then than it was, and was seen to be, at the time of the accident. In the present case the condition of the house was not the same, for the ceiling fell; what was visible when the tenancy began was a risk, and against this risk the landlord bound himself to protect the tenant. The facts here seem to me to necessitate trial by a jury.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to adjust the issue.

Counsel for the Pursuer—Watt—Blair. Agent—W. K. Steedman, W.S.

Counsel for the Defender—W. Campbell—Clyde. Agents—Patrick & James, S.S.C.

Friday, May 21.

SECOND DIVISION.

[Lord Kincairney, Ordinary

BARONESS DE BELLET *v.* SCOTT'S TRUSTEES.

Reparation — Measure of Damages — Damages for Delay in Payment of Money—Interest.

Averments in an action of damages for delay in the payment of money due to the pursuer, which *held* irrelevant in respect that the defender had paid the principal sum and interest, and that the pursuer had not stated any special circumstances to displace the general rule that the measure of the damages for delay in the payment of money due is the interest only.

Elizabeth Isabella Johnstone Gordon, Baroness Roissard de Bellet, raised an action of damages for £11,000 against the trustees acting under the trust-disposition of the late Major Hugh Scott of Gala, the pursuer's first husband. After his death she married, in 1878, the Baron Roissard de Bellet. The Baron died in 1891. At that date the pursuer was possessed of heritable properties in France, in the purchase and improvement of which she averred that she had expended above £16,000. She further averred—"(Cond. 5) Immediately prior to the death of Baron Roissard a number of large mortgages affecting these properties were cleared off by the sale of a large villa and ground near Hyeres, but there remained a number of merchants, tradesmen, and others, with unsatisfied claims of small amount, and these smaller creditors pressed the pursuer for immediate payment. The pursuer consulted M. Paget, a notary at Hyeres, with a view to seeing what could be done to meet these claims, and the arrears of interest due on certain small mortgages secured on the said properties. M. Paget stated that with a sum of £400 he could satisfy pursuer's creditors and avert a sale of her estates. M. Paget, at the request of the English Consul, M. Jouve, undertook to arrange with pursuer's creditors to delay taking legal proceedings for enforcing their claims for six months, and also a delay of one year to redeem pursuer's gallery of oil paintings, bronzes, and works of art pledged by the late Baron Roissard to M. Crevelli for 6000 francs (£240). As the result of the pursuer's consultation with M. Paget in March 1893, the pursuer, the said M. Jouve, Mr Chapman, banker, Hyeres, and the Rev. C. Panter, D.D., English clergyman, on pursuer's behalf made repeated application to her sons, the said Mr. John Scott of Gala, and Mr Hugh Scott MacDougall of Makerstoun, and to Messrs Tods, Murray, & Jamieson, W.S., Edinburgh, the law-agents for the trustees and executors of the said deceased Hugh Scott (who had in their possession at this time a considerable sum of money belonging to the pursuer) for such a sum as would enable pursuer to pacify her pressing creditors. The letters addressed to the pursuer's sons were forwarded to the said Messrs Tods, Murray, & Jamieson, but said letters and the requests contained therein were totally disregarded by all these parties, the pursuer receiving no reply of any kind. In consequence of no moneys being forthcoming, the pursuer's heritable properties in France, and her valuable gallery of oil paintings and bronzes, were brought to sale by her creditors, and were sold for what could be obtained immediately. (Cond. 6) The foregoing properties having been brought to a forced sale, realised much less than their real value, and the pursuer has suffered great loss and damage in consequence. In particular, the property of La Tuilerie, which, had it been judiciously and voluntarily realised, would have brought not less than £7000, was sold for £1250; the property of La Clapiere, which in the same circumstances would have brought £5000, was sold for £1250; and similarly, the property of Pouzac, which if sold as aforesaid would have brought not less than £2500, was sold for £1000. The occasion when pursuer's said properties were disposed of was not favourable for selling in the south of France, properties being then diminishing in value. Shortly thereafter prices improved, and they are now, and shortly after the date of said sales were, greatly higher than at the time when the pursuer was forced to put them in the market. It was not the desire nor the intention of the pursuer to part with said properties, and she did so only because she was compelled by the diligence of her creditors. (Cond. 7) After the sale of pursuer's properties, which she bought for about £17,000 and sold for £3200, the pursuer, finding herself without means of support, returned to Scotland, and applied to her sons and to her daughter, and to the defenders, the trustees and executors of the late Major Scott, for aliment . . . (Cond. 8) On the date of calling of the said action for aliment (10th January 1894) the pursuer's law-agents received a letter from Messrs Tods, Murray, & Jamieson intimat-

ing that during the whole period, since May 1870, the said Hugh Scott, and after his death his trustees and executors, had held the sum of £1250 belonging to the pursuer. They then offered, on behalf of the defenders, to make payment of this sum together with interest at 6 per cent., which they had received from May 1870 to May 1875, amounting to £374, with the further addition of £247 of interest received on the same sum from July 1875 to July 1879, and to allow bank-deposit rates from July 1879 to date of offer of payment, under deduction of income-tax. This offer was declined and the pursuer's agents demanded an explanation of the retention of the said sum of £1250. After some correspondence they learned that the fund in question had been originally lent to Lord Belhaven at 6 per cent.; that it had been uplifted from that investment by Messrs Tods, Murray, & Jamieson, as Major Scott's law-agents, in May 1875, and thereafter invested by them, on Major Scott's behalf, in the Credit Foncier of Mauritius, where it remained from July 1875 to July 1879. It was then uplifted by Messrs Tods, Murray, & Jamieson, and retained by them as agents for Major Scott's trustees until the calling of the summons for aliment, when, as already explained, intimation was for the first time given that the defenders were prepared to make payment of this sum with interest as aforesaid to the pursuer. (Cond. 10) The debts due by the pursuer, including the interest in arrear at the date of her and her friends' applications to the defenders for payment of her money, were much less than the sum retained by the defenders lying in the hands of Tods, Murray, & Jamieson and belonging to the pursuer, and paid over in 1894 by the defenders as aforesaid. Had the pursuer had the command of the sum of £400 at the time of the threatened foreclosing of the mortgages on her French properties she would have been able to pay off the creditors' claims and to have postponed the sale until such time as the property market improved, or until she was able to make other arrangements for borrowing the money, or in any event by obtaining time to bring the properties judiciously and voluntarily to sale she would have secured a much larger price for them than she did. The properties, if judiciously realised as aforesaid, would have brought not less than £14,500, and the pursuer has accordingly lost a sum of not less than £11,000, which is the sum sued for."

The defenders pleaded, *inter alia*—"(1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (3) The pursuer having been paid interest on the said sum of £1250, and having discharged the defenders of all claims therefor, has no further legal claim arising from the delay in paying said sum to her, and the defenders should be assoilzied, with expenses."

On 23rd February 1897 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds the averments of the pursuer irrelevant to support the conclusions of the summons, and therefore sustains defenders' first plea-in-law: Sustains also the defenders' third plea-in-law, and assoilzies them from the conclusions of the summons and decerns."

Note.—"This is an action of damages by the Baroness de Bellet, at one time the wife of the late Major Hugh Scott of Gala, who died in 1877. The defenders are his trustees. The sum claimed is £11,000, and the ground of claim seems to be, that because of the defender's delay in paying to the pursuer a sum of £1250 belonging to her, which was in their hands, certain properties belonging to her were sold by, or through the pressure of her creditors at a sacrifice whereby she suffered loss to the amount sued for.

"It does not appear precisely how that sum came into the defenders' hands, nor what the character of their obligation to pay it was, nor the reason why it was not paid earlier. On these points the condescendence and the defences are alike unsatisfactory. But at present I am not concerned with the defences, but only with the condescendence, because the defenders have maintained, and I think successfully, that it is wholly irrelevant. I have formed that opinion (1) because of the obscurity and incompleteness, and what I may call the incoherence of the pursuer's averments, and (2) because liability for the damages claimed does not, under the circumstances averred, follow from the defenders' delay in payment. I think also that the defenders' third plea is well founded, and that the pursuer's claim for damages has been satisfied, and that the present action is excluded by the admitted payment to her, on 24th January 1804, of the £1250, with interest.

"The pursuer's averments relate (Firstly) to the damage sustained, and (Secondly) to her application to the defenders. On the first point she avers that after Major Scott's death she married the Baron de Bellet, who died on 6th December 1891; that she was then possessed of properties, in the purchase and improvement of which she had expended above £16,000; that immediately before the Baron's death 'a number of large mortgages affecting these properties were cleared off'; but that she had still a number of creditors for small amounts; and 'in consequence of no moneys being forthcoming, the pursuer's heritable properties in France and her valuable gallery of oil paintings and bronzes were brought to sale by her creditors, and were sold for what could be obtained immediately.' She states that a property worth £7000 was sold for £1250, another property worth £5000 for £1250, and a third worth £2500 for £1000. As I read condescendences 5 and 10, the pursuer's averment is that these properties were sacrificed because she could not raise £400, and that had she received that sum the sale of her estates could have been averted. But if it be true, as she avers, that large mortgages affecting her properties had been cleared off, and if it be true that the creditors agreed to delay proceedings for six months, as she also avers, how can it be true that she was

unable to raise £400 on security of these properties? I suppose that in considering relevancy I am bound to make an effort to assume the truth of the pursuer's averment; but still it is so nearly incredible, and so completely unaccountable, as to throw on the pursuer the obligation of explaining distinctly, specifically, and in detail how it was that she was unable to raise £400, and so to prevent the sale of her properties. There is no such explanation, and therefore I hold that her averments on that matter are not such as can be sent to proof. Further, the dates of the sales of the pursuer's properties are not given, and they may have been, for anything that is clearly stated on record, before any application was made to the defenders or their agents.

"With regard to these applications, it appears from condescendence 3 that the pursuer did not know of the existence of this fund in the defenders' hands, and from condescendence 5 I gather that the applications were made after March 1893. They were not made to the defenders, but it is averred that they were made to their law-agents. They could not have been applications for money due to the pursuer, as she did not know that any money was due. What is of more consequence is that the pursuer does not aver that she informed the defenders' agents that her property was about to be sold for want of money, nor that she mentioned the amount required. She only avers that application was made for such a sum as would pacify pressing creditors. It is true that in condescendence 11 there is a general averment that repeated applications were made for money due to the pursuer (which is, of course, impossible if she did not know that any was due), that 'the purposes of the application' was 'explained, and the consequences to the pursuer, if the money was refused to her, clearly pointed out to them.' But it is not said what purposes or what consequences were disclosed, and I cannot hold that this general averment adds anything to the more specific averment in condescendence 5. I think, therefore, that it is not relevantly averred that the defenders were informed that the consequence of non-compliance with her requests for money would be the forced sale of the pursuer's properties.

"In the ordinary case the damage due for delay in payment of money is nothing but interest. 'Here interest is the damage due.'—Bell's Pr., sec. 32; *Fletcher* v. *Taylor*, November 2, 1855, 25 L.J., C.P. 65. That is the only damage which in the ordinary case a debtor and creditor have in view, and which, generally speaking, is the only damage recoverable. The general rule seems to hold whether damages are claimed for breach of contract or *ex delicto*. In this case the want of all averment as to the conditions under which the defenders held the pursuer's money makes it difficult, if not impossible, to say under what head this claim comes. There is no contract averred. At the same time it is not alleged that the defenders held the money as trustees for the pursuer. They were in fact not trustees for the pursuer. Counsel for the pursuer stated that he preferred to put his case on the delict of the defenders. But here again he has not alleged any delict or fault. Fault is mentioned generally in the first plea-in-law, but not, so far as I have noticed, in the condescendence. But whether the pursuer's claim is rested on breach of contract or on delict, it is nothing but a claim of damages for failure to fulfil in due time an obligation to pay money, and it can only, apart from special circumstances, be for such damages as might fairly and naturally be held to flow, according to the usual course of things, from failure to implement the obligation, and that, when the obligation is to pay money, can only be for interest (besides the principal). Nor will a debtor in such a case be subjected to additional liability for damage arising on account of special circumstances unless these special circumstances are fully disclosed to him. See *Hadley* v. *Baxendale*, 6 Exch. 341; *British Columbian Sawmill Company* v. *Nettleship*, 1868, L.R., 3 C.P. 497; Mayne on Damages, p. 11, *et seq.* The pursuer referred to *Robin* v. *Stewart*, 1854, 14 C.B. (Scott's) 595, in which a bank was held liable in damages for dishonouring a bill of a customer who had money in bank. There damage was allowed for injury to credit. But that case has little application. It may show that in certain circumstances a claim for damages other than interest may arise from failure to pay money. That may be so, if the special circumstances and their bearing on the failure to pay be known to and appear to have been in the contemplation of the parties; and in this case, if it had been averred that the defenders were certified that the pursuer's property was in peril and would be sold at a great loss if a sum demanded were not paid, it may be that there might have been a case for inquiry had not payment of the whole debt with interest been made and accepted. But, as above explained, I think the pursuer has not made any sufficient averment to that effect. I am therefore of opinion that the general rule applies, and that interest is the only damage due.

"Further, it seems to me that the payment of the £1250 with interest is conclusive against the pursuer. £1250 and £1750 of interest was paid and accepted on 24th January 1894, and it is not averred that any claim on account of failure to pay at an earlier date was reserved. The payment of the interest was undoubtedly a payment of damages for delay in payment, and it was accepted as damage for that delay, and no reservation of right to claim additional damage being made, it was clearly accepted as the whole damage.

"I apprehend that when the defenders made that payment their obligation, whether it was of the nature of contract or not, was fulfilled, and that the pursuer cannot now claim damages on the ground of failure to fulfil it. On this short ground I think the defenders are in any case entitled to prevail. It is expressed in the defenders' third plea, and I see no good answer to it.

I shall therefore find that the pursuer's averments are irrelevant, and shall further sustain the defenders' third plea-in-law."

The pursuer reclaimed, and argued—The action was relevant. There was a relevant statement in record that if the pursuer had possessed £400 in March 1893 she would not have required to sacrifice her properties in France at a price much below their value. Two out of the three trustees knew that she was in want of this money, because they had been personally applied to by her at that date. The trustees knew or ought to have known that they had money belonging to the pursuer in their possession. They therefore were in the wrong in retaining in their possession money which was not their own, especially when they were aware that the person to whom the money belonged was in dire need of money and was making applications to them for money. The defenders were liable not merely for the interest on the money retained but also for any damage arising to the pursuer from the wrong done to her. Among the consequences resulting from the pursuer not having this money was the sale of her property at a price much below its true value, and the defenders were liable for the loss thus sustained by her. Opinion of Bramwell, B., in *Gee* v. *Lancashire and Yorkshire Railway Company*, 1860, 6 H. and N. 218; *Larios* v. *Bonany y Gurety*, 1873, L.R., 5 P.C. App. 346.

Counsel for defenders were not called on.

At advising—

LORD YOUNG—In this case the Lord Ordinary has dismissed the action, and I am of opinion that his judgment is right on the grounds very fully and clearly stated in his note. I think that the defenders might and possibly ought to have ascertained after the trust-estate came into their possession that this sum of £1250 in their hands belonged to the pursuer, and that they might and possibly ought to have informed her sooner that they had the money, but I am not able from the statements made by her on record to impute to them any actionable *culpa* involving them in a claim of damages. It would require a case very emphatically showing *culpa* to entitle the owner of money in the possession of another who has never been asked to hand it over to damages beyond interest from such a holder. I do not think such a case has been stated here. I have said that the defenders might and possibly ought to have ascertained sooner than they did that money belonging to the pursuer was in their possession, but I also think that the pursuer might and possibly ought to have ascertained that money belonging to her was in the hands of her first husband's trustees. I concur in the conclusion which the Lord Ordinary has arrived at, and on the grounds stated by him, that there is here no relevant claim for damages.

LORD TRAYNER—I agree. I think that the grounds stated by the Lord Ordinary are sufficient to support the findings in his interlocutor. I would only observe that the cases quoted by Mr Abel are cases of breach of contract, and therefore cannot relevantly be considered in deciding the present.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer—Abel. Agent—James Anderson, Solicitor.

Counsel for the Defenders—W. Campbell—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, May 25.

OUTER HOUSE.

[Lord Pearson.

CADELL, PETITIONER.

Entail—Improvement Expenditure—Bond of Annual-Rent — Entail Amendment (Scotland) Act 1875 (38 *and* 39 *Vict. cap.* 61), *sec.* 8.

Section 8 of the Entail Amendment (Scotland) Act 1875 provides—"It shall be lawful for an heir of entail in possession of an entailed estate in Scotland holden by virtue of any tailzie dated prior to 1st August 1848 (notwithstanding any provision to the contrary contained in the tailzie), who has obtained the authority of the Court to borrow money under this Act on the security of the estate, to charge the fee and rents of such estate other than the mansion-house, offices, and policies thereof, or the fee and rents of any portion of such estate other than as aforesaid, with a bond of annual-rent binding himself and his heirs of tailzie to make payment of an annual-rent for twenty-five years from and after the date of such authority of the Court, such annual-rent to be payable by equal moieties half yearly, and to be at a rate not exceeding seven pounds two shillings per annum for every one hundred pounds so authorised to be borrowed, and so in proportion for any greater or lesser sum."

An heir of entail who had obtained authority to charge the estate with a certain amount, executed a bond of annual-rent for £7, 2s. for each £100 of the amount so authorised. For this bond he received a loan in excess of the amount authorised to be charged. *Held* that this was a competent method of exercising the powers conferred by the section quoted above.

James John Cadell, heir of entail in possession of the estate of Barnton in the county of Stirling, presented a petition for authority to charge money expended in improvements against the estate, in the manner provided by section 8 of the Entail Amendment (Scotland) Act 1875 (quoted in rubric), and obtained by interlocutor dated