

have been barred from objecting to his occupying it as a shop, and if the pursuer had purchased the premises as converted I think he would have been entitled to use them as such. But we have no such case here. Mr Aitken incurred no such expense with the knowledge of the defenders, and the pursuer was informed before he purchased that any use of the premises for trade purposes would be objected to.

I think the interlocutor of the Lord Ordinary should be adhered to.

LORD McLAREN — I concur in the opinion of Lord Adam, and have little to add. It does not admit of doubt that the superior is entitled to enforce building conditions which he or his authors caused to be inserted in the feu-rights, unless he has debarred himself from enforcing these conditions by acquiescing in alterations of the character described in the summons, or unless he has expressly authorised the particular thing. If the parties were willing to limit the discussion to this question, I should have no difficulty in affirming that it was impossible for the pursuer to obtain decree of declarator in the face of the superior's objections. I shall say nothing on the question of acquiescence or implied abandonment of the building conditions, because I agree with all that Lord Adam has said. The principle to be applied in such questions is, that where alterations or variations of the conditions of the feu-right have been permitted, the presumption is not for abandonment, but only for relaxation of the conditions of feu, according to the nature of the variations which the feuars have presumably consented to.

But then the co-feuars, who are defenders, are not satisfied that their rights would be sufficiently protected by a decree of absolvitor in favour of the superior for all interested. They desire also to have this declarator negatived at their instance, standing on their own rights under their title-deeds. Now, the condition of the right of a co-feuar to enforce a building condition is, according to the highest authority, that he has either obtained from the superior an express authority to enforce the conditions contained in the feu-rights of his neighbours, or that there is such a reference to a common system of conditions in the titles of each of the feuars as makes it clear that these conditions were inserted for their common benefit and not merely for the protection of the superior's rights. The clearest case of such a right accruing to feuars by implication is the case where the superior in each feu-right, or in the case of any particular feu-right, agrees that he shall insert like conditions in all feus hereafter to be granted, because his doing so amounts to a plain declaration that every vassal is to have a right to enforce the common plan or system of conditions. The feuar stands creditor in the obligation to insert such conditions in the feu-rights of his neighbours in order that he may enforce them. There could be no reason for putting the superior under such an obligation unless the vassal was to enforce the conditions

agreed to be inserted. But then this is not so strong a case. Still, where a feuar is taken bound to observe building conditions, described as elements of a common building plan which the superior intends to make binding on all the feuars within an area described—this, I consider, is equivalent to a grant to the feuar of a right to enforce the conditions. Obligatory language is not absolutely necessary to give an interest to the feuar, and it may fairly be deduced from the words used in these feu-contracts, that what the feuar is bound to is not the observance of a certain elevation or building plan for the security of the superior's feuduty, but the preservation of a common building plan for the amenity of the street or place and the convenience of the feuars. According to the opinions delivered in the House of Lords in the case of *Hislop*, the question is reduced to one of intention. Where it is made to appear as matter of intention, or agreement between the superior and the feuar that the feuar shall have the right to enforce the conditions, this suffices for the decision of the question in the feuar's favour.

I agree with Lord Adam that, according to the intention of the parties and their authors, these building restrictions were imposed for the common benefit and with the intention of giving a right to the individual feuar to insist on the fulfilment by others of the system of conditions.

The LORD PRESIDENT and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuer — Balfour, Q.C. — Rankine — Wilton. Agents — Jamieson & Donaldson, S.S.C.

Counsel for Defenders — H. Johnston — Constable. Agents — W. & J. Cook, W.S.

Saturday, July 10.

## FIRST DIVISION.

[Lord Pearson, Ordinary.]

### MILLAR'S TRUSTEES v. POLSON.

*Trust — Personal Liability of Trustee — Culpa lata — Defalcation of Co-Trustee — Failure to Take Proceedings — Onus of Proving No Loss Caused to Trust.*

P, a trustee, discovered, in February 1895, that his sole co-trustee E had not lodged in bank on deposit-receipt a sum of £200 of trust money which he had been directed to invest in that manner, but had retained in his own hands £150. He made repeated application to E, both verbally and in writing, to restore the money, but, beyond vague promises that it would be paid if time were given, received no satisfactory explanation. He also allowed E to uplift certain rents due to the trust at Whit-sunday 1895, which were retained by him. P was not at first aware, apart

from the default in question, that E was in financial difficulties, but by midsummer had learnt from other sources that this was the case, and in October was fully confirmed in this knowledge. Beyond remonstrating with E, he took no further steps till November, when he intimated that unless payment was made within a month "legal steps" would be taken.

A delegate, who had been appointed by the beneficiaries for the purpose of representing them in the sale of certain properties, and the investment of the proceeds, and who for that purpose had attended meetings of the trustees, was also aware of E's defalcations, but did not urge upon P to take legal proceedings. E's estates were sequestrated without his accounting to the trust for the sums retained by him.

In an action by the beneficiaries against P calling upon him to make good these amounts, held (after a proof) (1) that there had been *culpa lata* on the part of P to the extent of making him personally liable for any loss sustained; but (2) that as regards the £150, he had sufficiently discharged the *onus* of proving that owing to E's financial position no benefit would have accrued to the estate by prosecuting him, and that accordingly no loss had been sustained by the failure to do so.

The late Mr William Millar, solicitor, Jedburgh, died in 1879, leaving a disposition of his whole estate in favour of his widow. As a result of a family arrangement between Mrs Millar and her children, she executed in 1880 a trust-deed, whereby she disposed her whole estate to trustees, who were to pay the income to her during her life, and to hold the capital for behoof of her family. The trustees, who all accepted office, were Mr Alexander Catto, teacher, Ancrum, Mr William Elliot, Sheriff-Clerk of Roxburghshire, and the Rev. William Polson, Blackfriars Church, Jedburgh. Of these Mr Catto resigned in 1883. At the commencement of the trust the trustees employed Mr James Riddoch, solicitor, Jedburgh, as law-agent therein, and he continued to act as such until 1881, after which date they had no law-agent, Mr Elliot keeping all the accounts, making the remittances, and generally doing the work of an agent for the trust. Accounts of Mr Elliot's intrusions were prepared, and these were approved by the beneficiaries, who in January 1894 executed a minute of agreement by which they agreed to dispose of the heritable property and invest the price, it being provided that "the trustees shall consult with Mrs Millar through delegates" as to the disposal of the property, the investment of the funds, and the annual amount to be paid to Mrs Millar. Mr Riddoch was appointed one of the delegates, and thereafter attended the meetings of the trustees.

In 1896 Mr Polson and Mr Elliot executed a deed of assumption in favour of certain new trustees, and thereafter resigned their office. The new trustees, on discovering

that two sums of £150 and £95 had not been accounted for, raised an action against Mr Polson for payment of these amounts.

In or about November 1894 there was a large credit balance in bank on the current account of the trust apart from what had been placed on deposit. The bank account was in the joint names of the defender and Mr Elliot as Mrs Millar's trustees, and all money drawn from the bank had accordingly to be drawn by means of cheques signed and endorsed by both trustees. The trustees having resolved to transfer a further sum of £200 from the account-current to a deposit account with a view of obtaining interest on said sum, the defender, on or about 30th November 1894, at the request of his co-trustee, Mr Elliot, signed and endorsed a cheque for that amount drawn upon the trust account. He thereafter handed the cheque to Mr Elliot, who undertook to have the amount placed on four deposit-receipts of £50 each in their joint names as trustees foresaid. Instead of doing so Mr Elliot drew the whole sum of £200 from bank and placed only £50 on deposit-receipt, retaining £150 for his own personal uses and purposes. Mr Elliot's estates were sequestrated on 6th February 1896, but no dividend was likely to be payable. The sum of £95 second sued for arose out of rents of Bellevue, a heritable property in Jedburgh belonging to the trust. Mr Elliot collected for three half-years, ending successively Whitsunday 1894, Martinmas 1894, and Whitsunday 1895, the rents of this property, amounting to £95, 17s. 6d., and did not pay the same into the accounts of the trust, but retained same in his own hands and appropriated them to his own purposes. At the date of his sequestration the said William Elliot was due the sum of £95, 17s. 6d. in respect of the three half-years' rents collected by him as aforesaid.

The Lord Ordinary (PEARSON) allowed parties a proof. The nature of the evidence as to the course adopted by the defender to induce his co-trustee to repay the money retained by him is sufficiently indicated in the opinions of the Lord Ordinary, and of the Lord President, *infra*. As regards the financial position of Mr Elliot, it was proved that since 1893 he had been insolvent, there having been a balance of liabilities over assets ranging from £4300 at that date to £5000 at the date of his sequestration. Mr Stedman, the trustee on his sequestrated estate, deponed—"Judging from my investigations I should say Mr Elliot was hopelessly insolvent for many years during which he appeared to be in good credit. He paid pressing creditors by taking from one client to pay another."

Mr Maclean, who had been Mr Elliot's clerk, deponed that he was unable to raise money to pay his clerks' salaries. "I was personally aware of his difficulties in money matters for many years prior to his sequestration. His difficulties became more and more acute until the time of his bankruptcy. He was not able to raise money on credit in 1894, 1895, or 1896."

The Lord Ordinary on 19th January 1897

assolized the defender from the conclusions of the summons.

Note.—“Mr William Millar, solicitor, Jedburgh, died in 1879, leaving a will in favour of his wife. Shortly afterwards, the widow and children came to a family arrangement which resulted in a trust-deed under which she appointed three trustees to hold the estate substantially for herself in liferent and her children in fee. One of the three trustees resigned in 1883, and since then the other two have acted, namely, Mr William Elliot, the late Sheriff-Clerk of Roxburghshire, and the defender Mr Polson. They acted until 1896, when they resigned after having assumed the present pursuers as trustees, and the action is now directed against Mr Polson in order that certain sums of money which it is admitted disappeared from the trust during Mr Elliott's trusteeship, and liability for which I understand Mr Elliot substantially admits, should be restored to the trust-estate. Mr Elliot is living in England and is certified to be incapable of being examined as a witness. His estates were sequestrated in the beginning of 1896.

“The question is, whether in the circumstances there is on the part of Mr Polson such *culpa* as to render him liable to make good this money, although it is certain that he did not make any gain by it, and was deceived in the matter by his co-trustee Mr Elliot. That depends upon careful consideration of the facts of the case, and the facts with reference to the first sum of money in question, namely, £150, are simple enough.

“Before advertng to them, however, it is right that I should refer to an agreement which was made between the trustees and the liferentrix and beneficiaries in January 1894. The widow, who has since died, joined with the other beneficiaries in agreeing to dispose of certain heritable properties with a view to the realisation and distribution of the trust-estate, and to invest the funds securely, ‘paying the interest to Mrs Millar (the liferentrix), and if this is not sufficient for her comfortable maintenance’ that a part of the capital be set aside to augment it. The trustees shall consult with Mrs Millar and family through delegates as to the following matters, and among others is specified the ‘investment of the funds.’ Now, at that date, as I understand it, the widow had either occupied the house at Bellevue which belonged to the trust, or, when it was let, had drawn the rents herself; but after this minute was entered into, it became the duty of the trustees to take account of the rents of Bellevue towards her annuity, which was fixed by the agreement at £120 per annum. No delegates were named in the deed, but it appears from the proof that three gentlemen were appointed by the beneficiaries to act in that capacity, namely, Mr William Millar, Mr Morton, and Mr James Riddoch. Mr Riddoch had been law-agent of the trust down to the year 1881, but from that date he had ceased to act as law-agent of the trust, and Mr William Elliot, one of the trustees, had apparently fulfilled all the

duties of that office. But Mr Riddoch, in addition to being named as one of the three delegates through whom the trustees were to consult with the beneficiaries, did a certain amount of agency in connection with the realisation of the heritable property, and I think it may be taken on the proof that he was employed as law-agent in matters arising out of the realisation of the heritable subjects belonging to the trust. He also, it appears, was in the habit of convening the meetings of trustees subsequent to January 1894, and he himself attended all or nearly all the meetings. The other two delegates who, however, unlike himself, did not live near Jedburgh, did not attend more than one or two meetings.

“That being the state of matters in 1894, it appears that in November of that year there was a considerable amount in the current account in bank belonging to the trust, and at the meeting of 19th November, convened by Mr Riddoch, and at which he was present, it was resolved to place £200 of the amount on current account on deposit-receipt. Four deposit-receipts for £50 each were to be taken, and what followed was simply this—As the bank account could be operated on only by the signatures of both trustees, a cheque for £200 was drawn and signed by the two trustees and left in the hands of Mr Elliot in order that he might fulfil the mandate of the meeting, and obtain the four deposit-receipts of £50 each. That cheque is dated 30th November, and Mr Elliot, who as it turns out, was then a long way behind the world, took one deposit for £50, and transferred the remaining £150 into his own private bank account, or otherwise appropriated it to his own purposes. The next thing that happened in regard to the bank account was that towards the middle or end of January 1895 another cheque was drawn for £50 and signed by both the trustees, and another deposit-receipt was then as I understand issued to them. There is a marked difference between the terms of the two cheques, the second cheque having been issued in such terms as to safeguard the trust-estate from the undue attention of Mr Elliot to the trust funds, the terms being ‘pay to Commercial Bank for deposit-receipt, £50.’ I understand that to be accepted by the bank as an instruction to them by the signatories of the cheque that they are not to give the money or credit to the party presenting the cheque, but are to put it on deposit-receipt and nothing else. That is an obvious safeguard when once it is pointed out, and it was not inserted in the cheque for the £200 of 30th November 1894. If it had been proved that that was an ordinary mode of safeguarding trust funds when passing through the hands of one of the trustees, I am not at all sure that it would not have been a very important point against the defender. It would have been so even if, without being a common practice, it had been the course or practice in this trust, but neither the one thing nor the other is proved in this case, and all I know is that one cheque had and the other

had not that safeguard. Sometime after the meeting of 19th November Mr Riddoch learned that Mr Elliot had not taken out the deposit-receipts as instructed, and he communicated the fact to the defender. On this point a conflict of evidence occurs between Mr Riddoch and Mr Polson as to the date at which the intimation was made, as it undoubtedly was made at some date during the winter of 1894-95. to the effect that Mr Elliot had not put the £200 on deposit-receipt, but only £50 of it. Mr Polson asserts that the meeting at which that intimation was made to him was some weeks after November; indeed, he places it in the latter half of January 1895. Mr Riddoch, on the other hand, places it about 3rd December. If that part of the case should ultimately prove to be important, I have little hesitation in preferring the evidence of Mr Polson on that particular matter. Mr Riddoch assigns a reason for his date which certainly does not bear scrutiny, because he refers to a fact in support of it which it turns out did not happen for a year after. But in the view that I take of the case I do not think it very important whether the intimation which undoubtedly was made by Mr Riddoch to Mr Polson was made in December or in January. Certain it is that Mr Riddoch met Mr Polson and told him that only £50 of the £200 had been placed on deposit-receipt, and Mr Polson says that on getting that information he went at once, either on the same day or within a day or two, to Mr Elliot and demanded an explanation. Mr Elliot gave an explanation which seems to me to import that he not only had not fulfilled the mandate of the trustees, but was using the money himself. I regard the explanation as practically amounting to that, though in form Mr Polson says it was simply an assertion by Mr Elliot that he had invested the money at 5 per cent. I do not think Mr Polson was very careful to deny that that at all events put him on his inquiry, and I think he must be taken to have assumed that the money was not safely invested at 5 per cent., that it was not invested in conformity with the mandate of the trustees, and therefore it was a risk in the hands of his co-trustee. From that date onwards Mr Polson repeatedly—sometimes by letter and sometimes verbally—intimated to Mr Elliot that he must as soon as possible restore that money to the trust. Mr Elliot, who by this time was in very straightened circumstances, though nobody had any idea of it, except perhaps his confidential clerk, was putting off from time to time, and apparently welcomed the arrival of the summer holiday in order that the matter might be over. He writes a letter in June by which he gets the matter tidied over, and when it comes up again in September he writes laying the blame of the delay on the General Election, which had intervened, and which no doubt had given him and his assistants in the Sheriff-Clerk's office a great deal of work.

"I have said that until June no outside person suspected that Mr Elliot was in pecuniary difficulties, but Mr Polson says

that about midsummer he did come to be aware that Mr Elliot had some difficulties in money matters. He does not go at all into detail, but it must be taken as part of the facts of the case that about midsummer Mr Polson became aware that very probably the reason why Mr Elliot had not deposited the trust money was that he had used it up in payment of his own debts.

"On 23rd September Mr Polson gets a letter from Mr Riddoch about this matter, in which he states that Mr Elliot admits to him that he has £100 to return, and on 28th November (Martinmas being then past, at which term Mr Elliot had renewed his promise to make good the sum to the trust-estate) Mr Polson writes to Mr Riddoch—'I have to request you as acting for the trust to inquire without delay into this matter and report to me. Also I require you to give Mr Elliot due legal intimation that he is not henceforth to act alone in receiving any money due to the trust, and that I shall insist on signing any receipt for money and seeing that it is lodged in bank. As to the hundred pounds he has retained in his own hands since November last instead of putting the same in bank on deposit-receipt, as instructed at a meeting at which you were present, I have intimated to Mr Elliot that if that sum is not paid into bank in the name of the trustees within one month from Friday last, "legal steps" will be taken to have it done.' When that month elapsed Mr Polson again wrote to Mr Elliot (on 16th December)—'As the time allowed before taking legal steps to have it done is about to expire, I have to write that the sum with interest must be paid sooner or later, as I have no power as a trustee to modify the claim. Therefore the sooner the better,' and in reply to that letter he gets a letter from Mr Elliot saying that he has just granted a trust-deed for his creditors, and that it is of no use now raising proceedings against him.

"Now, I have considered very carefully whether, in the circumstances of the case, Mr Polson's conduct amounts to *culpa lata* so as to render Mr Polson liable to restoration of that money; and taking it, as I do, that that is a question to be determined on the circumstances of each case, I have come, though not without hesitation, to the conclusion that Mr Polson's conduct is not within the category of *culpa lata*. Most of the cases where *culpa lata* has been affirmed have had features in them which are markedly absent from this case. In the first place, the leading cases in that branch of the law have nearly all of them been cases where trustees have allowed money to get into the hands of their co-trustees or their factor, and have done nothing at all; and if a trustee does nothing at all—even for such a time as twelve months, possibly even for a shorter time—he may be held to have omitted his duty, and therefore to be liable as a man who takes no steps whatever for the recovery of what is due to the trust. Then, further, in most of the cases where the Court has affirmed liability on this ground a very much longer period of inactivity had elapsed

than in the present case. Then another point that arises on a comparison of this case with others is that here there is no disregard of any express direction or injunction of the truster. Where there is such disregard (as in the recent case of *Carruthers' Trustees*), the Court will infer *culpa lata*, and will not closely inquire whether any loss which occurs is proved to have resulted from the omission or the culpable act. No doubt, looking back upon it, one sees that Mr Polson might have taken and ought to have taken much more stringent steps. It is suggested that he ought at once to have sued Mr Elliot. I can hardly assent to that proposition. What I think he ought to have done was to instruct an independent agent to write to Mr Elliot and demand the money as under threat of litigation. But the question whether and at what stage that should be done is to a certain extent a question of judgment or discretion, and though Mr Polson may have exercised his judgment and discretion wrongly, yet, seeing that he pressed Mr Elliot as far as he could press his co-trustee—short of instructing an independent agent to write legal letters to him—I think on the whole that he has not incurred liability on that head for this money.

“The next part of the case relates to a sum of three half-years' rents. That stands on a different footing as to the facts. It is in one sense more favourable, and in another sense less favourable, to the defender than the other part of the case. On the one hand trust accounts, if they had been regularly made up and rendered, would have disclosed that the rent for the first half-year of the three now in question had not been paid over to the widow and had not entered the trust accounts, but had been kept back by Mr Elliot. But although the failure to have regular and stated trust accounts is not a circumstance in favour of a trustee, it is fair to say that it was through no departure from the ordinary course of this trust that the accounts were not made up in due time to show that Mr Elliot had kept back the first or the second of these half-years' rents. Then again, Mr Polson cannot be said to have had it brought to his actual knowledge till about Martinmas 1895 that the rent was kept back, and therefore he is in a more favourable position as to actual knowledge as to these rents than he was about the other moneys. On the whole, I think his position is stronger as to these rents than it was as to the £150, and if I am right in what I have said as to that sum, the same result will follow as to this part of the case.

“The next point argued for the defender was that even if *culpa lata* had been proved there was no proof whatever of loss resulting to the estate from the default of the trustee, and inasmuch as this is an action practically for damages for breach of trust, no damage is qualified. In the view I have stated it becomes unnecessary to decide this point, but I must not be taken as assenting to the defender's view that if he had been otherwise liable he could in this case have

escaped liability in respect of the plea that the trust-estate has not suffered any loss through his default. The plea is founded upon this undoubted fact, that for at least three years prior to his sequestration in January 1896 Mr Elliot was behind the world to the extent of about £5000, and was hopelessly insolvent all that time; and the argument urged for the defender was this, that in these circumstances pressure by Mr Polson at any time during 1894 and 1895 would have resulted either in bringing down Mr Elliot, and so depriving the estate of the possibility of getting the money back (for there is practically no dividend expected in the sequestration), or else would have produced the money by Mr Elliot getting it unduly and fraudulently from somebody else. Now, if that view were made out, that might be sufficient for the defender's case, but it seems to me that the argument as put lays a burden of proof on the beneficiaries which they are not bound to undertake. When Mr Elliot was brought to bay, and Purvis's trustees brought their action in November 1895 for £700 or £800, a relative came forward and settled the claim—it is true it was settled for 5s. per £—and the action was brought to a conclusion, and I suppose the trust-deed was granted as part of the arrangement. That shows that Mr Elliot had not come to an end of his friends' willingness to aid, and in view of that circumstance I cannot assume that if pressure had been put upon him earlier by Mr Polson the money might not have been produced otherwise than by Mr Elliot helping himself to other people's money fraudulently. Again, there are indications in the proof that Mr Elliot's business credit was not exhausted during the years of hopeless insolvency, for there were bills and advances made to him of larger amount than would have sufficed to restore this money to the trust-estate. I do not at all say that it is impossible for a trustee to make good such a plea if the facts bear it out, but it does appear to me that the burden of proving that part of the case is on him and not on the beneficiaries, and that he has not in the present case discharged that burden.

“There is another part of this case on which I think parties are entitled to my opinion, and which distinguishes it, so far as I know, from any case that has happened, and that is the peculiar position held by Mr Riddoch as one of the delegates appointed in pursuance of the agreement of January 1894. That introduces a new and somewhat embarrassing element into the relations between these trustees and the beneficiaries, because it is obvious that when beneficiaries appoint delegates to communicate with the trustees, anything done by these delegates, or by one of them acting as a delegate, with the knowledge and assent of the beneficiaries, may easily slide into acquiescence on the part of the beneficiaries in all that that delegate does or omits. Now, while two of the appointees could not delegate their functions to the third, it is difficult to resist the conclusion that the beneficiaries

must have known that he was the medium of consultation and communication with the trustees. Mr Riddoch attended the meeting of 19th November at which the instructions were given to invest the £200 on deposit-receipt, and if this had been a question of the propriety of some investment instructed at the meeting as a trust investment, there would have been little doubt that his presence there as a delegate to consult about the investment would have barred the beneficiaries from objecting to that investment as being *ultra vires* of the trustees. That, however, is not the position of matters here, for while Mr Riddoch must be regarded as having assented to the money being put upon deposit-receipt, it does not follow that he was bound, in the same way as the trustees were bound, to see that the instruction was carried out. If nothing more had happened, I should have said that Mr Riddoch's presence at that meeting did not commit him or the beneficiaries to anything further. But it appears from the proof that both within a few weeks after that meeting, and also repeatedly during the spring of 1895 communications were held between him and Mr Polson which render it certain that Mr Riddoch practically knew all about Mr Elliott's position as regards his money. Now, I do not say that he was the agent of the beneficiaries to all effects, but I do think that some duty lay on him to communicate to the beneficiaries this state of matters, and to inform them that part of the trust funds was at risk. The question of the rents is not much affected by the position of Mr Riddoch as delegate, but so far as regards the £150 which was appropriated in November 1894, I should have difficulty in holding that the beneficiaries have any good answer to a plea of waiver or acquiescence in respect of all that Mr Riddoch did and omitted during the year 1895. I do not think the defender put it too high when he said that there was in this matter a joint duty and joint negligence. So far as that part of the case goes, therefore, it seems to me to fall in with the view I have already expressed on the other part of the case in favour of the defender. On the whole matter I think the defender must be assoiized with expenses."

The pursuers reclaimed, and argued—(1) On the facts the defender had clearly failed in his duty to the trust. It was not a case of mere failure to recover a debt due in the hands of a debtor, but the defender, knowing that his co-trustee had misappropriated the trust funds, had failed to take the necessary steps for recovery of them. It was obviously his duty to put the matter in the hands of a lawyer on first hearing of it, and his failure to do so constituted a strong case of *culpa lata*—Lewin on Trusts (9th ed.) 217. In *Forman v. Burns*, February 2, 1853, 15 D. 362, the executor had a far stronger case than the defender here, but was held liable—*Billing v. Brogden*, 1886, L.R., 38 Chan. Div. 546; *Blain v. Paterson*, January 23, 1836, 14 S. 361; *Styles v. Guy*, 1849, 1 Macnaghten & Gordon, 422. 2. As to the defence that no benefit would have

accrued to the trust had the defender prosecuted Mr Elliot, the defence might be relevant, but the *onus* of proof lay upon the defender, and he could not easily discharge it—*Carruthers v. Carruthers*, July 13, 1896 (23 R. (H.L.) 55, at p. 58; *Dominion Bank v. Bank of Scotland*, July 19, 1889, 16 R. 1081; *Stiven v. Watson*, January 27, 1874, 1 R. 412, at 416; *Wynne v. Tempest*, April 10, 1897, 13 T.L.R. 360.

Argued for respondent—1. The trust as a whole had been well managed, and the estate had increased in value. The defender had taken scrupulous care and could not have managed his own affairs better. He could not have done more than he did, the pressure he put upon Mr Elliot being of the severest kind. It was not unreasonable not to sue, regard being had to Mr Elliot's reputation, and to the knowledge which the beneficiaries had of the affair through their delegate Mr Riddoch. The time during which he had failed to take action was very short compared with the time in cases cited by the reclaimers, e.g., in *Blain v. Paterson* there had been a delay of nine years. In *Styles v. Guy* there had been six years. In *Carruthers' Trustees* there was a special provision in the trust-deed as to the holding of an annual audit, and naturally therefore the trustees are liable for neglecting to do so. But if it could be proved that the defender had acted reasonably according to the average standard, even if there had been an error of judgment, he was not necessarily liable—*Knox v. Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, at p. 87. 2. But assuming neglect of duty, it had been clearly proved that no benefit would have resulted to the trust by suing Mr Elliot. If the Court were satisfied that the *onus* had been discharged, and that there would have been no use in suing, the defence was unquestionably good. The doctrine as to that laid down in *Holiday v. Peters*, 1860, 28 Beav. 603, had never been challenged. Here the defender had proved hopeless insolvency for five years, and that was enough to discharge the *onus*.

At advising—

LORD PRESIDENT—There is no controversy as to the material facts of this case, and I accept unreservedly the evidence of the defender, which is perfectly candid and distinct.

It appears, then, that in the beginning of February 1895 it came to the knowledge of the defender that Mr Elliot, his sole co-trustee, had not lodged in bank on deposit-receipt a sum of £200 of trust-money which had been entrusted to him for that purpose. This information did not come from Mr Elliot. The defender at once went to Mr Elliot and asked for explanations. He got none that satisfied him. Admittedly, Mr Elliot had not put the money in bank, and he gave no account of what he had done with it. Some words were used about a five per cent. investment, but they did not deceive the defender. He says frankly—"I thought he was keeping the money in his own possession and using it for his own

purposes, and was offering to pay five per cent. upon it, or something of that kind."

From February onwards, then, the defender knew that this £200 of trust-money was in Mr Elliot's hands contrary to express instructions, and that it was applied to his own uses. It admits of no doubt that *prima facie* it was the duty of the defender to take immediate steps to compel the replacement of the money. Beyond vague promises that the money would be repaid, the defender got nothing to reassure him. The fact of Elliot's default could only be accounted for by his being desperately in want of money. The defender does not profess to have at first abstained from action for any politic reason, in the belief that some temporary difficulty was to be tidied over; and as time passed things looked worse and worse, and called more and more clamantly for decisive action. By midsummer the defender knew, apart from the default in question, that Elliot was in difficulties. In October he saw Elliot's brother-in-law Mr Stevenson, and his suspicions were confirmed. Yet from February to November the defender allowed himself (to use his own phrase) to be trifled with by Elliot. He clung to the hope that the money would be repaid and took no legal action.

The true state of Elliot's finances and his inability to pay anything were not known to the defender, or indeed to anyone outside Elliot's own office, and accordingly are not advanced by the defender as accounting for his inaction.

It seems to me that these facts constitute a clear, and I may say a strong, case of *culpa lata*. The defender was one of two trustees; his co-trustee appropriates to his own uses £200 of trust-money which he had been entrusted with for investment, and conceals the fact, which was only accidentally discovered; no presentable excuse is made, nor is any reasonable prospect given of the money being replaced if time is given. It is, of course, disagreeable to take a co-trustee by the throat, but if a man undertakes to act as trustee he must face the necessity of doing disagreeable things when they become necessary in order to keep the estate intact. A trustee is not entitled to purchase a quiet life at the expense of the estate, or to act as good-natured men sometimes do in their own affairs in letting things slide and losing money rather than create ill feeling.

If it be asked what ought the defender to have done, the answer is obvious. Owing to the default of his sole co-trustee, the defender was placed in the position of a sole acting trustee, deprived of the legal assistance of his co-trustee. His duty was clear. He ought, without delay, to have instructed a lawyer to recover the missing £200, and he ought to have seen to it (by himself or through the lawyer) that the rest of the trust-estate was safe and did not get into the hands of Elliot. A lawyer so instructed would naturally have written Elliot intimating that unless the £200 was replaced within a given number of days a summons would be served, and steps would have been taken to prevent the Whitsunday

rent from getting into Elliot's hands.

The latter precaution as well as the former was omitted by the defender, and the Whitsunday rent of Bellevue was allowed to be uplifted by Elliot. It is nothing to say that the defender did not know that Elliot was uplifting these rents. Once he knew that his sole co-trustee was intercepting trust funds and applying them to his own uses, the defender ought to have taken alarm about the whole trust-estate, and to have seen where it was and where it was going.

The defender has founded on the fact that the history of the defalcation of Mr Elliot came to the knowledge of a certain Mr Riddoch at the same time as, or rather before, it did to his own, and that Mr Riddoch was aware of the defender's inaction. It is said that Mr Riddoch's knowledge was equivalent to the knowledge of the beneficiaries inasmuch as he acted as their "delegate" in the matter of the investment of the money of which this £200 formed part. I am not satisfied that Mr Riddoch's duties as "delegate" under the agreement from which he derived that position had not terminated so soon as the investment of the money on deposit-receipt was decided on. But, further, even assuming Mr Riddoch's knowledge to be the beneficiaries' knowledge, he did nothing that could at all amount to acquiescence in the defender's inaction, or could relieve the defender from the consequences of that inaction. He had no means of himself acting—the defender alone could act. The fact that Mr Riddoch left the defender to act on his own judgment cannot exonerate the defender for failing to act with requisite promptness and energy.

The next defence is, that even assuming that the defender has made himself liable for loss resulting to the trust-estate through his omissions, yet no loss has in fact occurred, because nothing could have been recovered from Elliot. It is necessary to observe that in the view which I take this defence does not apply to the Whitsunday rent, for if the defender had done his duty it would have been intercepted, and would never have got into Elliot's hands at all. Of the two sums which I have mentioned, this defence can only apply to the £200.

Now, it is clear that the burden of proof is on the defender. It is for the defender to prove that if he had done his duty the loss would equally have resulted. The defender has recognised this, and has placed before us very full information about the financial position of Elliot. He has proved that in and for long prior to 1895 Elliot was hopelessly insolvent. Now, where a trustee states the defence which we are now considering, I should not in every case be content with proof that the debtor's own means were exhausted. Some men, after their own means are exhausted, have other resources—they can appeal to their friends. Take the case of a young merchant, the son of a rich and liberal man. If he were indebted to a trust-estate, the circumstances might be such that even if it were proved

that his own means were exhausted, the trustee might not have negatived the likelihood that if action had been raised, the debt would have been recovered, especially if it touched the honour of the debtor. But the present case is in strong contrast to that which I have figured. The sequestrated estate of Elliot is not expected to pay any dividend at all. He is about 70 years of age. He had been in pecuniary straits for years. He had borrowed from friends, but seems to have come to an end of his resources in that quarter before 1895, and to have betaken himself to less defensible methods. "He paid pressing creditors by taking from one client to pay another."

Now, on this evidence I am prepared to hold that the defender has made out his case. The only suggestion to the contrary which is at all consistent with the facts comes to be, that if the defender had sued Elliot for the £200, Elliot would have stolen the money from some third party, and have paid it to the defender. I own that there is great plausibility in this conjecture. But in such a surmise I feel myself to be out of the region of legitimate inference.

The only other suggestion of possible aid coming from friends arises from the fact that in November 1895 some claim by people called Purvis's trustees was bought off at 5s. per £ by General Boswell, a brother-in-law of Elliot. We do not know anything but the fact, and I am unable to infer from this that General Boswell would again have intervened, or that any other General Boswell was available. The *onus* on the defender cannot impose on him the necessity of negativing such remote conjectures.

My opinion on the whole case is, that in February 1895, and certainly before Whitsunday 1895, it was the duty of the defenders to take steps for the recovery of the £200, and for the interception of the Whitsunday rent of Bellevue; that his omission to do so constitutes *culpa lata*; that he is liable for the Whitsunday 1895 rent of Bellevue, with interest from that date, and that no loss has been sustained by the trust-estate through the omission of the defender in the matter of the £200. The pursuers claimed from the defender two other half-years' rents of Bellevue. As these rents fell due and were ingathered by Elliot before the defalcation of the £200 and its discovery, some *culpa lata* must be formed to support this demand other than that which I hold proved. I have only to say that I think the pursuers' case on this head has entirely failed, but even if it had not, the same defence would avail the defender as I sustain regarding the £200. In my view the Lord Ordinary's interlocutor must be recalled and decree granted for the Whitsunday rent of Bellevue with interest, the defenders being *quoad ultra* assoilzied.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor" of 19th January, "decern against the defender for payment to the pursuers, as trustees foresaid, of the sum of £30, 17s. 6d., being the rent of Bellevue due at Whitsunday 1895, with interest thereon from said term until paid at the rate of 5 per centum per annum: *Quoad ultra* assoilzie the defender: Find no expenses due to or by either party, and decern."

Counsel for the Pursuers—Salvesen—W. Thomson. Agents—M'Naught & M'Queen, S.S.C.

Counsel for the Defender—Shaw, Q.C.—Watt. Agents—Winchester & Nicolson, S.S.C.

Saturday, July 10.

### FIRST DIVISION.

#### CHALMERS' TRUSTEES v. SINCLAIR.

*Minor and Pupil—Curator—Capacity of Married Woman to Act as Curator to a Minor.*

*Held* (per Lord President and Lord Adam, *diss.* Lord Kinneair) that a married woman is incapable of acting as a curator to a minor.

*Kerbechill v. Kerbechill*, 1586, M. 9585; *Marquis of Montrose*, 1695, 4 Br. Supp. 277; and *Stoddart v. Rutherford*, 30th June 1812, F.C., *commented on*.

By trust-disposition and settlement and relative codicils, Patrick Henderson Chalmers of Avochie, who died in 1889, nominated his wife and certain other persons to be his trustees and executors.

The truster left two sons, the elder born in 1882, the younger in 1888.

The following were the truster's provisions with reference to the guardianship of his children:—"And I hereby appoint my wife, the said Mrs Emma Jane M'Donell or Chalmers, to be sole tutor and curator during all the days of her life, but so long only as she shall remain unmarried, to our child or children, and from and after the death of my said wife I appoint [the other trustees], and in the event of the second marriage of my said wife, she shall cease to act as sole tutor and curator to our child or children, but she shall act along with those herein above appointed to act from and after her death, and the survivors and acceptors, or survivor and acceptor, to be tutors and curators or tutor and curator to our said child or children, with the fullest powers, privileges, and exemptions, declaring that such tutors and curators shall not be liable for omissions nor the one for the other, either *in solidum* or *pro rata*, but each for his or her own actual intrusions with the means and estate under his or her actual charge and administration."

Upon the truster's death his widow accepted of the office of tutor to her sons, and acted as sole tutor to them until her