Lord Adam—I concur with your Lordship on both points.

The Court pronounced the following interlocutor:—

"The Lords having, along with four Judges of the First Division of the Court, heard counsel for the parties on the reclaiming-note for the pursuers against Lord M'Laren's interlocutor of 12th June 1886, proof adduced, and the whole cause, in conformity with the opinion of the majority of the Judges present at the hearing, Assoilzie the defenders from the conclusions of the action: Find them entitled to expenses," &c.

Counsel for the Pursuers—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Mr Meek—Asher, Q.C.—G. W. Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Mr Hotson—D.-F. Mackintosh—Law. Agents—R. D. Ker, W.S., and Ronald & Ritchie, S.S.C.

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# HOUSE OF LORDS.

*Tuesday, August 7.*

(Before the Lord Chancellor (Halsbury), Lords Watson, Fitzgerald, and Macnaghten.)

## MACKINNON (MILLAR'S FACTOR) *v.* KNOX AND OTHERS (MILLAR'S TRUSTEES).

(*Ante*, Nov. 2, 1886, 24 S.L.R. 355; 14 R. 22.)

*Trust—Liability of Trustees—Personal Liability of Trustees for Imprudent Investment.*

Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security.

The trustees of a draper in Glasgow, who died in 1863, held his estate consisting, *inter alia*, of £4400 of capital in his business and his business premises, for the purpose of paying his widow an annuity of £400, and of dividing the residue among his children. They had the fullest powers to invest the estate "on such securities," heritable or personal, as they should think proper. The eldest son, who subsequently carried on the business, in 1874 bought the premises for £25,000, and applied to the trustees, after paying £13,000 of the price, for a loan of £12,000 to meet the balance, offering as security the premises themselves, on which he had already borrowed £17,000, and other subjects belonging to him. All these subjects were already burdened. The margin of value of the whole subjects, including the business premises—taking as the gross value in each case the prices paid for them within a year of the loan—was £12,150. He also offered the security of a policy on his life for £2160, the surrender value of which was less than £500, and his share, viz., one-seventh, of the sum of £10,000 held by the trustees for security of the widow's annuity. In addition he offered the personal security of his father-in-law, engaged in business in Glasgow. Both he and the offerer were then in good credit. The offer was accepted, but no communication was made to the other beneficiaries, several of whom were of age. One of them shortly afterwards, on hearing of the loan, protested for himself and the other beneficiaries, but no notice was taken of his letter. In 1884, the debtor and his father-in-law having both become bankrupt, and the prior bondholders having entered into possession, an action was raised by the beneficiaries against the trustees for repayment of the loss sustained by the estate through the transaction.

*Held* (*affirming* judgment of Second Division) that the trustees were personally liable, as having invested on unsubstantial and insufficient security, contrary to the law and practice of trust administration.

This case is reported *ante*, November 2, 1886, 14 R. 22, and 24 S.L.R. 355.

Millar's trustees appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case I have come to the conclusion that the judgment of the Lord Ordinary is one which, so far as it is a question of fact, is very satisfactorily supported by the evidence, and if the facts are as his Lordship found them to be it seems absolutely impossible to controvert the legal conclusion.

Certain family trustees appear to have lent a sum of £12,000 on what they ought to have known to be a very doubtful security. It is quite possible that the trustees were only actuated by an honest desire to do what was best for the whole family, and it may be that they were quite right in endeavouring to aid and assist William Millar to become the purchaser of the property of which they had the disposition; but there was upon them the overwhelming obligation to see that the property which they disposed of to William Millar was paid for.

Now, I am satisfied the trustees were or ought to have been conscious of the fact that William Millar was not in a position to pay for what he had bought; they nevertheless permitted it to be conveyed to him; they allowed him to raise £17,000 upon it, and then lent him £12,000 on the property so previously charged, not in truth as an investment at all, but as a method by which he should in form pay the purchase money of the property they had sold him.

I asked the same question as Lord M'Laren—"Why did not the trustees agree themselves to lend the £17,000 on a first bond, and allow Mr Millar to raise the £12,000 on what he offered as unexceptionable security?" They knew, or Mr Black knew on their behalf, that Mr Millar could not have got the £12,000 from any source but the trust, and I have the less difficulty in arriving at the conclusion at which I have arrived when I remember that Mr Black was to the knowledge of the trustees the adviser of Mr William Millar as well as their own. If trustees will permit such a mixture of interests to take place, they have but themselves to thank when such a misfortune as has resulted in this case overtakes them.

I think there is some evidence to show that the trustees (I daresay from very worthy motives) had placed themselves in the position of champions of the William Millar side of the family, but I am of opinion that the loan was originally a breach of trust. I think it was not made better by the personal security that they took, since I am of opinion that the whole transaction assumes the shape of an accommodation to William Millar to buy the property, and not a *bona fide* investment of the trust funds.

Under these circumstances it becomes unnecessary to consider the indemnity clause, since to such a transaction the indemity clause has no application.

It is to my mind unnecessary to consider under these circumstances the question as to the continuance of the loan in spite of warning and remonstrances. It certainly cannot make better the position of the trustees. I move your Lordships that the interlocutor appealed from be affirmed, and this appeal dismissed with costs.

Lord Watson—My Lords, the testamentary trustees of the late John Millar, merchant in Glasgow, who are represented by the appellants, lent in November 1874, £12,000 of the trust funds under their charge to William Millar, one of the seven beneficiaries entitled, in equal shares, to the residue of the trust-estate. That sum formed part of the price of a tenement purchased by William Millar from the trustees, which was payable in terms of the contract of sale in May 1874, but he was unable to pay the £12,000, and was allowed to retain it as a loan. In security of the loan he conveyed to the trustees three house properties in Glasgow, including his purchase from the trust, upon each of which there were prior incumbrances to an amount exceeding two-thirds of their estimated values as stated by the borrower. Besides these margins the trustees held the personal obligation of their debtor, whom they must have known to be impecunious, and of his father-in-law Andrew Walker, who was engaged in trade, and of whose solvency they knew nothing beyond general repute.

Notwithstanding remonstrances by the other beneficiaries interested the money was suffered to remain on these securities until 1884, when it was discovered that the margins were utterly worthless, and both the personal obligants became bankrupt, the estimated dividend in William Millar's sequestration being 2d. and in Andrew Walker's 5s. 9d. per pound.

It is not disputed that in ordinary circumstances the conduct of these trustees would have been unwarrantable, and that they would have been personally liable to make good to the trust-estate the deficit occasioned by the insufficiency of the securities, but the appellants plead that the combined effect of two clauses in John Millar's deed of trust is to relieve them of all responsibility for the loss.

By the first of these clauses his trustees are authorised and empowered, when they shall consider it necessary or expedient, to realise the trust-estate, and "to lend out the proceeds and other funds of the trust, or such parts thereof as may not be otherwise required, on such securities, heritable or personal, as they may think proper

A power to lend on personal security has been held in Scotland to include lending on personal credit, but it must be kept in view that in requiring some kind of security to be taken it was the plain object of the truster to preserve intact the capital of the trust-estate for the benefit of the persons ultimately entitled to it. It appears to me that the authority to invest, which he gives for that obvious purpose and no other, cannot be construed as a licence to his trustees to take a worse instead of a better security—that is to say, to accept a bare personal obligation so long as it is possible for them to obtain a pledge of heritable or moveable property. The power to lend trust money on personal credit may prove very useful to trustees who are in search of a permanent investment, but trustees who make a permanent loan on that footing must in my opinion, if any loss results from it, justify their action by showing that no safer investment was open to them. It would require very exceptional circumstances to warrant a loan of trust funds, continued for a period of ten years, upon no better security than the personal guarantee of two individuals whose ability to repay was dependent upon the vicissitudes of trade.

By the second of these clauses it is declared that the trustees "shall not be liable for omissions, errors, or neglect of management, nor *singuli in solidum*, but each shall be liable for his own actual intromissions only." I see no reason to doubt that a clause conceived in these or similar terms will afford a considerable measure of protection to trustees who have *bona fide* abstained from closely superintending the administration of the trust, or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust and of the persons whom it concerns; but it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or of gross negligence on his part, or of any conduct which is inconsistent with *bona fides*. I think it is equally clear that the clause will afford no protection to trustees who, from motives however laudable in themselves, act in plain violation of the duty which they owe to the individuals beneficially interested in the funds which they administer. I agree with the opinion expressed by Lords Ivory, Gillies, and Murray in *Seton* v. *Dawson*, 4 D. 318, to the effect "that clauses of this kind do not protect against positive breach of duty."

Upon the facts of this case I should be prepared to hold that there was *crassa negligentia* exhibited by these trustees. The sale to William Millar was effected on terms favourable to the trust, and having regard to the pecuniary circumstances of the purchaser they were not in my opinion to blame for not insisting upon immediate payment of the £12,000, which might have defeated the transaction. But these very circumstances, coupled with the unsatisfactory character of the securities which the purchaser was able to give them, ought to have warned men of ordinary prudence of the necessity of obtaining payment of the money within a limited time, and of placing it on a proper trust investment. I am content, however, to rest my judgment upon the same view of the facts which was adopted by the Lord Ordinary and by the Second Division of the Court. I do not think it necessary to enter into

details of the evidence, which has satisfied me that throughout the unfortunate transaction these trustees lost sight of the primary duty which they owed to the beneficiaries interested, and were mainly actuated by a desire to accommodate William Millar, the borrower of the money.

There were two points raised in the argument for the appellants which appear to me to deserve notice. It was seriously argued that according to the law of Scotland the responsibility of a gratuitous trustee must (apart from any special dispensation by the truster) be tested by reference, not to an average standard, but to the degree of care and prudence which he uses in the management of his own private affairs. The rule, which is quite new to me, would be highly inconvenient in practice. In every case where neglect of duty is imputed to a body of trustees it would necessitate an exhaustive inquiry into the private transactions of each individual member, the interest of the trustee being to show that he was a stupid fellow, careless in money matters, and that of his opponents to prove that he was a man of superior intelligence and exceptionable shrewdness. The learned counsel were unable to cite any case in which such a rule has been applied, but it was said to rest upon the high authority of Lord Stair. We were referred to a passage in that title of the Institutes which treats of mandates (i. 12, 10), where the rule is so laid down. But the passage thus relied on appears to me to have reference to special and not to general mandates. The learned author carefully distinguishes between these two classes (i. 12, 15), mandates being defined by him as special or determinate "when both matter and manner are special," and as "general or indeterminate" when the matter is special but when the manner is not specified. A testamentary trust to invest on such heritable or personal securities as the trustees may think proper is of the nature of a general or indeterminate mandate, and the rule which Lord Stair twice lays down in reference to that case (i. 12, 9, and 15) is, that the mandatar "must necessarily do what is best *secundum arbitrium boni viri*, and must do the like in all indeterminate mandates."

The other point involves matter of some delicacy. It was urged that the trustees acted *bona fide* in accordance with the advice of their law agent, whose evidence was no longer available when this case went to trial. The late Mr Knox, one of the trustees, said in his evidence "we were entirely guided by him," and another of them, Mr Gavin Millar, on his attention being called to the hazardous nature of the transaction, stated, "we were acting on the advice of our law agent, and we considered we were perfectly safe." The agent upon whom they thus relied was not only acting for the trust, but on behalf of William Millar, their borrower, and the fact of his double agency was well known to the trustees. I have always held that in the conduct of his own affairs a man may, if he chooses, trust to the advice of an agent in that position, and if anything goes wrong *sibi imputet*, but I am very clearly of opinion that no one clothed with a fiduciary character is justified in perilling the interest of the *cestui qui trusts* upon such partial advice. I have not found it necessary to take the circumstance into account in deciding the present case; had it been necessary to do so, any inference which I could have derived from it would have been unfavourable to the appellants.

I concur in the judgment which has been moved by the Lord Chancellor.

LORD FITZGERALD—My Lords, I concur in thinking that the interlocutor of the Lord Ordinary adopted by the Second Division of the Court of Session should now be affirmed, for the reasons given both by the Lord Ordinary and in the Court of Session. In the very able and elaborate judgment of my noble and learned friend opposite (Lord Watson) there are some additional propositions on which I do not find it necessary to express any opinion.

LORD MACNAGHTEN—My Lords, I quite agree. Notwithstanding the able argument of Mr Rigby and Mr Dickson I cannot say that I have felt any doubt as to the propriety of the interlocutors under appeal.

Any system of trusts which did not require trustees to act with perfect impartiality as between their *cestui qui trusts*, and to bring to the management of trust affairs the same care and diligence which a man of ordinary prudence may be expected to use in his own concerns, would be illusory and mischievous. Tried by this standard the conduct of the defenders falls far short of what is required by law and common sense. The transaction which has led to the loss stands condemned, whether it be regarded as a sale of trust property, or as an investment of trust funds, or as a combination of both. No man of ordinary prudence would, I think, have sold his own property on the terms upon which the defenders disposed of the property committed to their charge. The property seems to have been readily saleable at the time, yet the trustees were satisfied to part with the legal dominion over it for about half its value in cash, taking for the balance a parcel of securities of the most shadowy and unsubstantial character. No man of ordinary prudence would have thought of investing £12,000 of his own on these so-called securities. No man of ordinary prudence would have entered into the arrangement regarding it as a whole unless his first object had been to assist Mr William Millar and help him to become owner of his business premises.

It was said that the price was a very high one, and that it was greatly to the advantage of the trust-estate that the transaction should be carried through even at some risk. There is no evidence that the sum which Mr William Millar offered was more than might have been got in the open market. But assuming that the price was high, and that it was most important to secure it, that did not justify the trustees in parting with the substance in a great measure for a mere shadow. If the trustees were really desirous of carrying the transaction through for the benefit of the trust-estate one would certainly have expected to find that they would have required payment by instalments, or at least have insisted on Mr William Millar reducing his debt while his affairs still continued prosperous.

It is impossible, I think, not to see that the trustees did unduly favour Mr William Millar. They seem to have been led aside from the strict path of duty by two things. They appear to have thought, rightly or wrongly, that the second

family were trying to put an unfair pressure on Mr William Millar, and so they paid no attention to remonstrances in themselves reasonable, and they allowed their judgment to be guided or warped by the opinion of a gentleman who was acting, or professing to act, as their law agent, but who was also to their knowledge the law agent of Mr William Millar, and whom therefore they ought not to have consulted on this question.

On the whole, I have no hesitation in agreeing with the Lord Ordinary and the Second Division of the Court of Session that the £12,000 was lent to Mr William Millar upon unsubstantial and insufficient security, contrary to the law and practice of trust administration.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for the Appellants—Rigby, Q.C.—C. S. Dickson. Agents—Clarke, Rawlins, & Company, for C. & A. S. Douglas, W.S.

Counsel for the Respondent—Davey, Q.C.—Asher, Q.C. Agents—Freshfields & Williams, for Donald Mackenzie, W.S.

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*Friday, August* 10.

(Before the Lord Chancellor (Halsbury) and Lord Watson.)

WESTMINSTER FIRE OFFICE *v.* GLASGOW PROVIDENT INVESTMENT SOCIETY.

(*Ante*, July 12, 1887, 24 S.L.R. 691; 14 R. 947.)

*Fire Insurance—Right of Postponed Bondholder to Recover when Prior Bondholder has Received a Sum Sufficient to Reinstate.*

The proprietor of certain mills granted bonds over them for £9000, and afterwards a postponed bond for £900. Policies of fire insurance for £7000 were taken in name of the prior bondholders for behoof of themselves and of the owner in reversion. The postponed bondholder, an investment society, effected a policy of fire insurance with another company for £900 in name of the society, and of the owner "in reversion." The policy insured against damage by fire "the property described on the margin hereof." On the margin were set forth various items forming parts of the mills and machinery, with the specific sum insured on each. The owner paid the premiums of insurance.

A fire occurred, which damaged the mills and stopped the works. The holders of the prior bonds obtained under their policies of insurance the sum of £5668, which was sufficient to reinstate the works, but they applied it in reduction of their debt.

The investment society then raised an action, with consent and concurrence of the owner, against their insurers for declaration that the pursuers were entitled to be indemnified by the defenders for the loss they had sustained by the fire, and for payment. The defenders denied liability, on the ground that the loss caused by the fire had already been made good to the prior bondholders and the owner. It was admitted that at the date of the fire the subjects were of sufficient value to cover all the bonds, and that after the fire the subjects were not of sufficient value to meet the prior bonds.

*Held* (*affirming* judgment of the whole Court) that the defenders were bound under their contract to indemnify the investment society for the loss it had sustained by the fire.

This case is reported *ante*, July 12, 1887, 24 S.L.R. 691, and 14 R. 947.

The Westminster Fire Office appealed.

By consent of parties the judgment was accepted of two of their Lordships who had heard the case argued.

At delivering judgment—

The Lord Chancellor—My Lords, this action was founded on a contract contained in a policy of fire insurance dated 10th October 1881. One of the terms of that contract was that if the property or any part thereof should be destroyed or damaged by fire the appellants agreed that they would make good the loss to an amount not exceeding £900. The owners of the property insured were Messrs Hay, grain millers of Glasgow. The respondents held heritable securities on the property to an extent not exceeding £900. Other contracts of insurances had been made by other creditors of Messrs Hay, the proprietors of the mills. These other creditors also held heritable securities prior to those of the present respondents.

By the joint minutes of admissions it was agreed between the parties that immediately before the date of the fire the value of the subjects insured was sufficient to cover both the prior bonds and that of the respondents. As a consequence of the fire the value of the buildings is now so reduced that the respondents' bond is entirely uncovered. It appears to me beyond doubt that by the contract of indemnity into which the appellants entered with the respondents the contingency has arisen against which the appellants contracted to indemnify the respondents.

It is difficult to state the argument on the other side, since it seems to me to be founded partly upon an error of law and partly upon a suggestion of fact which seeks to get behind the admission by which the parties are concluded. The error of law, I think, is in the suggestion that a creditor has not an insurable interest in the property of his debtor, upon which property the debtor has given him a heritable security. I should have thought it was too well settled a proposition in insurance law to be susceptible of argument that a creditor under these circumstances is entitled to insure. The error in fact appears to be founded upon the suggestion, more implied than expressed, that more was insured upon the subjects of insurance than their value justified, since, if the property before the fire was good security for the value of the bonds, and is now only good as represented by the insurance paid in respect of it to satisfy the bonds prior to that of the respondents', it is difficult to see that when all these contracts were made, the subject being sufficient to satisfy them, and the fire alone hav-