read, I desire only to express my entire concurrence in the views they have announced. I have nothing to add, feeling that those noble and learned Lords have in far better language than I have at my command embodied the opinion I had also formed for myself.

Ordered that the judgment appealed from be reversed, and that of the Lord Ordinary be restored.

Counsel for the Appellant—Lord Advocate (Graham Murray, Q.C.)—Haldane, Q.C. —Ferguson. Agents — Dyson & Co., for Gordon, Falconer, & Fairweather, W.S.

Counsel for the Respondent — Guthrie, Q.C.—Clyde. Agents—Martin & Leslie, for J. K. & W. P. Lindsay, W.S.

Tuesday, March 13.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, Morris, Shand, Davey, and Lord James of Hereford).

FERGUSON *v.* PATERSON AND OTHERS.

(*Ante*, March 4, 1898, vol. xxxv. 674, and 25 R. 697).

Trust—Liability of Trustee—Negligence—Indemnity Clause — Trust Funds Deposited in Agent's Name.

The custody of trust funds is not property entrusted to the law-agent of the trust, and the immunity conferred upon trustees by a clause of indemnity against loss by the intromissions of their factors or agents does not extend to such a case, the clause only covering acts of factors or agents properly appointed and acting within the legitimate scope of their agency.

In July 1887, on a change of investment, certain trust funds were received by the law-agent and factor of the trust, and remained in his hands pending investment till the following December. On 21st December the trustees became aware that those funds had been placed in bank on deposit-receipt in the agent's name, and they then instructed the agent to re-deposit it in their name as trustees. Between the 21st December and the 18th June following one of the trustees called repeatedly upon the agent to see that the transfer had been made, but was on each occasion met by the excuse that the agent had sustained an accident and was too ill to attend to business. No communication was made by the trustees to the bank, and on 18th January the agent cashed the receipt and misappropriated the proceeds, Prior to this the trustees had no reason to suspect their agent's solvency or integrity. They were protected by an indemnity clause in their trust-deed declaring that they were not to be liable for the intromissions of any agent who, in transacting the business of the trust, should receive any part of the trust estate into his hands.

In an action brought by a beneficiary, *held* (*rev.* the judgment of the First Division, *diss.* Lord Morris) that the trustees were liable for the loss sustained through the agent's defalcation.

The case is reported *ante, ut supra.*

Mrs Wyman or Ferguson, as an individual pursuer and as the representative of her husband, appealed against the judgment of the First Division.

At delivering judgment—

LORD CHANCELLOR—In my view it is not necessary to go earlier in the history of this case than to note that the £3000 which has been lost through the fraud of the law-agents and factors of the respondent was paid to those law-agents and factors in the month of July 1887, but £3000 of the money handed to the agents of the trustees at that time remained uninvested at Martinmas.

The Lord Ordinary in terms says that in his opinion the trustees were quite entitled to entrust the money to the care of their law-agent and factor pending an investment being found. This is a somewhat formidable proposition, and one to which I cannot assent. How long that may be done appears according to the breadth of the proposition to be simply till an investment is found, however long that operation may take.

I am glad to see that the two learned judges of the First Division take a totally different view of a trustee's duty. Lord Adam says—"I see that evidence has been led to the effect that it is a common and recognised practice for agents and factors to deposit trust moneys in their own names for behoof of their clients. I quite recognise that such moneys as may be necessary for carrying on the current business of the trust should be so deposited or lodged in bank as to be payable on the receipt of agents or factors. But the trust money in question was not at all in that position. It was simply deposited until a permanent investment should be obtained, which apparently there was no immediate prospect of obtaining. It is the duty of the trustees to see that the money entrusted to them is so invested or deposited as not to be exposed to any unnecessary risk. That money deposited in an agent's or factor's name is not in that position the result of this case sufficiently demonstrates, and the only reason assigned for taking such receipts in the names of agents or factors, viz., the trouble of obtaining the signatures of the trustees where it is desired to uplift the money, appears to me to be perfectly trivial." And Lord Kinnear takes the same view. His Lordship says—"The chief difficulty in the case arose from the argument which was maintained to us that trustees are justified in allowing factors or agents to mix the funds of the trust with their own. I am clearly of opinion with Lord Adam that this is contrary to their duty, and that the reasons which were

given for following such a practice are quite inadequate."

I am not quite clear why, if these be the principles applicable to the conduct of a trustee, both those learned Judges have come to the conclusion that they have to assoilzie the defenders. I cannot understand upon what ground these defenders can escape from the consequences of their negligence, because they not only allowed the agent or factor to deal with the money but took no pains to ascertain in what manner the money had been deposited.

I observe the learned Judge further says that he would have taken a different view of their position had the trustees taken steps when they became aware that the money in question was not deposited in their own names. But why did they not? Whose duty was it to see, not in the month of December 1887, when for the first time they asked to look at the receipt, but originally when the money was entrusted to the care of their agent or factor? What single act is proved to have been done by these trustees to see (in the words of Lord Kinnear) "that the funds of the trust were not mixed with the funds of the factors and agents?"

I find that in Mr Paterson's evidence he says—"We were constantly inquiring about the re-investment of the money." He says at an earlier period of his evidence — "The trustees were informed by the agent that he had no investment that he could recommend." When asked whether it was not leaving the money with the agent to do what he liked with, he says—"It might be so, but it would be re-invested by the agents." The agent told him in reply to his inquiries that he had found nothing suitable that he could recommend.

Now, assuming that it was the duty of the trustees to see that the money was not left in the hands of the agent, what excuse is there that no inquiry was made in the period elapsing between July and 19th December?

I am not prepared to say that I should not, upon the grounds mentioned by the learned Judges, have held the trustees liable on the facts as they stood on the 20th December. But the facts do not end at that date. On that date the trustees became aware that the money was deposited in the names of the agents and factors themselves. It is brought to their attention, therefore, that the money (in the language of Lord Adam) "was exposed to unnecessary risk," and I understand both the learned Judges to whom I have referred are of opinion that it was the duty of the trustees, when that fact was ascertained, to have taken steps to remove that risk, and to have the money invested in the names of the trustees themselves.

The excuse for not doing so appears to me to be wholly inadequate. The fact that the agent had suffered an accident could not have prevented a proper communication to the bank. The only excuse given for not doing so—and the money was allowed to remain for a month in what has been described as an unnecessary risk—is that it might have injured the factor's credit with the bank if any such communication had been made.

I cannot assent to the propriety of such an argument, even if an injury to the factor's credit had resulted; but I think nothing could have been easier, without any imputation on either the credit or honesty of the factor, to communicate with the bank and state, as the fact was assumed to be, that it was only an accident that prevented the money from being properly transferred into the names of the trustees; but they as trustees felt it their duty to insist upon its being secured from risk. Moreover, in the event of the factor's death, it might have caused confusion and difficulty. These, to my mind, were ample reasons for a communication to the bank, without in the least decree injuring the credit of the factors. This was not done, and in the result the agent was enabled to withdraw the whole sum of £3000 and to use it for his own purposes.

I observe that neither of the learned Judges who have given judgment nor the Lord Ordinary rely, in the judgments they have pronounced, on the immunity clause of the trust-deed. But the Dean of Faculty has, in his very able argument before your Lordships, insisted on it, that granting a certain amount of negligence in the conduct of the trustees, it is only such an amount of negligence as is protected by the clause in question.

I confess for myself I have great difficulty in weighing the exact amount of what is described as negligence. But I do not think the question of negligence properly arises upon the facts of this case. It seems to me there was a plain breach of duty, and I do not think that, upon the principles laid down in *Seaton* v. *Dawson* (4 Dunlop), it is possible to rely on the immunity clause. There was no authority in the trustees to treat their agent and factor as a banker into whose account they might pay the money. If while acting strictly within the character of factor and agent, there was something which he might have lawfully done but which he did fraudulently, it may well be that the liability of the trustees is cut down and qualified by the immunity clause. But in this case it was not as factor or agent in any sense that could be supposed to be covered by that character, but as guardian of the money without any control or check, that the trustees thought proper to allow the defaulting agent to remain in possession of the money.

I am not certain that it is very important to show that the trustees did know what their duty was. People who undertake a duty are bound to know what their duty requires. But even if it were necessary to show knowledge, I am clear that in this case they did know. Their own conduct on 18th December exhibits their knowledge.

Under these circumstances, apart from the original error which in common with Lord Adam and Lord Kinnear I think was

committed by the trustees, the interval between 20th December and the period when the money was finally lost appears to me to have exhibited on the part of the trustees very gross negligence, for which I think they must be held to be responsible.

Under these circumstances I move your Lordships that the judgment of the First Division and that of the Lord Ordinary be reversed, and that judgment be entered for the pursuers—to replace the £3000 odd with interest at three per cent.; that amount must be paid to the judicial factor.

LORD MACNAGHTEN—I am of the same opinion, and I have only a very few words to add.

If the gentlemen whose conduct is impugned had been English trustees acting in the execution of an English trust, the case against them would have been I think too clear for argument. And though there seems to have grown up in Scotland an extraordinary laxity of pratice, which the learned Judges of the First Division reprobate and yet allow, it has not been suggested that there is any difference between the law of England and the law of Scotland as to the duties and liabilities of trustees in regard to the custody and investment of trust funds.

Three gentlemen were trustees of a fund set apart to answer a life annuity, and divisible on the death of the annuitant among the persons entitled in remainder. The sum of £3700, part of this fund, was invested on a heritable bond; on the 15th of July 1887 the bond was paid of. The trustees allowed their law-agent to receive the money and to retain it in his hands uninvested for rather over six months. At the end of that time the law-agent became bankrupt and the greater part of the fund was lost.

The surviving trustee and the representatives of the other two who are now dead contend that the trustees are not responsible for the loss. In my opinion the trustees were guilty of a plain and positive breach of trust, and are liable to replace the money lost by reason of their gross neglect.

The learned counsel for the appellant said that he did not complain of the trustees allowing the money to be received by the law-agent. He admitted that the receipt was proper. I think that the learned counsel was probably right in making that admission. But I think the admission ought to have been qualified. If the trustees were justified in allowing their law-agent to receive the money on the score of convenience, or, what is much the same thing—because it is in accordance with the ordinary course of business in Scotland—they were not in my opinion justified in leaving the money in the law-agent's hands for a longer time than might be reasonably required to enable him to pay it over to them.

No Scottish authority was cited on this particular point. Nor is there much authority to be found in England. It is plain that it is no part of the duty of a solicitor as such to receive trust money. And there is a dictum attributed by Lord Chancellor Hart to Lord Eldon, to the effect that if trustees permitted their solicitor to receive trust money and he became bankrupt next day, they would be held responsible. That probably is an extreme view and not in accordance with modern opinion. It is however unnecessary to pursue the point, because in this country it has been set at rest by the Legislature. The Trustee Act 1888 authorises trustees to appoint a solicitor to be their agent to receive trust money, but it attaches to the authority thus conferred the following proviso: "Nothing herein contained shall except a trustee from any liability which he would have incurred if this Act had not passed in case he permits such money . . . to remain in the hands of the solicitor . . . for a period longer than is reasonably necessary to enable such solicitor to pay or transfer the same to the trustees."

It seems to me that this enactment must be taken to be a statutory declaration of the law in this country, and although the Act does not extend to Scotland it appears to me that by analogy the law thus declared must be treated as applicable in the case of Scottish trustees.

Tried by this standard it is obvious that the trustees in the present case committed a gross breach of trust in leaving the money in the hands of their law-agent.

The immunity clause does not in my opinion afford the trustees any protection. It has been determined in this House that such a clause affords no protection against a positive breach of trust. And although the trustees described their law-agent as their factor, and desired that he should be regarded as such, it is obvious that it is no part of a factor's duty to retain in his hands the money of his employers and act as their banker. The provision as to immunity in regard to the acts of factors cannot I think extend to what the factor is known by the trustee to be doing outside the scope of his employment as factor.

There is only one other observation I desire to make. We were told that the delay was necessary, or at anyrate excusable, because the trustees were directed to invest the trust money in heritable securities, and it was difficult to find an eligible security of that description. No doubt the law-agent put the trustees off by an excuse of this sort, but the law-agent must have known, and the trustees would have known if they had made any inquiry, that under the Trusts (Scotland) Amendment Act 1884 it was competent for them to invest the trust money in their hands in any one of the securities therein mentioned. The Act places a wide range of investments at the disposal of trustees, although the investments mentioned in the trust-disposition may be of a very limited character.

I think the appeal must be allowed.

LORD MORRIS—James Ferguson, a pawnbroker in Edinburgh, died about forty-six years ago. He left property estimated between £30,000 and £40,000; he made a trust-disposition in December 1849 and

added codicils. He appointed several trustees. The trusts were various and numerous; the trustees were also numerous and of very various descriptions. They included two vintners, a baker, a medical doctor, a spirit merchant, a tobacconist, an upholsterer, a shawl merchant, an artist, and a pawnbroker. Such a heterogeneous body of trustees would require an active and efficient factor or agent. The truster by one of his codicils consequently appointed his then agents Ferguson & Stewart to be agents for the trustees in the administration of the trusts. They were appointed by and acted as agents for the trustees. By lapse of time the firm altered; Stewart retired; Ferguson took in his place as partner Mr Junner, and the firm became Ferguson & Junner. Ferguson died in January 1887, and Junner carried on in the name of Ferguson & Junner until his failure in January 1888. By the beginning of 1887 all the trust property had been administered except the sum of about £4000, of which £3700 was outstanding on the bond debt of a Mr Purvis. This debt was paid off by Purvis in July 1887 to Junner, who procured for him the discharge of the three surviving trustees Messrs Paterson, Gordon, and Lyon. The two latter died before the institution of this suit. The pursuers do not challenge the payment of the £3700 to Junner, nor that it properly came into his hands—the amount remained with Junner for immediate re-investment when attainable. The then three surviving trustees, Paterson, Gordon, and Lyon, could not immediately meet, as some of them were absent, and as the vacation had either begun or was near at hand, the matter practically stood over until the following Martinmas, though in the interval applications were made to Junner to know if he had got an investment. He did get an investment for an amount of £800, part of the £3700, and so apprised the trustees, but stated he was not able to get further investment. The pursuer in this case is beneficially interested in the trust estate, and she seeks to hold Paterson, the surviving trustee, and the representatives of the other two trustees, liable for the fraudulent appropriation by Junner of the residue of the £3700.

The Lord Ordinary who first heard the case dismissed the pursuer's claim. On appeal to the Judges of the First Division, the decision of the Lord Ordinary was affirmed. It is beyond dispute that the trustees exercised great care and diligence in the administration of the trust estate, which was a troublesome and protracted administration. In the year 1887 all was realised and divided except the sum of about £4000, of which the sum of £3700 paid off by Purvis was a part. The trustees were obliged to hold the sum of £4000 to enable them to pay the amounts payable to the truster's widow. After the expiration of a period of over half-a-century since the execution of the trust-disposition, and nearly thirteen years since the alleged breach of trust occurred, your lordship's House is engaged with a suit against Paterson, the sole surviving trustee of the ten appointed by the trust-disposition.

The pursuer complains that the trustees did not keep within their own control the money paid off by Purvis, as it is not disputed that Junner, the factor, properly received the amount so paid off—when then did a breach of duty arise? Two leading solicitors and agents, Messrs Ritchie and Robson, were examined. They proved that the practice of the profession is to put the trust money when received on deposit-receipt in the name of the firm for behoof of the trustees. They also proved that the firm of Ferguson & Junner represented by Junner was previous to and up to the crash in January 1888 of good and sound character, and nothing said against its financial position. Why then should Paterson, a shopkeeper, be held liable as for breach of trust because he did not depart from the usual custom that the money paid to the agent would be deposited in the name of the firm on behalf of the trustees pending investment? It must be remembered the period of payment was at the end of the term and the commencement of the vacation, running on close up to the following Martinmas. It appears to me there was no breach of duty by the trustees or default in leaving with the agent Junner, for so short a period, the amount received by him on their behalf.

The pursuers again complain that the trustees upon seeing the receipt sent to them on the 20th or 21st December should have observed it was only dated the 20th December, and should have had their suspicions roused, as that date was inconsistent with the statement made to them by Junner on 19th December that the money was deposited in bank on deposit-receipt. The respondent Paterson says he did not observe the date. I think that very likely. He had no suspicion of Junner, and did not scan the receipt with a watchmaker's eye. I cannot hold that up to the 21st December the trustees had done or omitted to do anything that an ordinary prudent man would not have done or omitted to do. The trustees had repeatedly pressed Mr Junner to try and procure an investment. They observed that he had advertised for it in the newspapers. They had some proof he was active by the fact that he did get an investment for £800 of the amount, and there was no doubt by anyone of his honour and financial position.

But it is said the trustees after the 21st December were guilty of some breach of duty? Why so? On the 21st they requested Junner to put the money into the bank in their names. It was only left with him pending investment; he had failed to get it, and consequently it would be prudent to have the amount deposited in the bank in their own names, a reasonable time to procure an investment by Junner having elapsed. They did not propose to leave the money under the control of Junner indefinitely. The respondent Paterson called next day to see if the new deposit-receipt requested by the trustees had been obtained by Junner, but Junner

had met with a serious accident and could not be seen. The Lord Ordinary and the Judges of the First Division held on the evidence that Paterson did all that could be reasonably expected towards having the money placed in their names in the bank. It appears to me they would be held accountable for the accident to Junner if any other conclusion was arrived at. I am clearly of opinion that neither during the period between July and 19th December, nor between that date and the date of Junner's failure, were the respondents guilty of any act which an ordinary prudent man would have avoided. But suppose they were a little to blame, the respondent relies on the protection clause, No. 6, of the trust-disposition. The truster thereby declared that as the trust may last for a period of years, he empowers the trustees to appoint a factor under them, and that the trustees shall not be liable for the intromissions of such factor, nor be liable for any agent who in transacting the business of the trust shall receive any part of the estate into his own hands. The trustees did employ an agent, namely, the firm directed by the truster himself, and they so continued the firm as their agents, which came to be represented by Mr Junner. Did not Junner receive the £3700 in transacting the business of the trust, and does not the clause expressly declare that the trustees are not to be liable therefor?

It was argued, however, that their exemption from liability was excepted by the case of *Seton* v. *Dawson* (4 Dunlop), which it was said covered this case. But what are the facts of that case? Sums of money belonging to a trust-estate were received by one of the trustees who had been directed by the others to realise, and without receiving any appointment as a factor. No meeting was held for eight years after the truster's death, by which time the acting trustee had become bankrupt, and a large sum was due by him to the trust-estate, the trustees were held personally liable, and were not exempted from liability by the protecting clause, because their conduct amounted to a *crossa negligentia;* they never looked after the estate for nine years, nor took any steps to ascertain what was doing with the estate that they had authorised their co-trustee to collect. So far from covering this case, *Seton* v. *Dawson* is its antithesis. In this case there was no delay to make inquiries; they were made even during the vacation, and probably led to the investment of the £800. The trustees did everything after the 21st December that can be suggested except that during the dangerous illness of a solicitor of the highest character they did not go to the bank and without having the slightest suspicion practically convey to the bank that he was an untrustworthy person.

In the case of *Knox* v. *Mackinnon* (13 App. Cas.) Lord Watson in speaking of a similar protective clause says—"I have no doubt that a clause in these or similar terms would afford a considerable measure of protection to trustees who *bona fide* abstain from closely superintending the administration of the trust or who have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust, but it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata* or gross negligence." This judgment of Lord Watson of the general law is most apt in its application to this case, which in no respect can be placed higher than an error of judgment in following the invariable practice of leaving the money paid into the factor's hands with him for investment for a reasonable time and in not giving notice to the bank after Junner's illness. In my opinion on the facts of this case a decision against the trustees would be a draconic decision, and would be an additional terror to any honest and solvent person acting as a trustee. In my opinion the judgments of the Courts of Scotland should be affirmed.

LORD SHAND—I have also come to be of opinion that the judgments complained of should be reversed, and that the pursuers should succeed in the action, and I agree in thinking that in regard to questions such as the case raises there is no real distinction between the common law of Scotland and that of England.

If the trust-deed did not contain the very wide clause of indemnity which has been founded on by the defenders it seems to me that there is really no answer on the part of the trustees to the fact that they allowed the fund which has been lost to remain in the possession and under the uncontrolled charge of their law-agent from July to the end of December 1887 without requiring that it should be placed in their own names. It appears to me to be no sufficient reason that the money was during all this time waiting an investment, if indeed the law-agent truly made efforts in the meantime to invest the money, and I agree that the alleged practice in Scotland, which is condemned by the learned Judges of the First Division—a practice which obviously subjects the trust funds to great and unnecessary risk—cannot relieve the trustees from legal responsibility for the loss of the fund which occurred in consequence of the fund being left entirely in the law-agent's hands.

A strong argument was submitted by the respondents' counsel founded on the clause of indemnity, and I confess that for a time it occurred to me that the defenders might be relieved from responsibility by the wide terms of that clause. But I have on further consideration come to the conclusion that the indemnity does not extend so as to cover the acts here complained of. When the trustees by their signature to the discharge of their security armed their law-agent with the power of himself receiving the amount in cash, and thus became themselves intromitters with that fund, I cannot regard it as a mere omission or neglect of management, such as the indemnity clause would cover, that the trustees failed for about five months to make any inquiry as to the position of the money, or to take care that it had been placed in

their own names. The argument if good for a period of five months would sanction omissions or neglect for a much longer period, and I cannot give such effect to the clause, the delay having been beyond even the term of Martinmas, which was upwards of four months after the money had gone into the law-agent's hands, and a term at which according to all ordinary practice an investment should have been had. Again, I agree with your Lordships who think that the part of the clause which declares that the trustees shall not be liable "for any agent who in transacting the business of this trust shall receive any part of the said estate into his hands," while it might cover a short period, it might be for a few days, or a very short time immediately before a term of Whitsunday or Martinmas, when investments on heritable security are usually made, would yet not cover such a time as here occurred, or even a shorter period. Such neglect appears to me to be correctly characterised as of that great or gross nature known as *culpa lata* to which Lord Watson and Lord Herschell both gave effect in their judgments in the cases of *Knox* v. *Mackinnon* and *Rae* v. *Meek* (13 and 14 App. Cas.) in this House.

LORD DAVEY—This appears to me a very plain case. The first duty of the trustees was to preserve the trust fund under their own control. Instead of doing so they allowed it to remain under the sole control and in the sole disposition of their law-agent for five months. They took it for granted that the money would be placed on deposit, but made no inquiry whether it was so, and indeed it appears from Mr Paterson's evidence that he did not even suppose that the deposit would be in the names of the trustees, as it ought to have been. The Lord Ordinary was of opinion that the trustees were quite entitled to entrust the money to their law-agent and factor pending an investment being found. Lords Adam and Kinnear were clearly of opinion that this was contrary to their duty, and that the reasons which were given for following such a practice were quite inadequate. I entirely agree with the learned Judges in the Inner House in that opinion. The trustees might properly employ their law-agent to receive the money from the mortgagees, but it was their duty to see that the money when received was immediately reinvested or placed on deposit in their own names and under their own control. Where I differ from the learned Judges is in thinking that the ineffectual attempts made by the trustees to recover the money from the law-agent did not absolve them from the consequences of their previous neglect of duty. It was in my opinion a clear breach of trust and *culpa lata* on the part of the trustees thus to abandon the performance of their primary duty, and the loss that has ensued was the direct consequence of their doing so.

It was argued that the trustees are exempted from liability by the immunity clause to be found in the will. I think that this point is covered by the decision of the Full Bench in *Seton* v. *Dawson* (4 D. 310), which has more than once been referred to with approval in this House. I agree with the opinion expressed by the Lord Justice-Clerk in that case, that where trustees give a joint receipt for trust money, though it is in fact received by the hand of an agent, it is the intromission of the trustees themselves. I also think that the immunity from liability for the intromissions of a factor or agent extends only to the acts of a factor or agent properly appointed and acting within the legitimate scope of his agency. In the present case the law-agent's duty was to receive the money and at once place it in safety under the control of the trustees, and they could not properly, and did not in fact, authorise him to retain the money in his own control. If trustees think fit to delegate their duties to their law-agent in a matter in which they cannot properly authorise him to act for them, they are not, in my opinion, protected by a clause of immunity from liability for the intromissions of factors or agents. The learned counsel for the respondents relied on some words used by Lord Watson in *Knox* v. *Mackinnon* (13 A.C. 763), but if the whole passage in which these expressions occur is read, they do not appear to me to have any application to the present case.

I am rather surprised to find it stated in the evidence in this case that it is the practice of Scotch solicitors to place trust funds in their own names for "behoof of the trustees," instead of placing them in the names of the trustees themselves. I am not aware that such a practice has ever been directly made the subject of judicial decision. If the case ever arises, it will have to be considered whether such a practice is consistent with the primary duty of trustees to retain the funds in safety under their own control.

I agree that the order appealed from should be reversed. A question was raised as to the rate of interest which should be allowed. There appears to be no settled rule on the subject in the Scottish Courts. I think the rate should be 3 per cent. An order should be made for payment by the surviving trustee and the representatives of the deceased trustees to the judicial factor of the sum of £3140, 12s. 2d. with interest at 3 per cent. from the 15th July 1887.

LORD JAMES of Hereford—It is with considerable hesitation that I have come to the conclusion that the judgment of the Court below should be reversed. I also regret that I have found it necessary to arrive at that conclusion, for I feel that the trustees whom the respondents represent have acted throughout with perfect good faith, and that the neglect which they have committed in discharging the duties of the trust they undertook resulted from a desire not to display an undue want of confidence in a firm which had been regarded as bearing a high professional reputation and composed of men of great personal honour.

But those considerations cannot control the principles affecting the liability of a trustee duly to discharge the obligations which he has taken upon himself arising out of his trust, and it is only by the application of those principles that the judgment of this House must be governed.

Now, it seems clear that the duty of the trustees in this case was to receive the trust money into their own hands or to place it in the hands of an agent properly selected and constituted for the purpose of taking charge of it and to see to its safety by their own control to the same extent as if it were in their own hands. I quite agree with my noble and learned friend Lord Morris that no breach of duty would have been committed by the trustees allowing a solicitor to receive trust money on a security being paid off, and also that if a new security was in sight or could fairly be anticipated promptly to come into existence, the money might, without breach of trust, remain, with the object of being so transferred, in the hands of the solicitor, that solicitor being employed for a purpose that was not completed at the time when the money was in his hands; but the solicitor so employed in the matter of a trustee's security is not the proper custodian of the trust funds except for the purposes I have mentioned.

On the whole case I have come to the conclusion as a matter of fact that this money was left without proper inquiry or supervision for an undue period of time in the hands of the solicitor under conditions which enabled him fraudulently to appropriate it to his own use. I do not refer to the facts of the case in detail, as they have been already stated by more than one of your Lordships, but referring to them generally I express the opinion that the period from July 1887 till December of that year, during which the money was allowed to remain in the solicitor's hands—a period of five months—was a period beyond that for which the money ought to have been allowed to remain in the hands of a solicitor as such, and during that period the trustees appear to have regarded their solicitor as a banker and custodian of the money and not to have treated him as a mere law-agent. In that way, as it seems to me, a breach of trust has occurred in this case.

With respect to the indemnity clause, I concur entirely in the observations which have been made by my noble and learned friend Lord Davey. It seems to me that that clause was intended only to protect the trustees from the fault of an agent properly constituted for the purposes of the trust; for instance, if the money had been deposited by the trustees in a bank, and the banker had become insolvent or had appropriated the money, the banker being properly constituted as the holder or custodian of the money, the trustees would have been protected; but if the trustees neglect to appoint an agent at all, and leave the money in the hands of some mere clerk in their establishment, careless as to how the money is taken care of, that person could not be regarded as such an agent that the trustees could appeal to the indemnity clause for their protection.

In the same way I think here when the trustees allowed money to remain in the hands of a solicitor without taking care as to the proper custody of it, the protection against the acts of an agent cannot apply in this case. Therefore, as I say, with reluctance I have come to the conclusion, with the majority of your Lordships, that the judgment of the Court below should be reversed.

Judgment appealed from *reversed*, and *ordered* that the sum of £3140, 12s. 2d. with interest at 3 per cent. from 15th July 1887, be paid by the trustees or their representatives to the judicial factor.

Counsel for the Appellant—Houston, Q.C.—Guy. Agents—H. Percy Becher, for Frank M. H. Young, S.S.C.

Counsel for the Respondent—Dean of Faculty (Asher, Q.C.)—Johnston, Q.C. Agents—A. & W. Beveridge, for G. M. Wood & Robertson, W.S.

Monday, March 26.

(Before the Lord Chancellor (Halsbury), and Lords Macnaghten, Morris, and Davey.)

BURRELL & SON *v.* RUSSELL & COMPANY.

(*Ante* Dec. 23, 1898, vol. xxxvi. p. 250.)

Proof—Written Contract—Modification by Parole—Incorporation of Plans—Ship.

By a written contract for the construction of certain ships the plans were expressly incorporated with the contract. These plans showed the vessels with straight keels, but as actually constructed the keels were cambered or arched so as to have a curve inwards. The effect of the camber was to increase the carrying capacity of the vessel, but it gave rise at the same time to inconvenience and expense when the vessel required to be docked, and was generally regarded as a serious defect unless it was of such slight amount that the keel would become straight when the vessel was loaded with cargo owing to the extra weight amidships.

A claim of damages by the shipowners on account of the camber, which had not disappeared in the manner indicated, was met by the defence that it had been resorted to in compliance with oral instructions given by the pursuers subsequent to the date of the written contract, and a proof in regard to this averment was, without objection, led before the Lord Ordinary. Evidence upon which *held* (*rev.* the judgment of the Lord Ordinary and of the First Division) that the defenders had failed to prove the alleged verbal modification of the contract.