up in the petition for warrant to erect which has now been presented, and which is still before the Dean of Guild Court, and that the interlocutor ordering demolition should not be put into force at once.

The only matter that remains for your Lordships to consider is whether we should touch the interlocutor now under review, which, of course, ordains the structure to be taken away. Now Mr Constable has very fairly said that inasmuch as he has already stated that the Dean of Guild is willing to consider what practical steps can be taken to render it secure, he should not be compelled to give up the interlocutor he has got. I think that is a perfectly reasonable proposition. If we were to take away the interlocutor we should take away the only compulsitor he has got. I think the Dean of Guild has acted in a perfectly reasonable way, and will continue to act in that way, and that the other side will remember that it is not your Lordships who are deciding this matter but it is the Act of Parliament; and as Parliament has said that such things must be erected to the satisfaction of the Dean of Guild, well, then, you must satisfy the Dean of Guild. Accordingly I think the appropriate course for your Lordships to follow is to affirm the interlocutor appealed against.

LORD JOHNSTON—I agree with your Lordship. Once the Dean of Guild's jurisdiction is either admitted or established, the case could only terminate in the manner which your Lordship proposes.

LORD MACKENZIE—I am entirely of the same opinion.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

"Refuse the appeal: Affirm the interlocutor of the Dean of Guild, of 27th December 1910, appealed against: Remit the case back to the Dean of Guild to proceed as accords, and decern: Find the appellants liable in the expenses of the appeal, and remit," &c.

Counsel for Petitioner (Respondent)—Constable, K.C.—W. A. Fleming. Agents—Graham Johnston & Fleming, W.S.

Counsel for Respondents (Appellants)—D. Anderson—W. J. Robertson. Agent—Arthur C. M'Laren, Solicitor.

HOUSE OF LORDS.

Thursday, March 30.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lord Atkinson, and Lord Shaw.)

BUCHANAN AND SPOUSE *v.* EATON.

Trust—Breach of Trust—Maladministration—Compromising Threatened Action—Annuities not Made Charge on Heritage.

Circumstances in which *held* (*rev.* judgment of the Second Division) that a trustee had not been guilty of maladministration so as to render himself personally liable, although the entire trust funds had now disappeared, and he had paid in 1898 a considerable sum to compromise proceedings against the trust threatened at the instigation of certain disinherited children of the truster, and had borrowed money on the heritable estate for this purpose without the annuities payable under the trust-deed being made a charge upon it.

On January 22, 1909, John M'Gregor Buchanan and spouse, *pursuers*, brought an action against James Eaton, clothier, Glasgow; George Buchanan, grain miller, Glasgow; and Mrs Jane Stewart or Buchanan, widow of the deceased James Buchanan, fishhook manufacturer and grain miller, Glasgow, the accepting testamentary trustees of the said deceased James Buchanan, *defenders*. In it the pursuers sought declarator that the defenders were bound to set aside and invest a sum sufficient to secure payment of the annuity of £200 provided to the pursuers during their lives and the life of the survivor in the testator's trust-disposition and settlement, and decree against them individually, jointly and severally, ordaining them so to set aside £6000 or such other sum as might be found necessary, or alternatively decree ordaining them to make payment to the pursuers of £4371, 11s. 8d., which was the actuarial value of such annuity, with decree also for payment of £93, 14s., the balance of the half-year's annuity due at Whitsunday 1907, and for three sums of £100 each, being the half-years' annuities from Whitsunday 1907 till the raising of the action. James Buchanan died on 27th September 1897, and his trust-disposition and settlement was dated the 18th August of that year.

James Eaton alone of the defenders compeared.

The pursuers pleaded—"(2) The defenders having, in breach of their duty under said settlement, failed to secure the pursuers' said annuity, are liable personally in the amount thereof, and decree ought to be pronounced in terms of one or other of the alternative petitory conclusions of the summons. (3) The trust estate under the charge of the defenders the said James Eaton, George Buchanan, and Mrs Jane Stewart or Buchanan, as trustees foresaid, having disappeared, and being insufficient to secure the pursuers' annuity owing to the *ultra vires* actings, breach of duty, and maladministration of the said defenders, the said defenders are bound to set aside and invest a sum sufficient to secure said annuity to the pursuers and to the survivor."

The trust-disposition and settlement contained these clauses—"*In the Third Place*, I direct my said trustees to allow my said wife during all the days and years of her life the liferent use and enjoyment of my heritable properties in Regent Park Square,

Glasgow, and in Girvan, and to deliver to her as her own absolute property the whole furniture, plenishing, and effects belonging to me at the time of my decease. . . . *In the Fifth Place*, I direct and appoint my said trustees to pay to my said wife during all the days and years of her life an annuity of Three hundred pounds sterling, payable in advance, beginning as at the first term of Whitsunday or Martinmas occurring after my death, and payable half-yearly in advance at the usual terms of Whitsunday and Martinmas. *In the Sixth Place*, I direct my said trustees to pay to my son John M'Gregor Buchanan and Mrs Helen M'Intyre or Buchanan, his wife, and the survivor of them, during all the days and years of their joint lives, and during all the days and years of the survivor, an annuity of Two hundred pounds sterling, beginning as at the date of my death, and payable in advance at such dates and by such instalments as my trustees shall think proper. *In the Seventh Place*, as soon as convenient after my decease, I direct and appoint my trustees to assign, dispone, convey, and make over to and in favour of my son George Buchanan the whole residue of my means and estate, heritable and moveable, real and personal, including my several businesses, but that always with and under the burden of the liferent before mentioned to my said wife of my properties in Glasgow and Girvan, and also under burden of the payment of the before-mentioned annuities to my said wife and to my son John and his wife."

At the date of the action the trust funds had entirely disappeared, and the point on which the case is reported is whether the trustees had been guilty of maladministration, rendering them personally liable, (1) in having in 1898-9 compromised threatened proceedings at the instigation of certain children of the testator who had been disinherited and claimed legitim, and who also spoke of bringing a reduction, by payment of £3700, and (2) in having borrowed on the security of the heritable estate money for this purpose without having first secured the annuities payable under the trust-disposition. The varying aspects in which the *evidence* was viewed and the *facts* considered to be thereby established are given in the different opinions (*infra*) of their Lordships.

The pursuers (respondents) relied upon the following authorities—(*a*) on a trustee's responsibility—*Rae* v. *Meek*, July 19, 1888, 15 R. 1033, 25 S.L.R. 737; August 8, 1889, 16 R. (H.L.) 31, 27 S.L.R. 8; *Knox* v. *M'Kinnon*, November 2, 1886, 14 R. 22, 24 S.L.R. 355; August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 752; *Ferguson* v. *Paterson*, March 13, 1900, 2 F. (H.L.) 37, 37 S.L.R. 635; *Seton* v. *Dawson*, December 18, 1841, 4 D. 310; *Mustard and Others* v. *Mortimer's Trustees*, June 24, 1899, 7 S.L.T. 71; *Carruthers* v. *Carruthers*, July 13, 1896, 23 R. (H.L.) 55, 33 S.L.R. 809; *Carruthers* v. *Cairns*, May 16, 1890, 17 R. 769, 27 S.L.R. 640; *Millar's Trustees* v. *Polson*, July 10, 1897, 24 R. 1038, 34 S.L.R. 798. (*b*) On the securing of the annuities on the heritage—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101); *Cowie* v. *Muirden*, July 20, 1893, 20 R. (H.L.) 81, 31 S.L.R. 275; March 17, 1891, 18 R. 706, 28 S.L.R. 605; *Coutts* v. *Tailors of Aberdeen*, May 23, 1837, 2 S. & M. 609, 1 Rob. App. 296; Bell's Lectures, p. 1153.

And the defender (appellant) relied upon the following authorities—Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), sec. 2 (4) and (7); *Cowie* v. *Muirden* (*cit. sup.*); *Williamson* v. *Begg*, May 12, 1887, 14 R. 720, at 722, 24 S.L.R. 490; *Buchanan* v. *Buchanan's Trustees*, (1908) 16 S.L.T. 364 and 421—and on the extent of liability, if any, *in re Speight*, 22 Ch. Div. 727, 9 A.C. 1; *Rae* v. *Meek* (*cit. sup.*).

On 16th July 1909 the Lord Ordinary (JOHNSTON) pronounced this interlocutor—"Finds and declares as against the said defender in terms of the declaratory conclusion of the summons: Decerns against the said defender in terms of the first alternative petitory conclusion of the summons; and accordingly decerns and ordains the said defender to consign the sum of £6000, referred to in the said alternative petitory conclusion, in the hands of the Accountant of Court, in terms of the Court of Session Consignation (Scotland) Act 1895, and that within one month from this date, and there to lie until final arrangements are made for the proper administration of the trust mentioned on record, and until the said sum, or such part of it as may be found necessary, be so invested as to provide and secure to the pursuers and the survivor an annuity of £200: With regard to the arrears of annuity, decerns against the said defender in terms of the four last petitory conclusions of the summons, with interest thereon as concluded for."

Opinion.—"I do not think that anything would be gained by taking further time to consider this case, because the circumstances are very fully before me by reason not only of the present action, but of a previous action in this Court, in which the pursuers challenged the validity of the bonds which have been granted in favour of the University Court of the University of Glasgow. I took the view that inquiry in that first action was necessary, but the Inner House have held that the case should have been disposed of without such inquiry, and so disposed of it by finding that the University Court, as lenders to Buchanan's Trustees, were only concerned with the power of these trustees to borrow, and not with the purposes for which they were proposing to borrow. I can only say that I quite acquiesce in that judgment, but at the same time, that I have some personal regret that the University of Glasgow should escape scatheless in this matter. The disclosure in the proof which has been led in the present case of the mean frauds which a man empowered by the grace of the University to style himself James Colquhoun, LL.D., have satisfied me that the University of Glasgow is not without responsibility for the losses which have been incurred by private parties in con-

nection with this and a great many other trusts. Their conferring the degree of Doctor of Laws upon James Colquhoun has been one of the means which enabled him to impose on the public and carry through his long series of successful frauds. However, the University Court are entitled to hold Buchanan's trustees to their bond, and accordingly the question comes to be, whether they are entitled in a question with a beneficiary under the trust, to table that bond, and their application of the money obtained on it, as an answer in an accounting for the trust funds which the pursuers demand, by enabling them to show that there is nothing now left out of which the pursuer's annuity is to be paid.

"I come thus at once to the will, and I cannot accept Mr Blackburn's explanation of it, that all that the truster intended was that his son George Buchanan should, as a personal condition on the residuary bequest to him, pay out of the residue of the estate the life interest conferred upon the truster's widow and his son John and John's wife, and for this reason—in the first place, the truster conveys his estate to trustees, and then in the sixth head of his will he directs his trustees to pay to his son John Macgregor Buchanan, and Mrs Helen M'Intyre or Buchanan, his wife, and the survivor of them, during all the days and years of their joint lives, and during all the days and years of the survivor, an annuity of £200 sterling. That is a distinct direction, and so long as the trustees kept the estate in their hands they were bound to implement, and had the means to implement, that direction. But then the truster contemplates the time arriving when the trustees may be divested of the trust estate, and what he does is most distinctly to provide other security to take the place of the vesting of the estate in trustees for, *inter alia*, the payment of this annuity. He directs them, in the seventh head of his settlement, as soon as convenient after his decease, to dispone the whole residue of his means to his son George, but that, in the first place, 'always with and under the burden of the liferent before mentioned, to my said wife of my properties in Glasgow and Girvan.' Would it have implemented that direction of the truster that the trustees should have conveyed these heritable properties in Glasgow and Girvan to his son George without heritably securing that liferent? I cannot conceive for a moment that anyone could so read the will. Now that part of the direction has to do with a proper liferent, by constitution, of definite properties. But then this seventh head of the settlement proceeds to say that the residue of the estate is to be conveyed, also under burden 'of the payment of the before-mentioned annuities,' to my said wife and to her son John and his wife—these were annuities of £300 and £200 respectively. According to the ordinary meaning of the language used, though not liferents by constitution as in the former case alluded to above, but only annuities, these annuities are, I think, to be secured so far as the nature of the subjects composing the residue permit. It is quite true that if you are handing over a going business to a beneficiary you cannot convey that business under the real, but only under the personal, condition of making payment of an annuity. But when you are dealing with other parts of the residue of the estate, which lend themselves to the real security of such burdens, it appears to me that the testator's language would not receive effect if you did not place the annuities as a proper burden on these subjects.

"I am not going to inquire into what Mr Colquhoun, or the trustees whom he misguided, understood the testator to mean, nor into what his family understood the testator to mean, nor into what his family understood him to intend. I can only regard his words, and the intention of these words, as that these annuities should be secured. If I am right in that, then of course there is no further question. The annuities have not been secured, and the trustees have taken steps to prevent them being secured by laying on prior burdens which exhaust the subjects in question.

"But suppose I take the case upon the footing that I am not well founded in this view. Equally it appears to me that the trustees are liable. It is hardly possible to conceive of a trust in which there has been throughout such supreme negligence in the acting of the trustees. Fraudulent devices and fraudulent actings on the part of Mr Colquhoun had landed him in the position in which either he or the parties for whom he was acting as agent must suffer. It is thanks to Messrs William and Robert Buchanan, and not to the trustees, that Mr Colquhoun did not carry off more of the trust money than he did. But the fact that they were defrauded by Mr Colquhoun, and misled and misadvised I think in order to defraud them, does not relieve the trustees or any of them from the responsibility for negligence. In the first place, what business had the trustees to make any payments to the family in the way in which they did? They made no inquiry; they did not estimate what the legitim fund would be; they did not consider whether there were any grounds for the elder children challenging the settlement. If they had inquired they would have found that the threat was not serious, but only the outcome of natural irritation, which soon evaporated. They took it for granted that they might, so to speak, be generous to the family whose interests they thought, with some justice, had been so scurvily treated by their father. The trustees had no business so to act. Their only business was to administer the trust or to decline it. Instead of that, they settled with this disinherited family, not on a view of their right to legitim, but on a general view that it was as well to be generous to them and to pay them out. That this threat of an action of reduction meant nothing could not be more clearly proved than by the very clear evidence given by

Mr Robert Buchanan, one of the elder brothers,—and I agree with Mr Blackburn that his evidence was that not only of a peculiarly straightforward but of a very capable man. The trustees then, in my opinion, had no business to make any payments except in satisfaction of legitim. If they did make such payments they could not do so except on a business consideration of the grounds of claim, the value of the estate, and what they were bound to pay under the circumstances. They made no such inquiry, and did not so limit their payments. But if they had arrived at a sum to be paid on a proper inquiry, what business had they to bond the heritable property in order to raise it. They were to pay a sum in full of legitim. Legitim does not come out of heritable property—legitim comes out of moveable property—and they were bound to provide for claims of legitim out of the moveable property, which they were administering, or to require Mr George Buchanan to provide the necessary funds. If he had proceeded to do so, and did not find it convenient to raise the necessary sum out of the moveable residue to which he was to succeed, he might have bonded or consented to the bonding of the heritage which was coming to him. But then neither he nor the trustees with his consent could bond the heritage except subject to the provisions to his mother and his brother and his brother's wife. Had the trustees done their duty and conveyed the residue to Mr George Buchanan under burden of these annuities, any bond that he could have put upon the heritable part of it would necessarily have been a bond postponed to the annuitants' interest. I do not think that I need elaborate this matter, because really, although Mr Blackburn has done his best for an absolutely hopeless case, it is impossible to get past the trustees' own minutes. Without examining these in detail, I shall merely refer to the minute of 10th February 1898, which says—'A correspondence with Mr Robert Buchanan was submitted in regard to the claims for legitim, and Mr George Buchanan stated that he had agreed to pay each of the other children of the deceased a sum of £800, and a sum of £500 to the children of Mrs Ramsay, a daughter of deceased, and he authorised the trustees to borrow on the security of the trust estate a sum of four thousand pounds sterling.' All I have got to say is, that it was quite open to Mr George Buchanan to pay any sum he liked to the rest of the family, but does his agreeing with the disinherited children ascertain what their claims against the trust were, or settle these claims as a matter of trust business? Then what business had Mr George Buchanan to authorise the trustees to borrow on the security of the trust estate, and what justification had the trustees for acting on his authority? He had the right and they the justification, provided they secured other prior interests under the trust—provided they secured the interest of Mrs Buchanan and John Buchanan and his wife, but on no other footing. Mrs Buchanan is out of the question, because she was herself a trustee, and so a party to these trust actings, which have so much affected her own private interest; but John Buchanan and his wife were not, and it is impossible that anything done by the trustees in concert with Mr George Buchanan could affect their rights and claims. If they were going to proceed on the authority of George Buchanan, the trustees should have gone first to the annuitants and asked them to sign, as consenters, the bond which they were going to grant. But they ignored John Buchanan and his wife, and, unfortunately for themselves, misled by one of the scoundrelly frauds of Mr Colquhoun, have laid themselves under liability to make good to the trust the funds necessary to provide the annuity to John Buchanan and his wife. I am not prepared to say that the case of their negligence stops even there. For having lightly signed this bond, they took no steps to see what was going to happen to the money to be raised on it. Mr Colquhoun was anxiously waiting for the money for his own purposes. It ought to have struck them as strange that he had arranged for the borrowing before he had even communicated with them, and merely called them in as matter of form to adopt what was already arranged. And such were his needs and his haste that he got the money next day, and took care at once to appropriate it as far as he could, and would have appropriated more if it had not been for the elder brothers William and Robert Buchanan. What care did the trustees take to see that the money was applied even to the purposes for which they had authorised its being borrowed? None whatever. They just left things loose in Mr Colquhoun's hands. But I cannot accept the suggestion which Mr Blackburn made, that as they were advised by a lawyer, then of high repute, in whom they were entitled to trust, and relied on him, they are free of blame and liability. No one knows better than Mr Blackburn that his clients are not shielded from liability for mistaken action and neglect of duty by the advice of any lawyer, however good his reputation. But equally emphatically it must be added that they are entitled to trust no one with trust money except their bankers. They were bound then to see that the money which they raised was kept under their own control, or, if not, they took the responsibility. If some of it went the way they intended, though even that was not the right way, some of it did not, and to make good its disappearance they again authorised the borrowing of a further sum without consulting the annuitants John Buchanan and his wife. I cannot do otherwise than express my sincere sympathy not only with Mr Eaton in particular, but also with Mr George Buchanan. They have both by misplaced reliance on the advice of Mr Colquhoun, and on his integrity, been made victims of one of his many frauds. Mr George Buchanan has also suffered by

reason of the *damnosa hæreditas* which his father left him, for he was not equal to take up his father's decaying business under burden of the provisions and conditions of his settlement. But my sympathy cannot prevent the necessity of my dealing strictly with the circumstances as they are presented on the proof, and I must therefore require Mr Eaton, as the only solvent trustee, to make good the amount necessary to produce the annuity to John Buchanan and his wife. The trust must be rehabilitated and provision made for the security of the pursuers, but with all consideration for Mr Eaton's interests, and he will be well advised if he retires from the trust after this unpleasant experience, which his want of training to this sort of business has brought upon him."

The defender reclaimed, and on 16th March 1910 their Lordships of the Second Division pronounced this interlocutor—"Recal the said interlocutor reclaimed against: Ordain the said defender to make payment, in terms of the second alternative petitory conclusion of the summons, to the pursuers of the sum of £3095 sterling, with interest thereon at the rate of £5 per centum per annum since 15th May 1909; and with regard to the arrears of the annuity payable to the pursuers, ordain the said defender to make payment to the pursuers, under the first petitory conclusion of the summons relating to said annuity of the sum of £64, 9s., and under each of the second, third, and fourth conclusions relating to said annuity of the sum of £70, 15s., in respect of each three, with interest thereon as concluded for, and decern: Find the defender liable in expenses up to 16th July 1909."

Lord Low—The first question to be considered in this case is what are the duties imposed upon his testamentary trustees by the deceased James Buchanan? The third, fifth, and sixth purposes of the trust, whereby the trustees are directed to allow the truster's widow a liferent of certain heritable properties, and to pay an annuity of £300 to her, and of £200 to the truster's son John Buchanan and his wife, are framed in terms which suggest a continuing trust until these purposes had been fulfilled.

The seventh purpose of the trust however shows that that was not the truster's intention, because he there directs his trustees, "as soon as convenient after my decease," to assign and convey the whole residue of his means and estate "including my several businesses" to his son George Buchanan, "but that always with and under the burden" of the liferent to his widow, and the annuities to her and his son John.

Now the only trust purposes which required to be carried out before the residue of the estate would be ascertained were (1) payment of the truster's debts (which appear to have been inconsiderable in amount) and his funeral expenses and the expenses of the trust; (2) payment to the widow of the proceeds of a life policy for £100; (3) delivery to her of the truster's household furniture; and (4) payment to her of alimony at the rate of £300 at the first term after the truster's death, and £40 for mournings.

When these purposes had been fulfilled the time had arrived for conveying the whole estate to George Buchanan in terms of the seventh purpose. Perhaps the words "as soon as convenient" gave the trustees some latitude in the matter, but no reason is suggested why they should not have carried out the directions of the seventh purpose on the expiry of the period usually allowed to trustees for ingathering the estate and paying debts. The trustees however never conveyed the estate or any part of it to George Buchanan although they allowed him from the first to carry on the truster's business, without supervision or control, as if it had been his own.

There was a good deal of argument in regard to what would have been the duty of the trustees in the way of making the annuities a burden on the estate if they had conveyed it to George. Upon that point I have no doubt. The trustees were bound to do what was necessary to make the burden effective, or at least as effective as the nature of the subjects permitted. Thus, so far as the business was concerned, the trustees could probably have done no more than take a personal obligation or bond from George, but as regards the heritable properties they would, in my opinion, have been bound, in conveying them to George, to have made the annuities real burdens, because in that way alone could the burdens have been made effective.

I have said that the trustees never made over the business to George, although from the first they acted as if the business was his. The trustees were however quite aware that the business was part of the trust estate conveyed to them, and that they required, when the time arrived, to convey it to George. That is shown by the minutes of meeting of the trustees. The truster died on 29th September 1897, and the minutes of a meeting of trustees, held on 23rd November of that year, bears 'the trustees then took into consideration the conduct of the deceased's business pending the winding-up of the estate.' The expression 'winding-up of the estate' plainly means the conveyance of the estate to George in terms of the seventh purpose, and the minute shows that the trustees knew that it was their duty to convey the business to him, and that until they did so they had some responsibility for its conduct. What the trustees did at the meeting was to authorise George to open an account in his own name with a branch of the National Bank of Scotland "on behalf of the trustees," and to draw upon the account to the extent of £2000. It appears that the agent of the bank accepted a copy of the minute as a guarantee by the trustees for the overdraft to George to the extent mentioned. I shall have

something to say presently as to the purposes for which the bank account was used.

The only other minute in which the business is mentioned is dated 10th August 1898. It is there stated that "the agent reported that Mr George Buchanan was desirous of having the properties and businesses transferred to him in accordance with the directions to that effect contained in the trust-disposition and settlement, and the trustees authorised the agent to prepare the necessary conveyances."

A minute of meeting of 12th April 1899 bears that the conveyances of the two properties of which the widow had a liferent had been prepared, and "were duly signed by the trustees." Whether the trustees actually signed these conveyances is doubtful, but they were never recorded and cannot now be found. The same minute bears that the agent reported that "with the exception of the conveyances in favour of George Buchanan of the properties in Girvan and Dale Street and West Street the purposes of the trust have been fully implemented, and the trustees instructed these conveyances to be prepared."

Nothing is said there about conveying the business to George Buchanan, which in the previous minutes had been recognised as being necessary. As, however, the business (which consisted of two branches, one that of a grain miller and the other of a fishing-hook manufacturer) was carried on in the West Street and Dale Street properties, perhaps it was intended that the conveyances of these properties should include the businesses carried on in them respectively. But however that may be the conveyances were never executed.

Up to the date—12th April 1899—of the last meeting of trustees which I have mentioned James Colquhoun was the law agent of the trust. Some time after that date however (I think towards the end of 1899 or early in 1900) his estate was sequestrated under the Bankruptcy Acts, and it was found that he had embezzled large sums belonging to his clients. James Colquhoun had carried on business in partnership with his brother David Colquhoun, and after the bankruptcy of the former the trustees appointed the latter to be law agent of the trust. A meeting of trustees, at which David Colquhoun was present as law agent, was held on 19th April 1900. It was resolved to lodge a claim in James Colquhoun's sequestration for certain funds of the trust which he had embezzled. It was then minuted that an inventory of the estate had been sworn to, and the estate duty adjusted with the Inland Revenue. The minute then proceeds—"Mr Buchanan then requested the trustees to formally convey and make over to him the residue of the estate in terms of the trust, and the meeting instructed the law agent, so soon as the confirmation was obtained to have the trust wound up and the estate, so far as not already done, transferred to Mr Buchanan as residuary legatee.'

These instructions were never carried out. The trustees never held another meeting, and, so far as appears, never concerned themselves in any way with the trust until 1907, when George Buchanan became bankrupt, and the present claim was made by the pursuers.

I shall now revert to the conduct of the trustees in regard to the business. During the truster's life the business had been, generally speaking, prosperous, having yielded to him an income of from £2000 to £3000 a year. It appears, however, that for some time before his death the businesses had not been so flourishing as formerly, because the grain mill was closed. It does not, however, appear whether that part of the business was given up, or only temporarily suspended during a period of depression in the trade. For sometime after the truster's death the business seems to have done well under the management of George Buchanan, because during the first year the profits are said to have amounted to £2500. Subsequently it appears that the business gradually declined until 1907 when George Buchanan became bankrupt. Until that year, however, he was able to pay the annuities to his mother and the pursuers.

Now the trustees were quite justified in allowing George Buchanan to manage the business after his father's death, because although not a partner he had assisted his father in the management, and the business fell to be conveyed to him. The trustees would also have been entitled to allow George Buchanan reasonable remuneration so long as he managed the business for them, but they should have remembered that until the business was conveyed to George it formed part of the trust estate for which they were responsible. The only thing, however, which the trustees ever did in regard to the business was to authorise the overdraft at the bank. They never had any accounts or balance-sheets submitted to them or in any way concerned themselves with the business. So long as George paid the annuities they were content.

In regard to the trust estate other than the business the trustees showed the same laxness. No trust accounts were ever submitted to them, or, so far as appears, ever called for. There is no ground for any charge of dishonesty on the part of the compearing defender Mr Eaton, and the explanation which he gives of his conduct seems to be, in the first place, that he had complete confidence in James Colquhoun (which is not surprising), and, in the second place, that he regarded George Buchanan (who was also a trustee) as the person who was truly interested in the trust estate. In these circumstances Mr Eaton seems to have thought that everything might be safely left in the hands of Colquhoun and George Buchanan. That attitude is intelligible, but it does not alter the fact that he was guilty of very grave neglect of duty, and the explanation hardly applies to the period after James Colquhoun's bankruptcy, when, although

Mr Eaton must have known that trust funds had been embezzled and the trust affairs left in confusion, he simply ignored the trust for a period of seven years, and indeed I observe he was not even present at the meeting of trustees on 19th April 1900, when David Colquhoun attended as law agent.

These being the circumstances, I have no doubt that as regards the general management of the trust the trustees were guilty of negligence which amounted to *culpa lata*. What, if any, was the loss to the trust estate which resulted from that general negligence is a question which I shall consider presently, but in the meantime it is necessary to refer to particular cases in which the trustees' negligence clearly resulted in loss to the estate.

I have already referred to the overdraft which George Buchanan was authorised to obtain from the bank. Shortly after that authority was granted he drew from the bank a sum of £1200, and handed it to James Colquhoun, who had represented that that sum was required for payment of death duties. That was not true. A tentative inventory had been prepared, but the inventory which was actually lodged was not adjusted till 1900, nor was the amount of the death duties settled till that year. I do not think that the precise date when the £1200 was paid to Colquhoun appears, but it must have been some time after 23rd November 1897, and on 20th May 1898 Colquhoun wrote to George Buchanan saying that he had paid out of the £1200 death duties to the amount of £633, 17s. 9d., that he had retained £66, 2s. 3d. towards expenses of the trust, and that he had repaid to George (as in fact he had done) the balance of £500. As I have said no death duties had in fact been paid, but Colquhoun had applied the £700 which he pretended to account for in his letter to his own purposes. I suppose that he thought that if he kept the whole of the £1200 George might make awkward inquiries, which would be avoided by making a show of accounting for the amount. The device was entirely successful, because George was satisfied with the statements in the letter. The fact that the death duties had not been paid and that Colquhoun had embezzled the £700 was not discovered until the end of 1899 (I suppose when Colquhoun's defalcations were discovered), and the trustees then, in order to find money for payment of the death duties, borrowed a sum of £800 upon the security of two of the trust properties. These were the properties of which the widow had the liferent, and she must have consented to postpone her rights to those of the bondholder. I suppose that the trustees borrowed the £800 upon the security of these properties, because they had already burdened the only other properties available with a debt of £4000, to which I shall presently refer.

I think, however, that the loss of the £700 embezzled by Colquhoun must be attributed to the negligence of the trustees. If they had required, as they ought to have done, trust accounts to be submitted to them from time to time, and had checked the payments for which Colquhoun took credit, it seems to me to be practically certain that the money could not have been embezzled. It was because he knew that the trustees were ready to accept without inquiry any statement which he chose to make that Colquhoun ventured to commit the fraud.

The second special occasion upon which the negligence of the trustees resulted in a large sum of money being lost to the estate arose in this way. In his trust-disposition and settlement the truster had declared that his surviving children (two sons and two daughters by a first marriage), other than John and George, should have no right to any share of his estates. These four children naturally claimed legitim, and it is admitted that there was no answer to that claim. They also, however, threatened to bring a reduction of the settlement on the ground of mental incapacity of the truster, and in this threat they were joined by the children of a daughter who had predeceased the truster. Ultimately the trustees agreed to pay to each of the four children £800, and to the family of the deceased daughter (who could not claim legitim) a sum of £500, and to enable them to make these payments they borrowed a sum of £4000 upon the security of certain heritable properties. The transaction is sought to be justified on the ground that the payments, in so far as they were in excess of the amount due as legitim, were a fair compromise of the threatened action of reduction.

Now there seems to be no room for doubt that although the truster was in bad health when he executed the settlement, and was a somewhat eccentric man, there were no grounds whatever for impugning his capacity to make a will. Further, there is good reason for believing that the action, although threatened, would never have been brought. Thus Robert Buchanan, one of the sons who claimed legitim, and who seems to have conducted the negotiations for his brothers and sisters as well as for himself, admitted that the threatened challenge of his father's will was dictated more by sentiment than reason, because he and those for whom he acted had been very badly treated. It was really James Colquhoun who settled with Robert Buchanan the amount to be paid, and he admits that he "had a kind of feeling that the first family had been badly used, and therefore I was a rather sympathetic negotiator." Of course, he had no right to allow his sympathies to influence him when acting as law agent for a body of trustees. George Buchanan says that he did not consider whether there was any justification for the proposed reduction of his father's will, and that he was guided by the advice of James Colquhoun. Mr Eaton, who was very intimate with the truster and had an interview with him when he made his will, says that although the latter was very ill, he was quite fit to

make a settlement. In regard to the amount which was ultimately agreed to be paid to the children, Mr Eaton says that he thought it was large, but that as James Colquhoun advised it, and George Buchanan was willing that it should be paid, he consented.

In regard to the amount of the legitim fund, the truster left very little money, his estate consisting almost entirely of heritable property and his business. The plant and machinery in the mill and hook factory were of considerable value, but the greater part consisted of fixed machinery. In October 1897 a valuation of the plant and machinery was made by a Mr Norman, and he valued the fixed plant at £5306, and the moveable plant at £462. My impression is that the witness Mr Ayton rightly estimates the amount of the legitim fund at not more than about £800.

It is therefore plain that the children claiming legitim were paid an altogether excessive amount. The greater part of the £3700 was certainly paid with the view of putting a stop to the threatened action of reduction, and that was a payment which in the circumstances the trustees were not entitled to make, at all events without the consent of all the beneficiaries. I think that it may be inferred that of the £800 paid to each of the four children, at least £500 related to the threatened action, because that was the sum paid to the family of the deceased daughter, who had no claim for legitim. That would leave £1200 which was paid as legitim, and although I do not doubt that that was much more than they were entitled to, if that had been all that was paid I should not have been prepared to say that the trustees had incurred personal liability, because the balance-sheet of the truster's affairs made up at the time of his death justified them in believing that the estate was of much greater value than it turned out actually to be. To the extent of £2500, however, I am of opinion that the payments were *ultra vires*, and made without any warrant whatever.

The present position of matters is this, the truster was at his death possessed of five separate heritable properties. There was, first, a villa at Girvan, and secondly a dwelling-house at Strathbungo. These are the properties of which the truster's widow had a liferent. They were valued in 1899 by Mr Binnie at £500 and £725 respectively, but their value is now estimated to be only £233 and £523. These are the properties over which the bond for £800 was granted, and it is in evidence that the bondholder has in vain tried to sell them. The third property is situated in Clyde Street, Glasgow. This property appears to be now of no greater value than a debt of £1000 with which it is burdened. That debt ought to have been cleared off before the truster's death, because he gave James Colquhoun £1000 for that purpose. The latter, however, embezzled the money, and the property has remained burdened with the bond ever since. I do not, however, think that as the evidence stands the trustees can be charged with negligence in not discovering that James Colquhoun had been put in funds to discharge this bond and had not done so. The fourth property is in West Street, Tradeston, and the fifth property in Dale Street, Tradeston. Those are the properties upon the security of which the trustees borrowed £4000, and they have recently been sold by the bondholders, after several exposures, for that sum, so that there was no reversion to the trust. The ground and buildings were valued by Mr Binnie in 1898 at £6300, and the fixed machinery was valued by Mr Norman at £5306, and I think that there can be no doubt that by 1907 the value had greatly depreciated.

The result is that there is no estate available for payment of the pursuers' annuity, and their claim is that the trustees, of whom Mr Eaton alone has any means, should be ordained to set aside and invest a sum sufficient to secure payment of the annuity, or alternatively to pay to the pursuers a sum of £4371, which, according to Mr Fenton's evidence, represents the purchase price of the pursuers' annuity. As, in my opinion, the trustees have been guilty of *culpa lata*, the claim of the pursuers must be sustained unless it can be established that their loss was not due in whole or in part to the negligence of the trustees, but would have been equally incurred if the trustees had in all respects done their duty.

Now, in the first place, it was upon the business that the annuitants had to a large extent to rely for payment of their annuities, because apart from the business there was practically no moveable estate, and the free rents of the heritable properties were quite insufficient to meet the annuities. The Girvan property and the Regent Park Square property were subject to the widow's liferent; and the rental of the Clyde Place property was little more than sufficient to pay interest upon the £1000 with which it was burdened. As regards the properties in West Street and Dale Street, Tradeston, although the total free rental is stated in Schedule C of the inventory at £651, 4s. 5d., that was not the amount which was available for payment of the annuities, but only about one-third thereof. I arrive at the conclusion in this way—the gross rental of the two properties was, according to the schedule, £976, but of that sum £653 was the estimated rental of the business premises, which left only £323 of gross rental, or about £216 of net rental, available for payment of the annuities of £500.

In regard to the business, the witness Mr Rainie gives a statement of the profits from 4th October 1897 until 30th June 1905. That statement, however, includes as profits of the business the rents of the heritable properties, which the trustees appear to have allowed George Buchanan to uplift. In the first period—from 4th October 1897 to 30th June 1898—the profits reached the large sum of £2098. In the following year,

however, they fell to £871, and in the three succeeding years to between one and two hundred pounds. Then in the year ending 30th June 1903 there was a loss of £202. The year to June 1904 shows a profit of £614, but to the extent of £607 that appears to have been money recovered from an insurance office in respect of loss by fire. In the year 1905 the business seems to have revived somewhat, because a profit of £308 was made. What happened in the two following years, until George Buchanan became bankrupt, is not given by Mr Rainie, but I think that there must have been large losses, as George Buchanan says that the average of what he got from the business from his father's death down to the time of his insolvency was only £125 a-year. It is evident, therefore, that except for the first year after the truster's death the business was back-going, and it is irrelevant to inquire whether or not that was due to bad management on George Buchanan's part, because the trustees were bound to make over the business to him, and ought to have made it over within a year or so of the truster's death.

In these circumstances, the question arises whether, if the trustees had not been guilty of negligence, there is any reasonable ground for supposing that George Buchanan's conduct of the business would have shown materially better results. He says that the main reason of his want of success was insufficiency of capital, which was limited to what he could obtain by overdrawing his bank account. Now at first sight it might be assumed that George Buchanan would have had more command of capital if the trustees had not burdened the Tradeston properties with £4000 of debt. I think, however, that that would not have been the case, because if the trustees had not burdened these properties at all, but had conveyed them to George along with the rest of the estate, they would have been bound to do so subject to this real burden of the annuities, and in that event I think that it is plain that the properties would not have been of any value as a source of credit.

It therefore seems to me that the only prejudice, in so far as the conduct of the business was concerned, which George Buchanan suffered by the properties being burdened with £4000, was that out of the proceeds of the business he required to pay the interest upon that sum, which he puts at £140. That, no doubt, was a considerable addition to the yearly obligations which he had to meet, but I do not think that it is reasonable to suppose that it made the difference between failure and success. If he had not been burdened with that interest he might have struggled on for a few years longer, but I think that the course of events showed that the business was doomed. It may be said that that is mere speculation upon which the Court is not entitled to embark, and no doubt it cannot be said to be absolutely proved that even if the Tradeston properties had not been burdened the business would have failed. But I think that the reasonable inference from what actually happened is that that would have been the case.

It must, I think, further be kept in view that if the trustees had done their duty, and had conveyed to George Buchanan the properties without burdening them with any debt, then in the event of the business failing the properties and their rents would have been liable, not for the pursuers' annuity only, but also for the widow's annuity of £300. No doubt the widow, having been one of the trustees, cannot make any claim in respect of her annuity, but I think that in estimating the loss which the pursuers have sustained by the trustees' breach of duty, it is legitimate and necessary to take into consideration the fact that if there had been no failure of duty both of the annuities would have been a charge against the trust estate, and in the event of there not being enough to pay both in full both would have had to undergo a reduction.

Now if the business had failed, as it did fail, and as I think it would have failed in any event, I do not think that there was any chance of the properties yielding a sufficient amount of revenue to pay the anuities in full. As I have already pointed out, the net revenue of the properties as given in the schedule was £651, but two-thirds of that was the estimated rental of the business premises, which I assume included the fixed machinery. It may be doubted whether at any time after the truster's death the estimated rental of the business premises could have been obtained, but I think that it is quite plain that it could not have been obtained in 1907, when the business was stopped and payment of the annuities ceased.

The conclusion therefore at which I arrive is, that even if the trustees had in all respects carried out the instructions of the testator, the pursuers would not now be in the enjoyment of their full annuity, but only of an annuity very restricted in amount. My brother Lord Dundas has gone very fully into the question of the precise amount for which the defenders should be held liable, and as I am satisfied that the result at which he has arrived does substantial justice between the parties, I need not say more than that I concur with him.

LORD ARDWALL—By his trust-disposition and settlement dated 18th August 1897, Mr James Buchanan, who died in September of that year, directed his trustees to pay to the pursuers and the survivor of them, during all the days and years of their joint lives and the life of the survivor, an annuity of £200 sterling, payable in advance at such dates and by such instalments as his trustees should think proper, and by the seventh purpose of his trust he directed and appointed his trustees to make over to his son George Buchanan the whole residue of his means and estate, including his businesses, "but that always with and under the burden" . . . of the before-

mentioned annuities "to my said wife and to my son John and his wife." Under these purposes I think it was one of the primary duties of the trustees to make provision for the annuities being regularly paid as directed, and I think that on a sound construction of the deed it was intended that payment of these annuities should be secured in some way when the residue was handed over to George Buchanan. Instead of anything of this sort being done, the trustees (1) failed to take any security for payment of the annuities, (2) failed to make a proper transfer of the heritable property or the businesses to George Buchanan, and (3) failed to take any means of securing at the time they informally handed over the businesses to him that these annuities should be regularly paid. They thus took all risks on themselves in the event of the annuities not being paid. This failure properly to administer the trust was, it is true, done under the advice and with the concurrence of their law agent Dr James Colquhoun, but this does not absolve the trustees from liability. Colquhoun himself adopted the view that the estate was practically George's from the very first, and that the estate was of such a value that there was no difficulty with regard to the annuities. He says—when speaking of the absurdly extravagant compromise made with the children of the truster other than George and John—"I did not think that the annuitants had any interest practically in the matter. It was not my view that it was quite unnecessary to submit this arrangement for the approval of the trustees, for I did submit it to the trustees. I thought it was practically a matter of form, because I regarded the estate as being practically George's from the very first," and he further says —"The annuitants had the whole estate to fall back upon. I did not regard the annuitants as being in the slightest jeopardy. It never dawned upon me that there was the slightest difficulty in the annuitants being paid out of an estate worth from thirty to forty thousand pounds."

It shortly turned out that the estate was far from being worth this amount, and that, in particular, the moveable estate, out of which legitim was due, was worth only about £2400, the fund available for legitim being worth only about £800, and accordingly the compromise, as it was called, which was effected with the other children regarding legitim, and under which the trustees paid in all £3700, was one entirely disproportioned to any claim they could possibly have against the estate, and in my opinion the trustees were guilty of gross negligence in entering into it. It was said that there was a threat of reduction of the settlement, but it now turns out that this threat was entirely without foundation, as indeed the trustees themselves might have known and ought to have known at the time, and accordingly it was a piece of negligence on their part to pay away trust moneys for a settlement of a threatened action which they should have known would come to nothing. This compromise, as it was called in the argument, led to the burdening of the most valuable part of the heritable estate with a bond for £4000, under which the properties have recently been sold at a very serious loss owing to the depreciation in the value of property. I think that gross negligence has been proved against the trustees.

In the first place, they got no proper valuations of the estate till long after they had entered on the administration of it, and no proper accounts of the trust estate were kept; second, they took no steps whatever to secure payment of the annuities; third, they entered on a so-called compromise of claims for legitim and a threatened action of reduction, which a consideration of the amount of the moveable estate and their own knowledge of the mental state of the testator when he executed the will should have shown them to be a most extravagant one; fourth, this extravagant compromise led them to burden unduly the most valuable portion of the heritable estate; and fifth, they apparently lost other £800, partly through their own negligence and partly through the fraud of the Colquhouns.

In these circumstances, I am of opinion that the defenders as trustees are now bound to make good to the pursuers the loss caused to them by their negligence. The only difficulty is, first, as to the amount for which they are liable, and, second, as to the way in which that liability is to be met.

On the first of these points I am of opinion that the liability of the trustees should be limited to the amount by which the pursuers have been the losers owing to the trustees' negligence. The total insolvency of the trust is due to a number of other causes which would have been operative had the trustees administered the trust according to law and in the way prescribed by the testator.

In particular, it is clear that if there had been a formal transfer of the business to George Buchanan, that would have made no difference in the result so far as the business is concerned, because George Buchanan really managed that business for himself, and it decayed, and finally failed, owing to the increased free importation of American flour and other causes for which the trustees are in no way responsible. Further, there has been an enormous depreciation in the value of house and other heritable property in Glasgow since the truster's death. I think it is the duty of the Court to endeavour to ascertain how much of the loss caused to the pursuers has been due to the negligence of the trustees and how much to other causes for which they are not responsible. This question is one of some difficulty, but in my opinion it may be satisfactorily solved in the manner proposed by my brother Lord Dundas, whose opinion I have had the advantage of perusing as well as of verifying the calcula-

tions upon which it is based. In these circumstances it is unnecessary for me to go into the figures, as with regard to them I entirely agree with the result arrived at by him. The manner in which the pursuers' claim is to be satisfied must depend to some extent upon the arrangements parties are willing to make.

LORD DUNDAS—After careful and anxious consideration of this case I agree with your Lordships in thinking that it is impossible to avoid the conclusion that the trustees were guilty of *culpa lata*. It is unnecessary for me to state my grounds for this conclusion, because they are the same as those which your Lordships have already expressed in full and precise detail. I further agree in holding that where *culpa lata* is established against trustees, the *onus* is upon them to prove, if they can, that the deficiency of the trust estate to meet the demands of beneficiaries would and must have arisen (in whole or in part) even if the trustees had fully and faithfully performed their duty. The sole compearing trustee here has put forward a defence of this nature, and I have come to be of opinion that he is entitled to be dealt with upon a less rigorous basis than that on which the Lord Ordinary has proceeded.

The trustees are charged with having illegally put a bond for £4000 upon the properties in West Street and Dale Street, and a bond for £800 upon some other properties forming part of the trust estate. It seems to me that the pursuers could in no view put their claim higher than that these sums, amounting together to £4800, should be replaced by the trustees; but, for reasons to be explained, I do not consider that the claim can be properly enforced to its full extent.

It was argued for the pursuers that the trustees were bound to take a bond or other personal security from George Buchanan before transferring the business to him, or letting him act as if it belonged to him; but assuming this to be so (which, personally, I rather doubt), the facts of the case make it only too clear that any such security would have proved valueless in the result. It was further argued for the pursuers that George Buchanan's bankruptcy was precipitated by his having to pay £140 of interest in respect of the bond for £4000 upon the West Street and Dale Street properties. But even if the trustees had done their duty in this matter and had made the annuities in favour of the pursuers and of Mrs Buchanan preferable real burdens upon those properties, George Buchanan would still have had to pay the interest on the (*ex hypothesi* postponed) bond for £4000, for he was a party to the compromise transaction which rendered necessary the raising of that sum, and however foolish and extravagant the compromise may have been, it was not a step which the trustees would have had power to prevent George Buchanan from taking if he chose to do so. So far, then, as regards the £4000 bond, if the annuities had been properly charged as preferable real burdens upon the said properties, it seems to me that the best the pursuers could possibly have done for themselves, when George Buchanan became bankrupt, would have been to invoke the concurrence of his trustee in sequestration, and sell the properties, and if this course had been followed it seems reasonably certain—not as matter of theory or speculation, but from the facts as they have actually happened—that no higher price than £4000 could have been realised. The sale I am supposing would have been, as the actual one was, a forced sale; and the time, the state of the market, and the whole conditions must have been the same. The price then of £4000 would have been available towards the purchase of annuities for the pursuers and the widow respectively, which I apprehend must be taken as ranking *pari passu* on the truster's estate. And although Mrs Buchanan cannot in the circumstances make any claim for her annuity, it is none the less proper, as I think, to take it into account in ascertaining, as I am endeavouring to do, the extent to which the pursuers have been damnified by the trustees' failure in duty; and the pursuers' claim on this head appears to me to be absolutely limited to an annuity of such amount as could have been purchased with their share or proportion of the £4000. Now Mr Fenton's evidence establishes that the purchase price of an annuity of £200 for the pursuers is £4371, and that of an annuity of £300 for the widow is £2155, these two sums making together £6526. By a simple sum in proportion it appears that £2680 or thereby represents the amount which, in my judgment, Mr Eaton would have to pay if he elected to submit to judgment under the alternative rather than under the principal conclusion of the summons. The sum of £2680, which (as I tentatively figure it) would purchase an annuity of about £123, seems to me to be all that the pursuers can justly demand upon this footing. If, on the other hand, Mr Eaton prefers the course adopted by the Lord Ordinary, consignation of a sum of, say, £3700 would seem to be ample in order to secure an annuity of £123 or thereby. The arrears payable by Mr Eaton would fall to be adjusted in regard to an annuity of the restricted amount of £123, or whatever the true figure may be ascertained to be. Mr Eaton is, in my judgment, entitled to elect, within such reasonable time as your Lordships may allow him, to which of the alternative methods he finds it more convenient to submit; and the parties should have no difficulty thereafter in adjusting figures which will appropriately give effect to the views above indicated.

I now turn to the £800 bond. The evidence in regard to it is meagre and unsatisfactory, but so far as its creation is explained at all it seems that the trustees required the money in order to pay the estate duties, for the settlement of which their law agent had previously received trust money and embezzled it. What then have the pursuers lost by the failure of

the trustees to secure their annuity as a preferable real burden on the properties which they actually bonded for £800? The position is somewhat different from that of the £4000 bond already dealt with, for the truster's widow had a right of liferent of the properties now in question, and apparently must have consented to the £800 bond being put on preferably to that right. It seems clear that as matters stand the value of these subjects is not more than £800; indeed, it is probably less, but as the trustees have not proved, so far as I see, what its actual value is, it must I apprehend for the purposes of this case be taken at £800. But here, as with the other bond, it seems plain that the pursuers' loss through the trustees' failure in duty is represented by only a proportional part of that sum. In the first place, the widow's liferent stands prior to their claim, though I do not think that fact can be pleaded as a bar to the pursuers' recovery in this action of what they can be held truly to have been lost by the trustees' failure to secure their annuity as a real burden on the subjects in question. If the widow's liferent of £800 be assumed at £25 per annum, about 3 per cent.—a figure to which I should think the pursuers could hardly take exception—one can deduce from Mr Fenton's figures, already alluded to, that a sum of about £180 would be required to purchase or secure an annuity for the widow representing the equivalent of her liferent. The balance of the £800 (say £620), would then, I apprehend, be applicable towards the annuities of the pursuers and the widow respectively, in the proportions indicated by Mr Fenton's figures, and these may, for the purpose of illustration and subject to actual ascertainment and adjustment, be roughly stated as £415 and £205 respectively. Mr Eaton is therefore, in my judgment, liable to pay the pursuers upon this head of the case the sum of £415, or whatever the precise figure may turn out to be, and that in addition to the amount—£2680 or thereby—falling to be paid by him in respect of the matter previously dealt with, and arrears of restricted annuity. If he should prefer the alternative footing of consignation, I apprehend that he would have to consign on this head of the case, and in addition to the amount (£3700 or thereby) falling to be consigned by him in respect of the matter previously dealt with, such a further sum as would fairly secure the proportion of the pursuer's annuity represented by the £415 or thereby above mentioned. I think the figure would be about £600.

I consider that if Mr Eaton's liabilities are computed upon the lines I have endeavoured to explain, the result when reduced to accurate figures—and the ascertainment of these ought not to present any real difficulty—will fully and properly satisfy the pursuers' just claims against the trustees.

The defender (reclaimer) appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal from an interlocutor of the Second Division of the Court of Session, dated the 16th of March 1910, whereby James Eaton, the appellant, one of the trustees and executors of a certain trust-disposition and settlement, dated the 18th of August 1897, of James Buchanan deceased, formerly fish-hook manufacturer and grain miller of Tradeston, Glasgow, was ordered to pay to the pursuers in the action three sums of £3095, £64, 9s., and £70, 15s., respectively, making together the sum of £3230, 4s., with interest on the first-mentioned sum from the 15th of May 1907 till paid at 5 per cent. per annum, in respect of certain breaches of the trust created by the said disposition and settlement, alleged to have been committed by the appellant.

James Buchanan died at Glasgow on the 28th September 1897, aged seventy-eight years. He left him surviving his widow Jane Buchanan, a co-trustee of the appellant; three children by his first marriage, two sons, William his heir-at-law, and Robert, the latter an engineering expert, living and carrying on business at Liverpool, a daughter, and certain grandchildren, issue of another daughter named Mrs Ramsay, who had predeceased him; and two sons named George and John, and a daughter, issue of his second marriage. By this trust-disposition he cut out all the children of his first marriage, and his daughter by his second marriage, leaving them nothing whatever. His widow, his son John, John's wife, and his son George, were his sole beneficiaries.

Of the several persons appointed trustees of this settlement, all but three, namely, the appellant, a clothier carrying on business in Bridge Street, Glasgow, a friend of the deceased, Jane, widow of the deceased, and George, his son, declined to accept office.

James Buchanan was admittedly a somewhat eccentric man, but is stated to have been very strong-minded, and keen and successful in business. For some time before his death he had discontinued the milling business, finding that owing to foreign competition it was no longer profitable, but from his other business, which had been long established, and was at the time of his death in a flourishing condition, he derived a profit amounting to about £3000 per annum.

This business was carried on in certain premises in West Street and Dale Street, Tradeston, heritable property of the deceased. His interest in these, exclusive of all machinery, fixed or movable, erected or upon them, was valued at £6275. The portion of the machinery classed by the valuator as fixed was valued at £5506, 7s. 6d., and that classed as unfixed at £462, 17s. 6d., but whether this classification was correct in law or not was not decided in the case. No evidence, indeed, was given upon which it could be decided, and it is not disputed that there are few questions more difficult to determine than whether machinery placed in a mill or factory has been so fixed to the freehold

as to lose its character of personal property and become heritable propery. It is obvious, therefore, that the amount of the testator's personal assets depended to the extent of £5306, 7s. 6d. on how the point would in this instance be ruled in a court of law.

The interest of the deceased in his other heritable property, namely, No. 13 Regent's Park Square, Strathbungo, and Rose Villa, 24 The Avenue, Girvan, was valued at the sums of £725 and £500 respectively. His account at his bankers was at the time of his death overdrawn to about £700, and it is very difficult to ascertain with accuracy what was the then entire value of his personal property, and therefore what the amount of the fund properly divisible amongst his disinherited children as their legitim. Lord Low appears to have fixed the amount of his clear movable assets at £2400, and therefore the legitim fund at £800; while Mr Lawrence, on behalf of the appellant, contends that, exclusive of the goodwill of the business, which he puts at about £7000, the value of the movable assets must have been about £15,000. The estimate of the learned Judge, which is founded on the evidence of a Mr Ayton, the pursuer's solicitor, is obviously erroneous in this, that it does not include anything for goodwill—a most extraordinary omission — and, moreover, it is based upon the assumption that the so-called fixed machinery had become heritable property.

If this old, well-established, and profitable business had been sold or valued as a going concern, a sum of between £6000 and £7000, one would think, must have been fixed for the value of the goodwill. It must have been worth something, and there is no justification, in my view, for ignoring it in the estimate of the assets. It would appear to me, therefore, that the estimate adopted by the learned Judge is certainly wrong to the extent of the value of the goodwill, and may be wrong, in addition, to the value placed on the fixed machinery, £5506, 7s. 6d. Now such was the trust estate which the appellant had to administer. The deceased, the appellant's old friend, must be taken to have had confidence not only in the latter's honesty, which is not impeached, but in his prudence, soundness of his judgment, business capacity, fitness to deal with the assets committed to his charge, and to discharge the duties of the office in which he had been placed.

The rule as to what diligence is required on the part of a trustee is in *Learoyd* v. *Whitely*, 12 A.C. 727-733, laid down by Lord Watson in these words—"As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs." And Lord Blackburn in *Speight* v. *Gaunt*, 9 A.C. 1, at p. 20, says — "It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are."

The question for decision is, has the appellant in this case fallen short of that standard, and, if so, have the respondents been damnified by that default, and to what amount, if any? In many matters he has done all that was required of him. It is unnecessary to deal with those instances. He had the misfortune to continue as his law agent for the purposes of the trust the confidential law agent of the deceased, a Mr James Colquhoun, a man then of high standing and acknowledged character in his profession, but who subsequently proved to be an unscrupulous and accomplished knave. As an example of the manner and the spirit in which things have been pushed against the appellant to show that he was negligent in the discharge of his duties as a trustee, it is contended that the deceased having in his presence, and that of Colquhoun, stated that there were no bonds on any of his property as he had given Colquhoun some time before money to pay off the last remaining bond, and asked Colquhoun if this was not so, to which the latter assented, the appellant should have examined into this past transaction between the deceased and his solicitor which took place before his appointment as trustee at all, and should have obtained inspection of Colquhoun's ledger, when he would have ascertained what was subsequently discovered, that Colquhoun had not paid over the money entrusted to him but had appropriated it to his own purposes. That contention is, I think, utterly unsustainable, and besides it is admitted that even if the appellant has in this instance been negligent the pursuers have not sustained any loss by his default.

Another matter of a somewhat similar character was treated as a loss for which the appellant was made responsible.

George Buchanan, the residuary legatee, was authorised by the trustees to obtain, on their behalf, a credit from his bankers to the extent of £2000. By virtue of this authority he obtained and handed over to Colquhoun a sum of £1200 to pay estate duty. For this sum the latter accounts in a letter dated 28th of May 1898, which ran as follows:—

"George Buchanan, Esq.,
"Dale Street, Tradeston.
"20th May 1898.
"*Buchanan's Trust.*

"Dear Sir,—We have your favour of to-day, and, as requested, beg to say that of the £1200 received by us towards the inventory and estate duty, there has been applied in payment of duty . £633 17 9
and we have repaid you . . 500 0 0
making together the sum of . £1133 17 9
and leaving £66, 2s. 3d. in our hands towards expenses of trust.—Yours truly,
"J. & D. T. Colquhoun."

In point of fact, Colquhoun, though he did repay the £500 to George, did not apply the sum of £633, 17s. 9d. in payment of the estate duty at all. He appropriated it to his own use, but there is no proof whatever that George Buchanan did not repay to the bank the sum so advanced to him. If so, the estate of the deceased has lost nothing by Colquhoun's fraud, since the estate duty should, in any event, be paid out of the

assets. But even if it were otherwise, I fail to see how entrusting, or causing to be entrusted, a law agent of good repute with money to pay estate duty, is an act of negligence on the part of a trustee, for any loss resulting from which he should be made personally responsible. It is quite true that it has been decided that if a trustee chooses to convert his solicitor into his banker, and leave trust funds in that solicitor's hands, he will be responsible if the solicitor should fraudulently misappropriate them, but putting a solicitor in funds to pay estate duty is quite a different thing. Indeed, it would appear to me to be one of the things which the solicitors of executors or of trustees are, in the ordinary course of business, frequently entrusted to do. And if so, according to the judgment of Lord Blackburn already quoted, a trustee so acting should not be held to blame. The estate duty not having been paid, it was necessary to raise, by mortgage of the heritable property, a sum of £800 in order to pay it. It does not appear to me that it was at all possible under these circumstances to hold the appellant personally liable for this sum as it was contended he should be held.

The two, and the only two, points of substance in the case remain to be dealt with: James Buchanan, by his above-mentioned disposition, directed his trustees to pay to his wife an annuity of £300 per annum during her life. He also directed them to pay to his son John and Helen, his wife, and the survivor of them, during their respective lives, an annuity of £200 per annum, at such dates and by such instalments as they the trustees should think proper. He further directed them in the seventh place in the words following— . . . (*quotes, v. sup.*). . . .

It is now doubtful, owing to the fact that Colquhoun's papers were made away with, whether the trustees ever conveyed this residue to George Buchanan. Deeds of some kind were executed, but what was their precise nature has not been shown, and it must, I think, be taken for the purposes of this case that no such conveyance or assignment of it was ever executed. The trustees, however, allowed George Buchanan to undertake immediately the management of the business. That, as appears from the language above quoted, was according to the intention of the deceased. They further permitted him to continue to manage the business up to the year 1907, when he became bankrupt. At first he managed it with success, realising considerable profits. The profits, however, soon and speedily dwindled, and ultimately, for want of capital it is alleged, the concern became insolvent. During these nine years, however, George Buchanan paid to the respondent the annuity of £200 per annum.

Robert Buchanan, irritated no doubt by the way in which he and his sisters by the first marriage, as well as the children of his deceased sister Mrs Ramsay, had been treated by his father, immediately after the latter's death threatened to institute legal proceedings on their behalf as well as on his own, with a view first to have the disposition by his father of his property set aside on the ground of his want of disposing capacity and of undue influence exercised upon him by George Buchanan, and secondly, to recover their legitim share of the father's assets. It is clear from the evidence of the appellant, whose truthfulness is not impeached, that he was fully aware that this latter question involved two others which Robert designed and intended to raise, namely, first the knotty question, on which Robert was supposed to be an expert, whether the so-called fixed machinery had in contemplation of law become heritable property or not, and second, the question whether in estimating the amount of the personal assets of the deceased a value should not be put upon the goodwill of the business.

It is quite true that the appellant and his legal adviser Mr Colquhoun, when this threat was made, were confident that the deceased was a man of sound mind at the time he made the impeached disposition of his property, and quite capable of making it.

It is, I think, equally clear on the evidence that neither of them believed that any undue influence had in fact been exercised upon him, or that if such an attempt had been made he would have yielded to it; but there is no evidence whatever to show that they did not believe, or ought not to have concluded, that at the time the threat was made it was not a real threat, or that Robert was not in earnest, and did not intend to carry out his threat and institute these proceedings.

As far as the claim for legitim, as well as the mode in which the amount of the personal assets were to be ascertained, are concerned, it was necessarily a real threat. As to these matters, at all events, the appellant and Colquhoun must as reasonable men have concluded that Robert Buchanan, to use a popular phrase, "meant business." And unless they were not only insensible to human feelings, and ignorant of the practice of courts, the appellant and his adviser must have been fully conscious that, should a suit be instituted to impeach this settlement, the sympathies at all events of any jury the case came before would most probably be excited strongly in favour of the disinherited children of the deceased, who, to use the words of Lord Johnston, he had treated "so scurvily."

The appellant, his co-trustees, and the legal adviser had before them valuations of this machinery and of the heritable property of the deceased, made by valuators whose competence and honesty is not impeached.

The question of a compromise of Robert Buchanan's claims was considered, discussed, and approved of by all of them, and ultimately carried out. The appellant in the following passage of his evidence details, with transparent honesty and perfect frankness, the advice he received from

his legal adviser, in whom he absolutely trusted, the motives which actuated him, the objects he desired to effect.

In the record, referring to the compromise, he says—"(A) The first I heard of that was at a meeting, when Mr Colquhoun told me that he had discussed the matter with George Buchanan, and he had agreed to give £800 each. I thought from what had passed between us before, that that was more than we had considered before. Mr Colquhoun said, 'You cannot do anything else; you cannot get out of it.' I expressed surprise, and I was surprised that George should have agreed to that sum. On the other hand, George was the residuary legatee and Mrs Buchanan was the principal annuitant, and Mr Colquhoun was in favour of it. Mr Colquhoun said that if we went into litigation it would cost us far more. He said that he believed that we would gain the case if we went into litigation, because we could prove that Mr Buchanan, although he had some peculiarities, was perfectly sane and was a strong-minded man. He never met a stronger-minded man. Mr Colquhoun said that even although we won our case it would cost us something, and after we were done with it we would still have to face the legitim and the difficulty of deciding what was movable and what was heritable. (Q) Are you clear that that question of deciding what was movable and what was heritable was raised by Mr Colquhoun at that time?—(A) Yes, I am perfectly clear about that. (Q) Was anything said as to the method by which that would require to be settled?—(A) No."

He also states that he was led to believe that they would have to get machinery experts to meet Robert; that it would cost a great deal, and that by paying this sum they would square the whole matter and let the trust go on; that they considered it the interest of all parties to effect this compromise; that they all had agreed to it except John.

Again, lower down, he says—"I considered that, supposing the money paid out was a little more than the legitim, still we were safer to do that than to run the risk of all the trouble and worry of litigation." On the next page he states that he was greatly swayed by the opinion Mr Colquhoun had expressed that he thought at the time ample would remain to meet the annuities, and that therefore it was a matter which chiefly concerned George Buchanan; that nobody could have foreseen the depreciation of the property which occurred in the succeeding ten years; that he had gone over with Colquhoun the inventory prepared for the payment of estate duty, in which the value of the estate was brought out at from £23,000 to £24,000; that he thought the estate was value for much more than this, and considered that they had done the best for all parties concerned. On cross-examination he stated—"We paid that sum of money to prevent all that and to square these different things, viz., the action for reduction, the legitim, and to save us going into the question of the value of the goodwill."

The evidence of Colquhoun is in substantial agreement with that of the appellant. He says he on a very strict scrutiny thought the estate might give £3800 for legitim alone; that he advised a settlement for that sum; "that his strong opinion was that it would have been exceedingly foolish on the part of the trustees, and especially of George, not to have settled the matter on the terms proposed, because he thought it was a very favourable settlement, in view of the determination which had been expressed to take the matter into Court." There was no risk, he thought, of the action being lost, but there would have been the expense and exposure, and it would have been very painful to have had Mr Buchanan's condition a subject of controversy before a jury to institute an action of reduction.

Robert Buchanan does not deny that he threatened to institute an action for reduction of his father's will or settlement; nor does he venture to state that at the time he made the threat he gave any intimation that he did not intend to carry it out, though at the trial he did say he challenged the will from irritation caused by its unfairness—a very different thing, however, from saying he did not intend to proceed. He says he treated the machinery as movable property, and on that basis estimated his father's personalty at from £12,000 to £14,000, and compromised on the terms of receiving £800 for each of the children and £500 for Mrs Ramsay's children, she having got £500 from her father already; that he thought from his knowledge of his father's estate this was a very small sum to accept. This compromise was carried out by an agreement in writing signed by all the parties interested.

It is contended that the appellant was guilty of negligence in consenting to it. He may have overestimated to some extent the amount of James Buchanan's personalty; he may have omitted to take some steps in the transaction with sufficient formality or to have fortified himself sufficiently with numerous and possibly conflicting valuations of experts or audits of accounts; but it certainly would appear to me that he dealt with this matter of the compromise, advised as he was, with the common-sense, shrewdness, and sagacity of a practical man of business. The deceased knew him well. It is not suggested that the appellant did not act honestly according to the best of his judgment. It was on that judgment James Buchanan relied. Much weight must therefore be given to his decision. It may be that looking back now on all the facts one might think that some other course would have been wiser than that which he took, but that is not enough. I confess I am utterly unable to see that the appellant in agreeing to this compromise acted otherwise than a man of ordinary prudence might be expected to act in the reasonable management of his own private affairs, provided always

that he was in a position to procure the money necessary to enable him to carry out the agreement into which he had entered. It is only necessary to look at the balance-sheets and valuations which were given in evidence to see that the requisite money could only be procured by the trustees in one of two ways, either by selling, under the powers conferred by the settlement upon them, this business as a going concern—a course which would manifestly have defeated the intention of the settlor and have been most injurious to the interests of all the parties concerned—or by exercising the other power conferred upon them, namely, the power to borrow upon the security of the trust estate or any part of it. They exercised the latter power and borrowed upon mortgage of the heritable property, the only security they really had to give, a sum of £4000 from the University of Glasgow.

This has, I understand, been held to be a good and valid charge. It is in front of the annuities. The property has vastly deteriorated. The mortgagees have sold, with the result that only enough has been realised to satisfy the mortgage debt, and nothing now remains to meet the annuity payable to the respondents. One must have sympathy for them.

The Court of Session held that the appellant was guilty of negligence and a breach of trust in not taking steps to secure the payment of the annuities in priority to any sum he might borrow for the purpose of carrying out the compromise. If the annuities were, by the words of the seventh clause of the will, read with the context, constituted a real burden on the heritable property of the settlor, that decision would in my opinion be right, and the appellant would be bound to compensate the respondent for the loss they have sustained by reason of his neglect to do this; but if the annuities were not by those words constituted a real burden on that property, then the appellant would by this omission have violated no duty, have been guilty of no breach of trust. This is, I think, clear from the judgments of Lords Watson and Shand in the case of *Cowie* v. *Muirden*, 20 R., pp. 81, 86, 87, decided in your Lordships' House. The serious and much-debated question then is, do the words of this clause, taken with the other clauses in the settlement, constitute these annuities a real burden within the meaning of the Scotch law on the heritable property of James Buchanan, or indicate an intention on the latter's part that they should be such a burden?

In my view, having regard, in addition to the decision in the case already cited, to the decisions in the two following cases, namely, the *Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 296, 306, 307, and *Williamson* v. *Begg*, 14 R. 720, 722, in which the words were much stronger than in the present case, the answer to that question must be in the negative.

I am therefore unable to concur in the view taken by the learned Judges of the Court of Session. With the utmost respect to them, I think that, judged by the established rule and standard, the appellant did not fail in his duty in any respect, that he was not negligent, and that the decision finding him to have been so was erroneous and should be reversed, and the appeal allowed with costs.

EARL OF HALSBURY—I am of the same opinion.

LORD SHAW—The late Mr James Buchanan, who died in September 1897, left a trust-disposition and settlement, under which he conveyed his whole estate to certain trustees. Three of these accepted, namely, the present appellant Mr Eaton, and the testator's widow Mrs Buchanan, and his son George Buchanan. These trustees were defenders in the present suit. For reasons which are apparent in the brief narrative which follows, the widow and son did not defend the action, and it is clear that the brunt of any decree obtained by the pursuer would have to be borne by the appearing appellant Mr Eaton. That gentleman was a clothier in Glasgow, and a friend of long standing of the testator. Mr Buchanan died at the age of 78, and shortly after the execution of the settlement.

By the third purpose of that deed the trustees were directed to allow Mrs Buchanan the liferent of certain properties of the testator in Glasgow and Girvan. By the fifth purpose they were directed to allow the widow an annuity for life of £300 sterling per annum. By the sixth purpose they were directed to pay to the testator's son John Macgregor Buchanan, and his wife, or the survivor of them, an annuity of £200 sterling "at such dates and by such instalments as my trustees shall think proper." The question which is raised in this case bears upon the rights of the annuitants John Macgregor and his wife, who bring the present suit, and have raised the points which have given rise to the very fully considered judgments of the Courts below. Substantially the case is that the interests of John Macgregor Buchanan and his wife as annuitants have been improperly sacrificed by what amounts to maladministration upon the part of the trustees. And it is said that they have illegally parted with the residue of the estate without securing the annuity out of the heritable portion thereof. The pleadings are long, but that is the real case which is made.

The residue of the estate was dealt with by the seventh purpose of the trust in this language—(*quotes, v. sup.*). It was declared that the provisions in favour of wife and children were to be in full of all claims and demands "competent to them by and through my death as terce, *jus relictæ*, legitim, or otherwise." A further declaration was made in these terms—"It is my intention that my sons William Buchanan and Robert Buchanan, and my daughters Mary Buchanan or M'Dougall and Jane Buchanan or Trill, shall have no right to any share of my estates." This clause constituted a plain disinherison of

these children. Three of them, namely, William, Robert, and Mrs Trill, had been children of a first wife; the fourth, Mrs M'Dougall, was a daughter of the second marriage. They all survived the testator. The law of Scotland, however, beneficently interposes in such a case by granting the disinherited children a right of legitim out of the movable estate. This claim is a claim of debt against the estate and *pro tanto* defeats the disinheriting will. Mrs Ramsay, another child of the first marriage, had predeceased her father leaving five children. Unfortunately, however, for the Ramsay children, there is not representation in regard to the right of legitim, and they accordingly not only took nothing under the will, but had not even the right of legitim which their parent Mrs Ramsay would have had had she survived the testator. George Buchanan obtained the whole of the residue; John Macgregor Buchanan obtained his annuity of £200, and none of the other issue were provided for.

In these circumstances, it appears that at the very first meeting of the trustees explanations were demanded as to the claim for legitim open to the children of the deceased who were excluded by the settlement. Another and more serious intimation was immediately thereafter made. The validity of the settlement was challenged, by children and grandchildren alike, on the double ground of it not being the testator's deed, owing to his lack of mental capacity, and of his having been induced to enter into it by those benefitting by it.

By the Trusts (Scotland) Act 1867, section 2 (5), trustees are empowered "to compromise, or to submit and refer all claims connected with the trust estate." The claims by the disinherited issue were in point of fact compromised by an agreement under which £3700 was struck as a reasonable payment to be made to them in full of all their rights, whether under the head of legitim or as heirs *ab intestato*. The children and grandchildren accepted this payment, and on their part by the agreement they proceeded to "renounce and give up all objections which they have taken to the validity of the said trust-deed," and they ratified and approved of the trust settlement, and agreed never to quarrel or impugn it. This compromise is attacked in the suit.

The action was raised about ten years after the agreement and the payments under it were made. The grounds of attack are (1) that the amount of the payment was extravagant; and (2) that the manner in which it was effected, viz., by borrowing on the heritable property, with the consent of the residuary owner George Buchanan, constituted an illegal prejudice of the annuitants' rights.

In regard to the first point, the trustees, the widow, and the whole family, except the annuitant John, assented to the arrangement as reasonable. Both in the Outer and in the Inner House, however, the learned Judges have decided that the payment was on a scale so extravagant as to amount to misfeasance by the trustees.

I examine the case without reference at present to the claim for reduction of the deed, but with regard to the payment of legitim alone. As I have said, that was a payment which could not be avoided. It was not, like the other head of claim, the threat of an action; it was, according to the law of Scotland, the tabling of a debt, and a debt of such a nature that it must be discharged in preference to any rights under the deceased's settlement. It is accordingly cardinal to consider what was the gross amount of movable estate, one-third of which would constitute the legitim fund to be payable under this demand. I regret to observe that a considerable portion of the judgments of the Courts below are taken up with the history of Mr George Buchanan, of his law agent, and of the business subsequent to the date when the settlement was arranged. In attacking, however, a compromise come to by the agreement of November and December 1898, and March 1899, the Court is, in my humble judgment, bound to consider the situation of parties and the state of accounts as they had then developed, so as if possible to put itself in the position of the contracting parties, and ascertain from that point of view whether the conduct was reasonable or the reverse.

That the late Mr Buchanan had enjoyed from his businesses a large income appears to be beyond question. It is variously stated at from £3000 to £5000 per annum. In the year subsequent to his death the business continued to yield between £2000 and £3000. It partly consisted of a hook factory, and partly of flour and gristing mills. In the business balance-sheet as of 30th June 1897 Mr Buchanan's balance at credit amounted to £32,358. An inventory and valuation of the estate was prepared by Mr James Colquhoun, who had been Mr Buchanan's agent and was agent in the trust, and the total amount of estate appears to have been between £26,000 and £28,000. Mr James Colquhoun, the trust solicitor, was subsequently convicted of embezzlement, and out of the confusion with regard to his papers and affairs that draft inventory has not emerged. Of the gross estate, however, it is admitted that by far the largest proportion was the value of the heritable properties, and indeed the nearest estimate that one can get as to the net value of the movable estate is derived unsatisfactorily from an estimate made by Mr James Colquhoun, that of the sum paid in compromise, one half, namely, £1850, would have been the estimate of the legitim due to the claimants. That is to say, the whole movable estate was treated by him as of the value of three times that figure, namely £5550.

It is at this point that I have come to be of the opinion that a serious error has been made in the Courts below as to the amount of the movable estate. I do not myself entertain any doubt that had the legitim had to be sued for and an account taken, the personal estate would have appeared

at a considerably larger figure. In my view it is clear that differences of opinion—working out to thousands of pounds sterling—existed amongst those interested; and *a priori* a compromise of some kind would appear to have been wise. One item in particular was the subject of serious dispute between the parties in the year 1898. In so far as the mill and factory machinery were concerned, the trustees founded upon a valuation by Mr Norman, which treated £5306 as the value of the "fixed plant," and only £462 as the value of the "movable plant." Mr Robert Buchanan, knowing the mill, &c., was of opinion that any such estimate was wholly wrong. It is, as your Lordships are aware, a matter of no little difficulty in many cases to settle the bounds of heritable and movable in this particular. It is not surprising, accordingly, that there was controversy on this matter of fact. Mr Robert Buchanan states that in his opinion there was at least £12,000 to £14,000 of what he considered movable estate, "that is to say, stock-in-trade, debts, and movable machinery," and he says plainly in his evidence that it was on that basis that he was claiming legitim. On the lower of these figures the legitim fund would have been £4000.

But, in the second place, neither in the inventory nor in Mr Colquhoun's calculations was anything put down for the goodwill of the business. It is at least highly probable that in any action of accounting this item would have formed a subject of keen discussion and estimate. Upon this subject we have not the advantage of knowing what were the views of the Court below, and the learned counsel for the respondent in his able argument candidly conceded that the item of goodwill had not been included, and that he was unable to give assistance as to its value. Assuming, however, a very moderate allowance of only one year's profits to be given, a sum of £3000 would be added to the total of the movable estate. The legitim fund would thus have been increased by another £1000 and would have amounted to £5000. A settlement was made for £3700. Upon these figures the suggestion that the settlement, even had it concerned the claim of legitim alone, was extravagant to the point of misfeasance would appear to me to be completely confuted. But when I consider that the compromise included the claims of the grandchildren and the setting at rest a challenge of the trust deed and obtaining a ratification of that document, I can only say that the whole transaction appears to me as an entirely sensible family arrangement.

I say so, repeating that I think it illegitimate in judging of the conduct of trustees at a certain date to take into account the history of a commercial concern in subsequent years and in other hands, or the defalcations or delinquencies of a law adviser subsequently committed. I am unable, for these reasons, to concur with the major portion of the observations and reasoning of the Judges in the Courts below.

I think that this result is entirely in accordance with sound principle. In Scotland much value has for many generations been attached to the private administration of trusts. It is the duty of courts of law to enforce these, and the performance of the duty resting upon those who take office as trustees. This is the cardinal and constant rule. But I do not think that this ought to or can with propriety be done by setting up a standard of duty higher or more rigorous than those which prevail in the transaction of business amongst straight-dealing and honourable men. Were such a standard insisted upon I doubt whether it would be possible to maintain the system of voluntary trusts in my country. The trusts are undertaken in the great majority of cases simply out of respect for the memory and wishes of a friend, and they are performed with no reward except the consciousness of duty done towards his family or the other beneficiaries under his will. It would not appear to me to be any part of our trust law to visit the persons so acting, and in many cases performing what are irksome as well as responsible tasks, with personal liability, unless there has been either such neglect or such a departure from ordinary business standards as would fall to be condemned in ordinary life.

Nor do I find any departure in the above from authority. In *Whiteley* v. *Learoyd*, 12 A.C. 737, the Lord Chancellor (Halsbury) said—"I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of a particular trustee. Persons who accept that office must be supposed to accept it with responsibility at all events for a position of ordinary care and prudence;" and the true question in such cases is, in the language of Lord Herschell in *Rae* v. *Meek*, 16 R. (H.L.), p. 34—"Has it then been shown that the trustee failed to exercise that degree of diligence which a man of ordinary prudence would exercise in the management of his own affairs?" These citations are recognised by the late Lord M'Laren in his work on Wills and Succession, p. 1205, as applying the true test; and of this he says—"It is indeed the only practicable test of prudent management, and it is one to which no honest and capable trustee need object as a standard by which his administration should be tried."

In the view which I have taken the compromise made by Mr Eaton and his co-trustees was a sound compromise on its merits and is entirely defensible in law. But while it may have been so on its merits, it is said that the transaction was carried through in a manner which violated the legal rights of the annuitants, which rights the trustees were bound to protect. If this be made out a breach of trust will be established and the defender will be responsible.

The position of the estate was that George Buchanan, the eldest son of the testator's

second marriage, was sole residuary legatee, subject to the following burdens—first, the liferent of two properties to his mother, and secondly, the annuity of £300 to his mother (this not being now in question, she having herself been a party to the whole transactions), and of £200 to his brother John and his wife or survivor. The businesses were continued to be carried on by George and in the old premises. To settle with the beneficiaries, even for their legitim, by demanding payment from George would have crippled him in business. What was done accordingly was to raise the needful sum for the payment by granting a bond for £4000 over the heritable estates destined as part of the residue to George. It is maintained that this bond, which of course entered the records, was a transaction which as events have proved after twelve years have elapsed and the value both of businesses and properties have gone down, imperilled the annuitants' legal rights. It is accordingly vital to ascertain what these rights were. The position of the annuitant John is that before granting a bond over the heritable property the trustees should have first and in front of the bond secured the annuity upon the records as a real burden upon the lands.

The right of an annuitant to have his annuity made a real burden upon heritable subjects depends upon the language employed in the dispositive instrument. Since the case of the *Tailors of Aberdeen* v. *Coutts*, 1 Rob. App. 306, it cannot be doubted that the employment of the term "real burden" in the sense of a *vox signata* is not required if language of an equivalent character is employed, as, for instance, if it be stipulated and declared that the burden is, during its currency, to enter the records and be inserted in all future transmissions or instruments of the lands. But what is required is that either by the use of the term itself or by some express words or by clear implication the heritable subject itself must be affected. It is the settled law of Scotland that nothing less than this will suffice. The question accordingly is whether the language employed in Mr Buchanan's settlement was sufficient either to create or to direct the creation of a real burden upon the properties.

The case of *Williamson* v. *Begg* was founded upon at your Lordships' Bar. Upon which I observe that I do not think in future it will ever be safe to cite the case of *Williamson* v. *Begg*, 14 R., p. 720, except along with the interpretation of that decision by the language of the learned Judges in the case of *Cowie* v. *Muirden*, 20 R. (H.L.) 81. In *Cowie's* case the testator had made a disposition of his whole estate under certain burdens. These were, however, expressly "declared to be real burdens on the estate and effects hereby conveyed," and this declaration occurred in the dispositive clause of the deed. No separate description of the heritable properties was contained in the deed, but by virtue of the provisions of the Titles to Land Act 1868 a title was made out to the several portions by a notarial instrument which effectually connected the beneficiary's title with that last recorded and so feudalised his right. It was held that an annuity in favour of the daughter of the testator had been effectively constituted a real burden upon the lands. The language as to the creation of the burden as a real burden was in *Cowie's* case express, and occurred at the appropriate part of the deed. In *Williamson's* case the words "real burden" were used, but as the judgment was interpreted in an inappropriate part of it. In the case of the present deed the words do not occur at all.

The Lord Chancellor (Lord Herschell) said—"In *Williamson* v. *Begg* the words which purported to declare that these obligations should be real burdens were not contained in the dispositive clause, and it was of course incumbent upon the pursuer in that case to make out that if the defender (who was the law agent in the trust) had done his duty, the result would have been to create this obligation a real burden. He failed, to my mind, to establish any such duty." So also Lord Watson —"In *Williamson* v. *Begg* the annuity was not in apt terms made a real burden by the general conveyance. . . . The disponee was therefore under no obligation to convert into a real that which its author had only made a personal burden." The judgment of Lord Shand is of this importance, that he was one of the Judges in *Williamson* v. *Begg*. His Lordship said—"The deed contained no term of obligation on the general disponee to constitute a real burden, and no condition that by acceptance of its benefits he should become bound to do so, and my opinion was and is that in these circumstances the mere ineffectual attempt by the testator to create the real burden did not infer such an obligation."

Standing that judgment, and having in view the fact that the annuities here are not in terms created real burdens, nor are there any terms of an equivalent character occurring in any portion of the trust deed, it appears to me to be clear that there was and is no obligation upon the trustees of the late Mr James Buchanan to convert these annuities into a real burden upon the residuary heritable estate. When, accordingly, that heritable estate was mortgaged for the sums required for the compromise, and this was done with the consent of Mr George Buchanan, it does not appear to me that the transaction could have been made the subject of interdict at the instance of the annuitants on the plea that they had the first charge upon the property. The burden of the annuities fell upon the residuary legatee as a personal burden, and it was not a part of the duty of the trustees to treat it as or make it a real burden on the lands. The case, accordingly, of malfeasance on this head also fails.

In view of certain observations which occur in the opinion of the learned Lord Ordinary as to the defender, I think it just to Mr Eaton to say that in my humble judgment, concurring as I understand it

to do with the judgment of all your Lordships, he stands entirely acquitted of the charges brought against him, either against his business capacity or his integrity. I think him entitled to be absolved from the conclusions of the action.

LORD CHANCELLOR—I entirely agree that this appeal should be allowed.

Their Lordships reversed the order appealed from, with expenses.

Counsel for the Appellant (Defender)—Lawrence, K.C.—Christie. Agents—R. & R. Denholm & Kerr, W.S., Edinburgh—Wilde, Moore, Wigston, & Company, London.

Counsel for the Respondents (Pursuers)—Munro, K.C.—Mair. Agents—James Ayton, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Thursday, February 10, 1910.

FIRST DIVISION.

[Sheriff Court at Hamilton.

WILSONS & CLYDE COAL COMPANY LIMITED *v.* CAIRNDUFF.

CADZOW COAL COMPANY LIMITED *v.* M'ALEER.

ROBERT ADDIE & SONS' COLLIERIES LIMITED *v.* COAKLEY.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (16)—*Suspension of Charge—Competency of Suspension Pending Decision of Application for Review.*

Opinion (*per* the Lord President) that the only proper way to get rid of a recorded memorandum of agreement under the Workmen's Compensation Act 1906 is by an application to the Sheriff for review, and that an employer who has applied for review of an agreement is not entitled, pending the disposal of the application, to obtain a suspension of a charge made by the workman in virtue of an extract of the memorandum.

Sheriff — Suspension — "Competency" — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *First Schedule, Rule* 125.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 125, enacts—"If objections be taken to the competency or regularity of suspension proceedings, the judgment of the Sheriff-Substitute on such objections may be appealed to the Sheriff, but his judgment shall be final."

Opinion (*per* the Lord President) that an objection to the "competency" of a suspension meant an objection to it as a form of process, and not an objection that there was no good ground for suspension, and that accordingly the question whether an employer who had applied for review of an agreement to pay compensation was entitled to obtain a suspension of a charge by the workman pending the disposal of the application, was not a question of competency within the meaning of the rule.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), enacts, section 8—"... In a summary cause, if the Sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final." Section 28—"Subject to the provisions of this Act it shall be competent to appeal to the Court of Session against a judgment of a Sheriff-Substitute or of a Sheriff, but that only if the value of the cause exceeds fifty pounds ...." The First Schedule, Rule 125, is quoted in the rubric, *supra*.

Three appeals raising the same question were heard together.

I. The Wilsons and Clyde Coal Company, Limited, *pursuers*, raised an action of suspension in the Sheriff Court at Hamilton against William Cairnduff, miner, Shotts, *defender*. The complaint, as set forth in the initial writ, was as follows—"That they have been charged at defender's instance by virtue of an extract registered memorandum of agreement between defender and pursuers, recorded in the special register kept under the Workmen's Compensation Act 1906 in the Sheriff Court of the County of Lanark, at Hamilton, on the 2nd day of March 1909, to make payment to the defender of £6 sterling, being eight weeks' compensation from the 18th day of June to the 13th day of August, both in the year 1909, at the rate of 15s. per week, in respect of alleged total incapacity through injuries received in the pursuers' employment, whereas the defender was on 21st February 1909 certified by the medical referee, Dr B. C. M'Vail, M.B., to whom the case was referred by parties, as fit for light work. It is explained that the referee expressed his opinion that in about three months from the last-mentioned date the defender would be able to resume his former employment, and that on the said referee's report being issued the parties agreed that the rate of partial compensation should be 8s. 5d. per week. It is further explained, that there is presently pending before the Court an application at the instance of the pursuers to have the defender's right to compensation reviewed, the first deliverance in which application is dated 26th June 1909, and the proof in which is to be taken on 6th October. It is further explained, that the defender has already charged the pursuers for payment of four weeks' compensation, from 21st May to 18th June 1909, at the above rate of 15s., and that an application to have that charge suspended is presently pending before the Court, and proof has been fixed