creditor, and the second alternative, where, instead of so granting a decree at once, he directs that the property shall be exposed for a re-sale at an upset price fixed by him. Those two alternatives are both contemplated in the words in a parenthesis in Schedule D. In the first case the price to be inserted where the blank is left in the schedule would be "the price at which the lands were last exposed" for sale before the application was made. In the case of the second alternative referred to in section 8, the words inserted would be "the price at which the lands have been bought in," which is the alternative in the parenthesis. In both cases it is treated as a sale. If it is a sale in the second alternative it appears to me to be a sale in the first alternative.

Again, section 9 would appear to me to be almost decisive, if not entirely decisive, upon the question of what should be the construction. It depends upon whether you apply the words "upon the sale being carried through" to the whole of the preceding section, or only to the immediately preceding part of the 8th section. If they are to be applicable to the whole section, section 9 describes the transaction whether taking place under the first or second alternative as a "sale." If the words "upon a sale being carried through" are to be applied only to the second alternative, that would be a statement by the Legislature that it did not apply to the first alternative, and that that was not a "sale." I am of opinion that the words "upon a sale being carried through under the immediately preceding section" apply to both alternatives. It is necessary that they should apply to the first alternative by reason of the proviso, which says, "Provided always that the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired." That proviso could scarcely be a proviso upon a section which previously had not applied to the subject-matter.

Upon those grounds I am of opinion that the judgment of the Court of Scotland should be reversed.

Ordered that the judgment appealed from be reversed; that the parties each bear their own costs in this House and in the Court below; that the respondent do repay to the appellants the costs he has received from them.

Counsel for the Appellants—The Attorney-General — the Solicitor-General for Scotland—A. J. Young. Agents—Solicitor of Inland Revenue, Scotland and England.

Counsel for the Respondent—Aitken—Spence (of the English Bar). Agents — Linds & Company, for John Stewart & Gillies, Writers, Glasgow.

COURT OF SESSION.

Friday, March 4.

FIRST DIVISION.

[Lord Low, Ordinary.

FERGUSON *v.* PATERSON.

Trust — Personal Liability of Trustees — Culpa lata—Defalcation of Agent to Trust — Trust Money Deposited in Agent's Name.

The agent for a trust having received certain trust money for investment stated to the trustees that it was in the meantime lying in a bank upon deposit-receipt. The trustees having called upon him to produce the receipt he made the excuse that he could not get access to it at the moment, but undertook to send it to them next day. In point of fact the money had not been deposited by the agent, but had been appropriated to his own use. Having deposited other funds in the bank, he sent to the trustees a deposit-receipt for the amount, dated the day after the meeting, taken in his own name on behalf of the trustees. The trustees had no reason to doubt the honesty of the agent, but thinking that the money should be deposited in their own names, called upon the agent for the purpose of having the transference made, and being unable to see him owing to his illness, wrote instructions to him to that effect. In the meantime the agent drew out the money and appropriated it to his own use.

Held that the trustees were not liable for the defalcation of the agent, in respect that as soon as they found out that the money was not deposited in their names they had taken every reasonable step to have it transferred.

Observed that it is contrary to the duty of trustees to allow an agent or factor to deposit trust funds in a bank in his own name for behoof of the trustees.

Mr James Ferguson, pawnbroker, Edinburgh, died on 1st April 1854, leaving a trust-disposition and settlement and relative codicils whereby he conveyed his whole estate to trustees. The trust-disposition contained the following clause of indemnity:—"*Sexto*—As this trust may last for a period of years, I empower my said trustees to appoint a factor under them, and to pay to him such salary as they may consider proper, and such factor, whether one of themselves or not, shall be entitled to such salary as shall be fixed; and my said trustees shall not be liable for the intromissions of such factors, or for debtors or companies to whom or where said estate shall be lent or invested, further than their being habit and repute responsible at the time of such loan or investment; neither shall they be liable for any agent who, in transacting the business of this

trust, shall receive any part of my said estate into his hands: And I do hereby declare that my said trustees, whether original or assumed, or tutors and curators after appointed, shall not be liable for omissions or neglect of management, or *singuli in solidum*, but each only for his own actual intromissions."

The truster nominated and appointed his then agents, Messrs Ferguson & Stuart, W.S., Edinburgh, or the survivor of them, to be "agents for my said trustees in connection with the foresaid trust, subject always to the control of my said trustees." The truster left property to the value of about £30,000, and in 1873, when his youngest child attained majority, the trustees, in terms of the trust purposes, divided the estate—which was then valued at £25,000—among his children, with the exception of a sum retained for the purpose of meeting an annuity to his widow.

Of the accepting trustees there were alive in 1887 Mr William Lyon, who died in 1895, Mr Robert Gordon, who also died in 1895, and Mr John Paterson.

In 1896 Mr Paterson, the sole surviving trustee, presented a petition for authority to resign his office of trustee and for the appointment of a judicial factor, and the Court granted the petitioner the authority craved and appointed Mr James Maxtone Graham, C.A., judicial factor upon the estate.

Mr Paterson executed a minute of resignation, and along with the trustees of Mr Lyon and of Mr Gordon presented a petition for discharge.

In February 1897 an action was raised by Mr James Ferguson, one of the truster's sons, against these gentlemen for payment to the judicial factor of the sum of £3140, which the pursuer alleged had been lost to the trust-estate in the year 1888, having been appropriated by the law-agent of the trust, Mr Junner, owing to the negligence of the then surviving trustees in not exercising proper oversight of the management of the trust-funds.

The pursuer averred that out of the sum of £3400 appropriated by Mr Junner, only £259 had been recovered by the trustees from his sequestrated estate, the net loss to the trust thus being the sum sued for.

The defenders admitted that a sum of £3000 or thereby had been lost to the estate through the law-agent's defalcations, but pleaded that the loss had not been caused through their fault.

The facts of the case as appearing from the admissions of the parties on record, a joint minute of admissions, and a proof, are set out fully in the opinion of the Lord Ordinary, *infra*.

The Lord Ordinary (Low) on 3rd June sustained the defences, and assoilzied the defenders from the conclusions of the action.

Opinion.—"The pursuers in the first place attempted to show that although in the earlier years of this long-continuing trust the trustees had shown great care and diligence, they latterly displayed a laxness in the performance of their duties, which culminated in 1887 in gross negligence, whereby the sum of £3000 was lost to the trust-estate.

"Thus in 1880 the trustees resolved to discontinue an independent audit of the accounts, which had previously been made year by year. In my opinion that resolution showed no negligence or laxness on the trustees' part. During the earlier years of the trust its affairs were very complicated, and to have the accounts audited by an independent auditor was no more than a proper precaution. But in 1880 the great bulk of the trust-estate had been realised and divided among the beneficiaries, and all that the trustees had in their hands was a sum of about £4000, which they held for the purpose of paying an annuity of £130 to the truster's widow. In these circumstances an independent audit of the accounts was unnecessary, and I think that the trustees were quite justified in resolving not to put the trust-estate to the expense of such an audit.

"Again, it appears that there are no minutes of meetings of trustees between November 1883 and January 1888. The trustees, however, held a number of meetings during that period, and, prior to the incident upon which the pursuer's claim directly rests, there is no suggestion that the trustees neglected any trust business which required their attention. I think that the absence of minutes during the period which I have mentioned may be explained by the fact that, except one or two not very important changes of investment, there seems to have been no trust transactions to chronicle.

"I therefore do not think that there is any evidence of general laxness on the part of the trustees during the later years of the trust, and, taking the whole period of their administration, I think that it is clear that the trustees devoted a very great amount of time and trouble to the performance of their duties.

"I have one other remark to make before proceeding to consider the circumstances which are said to involve personal liability on the part of the trustees, and that is, that although the money was lost in the very beginning of 1888, no claim was made until nearly ten years afterwards, when two out of the three trustees who were concerned in the transaction were dead, and their evidence of what actually occurred was no longer available.

"I now come to the circumstances under which the money was lost.

"In 1887 a sum of £3700 was invested in a bond and disposition in security over the estate of Purves, granted by Mr Home Purves. Mr Junner, who was agent to the trust, was also Mr Home Purves' agent, but the trustees did not know that that was the case. Mr Home Purves died in February 1887, and Mr Junner informed the trustees, at a meeting which they held shortly afterwards, that the bond would be paid at the following Whitsunday.

"It was argued that the trustees were guilty of negligence in not seeing that a formal notice that the money was to be

repaid had been given three months before Whitsunday. I do not think that there was any negligence on the part of the trustees in this respect. None of them were lawyers, and I think that they were entitled to trust to their law-agent to keep them right in regard to such a matter as notice by a debtor that a sum in a bond would be repaid.

"As it happened, Mr Home Purves' trustees did not pay the sum in the bond at the term of Whitsunday. They expected to be put in funds to make payment by receiving certain sums for which Mr Home Purves' life was insured, but owing to questions with the insurance company the money was not obtained in time for a settlement at Whitsunday. It was, however, paid in July, and the £3700 due to Ferguson's trust was then repaid.

"It was argued that Mr Ferguson's trustees were negligent in allowing payment of the bond to be made between terms. I think that it is a sufficient answer to say that in this case also they were justified in being guided by the advice of their law-agent. He told them that it was really an advantage to the trust that the money should not be paid until July, because he had not been able to find an investment for Whitsunday, and that so long as the money was unpaid it was bearing interest at the rate of 4½ per cent.

"It was also made a point against the trustees that when the money was paid they did not see that it was deposited in bank in their own names. Now, the intention of course was to reinvest the money as soon as possible, and Mr Junner was instructed to look out for an investment. In my opinion the trustees were quite entitled to entrust the money to the care of their law-agent and factor pending an investment being found.

"An investment was found for part of the money at Martinmas, but £3000 still remained uninvested. Immediately after Martinmas advertisements were inserted in the newspapers to the effect that Messrs Ferguson & Junner had £3000 to lend on heritable security. Mr Junner, however, reported that no suitable security could be found, and on 19th December the trustees held a meeting to consider the matter.

"At that meeting one of the trustees asked to see the deposit-receipt for the £3000. It is clear that he did not do so because of any doubt that the money was safely deposited in bank, but simply because it was a proper thing for the trustees when they met together to see the receipt.

"Mr Junner went to the speaking tube for the purpose, as the trustees believed, of calling for the deposit-receipt. He came back, however, and said that he found that the cashier was out, and that he could not therefore exhibit the receipt at that time, but that he would send it round to the trustees the following day.

"The fact was that there was no deposit-receipt at that time. Mr Junner was in money difficulties, and he had used the £3000 for other purposes. On the following day, however, he uplifted £3000 which belonged to another trust, and deposited it in the bank in the name of his firm for behoof of Ferguson's trustees. He afterwards gave the deposit-receipt to the witness W. J. Ferguson, and told him to take it round to each of the trustees and exhibit it to them. This Mr Ferguson did, either on the 20th or a day or two afterwards. I think that it was afterwards, probably on the 21st.

"This brings me to the incident upon which the pursuers chiefly rely. The deposit-receipt which was shewn to the trustees was dated 20th December. That, of course, could not be the receipt for which the trustees had asked on the 19th, and which Mr Junner had promised to send to them.

"It was argued that the date of the receipt ought to have aroused the suspicion of the trustees, and that it was their duty at once either to go to the bank and stop payment of the money in the receipt, or to have the money transferred into their own names. As I shall shew presently, two out of the three trustees in fact took steps to have the money transferred into their own names; but I desire to say in the meantime that I cannot assent to the view that the date of the receipt ought to have suggested to the trustees that there had been fraud on Mr Junner's part, and that it became their duty to take the strong steps which may be incumbent upon trustees who have reason to suspect fraud. No doubt the date of the receipt required explanation, and it might have been the duty of the trustees to ask what the explanation was. But considering the position and repute which Mr Junner had in the legal profession, I think that it would have been very extraordinary if it had ever entered into the minds of the trustees that he had been defrauding them.

"Two of the trustees, Mr Paterson and Mr Lyon, when they saw the receipt, were not satisfied with its terms. They thought that the money should be lodged in the names of the trustees and not in the name of Ferguson & Junner. What considerations influenced Mr Lyon we do not know, because he is dead, and Mr Paterson evidently does not recollect precisely what his view of the matter was. He is clear that the date of the receipt had nothing to do with it, because he says that he did not pay any attention to the date. I think, however, that it appears that he thought that the money should be deposited in the trustees' names either because it had been their practice when dealing with capital sums, or because it had been suggested at the meeting on the 19th December that as there did not seem to be any immediate prospect of finding an investment, the money ought to be held in the trustees' names.

"However that may be, both Mr Paterson and Mr Lyon instructed Mr Ferguson, who exhibited the receipt to them, to inform Mr Junner that they desired that the money should be redeposited in the names

of the trustees. Subsequently Mr Paterson, at all events, did everything which he could to see that these instructions were carried out. The day after, or two days after, he had seen Mr Ferguson he called at the office to see if the new deposit-receipt had been obtained. He was told that Mr Junner had met with a severe accident and could not attend to any business. Mr Paterson subsequently went again and again to the office to press that the transaction should be carried out, and it also appears that letters were written by the trustees to Mr Junner on the subject. The answer, however, which they always got was that Mr Junner was too ill to do business, and that he would attend to the matter when he was able.

"It was true that Mr Junner had had a bad accident and was very ill for some time, but while the trustees were still being put off on the ground of Mr Junner's inability to transact business, he was in fact doing business at his own house, and on 18th January 1888 he had the sum in the deposit-receipt uplifted, and applied it to his own purposes.

"Perhaps the strongest argument which the pursuers have is founded upon the anxiety which Mr Paterson shewed to have the money transferred into the trustees' names. It was argued that that shewed that he must have been suspicious that something was wrong, and that if so, it was his clear duty to keep the trust safe by stopping payment of the receipt at the bank.

"Mr Paterson, however, says that he had no suspicion either of Mr Junner's integrity or of his solvency, and I have no doubt whatever that that was the case.

"Upon the whole matter, therefore, I am of opinion that the pursuers have failed to establish their claim."

The pursuer reclaimed, and argued—(1) The clause of indemnity upon which the respondents founded really gave them no further protection than the ordinary indemnity clause inserted in all trust deeds, and it could not be extended to give them absolute protection in cases where there had been *culpa lata—Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H. of L.) 83; *Raes* v. *Meek*, August 3, 1889, 16 R. (H. of L.) 31. There was a common law liability upon trustees to see that the agent or factor did his duty, and they were clearly bound to see that he did not immix the trust funds with his own — M'Laren on Wills and Succession, pp. 1228-29; *Home* v. *Pringle*, June 22, 1841, 2 Rob. 384, at 430; *Sym* v. *Charles*, May 13, 1830, 8 S. 741; *Stewart* v. *Mackenzie*, May 27, 1834, 12 S. 636. The cases cited by the respondents to prove they were protected by the indemnity clause were very special ones, and contained stronger clauses than the present deed. (2) The whole history of this trust showed that the trustees had begun by exercising due caution, but that they had gradually relaxed, and all the proceedings connected with the deposit-receipt amounted to gross neglect of duty, their reasons for not taking immediate action being wholly inadequate.

Argued for respondents—(1) The clause of indemnity was sufficient to protect them from liability — *Wilkins* v. *Hogg*, November 16, 1861, 31 L.J. Ch. 41; *Ainslie* v. *Cheape*, February 6, 1835, 13 S. 416; *Home* v. *Pringle*, *supra*. (2) But apart from that clause there had been no case of *culpa lata* established against them. They were certainly entitled to employ a factor, and accordingly the only question was whether in 1887 they had done anything which the ordinary prudent man would not have done. But it was only natural that they should leave the money in the factor's hands till it could be invested, and it was not part of their duty to see that he did not immix this money with his own. To contend that it was, amounted to saying that trustees were not entitled to trust any man of good reputation, though they were entitled to appoint him as agent.

At advising—

Lord Adam—The £3000 of trust money was lost in this case because the trustees at Martinmas 1887, when they knew that they could not then get a permanent investment for it, did not see that it was deposited in bank in such terms as to be entirely within their own control. They seem to have made no inquiry about it, trusting no doubt that it had been deposited in their own names until they had a meeting with Mr Junner on 19th December. At this meeting they desired to see the receipt on which the money was deposited. There was in fact no receipt in existence, but Mr Junner put them off with an excuse to the effect that he could not then get access to it, but that he would send it round to them next day. Either next day or the day after he did send round and exhibit to them a deposit-receipt for the money, which bore the date 20th December. The trustees do not seem to have noticed the date, but it is said that they ought to have done so, and that if they had they must have become aware that the story which Mr Junner had told them at their meeting was false, and that he was not acting honestly in the matter. So far I do not think they were much to blame. They had no reason to expect any fraud on Mr Junner's part, and had before them perfectly satisfactory evidence that their money was safe in bank, which was the material matter. But they did notice that the receipt was not taken in their names, but in the names of Messrs Ferguson & Junner for their behoof, and therefore was at the disposal of Messrs Ferguson & Junner. All the trustees seem to have been dissatisfied with this form of receipt, and to have resolved to take immediate steps to have the money deposited in their own names.

I see that evidence has been led to the effect that it is a common and recognised practice for agents and factors to deposit trust-moneys in their own names for behoof of their clients. I quite recognise that such moneys as may be necessary for

carrying on the current business of the trust should be so deposited, or lodged in bank as to be payable on the receipt of agents or factors. But the trust-money in question was not at all in that position. It was simply deposited until a permanent investment should be obtained, which apparently there was no immediate prospect of obtaining. It is the duty of trustees to see that the money entrusted to them is so invested or deposited as not to be exposed to any unnecessary risk. That money deposited in an agent's or factor's name is not in that position the result of this case sufficiently demonstrates, and the only reason assigned for taking such receipts in the names of agents or factors, viz., the trouble of obtaining the signatures of the trustees when it is desired to uplift the money, appears to me to be perfectly trivial. Had the trustees, therefore, when they became aware that the money in question was not deposited in their own names, taken no steps to have the matter put right, but allowed the money to remain so deposited, I think they might have incurred a serious responsibility. But, as I have said, they were dissatisfied with the terms of the receipt, and resolved to have it deposited in their own names, and had they seen Mr Junner I see no reason to doubt that they would have succeeded in doing so, though possibly at the ultimate expense of Smith's trustees or some other client. I think that they did all that they could reasonably be expected to do to see Mr Junner, and would have seen him had it not been for his unfortunate accident, for which they were no way responsible. I do not think that in the circumstances they could be expected to do more than they did, and I therefore think that they ought to be assoilzied.

LORD KINNEAR—I have come to be of the same opinion, and for the reasons which Lord Adam has stated. The chief difficulty in the case arose from the argument which was mentioned to us, that trustees are justified in allowing factors or agents to mix funds belonging to the trust with their own. I am clearly of opinion with Lord Adam that this is contrary to their duty, and that the reasons which were given for following such a practice are quite inadequate. But I also agree that in the present case, when the trustees became aware that the deposit-receipt had been taken by Mr Junner in his own name, they took steps to set the matter right, and to have the money deposited in their names, and the failure of their efforts was not due to any negligence on their part, but to the accident which deprived them of the opportunity of seeing Mr Junner.

On the whole matter, therefore, I am of opinion that the charge of negligence made against the trustees has not been established.

The LORD PRESIDENT concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—Dundas, Q.C.—Guy. Agent—Frank M. Young, S.S.C.

Counsel for the Defenders—H. Johnston, Q.C.—Cooper. Agent—George M. Wood, S.S.C.