not know in the least whether they can or not, but if those statements can be established—then the Court may come to the conclusion that this substance is a mineral.

I have as yet really failed, I am afraid, to understand wherein the averments in the pleadings are not sufficiently specific. I suppose that in the Scots law the object is to make people state clearly what it is that they mean to prove, not to require them to state evidence, but so to aver that there is sufficient particularity and that there will not be embarrassment or surprise to their adversaries. I presume that is the general object. In my opinion it is quite sufficiently stated here.

I must observe that this point of pleading does not appear, so far as I see, to have been in the least degree mentioned in the Court below. I am not sure that it is mentioned even in the respondents' case in this House. If it is, at all events I think it has really no substance in it.

I will only make one further observation, which is this. It is greatly to be regretted that in cases of this kind you have to decide upon the particular facts of each case upon evidence. I do not believe myself this requirement will prove so formidable as some people seem to assume; but the only alternative that I can see is to allow it to be treated as a matter of law. Now how the question whether freestone or any other kind of stone or substance which might be found in the soil is or is not a mineral can be treated as a matter of law really passes my understanding. The law has sufficient tasks to undertake, but the judges in a court must be inspired if they are able to answer for themselves what is pre-eminently a question of fact by evolving the answer from their own inner consciousness. There is no method except to ascertain these things as matter of fact according to the rules that have been laid down by the Courts.

I therefore think that there ought to be proof in this case, and that the judgment of the Court below ought to be reversed.

LORD ATKINSON—I concur.

LORD GORELL—I take the same view. I concur in the judgment proposed.

LORD SHAW—In this case the Lord Ordinary allowed a proof. It is pled by one of the parties that the stone in question formed an exception to the general rock of the district. That exception must be established by evidence, and the *onus* of doing so rests upon the person proponing the exception. In the pleadings of parties under the law of Scotland there is a wholesome rule to the effect that a proof will not be ordered or evidence taken upon a vacuous generality. The whole question in this case is whether this pleading can be so characterised. If so, a party would be prejudiced by the lack of sufficient notice of the other party's case.

I cannot, in view of the passages that have been cited from answer 11, hold that this is a mere generality in pleading. I think the specification is sufficient to entitle the Lord Ordinary to have allowed the proof, and I think the burden of proof should be where I have ventured to put it. I am accordingly of opinion that the appeal should be sustained and a proof allowed, the appellants to lead therein, as was provided by the interlocutor of the Lord Ordinary, Lord Cullen, on the 6th December 1910.

Their Lordships reversed the judgment appealed from with expenses.

Counsel for the Complainers, the Caledonian Railway Company, Respondents—Clyde, K.C.—Morison, K.C.—Hon. Wm. Watson. Agents—Hugh R. Buchanan, Glasgow—Hope, Todd, & Kirk, W.S., Edinburgh—Grahames, Currey, & Spens, Westminster.

Counsel for the Respondent, Symington, Appellant—Sir R. Finlay, K.C.—The Solicitor-General for Scotland (Hunter, K.C.)—Gentles. Agents—Borland, King, Shaw, & Company, Writers, Glasgow—Dove, Lockhart, & Smart, S.S.C., Edinburgh—Balfour, Allan, & North, London.

COURT OF SESSION.

Saturday, November 4.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

SCHULZE AND ANOTHER (LEES' TRUSTEES) *v.* DUN AND OTHERS.

Trust—Personal Liability of Trustees—Breach of Trust—Negligence of Original Trustees and Negligence of Succeeding Trustees—Action by Succeeding Trustees against Representatives of Original Trustee Twenty-one Years after his Death—Mora—Personal Bar.

Testamentary trustees who were empowered to sell the truster's house to his eldest son R., executed and delivered to R. in 1870 a disposition of the house without getting payment of the price. In 1887 all the original trustees except one having died, two new trustees, one of whom was a beneficiary, were assumed. No steps were taken by either the original or the assumed trustees to recover from R. payment of the price of the house until 1902, after the death of the last original trustee, when the assumed trustees raised an action against R., but recovered nothing owing to the death of R., hopelessly insolvent. In 1909 the assumed trustees raised an action to recover the price of the house against the representatives of one of the original trustees who had died in 1887. The defenders pleaded that the pursuers were barred by *mora* and taciturnity, and by their negligence in taking no steps to recover from R. between 1887 and 1902.

Held (1) that in a question with the beneficiaries, whom the pursuers repre-

sented, the liability of the defenders in respect of their author's negligence could not be discharged or extinguished by negligence or *mora* on the part of the pursuers as trustees, though negligence on their part might involve them in joint and several liability with the defenders; and (2)—*distinguishing Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31, 27 S.L.R. 8—that though one of the pursuers was a beneficiary, the effect of her negligence or *mora* as trustee (assuming there was such) on her rights as beneficiary could not be considered in an action in which she sued only as trustee.

Opinion (*per* Lord Salvesen) that a plea of *mora* could not be sustained unless the whole circumstances were consistent with the claim having been satisfied or settled or abandoned as no longer due.

Per Lord Salvesen—"Where a discharge or abandonment is to be presumed from mere silence, there must, I think, in the ordinary case be 'actual' and not merely 'imputed' knowledge. A man cannot be presumed to discharge or abandon a claim which he did not know existed, even where it may be said that he could easily have ascertained what his rights were on inquiry. The presumption which arises from *mora* and taciturnity is a presumption of fact and not a presumption of law."

Interest—Rate of Interest—Trustee Held Liable for Loss Caused by his Negligence.

Where a trustee's negligence in parting with a disposition of part of the trust estate without getting payment of the price, and in delaying to take steps for recovery of the price, resulted in a loss to the trust estate, the Court held him liable in simple interest on the sum lost at 3½ per cent., as being the average rate of trust interest.

William Schulze and Mrs Mary Schulze, his wife, the assumed trustees acting under the trust-disposition and settlement of the late Hugh Lees, raised an action against John Sanderson Dun and others, the beneficiaries of the late John Dun, concluding for payment by the defenders jointly and severally, or to the extent to which each of them was *lucratus* from the estate of the late John Dun, of the sum of £1040, with compound interest from 31st May 1870, being the alleged loss sustained by the trust estate through the negligence or breach of trust of the said John Dun while trustee thereon.

The following *narrative* is taken from the opinion of the Lord Ordinary (MACKENZIE)—"The testamentary trust of Hugh Lees, a solicitor in Galashiels, contained provisions for his widow and children, and conferred a right on his son Richard to purchase his dwelling-house in Abbotsford Road on attaining the age of twenty-five. The price was to be fixed by valuation, subject to a certain deduction, the son being put under an obligation, if he bought, of finding a suitable house for his mother and unmarried sisters, if they did not live with him. The truster died in 1858. His eldest son Richard intimated to the trustees sometime before attaining the age of twenty-five, which he did on 20th May 1870, that he wished to avail himself of this provision in his favour. The acting trustees at that date were Mrs Lees, the widow, Mr George Lees, Mr Robert Lees, Mr William Sanderson, and Mr John Dun. A meeting of the trustees was held on 26th April 1870, at which Mr Dun was not present. The trustees gave instructions that a valuation should be obtained of the house, and directed that thereafter a conveyance should be prepared in favour of Mr Richard Lees. The trustees further directed 'that the agents proceed to prepare states of their intromissions and of the funds of the estate for submission to a meeting of the trustees, preparatory to the period of division.'

"The agent who had been appointed by the trustees was Mr Stewart, the partner of the truster. When Richard Lees attained the age of twenty-one he had been assumed as a partner by Mr Stewart. Though never appointed as such, the firm thereafter acted as agents in the trust, and Richard Lees was regarded by trustees and beneficiaries alike as the agent who looked after the trust affairs.

"He was in 1870 engaged to be married to a lady in England, and he proposed to convey the Abbotsford Road house to the marriage-contract trustees. The English solicitors of the lady requested Messrs Fyfe, Miller, & Fyfe, S.S.C., Edinburgh, to attend to her interests. A valuation was got, and the price to be paid after allowing the deduction was £1040. On 25th May 1870 Richard Lees wrote to Mr Miller, S.S.C., asking him to get the draft disposition he enclosed extended, as he could not get a stamp of the necessary amount in Galashiels. Mr Miller had the deed extended on plain paper, and returned it saying they could get the stamp impressed afterwards. On 28th May 1870 Richard Lees wrote to the two trustees resident in Galashiels and got them to sign the conveyance. His mother had signed it on the 26th both as trustee and as a consenter. The present pursuer Mrs Schulze, a daughter, also signed as a consenter. On 28th May Richard Lees wrote the following letter to John Dun, who then resided at Eskbank—'Will you oblige me by signing the enclosed conveyance by my father's trustees in my favour of the property in Abbotsford Road, and by sending it in the enclosed envelope to Messrs Fyfe, Miller, & Fyfe. I am in course of preparing states, &c., to be laid before a meeting of the trustees preparatory to a winding-up of the trust, but this is a deed that I require to have executed sooner.' Mr Dun signed the deed on the 31st. It does not appear what he did with it after signing, and from a letter Richard Lees wrote on 31st May 1870 to Mr Miller it is possible the former went to Eskbank and got it from Mr Dun. Mr Sanderson did not sign it. The disposition was recorded on 2nd June 1870, the

warrant for registration being signed by Richard Lees. Thereafter the house was conveyed by Richard Lees to his marriage-contract trustees, who were infeft.

"The disposition bore that the price (which was therein erroneously stated to be £1060 instead of £1040) had been 'instantly paid.' Certain cross entries were made in Richard Lees' books at a much later date, but in point of fact the price was never paid or accounted for by Richard Lees to his father's testamentary trustees.

"Richard Lees died insolvent in November 1902. Mrs Hugh Lees, his mother, died on 27th April 1902. Mr John Dun died on 22nd October 1887. Mr George Lees had died in 1879, Mr William Sanderson in 1880, and Mr Robert Lees in 1883. Mr and Mrs Schulze (the present pursuers) were assumed as trustees by an informal deed on 16th August, and by a formal deed on 25th November 1887.

"In these circumstances the pursuers sue John Dun's representatives for payment of £1040, the price of the house, with compound interest since 31st May 1870."

The settlement provided, *inter alia*—"*Fifth*, In the event of my wife surviving me, and being alive when our oldest child attains the age of twenty-five years complete, and not having entered into a second marriage, my trustees shall . . . provide and make payment to her so long as she remains a widow such free yearly annuity as my estate may appear to them to be able to afford . . . Declaring that neither trustees, tutors, nor curators shall be liable in any way excepting only for his own actual intromissions with the funds of my estate."

The defenders pleaded, *inter alia*—"(4) The pursuers are barred by *mora*, taciturnity, and acquiescence from insisting in the present action. (5) *Separatim—Esto* that the principal sum sued for was lost through the negligence of the trustees, the pursuers, or one or more of them, being parties to such negligence, are barred from insisting in the present proceedings. (7) The said John Dun not having himself intromitted with the said sum of £1040, the defenders are not liable to account therefor in respect of the immunity clause contained in the trust-disposition and settlement of the said deceased Hugh Lees. (10) Further, and in any event, the defenders are not liable in interest on the sum sued for prior to 27th April 1902 in respect that the interest prior to that date was applied to the purposes of the trust."

On 22nd July, after a proof, the import of which sufficiently appears from his Lordship's opinion and the opinion of Lord Salvesen *infra*, the Lord Ordinary (MACKENZIE) sustained the fourth plea-in-law for the defenders and assoilzied them.

Opinion.—[*After the narrative above quoted*]—"It appears to me that if the trustees and the representatives of those who had died had been sued within a reasonable time after the assumption of the present pursuers to make good the price to the trust estate, there would have been liability. In the first place, the disposition was delivered without getting payment of the price, or setting against the price part of the residue to which Richard Lees was entitled. In the next place, from the date of the meeting on 26th April 1870 the trustees did nothing, so far as appears, to see whether the price had been paid by Richard Lees or not, until 14th December 1887. This is the date of the next minute of meeting of the trustees. There were present at that meeting Mrs Hugh Lees and Mr and Mrs Schulze.

"There was thus a failure on the part of Mr Dun to supervise the affairs of the trust. This would have involved a liability on his part. The assumed trustees could have sued him whenever the facts came to their knowledge. If they delayed to do so after they knew, and if their delay was to the prejudice of the defenders, the question is whether they are not now barred from insisting in the action.

"The legal principles applicable to such a case as the present appear to me to be stated in the case of the *Assets Co.*, 6 F. 676. Lord Kyllachy, at p. 685, pointed out that a pursuer who has a cause of action 'must bring his action within a reasonable time—at all events, must do so if delay is fitted to prejudice his opponent's position. The defence thus arising may be variously described. It may come under the head of *mora* or under the head of bar.' The Lord President (Kinross) said, at p. 705, it appeared to him that 'the plea of *mora* cannot be successfully maintained merely on account of the lapse of time, but that the person stating it must also be able to show that his position has been materially altered, or that he has been materially prejudiced, by the delay alleged . . . where, coupled with lapse of time, there have been actings or conduct fitted to mislead, or to alter the position of the other party to the worse, the plea of *mora* may be sustained. But in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances to the detriment of the other party.' Lord Trayner, at p. 740, says that delay *per se*, short of prescription, does not bar a pursuer's claim; that to avail a defender the delay must be in prosecuting a claim known to the pursuer to exist; and that the delay must have been prejudicial to the defender in depriving him of evidence. It was natural in the *Assets* case to refer only to prejudice by loss of evidence, as the claim could only have been made against one party. Where, as here, the claim might have been made against a party who had a right of relief, it is obvious that prejudice would arise if through the delay the benefit of the right of recourse has been lost.

"On the assumption that Mr Dun and his representatives could have been made liable if an action had been brought in time, the question is whether the pursuers, who are trustees, can now maintain the action in face of the pleas of *mora* or personal bar. The defence may also be

stated by saying that the facts involve an election on the part of the trustees to accept Richard Lees alone as the debtor to the trust. This, however, seems to me to impose an undue *onus* on the defenders. The defence is really founded on *mora* or bar. It is necessary to observe that the pursuers who remain in the case are trustees, not beneficiaries. Though Mrs Schulze is also a beneficiary, she sues as a trustee. The result of sustaining the defence would not necessarily mean loss to the trust estate. If Mr and Mrs Schulze knew in 1887, when they were assumed as trustees, all the facts necessary to found a claim against Mr Dun or his representives—if through their delay they are now barred from insisting in that claim—the result may be that it is they (the pursuers and not the defenders) who are the proper parties to restore the money to the trust estate.

"I think the facts establish that Mr and Mrs Schulze knew, at or shortly after the date of their assumption, the facts necessary to enable them to sue the previous trustees, including Mr Dun, for the price of the Abbotsford Road house. The disposition had been recorded in 1870 in the Register of Sasines. As pointed out by the Lord President in his opinion in the action against Richard Lees' marriage-contract trustees, knowledge of the contents of the disposition must therefore be imputed to them. It is not, however, necessary to found upon that, because it is evident from the terms of the correspondence which passed in 1886 and 1887 between Richard Lees and his mother and Mr Schulze that Mrs Lees and Mr and Mrs Schulze were then made aware that Richard Lees had got a disposition of the Abbotsford Road house, and that he had made it over to his marriage-contract trustees. In his letter of 4th October 1886 to his mother Richard Lees calls it his house. On 14th October 1886 he writes that he had to send to Bristol for the extract of his father's will and the conveyance by the trustees to him of the Abbotsford Road property, which he says he acquired in May 1870 for £1060. At this time Mrs Lees was living in family with her daughter Mrs Schulze and her husband. Looking to the terms of the correspondence, it is impossible to believe that both the pursuers were not quite well aware at that time of the disposition of the house. On 26th October 1886 Mrs Lees pressed her son for a statement of her affairs. It appears from the letter of 1st November that both the will and the disposition had been sent by Richard Lees to his mother. The undated letter from Mr Schulze to Richard Lees states that 'the deed' is returned (this must, I think, refer to the disposition), and he is asked what about providing a house for his mother. This is significant of the extent of Mr Schulze's knowledge, because under Hugh Lees' will the obligation on Richard Lees to provide a house for his mother only emerged if and when he took advantage of the clause in the will entitling him to acquire the Abbotsford Road house for himself. In his letter of 26th November Richard Lees, answering a question that had been put, informs his mother that the reason why the extract of his father's will is with the Bristol solicitors is that it forms part of the titles to the property in Abbotsford Road which belongs to his marriage-contract trustees. I believe that Mr Schulze as well as his wife at the time knew the facts contained in these letters.

"On 14th September 1887 Mr Schulze wrote pressing Richard Lees for trust accounts, which he says must be made up not later than within eight days. On 26th October Mr Schulze consulted Mr Thornton, solicitor, Dundee, how he is to compel Richard Lees to render accounts. In that letter he refers to the fact that Richard Lees availed himself, the very day he became twenty-five years of age, of the advantage he had under his father's will of acquiring the dwelling-house. Mr Schulze in the witness-box could give no satisfactory explanation of how he had got this information. How untrustworthy the account of the pursuers is of this matter is shown by their statements on record. Cond. 5—'Mrs Hugh Lees and Miss Mary Lees had no knowledge that the transaction had ever been completed. They did not know the purport of the said disposition, and continued in the belief, until the death of Richard Lees, that the house belonged to the Hugh Lees' trust.' Answer to Stat. 7—'Mrs Hugh Lees, until her death in April 1902, and the pursuers until immediately prior to the raising of the said action against the marriage-contract trustees, believed that the said property had never been alienated from the Hugh Lees' trust.' These statements are entirely negatived by the evidence.

"Mr Schulze thereafter consulted Mr Prosser, W.S. In his letter of 10th November 1887 he says that until lately he did not know that Richard Lees had acquired the dwelling-house under the will. Notwithstanding this, in the first letter he wrote to John Dun making a claim, on 5th December 1905, he says that down to the end of 1902 he considered the house belonged to Hugh Lees' trust. Not only did he know in 1887 that Richard Lees had acquired the house, but he also knew that the house had subsequently been made over, as Mr Schulze puts it in his letter to Mr Prosser of 10th December 1887, to Richard Lees' wife by his marriage-contract. His opinion, further, was, as expressed in the same letter, that Richard Lees had not paid for it, and this opinion was shared by Mrs Lees.

"He now admits that the trust accounts which were rendered in 1888 prove that Richard Lees never paid the price. He further admits that he knew when he got these accounts that the trust funds were uninvested. Down to 1889 he was making repeated efforts to get Richard Lees to account. There was then a cessation of his attempts down to 1902.

"There can be no doubt that the reason why during all those years Mr Schulze acquiesced in the state of matters was

because his co-trustee Mrs Lees would not allow her son to be sued. Immediately upon her death an action was launched. This was not proceeded with, as Richard Lees became bankrupt and died. Mr and Mrs Schulze then brought an unsuccessful action against Richard Lees' marriage-contract trustees. No claim was intimated against Dun's trustees until 1905, and the present action was not raised until 1909. It is therefore established in this case that there was, to quote again the opinion of the Lord President in the *Assets* case, an 'excessive or unreasonable delay in asserting a known right.'

"The next question is whether this delay prejudiced the position of the present defenders. I am of opinion that it did. The assumed trustees neither sued Richard Lees nor did they intimate to Dun's representatives that there was a claim against them. If liability had been established against Dun's representatives in 1887, or at any time down to 1902, they would have had recourse against Richard Lees. The pursuers say that they could not have recovered from Richard Lees. The *onus* is upon them to show this. He was outwardly solvent for fifteen years after 1887. During that period he was carrying on what is described as a good business as a solicitor in Galashiels with an average annual professional income of £1484, which in the year preceding his death rose to £2800. His life was insured for considerable amounts, and down to 1896 the policies had not been assigned in security of loans. Mr Rutherford, who knew him well, gave evidence that he had not the least doubt, if the claim had been pressed against him, the trust estate would have been vindicated. In confirmation of this view it is proved that a claim for £500 was made and met in 1900, and a sum of £1000 was found by Richard Lees in July 1902 to meet a claim by a body of trustees. The evidence of the other witnesses for the defence corroborates the view expressed by Mr Rutherford. By the end of 1902 Richard Lees had become insolvent and died. There was by that time a material alteration of circumstances to the detriment of the defenders. In these circumstances the elements necessary to sustain a plea of *mora* or personal bar are, to my mind, present in this case.

"The pursuers attempt, however, to avoid the plea of *mora* and personal bar by averring that there are grounds for holding there was special negligence on the part of Mr Dun. They say he was the last trustee to sign the disposition, and that it was he who delivered it without seeing that the price was paid. These acts, according to Mr Schulze, were only discovered by him in the course of the action against Richard Lees' marriage-contract trustees. As regards the delivery by Mr Dun, I do not think it is proved that he did deliver the disposition to Messrs Fyfe, Miller, & Fyfe. The letter written by Richard Lees on 31st May 1870 leaves this in doubt. Even if Mr Dun did, the purpose was that the deed might be properly stamped. It was Richard Lees who put on the warrant for registration, and it does not seem of importance whether the deed passed through the hands of Messrs Fyfe, Miller, & Fyfe or not. It is said that Mr Dun was the last trustee to sign. In the view I take this is not material to the issue; if it is, then it could have been ascertained by Mr and Mrs Schulze in 1887. The disposition had been recorded. The fact is that the incident of Mr Dun having been the last to sign does not affect his liability. What does affect it is the fact that the disposition was delivered without getting payment of the price, and also the failure to supervise the trust thereafter. It was suggested that there was no need to intimate to Dun, because he knew what he had done in 1870. He did not, however, know that advantage had been taken of this by Richard Lees to defraud the trust. Mr Dun died in 1887, and his trust was wound up by 1898. His son, who was examined as a witness, did not even know that his father had been one of Hugh Lees' trustees. One argument which was urged on behalf of the pursuers has a certain amount of force, viz., that there were no trust funds in 1887, and that Mr Schulze was not bound to vindicate the trust estate at his own expense. This made it all the more necessary that Dun's representatives should get notice of the claim. They would then have been in a position to judge whether proceedings should have been taken against Richard Lees.

"There are circumstances in the case which make it by no means certain that Mr Dun would have withheld the disposition from Richard Lees even if he had been told that there was not to be an immediate settlement of the price. Both the minute of 26th April 1870, and the letter of 28th May 1870, already referred to, indicated that states were being prepared with a view to winding up the trust. Richard Lees was entitled to one-third of the residue of his father's estate, or about £1700. I do not think the pursuers have proved that by 1870 he had got payment of more than £500. I cannot regard the earlier payments as having been made to account of his share of residue. The trustees could not have debited him with these payments unless they had first come to the conclusion that the annual produce of the trust estate paid to the widow under the second purpose of the settlement was inadequate for the maintenance, education, and upbringing of the children. There is no evidence they ever did so. These judgments were not so treated in the accounts. Mr Dun could therefore have pleaded in justification of what he did in 1870 that sufficient residue belonging to Richard remained in the trustees' hands to set off against the price of the house. Another point is that it appears, from the opinion of Mr (afterwards Lord) Shand, given in 1870, that Richard Lees had a claim against the trustees for £1908, profits of the law business which had been credited to the trust, but which should have been credited to him. It was contended on behalf of the

defenders that it was not proved that Mr Dun knew of the existence of this claim. After such a lapse of time, however, it cannot be assumed in favour of the pursuers that he did not know of it. I do not think it necessary to go into the merits of the claim, and mention it merely as an element which might have affected Mr Dun in delivering the deed.

"It appears to me that there is no separate ground of action against defenders founded on any special negligence on Mr Dun's part. His negligence was the same as that of the other trustees, and consisted in allowing Richard Lees to get the disposition and then not taking steps to see that the price was paid or accounted for. This ground of liability, for the reasons already stated, is met by the defenders' plea of *mora* or personal bar.

"I am of opinion that the defenders' fourth plea-in-law should be sustained, and that they should be assoilzied with expenses."

The pursuers reclaimed, and argued—The conduct of the trustees in delivering the disposition without getting payment of the price, and without taking any further steps for seventeen years to get payment or to ascertain whether the price had been accounted for, undoubtedly subjected them in liability for the loss thereby caused to the trust estate. The indemnity clause was no protection, for in granting and delivering a disposition which contained an acknowledgment of payment of the price the trustees were intromitting—*Thomson* v. *Christie*, 1852, 1 Macq. 236, at pp. 241, 242; *Seton* v. *Dawson*, December 18, 1841, 4 D. 310; *Wyman or Ferguson* v. *Paterson*, March 13, 1900, 2 F. (H.L.), 37, 37 S.L.R. 635, *per* Lord Davey, at p. 46, p. 640. In an action to enforce that liability it was not necessary to call all the trustees or their representatives—*Allen* v. *M'Combie's Trustees*, 1909 S.C. 710, 46 S.L.R. 485. The plea of *mora* and taciturnity could not be sustained, for there was no room in this case for the application of the doctrine of *mora* or personal bar. The liability of one trustee to make good the loss caused to the trust estate by his intromissions could not be extinguished by anything in the conduct of his successors in office. The present pursuers could not have granted a gratuitous discharge to the defenders' author—*Smith* v. *Patrick*, May 7, 1901, 3 F. (H.L.) 14, 38 S.L.R. 613—and therefore nothing that the pursuers had done or had failed to do could effect an implied discharge. If the pursuers themselves had been guilty of negligence they might thereby be involved in liability to the beneficiaries, but that question could not be determined in this process, where the pursuers sued as trustees and for behoof of the beneficiaries. Whatever their liability to the beneficiaries, the pursuers were entitled to recover from their predecessors loss caused by the intromissions of the latter—*Ogilvie* v. *Boswell*, May 22, 1850, 12 D. 940. It made no difference that Mrs Schulze was one of the beneficiaries, because she was here suing as trustee, not as beneficiary. The case of *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31, 27 S.L.R. 8, was no authority for the view that Mrs Schulze's rights as a beneficiary could be considered in an action which she sued as trustee. In any event, there was nothing in the conduct of the pursuers to subject them in liability, because they never got possession of the trust estate, and were therefore protected by the indemnity clause. But even if a plea of bar or *mora* could be founded on actings of the pursuers, the facts of the case would not support it. The pursuers were here suing for a debt, for the acknowledgment of receipt in the disposition made Mr Dun simply a debtor to the trust—*Seton* v. *Dawson, cit.*, *Wyman or Ferguson* v. *Paterson, cit.*—and therefore mere delay in raising action would not found the plea of *mora*—*Bain* v. *Assets Company*, June 4, 1905, 7 F. (H.L.) 105, 42 S.L.R. 835, 6 F. 692, 41 S.L.R. 517—there must be something in the circumstances to raise a presumption of payment—*Gourlay* v. *Wright*, June 23, 1864, 2 Macph. 1284. Here it was admitted that the debt had never been paid. Further, to avail the defenders here the plea of *mora* or of personal bar must be founded on a breach of duty owed to Mr Dun or the defenders, but the pursuers owed no such duty. Besides, Mr Dun was sufficiently reminded in 1887 of his liability by the proceedings in connection with the assumption of the pursuers. There was no known claim here, for the pursuers were not aware of their rights as against Mr Dun's representatives until after the action against Richard Lees. It might be that they were aware in 1887, or could have then ascertained facts inferring Mr Dun's liability, but that was not enough. There must be actual knowledge—*Allan* v. *Allan's Trustees*, June 24, 1851, 13 D. 1220. Further, the delay in raising the action had involved no prejudice to the defenders. There was no loss of evidence, for parole evidence qualifying the acknowledgment in the disposition would be incompetent, and there was no loss of recourse against Richard Lees, because Mr Dun could have sued him when he was trustee and after he ceased to be, because being debtor to the trust he could have sued on his right of relief. In any event Richard Lees could not have paid anything after 1889. The defenders were thus liable for the principal sum, and they were also liable for interest from the day the disposition was granted. The annuity paid to Mrs Lees could not be held to include the interest on the sum sued for, for the trust funds other than the sum sued for in the hands of Richard Lees were sufficient to yield annually the sum paid to Mrs Lees. The interest ought to be compound interest, for only thus could the trust be placed in the position it would have been in but for the negligence of the trustees.

Argued for the defenders (respondents)—*Prima facie* there was no negligence in handing the disposition to the partner of the agent of the trust without actually receiving the money. At that time Richard

Lees was a beneficiary as well as a creditor of the trust, and he was not a debtor on a true accounting until six months after the delivery of the disposition. It might be that the trustees were in fault in subsequently allowing Richard Lees to get possession of other parts of the estate, but that was not the case made on record. But if the trustees were negligent in parting with the disposition without getting payment, then the pursuers should have called the representatives of all the trustees. Though doubtless a beneficiary might select one of a body of negligent trustees and sue him—*Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490; *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Limited*, June 5, 1894, 21 R. (H.L.) 39, 31 S.L.R. 937, *per* Lord Watson at p. 43, p. 939—that privilege would not be extended to a trustee whose own negligence had contributed to the loss. In any event the conduct of the pursuers since they were assumed into the trust provided a complete answer to the present action. The pursuers could be compelled by the beneficiaries to account for their predecessor's intromissions as well as their own—*Pearson* v. *Houston's Trustees*, January 29, 1868, 6 Macph. 286; *Sommerville's Trustees* v. *Wedmess*, December 8, 1854, 17 D. 151. It followed that the pursuers could demand an accounting from their predecessors and could discharge them. Therefore a discharge might be inferred from their actings, and the defenders could found thereon a plea of *mora* or of personal bar. At all events the plea could be stated against Mrs Schulze, and receive effect *quoad* her interest in the estate as beneficiary. No doubt she sued only as trustee, but the Court could nevertheless deal with her rights as beneficiary—*Raes* v. *Meek*, (*cit.*). On the facts the pursuers were barred by *mora* and by their own negligence as trustees, for their unreasonable delay in prosecuting a known claim had resulted in prejudice to the defenders—*Bain* v. *Assets Company* (*cit.*), *per* L. P. Kinross, Lord Kyllachy, in 6 F. at pp. 705, 685, 41 S.L.R., at pp. 531, 521. The trustees were in possession in 1889 of all the facts inferring liability against Mr Dun, and they were not entitled to say that they did not know of their claims. In a question with a trustee at all events, who owed a duty to the trust, knowledge of facts which put him on his inquiry was enough. There was also clearly prejudice to the defenders. There was or there might be loss of evidence in consequence of the pursuers' delay. It was impossible now to know all the circumstances, and there might have been a complete answer to the claim, *e.g.*, there might have been an arrangement to which the beneficiaries were parties under which Richard Lees was to keep the price of the house in satisfaction of his share of the estate or his claims on it as creditor, for the trustees had unusually wide powers. The Court would not presume against a trustee that he had no answer to the claim had it been brought timeously, and the delay in the circumstances would found a plea of *mora—Bain* v. *Assets Company* (*cit.*); *Rocca* v. *Catto's Trustees*, November 2, 1876, 4 R. 70, 14 S.L.R. 40, *per* L.J.-C. Moncreiff; *Buchner* v. *Jopp's Trustees*, June 16, 1887, 14 R. 1006, 24 S.L.R. 680, *per* L. J.-C. Moncreiff, at p. 1024, p. 689. The defenders had suffered prejudice also in the loss of relief against Richard Lees, who had he been pressed could have found the money. If Mr Dun were to be regarded as a debtor to the trust, then *mora* would be a good answer if the circumstances raised a presumption of payment or abandonment or discharge—*Cunningham* v. *Boswell*, May 29, 1868, 6 Macph. 890, 5 S.L.R. 559; *Gourlay* v. *Wright* (*cit.*); *Moncrieff* v. *Waugh*, January 11, 1859, 21 D. 216. The circumstances here founded a presumption that the pursuers had decided to accept Richard Lees as their sole debtor and thereby to discharge Mr Dun. The case of *Allan* v. *Allan's Trustees* (*cit.*) was distinguishable, for there the plea of *mora* was stated by an executor who had the money in his hands to meet the claim. Further, the pursuers themselves were undoubtedly negligent in failing to take proceedings against Richard Lees, and the indemnity clause would not avail them—*Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 752, *per* Lord Watson at p. 86, p. 753. That negligence was the proximate cause of the loss, and the defenders were thereby discharged. If, on the other hand, the negligence of the pursuers did not discharge the defenders as in a question with the beneficiaries, then the result was that the pursuers were liable primarily and the defenders only subsidiarily after discussion of the pursuers. The present action therefore could not be maintained, as it was of the nature of a claim of relief made before payment by the claimant. The rights of the beneficiaries against the defenders could be reserved if necessary, for they could in the circumstances sue the defenders—*Watt* v. *Rogers' Trustees*, July 18, 1890, 17 R. 1201, 27 S.L.R. 904. In any event no interest could be allowed for the period prior to the death of Mrs Lees, for she had received during her lifetime an annuity which must have included interest on the sum sued for.

At advising—

LORD DUNDAS—The Lord Ordinary's careful and elaborate opinion sets out so clearly the general outlines of this case and the salient facts with which it is concerned that it is unnecessary to repeat or even summarise them. I agree with his Lordship's conclusion (and indeed it was scarcely disputed by the defenders' counsel) that the evidence establishes that there was such failure on the part of the late Mr Dun to supervise the affairs of the trust as to involve liability against him if a timeous demand for reparation had been made by persons entitled to make it. I should also be disposed to agree with the Lord Ordinary (if it were necessary to do so) in holding that no separate ground of action against Mr Dun or his representatives is disclosed,

founded upon any special negligence on his part, as distinguishing his liability from that of his co-trustees. But the Lord Ordinary has sustained the defenders' plea that "the pursuers are barred by *mora*, taciturnity, and acquiescence from insisting in the present action," and has assoilzied them upon this ground. I am unable to agree with the Lord Ordinary upon this vital point. The pursuers are the assumed trustees acting in the trust. Even upon the hypothesis that they have been guilty of negligence in not taking due steps to have the loss to the trust estate made good, or that it was owing to their action or want of action that that loss ceased to be merely potential and became an actual fact, I do not see how this should result in absolving the defenders. The consequence would, in my judgment, rather be, that the pursuers, as well as Mr Dun and his co-trustees, would be involved in joint and several liability to make good the loss to the trust estate, although practical effect could not be given to this conclusion in the present action. It seems to me that the pursuers, as the acting trustees, are the proper persons, and indeed primarily the only persons, entitled to call the defenders to account. If the pursuers had refused to do so, or to lend their instance (upon due security as to expenses), it might have been open to beneficiaries to sue such an action; but that is not the case here; nor can I see that the position of matters, even assuming all that the defenders allege against the pursuers to be well founded, is at all analogous to that which I have figured. It follows, in my opinion, that many of the considerations which were anxiously canvassed at our bar are irrelevant. I should (as at present advised) be prepared, if it were necessary, to agree with the Lord Ordinary in holding, upon the evidence before us, that the pursuers (contrary to their record) "knew at or shortly after the date of their assumption the facts necessary to enable them to sue the previous trustees, including Mr Dun, for the price of the Abbotsford Road house"; and also that they could have recovered the money from Richard Lees if due pressure had been applied in 1887 or at any time during a good many years subsequent to that date. But these are not, to my mind, matters relevant for consideration or decision in the present action. In the same way we are, I think, absolved from the necessity of forming or expressing any opinions upon a number of interesting and perhaps difficult topics on which arguments were submitted by counsel, *e.g.*, as to the precise nature of the elements necessary to the success of a plea of *mora* and taciturnity; whether or not the knowledge by a pursuer of his claim must be knowledge in law as well as of facts; how far such a plea can be available to a trustee or executor in a case of this sort; and whether (as was contended) the immunity clause in the truster's settlement would be sufficient to protect the present pursuers, assuming them to have failed in due supervision of the affairs of the trust. It appears to me that none of these considerations have any place in this action. The pursuers are, as I think, entitled to call the defenders to account, even if they themselves may be also accountable; and there is really no defence here upon the merits of the case which the Lord Ordinary would have decided adversely to the defenders apart from the plea of bar. In my judgment, therefore, though the case may be a very hard one for the defenders, decree must go out against them . . . for the capital sum sued for. As regards interest, the pursuers' claim for compound interest seems scarcely stateable and was not much insisted on by counsel. I think that, looking to the facts disclosed in the proof, it will be sufficient if we decern for payment of simple interest as from 27th April 1902, the date of Mrs Hugh Lees' death. The pursuers' counsel asked that the rate should be five per centum per annum, and nothing was said to the contrary during the discussion at our bar. But if this was an omission due to some misapprehension (as I think it must have been), counsel will have an opportunity of mentioning the matter before judgment is pronounced. It is important to add in conclusion — what indeed was frankly conceded by the pursuers' counsel—that our decision in this case will in no way affect any rights of relief which the defenders may be able to instruct outside this action against the former trustees (other than Mr Dun) or their representatives, or any of them, or against the assumed trustees, or against the representatives of the late law agent of the trust, or otherwise.

LORD SALVESEN—The first question in this case is whether the late John Dun incurred personal liability as a trustee on the estate of the late Hugh Lees, and on this question I am so entirely in accord with the Lord Ordinary and with his statement of the facts that I deem it unnecessary to go into any detail. It is difficult to conceive a more serious violation of duty than for a body of trustees to sign a disposition of a heritable property belonging to the trust and to deliver it to the purchaser without payment of the price, and without ascertaining during the course of seventeen years whether the price had ever been accounted for to the trust or remained in the hands of the purchaser. It is no doubt true, as the Lord Ordinary points out, that the fact that Richard Lees was a beneficiary on his father's trust, and was also the agent of the trustees, might justify the delivery to him of the disposition without demanding instant payment of the price; but there can be no excuse for a body of trustees handing over the whole trust funds to the agent or permitting them to be uplifted by him without seeing that any part of them was properly invested. It appears that for seventeen years the trustees, of whom the late John Dun was one, never attended a trust meeting, and never took any steps to have the trust funds transferred to their names. In short, they appear to have

delegated their whole duties to Richard Lees, in whose hands they had already placed the complete control of the entire capital of the trust. In these circumstances it is plain that they are not protected by the indemnity clause, which is in this case expressed in the barest form—"Declaring that neither trustees, tutors, nor curators shall be liable in any way excepting only for his own actual intromissions with the funds of my estate." I adopt on this matter the opinion of Lord Davey in the case of *Ferguson* v. *Paterson* (2 F. (H.L.) 37)—"Where trustees" (he says) "give a joint receipt for trust money, though it is in fact received by the hand of an agent, it is the intromission of the trustees themselves." And again—"If trustees think fit to delegate their duties to their law agent in a matter in which they cannot properly authorise him to act for them, . . . they are not, in my opinion, protected by a clause of immunity from liability for the intromissions of factors or agents." These observations were made in a case where the fault of the trustees was absolutely venial as compared with that to which John Dun was a party as a trustee of the late Hugh Lees. Had, therefore, the action been raised shortly after John Dun's resignation of his office of trustee, I cannot doubt that he would have been found liable to restore to the trust the price of the house, the conveyance of which he was the last to sign, leaving him to operate such relief as he could against Richard Lees, who still remained the debtor to the trust for the entire price.

The next question is, whether what happened during the administration of the present trustees has freed the defenders from the responsibility which would otherwise have attached to them. The Lord Ordinary has sustained the fourth plea-in-law, and has accordingly held that the pursuers are barred by *mora*, taciturnity and acquiescence from insisting in the present action. In dealing with this plea it is necessary to summarise the facts as I hold them proved, although I do not materially differ from the Lord Ordinary in his statement of them. The pursuers were assumed as trustees in the end of 1887, and at once took steps to ascertain the position of the trust. They ascertained, at all events by 1889, that the whole of the trust funds, including the price of the house conveyed in 1870, remained uninvested, and were in the hands of Richard Lees; and they were informed by him that it had been shortly thereafter transferred to his marriage-contract trustees. They were advised by Mr Prosser that it was their duty to call Richard Lees to account, and to invest in proper trust investments the sums that he was owing to the trust. They did not, however, take any action against him until 1902; and the action then taken proved abortive, as Richard Lees shortly thereafter died, leaving his affairs in a state of hopeless insolvency. I further agree with the Lord Ordinary that their inaction is to be explained by the fact that Mrs Hugh Lees remained a trustee until 1902 and would not allow her son to be sued. Had this difficulty been overcome, and drastic steps been taken against Richard Lees, I think it probable that he would have been able to raise sufficient money to meet his indebtedness to his father's trust.

On the other hand, it is fair to say that the position of Mr and Mrs Schulze, when they were assumed into the trust, was an extremely difficult and invidious one. No funds of any kind were transferred to them by their predecessors, nor were there any invested in the names of the trustees. They would therefore have had to litigate at their own personal risk. Moreover, it is plain that they could not have sued Richard Lees without creating a breach between them and Mrs Schulze's nearest relatives. Further, Richard Lees was at that time in good credit, and was conducting a large and prosperous business as a country solicitor. No doubt Mr Schulze had reason to believe that Richard Lees, for all his seeming prosperity, had difficulty in meeting his obligations; and he says that he was all along afraid that if he had raised an action against his brother-in-law it would probably have resulted in the latter's bankruptcy. Perhaps, notwithstanding, it was the duty of the pursuers to have sacrificed their family ties, and by taking judicial proceedings against Richard Lees, to have put the administration of the trust beyond cavil. It may also be that their failure to take such proceedings constituted negligence, for which they may be answerable to the beneficiaries; but we are not here concerned with any question between the beneficiaries and the pursuers, but only with the question whether their negligence as trustees is sufficient to relieve the defenders of the consequences of their author's breach of trust as in a question with the beneficiaries whom the pursuers represent. This is an aspect of the case that the Lord Ordinary does not appear to have considered, although I humbly think that it is decisive of the case.

Had the pursuers been the sole beneficiaries as well as the trustees, there would have been a stronger case for the application of the doctrine of *mora* and taciturnity. Even on this assumption, however, there are two matters to which the Lord Ordinary has not, in my opinion, given due weight. The first is, as Lord Cowan expressed it, that in order to sustain a plea of *mora* and taciturnity "there must not only be the mere lapse of time, but the whole circumstances must be such as are consistent with a presumption of the claim having been fully satisfied or settled and abandoned as no longer due"—*Moncrieff* v. *Waugh*, 21 D. 216; see also *Cunningham* v. *Boswall*, 6 Macph. 890. Here there is no suggestion that the price of the property was ever paid to the trustees by Richard Lees. On the contrary, it is admitted that it was allowed to remain in his hands; and there is nothing to suggest that the pursuers either discharged Richard Lees or the defenders of their

indebtedness to the trust. But then it is further said that as the result of the pursuers' inaction during this period of thirteen years the defenders have been prejudiced by losing their right of relief against Richard Lees; and on the assumptions of fact on which the Lord Ordinary proceeds this may be said to be established; but it by no means follows that this kind of prejudice can be founded on by the person who was directly responsible for the act of maladministration which ultimately resulted in the loss to the trust estate. The case for the defenders would have been just as strong had Lees died ten years earlier, for there would have been some three years in which the pursuers might have made good their claim against him. In my opinion, unless it can be alleged that it was the duty of the pursuers, as in a question with John Dun and his representatives to have intimated their claim against him as soon as they were in a position to ascertain the facts, no plea of personal bar can be maintained. For seventeen years Mr Dun had neglected the very duty which he says that the pursuers on their assumption as trustees ought instantly to have discharged. He was or must be presumed to have been aware that the heritable property of the trust had been conveyed to one of the beneficiaries without any price being paid, and yet he never took any steps to restore the trust against the loss to which he had exposed it. It is said that after he resigned office he was not in a position to take steps to recover the price from Richard Lees. This is true in the sense that he could not have sued Richard Lees for the price, but he was not therefore entirely without a remedy. He could have called upon his successors to sue for the price, and if he had restored the money to the estate they could not have refused him an assignation which would have enabled him to proceed directly against Richard Lees. Even if he had been in the position of a cautioner for Richard Lees, the failure of the pursuers to proceed against the principal would admittedly not have relieved him from responsibility, for the pursuers never gave Richard Lees time nor acted in such a way as to relieve a cautioner of liability. I cannot conceive that the position of a co-obligant, which was in effect that of Mr Dun, can be more favourable than that of a cautioner. If there are two or more obligants bound for a debt the delay of the creditor to sue one of them may result in the other having to meet the whole debt; but I never heard it suggested that such delay had the effect of extinguishing the debt. The pursuers undoubtedly had a direct right of action against Richard Lees, as being in possession of trust estate, to account for what he had in his hands, and they had also a concurrent right against the trustee who had so intromitted with the estate as to put it entirely beyond their own control; but the latter had no need to be informed of the facts, for he knew them better than his successors in office, and the defenders cannot found upon their own ignorance when they are asked to make good the liability which their ancestor had incurred.

The next point on which I do not agree with the Lord Ordinary's view is that the right of action which the pursuers possessed against the present defenders was a known right. It may be conceded that in 1889 they had the means of ascertaining just as readily as in 1909, when the present action was brought, the facts upon which their claim is based, and that all the material facts were already within their knowledge. On the other hand, I think it is plain that the idea of suing Mr Dun's representatives never occurred to Mr Schulze until after he had raised the unsuccessful action against the marriage-contract trustees, when the true nature of his remedy was suggested by the Court. Where a discharge or abandonment is to be presumed from mere silence there must, I think, in the ordinary case be "actual" and not merely "imputed" knowledge. A man cannot be presumed to discharge or abandon a claim which he did not know existed, even where it may be said that he could easily have ascertained what his rights were on inquiry. The presumption which arises from *mora* and taciturnity is a presumption of fact and not a presumption of law. On these several grounds I am of opinion that the Lord Ordinary has erred in sustaining the fourth plea-in-law.

Even on the assumption that the plea of *mora* would have been well founded against the pursuers had they been the sole beneficiaries in the trust, it does not follow that the present claim is excluded. The defenders boldly maintained that as the administration of the trust was vested in the pursuers, their implied discharge or abandonment of the claim against the defenders is binding on the beneficiaries. No authorities were cited in support of this proposition except two—*Wedmess* v. *Somerville* (17 D. 151) and *Pearson* (6 Macph. 286). These cases appear to me to have no application. They merely decided that the existing trustees are liable to render an account, not merely of their own intromissions, but of the intromissions of their predecessors as in a question with a beneficiary. They did not establish that the liability of one set of trustees to the trust arising from maladministration may be sopited or extinguished by the similar maladministration of their successors in office. Even if the pursuers here had given John Dun a formal discharge of the claim which is now made, such a discharge being without consideration would not have been binding upon the trust estate. This was expressly decided in the case of *Smith* (3 F. (H.L.) p. 14). The present action is not at the instance of the pursuers as individuals. . . . It is brought by them, as administrators of the trust estate, to recover trust funds which but for the negligence of the previous trustees would now have been in the pursuers' possession. It might equally well have been brought at the instance of

a judicial factor who had superseded the pursuers; and I can see no reason for holding that an action at the instance of such a factor would have been excluded because of the intervening negligence of the trustees whom he superseded. There is no case where this point has been fully considered; but in *Thomson* v. *Christie* (12 D. 179) the point might equally well have been raised, and indeed was argued in the Outer House. The charge against Thomson, the trustee there, was that, having in 1829 sold property belonging to the trust to a Mr Alison, he conveyed the property to the purchaser without enforcing a condition in the articles of roup that caution should be found for the price within twenty-one days, and thereafter allowing the price to remain in the hands of the purchaser until it was lost by his bankruptcy in 1837. It appears that Thomson died in 1831, and that a judicial factor (Mr Grieve) was appointed on the estate in 1834. Mr Grieve apparently made no attempt to recover the amount due by Alison prior to the latter's bankruptcy in 1837. The Lord Ordinary in his opinion says—"The main defence, however, which the defender pleads is that in point of fact no loss arose from anything done by her father previous to his death in 1831. Mr Alison was then solvent, and continued solvent until towards the end of the year 1837. She even carries her argument so far as to maintain that the loss has arisen from misconduct on the part of Mr Grieve, who was appointed judicial factor in 1834." The Lord Ordinary did not find it necessary to dispose of this plea, as he assoilzied the trustee; but his decision was reversed by the First Division, whose judgment was affirmed on appeal by the House of Lords. The contention which the Lord Ordinary characterised as the main defence was either not repeated before the Inner House, or it was disregarded as entirely unsound. The facts of that case bear a somewhat striking similarity to the present, except that the interval of time during which the judicial factor was in the saddle before the debtor's bankruptcy was only three years instead of thirteen; but there would have been ample time during that period to have taken steps for recovery of the debt. It may be that Mr and Mrs Schulze have incurred a joint liability because of their failure to take steps against Richard Lees. On this matter I pronounce no opinion, but I cannot see that it affords any defence against a claim by the beneficiaries, whose rights are being maintained, and can only be maintained, by the trustees now in office.

It was further argued that in any case Mrs Schulze's rights as a beneficiary are excluded by her conduct as a trustee. That is a matter which we cannot decide in the present action. Apart from the fact that she is not before us in her character as an individual, there are no materials to enable us to estimate with any accuracy the extent of her interest in the trust estate. The case of *Rae* v. *Meek* (16 R. (H.L.) 33) was cited in support of the view that the Court may deal with the individual rights of trustees in an action which is directed against them in their representative capacity. I do not think that that is the true effect of the judgment. In that case Mr and Mrs Rae had been parties *qua* trustees to an act of maladministration in respect of which a decree for damages was given against Mr Meek. The only interest that the pursuer of the action had was to get the money that had been lost to the trust estate restored, so that it would be available on the death of Mr and Mrs Rae, who were entitled to the income. The only way in which this could be effectively done was by ordaining Mr Meek to consign the fund; and it was only proper that as in a question with the pursuer the interest derived from the investment of Mr Meek's money should be appointed to be paid over to him during the joint lives of Mr and Mrs Rae.

The only other question is as to whether the pursuers are entitled to interest upon the sum sued for after deducting from that sum the amount recovered from Richard Lees' estate. The claim for compound interest is, in my opinion, not stateable, and we were not referred to any case where compound interest had been given. As regards the claim for simple interest, it must be kept in view that Mrs Lees was entitled to "such free yearly annuity as my estate may appear to them [that is, the trustees] to be able to afford," Under this clause the trustees were entitled to have given her the free income of the whole estate; and although they passed no formal resolution on the subject, what they did was to distribute only a part of the estate, and to leave the remainder in the hands of Richard Lees, who regularly paid his mother a sum of £100 per annum, besides allowing her during the greater part of the time to occupy the house the price of which is here sued for. There is no suggestion that the other beneficiaries ever claimed any part of the income while their mother was alive; and I think it was the understanding of all parties that the estate in Richard Lees' hands was no more than sufficient to yield his mother a suitable annuity. As from Mrs Lees' death, however, the defenders cannot resist the payment of some interest.

LORD JUSTICE-CLERK—I have had an opportunity of considering this case along with your Lordships, and your Lordships have so fully and clearly expressed the grounds of judgment that it is unnecessary for me to add anything.

LORD ARDWALL was absent.

Counsel were then heard on the question of interest, when the defenders argued—Interest at 5 per cent. was allowed only where there was fraud or personal use by the trustee of trust funds. Otherwise interest was allowed only at the rate which trust investments would have earned during the period in question—*Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, December 17, 1892, 20 R. 675, 30 S.L.R. 354; *Wyman or Ferguson* v. *Pater-*

son (*cit.*); *Baird's Trustees* v. *Duncanson*, July 19, 1892, 19 R. 1045, 29 S.L.R. 862; *Bryson* v. *Bryson's Trustees*, January 30, 1907, 14 S.L.T. 750.

Argued for the pursuers—When trustees were held liable for loss to a trust estate, penal interest at 5 per cent. was usually allowed. The negligence here was in any case so gross as to involve the trustees in payment of interest at the penal rate—*Bryson* v. *Bryson's Trustees* (*cit.*).

The Court recalled the Lord Ordinary's interlocutor, and decerned against the defenders jointly and severally, but that only to the extent to which each was *lucratus* from the estate of the late Mr Dun, for payment to the pursuers of the sum of £1040, with interest at the rate of 3½ per centum per annum.

Counsel for Pursuers and Reclaimers—M'Lennan, K.C.—A. M. Stuart. Agent—Andrew Tosh, S.S.C.

Counsel for Defenders and Respondents—Constable, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

Thursday, November 9.

FIRST DIVISION.

[Dean of Guild Court at Rutherglen.

CAMPBELL AND OTHERS *v.* BAINBRIDGE.

Property—Superior and Vassal—Building Restrictions—"Villas or Dwelling-Houses."

A disposition of ground provided that "no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build."

Held (*dissenting* Lord Johnston) that the restriction did not prohibit the erection of tenements.

George Bainbridge, florist, Rothesay, presented a petition to the Dean of Guild of the burgh of Rutherglen for a lining for three tenements of dwelling-houses which he proposed to erect on ground disponed to him in 1877 by David Warnock.

Objections were lodged for John Campbell and others, each of whom maintained that he had a *jus quæsitum* to object to the erection of such buildings, and that these were prohibited by the following provision in the said disposition to the petitioner by David Warnock—"And providing, as it is hereby provided and declared, that no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponee may think proper to build, but this shall not imply a prohibition against using the ground for nursery purposes for the rearing of trees, plants, shrubs, fruits, and flowers, nor shall it imply a prohibition against the erection of greenhouses or conservatories."

On 6th November 1910 the Dean of Guild (Robert Reid), for the reasons assigned in the annexed note, found that the buildings proposed by the petitioner were not in violation of the restrictions contained in his title, and therefore repelled the objections stated for the respondents and granted warrant as craved.

Note.—"The petitioner is proprietor of a piece of ground extending to 6300 square yards lying on the east side of Mill Street, Rutherglen, and he asks authority to erect thereon three tenements of dwelling-houses of single apartments and rooms and kitchen. That ground was part of an area of 10 roods which at one time belonged to a Mr Warnock, the ancestor of the respondents the Misses Warnock, and the author of the other respondents. The remainder of the 10 roods is now held by the respondents. The ground held by the respondent Rodger was given off by Warnock in 1872. The ground held by the respondent Campbell was given off later in the same year. The ground now belonging to the respondent M'Mahon was given off along with the ground now belonging to the petitioner in November 1877. The Misses Warnock made up a title in 1895 to the ground now held by them. . . . . .

"In selling to the petitioner Warnock granted a disposition dated 19th, and recorded in the Register of Sasines kept for the burgh of Rutherglen 22nd November 1877, and upon the restrictions said to be contained in this deed the respondents found and oppose the lining asked. The respondents found upon the provision in that deed, which states that 'no houses or buildings of any kind shall be erected on the ground other than villas or dwelling-houses with offices and such enclosing walls' as might be proper.

"A long and interesting argument was addressed to the Dean of Guild as to whether the respondents had a *jus quæsitum* to enforce restrictions in the petitioner's title. Several interesting topics were touched upon in the consideration of that question—for example, the effect of the consolidation effected in the title of the ground belonging to the respondent M'Mahon, the effect of the discharge of the ground annual in the title of the respondent Campbell, and the freedom from the common restriction of the ground belonging to the respondents the Misses Warnock, and so on. But, in the view which the Dean has come to take in this case, it is unnecessary for him to decide the question of *jus quæsitum* or to deal further with the topics alluded to. The Dean thinks this case can be determined upon the main issue between the parties, viz., the effect of the restrictive covenant in the petitioner's title.

"It was maintained for the respondent Campbell that the expression 'villas' or dwelling-houses' must be read along with the context; that the word 'villas' followed