Mr. Rolt.—My Lords, this is a minister suing alone against the public purse. It will be two years' stipend to him.

LORD CHANCELLOR.—We dismiss the appeal without costs. I should much doubt what you are stating; it looks very like a proceeding on behalf of the church generally.

Mr. Rolt.—I am told not, my Lord; I am told that numerous boards of parishes have subscribed for this matter, but that fact could be ascertained.

Interlocutor affirmed.

Second Division.—Lord Dundrennan, *Ordinary.*—Connell and Hope, *Appellant's Solicitors.* —Robertson and Simson, *Respondent's Solicitors.*

JUNE 15, 1852.

MRS. LUCY THOMSON or DAVIDSON and Husband, *Appellants*, *v.* MRS. ANN CHRISTIE or THOMSON and Husband, and (D. J. MACBRAIR) Mandatory, *Respondents.*

Trustee, Liability of—Culpa—Factor—Law-Agent—*A trustee, T., under a trust deed which authorized investment in securities (not defining these), lent trust monies on security of two houses (a second mortgage), and on selling under the power of sale gave up possession, and allowed the purchase-money to remain long unpaid, whereby the whole was lost.*

HELD (affirming judgment), *that T. was liable to repay the trust money so lost, as he ought to have pursued the transaction to its end promptly.*[1]

The *appellants*, in their *printed case*, contended that no loss to the trust estate had arisen by any fault of Mr. Thomson, the trustee whom they represented; and if it were so, he was protected by the trust-deed:—Authorities Cited—*Dalrymple*, M. 3534; *Campbell and Clason* v. *Campbell*, in H. of L. May 30, 1845; 17 Sc. Jur. 500.

The *respondents*, in their *printed case*, contended that the judgments were well founded, because "the sums, for which Thomson has been made personally answerable, were lost to Haldane's trust estate through Thomson's negligence and breach of duty as trustee and law-agent of the trust." *Morrison* v. *Miller*, 5 S. 322; *Anderson* v. *Small*, 11 S. 382; *Mayne* v. *M'Keand*, 13 S. 870; *Sym* v. *Charles*, 8 S. 741; *Fowler* v. *Reynal*, 3 Mac. & G. 500; *Rowland* v. *Witherden*, *ib.* 586.

B. Andrews Q.C., and *Bethell* Q.C., for appellants.—The discretion allowed to the trustees by Haldane's trust-disposition is so ample and almost unlimited, that it covers any defect in Thomson's discretion as trustee and factor—1 Bell's Com. 459; *Dalrymple* v. *Murray*, and *Campbell* v. *Campbell*, *supra.* We admit, if the words of a trust are not express, the ordinary relation of truster and trustee will still create a liability; but when a specific clause of indemnity is introduced, it is different. It cannot at least be said, in the present case, that Thomson was wrong in lending the £600 by the bond, for the security was then ample. It is usual in Scotland for trustees so to deal with trust-monies, and there is no severe rule as to investing in the funds, such as prevails in England. As to the sale, it is true that the articles of roup contained one condition to the effect that the purchaser should, within 20 days, grant a bond with caution for the price. But it has never yet been held, that a trustee may not dispense with or waive a condition of sale which he may find to operate to the prejudice of the estate to be sold. All that a court of equity here would have done, would be to direct an inquiry, whether, at the date of Thomson's death, the property was of less value than it was at the time of sale. The sole negligence of which Thomson was guilty, if any, was in his not putting up the subjects again for sale after he had discovered that Tasker and Scott had purchased, not for themselves, but for Alison—though, perhaps, he would in that case have obtained a less price. As to the deeds, they were prepared, not by Thomson but by Thomson Paul his agent, and a trustee cannot be liable under this trust for the acts of his agent.

[LORD CHANCELLOR.—Surely you can't say a trustee is not liable for a breach of trust because he has an agent. Does that not make the matter worse?]

A trustee may competently say, I shall be answerable for my own acts, but not for any agent; and it would be a hard thing if a trustee were to be prevented from having an agent. In *Moffat* v. *Robertson*, 12 S. 369, it was not sought to make the trustee liable for the act of his agent, but for an act of his own. Then it is said the deeds bore that the purchase-money had been paid—

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[1] See previous report 12 D. 179; 22 Sc. Jur. 21. S. C. 1 Macq. Ap. 236; 24 Sc. Jur. 526.

but that was a mere form; and even though they had been executed containing such a recital, yet so long as the purchase money was not paid, there would be a lien on the estate. Our feudal title was not divested by these deeds; they only lay ready to be completed when the purchaser should pay the price, and the testing clause was not added. No infeftment could have taken place in that situation of the deeds.

[LORD CHANCELLOR.—Could the testing clause not be filled up afterwards?]

Yes; but the mere delivery of the deeds would not discharge the property of the debt, and accordingly the title has never yet gone out of Thomson's representatives. But even supposing it was by Thomson himself that the deeds were prepared, it is the usual practice in Scotland for the vendor's solicitor to prepare the conveyance at the expense of the vendee—though, in England, the custom is different. *Lastly*, The beneficiary took no step to get the contract annulled, which might have been done much earlier than 1834; on the contrary, when the judicial factor was appointed, he did not press Alison for the money. In fact he, and the beneficiary through him, condoned any irregularity of which Thomson may have been guilty, and it is owing to their own laches, and not ours, that the matter was not settled long before this.

Rolt Q.C., and *Anderson* Q.C., for respondents.—There were two clear breaches of trust. It was a breach in taking so inferior security as the bond for £600. Lord Cottenham used to lay it down, that a trustee was not justified in taking a second mortgage. That would have been so here even if the trust-deed had been silent on the subject of investment; but there is a special clause in that deed regulating the mode of investment, and its directions have been disregarded. —*Morrison* v. *Miller*, *Anderson* v. *Small*, *Mayne* v. *M'Keand*, *Sym* v. *Charles*, and *Fowler* v. *Reynal*, *supra*. The second gross breach of trust was in Thomson's not only failing to require the purchaser of the subjects at the auction to give security, but actually delivering executed deeds, whereby he conveyed the feudal title away, without having ever received the purchase-money. The lien was thus completely lost, for the mere filling up of the testing clause could be done at any time. It is not made out that Thomson ever ceased to be trustee, and all the litigation that took place as to the assumption of Thomson Paul, was caused by Thomson's own act. Even if Thomson had an agent who misconducted himself, both were jointly liable.—*Rowland* v. *Witherden*, *supra*.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, the question arises upon the disposition of certain trust-money, £600, a loan from the estate of Mr. Haldane, who died as far back as 1789. Mr. Thomson, who was a writer to the signet, was one of the trustees of the property of that gentleman; and there are certainly very large discretionary powers given by the deed, and by the codicil, and very unusual clauses of indemnity for the trustees in the execution of them.

Now, in 1819, Mr. Thomson being then the surviving trustee, under those documents, and the agent of the other trustees, being himself a writer to the signet, what is called here a solicitor or an attorney, and continuing to carry on the trust, he instituted some proceedings in the Court below for the purpose of bringing before the Court the different persons who were entitled to Mr. Haldane's property, and having that property distributed under the order of the Court. Mr. Thomson, in 1822, in that action brought in his accounts, and four years afterwards, in 1826, he advanced £600 (which had come to his hands as part of the property) in the way which I am about to mention. Now, by the original instruments, he was bound to lay that money out on securities. The securities were not defined by the instruments, but they must be understood in law to mean such securities as a trustee of funds could properly take. At the same time, I am quite ready to admit, that the very unusual and extensive indemnity clauses given to the trustees, might cover an improper disposition to some extent in this case, which would not be allowed to pass in ordinary cases. But this gentleman advanced £600 without taking the opinion of the Court, or having any officer appointed to consider whether it was right so to dispose of the fund; without consulting any of the parties interested, he advanced £600 upon two houses. Now those houses were, at the time when he made the advance, in mortgage for £3000. The houses are represented at that time to have been worth £4200, and there is evidence of a very slight nature, of a surveyor, that at a later period they had become of a still larger value—evidence very little to be relied on, because, my Lords, there is no man who has decided or acted in any Court of justice, but is painfully aware that the evidence as to value is scarcely ever that which can be materially relied upon. If it is on one side, it is entitled to very little attention, I am sorry to say; and if you have evidence on both sides, the statements are certain to clash the one with the other, according as the surveyors are employed for the different parties.

My Lords, this money was secured by what we should call a second mortgage upon the property; and Mr. Alison joined in a bond with sasine as a security for the £600 which was so advanced. Now, that that was an improper security by the law of this country, is beyond all question. Whether it was so by the law of Scotland, may be open to a little doubt. It is not right to judge any case coming from Scotland, by the law of England; but if in point of fact the same principle is found to apply to the law of the two countries, then nothing can be more just or rational than to see how that principle applies in England, if the consequence flowing from the principle have

not been clearly settled in Scotland. In no other way would I ever advise your Lordships to act upon the law of England, as producing an effect upon the law of Scotland. It has sometimes been very much matter of complaint in Scotland that a contrary course has been adopted, and, I daresay, in some instances not without foundation; but that certainly is advice which I should never offer to your Lordships.

Now I think it is not a question for consideration, whether this was a breach of trust or not according to the law of Scotland, because the clauses in these instruments are so very extensive, that I think if they were not to be held to apply to a security so taken as this is, they really would be inoperative. It therefore seems to me that they must be considered to excuse the trustees in the present instance. But it ought to be considered, whether it is possible to maintain in ordinary cases, even upon the law of Scotland, such a transaction as this. When trustees advance money it is not simply a question whether the estate is sufficient for the purpose; the question lies much deeper. Is it prudent and proper to advance money upon a property which is not greatly beyond the amount of the first mortgage?—will you place yourself in that position? First of all you may be excluded altogether by acts taken by the first mortgagee. The houses are subject to the paying off of a higher mortgage—in this case £3000, when you are only advancing £600; and if they are only sufficient to do that, and he enforces that payment, you do not get a penny of the money which you have advanced. House property is never very satisfactory, for it is liable to casualties which do not attach in general to lands. Take the accident of fire,—the most valuable property may be reduced to dust and ashes in the course of a few hours; and unless the trustees are constantly alive to the necessity of keeping an insurance afloat, (and it is very easy to miss the day,) there would in that event be no property whatever left under such a security for the trust-fund.

My Lords, I make these observations rather with a view to deter trustees in Scotland from doing an act which may be spoken of to their detriment, than as bearing very closely upon the case now before your Lordships; for, as I have already said, I think it must be supposed, under the peculiar provision in these instruments, that this was an application of the money which a Court of equity would not visit upon the trustees.

My Lords, so matters stood till 1828, and we have then, upon deeds executed by Mr. Thomson himself, a statement that he had found it necessary to offer the property for sale. In 1828 he put it up for sale under the power of disposition which he had by the mortgage itself. That property was bought by two different persons, at different prices, as the real purchasers at the sale, and they were treated as such. Now the monies so produced were more than sufficient to pay off the £3000 the first mortgage, and the £600 the second mortgage—they left even a surplus. Mr. Thomson conducted that sale as the writer to the signet, or attorney for the parties. In short, for the expenses of it his bill was made out—£50 all but a fraction; and he was paid as a writer to the signet for his professional labour in carrying out that sale.

Now, my Lords, it appears that the persons who bought at the sale were mere nominal purchasers. They had no right to relieve themselves; they could not have insisted that they were buying as agents; they could not have been right in saying that, for they bound themselves by the articles, and by their signatures, to complete their purchase. It turned out that they had both of them bought for Mr. Alison. Now, who was Mr. Alison? He was himself the surety for Mr. Ireland in the bond with sasine, which had been given as one of the securities with the property in question, to Mr. Thomson, when he advanced the £600. Now, if there was anything calculated to excite the care and suspicion of a legal person, a solicitor entrusted with the management of this particular business by the trust-deed, taking upon himself the execution of it, and charging for the labour and pains in carrying it into execution, it was the circumstance, that Mr. Alison, himself a surety and liable to pay the money, should not have come forward to pay the money, but should have driven Mr. Thomson to the necessity of selling this property in order to raise the money. We should have thought, therefore, that great caution would have been taken in accepting Mr. Alison as the purchaser in lieu of the two persons who had actually purchased the property; but Mr. Thomson at once accepts Mr. Alison as the purchaser.

My Lords, by the articles of what we call here sale, it was stipulated, that the purchaser should enter into a bond with cautioners to pay the money, and perform every other duty; and it was also stipulated, that, in default, the seller might resell the property. The learned Judges below seem to have laid great stress upon the circumstance, that the property was not immediately resold under that condition, and the case has been in some respects argued upon that ground at your Lordships' bar. Now, I cannot agree that that is a sufficient ground to charge the trustee. We always have a condition upon a sale by auction that if the purchaser does not within a given time complete his purchase, it shall be lawful to resell the property—and that whatever is the loss which is sustained by that resale, it shall fall upon the purchaser. But it is very seldom indeed that that is resorted to—no trustee would resort to it if he were taking other proper steps to carry out the purchase; and therefore, my Lords, I do not agree to put the case upon that ground, and to consider that as a breach of trust upon the part of Mr. Thomson.

But what is the conduct of Mr. Thomson? He lived for three years after the sale. He found

it necessary to resort to the sale of the property in order to raise the money. Mr. Alison, whom he admitted as the purchaser, who had purchased the property indirectly, had not the money forthcoming, and then Mr. Thomson suddenly changes the whole character of the transaction upon which the security depends, complicates the trust, and, as far as is in his power, destroys the original security by the sale which he has effected, and for which he has charged this trust-estate. Only observe, my Lords, what takes place. Mr. Alison paid a small sum for interest; there was no payment after 1828—not a shilling of principal is ever paid. What does Mr. Thomson do? He executes regular deeds conveying the two lots by separate deeds to Mr. Alison, upon the face of which he states that to which I have already called your Lordships' attention, that he had found it necessary to resort to a sale to raise the money. He admits that he had not received the money, and he conveys the property in the clearest terms to Mr. Alison.

Now, it is very true that those deeds have not been perfectly executed—that is to say, that although they are executed by Mr. Thomson, and although they were witnessed regularly by witnesses who attested them, yet the attestation clause is not what it is necessary it should be. But it is not attempted to be argued that that attestation clause could not have been added at a later time, and then perfection would have been given to the deed.

What further takes place? One of these nominal purchasers conveys the property which has been purchased under these articles of sale, to Mr. Thomson Paul, by way of securing the debts which were charged upon the estate. I never saw a more improper transaction; and in that way the matter stands, till we find, by the judicial factor's report,—and I see nothing to oppose that statement,—I take it for granted that those facts are not displaced,—that they are rightly stated upon the face of that report,—it appears that the deeds, and the bond with sasine, which was the security originally to Mr. Thomson for the £600, are all delivered up to Mr. Alison, and the possession is allowed to be transferred to Mr. Alison.

Now, your Lordships have heard arguments at your bar with regard to the operation of this transaction, but it is not worth while to pursue the inquiry, whether there was a lien or not. It is not to be tolerated that a trustee shall venture to sell an estate to raise trust-money, because he cannot get the money in, and that the moment that sale is effected, he is to endanger his trust, to complicate and obstruct his trust, by executing a deed of conveyance, though in an informal way, delivering it to the purchaser, allowing the purchaser to have possession, and admitting him, through the whole remainder of his the trustee's life, to retain that possession without paying a single shilling of the purchase-money, and without aiding the trustee by a single effort to recover it. I think, my Lords, that this is so manifest a breach of trust, that your Lordships can entertain no doubt upon the matter.

My Lords, there is nobody more reluctant than I am, in a judicial character, to visit hardly a trustee. I never do it without pain, and never should do it if the law did not compel me to do it. I cannot but apply those observations to this case. I believe that the illness which operated upon Mr. Thomson led him to act in a way in which he would not otherwise have acted; but it is impossible that a trust can be properly executed if transactions like these are allowed to pass.

Now, during the whole of this time, although it may be that Mr. Thomson did not interfere in the execution of this trust, that it is which makes him responsible. He cannot be protected by that clause which is referred to about the sale, because the sale was his own act. A man cannot be permitted to sell an estate as a trustee, and then to leave it optional whether that sale shall or shall not be completed. It is a transaction in which he has bound himself, from the very necessity of it, if he does not find the money himself, to pursue that matter until he has brought it to a satisfactory conclusion. His act, therefore, was an intromission clearly within the meaning of the law of Scotland, which would bind this gentleman to answer for his neglect, and was not a single case standing by itself. My Lords, I am therefore clearly of opinion, that this is a manifest and gross breach of trust.

Then arguments have been raised of this description:—It is said that no judicial factor was appointed until 1834, and that the parties beneficially interested ought themselves, by proceedings in Scotland, to have applied for a judicial factor. My Lords, it was justly observed at the bar on the part of the respondents, that the whole time was occupied in contesting the right of Mr. Thomson Paul to act as trustee and agent in this matter, and that he was introduced improperly into this trust by Mr. Thomson himself. With respect to the delay, of course it cannot be said, that that is a delay to be thrown upon the persons beneficially interested.

Then another argument is raised, that, when the judicial factor did act, he gave time, and he treated with Mr. Alison as if the money was properly remaining in Mr. Alison's hands. Now, my Lords, the correspondence does not bear that out—but it satisfies me, looking at what was read this morning at your Lordships' bar by the learned counsel, that the judicial factor did not know what the circumstances were, for he is actually applying to Mr. Alison, not as the purchaser in 1828, to pay the money, but he is applying to him upon the bond which he entered into with Mr. Ireland when the money was originally advanced. It is therefore clear that Mr. Thomson had so complicated this matter by his dealings, that, unfortunately, nobody knew exactly how it stood.

My Lords, under the circumstances, I am of opinion that the decision of the Court below was right, and I must therefore move your Lordships that the interlocutors complained of be affirmed with costs.

Interlocutors affirmed with costs.

First Division.—Lord Murray, Ordinary.—Law, Anton and Turnbull, *Appellant's Solicitors.* Richardson, Loch, and Mac Laurin, *Respondent's Solicitors.*

JUNE 17, 1852.

THE ABERDEEN RAILWAY COMPANY, *Appellants, v.* BLAIKIE BROTHERS, *Respondents.*

Arbitration—Submission—Contract—Agreement—Clause—Construction—*A railway company's engineer was made by contract deed the arbiter as to the furnishings supplied by a contractor, with power to decide disputes as to the meaning of the contract, and the quantities and state of materials supplied. The arbiter decided these points, and awarded damages for breach against the company.*

HELD (partly affirming judgment), 1. *That there was a valid agreement to refer to arbitration;* 2. *That the arbiter named had power to construe the agreement of parties; but,* 3. *Not to assess the amount of damages for alleged non-implement of the agreement.*[1]

The pursuers appealed against the interlocutors of the Lord Ordinary (20th July 1849), and of the Court (28th Jan. 1851), in the process of *declarator,* for the following reasons: 1. Because the contract imposed no obligation on the appellants to take from the respondents all the materials, of the description specified in the schedule, which might be necessary for the construction of the railway and works. 2. Because the arbiter had no power or authority, under the contract or otherwise, to try the validity or assess the amount of the respondents' claim of damages for alleged non-implement of obligation, and any defence founded on the alleged clause of submission, as excluding the jurisdiction of the Court, was groundless. 3. Because there were no *termini habiles* for the finding in the interlocutor of the Lord Ordinary, that the contract was in full force, and obligatory on the parties; and because, even although it had been otherwise, the appellants were entitled to the declarations and reservations sought in the conclusions of the summons.

In the process of *suspension,* which in the Court of Session, it was conceded, should abide the fate of the declarator, they also appealed, maintaining in their *printed case* that the interlocutors in that process ought to be reversed for the following reasons:—1. Because the charge of horning was irregular and defective, in so far as the copy of the warrant prefixed to the charge had not been duly signed by the messenger. 2. Because, even if the contract and clause of submission empowered the arbiter to determine whether the appellants had or had not been guilty of any breach of obligation, and the extent, if any, of such breach, he was not empowered, and was not entitled, to assess and fix the amount of damage resulting from such breach, and to pronounce judgment for payment. 3. Because the claim and award, or decree-arbitral following thereon, dated in July 1850, were not warranted by, and were at variance with, the previous award or decree of 6th September 1849, which proceeded upon the claim of the respondents for alleged breach of contract; and any decree at variance with, or going beyond, the judgment of the arbiter of September 1849, must be regarded as *ultra vires* of him. 4. Because, in the circumstances, as connected with the unjustness of the claim and award, and the mode in which Mr. Gibb had proceeded and acted as arbiter—particularly as to this award, and his refusal to hear the appellants, to consult counsel, or to give any information as to the *data* on which his award proceeded, though he reserved farther claims as to the same matters—the decree and charge ought to be suspended *simpliciter.* 5. Because, even if the above reasons were not well founded, the note of suspension ought at all events to have been passed, in respect of the challenge of the contract and subsequent proceedings, including the decrees-arbitral, at present before the Court in the action of reduction, especially as the appellants had found sufficient caution.

The respondents, in support of the judgments of the Court of Session, (in the *declarator,*) generally referred to the grounds of opinion of the Judges. In regard to the *suspension* process, they maintained in their *printed case* that the interlocutors were well founded, because—1. A dispute and difference having arisen between the appellants and respondents regarding the true intent and meaning of the contract of 22d and 28th September 1847, and, in particular, regarding

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[1] See previous report 14 D. 66; 23 Sc. Jur. 237. S. C. 1 Macq. Ap. 461; 24 Sc. Jur. 537.