his title. It is no doubt a condition of the conveyance that a strip of ground should be taken off for the formation of a private road, and that the road shall be formed from the Lovers' Walk northward as far as the land disponed extends. No time is specified for the formation of the road. It is said that the condition imposes an immediate obligation. I cannot assent to that proposition. I find that as matters now stand, the pursuers have no interest in the formation of the road, and I prefer to construe the disposition as imposing no higher obligation on the disponee than to make the road when the purposes for which it is required come into existence, or, in other words, when the property is laid out for building ground. That may never be, for Mr Grierson and Mr Scott as his disponee are entitled to reserve it for garden or ornamental purposes, and it seems absurd to read the disposition as obliging them to make a road through their private grounds.

If the property were to be used for building purposes the several proprietors would probably have a legitimate interest to see that uniformity was preserved in the buildings, and in the road along which they are to be built. In that case it might be of importance to them that the road should be in the line specified in the plan, and that it should be 20 feet in width. If there was an obligation to make it, I should not doubt that these conditions must be observed. But these considerations are of no importance unless we can affirm the existence of an obligation to make the road. The title is silent as to time, and I cannot hold that the obligation comes into force until there is a reason for the road,

We are referred to the case of *Fimister*. I do not think that it applies. There a road had been made through the entire length of the property, which had been given off in several feus, but terminating at a private place, namely, at the property of another person. A feuar at the inner end proposed to shut up a part of the road. It was held that he was not entitled to do so, because the road was common to all the feuars, and because they had an interest to keep it open in case it should be extended to a public place. It is different here. The defenders do not propose to shut up a road. They are contending that they are not obliged to make one. We have to determine whether they are at the present time under such an obligation. I do not think they are.

The LORD JUSTICE-CLERK—That is the opinion of the Court.

The Court pronounced the following interlocutor:—

"Sustain the appeal, recal the interlocutor appealed against, and the interlocutor of the Sheriff-Substitute dated 6th August 1894: Find that the defenders, as proprietors of portions of the lands of Loreburn Park, are not bound forthwith to make and construct a private road northward through the said lands in continuation of the existing road from Lovers' Walk, and to enclose the same: Therefore assoilzie them from the conclusions of the action, and decern," &c.

Counsel for the Pursuers—C. S. Dickson – A. S. D. Thomson. Agents—Somerville & Watson, S.S.C.

Counsel for the Defenders—Jameson—Clyde. Agents—J. & A. Hastie, S.S.C.

Friday, November 30.

SECOND DIVISION.

[Lord Low, Ordinary.

ADAIRS' JUDICIAL FACTOR *v.* CONNELL'S TRUSTEES.

Fraud—Trustee and Beneficiary—Forgery by One of Two Trustees—Liability of Beneficiary through Negligence in Supervising Trust Administration.

A sum of £1000, being part of a trust-estate in the hands of two trustees, was invested in a bond. One of the trustees granted a transfer of the bond, to which he forged the signature of his co-trustee, and embezzled the money paid by the transferee. The forger having absconded, a judicial factor was appointed on the trust-estate. In an action by the judicial factor for reduction of the transfer the purchasers of the bond pleaded that the pursuer was barred from insisting in the action, in respect that the forger had been left by his co-trustee and by the beneficiaries under the trust in the uncontrolled management of the trust funds after knowledge on their part that he was not a fit person to be entrusted therewith.

The Court *repelled* this plea, on the grounds (1) that negligence on the part of the forger's co-trustee could not bar the pursuer from maintaining the action in the interest of the beneficiaries; and (2) that the defenders had failed to prove negligence on the part of the beneficiaries.

Opinion by Lord Young that, to make the plea of bar effectual against the judicial factor, negligence would have had to be proved on the part of all the beneficiaries.

By mutual disposition and settlement dated 2nd September 1864, John Adair and Mrs Jane Elizabeth Adair, his wife, disponed to each other and the longest liver in liferent their heritable and moveable estate, and at the death of the survivor conveyed their whole estate to the trustees therein named for the purpose of dividing it among their children. John Adair died in 1867, and thereafter, with Mrs Adair's consent, Hugh Adair, her eldest son, and Robert Vans Agnew, acted as trustees under the said trust-disposition, and paid over the liferent to Mrs Adair Hugh Adair, who was a writer, also acted as agent for the trust.

On 4th June 1889 Robert Vans Agnew and Hugh Adair, as trustees foresaid, invested £2000 of the funds of the trust on a bond by the Trustees of the Clyde Navigation.

On the 9th March 1891 a transfer of the bond was granted in favour of the trustees of the deceased Daniel Ferguson Connell. This transfer bore to be signed by Hugh Adair and Robert Vans Agnew, but the signature of Robert Vans Agnew was forged by Hugh Adair.

Hugh Adair absconded in February 1893. On 11th July 1893 John Marquis Rankin, solicitor, Stranraer, was appointed judicial factor on the trust-estate. Robert Vans Agnew died in September 1893.

On 5th August 1893 Mr Rankin, as judicial factor foresaid, raised an action of reduction of the forged transfer against the Clyde Navigation Trustees and Connell's trustees. The defenders, Connell's trustees averred, *inter alia*—"(Stat. 4) Shortly after John Adair's death Hugh Adair gradually got possession of the whole estate. He never rendered any statement of the trust funds, either as regards revenue or capital. Nobody exercised the slightest supervision over him. It was generally difficult and sometimes impossible to obtain money from him on account of the revenue to which his mother was entitled. No meetings of the trustees were ever held, and no trust accounts or trust records were kept. Mr Vans Agnew's connection with the affairs of the trust was practically formal, and he left the whole management of the trust to Mr Hugh Adair, without exercising any check, control, or supervision whatever. (Stat. 8) Out of her own estate Mrs Adair had purchased £533, 6s. 8d. three per cent. debenture stock of the Midland Railway Company which stood in her own name. In or about the beginning of 1891, Hugh Adair forged his mother's signature to a transfer of that stock. In consequence of inquiries that were made by the Midland Railway Company at the time, it became known to Mrs Adair, and also to Hugh Adair's brothers and sisters, that Hugh Adair had forged his mother's name to this transfer, but still no step was taken by any of them to prevent further improper dealings with the trust funds. (Stat. 9) For many years prior to 1891 Hugh Adair was a heavy drinker, given to drinking bouts from time to time, and creating for himself the reputation and notoriety of being grossly careless and negligent in his actions and dealings. If the slightest investigation had been made into the affairs of the trust at any time, at least during the ten or twelve years preceding 1893, it would have been ascertained with no difficulty that the affairs of the trust were in great confusion, that there had been gross mismanagement by Hugh Adair, and dishonest appropriation of the funds. Hugh Adair's mother, and his brothers and sisters, and his co-trustee, Mr Agnew, were put upon their inquiry from time to time in the most definite way, but they continued to allow matters to remain as before."

The defenders, Connell's trustees, pleaded, *inter alia*—"(1) The pursuer's averments are irrelevant. (2) The defenders ought to be assoilzied in respect—(*a*) That they are *bona fide* assignees for value of the bond in question. (*b*) That the said Hugh Adair was left by the beneficiaries of the said trust-estate and by his co-trustee in the uncontrolled management of the trust-funds, after knowledge on their part that the said Hugh Adair was not a fit person to be entrusted with the management thereof. (3) In respect of the actings and negligence of the beneficiaries and of the co-trustee condescended on, the pursuer is barred from insisting in the present action."

A proof was led. The evidence showed that Mr Agnew had left the management of the affairs of the trust-estate almost entirely to Hugh Adair. He had, however, insisted that all investments should be approved by him before they were made. There was no evidence that he had ever looked into the trust securities to see whether they were in order, but, on the other hand, there was no evidence that he had not fulfilled his duty in this respect. Hugh Adair kept no accounts in connection with the trust. Prior to the date of the transfer he had embezzled £4000 of the trust-estate. His diary was produced, which showed that he drank heavily at times. He was joint agent for the National Bank of Scotland at Stranraer down to the time of his flight. Witnesses gave evidence that until he absconded he had the repute of being an honest man, and careful as an agent. Four of the beneficiaries, a brother of Hugh Adair and three of his sisters, were examined, and gave evidence that down to 1893 they had no suspicions of the honesty of their brother or his ability in business matters. The children of a deceased daughter of the truster, who resided in New Zealand, were also beneficiaries under the trust. Mrs Adair, one of the trusters, the liferentrix of the estate, died about the time the action was raised. Down to the date of his disappearance Hugh Adair had paid her a yearly sum, which he averred was the income of the trust-estate.

On 14th July 1894 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that the signature of the deceased Robert Vans Agnew to the transfer of which reduction is sought in the summons was forged by Hugh Adair, solicitor and bank agent, Stranraer; (2) that the pursuer, as judicial factor upon the trust-estate of the deceased John Adair, is not barred from seeking to have the said transfer reduced, and held to be null and void, by reason of the negligence of the said Robert Vans Agnew, as a trustee upon the said trust-estate, or of the beneficiaries under said trust: . . . With these findings appoints the cause to be enrolled for further procedure, &c.

"*Opinion.*—It is proved beyond any doubt that the signature of Mr Vans Agnew to the transfer under reduction was forged by Hugh Adair, and the questions which I have to determine are, in the

first place, whether the pursuer is not barred from asking reduction of the transfer in respect that Hugh Adair was enabled to commit the fraud, first, by the negligence of Mr Vans Agnew as trustee upon the estate to which the bond which was transferred belonged, and secondly, by the negligence of the beneficiaries under the trust. . . I shall consider these questions in the order in which I have stated them.

"1. It is proved that prior to the date of the transfer in question, Hugh Adair had appropriated to his own purposes some £4000 of the trust funds, and the defenders' argument is that if Mr Vans Agnew, who was the only trustee except Hugh Adair, had done his duty, and taken that supervision of the affairs of the trust which he ought to have taken, Hugh Adair's embezzlement would have been discovered, and the management of the trust taken out of his hands long before the date of the transfer, and in that way he would never have had the opportunity of forging the transfer, and obtaining the money. [*His Lordship then examined the evidence on this part of the case.*] In these circumstances the defenders do not appear to me to have proved their averments of negligence against Mr Vans Agnew. . . .

"2. The alleged negligence of the beneficiaries is also pleaded by the defenders. In my opinion negligence on the part of the beneficiaries is not proved. They were all adduced as witnesses, and they all said that until after the date of the transfer they never suspected that Hugh Adair was dealing dishonestly. I saw no reason to doubt the truthfulness of that evidence."

The defenders, Connell's trustees, reclaimed, and argued—The pursuer represented the beneficiaries, and the beneficiaries by their culpable negligence in not looking after Hugh Adair's management of their business had made it possible for him to commit the forgery. Neither the co-trustee nor the beneficiaries had exercised the slightest supervision over Hugh Adair. If they had looked at the accounts they would have seen that he was embezzling money year after year. The beneficiaries must have known that Hugh Adair was given to drink, and was mismanaging the trust-estate. In particular, it was brought home to their knowledge that he had forged the signature of his mother to a transfer of Midland stock in February 1891. The beneficiaries were thus put upon their inquiry, and were not entitled to stand by and see the trustee acting in a fraudulent manner. If the beneficiaries put overweening confidence in a man of this sort, it would not do for them when he deceived third parties to say, "You must suffer, not we, for the consequences"—*Wallace's Trustees* v. *Port-Glasgow Harbour Trustees*, February 27, 1880, 7 R. 645; *Orr & Barber* v. *Union Bank of Scotland*, January 31, 1852, 14 D. 395—August 7, 1854, 1 Macq. 513; *Lickbarrow* v. *Mason*, 1 Smith's Leading Cases, opinion of Ashhurst, J., p. 747; *Barton* v. *North Staffordshire Railway Company*, 1888, L.R., 38 Ch. Div. 468.

Argued for the pursuer—In order to support a plea of bar on the ground of negligence three conditions were essential—(1) Negligence with regard to the forged document itself; (2) neglect of a duty which deceived the third party taking advantage of the plea; (3) neglect of a duty which the trustee or beneficiary owed to the third party or to the public, and not merely of a duty which the trustee or beneficiary owed to himself—*Bank of Ireland* v. *Trustees of Evan's Charities*, 1855, 5 Clark's Reports, 389; *Arnold* v. *Cheque Bank*, 1876, L.R., 1 C.P.D. 578; *Hall* v. *Fuller*, 1826, 5 B. & C. 750. None of these three essential conditions were present in this case. The case of *Young* v. *Grote*, 1827, 4 Bingham, 253, might be quoted as a contrast to the present. The neglect of a co-trustee to attend to his duties could not prejudice the rights of the beneficiaries. No evidence had been led showing that knowledge of this forgery had been brought home to the beneficiaries. Up till the last they had put their trust in him as an upright man. Before the defenders could succeed they would require to prove that every one of the beneficiaries by their negligence had assisted Hugh Adair in deceiving the public. Nothing of the kind was proved. The judgment of the Lord Ordinary was right.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has given us an elaborate and full note, and in the general proposition which he lays down I concur with his Lordship.

The case presented to us is of this nature. Hugh Adair, who has disappeared, was a trustee on his father's trust-estate along with Mr Vans Agnew. In making a transfer of certain bonds to the defenders, Connell's trustees, he forged the name of his co-trustee. Of that there is no doubt. The judicial factor on the estate, acting in the interests of the beneficiaries under the trust, now sues for reduction of the transfer with the forged signature. As I have said, no answer is made on the fact of forgery, but it is suggested that on account of the neglect of Mr Vans Agnew to maintain a proper supervision over the affairs of the trust and the proceedings of his co-trustee, the defenders have a good ground on which to resist reduction. It is further mentioned that the beneficiaries by their actings are barred from the benefits of reduction of the forged deed.

I think it is well established that no such plea as that stated on the ground of misconduct of the trustee can be sustained. The beneficiaries would have been entitled to reduce this deed if both trustees had been equally guilty. They are therefore plainly not bound to suffer if one of the trustees only has been guilty of such neglect as is alleged.

The next question is, are the beneficiaries themselves barred from decree of reduction being given in their interest? Of course Hugh Adair would have been barred, as he could not take advantage of his own forgery. The other beneficiaries might have

been barred in certain circumstances, but I fail to find any such circumstances here. The beneficiaries' position is that down to the time of their discovery of the true character of their relative they had no means of knowing that he was not an honourable man and a good man of business, and the best confirmation of their view was that the general public and persons associated with him in business believed him to be so. I think a strong indication of the general repute in which he was held is that the bank whose agent he was had no idea down to the very last that he was not a person whom it was safe to entrust with the large sums of money which pass through the hands of such a bank agent. It is quite true that before absconding Adair's own diary shows that he was addicted to drinking, and indulged in occasional bouts of drinking, and that his irregularities caused him distress of mind. But it does not appear that his drinking habits were known to the general public, and the fact that he kept the house from time to time may have been put down to illness. It is of course natural that his relatives should have been the last persons to hear of anything being wrong, and probably they would have been the last to believe any such suggestion even if they had heard of it. Accordingly, I am of opinion that the beneficiaries cannot be held to have so acted as to be barred from getting rid of the forgery by which their interests are injured.

I therefore think that the conclusion to which the Lord Ordinary has come is right, and I am prepared to sustain the first finding of his interlocutor, and to repel the first three pleas-in-law for the defenders.

LORD YOUNG—The facts of this case are in a very narrow compass. The pursuer is judicial factor on a trust-estate, and seeks the reduction of the transfer of a bond forming part of the trust-estate, the transfer being dated in March 1891. The bonds thus attempted to be transferred are for £2000, and were granted by the Clyde Navigation Trustees in favour of the former trustees in the estate over which the judicial factor has now control. The judicial factor challenges the transfer on the ground that it is a forgery. It bears to be signed by the two trustees, but it is alleged—and the allegation is admitted—that the signature of Mr Vans Agnew was forged by his co-trustee Hugh Adair.

Prima facie, that is a good ground of reduction, but the defender in the three pleas-in-law referred to maintains that the pursuer of the action is barred from maintaining that the fact of the document being forged is a good ground of reduction generally, for this reason, that Hugh Adair was a man of irregular and dissipated habits, and inattentive to business, and not a fit person to be entrusted with the management of the trust, and that Mr Vans Agnew did not attend to the business of the trust, and that these facts were known to some of the beneficiaries.

I am of opinion that there are set forth on record no grounds for giving effect to the defenders' contention. It is ridiculous to contend that the judicial factor is barred from reducing the deed because it is said that one of the trustees was addicted to drinking more or less. Looking at the facts, I think these show that Hugh Adair was not always of strictly temperate habits, or attended to his business so closely as was desirable. I am also very clearly of opinion that there were no facts proved which would entitle us to uphold the pleas-in-law of the defenders, and that no relevant ground of bar has been shown.

A particular beneficiary might be barred from maintaining such an action as this, or might be responsible for the consequences of any misconduct on the part of the trustee, but in order to bar a reduction at the instance of a judicial factor who represents all the beneficiaries, you would require to have bar against all. Bar against one of the family would be really nothing in the way of bar.

While therefore I concur in repelling the defenders' plea of bar, I do so on two grounds—(1) That he has stated on record no relevant facts which ought to have been remitted to inquiry, and (2) that the facts proved do not bear out his plea of bar at all.

There is nothing to prejudice the defenders following their money into the hands of any person whom they can prove to have got it. This reduction will do no more than restore the trust-estate, so that the rights of those taking under the trust will not be prejudiced by the forged transfer.

LORD RUTHERFURD CLARK—I am satisfied that the plea of bar is not well founded.

LORD TRAYNER concurred.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find that the signature of the deceased Robert Vans Agnew to the transfer, of which reduction is sought in the summons, was forged by Hugh Adair, solicitor and bank agent, Stranraer: Repel the first, second, and third pleas-in-law for the defenders, the trustees of Daniel Ferguson Connell, and decern: Remit the cause back to the Lord Ordinary to proceed therein as accords."

Counsel for the Pursuer—Jameson—Abel. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Defenders, Connell's Trustees—C. S. Dickson—Wilson. Agents—Campbell & Smith, S.S.C.