a right to occupy land for all purposes where the object which the tenant has in view is deer shooting, and where it is shooting of a different description. I apprehend that an occupation of land for the combined purposes of agricultural or pastoral pursuits and shooting constitutes the whole occupation of the subject, and is properly assessed at the full rent under Schedule B.

LORD KINNEAR—I am of the same opinion for the same reasons

The Court reversed the determination of the Commissioners.

Counsel for the Surveyor of Taxes—A. J. Young. Agent—The Solicitor of Inland Revenue.

Counsel for the Appellant—A. Jameson—Macphail. Agents—Macpherson & Mackay, S.S.C.

Wednesday, June 26.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

CARRUTHERS *v.* CARRUTHERS' TRUSTEES.

Trustee—Personal Liability—Neglect to Audit Factor's Accounts in Accordance with Truster's Directions—Culpa lata.

A testator conveyed his whole estate to five trustees, who resided in different parts of Scotland, directing them to pay the liferent of the residue to his daughter and the fee to her children. Power was given to the trustees to appoint a factor, and they were directed within one month after the 31st day of December in each year to call for an account of the factor's intromissions, and to audit the same. The testator died in 1879 leaving, as the bulk of his estate, a *pro indiviso* share of a heritable property, consisting partly of minerals and partly of agricultural ground. One of the trustees, who had been the testator's law-agent, acted as factor to the trust. The rents and royalties were not drawn directly by the factor, but by the agents of the other co-proprietors, who paid the factor the shares due to the trust. The factor's accounts were audited and found correct in 1881, 1882, 1888, and in June 1890. No further account was rendered by the factor, who became bankrupt and absconded, in the end of 1891, when it was found that he had appropriated about £380 of trust money which had come into his hands since June 1890.

In an action by the liferentrix to have the remaining trustees ordained to replace the sum misappropriated by the factor, on the ground that it had been lost through their neglect in failing to audit his accounts annually, the Court (*aff.* judgment of Lord Kincairney) *assoilzied* the defenders, *holding* (1) that, although the trustees had failed in their duty in not auditing the factor's accounts regularly, their negligence did not amount to *culpa lata*, involving personal responsibility; and (2) that the loss to the trust-estate was not, as matter of fact, the result of their failure in duty—*diss.* Lord Rutherfurd Clark, who held (1) that the negligence of the trustees amounted to *culpa lata;* and (2) that the *onus* lay upon them of proving that the loss to the trust had not resulted from that negligence, and that they had failed to discharge it.

David Carruthers, manufacturer in Bervie, died on 7th April 1879 leaving a trust-disposition and settlement, whereby he conveyed his whole estate to five trustees, of whom three—James Glegg, William Jarvis, and Hector Forbes resided in Bervie, one, the truster's brother William Carruthers, in Glasgow, and the fifth, Hall Grigor, the truster's agent, in Inverkeithing. The trustees were directed to pay the liferent of the residue of the estate to the truster's daughter, and the fee to her children. The deed contained the following clause:—"With full power to my said trustees to appoint factors, either of their own number or other fit persons, for uplifting the rents and interest of my said estate, and to hold him liable to them for all omissions, errors, or neglect of management, and for his own personal intromissions with my said estate; and I do hereby direct my said trustees under this settlement annually, within one month after the 31st day of December in each year during their administration, to cause their factor to make up an account of the intromissions had by him by virtue hereof in the course of the year ending on that date, and to lay the same, with the whole vouchers thereof, before them, to be by them examined, audited, and (if found to be correct) approved of; and in the event of my said trustees being dissatisfied with the management of my said estate by the said factor whom they may appoint, I hereby authorise them to appoint a new factor in his place, either of their own number or other fit person as aforesaid, who shall be responsible to them as above mentioned."

All the trustees nominated accepted office. No special appointment of Mr Grigor as agent or factor for the trustees was made, but he acted in that capacity.

The truster's debts exceeded his personal estate, and a *pro indiviso* share of the lands of Cobbinshaw, consisting partly of minerals and partly of a farm, formed the bulk of the trust-estate. It was heavily burdened, and the greater part of the rents were exhausted in payment of interest on bonds, taxes, and expenses. The rents and royalties were not drawn directly by Mr Grigor, but the shares of them effeiring to the trust were from time to time paid to him by the agents of the other co-proprietors.

In December 1891 Mr Grigor became bankrupt and absconded, and his estates were sequestrated on 19th January 1892, when it was found that he had misappropriated to his own use £381, 12s. of trust money.

In June 1894 Miss Carruthers, the liferentrix, raised an action of count, reckoning, and payment against her father's trustees, to have them ordained to replace the sum lost to the trust by Grigor's defalcations. She averred that the loss to the trust-estate had been caused by the failure of the trustees to audit the factor's accounts at the end of each year as required by the trust-deed; and pleaded—"(3) The defenders having been guilty of a contravention of the trust-deed, and, *separatim*, of gross breach of trust and neglect of duty, whereby a portion of the trust-estate has been lost, are bound to make good said loss to the trust-estate."

Defences were lodged for William Carruthers, James Glegg, and Hector Forbes. They denied that they had failed in their duty as trustees.

Proof was allowed. The evidence showed that the factor's accounts for the first two years of the trustees' administration were formally rendered and docquetted in 1881 and 1882. The third account, and the last entered in the sederunt-book, was for the years from 15th May 1882 to 29th February 1888, and showed a small balance in favour of Mr Grigor. A fourth account not engrossed in the sederunt-book was brought down to 1st June 1890. It was not docquetted, but had been laid before the trustees and was admitted to be correct. It showed arrears of interest due by the trust amounting to about £130, and a balance of above £60 in favour of Mr Grigor. After 1st June 1890 no further account was rendered by Mr Grigor. The funds which he had misappropriated had come into his hands after that date—£165 in the latter part of 1890, and the balance in 1891.

The evidence also showed that down to the date of Grigor's disappearance the trustees had had no doubts of his honesty.

It further appeared that in September 1890 the widow of the testator had raised an action against the trustees for payment of terce and *jus relictæ;* that in regard to this action differences had arisen between the three trustees resident at Bervie on the one hand, and Grigor and Carruthers on the other; that on 4th December 1890 Grigor and Carruthers had presented a petition for the removal of Jarvis, and that this petition had resulted in the resignation of Jarvis in March 1891, and of the other two Bervie trustees in the autumn of the same year.

On 9th February 1895 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that it has not been proved that any of the defenders, William Carruthers, James Glegg, William Jarvis, or Hector Forbes have been guilty of gross neglect of duty as trustees acting under the trust-deed of the late David Carruthers, manufacturer in Bervie, whereby a portion of that estate has been lost: Therefore assoilzies the said defenders from the conclusions of the summons, and decerns: Finds no expenses due by or to any of the parties.

"*Note.*—[*After narrating the facts*]—No objection has been taken to the pursuer's title to conclude for the replacement into the trust-estate of the money which had been lost. The only questions which have been raised are as to the liability of the trustees — questions about which I felt and feel great difficulty. There is perhaps no great difficulty about the law. In regard to questions of this kind, where it is sought to make trustees liable for losses to the estate, certain general principles appear to have been settled. I think it settled as a general rule that where the conduct of trustees has been so faulty as to amount to *culpa lata*, or *crassa negligentia*, they will be liable for the loss occasioned by that fault, whether the fault be a fault of omission or commission, and that they are not protected in that case by the clause in the Trusts Act of 1861, which exempts them from liability for omissions. On the other hand, I think that as a general rule where the trustees are in fault, but where the fault is not so great as to be justly described as *culpa lata*, they will not be liable.

"In this case there can be no doubt that the defenders are chargeable with great neglect of duty. Between 1882 and 1888 they seem to have known very little about the trust, and I think that their negligence during that time amounted to *culpa lata*, and that it would have inferred liability for loss if it had resulted in loss. But it is certain that it did not result in loss, because down to June 1890 there had been no defalcations and no loss. In cases of this sort it must appear not only that there has been fault, but also loss resulting from that fault, of which obvious principle *Binnie* v. *Binnie's Trustees*, February 10, 1888, 15 R. 417, is an instructive example. Hence the neglect of the trustees prior to June 1890 is, if not quite, yet almost, out of the case; and the case has to be considered as if the trustees had not been in fault till then, with this qualification, that their prior conduct might throw light on what followed. The question, then, I consider, is—Are the trustees liable for fault committed after 1st June 1890?

"In considering that question the nature of the trust-estate is to be kept in view. It did not consist to any extent of capital. Nothing was entrusted to the factor except the revenue. The precautionary directions of the truster in order to the safety of that revenue require attention, for they were not calculated nor intended to protect it altogether, and they left the whole annual revenue from the date when the accounts were to be rendered, in the hands of the factor, at least so far as the trustees were concerned. The loss of a year's revenue by the defalcations of the factor was not provided against. This arose, not from any defect in the truster's direction, but from the nature of the case. In such a case the safety of the annual revenue is not depen-

dent on the care of the trustees, but on the honesty of the factor. I do not see that it was or could be the duty of the trustees to secure against that danger.

"Further, it is to be kept in view that this case regards the omissions of the trustees, not their intromissions. They are not called on to account on the footing that they received the money. They did not.

"A broad distinction seems recognised between the liability of trustees for intromissions, actual or constructive, and their liability for omissions—*Seton* v. *Dawson*, December 18, 1841, 4 D. 310; *Knox* v. *M'Kinnon*, November 2, 1886, 14 R. 22, and 7th August 1888, 15 R. (H.L.) 83; and *Raes* v. *Meek*, July 19, 1888, 15 R. 1033, and 8th August 1889, 16 R. (H.L.) 31, are probably the leading cases of the former class; and *Ainslie* v. *Henderson's Trustees*, February 6, 1835, 13 S. 417; *Thomson*, July 16, 1838, 16 S. 560; *Home* v. *Pringle*, December 1, 1837, 16 S. 142, affirmed 22nd January 1841, 2 Rob. 384; and *Gordon's Trustees* v. *Gordon*, March 18, 1882, 19 S.L.R. 549, are cases of the latter class. The responsibility of trustees is less stringent in the latter class of cases.

"The pursuer maintains that, apart from all question as to *culpa lata* or negligence of any kind, the defenders are liable because they disregarded the truster's direction to cause their factor to furnish annual accounts within one month after 31st December in each year. The direction is quite explicit, and it is certain that it was not obeyed. But I do not think that the trustees can be made liable in respect of their non-compliance with the truster's direction except as an element to be taken into account in considering the question of negligence. When a trustee undertakes a trust containing such a direction, he does not enter into a contract that he will fulfil that direction, and he will not be liable for breach of contract if he fails to do so. His obligation is that of a trustee, not of a contractor, and in the obligation of a trustee there is an element of discretion which is not present in a contractual obligation. A trustee may justify non-compliance with such a direction on grounds of expediency; he may excuse it on strong grounds of convenience. It was argued that there were grounds of excuse in this case. It was said that as accounts had been rendered in September or October, coming down to 1st June, it was unreasonable to insist on additional accounts in January. Further, it was said that the trust was at the beginning of 1891 involved in difficulties and brought to a deadlock by the difference between the two sections of the trustees.

"I must say that I am not satisfied with these reasons, and think that the trustees have not justified their failure to comply with the directions of the truster, although in considering their liability the position in which they were placed may be considered.

"But admitting that the trustees were in the wrong in not calling for the accounts as directed by the trust-deed, their liability is not a necessary consequence. For it is not every fault which is so punished, but only *culpa lata*, and I am not aware of any case, not involving a question as to the powers of trustees, where they have been held liable for failure to comply with the truster's directions where they were not chargeable with *culpa lata*, or not directly accountable for their own intromissions. It appears to me that the question must still be, has there been *culpa lata?*

"Still further, the loss of the trust-estate must be the result of the fault averred. It is maintained that that is not so in this case. Had Mr Grigor's accounts been called for in January or February 1891, they would, if fairly rendered, have shown that he had then above £100 in his hands, and that arrears of interest had not been paid. But that—apart from the question of whether it was put in bank for the trust or not—could not in the circumstances have been regarded as illegitimate or suspicious, because at that time the law expenses in regard to Mrs Carruthers' action had not been paid, and the petition for the removal of Mr Jarvis was still in Court: law expenses had been incurred in it, and more might be incurred, so that it was apparently legitimate and expedient, and perhaps necessary, that the factor should be in funds to meet these claims. I think, therefore, that it does not appear that had the truster's directions been complied with any default of Grigor would have been detected or the loss averted.

"But then it is said that the obligation of the trustees to comply with the truster's direction was a continuing obligation, and that, if they did not call for accounts in January or February, it was all the more incumbent on them to insist on them in March or April. This argument appears plausible, but it seems to me illegitimate, in support of the plea that the defenders are liable for mere breach of the instructions of the truster apart from negligence. It all really enters into the question as to the *culpa lata* of the trustees, and I think that is the true question in this case.

"Now, that is a question depending on the specialties of the case, and it seems to come to this—Grigor had been the truster's agent; for above ten years the trustees had had experience of him as agent in the trust, and had not had reason to suspect his honesty or his financial stability. That, I think, is the fair result of the evidence. They knew that up to 1st June 1890 there was nothing wrong with his accounts, and that there were sums to pay to himself and to creditors of the trust. A somewhat pronounced difference had arisen between two sections of the trustees. In that position of matters they failed to call for his accounts until his sequestration. In failing to do so they are undoubtedly chargeable with negligence and fault, but the question is, whether, keeping in view the directions of the truster, that negligence was so great as to lead to liability for the loss which has befallen the trust-estate. I am disposed to answer that question in the negative.

"I am not aware of any case where the liability of gratuitous trustees for omissions has been carried so far. The cases

most in point appear to be *Ainslie* v. *Henderson's Trustees* and *Home* v. *Pringle*, which show that the Court discriminates between degrees of fault. The latter case is of the highest authority. In the former case it may be that more weight is given to clauses of immunity than would now be given. Still I am not aware that it has ever been doubted. I must say that I think there was more fault in the conduct of the trustees in that case than has been proved against the defenders in this case, since the accounts down to 1st June 1890 were rendered.

"Whether trustees are chargeable with *culpa lata* or not is a question of impression, difficult in a case like this, to bring to any definite test, and my impression, formed certainly with much hesitation, is that the trustees in this case are not liable. . . .

"While I assoilzie the trustees, I do not consider that they are entitled to expenses.

"No appearance has been made for Grigor, but I suppose no decree against him is desired."

The pursuer reclaimed, and argued—The defenders had been guilty of breach of trust, and were therefore responsible for the loss sustained by the trust-estate. They had failed to obey specific instructions of the testator. Further, they had at common-law been guilty of gross neglect of duty. No accounts had been called for, nor had there been any supervision of the factor. It was for the trustees in these circumstances to show that the loss which had admittedly been sustained would not have been incurred if they had done their duty. This the trustees had failed to show, and they had been guilty of gross negligence and want of due care, and were accordingly bound to make good the loss which the trust-estate had sustained—*Sym* v. *Charles*, May 13, 1830, 8 S. 741; *Kilbee* v. *Sneyd*, 1828, 2 Molloy's Reps. 1886; opinion of Willes, J., in *Grill* v. *General Iron Screw Collier Company*, 1866, L.R., 1 C.P. 612; *in re Brogden*, 1888, L.R., 38 C.D. 546; *Gordon's Trustees* v. *Scott*, March 18, 1882, 19 S.L.R. 549.

Argued for the defenders—The judgment of the Lord Ordinary was sound and should be upheld. The trust-estate had not been lost by reason of *culpa lata* on the part of the trustees. The trustees had, no doubt, omitted to get accounts presented to them by the factor on the 31st of December of each year, but such omission did not in the circumstances of this case amount to gross neglect.—*Home* v. *Pringle*, November 30, 1837, 16 S. 142, *aff.* June 22, 1841, 2 Rob. App. 384; *Thomson* v. *Campbell*, February 16, 1838, 16 S. 560. Nor was the loss to the trust-estate due to the trustees' failure to call for accounts.

At advising—

LORD JUSTICE-CLERK—The late Mr Carruthers, who was a manufacturer in Bervie, by his trust-disposition and settlement left his estate to five trustees, who were resident at various places in Scotland, one being his own law-agent, Mr Grigor of Inverkeithing. The trust was likely to be of considerable duration, as he left a liferent to a daughter and the fee to his grandchildren. Power was given to the trustees to appoint factors either of their own number or otherwise. Mr Grigor, who had been his agent, became the factor, and the affairs of the trust were in his hands for several years, when having become insolvent he absconded, and after he did so it was discovered that about £380 of trust-money which had reached his hands could not be accounted for. The beneficiaries now seek to make the trustees personally liable for this loss.

The chief part of the trust-estate consisted of a *pro indiviso* share of the lands of Cobbinshaw, yielding both an agricultural rent and a return from minerals. The estate was heavily burdened, and it appears that there were occasions when the factor did not have in his hands funds to meet the interests falling due.

Accounts were from time to time, although not with proper regularity, laid before the trustees, as on two occasions between 1886 and 1890 the accounts were only rendered after a lapse of two years, instead of annually, as the trust-disposition directed. By the last of these accounts, which was in June 1890, it appeared that the factor had advanced about £60 of his own funds for the trust purposes, and that there was a considerable sum of interest, about £150, due by the trust, which there were not then funds to meet.

Up to this point nothing had occurred to cause the trustees to have any doubt either of the sufficiency or the honesty of Mr Grigor.

It appears that of the sum of £450 which came into Mr Grigor's hands after the account of 1890, £165 was received within the year 1890, and this would have cleared off the balance due to Mr Grigor and £105 of the arrears of interest, had it been so applied. The remainder of the sum was received in 1891, and would not have fallen in ordinary course to be accounted for till the beginning of 1892, or just about the time that Mr Grigor failed and absconded.

It is not and cannot be disputed that the trustees committed a breach of duty in not requiring accounts more regularly from Mr Grigor, and that had they done so at the end of 1890 they would either have discovered that Mr Grigor had £100 in his hands and had not paid any of the arrears of interest, or the fact of their requiring the account might have compelled Mr Grigor, if he then had the money, to so apply it, or if he had not, to make an effort to raise it and apply it to meet the interests. The question is, whether their not having done so amounts to "gross breach of trust or neglect of duty," to use the pursuer's words, so as to make them personally responsible to replace the money lost. It appears to me that that question must be considered as at the end of 1890, for it was then and then only that they had opportunity for discovering anything wrong. Before that there was nothing wrong. I do not see that, had they obtained an account

at the end of 1890, the loss would have been prevented. Their ordinary course would have been to direct the £100 to be applied to the interests, but there would have been no breach of duty in their trusting Mr Grigor, whose conduct had up to that time been unexceptionable, to carry out the direction formally given to him. I agree with the Lord Ordinary in thinking that, in considering such a question, all the surrounding circumstances may be considered, whether favourable or unfavourable to the trustees. Now certainly this trust had peculiarities. There was no general fund lying in the factor's hands, no capital estate to be dealt with or invested from time to time. He had only to receive the share of rents for the *pro indiviso* proprietor, and to pay the proceeds out in meeting interests due. Thus the trustees had no intromission with the funds, no duty to consider application of funds. For the time being the trust resolved itself into mere detail business of receiving a revenue, and paying interest of debt. There was no trust management required, and the work to be done was entirely routine work, such as a factor usually does. It was a case, therefore, in which there rested practically no duty on the trustees except to examine the accounts according to the truster's directions. They certainly omitted to do this with the regularity which was called for. But is such an omission a sufficient ground for holding them liable as for gross and culpable neglect, and therefore requiring them to make good the defalcation of a factor who had for many years proved himself worthy of trust and been the trusted agent of the truster himself?

Such questions cannot be settled by reference to any exact standard. It is not every omission that will render trustees liable. A Court must judge with regard to the circumstances of the particular case.

Here, looking to the whole circumstances, I am unable to hold that the decision of the Lord Ordinary is wrong, and I would therefore propose to adhere to his interlocutor. He has refused to give the trustees their expenses, and I concur with his decision on that matter also.

LORD YOUNG—I am of the same opinion. I think on the facts of the case it is clear—I have none of the difficulties of the Lord Ordinary—that the trustees did nothing to make them incur personal liability. It is true that they omitted to require the factor to submit accounts to them annually as they were directed in the trust-deed, but it is also true that no loss was incurred to the trust-estate by reason of this omission, and that if the accounts had been rendered annually they would have shown everything to be right at the end of the last year. It is therefore plain that no loss arose to the trust-estate from that omission, which was not inexcusable in the case of trustees scattered over the country, and whose factor was the trusted agent of their author.

I see no ground for refusing the trustees the expenses of successfully resisting this action against them. I would therefore alter the Lord Ordinary's interlocutor, which does not give the defenders the expenses incurred by their successful resistance of this action, and, as regards the expenses in this Court, I would give the trustees the expenses of upholding the interlocutor reclaimed against.

LORD TRAYNER—The claim made by the pursuer in this case is based upon the allegation that the defenders as trustees of the late Mr Carruthers failed in their duty, with a resulting loss to the pursuer as a beneficiary under the trust. I think it quite clear, and indeed it is scarcely denied, that the defenders were guilty of a failure in duty in respect they neglected or disregarded the trusters' specific direction that they should within one month after the end of each year obtain, audit, and check their factor's account of his intromissions with the trust-estate. But it is not enough for the pursuer to establish that the defenders failed in their duty, she must also show that the trust has suffered loss through such failure. Now, it appears that the trust-estate was administered by the defenders with Mr Grigor as their factor for a period of ten or twelve years, and although during the much greater part of that period they neglected to obtain and audit the factor's accounts as directed by the truster, no loss resulted to the trust-estate prior to the month of June 1890. Down to that date certainly no loss was sustained, but somewhere in or about the month of December 1891 Mr Grigor absconded, and it was found that he had misappropriated funds belonging to the trust to the extent of about £380, and it is for this sum that the pursuer seeks to make the defenders responsible. It follows from what I have said that the only failure in duty on the part of the defenders which it is here of any moment to consider is their failure to obtain and audit their factor's accounts within one month after the end of the year 1890. Mr Grigor's accounts were all in order in June of that year, and he had absconded before the time when the defenders were called to ask or audit his accounts ending 31st December 1891. Accordingly, the question to be considered is, whether the defender's failure to get their factor's accounts for the period from 6th June 1890 to 31st December of the same year was a failure which resulted in loss to the trust, which they are now bound to make good. On this question I have come to be of the same opinion as the Lord Ordinary. If the accounts of the factor had been duly rendered as at 31st December 1890, they would have shown that he had received trust-funds to the extent of about £165, while the trust was then indebted to Grigor himself about £56, and to three heritable creditors for interest in arrears about £130. Roughly speaking, therefore, the factor's accounts would have shown that at 31st December 1890 Mr Grigor (after paying off the sum due to himself) had about £110 in hand to meet the claims of the heritable creditors, amounting as I have said to about £130.

It was suggested, or perhaps I should say maintained, for the pursuers, that on seeing such a state of accounts showing that the factor had £110 in his hands which should have been paid away to the heritable creditors, the duty of the trustees would have been at once to remove their factor from his office, and insist on immediate payment by him of the sum in his hands. I cannot adopt that view. Apart from the consideration (1) that difficulties had arisen among the trustees involving the trust-estate in litigation, for meeting the expenses of which Mr Grigor might very fairly have held the balance then on his hands, and (2) that the trustees were dealing with a man who was habit and repute both solvent and honest, who had honestly as factor conducted the business of the trust for over ten years, and who had been the trusted man of business of the truster—I say, apart from these considerations, it occurs to me that had the defenders found, as at December 1890, their factor's accounts in the state I have already described, it would have been harsh and unreasonable in them to have acted towards the factor in the way suggested by the pursuer. It would have been a sufficient fulfilment of their duty if they had directed Mr Grigor to apply the funds in his hands in extinction *pro tanto* of the heritable creditor's claims, so far as they considered the state of the trust affairs admitted of this being done. Nor would they have incurred blame or responsibility because they did not personally see to the application of the trust-funds in accordance with their directions. In the circumstances they might very well trust their factor with the fulfilment of their directions, and as prudent men, if dealing with their own affairs, would probably have done so. Nothing more however was required of them in the trust management than could reasonably be expected or required of them in the prudent and reasonable management of their own affairs. I am therefore of opinion that while the defenders certainly neglected the exact fulfilment of the duty imposed on them by the terms of the truster's settlement, it has not been shown that that neglect resulted in any loss to the beneficiaries. Such loss as has been sustained was not the consequence of any failure on the part of the defenders to conduct the business of the trust with the care and prudence bestowed by ordinary men on their own affairs. I think the Lord Ordinary's judgment should be adhered to.

In the view I have taken of the case, it is unnecessary to consider the minor question whether any distinction could be made between the defenders had liability against any of them been affirmed.

The Lord Justice-Clerk then read the following opinion of LORD RUTHERFURD CLARK, who was absent:—The defenders entered on their office as trustees in April 1879. They were empowered to appoint a factor for uplifting the rents and interests of the estate, and they were directed to cause him to lay before them within one month after 31st December in each year an account of his intromissions, "with the whole vouchers thereof, to be by them examined, audited, and (if found to be correct) approved of."

The trustees did not obey these directions. For two years the accounts were rendered and docquetted. No further account was rendered till 1888, for the period between 15th May 1882 and 29th February 1888. A fourth account was engrossed in the sederunt-book, which comes down to 1st June 1890. It was not prepared in order to an audit of the factor's accounts, but because the widow had threatened to bring an action for the *jus relictæ* and terce. It showed that the factor, Mr Grigor, was the creditor of the trust for about £60. It is admitted that the account is correct.

No further account was required by or rendered to the trustees. Mr Grigor was sequestrated in January 1892, and shortly afterwards absconded. It has since been found that he had failed to account for two sums amounting to £165 received by him in August and November 1890, and for four sums amounting to £250 received by him on several dates between May and December 1891. The debt which was brought out in the account of June 1890 must, however, be deducted.

This action has been brought against the trustees in order to oblige them to make good the amount of the defalcation. The Lord Ordinary has assoilzied them on the ground that they have not been "guilty of any gross neglect of duty," whereby a portion of the trust-estate has been lost. I gather from his note that he means, first, that the trustees have not been guilty of any gross neglect of duty; and second, that if they were, it has not been proved any loss resulted from it.

I am of opinion that the trustees were guilty of gross neglect. They failed to perform their duty of supervision, and the duty which the truster expressly enjoined. The one is imposed by law, and by accepting the trust they undertook to perform the other. To my mind this amounts to gross neglect. There has been almost an absolute failure to perform very plain and very important duties.

When the trustees are in such default, it seems to me that they are responsible for the defalcations of their factor unless they show that the loss was not due to their misconduct. The presumption is that if they had done their duty the loss would not have arisen. They must displace it. I see no justice in throwing any *onus* on the beneficiaries.

If they had required an account in January 1891, they would have found that the factor had £100 in his hand in November 1890, and that he had not paid the overdue interests on certain heritable bonds which affected the lands belonging to the trust-estate. This in my opinion was a very great breach of duty on his part, and cannot be justified on the ground that he was retaining the money to meet expenses which might be incurred in certain existing or threatened litigations. His conduct

seems to me to admit of no reasonable explanation other than that he had misapplied the money. If the fact that the interests remained unpaid had come to the knowledge of the trustees, I do not think that they would have discharged their duty by directing the factor to pay the interests. They would have been bound to see that he paid them immediately, and if he did not, to remove him from his office. In that case they would probably have recovered what was due to the trust, and they would have prevented any future loss.

The Court adhered, and found the pursuer liable in expenses since the date of the interlocutor reclaimed against.

Counsel for the Pursuer—Salvesen—A. S. D. Thomson. Agents—Finlay & Wilson, S.S.C.

Counsel for the Defender William Carruthers — Craigie — Macphail. Agents — Mackenzie & Black, W.S.

Counsel for the Defenders James Glegg and Hector Forbes — Baxter — Abel. Agents—W. & J. L. Officer, W.S.

Wednesday, June 26.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

MOUBRAY'S TRUSTEES *v.* MOUBRAY AND OTHERS.

Entail—Direction to Entail—Destination—Heirs Direct or Collateral.

Robert Moubray left a holograph writing, in which he directed that the income of his estate should be accumulated after his death until it reached a certain sum, and that his trustees should then purchase lands therewith, and entail the same on his "heirs direct or collateral," so long as the estate of Cockairney was theirs. When that estate was not any longer in the possession of the Moubrays, the estate which was to be purchased was to go to another family, provided the family of Moubray of Cockairney no longer existed in Scotland. At the time when the required sum had been accumulated the estate of Cockairney was held by trustees for behoof of William Moubray, the testator's heir-at-law, and his heirs-male.

Held (*aff.* judgment of Lord Kincairney) (1) that the testator had provided for the execution of a valid entail, in respect that the direction to entail the lands upon his "heirs direct or collateral" imported a destination to his heirs in blood, and that this destination differed from the legal order of succession; and (2) that the estate of Cockairney was, in the sense of will, in the possession of the testator's heir-at-law.

Succession — Will — Successive Holograph Writings—Construction.

By holograph writing dated in 1867 a testator directed that the income of his estate should be accumulated until the whole reached the sum of £40,000, and that his trustees should then purchase lands, and entail the same on his "nearest of kin." By holograph writing dated in 1868 the testator directed that the income of his estate should be accumulated until the whole reached the sum of £41,000, and that his trustees should then purchase lands therewith, and entail the same on his "heirs direct and collateral."

Held that the later deed superseded the earlier, and was to be construed without reference to it.

Robert Frederick North Bickerton Moubray, who resided at Cockairney, in the county of Fife, died on March 31st 1875 leaving certain holograph testamentary writings dated in 1867 and 1868. By the first of said writings, dated 10th June 1867, Mr Moubray provided—"This is my last will and testament. I beg Coutts and Co. will continue to re-invest twice a-year my balance in their hands less £10, ten, if that is necessary to keep the account with them open; and my trustee or trustees, when it has amounted to £40,000, forty thousand pounds, will buy lands in Fife in the western district, or as near the estate of Cockairny as may be, and entail said lands on my nearest of kin in the strictest way admissible by the law of Scotland. I leave my snuff-boxes to my two brothers William and Edward, and any other trifles I may leave among my sisters, married or single. I leave my brother William Hobson Moubray, living at Otterston, my testamentary executor, or, if he should die before me, my next blood or collateral relative, and beg my remains may be interred by him in the funeral ground of Cockairny in the Dalgety Church (old yard)."

On 18th November 1868 Mr Moubray executed another holograph writing in these terms—"Should the estate of Cockairny be no longer in the possession of my relatives by blood in regular succession, when the forty or forty-five thousand pounds have accumulated, I desire that sum may be devoted to the purchase of land as near to the estate of Upwood, Hunts, as may be, and such lands to be strictly entailed on the possessor of the lands of Upwood and Wood Walton in the same manner according to the law of England, as correspondingly it would have been if invested in lands adjacent to Cockairny, Fife, as above."

The last holograph writing dated 30th April 1868 was in these terms—"This is my last will and testament. I beg Messrs Coutts and Co., London, will continue to reinvest twice a-year any balance in their hands on the conditions if necessary of keeping ten pounds at the disposal of my trustees in their hands; and when the sum invested shall be sufficient to realise forty-one thousand pounds, my trustees shall have power to realise through Messrs Coutts