LORD YOUNG—I do not differ from the course which your Lordship proposes to take. This is evidently a case in which it is not desirable that there should be protracted litigation, and the only way in which we can prevent that protracted litigation is to follow the precedent cited to us and which I agree with your Lordship is in point.

But I do not wish to say anything that would add to the authority of that case. I think it is a case which is well worthy of reconsideration on a suitable occasion. The question is whether in a case where we have a legacy left to a particular person, and the bequest followed by such unfortunate words as we have here, and the legatee dies before payment, the money which is undoubtedly his should not be available for payment to his creditors. The money is really his because it was given to him, and to say that the vesting of the legacy, which means merely the clothing the legatee with the gift, is to depend upon the zeal and activity of the trustees or upon some accident, and that inquiry may be made as to whether the estate might not have been realised and the payment made a little sooner than actually took place, is to my mind a very dangerous doctrine.

I should be willing to establish some such rule as this—If a truster creates a right in any person, which right has to be established by trustees, that right is not to be frustrated by the want of zeal or inactivity of the trustees. It would be impossible, I think, to say that if a person in these circumstances should die before the payment was actually made—even if he had been constantly urging the trustees to realise the estate and pay it over to the beneficiaries—it would be impossible to say that that legacy should not go to his heirs.

I think that some of these considerations may not have had their full weight in the decision of cases of that class. But I desire to say that I think the principle of such cases is well worth reconsideration, and that my inclination is to take the view taken by Lord Deas in *Howat's* case, who dissented from the majority of the Court. But I think in this somewhat petty case that we should follow the case of *Howat's Trustees*.

LORD RUTHERFURD CLARK—I think that the case of *Howat's Trustees* is in point, and that therefore we should follow that decision.

LORD LEE concurred.

The Court adhered.

Counsel for the Pursuer—A. S. D. Thomson. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defenders — Pearson. Agents—H. B. & F. J. Dewar, W.S.

Friday, May 16.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CARRUTHERS *v.* CAIRNS AND OTHERS.

Trust—Liability of Trustee—Neglect to Use Diligence for Recovery of Debt Due to Trust-Estate—"Wilful Default."

A farmer died leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees for behoof of his wife and children, declaring that his trustees should not be liable "for the responsibility of the debtors, purchasers, or others" with whom they might transact, but "for wilful default, and no further."

The trust-estate consisted almost entirely of the crop and stocking of the farm of which the truster was tenant. A renunciation of the lease by the trustees was accepted by the proprietrix, who let the farm to another tenant with entry at Whitsunday 1882. The incoming tenant bought the fallow, dung, crop, &c., for £815, 10s. 9d., the value fixed by arbiters, the last instalment of which sum was payable in August 1883. He also made purchases amounting to £774, 7s. 3d. at a sale by public auction of the stock on the farm, the articles of roup containing the usual provision for cash or four months' bills. In October 1882 he paid £500, and in March 1884 £200, to account of his debt. The balance remained unpaid, and the trustees, though making demands for payment, took no serious steps to recover it. In November 1886 the debtor, who had become insolvent, granted a trust-deed for behoof of his creditors, which was followed by the sequestration of his estate in May 1887.

In an action by the widow of the truster, *held* that the loss sustained by the trust-estate had been caused by the gross neglect of the trustees (excepting one lately assumed as trustee) in having failed to use due diligence for the recovery of said debt, and that they were liable to restore the amount so lost to the trust-estate.

Process—Summons—Amendment—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.

Circumstances in which the pursuer of an action was *allowed* to amend the summons after the Lord Ordinary had heard proof and pronounced an interlocutor containing findings, in respect that the amendment was, in terms of the above section, "necessary for the purpose of determining in the existing action . . . the real question in controversy between the parties."

John Carruthers died on 16th June 1881, survived by a widow and two pupil children. He left a trust-disposition and settlement, by which he disponed to the trustees therein

named his whole means and estate, heritable and moveable, for behoof of his widow and children. The deed contained a declaration that "my trustees shall not be liable *singuli in solidum* for any omissions or neglects of their agents, factors, or managers, nor for the responsibility of them or their cautioners, if any, nor for the responsibility of the debtors, purchasers, or others with whom they may transact, but they shall be liable for wilful default, and no further."

At the time of his death John Carruthers was tenant of the farm of Watherstone, Stow, under a lease for fifteen years, beginning at Whitsunday and separation of crop 1880. The lease contained a clause providing that at its close the proprietor or incoming tenant should have power to take the way-going crop of corn or straw, and also the dung made on the farm from the penult crop, at the valuation of arbiters. The truster's estate consisted almost entirely of the crop and stocking of his farm, the total estate being valued at £2156, from which there fell to be made certain deductions, including £320 of debt and the amount of the Inland Revenue duties.

After the truster's death the trustees deemed it expedient to arrange to have the farm given up, and the proprietrix Lady Reay agreed to accept a renunciation of the lease at Whitsunday 1882, and separation of the crop of that year from the ground, and let the farm at that date to Robert Ramage, shepherd, Flass. It was arranged that Mr Ramage should take the corn, straw, and dung on the farm, and reference was made to arbiters to fix the price to be paid by him for these articles, and also for a threshing-mill and other articles which it was considered expedient to sell to him. The arbiters awarded a total sum of £815, 10s. 9d. under three awards. By the first in July 1882 they awarded £215 for young grass, mill, dung, &c. In February 1883 they awarded an interim payment of £270 for first instalment of white crop, payable in March 1883, and in August 1883 they awarded £330, payable on the 28th of that month.

On 19th May 1882 the trustees sold the stock and implements on the farm by public roup under conditions of sale, one of which was as follows—"Purchases over £10 may either be paid in ready money, for which 4d. per £ of discount will be allowed on even pounds, or bill may be granted for the same along with a sufficient co-obligant, payable to the clerk of the sale four months after date in the Bank of Scotland's office in Lauder, and failing compliance with the articles immediately after the sale, purchasers shall forfeit all right to their purchases, and a sum equal to a fifth of that offered."

Mr Ramage made purchases at the sale to the amount of £774, 7s. 3d. He paid £500 to account in October 1882, and £200 in March 1884.

On 21st May 1887 his estate was sequestrated, at which date the rest of his debt to the trust-estate was still unpaid.

In March 1888 the present action was raised by Mrs Carruthers, the truster's widow, for herself and as guardian of her pupil children, against her husband's trustees, seeking to have it declared that the defenders Andrew Carruthers, Thomas Broomfield, Duncan Turner, and John Cairns, had by wilful default illegally and unwarrantably caused loss to the trust-estate to the amount of £976, with interest from July 8th 1885, and were bound forthwith to make repayment thereof to the "pursuer for herself and as representing her said pupil children," and to have the defenders ordained to give an account of their intromissions, whereby the true balance due by them to the "pursuer" might appear, and to make payment to the "pursuer" of the ascertained balance.

It appeared that Andrew Carruthers had never accepted the trust, and the action was abandoned as against him. Thomas Broomfield died after the action was brought. His estates were sequestrated, and as the trustee on his sequestrated estate did not insist in the defence, his estate was found liable to the estate of John Carruthers in the sum of £976 with interest as sued for.

Proof was allowed, in the course of which it was admitted that the pursuer had not instructed liability against Mr Turner, who was assumed into the trust at a late period, and he was assoilzied. With regard to the case against Mr Cairns the following facts appeared—Only two meetings of the trustees were ever held, one in July 1881, shortly after John Carruthers' death, and the second in 1887, after Ramage had granted a trust-deed for behoof of his creditors. As to the date at which payment was exigible by the trustees from Ramage for the crop, dung, &c., taken over by him under the reference, James White, farmer, deponed—"I am familiar with the procedure when farm stock is taken over, and when there is a sale. The payment for fallow grass and dung is generally about July or August after the sale; for white crop generally about February or March, when the fiars prices are struck; and as regards the balance, possibly the half is paid in the following August. That applies to a Whitsunday entry."

Thomas Broomfield, who was a writer and bank agent in Lauder, acted as agent of the trust, and on 7th June 1884 Mr Cairns wrote to him as follows—"It being now two years since Watherstone sale, the whole of the estate will have been realised about a year ago. In my opinion, therefore, there ought to be a meeting of the trustees, and a statement of the trust funds submitted, made up either to date or Whitsunday last, and the estate put in a satisfactory position. For my part I know no more about the affairs than the man in the moon, having neither heard nor seen any account of what the estate realised, what had been done with the funds, nor what amount was being paid to Mrs Carruthers, which is certainly not a satisfactory position for a trustee to be in. Therefore I think I am justified in directing attention to the present state of affairs, and suggesting that a

meeting be held to put ourselves in a proper position, so that we can give an account of our stewardship. I have not the least doubt that you have everything right, at the same time I think that all trust-accounts should be made up at least once a-year, submitted and attested by the trustees. I shall therefore be glad to hear from you thereanent."

Mr Broomfield replied in a long letter, dated 11th June 1884, in which he said that Mr Ramage was still due £926, 6s. 2d., besides interest from 10th March 1884. The letter proceeded—"I have had more than one interview with him, explaining that we could not let this money lie as a permanent loan, though we are not responsible under the will. He is doing well enough, but there is no doubt he has taken the farm with too little capital. It was a pity he took it at all. He promises faithfully he will clear us off in the end of July and beginning of August, after he has sold his wool and lambs. He is honest, but he has no friends to give him cash, and I think we would be less likely to do good by pushing him now than by waiting a little."

Other communications, both written and verbal, took place subsequently between Mr Cairns and Mr Broomfield, but nothing was done to enforce payment of Ramage's debt, except that Broomfield made repeated requests for payment. On 21st November 1884 Ramage, at Broomfield's request, insured his life for £500, and granted a bond and assignation dated July 11th and 15th 1885 in favour of Cairns and Broomfield as Carruthers' trustees. The bond bore to be granted for £976 "now or formerly" borrowed from the trustees. The deed assigned the policy, and two sons of Ramage's were bound along with him for payment of the premium, but their security was of little value, and the premiums were chiefly paid out of the trust-estate. Mr Cairns continued from time to time to request Broomfield to send him the accounts of the trust, but Broomfield did not send them till September 1886. An inquiry was then made into Ramage's affairs, which resulted in his granting a trust-deed for behoof of his creditors on 20th November 1886, and on 21st May 1887 his estates were sequestrated. Cairns deponed that in October 1884 Broomfield had told him that Ramage was just about to pay £500 to account, and that till he received the trust-accounts he believed that this sum had been paid. He knew that a policy of assurance for £500 had been effected by Ramage and assigned to the trustees, but denied all knowledge of the bond. Mr Ramage's debts amounted to £4481, on which a dividend of 5s. per £ was paid, and a further dividend of 1s. 4d. or 1s. 5d. was expected. It was proved that Ramage had taken the farm on borrowed money, having only £130 of his own at that date. He was a man of good credit in the district. In 1883, including his debt to Carruthers' trust, he had borrowed nearly £3000. His rent was £325, and he paid it punctually for the first three years. He fell into arrears the fourth year, and the fifth was paid by his trustee.

On 3rd January 1890 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor—"Finds (1) that the now deceased Thomas Broomfield and the defender John Cairns, as trustees of the deceased John Carruthers, farmer, Watherstone, Stow, in the county of Midlothian, renounced the lease of the said farm after his death, and that the farm was then let to Robert Ramage; (2) That the said Robert Ramage purchased the stock of the said farm, and that after paying a part of the price there remained a balance due by him to the trustees therefor, amounting to £74, 7s. 3d.; (3) That the said Robert Ramage took over the waygoing crop, fallow, manure, and mill on said farm at a price of £815, 10s. 9d.; (4) That the trustees failed to use due diligence to recover said sums, and that no part thereof was paid prior to the sequestration of the estates of the said Robert Ramage on 21st May 1887; (5) That the said debts have been lost to the estate, except in so far as a dividend has been paid, or may yet be paid thereon, out of said sequestrated estate; (6) Finds that the loss to the said estate was caused by the fault and negligence of the said Thomas Broomfield, and of the said John Cairns, in failing to use due diligence to recover said debts as aforesaid; (7) Finds that the said John Cairns is liable to account for and to restore the said amounts so lost to the said trust-estate: Appoints the cause to be enrolled that parties may be heard on the terms of the decree falling to be pronounced, and on the sum for which the said John Cairns is liable, in accordance with the foresaid findings.

"*Note.*— . . . . . . In these circumstances the question arises whether Mr Cairns has incurred liability for the loss incurred to the estate.

"The loss arose out of the renunciation of the lease, an act which was not blameable at all, but prudent and commendable.

"No charge of dishonesty towards the trust is made, either against Mr Broomfield or Mr Cairns. Whether Mr Broomfield acted fairly towards Mr Cairns may be questioned, but he does not seem chargeable, and Mr Cairns certainly is not, with any dishonesty towards the estate.

"Nor is this a case in which money has been lost in the hands of trustees or their agents. All the money which got into their hands has been accounted for, and the money sued for did not get into the hands of either. The case is laid on neglect in recovering debts due to the estate and nothing else.

"The money which has been lost consists in part of the price of the farm-stocking which was purchased by Ramage at the public sale, and in part of the price of the way-going crop and manure sold under the arbitration.

"With regard to the price of the farm-stocking, it was maintained for the pursuers that no debt should ever have arisen, or, if it did, that it should have been secured, because the articles of roup required payment in ready money or secured bills. On the other hand, the defender

submitted that the clause to that effect did not refer to purchases by the incoming tenant at all. I do not pause to consider that question, because, however that may be, it appears to me that this sale was conducted, and properly so, by Mr Broomfield as agent, and that it was not the duty of Mr Cairns as trustee to supervise it. If, then, there was fault in not exacting immediate payment or security, that was the fault of Mr Broomfield as agent, and for that fault Mr Cairns is by the trust-deed declared not responsible.

"With regard to the price of the waygoing crop, fallow, and manure, it was contended for the defender that the trustees had to a certain extent no choice, because they were bound to sell to the incoming tenant. They were so, if the clauses in the lease relating to the waygoing crop were applicable to the crop of the year when the lease was renounced. I am disposed to think that they were, but it does not seem to be of much consequence, because, even although the trustees might have been bound to sell to Mr Ramage, they could not possibly have been bound to sell to him without payment or satisfactory security for the price. Still, when it is considered that Ramage was regarded as in fair circumstances and responsible—so much so, that he was accepted as tenant without security—I can hardly think that there would have been personal responsibility on the part of Mr Broomfield, still less on the part of Mr Cairns, on the ground that they did not insist on immediate payment, had payment been demanded and pressed for soon after it was due, as for instance in August 1883, when the last instalment was payable under the arbitration. I think that a man of ordinary prudence might have done the like in the conduct of his own affairs; and I think, therefore, that Mr Cairns would not be liable because of the mere fact that Ramage was allowed to become a debtor to the estate, considerable as the debt was.

"But the debt remained after that date unpaid, and I think it may be admitted to have been past recovery when on 20th November 1886 Ramage granted a trust for creditors; and the question seems to be reduced to this, whether Mr Cairns is now liable because he failed to use due diligence to recover the debt due by Ramage between August 1883 and November 1886. Mr Broomfield undertook the management of the whole matter, and was undoubtedly greatly in fault if at any time after a reasonable interval he could have recovered this debt or part of it and failed to do so. I can hardly doubt about his responsibility in that case. Mr Cairns was certainly not so much to blame, and was probably, to a certain extent, misled by Mr Broomfield, but it is impossible to hold him free from blame; and the question whether his fault was so great as to make him personally responsible appears to me to be a very narrow and anxious question indeed. The defender relied a great deal on the clause of immunity which has been quoted. But I do not think that the clause is of much consequence in this case. In the case of *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31, where the clause of immunity was not very different, Lord Herschell adopted the law stated by Lord Watson in *Knox* v. *Mackinnon*, 15 R. (H.L.) 86—that such a clause is ineffectual to protect a trustee against the consequence of *culpa lata* or gross negligence, and held that the trustee was not protected. But, in truth, I doubt whether the clause has much application to the present case, because it is to be observed that in this case it is not sought to make Mr Cairns liable for Mr Broomfield's fault but for his own, nor is it sought to make him responsible for the responsibility of a debtor to the estate—at least, I do not think him liable, because Ramage was originally not responsible if he was so, but for allowing a debt to be in the hands of a debtor, whether responsible or not, until in the end he proved to be irresponsible. By the clause Mr Cairns is declared liable for wilful default, and he is charged with wilful default, because he is charged with wilful neglect.

"Now the question whether a trustee has incurred personal responsibility must be solved by reference to the special facts in each case. No doubt this branch of the law has recently been very much considered and very important decisions have been pronounced, but still I hardly think that any general principle has been elucidated which affords much practical assistance. To say that a trustee is required to exercise the same degree of diligence which a man of ordinary prudence would exercise in his own affairs (*Raes* v. *Meek*, 16 R. (H.L.) 33), with the qualification or addition that he is also bound to act within the powers conferred on him by the deed, which seems to be the outcome of the more recent decisions (see *in re Brogden* 1888, L.R., 28 Ch. Div. 546) does not guide one very far in any particular case. It is still a question of impression in each case whether the conduct under consideration falls short of the care which a man of ordinary prudence would use in his own affairs.

"Now, in this case, Mr Broomfield was not only a trustee but an agent in good practice and repute, and he was the truster's agent. Besides being an agent, he was also a banker, which is not wholly without importance, and, on the whole it was reasonable that Mr Cairns should trust him to a considerable extent; and because he was a banker he might be led to think that what money was in his hands was presumably safely deposited in the bank.

"But then Mr Cairns' letter of 7th June 1884 discloses a state of ignorance of the trust affairs which is hardly consistent with the due performance of the duty of a trustee. It would have been a very odd letter for a man to have written about his own money unless he had been abroad for a couple of years and had just returned to this country. But yet Mr Cairns' neglect though complete had not lasted very long; and in the meantime the estate was under the charge of an agent in whom he had justifiable confidence. If after the perilous

condition of the estate had been disclosed to him by Mr Broomfield's letter of 11th June 1884 he had acted with adequate vigour, he might perhaps have been exonerated. But did he do so? Here was a trust in which there had not been a meeting for three years, and when the trustee inquires about it he finds the bulk of the estate is in the hands of a debtor unsecured, and whom he is told it may be imprudent to press. A man of ordinary prudence if told that his own estate was in such a predicament would not have been put off from time to time with vague excuses such as those he received from Mr Broomfield, but would have made the most searching inquiry and probably would have pressed the debtor to the utmost. He was told, it is true, that £500 was about to be paid to account, but he did not inquire whether it had been paid, or, if paid, how it had been invested, although no doubt he says he supposed Mr Broomfield had deposited it in his bank. Would he have been equally incurious had the money been his own? Mr Cairns, indeed, was by no means entirely regardless of the interests of the trust-estate. He was alive to his duty as trustee, but for some reason or another he failed to act on his convictions; he inquired about the trust-estate every now and again and made some attempt to induce Mr Broomfield to do his duty; but it seems to me to have been Mr Cairns' duty to insist effectually on immediate information about the state of the trust, and to insist on an immediate remedy unless the matter was past remedy.

"Mr Cairns deponed that he was assured by Mr Carruthers that he would incur no personal responsibility, that his services were wanted chiefly to have an oversight of the children, and that clauses would be put in the trust-deed which would secure his safety. I have seen no reason to doubt Mr Cairns' word at all; but, accepting it, I cannot think that I am at liberty to give any practical weight to parole evidence of that sort, and I think that I must give Mr Cairns the protection which the trust-deed confers, and which our trust law recognises, and no more; and doing so, I am most reluctantly forced to the conclusion that he incurred personal responsibility, not for any fault of Mr Broomfield, but because he himself did not exercise the degree of diligence that a man of ordinary prudence would exercise in his own affairs.

"But it was further argued that the defender cannot be made liable because had he been never so diligent the money could not have been recovered. Now, I recognise the relevancy of that defence. A trustee will not be held liable for a loss suffered by the estate which he has not caused, but I think it is settled that it falls on the trustee in default to show distinctly that loss has not resulted from his default, and that the debt which has been lost was always irrecoverable. It would be very hazardous to hold a trustee relieved on a mere guess or suspicion to that effect. That rule was very distinctly applied in the recent case of *Brogden* before quoted. Now, I am unable to come to the conclusion that that has been proved. No doubt it is true that Ramage had very little money to start with, and behaved with astonishing impudence, if that be not too mild a word to characterise his conduct. Still I can have no confidence that if he had been pressed sufficiently he would not have paid. It seems proved, or at least probable, that his estate would have brought a larger dividend even had the pressure on him resulted in his sequestration, for his debt when he failed was about £1500 more than it was in the end of 1882. I do not think I can venture to measure the amount which could have been recovered. But I think the defender has not proved that any definite part of it could not have been recovered. He has not been able to specify an irrecoverable balance.

"This case, like almost all actions of the kind against gratuitous trustees, is extremely hard, and seeing that there is no room for any reflection on Mr Cairns' honesty or motives, I have come very unwillingly indeed to the conclusion which I have stated."

On 22nd February 1890 the pursuer proposed to amend the conclusions of the summons, and in place of seeking decree in her own favour to ask that it should be found and declared that the defenders were bound forthwith to make repayment to the "trust-estate of the deceased John Carruthers, or to a judicial factor on the said estate, to be appointed by our said Lords for and on behalf of the said estate" of the sum of £976, with interest from July 8th 1885, and that the defenders should be ordained to give an account of their intromissions whereby the true balance due by them to the "said trust-estate" might appear, and to make payment to the "said trust-estate, or to the said judicial factor for or on behalf of the said trust-estate" of the ascertained balance.

The Lord Ordinary allowed the amendment and granted leave to reclaim.

The defender Cairns reclaimed, and argued—The clause in the trust-deed exempted the trustees from the consequences of everything except "wilful default" on their part. This was a much stronger clause than the usual clause of exemption, and distinguished the present case from the cases of *Raes* v. *Meek* and *Knox* v. *MacKinnon*, on which the Lord Ordinary founded his judgment. It required deliberate and gross negligence to infer liability, and the evidence showed that the chief fault committed by Cairns consisted in trusting to Broomfield, his co-trustee and agent of the trust, who had deceived him. No consideration was allowed by Cairns to Ramage, who was not pressed harder for payment because it was thought prudent in the interests of the trust-estate not to do so. There was accordingly no such fault as to make Cairns liable for the loss sustained—*Kennedy* v. *Kennedy*, December 9, 1884, 12 R. 275. The amendment was beyond what the Court would allow—*Taylor* v. *M'Dougall*, July 15, 1885, 12 R. 1304.

The respondent was not called on.

At advising—

LORD PRESIDENT—This is one of these actions which are unfortunately of too frequent occurrence, in which it is sought to make gratuitous trustees personally liable for loss sustained by the trust-estate owing to neglect of duty on their part.

The truster was a tenant farmer, and he died on 16th June 1881. He had just entered on a lease of a farm at Whitsunday 1880, the endurance of the lease being 15 years. It was very desirable, looking to the fact that his representatives were his widow and young children, that the lease should be got rid of, and accordingly a renunciation of the lease was accepted by the proprietrix, and the farm was let to a new tenant at Whitsunday 1882.

The estate really consisted of the crop and stocking of the farm, the deceased not possessing any other estate to speak of. I see Mr Broomfield, the truster's agent, estimated the estate at about £2156, and there were certain debts amounting to £320, which reduced the estate to £1836, which again would require to suffer certain other deductions, including the amount of Inland Revenue duties, so that there was certainly no estate beyond the estimate above given.

A displenishing sale took place, and an arrangement was made with Mr Ramage, the incoming tenant, that he should take over the dung and fallow and young grass on the farm at a valuation. At the sale Mr Ramage purchased to the amount of £774, and under the arbitration the amount to be paid for the dung, fallow, and young grass for which he was liable was £815. He thus owed the estate £1589—really the bulk of the estate—and therefore when the trust came into practical operation substantially the whole money was in the hands of Mr Ramage and due by him.

Now it seems to me that this is the sort of trust which requires careful administration, and very active steps should have been taken to realise the money. The trustees, who accepted office immediately after the truster's funeral, were Mr Cairns and the now deceased Mr Broomfield. So far as Cairns is concerned, who is the sole party now interested in defending the case, nothing was done either by him or on his suggestion for at least two years. It is difficult to say that anything was done by him prior to June 1884. Mr Ramage was in this position. He had not been a farmer before, but a shepherd, and therefore his qualifications for farming were doubtful, and he was also stocking the farm on borrowed money. There was therefore very little to rely on except immediate pressure for payment of the price of the farm-stocking purchased and the articles taken over.

The first question is, when should the money have been paid, and the best evidence on the subject is that of Mr White, who is a person of skill in agricultural subjects. He says that "the payment for fallow, grass, and dung is generally about July or August after the sale," which in this case would be July or August 1882; "for white crop generally about February or March, when the fiars prices are struck; and as regards the balance, possibly the half is paid in the following August." As regards purchase at the displenishing sale, the sale was made under articles of roup, containing the usual clause providing either for ready money or for four months' bills with approved caution. It is pretty plain that almost the whole money was to be paid or accounted for within the year. It is of no consequence to go over the circumstances intervening between the entry of the new tenant, and the time when the condition of the trust-estate first came up between the two trustees. I cannot find that Mr Cairns ever did anything to perform his duty till June 1884, when he writes the following remarkable letter to his co-trustee — Mr Broomfield:—"It being now two years since Watherstone sale, the whole of the estate will have been realised about a year ago. In my opinion, therefore, there ought to be a meeting of the trustees, and a statement of the trust-funds submitted, made up either to date or Whitsunday last, and the estate put in a satisfactory position. For my part, I know no more about the affairs than the man in the moon, having neither heard nor seen any account of what the estate realised, what had been done with the funds, nor what amount was being paid to Mrs Carruthers, which is certainly not a satisfactory position for a trustee to be in. Therefore I think I am justified in directing attention to the present state of affairs, and suggesting that a meeting be held to put ourselves in a proper position so that we can give an account of our stewardship. I have not the least doubt that you have everything right, at the same time I think that all trust accounts should be made up at least once a year, submitted and attested by the trustees." That letter is certainly very clear evidence down to its date that Mr Cairns had entirely neglected his duty as trustee. It is a very candid and outspoken profession of gross neglect of duty, because looking to the circumstances of the case nothing could be more blameworthy than simply standing still and doing nothing for two years after the sale. But Mr Broomfield's answer to the letter I have read is also very important. He says—"I only wish the funds were all realised. There is a small affair of Mark at Galashiels under £10 not paid, but I expect that in the next fortnight or so through a Galashiels agent. It is Mr Ramage who is the obstacle." He then brings out that he is still due the trust-estate £926, 6s. 2d. with interest from March 1884, after which he proceeds—"I have had more than one interview with him, explaining that we could not let this money lie as a permanent loan though we are not responsible under the will. He is doing well enough, but there is no doubt he has taken the farm with too little capital. It was a pity he took it at all. He promises faithfully that he will clear us off in the end of July and beginning of August after he has sold his wool and lambs. He is honest, but he has not friends to give him cash aid, and I

think we would be less likely to do good by pushing him now than by waiting a little."

It there appears quite distinctly that there was the very large balance of £926 with the interest since March 1884 still owing by Ramage. That was not a state of matters which should have been allowed to exist, and what was done to remedy it? No answer to that letter was sent by Cairns, and nothing was done, and in 1884 from the 9th of June onwards there was the same absolute negligence and want of activity as existed before. The meeting of trustees proposed by Mr Cairns never took place, and it is not an unimportant observation that there never were but two meetings of trustees, one immediately after the truster's funeral, and the second after Ramage had executed a trust-deed in favour of his creditors.

In these circumstances it is very difficult to say that Mr Cairns can defend himself against a charge of gross negligence. The difficulty I find is to say that he has ever done anything as trustee at all. He made a sort of protest in 1884, but did not follow it up by any active step, and we cannot tell what might have been made of Ramage if active steps had been taken. He, at all events, had the stock on his farm, and it was the duty of the trustees to use all the steps necessary to attach the stock, which could have been done without doing Ramage any harm, or injuring in any way his prospects in carrying on his farm.

The ground on which I am inclined to put the judgment is perhaps not exactly as it has been put by the Lord Ordinary, but as I would rather express it, that the defender is liable for gross neglect of duty.

Your Lordships are very well aware how little sympathy I have with the rule now formally established by judgments of the House of Lords that the law requires of a gratuitous trustee the same degree of diligence that a man of ordinary prudence would exercise in the management of his own affairs. As a definition of duty I think the rule is vague and inadequate, and in its application it has been found to be often severe and unjust. For this evil I hope some legislative remedy will be found. But in the present case I should have no difficulty or reluctance in giving judgment against the defender Cairns, on the simple ground that the loss of the trust funds has been caused by the gross negligence of himself and his co-trustee Broomfield.

One ground of defence was rested on the clause of immunity in the trust-settlement, and there certainly is an expression there not of very usual occurrence. The declaration there is that the trustees "shall not be liable *singuli in solidum* for any omissions or neglects of their agents, factors, or managers, nor for the responsibilty of them or their cautioners, if any, nor for the responsibility of the debtors, purchasers, or others with whom they may transact, but they shall be liable for wilful default, and no further." Now, what is meant by "wilful default?" "Default," as I understand the word, is failure. It has no technical meaning, and therefore the question is, whether the defender Mr Cairns has been guilty of wilful failure of duty as trustee, and that is a question I cannot help answering without hesitation in the affirmative, because if a man takes upon himself the business of a trustee, and is an intelligent man of business, and allows the bulk of the estate to remain in the hands of a debtor, I cannot conceive anything so completely answering to the description of wilful negligence.

It only remains to dispose of the objection to the interlocutor of 22nd February allowing the pursuer to amend the summons. That amendment was allowed under section 29 of the Act of 1868, and I shall content myself with saying that the duty is thereby imposed on the Court to allow "all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties." The section not only authorises but obliges the Court to give effect to such amendments as the one here proposed.

LORD SHAND—It is always with regret that the Court imposes liability on gratuitous trustees, who, having probably accepted the office of trustee from considerations of friendship, become involved in pecuniary consequences never contemplated by them, but here we have, I think, no alternative but to adhere and find the defender liable.

The circumstances are fully detailed in the Lord Ordinary's note, and, as your Lordship has stated, they really amount to this, that Mr Cairns entirely failed to perform any of his duties as trustee. The deceased Mr Carruthers seems to have told him that he would have no responsibility, and he thought there was a provision put in the deed protecting him from personal liability. Mr Broomfield seems to have said the same thing. The result was that he did none of the duties of a trustee. He did in 1884 make inquiries about the estate, and the Lord Ordinary seems to think that if he had begun to make them as soon as August 1883 he might have been exonerated. I am not satisfied of that. He should have immediately taken steps to satisfy himself that the price was got in; but even on the Lord Ordinary's view he did nothing of the kind. Nothing was done. He never asked if the money was got in apart from the request for accounts. If he could have said he had, and had been assured that it had been got in, it would have been a different case, but he did not, and so I think that if there is no peculiarity in the trust-deed there is no possible question of his liability. Of course it is no answer to say that he trusted to Mr Broomfield, because he was not entitled to trust to him, and he is held responsible not for Mr Broomfield's failure of duty but his own.

As to the clause in the trust-deed, I agree with the Lord Ordinary in holding that the present case is ruled by the cases of *Knox* v. *MacKinnon* and *Raes* v. *Meek*, and that we cannot draw a distinction between the clauses of immunity in these cases and in the present.

There was a second point referred to by the Lord Ordinary about which nothing was said by your Lordship. It is asserted that even if diligence had been used at an earlier period the money never would have been secured. The *onus* in this matter lies on Mr Cairns, the defender. If he could show that the money could not have been recovered, then no decree would be given against him, but it is almost impossible for him to show that in this case. It is not the case of a debt due to the testator which he himself allowed to continue. The trustees themselves sold the estate, and in the circumstances of the estate it was their duty to see that they got the money for the estate they had parted with. They were bound to see that they were selling to a party who could and would pay, and that payment was made within a reasonable time.

On the question of amendment, as the pursuer and defenders remain the same, and the declaratory conclusions remain the same, and the only purpose of the amendment is to add an additional conclusion not enlarging the defenders' liability in any way, I think it is the kind of amendment authorised by the Act.

LORD ADAM concurred.

LORD M'LAREN—I concur in the opinion expressed by your Lordships, and only wish to make the observation that I sympathise with the remark made by your Lordship as to the unsatisfactory character of the definition of the diligence prestable by trustees. I think everyone must know men of prudence and ability who are in the habit of leaving the management of their own affairs to a factor or junior partner, and who do not give to their own affairs nearly the attention we would require from trustees. Others give far more than we would require from trustees who only exercise a sort of general supervision. In the points of duty which a trustee has to perform in person he must give his mind to the performance of his duties. In this case Mr Cairns did not give the attention which every man, whether clever or stupid, is bound to give, or which he should have given when he became aware that the estate was in danger.

The Court adhered.

Counsel for the Pursuer and Respondent—Sir C. Pearson—C. N. Johnstone. Agent—Andrew Wallace, Solicitor.

Counsel for the Defender and Reclaimer—C. S. Dickson—Lyell. Agent—George Mills, S.S.C.

Thursday, May 22.

FIRST DIVISION.

[Exchequer Cause.

CHARLTON *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income-Tax — Deductions from Minister's Stipend—Act 16 *and* 17 *Vict. cap.* 34, *sec.* 52.

Section 52 of the Act 16 and 17 Vict. cap. 34, provides that in assessing the duty chargeable under the Act upon any clergyman or minister in respect of the emoluments of his profession, it shall be lawful to deduct expenses incurred by him "wholly, exclusively, and necessarily in the performance of his duty as such clergyman or minister."

Held that under this section it was lawful for a minister to deduct from his stipend (1) the expense of visiting members of his congregation, whether resident within his parish or not; (2) expense of attending meetings of mission board and presbyterial commissions, where these formed part of the duty enjoined on the minister by his ecclesiastical superiors; (3) outlay on stationery; (4) expense of attending meetings of General Assembly, presbytery, and synods; (5) communion expenses;—but that it was not lawful for him to make any deduction in respect that part of his dwelling-house was used as an office for the business of his profession, or for the expense of books.

At a meeting of the Commissioners for General Purposes of the Income-Tax Acts for the county of Wigtown, held at Stranraer on 12th November 1889, the Rev. H. P. Charlton, minister of the parish of Stranraer, appeared in support of the following claim for repayment of income-tax in respect of ministerial expenses for the three years 1886-7, 1887-8, 1888-9, under the Act 16 and 17 Vict. cap. 34, sec. 52:—

	Per annum.		
1. Travelling expenses in visiting members of his congregation, .	£20	0	0
2. Part of his dwelling-house used as an office, ...	8	0	0
3. Books, ...	5	0	0
4. Expenses of attending meetings of mission board, presbyterial commissions, ...	21	10	0
5. Stationery, ...	2	0	0
6. Attending General Assembly, .	4	0	0
7. Attending presbytery and synods, ...	1	10	0
8. Communion expenses, . .	10	0	0
	£72	0	0

Mr Charlton did not exhibit any vouchers or receipts for the sums stated to have been disbursed by him.

The Commissioners, after a careful consideration of the whole facts of the case, were of opinion that they could only allow Mr Charlton expenses actually and necessarily incurred in performing the necessary