case as established by the proof were as follows—The truster John S. Miller had for a number of years carried on business as a dyer and calico printer at Springfield, Dalmarnock, and in Glasgow, under the firm name of William Miller & Sons. At the date of his death, which occurred on 3rd August 1876, he was indebted to the pursuers' company in sums amounting to nearly £74,000. The chief part of these sums was due under two personal bonds for £40,000 and £15,000, dated respectively in December 1872 and December 1873, granted by the firm of William Miller & Sons, and by the said John S. Miller as the then sole partner thereof, and as an individual.

In both bonds John S. Miller bound himself, his heirs, executors, and successors whomsoever, for repayment of the sums borrowed. Under the earlier bond £20,000 was repayable in June 1873, with interest at 5 per cent during the not-payment, and the balance in half-yearly instalments of principal and interest extending over a period of 14 years. Under the later bond £5000 was repayable in June 1874, and the balance in half-yearly instalments of principal and interest extending over a period of 16 years. Of even date with the first bond, John S. Miller disponed to the pursuers, by *ex facie* absolute disposition, the lands, works, and fixed machinery at Springfield, Dalmarnock, the adjoining property of Cunningar, and a property in Gordon Street, Glasgow, which subjects belonged to him as an individual. The transaction was completed by the pursuers granting, in trust for his firm, a lease of the lands and works of Springfield, and of the adjoining property of Cunningar, and by the execution of an agreement between the parties, wherein it was, *inter alia*, declared that the subjects disponed to the pursuers should be redeemable by John S. Miller in payment of the sum of £40,000 and other advances which he had previously received. Along with the subsequent bond for £15,000 a similar agreement was executed, in which it was declared that the properties previously disponed to the pursuers should be held in security for this loan also. At the date of his death J. S. Miller's estate consisted almost entirely of the heritable properties disponed to the pursuers, and a villa at Ardrossan.

By his trust-disposition and settlement John S. Miller disponed his whole estate, heritable and moveable, to the trustees therein named, and he directed, *inter alia*, that his son William (whom he had assumed as a partner, with a one-fourth interest in the business of William Miller & Sons, in 1874) should be entitled to take over the lands and works of Springfield, and the property of Cunningar, at the valuations appearing in the books of the firm at the balance immediately preceding his death; that in the event of his so taking over the works, he should be taken bound to pay all the debts and claims against the same; that he should be allowed ten years within which he might pay the price of the works, but the trustees were not to convey the works to him, but should let them to him at such rent as would yield a free interest of not less than 5 per cent. to the trust-estate. The trustees were further directed, until the price of the works should be paid, to divide the income of the trust-estate, after paying an annuity to the testator's widow, in certain specified shares among the testator's children, and the issue of such as had predeceased.

At the date of his death John S. Miller owed William Miller & Sons about £37,000. The affairs of the firm were at that time much embarrassed, the working capital of the business having been absorbed by losses, while the trade debts amounted to nearly £100,000. William Miller accordingly resolved at first that the business should be wound up, and this resolution was approved by the trustees on 8th September 1876. On 12th September a meeting of the trade creditors was held, to which were submitted statements of the financial condition of the firm prepared by Mr Wyllie Guild, C.A. The creditors were unanimously of opinion that the estate should be protected so far as possible for the sake of Mrs Miller and the family, and they resolved, in order to give the firm full

opportunity to retrieve its affairs, not to press for immediate payment of their claims.

The result of this meeting was communicated to the trustees by Mr Ross, the law-agent of the trust, at a meeting on 18th September. Mr Ross further explained, "that, as appears from Mr Guild's statements, the working capital of the partners had been more than absorbed by losses sustained in the business; that the assets of the business, apart from the works and the Gordon Street property, which belonged to Mr J. S. Miller individually, were insufficient to meet the liabilities, the apparent deficiency being £31,068, but that, taking the works and the Gordon Street property into account, there was an apparent surplus of £27,731; that in the statements made out by Mr Guild the works were dealt with as a going concern, but that the apparent surplus would in all probability disappear if the business were discontinued and wound up as a stopped concern." The meeting, after deliberation, decided "that it was for the interests of the trust that the business should be continued, . . . and therefore sanctioned the business being continued by Mr William Miller." The meeting also resolved, in accordance with a wish expressed by the creditors, to sell the Gordon Street property, and the law-agents of the trust were requested to communicate with the pursuers' manager as to the apportionment of the debt between that property and the works at Springfield. Negotiations on this point were subsequently opened with Mr Paterson, the pursuers' manager. These negotiations were carried on, not by the law-agents of the trust, but by William Miller and William Miller & Sons, and in his evidence William Miller stated that he did not carry on these negotiations on behalf of his father's trustees, and never mentioned them.

At a meeting of the trustees held on 12th January 1877, William Miller intimated that "he had resolved to exercise and now exercised his option to take over the works at the price at which they stand in the company's books, he being bound to relieve the estate of all liabilities in connection therewith." The accounts between the trust-estate and William Miller, which were subsequently adjusted, showed that William Miller was due the trust-estate for the works so taken over the sum of £19,709.

On 24th January 1877 the Gordon Street property was sold for £75,000, with entry at the following Whitsunday, and the fact of the sale and the price were intimated to the pursuers' manager on 26th January by William Miller, who at the same time expressed a wish that as large a sum as possible might be left on Springfield and Cunningar.

On 29th January a meeting took place between William Miller and Mr Paterson, at which Mr Guild was also present. The evidence as to what took place at this meeting was conflicting. Miller and Guild both deponed that on this occasion they laid before Paterson a balance-sheet of the firm as at 25th September 1876, and showed him a valuation of the works as at December 1876, and a copy of J. S. Miller's settlement, along with an estimate of his estate; that they explained to Paterson the position of the affairs, not only of the trust-estate, but also of the firm, and made it quite clear to him that the surplus price to be received for the Gordon Street property was to be devoted to paying the trade creditors of William Miller & Sons. Mr Paterson deponed—"I have no recollection of any documents being exhibited to me by these gentlemen. I should say they did not put any before me. I did not require to see any documents, because I had the matter fully at my finger ends. . . . At that time we were so confident in regard to the value of the works that we did not need to go into details, because we looked to the heritable security, knowing the trust-estate was bound to us as well. I did not make any inquiry about the trust-estate, because we considered the heritable security perfectly good without it. . . . Did you not at that time consider how best William Miller & Sons' creditors could be satisfied and the business carried on?—I did not take the matter into consideration, because we considered the loan perfectly safe, and that we did not need to go into details. . . . I cannot say that I asked Mr Miller to tell the trustees to retain in their hands the balance of the price of the Gordon Street property to meet the debt to our association. I knew they were bound to account properly as trustees for the money. . . . I never agreed on behalf of the company that the £26,000 should be dedicated to paying William Miller & Sons' creditors."

The final arrangement with regard to the apportionment of the loans on the different security-subjects appears from the following minute of a meeting of the pursuers' association held on 9th April 1877—"The manager reported that Messrs Miller & Sons had sold the Gordon Street property, and was to pay off a portion of the loans, and they requested to know how much the board would allow to remain on the Springfield works and land. These works and land were estimated at £105,791. It was agreed to allow £50,000 to remain."

In accordance with this arrangement the property was reconveyed by the pursuers to J. S. Miller's trustees in consideration of a payment of about £25,000, and they in turn conveyed it to the purchaser. After certain postponed bonds had been paid off there remained a balance of about £27,000 in the hands of the trust, of which sum they paid over £25,035 to William Miller, to be "applied towards payment of the debts due by Willam Miller & Sons at Mr Miller's death."

In the spring and summer of 1878 some correspondence was carried on between William Miller and Mr Paterson with regard to the disburdening of Cunningar, which William Miller desired to sell, the result being that the pursuers agreed to disburden the property, and to grant a conveyance to the purchaser on payment

of £6000. The property was thereafter sold for £8250, and the disposition granted by the pursuers in the purchaser's favour bore to be "in consideration of the sum of £6000 paid to us, and of the sum of £2250 paid to William Miller."

This sale was intimated by William Miller to J. S. Miller's trustees at a meeting held on 8th August. The minute of meeting bore, *inter alia*, that "the law agent produced the conveyance of the property to which the trustees are made parties as consenters for their interest, and he explained that the price was intended to be disposed of as follows:—£6000 were to be applied in reducing the bonds held by the Heritable Investment Society over the works, and the balance was to be handed to Mr Miller to assist him in his business, he having withdrawn a large sum of capital to pay the trade debts for which the trust-estate was liable. The meeting approved of the sale, and the proposed disposal of the price, and the conveyance in favour of Mr Farie was signed." At the same meeting evidence was produced to the trustees that William Miller had paid all the trade debts owing by William Miller & Sons at the date of J. S. Miller's death, except a debt of about £5000 due to Williamson Brothers.

William Miller deponed that the sum received by him out of the price of Cunnigar had been handed to him for the purpose of reducing the above debt, and had been used for that purpose, and that the pursuers "knew that the money was given to me as a member of the firm of William Miller & Sons." It was not alleged that Williamson Brothers had been pressing the trustees for payment.

Mr Paterson deponed—"I did not know to what purpose the balance of £2250 was dedicated. I did not tell the trustees at the time that they should retain it to pay the debt to the association; but I expected that they would apply the trust funds properly, so that they would be able to account for it as having been properly treated."

In 1879 William Miller assumed new partners into the firm of William Miller & Sons, and the pursuers agreed, without prejudice to the securities already held by them, to take the new firm as obligants for their debt under a bond of corroboration, the firm agreeing to pay interest at a slightly increased rate on a part of the debt, and the pursuers agreeing that such portion of the debt should not be payable until a postponed period. The trustees were not parties to this arrangement.

Down to 1883 William Miller at different times, with the approval of the trustees, paid various sums to his mother, himself, and the other beneficiaries under his father's will.

With regard to these payments William Miller deponed that at the meeting between him, Mr Guild, and Mr Paterson, on 26th January, Mr Guild had explained to Mr Paterson that if the then proposed arrangement as to the Gordon Street property were carried through "it would provide a certain sum from which Mrs Miller could receive her annuity, and that the balance of the interest would be divided amongst the family. . . . Mr Paterson did not object." Mr Guild's evidence was not so strong. He deponed that it had been explained to Mr Paterson that one of the objects which they had in view in getting the loan rearranged was "if possible to realise something for the family." Mr Paterson deponed "that no reference was made to Mrs Miller's annuity, or to payments to beneficiaries," and denied that he was aware of the payments to beneficiaries until about a year before the action was raised.

There was no minute of the pursuers' association authorising Mr Paterson to discharge the obligation of Mr J. S. Miller's estate under the bonds, and the only director examined deponed that no application for such discharge was brought before the board so far as he remembered.

The interest and instalments due under the bonds were regularly paid by William Miller down to December 1884, and at that date the amount due to the pursuers had been reduced to about £29,000. Setting aside these payments and the payments made to beneficiaries, no further payments were exacted from William Miller by his father's trustees. In the year 1883 William Miller & Sons suspended payment, and in 1885 the estates of the firm and the individual partners were sequestrated. At the date when the firm stopped payment the debt due by William Miller to his father's trustees for the lands and works at Springfield taken over by him was still unpaid, and the arrears of interest due on this debt amounted to £1681, 2s. 1d.

The evidence did not show with certainty at what date the officials of the pursuers' association became aware that the great bulk of the trust-estate consisted of the above debt; but a memorandum, dated in May 1883, in the hand of the secretary, showed that it was known in 1883.

Down to the stoppage of William Miller & Sons both the pursuers and the defenders had looked upon the security held by the pursuers as ample. Both parties had obtained valuations in which the lands, works, and fixed machinery at Springfield were valued at nearly £100,000, the works being taken as a going concern. After the business was stopped the value of the works greatly depreciated, and though part of the subjects were let from time to time the rental obtained was insufficient to meet the interest on the pursuer's bonds. In 1885 the pursuers demanded payment of their debt from the trustees, and this was the first demand made upon the trustees. In June 1891 the present action was raised.

At the proof the pursuers stated that they did not insist in their claim for the sum of £25,035 paid to the creditors of William Miller & Sons out of the surplus price of the Gordon Street property, in respect that they had discovered from balance-sheets of the firm produced to them that J. S. Miller was indebted to the firm in at least that amount at the date of his death.

On 13th April 1892 the Lord Ordinary (WELLWOOD) pronounced this interlocutor —"Finds that it is not disputed that the pursuers are entitled to decree for £40,373, 8s. 2d. with interest as concluded for against the surviving and acting trustees and executors of the late J. S. Miller as trustees and executors aforesaid: Finds that the defenders are not liable as individuals, or as representatives of individuals, to make payment to the pursuer of the following sums—(1) The sum of £25,035, 9s. 6d. specified in the 4th article in the condescendence; (2) the sum of £2163, 17s. 6d. specified in the 5th article of the condescendence; and (3) payments made out of income to the widow and children of J. S. Miller, in terms of his trust-settlement prior to 31st December . . . Grants leave to reclaim.

"*Opinion*—It is not disputed that the pursuers are entitled to decree for the sum of £40,373, 8s. 2d., with interest, against the surviving and acting trustees of the late J. S. Miller, as trustees. The only question is whether they are also entitled to decree against all or any of the defenders who acted as trustees as individuals, or the executors of those trustees who are dead.

"I shall first inquire what sums the pursuers now claim from the defenders as individuals or the representatives of individuals, and what position the defenders take up in regard to those demands. It will be convenient to consider separately each sum claimed in its order.

"1. Certain sums are specified in the summons as having been improperly paid away by the trustees; but before dealing with them I must notice a sum of £25,035, 9s. 6d. which in condescendence 4 the pursuers call upon the defenders to account for. One of the subjects over which the pursuers' loans to J. S. Miller were secured was a property in Gordon Street and Renfield Street, Glasgow. In February 1877 this property was sold with the consent of the pursuers, in consideration of a payment to them of £25,169, 3s, 9d., in repayment of their secured loans. Upon the sale there was a surplus in excess of the loans of the pursuers and other persons secured over it of £26,235, 9s. 6d. Now, in condescendence 4 the pursuers state that they have 'recently ascertained' the existence of this surplus, and 'that of this surplus price the defenders on 16th May 1877 improperly paid away to the said William Miller, or his firm of William Miller & Sons, of which at the time he was sole partner, the sum of £25,035, 9s. 6d.' It is now clearly proved that these statements are incorrect, and that the disburdening of Gordon Street and Renfield Street properties, and the payment of £25,035, 9s. 6d. to William Miller for distribution among other creditors of William Miller & Sons, were the results of negotiations and arrangements with the pursuers. I shall afterwards advert more particularly to what then took place, and to the inferences to be drawn from it. In the meantime it is sufficient to note that the pursuers do not now maintain that they have any claim in respect of that payment.

"2. The next sum to be noticed is a sum of £2163, 16s. 7d., being a sum realised on the sale of the Cunningar property, another of the trust properties burdened with the pursuers' loans in excess of a sum of £6000 paid up to the pursuers. The Cunningar property was sold in June 1878. In regard to this sum the pursuers state in condescendence 5—'The said sum of £2163, 16s. 7d. was paid over to the said William Miller while the debt due to the pursuers was unpaid, and without making any provision for the payment of the said debt. Said payment was wrongful and in breach of the defenders' duty as trustees.' It is sufficient in regard to this sum also to say that it was paid to William Miller with the knowledge and consent of the pursuers, as is shown, *inter alia*, by the disposition granted by them with consent of J. S. Miller's trustees to the purchaser James Fairie, dated 7th and 8th August 1878, which proceeds 'in consideration of the sum of £6000 paid to us, and of the sum of £2250 paid to William Miller.' Of the effect of this transaction on the rest of the case I shall speak afterwards; but the pursuers in the face of the disposition and correspondence, cannot dispute that that payment was properly made.

"3. The payment of these two sums being thus satisfactorily explained, the sting of the pursuers' record is extracted; because as will be seen presently, the only remaining payments which are seriously in dispute stand in a very different position. The pursuers claim a sum of £11,677, 14s. 9d. (£7864, 8s. 3d. of which is principal, and the rest interest) which represents payments made out of income by J. S. Miller's trustees to his widow and family between the date of the truster's death on 3rd of August 1876 and the end of the year 1884.

"In regard to those payments the pursuers' position is simply this—that the trustees were aware of the pursuers' debt; that the debt was never discharged or waived; that until it was paid or provided for, the trustees were not entitled to pay away a shilling of the trust estate to beneficiaries; and that having made those payments, the trustees rendered themselves personally liable to replace them.

"The defence is that the payments were made in the *bonâ fide* belief that the trust estate was solvent; that in point of fact it was solvent until 1884; that the pursuers were thoroughly satisfied of the sufficiency of the securities which they held, so much so that they voluntarily gave up nearly £30,000 worth of them; that if they had not done so, there would have been no deficiency; and that by their actings they induced the trustees to suppose that they were at liberty to apply the income of the trust estate to the more pressing purposes of the trust, of the existence of which the pursuers must have been aware.

"These are the respective contentions of the parties, and I shall now proceed to consider the evidence adduced in support of the averments upon which they depend, and afterwards the law applicable to the facts proved.

"The pursuers cannot obtain decree

against the defenders personally unless they establish that the defenders have been guilty of breach of trust, and have administered the estate inequitably by paying away part of it to beneficiaries without paying or providing for the debts of the trust.

"As to certain facts there is no dispute. It is not disputed, for instance, that the trustees knew or must be held to have known of the existence of the pursuers' debt, and that it had not been paid off when these advances to beneficiaries were made. It is also true that there is no writing under the hand of the pursuers' representatives expressly consenting to the payments to beneficiaries.

"On the other hand, I think it clearly appears from the evidence and valuations in process that Mr J. S. Miller's estate was solvent till 1884; and that there was, or was thought to be till then, an ample margin on the heritable security which the pursuers held.

"It is impossible to form a satisfactory opinion on the case without reading the documents, correspondence, and proof together in chronological order. I shall not attempt to analyse them here; but I shall take and examine in detail one incident as an illustration of the nature of the communications that passed between William Miller & Sons and the pursuers' company, which shows the fulness of the information which the latter had in regard to the affairs of the firm of William Miller & Sons, and of the trust estate of J. S. Miller, and of the value of the subjects over which their securities extended.

"The loans granted by the pursuers to J. S. Miller and his firm were secured over several heritable properties, the lands and works at Springfield, the lands of Cunningar, and a property in Gordon and Renfield Streets. When in 1876 Mr J. S. Miller died and the affairs of the firm were found to be embarrassed, it became necessary to liberate some of the capital which was locked up in the heritable subjects for the double purpose of paying off other creditors and saving something for J. S. Miller's widow and family. It was therefore resolved to sell the Gordon Street property and to endeavour to induce the pursuers to consent to placing part of their loan on the other subjects.

"I find in the minutes of the pursuers' directors, under date 18th September 1876, this entry—'*Stoppage of Miller & Sons.*—Mr Todd reported that this firm were not in arrear to the Association; but that immediately on their stoppage being announced he had applied to them for an abstract of their affairs; that this had not yet been received; and that as yet no authentic information regarding their position had been obtained.'

"On the margin of the draft minute there is a pencil note in the handwriting of Mr Todd, then secretary, now manager of the pursuers' company—'Surplus, £70,000.'

"Now, on 29th January 1877 an important interview took place between Mr William Miller and Mr Wyllie Guild on the one hand, and Mr Andrew Paterson, the pursuers' then manager, on the other. The Gordon Street property had previously been sold for £75,000, and the object of the visit was to settle with Mr Paterson how the price was to be allocated; how much of the pursuers' debt should be paid out of it, and how the balance of the pursuers' loans should be readjusted. There is no doubt that an interview took place on 29th January 1877. Mr Miller and Mr Wyllie Guild remember it distinctly, and the day is fixed by Mr Wyllie Guild's diary, and this, amongst other interviews, is referred to in William Miller's letter to Paterson of 13th February 1877. Unfortunately Mr Paterson's recollection of what took place is very indistinct. This is not surprising, considering that fifteen years have passed since then; but the pursuers are not entitled to take benefit from that, because the delay is due to their not having sooner pressed this claim against the defenders.

"Now Mr Miller and Mr Wyllie Guild both say distinctly that at the interview with Mr Paterson on 29th January 1877 the affairs of William Miller & Son and also of J. S. Miller's trustees were discussed and explained. They say that there was produced a balance-sheet of the firm as at 25th September 1876, and also that Mr J. S. Miller's settlement was produced along with an estimate of his estate, of which No. 150 of process is a copy. They also say that they showed to Mr Paterson a valuation as at December 1876 (which I take to be that printed in the Joint Print), which shows the value of Springfield Works and land and Cunningar as at that date. They also say that they explained to Mr Paterson that they hoped that if some satisfactory arrangement was come to, Glenfoot House might be saved for the truster's widow, and also that arrangements might be made for the payment out of income of the provisions to the truster's children.

"Those are very pointed statements, and I think that they are proved to have been made whatever their worth and effect may be. While Mr Paterson says that he does not recollect a good deal of what is said to have passed, he does say most distinctly that at that time he considered the security so good that he did not trouble himself with thinking about Mr J. S. Miller's individual estate. He says for instance—'I have no recollection of any documents being exhibited to me by these gentlemen. I should say they did not put any documents before me. I did not require to see any documents, because I had the matter fully at my finger ends. I think Mr Miller mentioned that Mr Wyllie Guild was assisting them with their affairs. I understood the trustees' affairs.' Again—'At that time we were so confident in regard to the value of the works that we did not need to go into any of the details, and I do not suppose they thought it of any consequence to go into details, because we looked to the heritable security, knowing that the trust-estate was bound to us as well. I did not make any inquiry about the trust-estate, because we considered the heritable security perfectly

good without it.' Lastly, he says—'It never occurred to me to inquire how Mr J. S. Miller's widow was being supported. I had no right to meddle with that. I made no inquiry about it. I made no demand upon the trustees until 1885. During the time I was manager I held the view that the association had ample security for the loans over the property, and that I did not require to apply to the trustees. Down to the end of December 1884 the interest and instalments were regularly paid. Throughout the whole period of my management my communications were made to Mr William Miller and William Miller & Sons, not to the trustees. (Q) Do you know that in December 1884 the debt which had stood in 1877 at £50,000 was down to £29,000?—(A) I have no doubt what is represented in the letters is correct.'

"The result of this and other interviews was that on 9th April 1877 the manager reported to the pursuers' board that William Miller & Sons had sold the Gordon Street property and were to pay off a portion of the loans, and wished to know how much the board would allow to remain on Springfield Works and land. 'Those works and land were estimated at £105,791. It was agreed to allow £50,000 to remain.' The valuation here referred to will be found in a pencil jotting in Paterson's handwriting, printed in the Joint Print. That is a valuation of Springfield Works alone. The importance of that transaction in the question now under consideration is twofold. It shows, in the first place, that the pursuers' company were quite satisfied with the security which they held for the debt due by J. S. Miller & Son; and in the second place, that they were aware that money was urgently required to pay debts for which the firm of J. S. Miller & Son and the personal estate of J. S. Miller were liable.

"The pursuers now say that they do not intend to claim repayment of the sum of £25,035, 9s. 6d., because they have ascertained that that money went to pay other creditors of J. S. Miller & Son. That is not the position which they formerly took up. On record they allege that that money was improperly paid away to William Miller, and even in the course of the proof their witnesses spoke as if they thought that that sum should have been retained and invested to meet any ultimate deficiency on the pursuers' debt. I am satisfied, however, upon the evidence that the pursuers must have known that that money was to be applied in payment of other debts or obligations, and that they consented to its being so applied. Perhaps it would be more correct to say that they did not trouble themselves as to its application. Even if part had been applied in payments to beneficiaries, the pursuers would not now be entitled to object.

"The same observations apply to the transaction by which in 1878 the pursuers allowed the Cunningar property to be sold and the balance of £2163, 17s. 7d. to be paid over to William Miller. This shows clearly that the pursuers knew that the trustees were paying away part of the trust-estate not to other creditors, but to their debtor William Miller, and that they did not object to that payment being made.

"This line of conduct on the part of the pursuers was calculated, I think, to lead the trustees to think that they were at liberty at least to apply the income of the trust-estate in satisfaction of alimentary provision in favour of the truster's widow and family. This belief must have been strengthened by the course of dealing which followed. From 1876 onward the pursuers dealt in regard to their debt exclusively with William Miller and the new firm of William Miller & Sons, as afterwards constituted. In particular, in 1879, an important transaction took place between the pursuers and William Miller & Sons, and the individual partners. By that transaction the pursuers, in respect of a bond of corroboration granted by William Miller and his partners, Thomas Glen and Hugh Crawford Smith, agreed to give time for payment of two principal sums of £20,000 and £3000, stipulating that notwithstanding the terms of the security writs the said payments should not be called up before December 1886 and December 1889 respectively. By the bond of corroboration William Miller & Sons agreed to pay a higher rate of interest upon certain of the loans. Mr J. S. Miller's trustees were not made parties to the transaction. The defenders did not maintain in argument that by this transaction the pursuers liberated Mr J. S. Miller's estate; but they maintained, and I think soundly, that by so acting the pursuers induced the trustees to think that they were at liberty to administer the trust-estate as they did.

"Not much was said in the argument with regard to the trustees not having done due diligence to recover payment from William Miller of the debt due by him to Mr J. S. Miller's estate. The reasons probably were, in the first place, that Mr J. S. Miller's trustees could not have adopted any other course without bringing the business of William Miller & Sons to a standstill; and in the second place, that it appears from the evidence, written and oral, that the pursuer, or at least their manager and secretary, were well aware of the way in which Mr J. S. Miller's estate was invested.

"It appears from a 'memorandum of debt and security' dated 21st May 1883, in Mr Todd's handwriting, that at that date the sum due was £34,300, and the estimated security £97,627. Among the obligants for the loan there is this entry—'2. John Stevenson Miller's estate, postponed bond over works, about £21,000; do. over Gordon Street, £2000.' This shows that at that date the pursuers were well aware that the capital of J. S. Miller's estate was invested in postponed bonds; but no objection was taken upon that head. I think the memorandum shows more. I think it must be inferred that the pursuers knew that the interest upon these postponed bonds was being received by J. S. Miller's trustees and applied for the purposes of the trust.

"On the evidence, I am prepared to hold that the payments to beneficiaries were made by the trustees in the *bona fide* belief that the trust-estate was solvent; and in the reasonable belief, induced or confirmed by the actings of the pursuers and their representatives, that the debt due to the pursuers was sufficiently provided for.

"If this view of the facts is correct, it only remains to consider whether they afford the defenders a good defence in law. In my opinion they do. Two things must be kept in view—First, that we are dealing, not with the liability of the trust estate or the liability of beneficiaries who have received payments to refund, but with the personal liability of gratuitous trustees; and secondly, that what was paid away by the trustees was the income alone, and not the capital of the estate. The pursuers' argument involves this proposition, that if at a debtor's death there is a loan unpaid, but heritably secured, which the secured creditor does not desire to call up, or which according to the terms of the loan, cannot be called up or repaid for several years, the debtor's trustees must nevertheless, however ample the security may be, retain the whole trust estate, capital and income, to meet the possible contingency of there being an ultimate deficiency on the security. This is a startling proposition, and I am not prepared to assent to it. If a debt is known to be unpaid and is immediately exigible, or if the trustees have no reason to think that the creditor does not desire it to be paid up, no doubt payment or an offer to pay is the appropriate and safe course; and if the trustees pay away the trust estate to beneficiaries they do so at their peril. But in the case which I have put of the creditor not desiring immediate payment, or of the debt not being exigible for a considerable period, I think that if the trust estate is undoubtedly solvent, and the creditor's security at the time is ample, all that the trustees can fairly be expected to do is to see that reasonable provision is made for ultimate payment. It is always a question of circumstances what is to be considered reasonable provision, and one to be liberally considered in favour of the creditor. But for the reasons which I have stated, I think the trustees did make reasonable provision in this case.

"I do not think any of the cases quoted are precisely in point. The case of *Lamond's Trustees* v. *Croom*, 9 Macph. 662, was a clear case for holding the trustees personally liable. The truster Malcolm Lamond died in the year 1864 leaving various debts unpaid. Amongst his creditors was Croom, who held a mortgage over Lamond's heritable property in Shanghai. He was thus what is called in English law a specialty creditor, and entitled to rank preferably for the balance of his debt if there was a deficiency on the personal estate of the debtor. Notwithstanding this, Lamond's trustees, through one of their number, immediately after the truster's death, made payments to postponed creditors and to annuitants without paying or providing for Croom's debt. It turned out that the heritable property was insufficient, and that Lamond's estate was insolvent. The Court held that the trustees, as in a question with Croom, were bound to account for the fund *in medio* without deduction of the sums paid to postponed creditors and annuitants. The remarks of the Judges must be read in view of these facts. The Lord President says (p. 668)—'It is most convenient to consider first the payment to beneficiaries under the trust, and that is a question which admits of no doubt. The estate is insolvent; some of the creditors, one of the largest being the real raiser of this action, are not paid, and yet the trustees have paid away a portion of the estate to beneficiaries. There can be no doubt that they are liable to replace what they have thus paid away, for no trustees are entitled to pay away one shilling of the estate to beneficiaries until all the truster's debts are paid, and if they do so before ascertaining with certainty that the estate is solvent, they do so at their own risk. . . . The case of postponed debts at Shanghai is attended with more difficulty, but I have a clear opinion on this point too. . . . I am afraid there is little doubt that an executor who pays postponed creditors, and leaves a preferable creditor unpaid, does so at his own risk, just as much as if he paid beneficiaries and left creditors unpaid. And therefore, Smith being in the knowledge of the existence of this specialty debt, and choosing to take his risk of the security turning out sufficient to meet the debt, has made himself liable in the first instance to pay the preferable creditor.

"It will be observed that the facts in the case of *Lamond's Trustees* were very different from those in the present case, because the payments were made immediately after the truster's death, without any inquiry as to the sufficiency of Croom's security or the solvency of the estate, and without any circumstances to justify the belief that Croom was content with the security which he held.

"The case of *Stewart's Trustees* v. *Evans*, 9 Maeph. 810, was relied on by the defenders. It is valuable as containing an exposition of the law, and in many respects resembles the present case, in particular in the long delay on the part of the creditor to enforce his claim. The facts, however, were not precisely the same, because there the trustee *bona fide* believed that all liability for future calls had ceased; and that the trust's connection with the joint-stock company was effectually severed in 1850, when they obtained what bore to be a discharge from the company's secretary. It was held afterwards that the secretary had no power to give it; but although it was strongly urged that the trustees were bound to see that they got an effectual discharge, the majority of the Court held that the trustees having paid away the trust-estate in the *bona fide* belief, induced by the company's actings, that there remained no liability to the company present or contingent, were freed from personal liability for the debt. That case is perhaps stronger in this respect, that there what bore to be a discharge was granted by the company's official. On

the other hand, in the present case actual provision was made or existed for payment of the debt, which at the time the pursuers considered so ample that they not only never considered the liability or amount of J. S. Miller's estate, but voluntarily gave up £30,000 worth of their security.

"I may also refer to the case of *Young* v. *Johnston's Trustees*, which was quoted in the argument. What the trustees did in that case was this. The trust property, consisting chiefly of houses, was valued at £2778. There were two creditors unpaid; the debt of the first amounting, with interest to £2000, and that of the second about £530. The trustees, without communication to the second creditor, borrowed £2000 upon the heritable subjects, and paid off the first creditor in full. The property thereafter fell in value, and there was not sufficient left to pay the second creditor's debt. The Court, by a majority, and with reluctance, held the trustees personally liable to the creditor. In doing so they appear to have been influenced by two considerations—First, that the valuations obtained showed scarcely any margin; and, secondly, that the intended transaction was not communicated to the second creditor. I think it is pretty clear from the opinions that if there had been a larger margin, or if the second creditor had been informed that the trustees proposed to pay off the first creditor's debt, and did not object, the decision would have been otherwise.

"It is true that mere delay on the part of a creditor to demand payment of his debt will not justify a trustee or executor in paying away the trust-estate to beneficiaries without paying or making provision for the creditor's debt. But where a creditor delays to call up his debt and the security is ample, and considered by the creditor to be so, it will readily be inferred that the creditor did not desire that the administration of the trust should be wholly paralysed, and consented to the trustees making payments out of the trust-estate to beneficiaries of the character of those in question. One of the Judges in the case of *Jewsbury* v. *Mummery*, L.R., 8 C.P. 60, expressed himself thus—'If the defendant could have shown before the arbitrator that though assets had come to his hands, he had parted with them under circumstances which precluded the plaintiff from alleging that they had not been duly administered, clearly that would have been a defence under the plea of *plene administravit*.'

"In considering, therefore, whether trustees have in such a case made reasonable provision for payment of the creditor's debt, there must be kept in view not only the character of the payments which are challenged and the sufficiency of the security thereafter remaining to satisfy the creditor's debt, but also the creditor's attitude and behaviour in regard to payment of and security for his debt.

"On a consideration of these and other elements in this case I am not prepared to hold the defenders personally liable for the payments made by them to beneficiaries.

"The other specific sums of which the pursuers demand payment stand in a different position. It is not disputed, I understand, that after 1884 Mr J. S. Miller's trustees had no right to continue to make payments to beneficiaries, and I understand that the defenders are willing to repay to the pursuers all sums so paid away after that date. I also understand that the defenders are willing to convey the Glenfoot property to the pursuers, and also to assign to them the bond for £1200 with interest. That offer is made in the thirteenth answer for Mrs Jean Broom or Miller and others; but during the discussion the defenders' counsel stated that the offer there made is not quite full or accurate. If the defenders are willing to make conveyance and payment as proposed, it is not necessary for me to express an opinion as to their legal liability.

"I shall therefore pronounce findings in regard to the three sums with which I have dealt, and order the case to be put to the roll that the terms of the defenders' offer may be adjusted, and that they may state when and how they propose to carry that offer into effect. In the view which up to this point I have taken of the case, I have not found it necessary to distinguish between the different defenders. My present impression is that if the defenders implement the offer made on record as amended, the whole of the defenders will be entitled to absolvitor from the conclusions of the summons which are directed against themselves as individuals or as representing individuals. As I have already said, the pursuers will in any case get decree against the trust for the balance of their debt."

The pursuers reclaimed, and argued—1. The payment of £2163, part of the price of Cunningar, was made to William Miller at a time when he was largely indebted to the trust-estate, and was clearly *ultra vires* of the trustees. They were therefore personally liable to replace that sum. The defenders could not escape liability by showing that the pursuers knew that such a payment was being made. They must prove that the pursuers consented to give up all claim to the truster's general estate, or at least to that part of it, and they had failed to prove either of these points. There was no evidence that the pursuers ever consented, either in the negotiations as to the disburdening of the Gordon Street property, or in the negotiations as to the disburdening of Cunningar, to forego their claim against the whole or any part of the truster's general estate. The fact that the negotiations were carried on with William Miller was no evidence that the pursuers had relinquished their claims against the trustees, for William Miller was himself a trustee, and the pursuers were entitled to look upon him as the representative of the trustees. Further, it was not proved that the pursuers knew, nor could they be held to have known, the state of the affairs of the trust. They had no duty of superintending the administration of the trustees, but were entitled to rely upon them

observing the ordinary rules of trust administration. The fact that the pursuers had relinquished their claim in respect of the £25,035 paid to the trade creditors of the truster's firm could not be construed or held to be a waiver of their further claims against the trustees. 2. The defenders were further liable to replace the sum of £1681, which they had failed to exact from William Miller. The trustees had apparently allowed William Miller to make what payments he liked to the trust-estate, instead of exacting the 5 per cent. on the balance due by him for the works to which they were entitled. The result of their negligence was that the sum mentioned had been lost in his sequestration, and they were bound to replace it—*Seton* v. *Dawson*, December 18, 1841, 4 D. 310. 3. The defenders were also bound to replace the sums paid to beneficiaries, as they could not show that the pursuers had consented to these payments being made. The primary duty of trustees was to make the trust-estate forthcoming to creditors, and they were liable if they failed in this duty. To escape liability they must show either that the creditors had consented to such payments being made in full knowledge of the circumstances, or that when they made the payments the trustees were in justifiable ignorance of the existence of the creditor's claim, which was the ground of decision in the case of *Stewart's Trustees*, *infra*. It was no defence to say that the creditor believed his security to be ample, or that the trustees had acted in the reasonable belief that the debt was sufficiently provided for. Their duty was not to deal reasonably with their creditor, but to pay him preferably out of the estate, and if they made payments to beneficiaries, and the estate became insolvent, with the result that the creditor was not paid in full, they were liable to make good to him the sums so paid away—Stair, i. 40, 33; *Lamond's Trustees* v. *Croom*, March 8, 1871, 9 Macph. 662. Further, in the present case the trustees were warned that the solvency of the estate depended largely on the Springfield works being kept up as a going concern, and it could not be held that they were justified in paying away any part of the trust-estate to beneficiaries without making sufficient provision for paying the creditors of the trust-estate.

Argued for the defenders—To fix liability upon trustees it was necessary to prove that they had acted culpably or in breach of their duty as trustees, but in the present case the pursuers had entirely failed to establish fault on the part of the defenders. The result of the evidence was to show that the pursuers had all along looked upon their security as ample, and looked to it for satisfaction of their debt, and their actings with regard to the disburdening of the Gordon Street and Cunningar properties, and the disposal of the price derived from the sale of these properties, amounted to an abandonment of their claim against the truster's general estate. In allowing sums which they might have claimed, to be handed over to other parties without objection, they waived their preferential claim against the general estate in the hands of the trustees. At all events the actings of the pursuers were such as to induce a reasonable belief in the minds of the trustees that they were entitled to look upon the general estate of the truster as freed from any claim on the part of the pursuers. *Particular Claims*—1. *Claim for £2163 paid to William Miller*—This payment was made in accordance with an arrangement concluded between William Miller and the pursuers, and the pursuers were therefore barred from now objecting to it. 2. *Claim for* £1681. The defenders were entitled to treat William Miller with consideration, as the welfare of the trust-estate was bound up with the prosperity of the business of William Miller & Sons, and to abstain from pressing him for the rent due to the trust, was possibly the most prudent course for the defenders to take. 3. *Claim for Sums paid to Beneficiaries*—Whatever might be said as to the other sums which the pursuers called upon the trustees to replace, there was no ground for the allegation that the trustees had acted improperly in making the payments they did to the beneficiaries prior to 1885. Prior to that date no demand was made upon them by the pursuers. The trust-estate was solvent; they had good reason to believe that the pursuers' debt was amply provided for. Further, part of the debt was not exigible except by instalments, the last of which was not due until the end of 1889. In such circumstances it was surely not improper for trustees to divide the income of the estate among the beneficiaries. The contrary view would imply that trustees could never proceed to administer the estate entrusted to them in terms of their truster's directions until all known creditors were satisfied, although these creditors were amply secured and did not desire immediate payment, and the administration of a trust might in this way be paralysed for years—*Stewart's Trustees* v. *Evans*, June 9, 1871, 9 Macph. 810; *Harkness* v. *Graham*, June 28, 1836, 14 S. 1015. *Lamond's Trustees* was quite a different case from the present, for there the estate was insolvent when the payments were made, and the payments were made without the creditors' knowledge.

At advising—

LORD PRESIDENT—Mr John Stevenson Miller when he died in 1876 was debtor of the pursuers for the balance under two bonds, the one executed in 1872 for £40,000, and the other executed in 1873 for £15,000. They were personal bonds granted by Mr Miller and the firm of which he was at the time sole partner, and in each he bound himself and his heirs, executors, and successors whomsoever. Of even date with the former bond there was granted heritable security over properties then reputed as of great value, the form of security being an absolute disposition, minute of agreement, and lease; and the later loan was covered by the same security in terms of an agreement executed of even date with its bond.

Mr Miller's estate since his death has been in the hands of his testamentary trustees, who are defenders in this action. The pursuers have failed to obtain full payment of their loans, the securities having proved insufficient, and the other estate of the deceased is exhausted. The pursuers, founding upon the personal obligation of the bonds, allege against the defenders that they have illegally parted with certain portions of the estate of the deceased, and to that extent they seek to make the defenders personally liable for the deficiency.

Before dealing with the three sums thus claimed, each of which raises separate considerations, I think it well, especially in view of some parts of the Lord Ordinary's note, to state what I assume to be the relations of the creditor of a deceased debtor towards testamentary trustees in possession of the debtor's estate.

As the debtor in a bond guarantees payment, the first duty of whoever is in possession of the estate is to meet this obligation, and to make forthcoming the whole estate to creditors. The rights of creditors are in no degree affected by the testamentary dispositions which the deceased may have made of his estate, and the rights of the beneficiaries of the deceased do not open except to the free estate of the deceased. Accordingly, the rights of beneficiaries are entirely postponed to those of creditors, and the creditor has no occasion to consider or concern himself with the terms of his debtor's settlement, his own rights being entirely independent of and unaffected by it. His only duty is to show himself, and the trustees, or whoever are in possession, being made aware of his claim, must keep the estate safe till he is paid. The first duty of the trustees then being to creditors, they may be called to account for the whole estate by any unpaid creditor, and if any part cannot be well accounted for, the trustees must personally make it good. This claim is founded, not on the terms of the trust, but on the duty of the holders of a deceased person's estate to the creditor in a personal obligation for payment.

It is of course true that a creditor may depart from his rights. For example, if he holds a heritable security he may think good to give up his claim under the personal obligation to the general estate of the deceased, or he may consent to part of the general estate being paid away to beneficiaries. Such consent may be express or it may be established by conduct, but in one way or another it must be proved.

Now, in the present case it is said against the trustees of Mr Miller by his creditor the pursuers' company that they did the following things—First, That a sum of £2250 was by order of the trustees paid to one of their number, who has since become bankrupt, and applied by him to his own uses, he having been at the time of payment the debtor of the trust-estate to the amount of £19,000. Second, That there has been lost, in the hands of the same gentlemen, moneys amounting to some £1600, being income accruing to the trust-estate, which the trustees did nothing to recover. Third, That large payments were made to beneficiaries out of the trust-estate.

The facts generally stated are these—Mr Miller's business was that of a dyer and calico printer in Glasgow. At the time of his death he and his son William Miller were the partners of his firm. The buildings in which the firm's business was carried on were the property of the deceased, and not of the firm. By his trust-disposition and settlement Mr Miller gave his son an option to take over the business and the business premises, and this option was exercised. It was agreed between the trustees and Mr William Miller (and this was in accordance with the conditions prescribed in the will) that the last balance-sheet before the death should be adopted as the basis of arrangements. The result was that Mr William Miller undertook the very large liabilities of the firm, and got the business premises at the value specified in the balance-sheet, with the nett result that he became indebted to his father's trustees (1) in the balance due to his father as a partner, and (2) the price of the buildings, which under the will was to be payable by instalments extending over a number of years.

Until full payment was made, the son was not to receive a conveyance, and was to pay, by way of rent, interest at 5 per cent. on the portion of the price remaining unpaid.

The interest thus payable by William Miller constituted the main part of the income of the trust-estate. It may be noted, in passing, that the second of the claims which I have narrated is for moneys due by Mr Miller to the trustees under this arrangement.

Two other properties belonged to Mr Miller at his death—one in Gordon Street, Glasgow, and the other some land called Cunningar. Both, as well as the works, were held by the pursuers under the *ex facie* absolute disposition which they held for their debts. Now, it was desired by the trustees to sell the Gordon Street property, but this could of course only be done with consent of the pursuers. It was arranged with the pursuers that they should give up their rights (under their absolute disposition) over the Gordon Street property, and allow it to be sold, in consideration of £25,169, 3s. 9d. being paid to them out of the proceeds. This was done in 1877. The debt of the pursuers was thus reduced by this amount; and for the balance they continued to hold the Cunningar property and the works.

The next stage in the history is reached in 1878, when a similar application was made to the pursuers, to allow Cunningar to be sold. Here again they consented; Cunningar was disburdened and sold for £8250, of which the pursuers received £6000 as part payment of their debt.

From the date of Mr Miller's death down to 1884, interest continued to be paid by the trustees on the extant debt. By that time, however, the affairs of Mr Wm. Miller had become embarrassed, and his estates had

been sequestrated, and in 1885 the pursuers, who had up to that time regarded their loan as abundantly secured by the works, became alarmed, and called on the trustees to furnish them with an account of the estate in their hands. They now find that the trust estate has been exhausted, while the security subjects, into possession of which they have entered, do not yield the stipulated interest.

Such are in outline the general facts of the case, and I shall now proceed to consider the three specific questions raised.

1. *The Cunningar Property.*—The Lord Ordinary has decided this question on a short and definite ground. His Lordship holds that as it is instructed by the disposition of Cunningar granted by the pursuers (as formerly owners of the property) that £2250 of the price was paid to William Miller, in their knowledge and with their consent, they cannot dispute that that payment was properly made. His Lordship also founds on the correspondence as furnishing additional evidence of consent to such payment.

Now I do not think that this is a good ground of judgment. From the nature of the case, the bargain between the pursuers and the trustees regarding this property was simply this—if the trustees paid the pursuers £6000 the pursuers agreed to set the property and the balance of the price at their disposal. The pursuers got the money thus agreed for, and they were told by the trustees that they wanted the lands conveyed to James Farie, and the money paid to William Miller. This was entirely a matter for the trustees to settle, and the pursuers executed the disposition in the terms dictated by the trustees—the pursuers, so they got their £6000, having no further interest in the affair.

It now appears, however, that when the trustees paid the £2250 to William Miller, (or what is the same thing, allowed him to receive it) he was their debtor to the amount of £19,000, made up, as I have already mentioned, of the sum of some £4000 due to his father's estate by the partnership whose liabilities he took over, and of the price of the works. It is quite true that this latter money was payable at deferred periods; but this does not affect the question, and even were the debt no more than £4000, it is enough for the present purpose.

Now, *prima facie*, the trustees were not entitled to pay over £2250 to a debtor unless upon some good ground. The defenders have maintained that they were justified in making this payment, because they say it went to pay off a debt of one Williamson, to whom the trust-estate as well as the firm were liable. This defence, however, fails on several grounds. Assuming, what is not well instructed, that Williamson was in the end paid by William Miller, the ultimate liability was with Miller himself, and not with the trustees, for he had undertaken all those liabilities when he took over the business. Accordingly the trustees had no business to provide William Miller with money to pay this debt, unless they were themselves distressed for payment, and all are agreed that they were not distressed. But further, the minute of the trustees of 8th August 1878 shows that when they parted with this money, it was on a quite different ground, and in fact the money went into William Miller's general funds.

Accordingly, I think that the trustees are liable for this money, unless the pursuers are barred from challenging the breach of duty, and this leads me back to the Lord Ordinary's ground of judgment. Now, all that the disposition shows is that the money was paid to William Miller, but it does not show for what purpose or on what consideration. The pursuers in short had no knowledge of the facts which I have now detailed, and which make the payment illegal instead of legal. It is said that the pursuers, or rather their manager, knew that William Miller when he began business was the debtor of the trustees, but, even so, for aught they knew there might be any number of good reasons why the trustees should pay William Miller £2250, and there was nothing whatever to show that there was no such good reason. The pursuers would, I think, have entirely stepped out of their place and province had they questioned the trustees as to why the money was to be paid to William Miller and not directly to themselves. Accordingly, I hold that there is nothing to preclude the pursuers from now challenging what is now shown to have been an illegal parting with trust money.

2. The case of the £1600 is not, I think, separately discussed by the Lord Ordinary; but it is a matter unfortunately for the defenders of conspicuous simplicity. William Miller was indebted to the trustees, year by year, in the rent of the works, which, as I have pointed out, was a sum corresponding to 5 per cent. on the outstanding piece. He seems to have been allowed to pay or not to pay at his discretion from 1877 down to his failure in 1883, and he omitted to pay in any shape or form moneys amounting to £1681, 2s. 1d. No supervision whatever seems to have been exercised by the trustees over his proceedings in this regard; and I cannot say that I heard any tangible defence against this claim for the loss of a part of the estate which was simply allowed to go by the board. For default such as this a creditor is clearly entitled to hold the intromitters with his debtor's estate to be personally liable.

3. I now come to the third question argued; and that relates to the payments made by the trustees to beneficiaries. The total amount of those payments as given in the state is £7864, 8s. 3d., but it appears that of the moneys paid to the testator's widow a certain amount is free from objection as the lady was a creditor under the marriage-contract for an annuity of £100.

It may be taken, however, that several thousand pounds are involved in this question.

Now, in the view which I take of the law it is for the defenders to make out that the

pursuers have so acted as to be barred from challenging what *prima facie* is illegal, viz., the paying away of the trust estate to beneficiaries, creditors being unpaid.

It is said, however, in the first place, for the defenders, that the trustees are justified in dividing the estate among beneficiaries if they make reasonable provision for payment of creditors. From this doctrine which underlies the Lord Ordinary's judgment, I entirely dissent. Extreme cases were put as supporting its fairness. Suppose an estate of £50,000 and a debt of £5000 amply secured and not payable till ten years after the death, and of which the creditor cannot be forced to take payment till then, is the execution of the trust, it is asked, to be paralysed and nothing to be allowed to be given to beneficiaries until the creditor is satisfied? My answer is, that the rule is peremptory and applies to that case, and if the trustees choose to part with any portion of the estate, they do it at their peril. I see nothing startling in such a result. The good sense and self interest of the persons concerned will generally provide a solution of any resulting inconvenience; but if a creditor declines to say yea or nay to any proposal which may be made for setting a part of the estate free from his claim, then I say his right must prevail, for the beneficiaries' right is entirely subordinate to his.

To my thinking, therefore, it is irrelevant to say that the trustees had good grounds for believing that the pursuers' debt was amply secured, and that they acted in good faith in making payments to beneficiaries. The only case in which good faith has been laid down as excusing payments to beneficiaries to the prejudice of creditors is where the trustees were with good cause ignorant of the debt. In that case there is sound ground for refusing the claim of the creditor, for he is himself to blame, the duty of a creditor being to show himself and manifest his claim. But the proposition now maintained, that trustees can limit the universal liability of the estate by setting aside such a reasonable proportion of the estate as they in good faith believe will meet the debt, seems to me entirely opposed to principle and unsupported by authority. The only case ultimately relied on by the defenders was *Harkness* v. *Graham*, 14 S. 1015. When examined it will be found to give them no help. It is a complicated case, but the claim payment of which had to be justified was that, not of a beneficiary, but of a creditor, and the question of reasonable amount only arose because his claim was not for a liquid sum but for aliment.

In *Stewart's Trustees* v. *Evans*, 9 Macph. 810, which is referred to by the Lord Ordinary the ground of judgment was that the trustees proceeded to pay to beneficiaries in the belief that there was no creditor unpaid, this belief having been induced by a discharge of the debt granted by the secretary of the Creditor Company, and the opinions of the learned Judges may be referred to for very clear exposition of the law on the subject.

Now, turning to the present case it is plain that the trustees were in the fullest knowledge of the subsistence of the pursuers' debt.

Accordingly it seems to me that the payments now in question can only be justified by showing that the actions of the pursuers proved them to have waived or abandoned or limited their rights under personal obligation in their bonds. My opinion is that the defenders have entirely failed to establish any such case.

The defenders make much of the fact that the pursuers like themselves believed the heritable security to be ample, and it is quite true that they did so. But assuming this to the fullest extent, to the extent that the pursuers never thought of estimating the value of the personal obligation, this does nothing more than present some antecedent probability that they might consent to the general estate being given away to beneficiaries, but it leaves over the necessity of proving that such consent was given.

The defenders have mainly relied on the facts regarding the sale of the Gordon Street property and the application of the price, as implying a departure by the pursuers from their rights to the general estate, and the Lord Ordinary considers the evidence to support them.

Now, I find it useful to bear in mind *de qua re agebatur* in the interview and letters in question. The parties met and corresponded to see whether and on what terms the pursuers would agree to release the Gordon Street property from their security title. The proposal to this effect had been made to and considered by the directors of the pursuers' company, and their managers went to the meeting with the defenders authorised in this behalf alone. If therefore having met for this purpose, they parted having agreed that the pursuers should not only release the Gordon Street property but should in addition give up their claim under the personal obligation of the bond, this having been never proposed to or considered by the pursuers, I can only say that this would require to be pretty clearly proved not being a very natural result. But when we turn to the parole proof, I confess I find no adequate evidence to support the defenders. I am afraid that my view of the law about the rights of creditors makes me more exacting than the Lord Ordinary as to what in the way of consent is required to justify trustees in paying away to beneficiaries, creditors being unpaid; but I must also add that, apart from any question of presumption, I think that the Lord Ordinary ascribes to the evidence more point and force than it really possesses. It seems to me that from beginning to end the pursuers' company never said or did anything relating to the disposal of the general estate of the trust, and for the good reason that they never were asked to consider and never considered the question. This being so, I think they are entitled now to stand on their legal rights.

I ought not to omit to mention another point made by the defenders. When the Gordon Street property was sold, the pursuers, as I have mentioned, got out of the proceeds some £25,000. The remainder of the price, amounting to (roundly speaking) another £25,000, was received by the trustees. In the present action the defenders were at first sought to be made liable for this amount. It is proved, however, that the money was paid away, not to beneficiaries, but to unsecured creditors; and the pursuers have abandoned the claim on this head. The defenders have strenuously maintained that this concession is fatal to the present demand. I do not think there is weight in this argument. The pursuers say that when they set free this money they quitted all preferential claims to it, and the trustees accordingly applied it in ordinary course to the payment of creditors who were pressing. I cannot see that because the pursuers decline to challenge such payments to creditors, they are precluding from challenging payment to beneficiaries.

The conclusion which I come to upon the whole case is, that in the three matters in dispute the pursuers are entitled to prevail, and that the Lord Ordinary's interlocutor must be recalled. The decree to be pronounced, should your Lordships think liability established, will require adjustment on at least two matters mentioned by the parties, viz., (1) the sum of the payments to beneficiaries, excluding the widow's annuities; and (2) the various liabilities of the defenders who are representatives of deceased trustees.

LORD ADAM—The leading question in this case is, whether the defenders are personally liable to make good to the trust-estate certain payments made by them to beneficiaries to the prejudice of creditors of the trust.

It appears that the truster John Stevenson Miller died in August 1876.

He was at the time of his death indebted to the pursuers in the balance due on two personal bonds, one for £40,000 dated in December 1872, and the other for £15,000 dated in December 1873. Part of the debt contained in these bonds was only payable by instalments, and I see there was a question whether, so long as the instalments were duly paid, any part of it could be called up. However that may be, the pursuers did not call up the debt. In security of these debts the pursuers held an absolute disposition to certain property belonging to their debtor in Gordon Street, Glasgow, and over the works called Springfield Works in which Mr Miller's firm carried on their business, and also over an adjoining property of Cunningar. The disposition was *ex facie* absolute, but of course the creditors were bound to account for the residue of the properties after payment of their debt.

I suppose there can be no question in law that the whole of the trust-estate, heritable and moveable, is liable for the truster's debts. I suppose it is equally clear in point of law that, if the trustees of a deceased truster are unable to pay his debts in full, they are liable to account to the creditors for the whole trust-estate which is or ought to be in their hands. I think there can be no doubt of these propositions. I think it equally clear that if trustees pay away the trust-estate improperly, they are bound personally to restore the amount so improperly paid away by them. I think it is also a clear proposition in point of law, as your Lordship has said, that trustees are not entitled to pay any part of the estate to beneficiaries before the creditors are paid. Beneficiaries are, of course, in all cases postponed to creditors in such matters. And accordingly I think the question we have to consider in this case is whether there is anything in the history or the circumstances of this trust, or in the conduct of the pursuers, to justify the trustees in having made the payments in question to the beneficiaries as they did.

Now, it is clear from the evidence that at the date of the truster's death the business which he or rather his firm (consisting of himself and his son) carried on was in anything but a flourishing condition, and accordingly we find from the minutes of the trustees that they resolved, looking to the state of matters, that it was necessary that the business should be put into liquidation. That was their first resolution. But in the meantime the son William had been in communication with the principal creditors of the firm, and they consulted Mr Wyllie Guild. The result was communicated to the trustees by their agent at a meeting held on 18th September 1876. I would desire to call attention to what took place at that meeting, because it shows, and shows clearly, the nature and character of the trust-estate which these trustees had to administer; and I think it will be acknowledged that it required a great deal of caution at their hands how they should administer it. The agent in the trust makes this report to the trustees—"He further explained that, as appears from Mr Guild's statements, the working capital of the partners had been more than absorbed by losses sustained in the business; that the assets of the business, apart from the works and the Gordon Street property, which belonged to Mr J. S. Miller individually, were insufficient to meet the liabilities, the apparent deficiency being £31,068, but that, taking the works and the Gordon Street property into account, there was an apparent surplus of £27,731; that in the statements made out by Mr Guild the works were dealt with as a going concern, but that the apparent surplus would in all probability disappear if the business were discontinued and wound up as a stopped concern; that there was an unanimous feeling amongst the creditors that the estate should be protected as much as possible, and something saved for the benefit of Mrs Miller's family, and they considered that that end would be best attained by discontinuing the shipping business," and so on; "that in the meantime, and in order to give a full opportunity for re-

trieving the affairs of the company, they would not press for immediate payment of their claims, and that they had for that purpose passed" certain resolutions. "The meeting having anxiously deliberated on the position of the trust in relation to the business were decidedly of opinion that it was for the interests of the trust that the business should be continued on the conditions contained in the resolutions. It was considered advisable to advertise the Gordon Street property for private sale, reference to be made to Mr David Broom and the agents. In view of a sale the law agents were requested to communicate with the manager of the Heritable Investment Society with reference to the apportionment of the heritable debt as between the Gordon Street property and the works, the society holding both properties for the entire loan."

Now, I have read that because it appears to me to indicate that the solvency might depend and in point of fact did depend upon the success of the firm keeping the Springfield Works going. The trustees were told that if Springfield ceased to be a going work, the apparent surplus of the trust-estate would in all probability disappear. That was the nature of the estate with which these trustees had to deal. The resolution to carry on the business was not carried out by the trustees for this reason. The son William, who had been a partner of the firm, had by his father's trust-settlement a right to take over the business and works at the valuation of the last balance sheet, and he did so. He took over the Springfield Works and the business, but he did not take over the Gordon Street property left by his father which he had the option to do—and he thereby became liable for all the debts and obligations of the firm, and he also became liable to the trustees for the value of the properties so taken over by him. The result of this transaction was that William became debtor to the trustees in a sum which amounted to some £20,000; and this sum of £20,000 constituted almost the whole assets of the trustees. That was the position of matters.

In the meantime, and while this transaction was going on, the trustees applied to the pursuers in terms of their minutes, to see if they would disburden the Gordon Street property of their debts, and if so upon what terms. The trustees sold the Gordon Street property on 15th January 1877 for a sum of £75,000, and the pursuers on their part consented to disburden that property of their security over it on getting a money payment of £25,000. A large part of the balance of the price—some £25,000—went to pay off other burdens preferably secured over the property, but there was a balance of £26,000 which, with the pursuer's consent, passed into the hands of the trustees. Now, I think it is quite clear that all that the pursuers consented to do in this matter was, that upon part of their debts over the estate being paid off with the £25,000, to disburden Gordon Street property to that extent. I also think that it is perfectly clear that they did not concern themselves—and that was a very proper decision—with the disposal of the sum of £26,000 paid into the hands of the trustees. They left the disposal of that sum entirely in the hands of the trustees, and to the discretion of the trustees to do what they pleased with it. I think that is the true state of the facts.

Again, in June 1877 the pursuers consented to disburden the estate of Cunningar, which was also included in their security, for a money payment of £6000, and consented that the balance of £2250 should go into the hands of the trustees. Now, that, just as in the case of disburdening of the Gordon Street property, was all that the pursuers consented to. They did not in this case, as they did not in the Gordon Street case, concern themselves with or take any responsibility as to what should be done by the trustees with the money they thus got into their hands. They left it, as it appears to me, entirely in the discretion of the trustees to do with it as they pleased. The pursuers having consented to disburden the property of their securities, it appears to me that they had no option but to pay that money to William in accordance with the directions of the trustees. But I entirely fail to see how their so following the direction of the trustees as to paying that sum to William can prevent them objecting to the payment of that sum by the trustees to William as not being a payment which they were entitled to make. The Lord Ordinary's comment on these transactions—and these are the principal transactions founded on by him—is this:—"This line of conduct on the part of the pursuers was calculated, I think, to lead the trustees to think that they were at liberty at least to apply the income of the trust estate in satisfaction of alimentary provision in favour of the truster's widow and family." Now, it appears to me that this "line of conduct" on the part of the pursuers may be very good evidence indeed that the pursuers thought that the remaining trust estate was perfectly sufficient security at that time for the whole of the debt. It may also be very good evidence that the pursuers probably considered the remaining heritable security sufficient, and it may no doubt have induced the trustees—I do not say that it did—to think that they were in safety to pay sums of money to the beneficiaries, but I entirely fail to see how that could relieve the trustees of their responsibility in the matter. They alone were charged with the duty of administering the estate. It was a question for them to settle on their own responsibility and not for the pursuers.

I have only further to add in this matter, that, so far as I can see, there is no evidence whatever that the pursuers knew of these payments by the trustees to the beneficiaries. I do not think it would have been material if they had. I do not think either that there is any evidence that the pursuers' manager Mr Paterson knew of these payments, but whether he did or not is to my mind immaterial, because mere

knowledge would be nothing. It is perfectly plain that Mr Paterson had no authority from the pursuers here to consent to prejudice their security in any way over this trust estate.

Now, these are the principal facts with reference to the conduct of the pursuers which have been urged as justifying the payment of the money by them. The proposition in law upon which the Lord Ordinary has decided this case against the pursuers is this—"In the case which I have put of the creditor not desiring immediate payment, or of the debt not being exigible for a considerable period, I think that if the trust-estate is undoubtedly solvent and the creditor's security at the time is ample, all that the trustees can fairly be expected to do is to see that reasonable provision is made for ultimate payment." That is the proposition in law in respect of which he arrives at the conclusion that the defenders are freed from liability in the case. Now, I can find no authority for that. The trustees are debtors in this case, and the pursuers are creditors in a debt due by the trust-estate; and if a debtor can free himself of liability for such a debt by saying—"I made provision for its payment which was reasonably sufficient." All I can say is that that is to me a new proposition in law; I know of no authority for it. The Lord Ordinary has referred as an authority in point to the case of *Stewart's Trustees*, but that to my mind is an entirely different case. The decision in that case was that trustees were not personally liable in respect of payments made by them *bona fide*, and in excusable and legitimate ignorance of the existence of the claim which was subsequently made upon them. But I fail to see that that is any authority for the proposition which has necessarily to be affirmed in this case, viz., that where trustees are in complete knowledge of a debt which is due from the trust-estate they are freed from liability because they think reasonable provision has been made to meet it.

Now, I confess it appears to me that where trustees are aware of the existence of a debt, the responsibility rests upon them to provide the means for payment of that debt. If they choose to pay away the estate, they do so, it appears to me, at their own risk. It may be—I do not think it is necessary to decide that proposition in this case—that if trustees specially set aside a part of the estate, and invest it in securities which trustees may lawfully invest in, in order to meet a debt not presently payable, it may be that they may not be liable for any unforeseen loss or depreciation of these securities. But to my mind we have no such case here. The case, as I have pointed out, is that the trustees were aware from the beginning of the very speculative nature—I may so call it—of the securities in this case. They were told at the beginning that if a certain event took place, which has taken place, there would probably be nothing left for the beneficiaries. They set aside no part of the estate to meet this particular debt. It happened that this particular debt was heritably secured. They chose to think that that heritable security would be sufficient. That is the position which the trustees took up in this matter. They went to the pursuers to ask them to disburden certain properties of their securities over them, but they never asked them to give up their security over the rest of the trust-estate.

The proposition we are now asked to affirm is that the trustees, although they never asked that, are now entitled to say—"Because we thought the securities held by the pursuers for their debt were reasonably sufficient, that has exonered us from producing the trust estate, and from fulfilling our personal obligation to the pursuers."

What they did, as we know, was that they handed over the whole assets of the trust, so to speak, to the son William, and left them in his hands apparently without any control or supervision. It may be that the trustees were perfectly entitled to do so under the trust-deed, but that is not a defence in a question with creditors, because creditors cannot be affected by the conditions which a truster chooses to impose upon or to relieve his trustees of.

The trustees here would possibly have a good answer if the case had been with the beneficiaries only. But they should have considered from the first what their position was with reference to the creditors on this estate. If they did not do that, they must just take the consequences; and that is, to my mind, making themselves personally liable to restore the money they have illegally paid away.

Now, that appears to be all I have to say with reference to the payments to the beneficiaries. We have next to consider whether the payment of £2250, the balance of the price of Cunningar, made by the trustees to the son William, is a good payment or not. What your Lordship said upon that point is, I think, unanswerable. The Lord Ordinary, so far as I read his judgment, seems to think that, because the pursuers were aware that this payment was made to William, that was enough to decide the question, and that they cannot now object. I have already said what I have to say in regard to that.

With reference to the other sum of £1600, I also agree with your Lordship. It consists of an estimate of arrears of interest due upon the sum of £20,000 by William to his father's trustees, which these trustees simply left in his hands uncalled for. They apparently never sought to recover it. I think both cases are the same. Therefore I concur with your Lordship.

LORD M'LAREN—With reference to the two sums which your Lordships have considered firstly and secondly, I am of opinion,—and I understand we are all agreed—that these were payments made by the trustees to William Miller, the testator's son, at a time when he was a debtor to the trust-estate. Now, no trustee can justify the advancing of trust money to a debtor without security, and if that money be lost or be not forthcoming the trustees are neces-

sarily responsible as for a breach of the trust under which they hold. I do not propose to go over the circumstances connected with these payments or to refer to the reasons by which the trustees have sought to justify their action. Your Lordship has fully explained the views of the Court on that part of the case. I will only add that where trustees have made money payments or advances which they cannot justify as being in accordance with the conditions of their trust, they are responsible and may be made to replace that money at the suit of anyone who is interested in the trust whether as a creditor or as a beneficiary. It follows that the heritable creditors who are suing this action have a good title to challenge what I conceive to be improper acts of administration.

But, in the view which I take of the case, the payments made to beneficiaries stand in a very different position, and while, of course, after the opinions that I have heard I cannot place implicit confidence in my own view, yet as I have a clear opinion upon this question I think it is due to the parties that I should state it.

It seems to me that the difference between the majority of the Court and myself is a difference of principle and depends on this, as I understand, that your Lordships hold that in some way, in some qualified sense, there is a personal obligation towards the heritable creditor after the death of the debtor. Now, my view is that there is no such personal obligation, that the obligation ceases at the testator's death, and that in place of it there comes an obligation on the part of his representatives to make his estate forthcoming in a due course of administration. I qualify what I have said by this exception, that where there is vitious intromission the responsibility is absolute. But we are dealing here with the case of trustees who have confirmed to the moveable estate and made up property titles to the heritable estate, and who are only responsible in a representative character. And I take it that the measure of their responsibility under the law of the United Kingdom—for there seems to be no difference between the law of England and the law of Scotland in this respect—the measure of their responsibility is that they are to make the estate forthcoming to all concerned in a due course of administration, and are only to be responsible as for negligent administration. The case would be different if the trustees had given a corroborative obligation, but no such obligation was requested of them, and the bond of corroboration given was granted by William Miller the testator's son. Now, we have to deal with so elementary a case, so simple in its features as this, that while the testator left large heritable estate burdened with debts which were not to be paid off until the lapse of a term of years, the heritable debts were considered, not only in the opinion of the trustees, but in the opinion of the heritable creditor himself, to be most amply secured. So strong was the feeling of security that the heritable creditors voluntarily consented to allow a portion of the estate to be sold, and a large sum—I think £30,000—to be paid over to the trustees to be applied to the discharge of other trust obligations. Now, that being the case, and it being according to the contract with the heritable creditor impossible to realise the security for the debt or to bring the trust to an end, the question was—What were the trustees to do with the surplus income? Under their trust they were directed to divide it amongst the testator's family—his widow and daughters—and they did so. No adverse or competing claim was preferred, and the trustees proceeded to carry out the directions which the testator gave them; and in fulfilling these directions *prima facie* they were discharging their duties as trustees. Now, I quite see that if at any time before the bonds came to be repaid it should become apparent that the security was less valuable than was supposed—I mean the case which happened of the property declining in value—it might be a right thing that the trustees should cease to divide the income among the beneficiaries. Creditors are always entitled to the first place in the administration of every trust, and although the security may have been sufficient at the time when the trustees investigated the solvency of the estate, that would not relieve them from the necessity of watchful administration and adapting their policy to changed circumstances. No case of this kind is raised on the record or in the argument addressed to us. The argument for the heritable creditor is that he had an absolute security over the whole estate, heritable and moveable, and that no payment made without his consent is a valid payment, or ought to be allowed as an item of credit in the trustees' accounts. Now, I confess I have been unable to see in what respect these trustees have failed in their duty as regards the application of the income of the estate. I cannot think that it is the duty of trustees, when ample provision has been made for payment of future debts, to accumulate income, leaving the family of the testator to starve. There is no statute to this effect; there is no decision to this effect; and I cannot think that this question is just to be solved by saying that there is no decision indemnifying the trustees in such circumstances. There is no general assumption against trustees that in case of unexplained loss they are guilty of mismanagement. The presumptions are all the other way, and I should rather have desiderated some authority for holding trustees who act gratuitously, responsible, because the creditors of the trust had not received payment in full under circumstances which imply no personal failure of duty on the part of the trustees, but merely an unforeseen depreciation in the value of a security.

We are acting here as a Court which has authority over trustees. When new circumstances arise we must endeavour to find out, or if necessary to formulate, new rules which shall be available for their

guidance; and sometimes these rules operate hardly in cases to which they are applied. But I should wish, in the case of a new point like this, that the rule laid down should be a convenient rule, consistent with practical trust administration, and fair to all parties. I may say with the greatest deference and respect, and I do think, that the rule which your Lordships are laying down is one that will operate with the most cruel hardships and injustice to families, because it means this, that wherever there are outstanding obligations —and nothing is more common in trust management, where the testator was a merchant or manufacturer, than outstanding obligations—the whole estate, heritable and moveable, is to be laid under an interdict, and not one penny can be paid to the family of the testator, because probably at some future period investments which appeared ample may fail, and the creditors will hold the trustees responsible.

I am quite sure that if I had been consulted at the bar in such a case as this, I would without a moment's hesitation have advised the trustees not only that it was permissible, but that it was their positive duty to make these payments to the beneficiaries. I should have so acted myself as a trustee, and I may say I am not sure that I would not do so again if the occasion should occur. It is really impossible to work out a trust upon the principle that the trustees must hold their hands for years until everything is paid off.

For these reasons I must dissent from the judgment which your Lordships propose, in holding the trustees personally liable for the payments made out of income. On the other points, as I have already said, I agree with your Lordships.

LORD KINNEAR was absent,

The case again came before the Court on the question of what interest the trustees were bound to pay on the sums which the Court had found them liable to replace.

The pursuers maintained that they were entitled to 5 per cent.

The defenders submitted that in the circumstances of the case the trustees should not be found personally liable in interest until date of summons, or at anyrate that interest at bank deposit rates was all that should be allowed.

The LORD PRESIDENT delivered the judgment of the Court:—"As regards interest, the pursuers will, if we allow only the average rate of trust interest, be put in the same position as they would have occupied if the estate had been duly administered by the defenders. No profit has been made or has been sought to be made for themselves by the trustees, and we do not consider this a case where penal interest should be required."

The Court recalled the interlocutor of the Lord Ordinary, and decerned against the surviving and acting trustees under the settlement of the deceased John Stevenson Miller, as such trustees, to make payment to the pursuers of the sum of £40,150, 16s. 10d., with interest at 5 per cent. per annum from 31st December 1890, and to grant the pursuers a conveyance of Glenfoot House, and to assign them the bond for £1200: Further, decerned against the said surviving and acting trustees, as individuals, and the representatives of deceased trustees (with regard to the sums paid away prior to the decease of each), to make payment of the sum of £2163, 17s. 7d., with interest at 3 per cent. from 8th August 1878; the sum of £1534, 14s. 5d., with interest at 3 per cent. from 30th May 1884; the sum of £157, 7s. 8d., with interest from 31st December 1884; and the various sums paid to the beneficiaries, with interest at 3 per cent. from the date of the several payments.

Counsel for the Pursuers — Sol.-Gen. Asher, Q.C.—W. Campbell—W. C. Smith. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Defenders—D.-F. Sir Charles Pearson, Q.C. — Ure — Guthrie. Agents—Maconochie & Hare, W.S.

Thursday, January 26, 1893.

FIRST DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.

DURIE'S EXECUTRIX *v.* FIELDING.

Donation — Proof — Bill of Exchange — Insufficiency of Stamp—Stamp Act 1870 (33 *and* 34 *Vict. c.* 97), *sec.* 17.

Section 17 of the Stamp Act 1870 enacts that, save as is provided in the said Act, no instrument shall be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped.

D's executrix sued for repayment of a sum which she alleged had been lent the defender by D. The defender admitted the loan, but averred that D had taken a bill for the amount thereof from the defender and his sisters; that he had subsequently endorsed and made a donation of said bill to his sister M, and that she alone had right to the sum sued for. The bill was in M's possession at the date of D's death, but was not duly stamped. Apart from the fact of the bill being in M's possession, the only material evidence in favour of donation was that of the donee herself.

The Court *held* that the bill could not be looked at as evidence in favour of the alleged donation, and therefore *decerned* against the defender for the sum sued for.

This was an action raised in the Sheriff Court at Aberdeen by the executrix of Charles Durie against Henry Fielding for payment of the sum of £200, with interest from Whitsunday 1890, being the amount of a loan which the pursuer alleged that