these sections together the argument of the appellants is this—This man died on 14th September 1907; he did not obtain a certificate of disablement; therefore as he died of a disease mentioned in the third schedule, the date of his death is the date of disablement. The date of disablement was thus after the beginning of the Act, and therefore he is entitled to recover. I think this is ingenious but quite fallacious, and I quite agree with the decision of the Sheriff-Substitute. These provisions were only made to enable the Act to be applied to industrial diseases after it had come into operation. The only provision in the Act which gives a right of recovery at all is section 1. All these sections have the effect of giving an artificial date to the disablement, but you cannot by piecing together these sections make the Act retrospective. Now when the day dawned on 1st July 1907 there was no relation of employer and employed between the parties to this case, and there never was such a relation after the Act came into force. I am therefore of opinion that the Sheriff-Substitute is right.

LORD M'LAREN—I concur.

LORD PEARSON—In this case the injured workman died of lead poisoning on 14th September 1907. The Act of 1906, under which his widow now claims compensation, came into operation on 1st July 1907, and I assume that if the period of employment which resulted in the disease had continued until after 30th June, he or his representative would have been entitled to compensation. But the facts before us include a finding by the Sheriff-Substitute that the workman finally left work on 22nd June. He was therefore not in the employment of the respondents, nor of anyone else, on or after the date when the Act came into operation; and as the Act applies only to cases of employment, it appears to me to have no application to the case in hand. To hold the contrary view is really to antedate the Act.

LORD KINNEAR was absent.

The Court answered the question of law in the affirmative.

Counsel for the Appellant — Paton. Agents—Reid & Milne, W.S.

Counsel for the Respondents — Wilson, K.C. — Hon. Wm. Watson. Agents — Robson & M'Lean, W.S.

Thursday, March 4.

FIRST DIVISION.

[Lord Johnston, Ordinary.

ALLEN *v.* M'COMBIE'S TRUSTEES.

Process — Title to Sue — Breach of Trust — Action by One of Two Beneficiaries — Remaining Beneficiary neither Conjoined as Pursuer nor Called as Defender for Her Interest—Competency—Intimation.

In an action by one of two beneficiaries against trustees for alleged breach of trust the defenders pleaded that the action as laid was incompetent, in respect that the other beneficiary was neither conjoined as pursuer nor called as defender for her interest.

Held (1) that as any beneficiary might sue for breach of trust without either conjoining with him the other beneficiaries as pursuers, or calling them as defenders for their interest, the action as laid was competent; but (2) that inasmuch as the action, if properly and not collusively fought, would be *res judicata* against the remaining beneficiary, it was proper that she should receive intimation of it in order that, if so advised, she might sist herself as pursuer.

Pollok v. *Workman*, January 9, 1900, 2 F. 354, 37 S.L.R. 270, *distinguished.*

Process—"All Parties not Called"—Action by Beneficiary against Trustees for Alleged Breach of Trust — Representative of Deceased Trustee not Called as Defender — Plea Repelled.

In an action by a beneficiary against trustees for alleged breach of trust the defenders pleaded "all parties not called," in respect that the representative of a deceased trustee was not called as defender.

Held that as the action was founded on breach of trust, it was competent for a beneficiary to sue all or any of the alleged delinquents—any right of relief on the part of those found liable not being thereby prejudiced—and plea *repelled.*

Croskery v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490, *followed.*

On 8th May 1908 Mrs Mary M. M'Combie or Allen, 5 Johnstone Street, Bath, widow, brought an action against Andrew Murray, Ravenscraig, Inverugie, and others, trustees of the late Thomas M'Combie, Tillyfour, Aberdeenshire, for decree that the defenders as individuals were jointly and severally bound to restore to the trust estate a sum of £1800 with interest thereon from Martinmas 1905.

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 25th November 1908 continued the cause.

Opinion.—"The late Thomas M'Combie, who died in 1869, left a settlement in favour of his widow Mrs M'Combie, afterwards Wright, his two brothers, and a cousin, all

now dead. The last survivor of the trustees was Mrs Wright, who in 1885 assumed Andrew Murray, advocate, Aberdeen, as a trustee, and there were afterwards assumed in 1893 John Carmichael Bennett, advocate, Aberdeen, a partner of Mr Murray, and the Rev. Thomas Young, minister of Ellon. Mrs Wright died in 1899. The three assumed trustees above mentioned survive.

"The testator left two daughters, now Mrs Mary Marshall M'Combie or Allen and Mrs Louisa M'Combie or Everard. By his settlement he provided for the application of the annual income of his estate for the maintenance of his wife and daughters during his wife's lifetime, and after her death directed the estate to be held for behoof of his daughters.

"In 1893, while the widow Mrs Wright and Andrew Murray were the sole trustees, an advance of £1800 of the trust funds was made on the security of certain tenement property in Aberdeen, and on the assumption later in the year of Mr Bennett and the Reverend Thomas Young a title to the bond was made up in favour of the whole trustees. In 1899, while the widow was still alive, the security for the loan was restricted without consideration and part of the security subjects released. Alleging that the security was never a proper trust investment, and that on the restriction in 1899 it became wholly insufficient to secure the amount of the trust funds lent, one of the daughters, Mrs Allen, has raised this action against the three surviving trustees to have it declared that the defenders, as individuals, are jointly and severally bound to restore the sum of £1800 to the trust estate, with interest from Martinmas 1905, and to have the defenders, as individuals, decerned and ordained jointly and severally to make payment to themselves, as trustees presently acting under the settlement of the late Thomas M'Combie, of the sum of £1800 with interest as aforesaid.

"It was not attempted to be maintained that the pursuer's averments were irrelevant, but it was contended—(Plea 2) That the action as laid at the pursuer's instance was incompetent, by which I understand to be meant that the pursuer cannot sue without conjoining with herself her sister Mrs Everard. (Plea 3) That all parties are not called, in respect that the three surviving trustees alone are sued, without calling the representatives of the truster's widow Mrs Wright, who was a trustee both when the investment was made and when the security was restricted.

"1st. I do not think that there is anything to preclude a single beneficiary suing an action for accounting for trust funds. And in a sense this is an action of accounting, in respect that it has reached by a shorthand method what is usually the object of such actions of accounting, viz., an objection to a specific entry or entries in trust accounts. But these two ladies have an equal interest in the trust funds, and therefore in this particular item, and there is certainly wanting an explanation why the one sister should sue this action without the concurrence of the other and without explanation of her absence, and should so sue for restoration to the trust estate of a sum to one-half of which only she is entitled, and her sister to the other half. I can see very possible hardship to the defenders in being compelled to litigate with one of these joint beneficiaries while the other stands aside, and though I do not think that the circumstances justify my dismissing the action *de plano*, as was done in the case of *Pollok* v. *Workman*, 2 F. 354, I think it ought not to proceed until Mrs Everard, if she does not choose to sist herself as a pursuer, is called as a defender for her interest.

"2nd. But I have also to consider whether the action can be allowed to proceed against three of the trustees only, the representative of the fourth being left out. I recognise that it is now definitely settled in our practice that an action may proceed against any one or more of a set of trustees where the ground of action is delict or *quasi* delict—*Croskery* v. *Gilmour's Trustees*, 17 R. 697. I think indeed that opinions differ somewhat as to the justice of this rule as a rule of universal application, and I think that there is no inclination anywhere to extend it. If, then, I could regard this question as one of delict or *quasi* delict, I should feel myself bound by this rule of practice to allow the action to proceed as it has been instituted. But this is not a case such as *Croskery's*, where the act of the trustees complained of was the violation of one of the common law principles of trust, where the alleged act was absolutely illegal *per se* or *ultra vires* of any body of trustees, and therefore a *quasi* delict. What is complained of here is truly a breach of contract. Trust is compounded of the nominate contracts of deposit and mandate. *Ex hypothesi* the sum entrusted to the trustees under the contract of deposit cannot be made forthcoming in respect that the security taken by virtue of the contract of mandate is insufficient. I do not think that that can be regarded in any other light than merely as a breach of contract. To such a case the rule of *Croskery* does not extend. The defenders are not co-delinquents, even in a *quasi* delict, but merely *corei debendi*. I refer to the opinion of Lord Justice-Clerk Inglis in *Liquidators of Western Bank* v. *Douglas*, 22 D., at p. 474. I think therefore that Mrs Wright's representative, who I understand is Mrs Everard, as sole executrix of her mother, must be called as a defender if the action is to proceed. That Mrs Everard is her mother's sole executrix is a very probable explanation of her neither appearing as pursuer nor being called as a defender.

"I shall continue the case to allow of the pursuer considering her position."

Thereafter, on 1st December 1908, his Lordship, on the motion of the pursuer, granted leave to reclaim.

Note.—"It is proper that I explain that the justification of the pursuer's request for leave to reclaim, and of my having granted it, is to be found in the judgment which I pronounced on 25th November

1908, rather than in the interlocutor of that date. The natural conclusion of that judgment was that I should sustain the compearing defenders' pleas to the competency, and that all parties are not called, and dismiss the action. But I thought it proper to continue the case to give the pursuer an opportunity of remedying the defect and avoiding this result, if so advised, but this subject to the intimation that if the opportunity was not availed of decree would follow, if moved for, after the lapse of a reasonable time."

Argued for reclaimer — (1) It was well settled that one of several beneficiaries might sue for breach of trust without the concurrence of the others. The pursuer did not ask for an apportionment, but merely that the money should be restored to the trust. The case of *Pollok* v. *Workman*, January 9, 1900, 2 F. 354, 37 S.L.R. 270, was therefore inapplicable. That was a claim for *solatium*, and the *ratio* of the decision was that the defenders might otherwise have been found liable for more than they were justly due. The present action, if allowed to proceed, would be *res judicata* against the other beneficiary. (2) It was not necessary to call the representative of the deceased trustee. The respondents were not charged with breach of contract but *quasi* delict, viz., breach of trust, and for that any one of the trustees might be sued—*Liquidator of Western Bank* v. *Douglas*, January 21, 1860, 22 D. 447, at p. 475; *Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490; *Palmer* v. *Wick and Pulteneytown Steamship Co., Limited*, June 5, 1894, 21 R. (H.L.) 39, 31 S.L.R. 937. It was irrelevant to say that the defenders called would be prejudiced by the absence of the deceased trustee's representative, for if found liable they would have an action of relief.

Argued for respondent (Bennett)—(1) The Lord Ordinary was right, but this respondent would be satisfied with intimation made to Mrs Everard. (2) The action was based on contract, and therefore all the trustees or their representatives must be called — *Croskery*, *cit. supra*, at p. 700; *Palmer*, *cit. supra*, at p. 43.

Argued for respondent (Young)—(1) On this point this respondent adopted the argument of the respondent Bennett. (2) This respondent was not a trustee when the alleged breach took place. *Esto* that he had a right of relief, it was for his interest to have the representative of the deceased trustee here so that decree could go out against her too. It would be inequitable if Mrs Everard, who was the representative of the deceased trustee, should get the benefit of the restored funds without bearing her share of the loss. Reference was made to *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31, at p. 35, foot, 27 S.L.R. 8.

At advising—

LORD PRESIDENT—Thomas M'Combie left a trust-disposition and settlement by which he conveyed his property to trustees. These trustees were his widow and certain other persons. These other persons died, and the widow, who afterwards re-married and took the name of Wright, became the last survivor of the originally appointed trustees. In 1885 she assumed Mr Murray, and there were afterwards assumed besides Mr Murray, Mr Bennett and the Rev. Thomas Young. In 1899 Mrs Wright died, and the other three trustees—that is to say, Mr Murray, Mr Bennett, and the Rev. Thomas Young—still survive, and are the defenders in the present action. The present action is brought by a daughter of the truster, and is directed against the three trustees, and asks them to replace a sum of £1800 in the trust estate which has been lost by wrong investment. I do not go into the particulars of that claim or of the defence to it upon the merits, because the question at this stage does not deal with the merits. Besides the pursuer, there is also another daughter, Mrs Everard, and these two are, as I understand, practically the sole beneficiaries under the will.

Now, two preliminary defences were raised before the Lord Ordinary, and have been disposed of by him, and it is against his judgment upon this matter of the preliminary defences that the present reclaiming note is brought. The first preliminary defence was that the action was incompetent, because the pursuer sues alone, and without conjoining with her, her sister, the other beneficiary, who, of course, is injured to the same extent as the pursuer by the diminution of the trust funds by improper investment. Now the Lord Ordinary has dealt with that plea thus—he says that although a single beneficiary may sue, yet he thinks that the action ought not to proceed until Mrs Everard, if she does not choose to consider herself as a pursuer, is called as a defender for her interest. I am afraid I cannot agree with the Lord Ordinary upon the idea of calling her as a defender. I find it a little difficult to follow the trend of the reasoning which could ever make a person a defender who under no circumstances has any interest to defend. The position of Mrs Everard must be that of a pursuer or nothing at all, because upon the statement of the case it is out of the question that she should be called as a defender. We are, of course, quite familiar with calling persons as defenders for their interest, but the reason of that is that they have some interest which should make it possible for them to say—"I do not wish the decree to be pronounced which is asked, because this would prejudice me." Now there is no conceivable circumstance in which it can be held to prejudice a beneficiary that the trust estate should be replaced. A beneficiary might say—"I do not wish to distress the trustees. I think they acted in good faith, and I will waive my rights." But that is not in the sense of the law an interest which is infringed by the decree which is being pronounced. And therefore I think the idea of calling her as a defender is out of the question.

How does the matter then stand as to allowing the action to go on without her

being conjoined as a pursuer. The case that was pressed upon us by the defenders is the case of *Pollok* v. *Workman* (1900, 2 F. 354), where in an action at the instance of one of a family for damages in respect of an unwarranted *post mortem* dissection, the action was dismissed because there were a number of other children in exactly the same position who were not conjoined in the suit. I think that that is a perfectly good decision, one which I should follow, and by which at any rate I am bound. But I venture to think that it is really based upon what may be called a rule of Court, not only for convenience, but also for avoiding injustice. We can easily see, taking the case of a railway accident where the father is killed leaving a widow and several children, if the widow and children were allowed to bring successive actions, there is, I am afraid, no question that the railway company would be made to pay a great deal more than they ought to pay from the fact that successive juries would deal with the matter without having a proper knowledge or consideration of what had been done by other juries before them, whereas, if all the actions are brought at once, then one jury deals with the case and finds the railway company liable in a certain sum apportionable among the widow and the children. And therefore I think the decision in *Pollok* v. *Workman* is a very salutary decision, but I think it is based more upon what I may call practical considerations than upon any absolute rule of law. Now the practical considerations which apply there do not apply in a case of this sort. It seems to me that where there is an alleged breach of trust, it is quite within the power of any one beneficiary to bring an action by himself. But then there is another word to be said. The result of the action will be either that the money is ordered to be replaced or not. If the money is ordered to be replaced, then the thing is done once and for all, and it is quite obvious that the trustees cannot afterwards be distressed by another beneficiary to have the money replaced again. If, on the other hand, the money is not ordered to be replaced, that is to say, the trustees are assoilzied, they have a quite proper interest to say: "Well, we fought this once, and we are not to be harried by having exactly the same thing fought over again with another beneficiary." I think that is quite true, but I think that the answer is that the action, if once properly and not collusively fought, is just one of those representative actions which would be *res judicata* against another beneficiary; just as, for instance, you can have an action by an heir of entail as to something with regard to the estate—a boundary, say—with another proprietor, that would bind the succeeding heir of entail, although there is nothing better settled than that one heir of entail does not represent another. Therefore I think that the case ought to go on, but that it will be *res judicata* against the other beneficiary. But then I do think this, that the other beneficiary ought to be given the opportunity of being here, if she likes, and of seeing that the case is, according to her own view, properly fought out. My judgment, therefore, upon this plea is that it is not a prejudicial plea, but that before the action further proceeds intimation should be made to Mrs Everard, with the result that she may come and sist herself if she chooses, but that if she does not choose to do so she will well know from this judgment that it will be quite futile for her to raise the question in the future, for we should hold it to be *res judicata*. I take it that that is all really that the respondents want by this plea.

Now the second plea is this, the widow, Mrs M'Combie or Wright, was one of the trustees at the time the alleged breach of trust was committed, and therefore if there was a breach of trust she may be at least equally blameable with the other trustees, and the sister who is not here is the executrix of the widow. It is said that the action should not be allowed to proceed against three of the trustees without also calling the representatives of the fourth, that is to say, the executrix. The Lord Ordinary has sustained that plea, and he has sustained it on this ground, that he considers that what is here complained of is not a delict or *quasi* delict, in which case, following the case of *Croskery* v. *Gilmour's Trustees*, 1890, 17 R. 697, he would have held it was quite possible to proceed against one or more of the trustees without calling the others, but that it is breach of contract, and he cites the opinion of Lord President Inglis, when he was Lord Justice-Clerk, in the case of the *Liquidators of the Western Bank* v. *Douglas*, 1860, 22 D. 447, in which he says that "trust is compounded of nominate contracts, of deposit and mandate." I am afraid I cannot agree with the Lord Ordinary in this matter, and I think it is pressing the *dictum* of Lord President Inglis too hard. It is quite true that the origin of trust may very well be taken to be a combination of these two contracts. In the older works, for instance Mr Erskine's work, written at a time when trust law was what one may call exceedingly unfamiliar, trust is treated as a branch of deposit. But although that is historically true, I do not think that trust can be treated as deposit and mandate and the rule of these two contracts applied and no others. Nor do I think that breach of trust can be treated merely as breach of contract. In the first place, I very much doubt whether all actions for breach of trust can be conclusively divided into the two categories of either breach of contract or *quasi* delict. It sometimes clears one's mind to go to another system of law. It certainly is not the case in England. The two terms which correspond to our breach of contract and *quasi* delict are in England breach of contract and tort. But that division was a common law division altogether, and when you come to things like breach of trust you find there that the remedy was in the Chancery Courts, and was not assigned to a division which was only appropriate to common law actions. Now, in our Courts we have never had a

distinction between equity and common law jurisdiction, and yet I think, unknown to us, the same ideas have run through our jurisprudence, and therefore I very much doubt whether you can divide all actions conclusively and say that one must fall on one side or on the other, that it must either be breach of contract or *quasi* delict. But besides that I am equally clear that there are a great many wrongs—to use a neutral term—which may partake of both characters; and one very familiar instance is the wrong which a carrier does to a passenger by hurting him during the progress of his carriage. I looked up to see what doctrine of law that wrong is assigned in the older cases, and I find that Lord Ivory in his Notes, speaking of what is probably the first case in our books of exactly this kind, the often-cited case of *Brown* (26th February 1813, F.C.), the case of the accident to the Queensferry coach, speaks of it in this way. It is in the part of Mr Erskine's work which is dealing with *quasi* delict. Mr Erskine deals with *quasi* delicts, and the instance he gives is that where by the negligence of a jailer a prisoner is allowed to escape. Annotating that, Lord Ivory referred to the case of *Brown* as being decided "partly on the same principle"—that is, on the principle of *quasi* delict—"and partly from the obligation arising *ex contractu*." And Lord President Inglis said precisely the same thing many years afterwards in the case of *Eisten* (1870, 8 Macph. 980), another good example of a case where it is really very difficult to say whether the right to recover depends upon the fact that there is a breach of contract or the fact that there is *quasi* delict.

There is also another consideration which, without anything else, would affect my mind powerfully, and it is this—if it was a question of contract pure and simple, as the Lord Ordinary has held, then of necessity all must be bound or all must be free, and that is really, I think, the only basis upon which he can sustain the plea. When we come to the question of breach of trust by a mal-investment, everybody knows it is not a case of all being bound or all being free. One trustee may be guilty and another may be innocent. It all depends upon the facts. One trustee may be able to show that he had done everything he could, and that the bad investment was owing to no fault of his—that it was owing to the fault of a co-trustee. In that case the one would be free and the other would be bound. That, I think, shows, I will not say *quasi* delict, but something which may more properly be described in the general terms in which it is described in the Chancery law of England as breach of duty. And as a matter of fact, that that has been the view of our law upon the question of trusts I have no doubt. Long before there was any question of this class of case in the Scottish Courts, there was an immense body of law in England erected by the Court of Chancery; and looking back to the earliest cases in which this remedy was sought in Scotland, viz., the cases reported in 15 and 16 Dunlop, I found that the Judges without any difficulty simply took the English Chancery doctrine. They considered that our jurisprudence was quite sufficient to visit breach of duty with its proper consequences, and I do not think that anyone for one moment ever dreamt of rigidly assigning the matter either to breach of contract or *quasi* delict.

Accordingly in this matter I cannot agree with the Lord Ordinary. It seems to me there is another objection as well, which is this—it is not as if Mrs Wright were alive and the proposal were to make her a party to the case. The proposal is to call her executrix, but the executrix can only be bound in so far as the executrix holds funds of Mrs Wright, and of this we know nothing. Accordingly I think the action must be allowed to go on, but that does not affect the question of right of relief of a trustee who is held liable against the representatives of another trustee who may have been equally culpable. In that question one cannot decide anything in this action, but undoubtedly such actions are competent. They have often been allowed in England, and nothing which I say here is against that notion.

I am therefore of opinion that upon the whole matter we should recal the Lord Ordinary's interlocutor, and that we should remit to his Lordship to proceed with the action, giving due intimation to the other beneficiary in order that, if so advised, she may come and sist herself as a pursuer.

LORD M'LAREN—I concur on both points with your Lordship in the chair. I only desire to add some observations on the necessity of conjoining all the trustees in an action of this kind. The Lord Ordinary has treated the case as one of breach of contract, and no doubt if a truster conveys property to a body of trustees and they neglect their duties, then, so far as concerns the right of the truster himself, he would have an action on the ground of breach of contract against the persons who had accepted his trust and had not carried it out, independently of any further theoretical responsibility that might arise in consequence of the proof of delinquency. But then I think the Lord Ordinary has fallen into error in not observing a distinction between the case I have mentioned, which is one of comparative rarity, and the common case of a testamentary trust in which the grantor places property in the hands of trustees with no view of their holding for him, because the trust only comes into operation on his death, but in view of their holding for the benefit of persons named and designed in his will. Now, a moment's consideration will show that no relation of contract exists between the beneficiaries under a will and the trustees. It was not the beneficiaries who constituted the trust or who contracted with the trustees for the performance of their duties. They have no doubt a *jus quæsitum* for the enforcement of the trust, but that is really a very different thing from a contract such as the Lord Ordinary

has supposed. Now, when considered in the light of principle, it seems perfectly clear that an action at the instance of a beneficiary is an action, not of breach of contract, but of neglected performance of a duty towards him which they have accepted from a third person. Well, I venture to say that there is not even a historical foundation for treating these actions as actions founded on breach of contract. If you go back to the Roman law, which is the source of the fundamental principles of trust administration, you find the principle was the same though it was worked out in a different way. The property was given to the heir, who by the strict law of Rome was entitled to ingather the estate as if it were his own. But then it was given to the heir on condition that he should leave the whole or part of it to some other person. That was a *fidei commissum*, to which effect was given, not as a matter of strict law, but by the exercise of the prætorian power which recognised the justice of the beneficiary's claim in that matter that was not covered by the ancient law. Now, curiously enough, that distinction has come down to a time comparatively recent, because the Ecclesiastical Courts in England and Scotland, and I suppose other countries, assumed that they were the successors of the prætors in the administration of the prætorian law, and they arrogated to themselves exclusive jurisdiction not only in the appointment of executors where that was necessary, but also in the construction of the will. Since the Reformation, when these Courts lost their standing in this country, we find that in England the Court of Chancery took up the same matter of administration and construction of wills, while in Scotland, where we had only one system of jurisprudence, naturally the Court of Session as the supreme Court of the country was the Court on which all questions of administration of trusts devolved, because I think, except in recent statutes, the Sheriff had only jurisdiction in regard to legacies. He certainly had no jurisdiction with regard to trust property. Well, these considerations show that this matter of enforcement of a trust created by a will was a special jurisdiction which had a special region and was administrated by the Court exclusive of the ordinary common law jurisdiction of the country, and that it was a breach of duty on the part of the executor, trustee, or administrator which was the foundation of any action of this kind. Now, the moment that you come to a question of breach of duty or fault, the action must lie against the person who committed the fault, because it is perfectly possible that there might be other trustees who were not present at the meeting at which the bad investment was made, and who were excusably absent and are not chargeable with any breach of duty. They may not have had any notice of the meeting. It seems to me quite superfluous that a person against whom no neglect is alleged should be a necessary defender in an action which is brought to enforce liability upon persons who are said to have been guilty of fault; and I hope that it will not be supposed that in future it is necessary in an action against trustees who are chargeable with fault, also to include those who are innocent.

Lord Kinnear—I agree with your Lordships on both points. I think it is clear that one beneficiary has no interest to appear as the contradictor of another beneficiary who claims only that the money which is alleged to have been lost by the imprudence of a trustee should be replaced in the trust estate. The second beneficiary is not a proper contradictor, and therefore it is quite unnecessary that she should be called as a defender. But then it is perfectly reasonable and proper that the trustee against whom such an action is brought should be protected from the unnecessary duplication of actions, and therefore it is right that the action should be intimated to the beneficiary who has not voluntarily come forward in order that she may either leave the conduct of the whole case in the hands of the actual pursuer, or may come forward now and maintain any pleas which she cannot trust the pursuer to maintain, so that, in other words, the judgment obtained by the trustees will be *res judicata*.

As to the second point, I also agree in all that your Lordship has said. I think the theoretical ascription by Lord President Inglis of the doctrine of trust to the two contracts, deposit and mandate, has been pressed by the Lord Ordinary to logical consequences which were not in the Lord President's mind. Whether the theory is sound or not as matter of legal history may be a very interesting question, but, so far as we are now concerned, it is academical. For practical purposes I agree with your Lordship that there can be no doubt that we have derived the law of trust as now administered much more directly through the aid of decisions of the House of Lords, from the equitable administration of trusts by the Court of Chancery in England, than by any logical deduction from the strictly legal conception of the contracts to which the Lord Ordinary refers. But whatever be the origin of the legal conception of trust it has wider consequences in the fiduciary relation which it creates than can be referred to contract. Therefore I confess I am not much moved by the suggestion that you are to consider whether a beneficiary, bringing an action against trustees founded upon breach of duty, is proceeding upon any right derived from the two contracts in question or not. The two categories of actions for delict or *quasi* delict, and of actions for breach of contract, do in many cases overlap, and I think that in the case of *Palmer*, 1894, 21 R. (H.L.) 39, Lord Halsbury points out that exactly the same thing is true of the law of England as Lord Justice-Clerk Inglis pointed out was true of the law of Scotland, that the same act may be treated as a tort and as a breach of contract, and that the two terms are not used with logical precision. Suppose the action now in question were referable to the law

of contract, and not, as I think, to the law of *quasi* delict, I should still have to inquire what is the stipulation of the contract by which the Lord Ordinary holds that the pursuer is bound to call all the trustees into the field or none? Lord M'Laren has pointed out that a beneficiary is not himself a party to the contract, if there be one, between the truster and the trustees, but then he may be entitled to press against the trustees a *jus quæsitum tertio* which will be measured by the contract, and therefore he might be bound, if we could find any ground for it, by a stipulation which so tied all the trustees together as co-obligants that he was bound by contract to bring them all into the field or none. But it is impossible to find, so far as I can see, any such implied stipulation in the relation created by the truster when he puts his money in trust. If the action is laid upon contract, then, as Lord Justice-Clerk Inglis pointed out in the case of *Douglas*, 1860, 22 D. at p. 476, the contract itself will by its own terms fix whether the liability is conjoint or several or conjoint and several. If the action is one for reparation for a wrong or for *quasi* delict, then the ground of complaint is not referred to any particular stipulation. The action is founded upon the conduct of the person complained of, and the question therefore really must always be whether the action is founded upon the stipulation of the contract which he says has not been performed, or upon what he alleges to be wrong conduct upon the part of the defender. I agree that the particular complaint in this case does not involve any wrong so grave as to be properly called a delict, but then the term "*quasi* delict" is a very wide term, and it will cover any degree of imprudence or neglect on the part of a trustee, by which trust property, which it was his duty to preserve, is lost. On the form of this action I cannot say I have any hesitation in saying that it is an action founded upon *quasi* delict, and not upon breach of contract. The liability of the trustees and the corresponding rights of the pursuer are not to be measured by any express stipulations between them, or between the truster and trustees, by which they are to benefit, but upon the duties arising upon the fiduciary relation which was established by the trust.

The action, therefore, in my opinion must be allowed to go on, and I think the final and conclusive answer to the difficulty raised by the Lord Ordinary is the one your Lordship has given. One trustee may have committed an imprudence, or may have been guilty of fault, for which the other cannot be liable. One trustee may be liable to replace funds, because they may be in his hands, or because he has misapplied them, and another trustee may be altogether free from any such liability. I agree also, and I think it is important to notice, that a decision that the action may go on against one trustee without calling upon the other by no means trenches upon the question whether the trustee who has been called and who may be ultimately found liable to make good the loss to the trust, is entitled to contribution for his relief from the other trustees or not. That is settled by the case of *Croskery*, or at least by the case of *Palmer*, where it was pointed out in the House of Lords that *Croskery's* case, while it allowed an action to be brought against one trustee, did not prejudice any right that may have been in him to obtain relief against his co-trustees. The doctrine is laid down very distinctly by Lord Watson in the House of Lords, and was stated with great distinctness in this Court by Lord Shand in the case of *Croskery*.

LORD PEARSON concurred.

The Court recalled the Lord Ordinary's interlocutor; repelled the pleas "the action as laid is incompetent" and "all parties not called;" and remitted the cause to the Lord Ordinary to order intimation thereof to Mrs Everard in order that she might sist herself with the pursuer in the action if so advised, and to proceed as accords.

Counsel for Pursuer (Reclaimer)—Cooper, K.C.—Hon. W. Watson. Agent—F. J. Martin, W.S.

Counsel for Defender Bennett (Respondent)—M'Lennan, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defender Young (Respondent)—Crabb Watt, K.C.—Chree. Agent—Alexander Ross, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

MAIR AND OTHERS *v.* ABERDEEN HARBOUR COMMISSIONERS.

Harbour—Ship—Injury to Ship in Harbour—Responsibility of Harbour Authorities—Ship Torn from Moorings by Descent of Ice—Reparation—Culpa.

The "Trustful," a fishing vessel, was laid up for the winter in the harbour of Aberdeen, moored along with other fishing vessels to a wharf at the mouth of the Dee. While she was so moored a large accumulation of ice came down the river tearing her from her moorings and causing damage.

Her owners brought an action against the harbour authorities alleging negligence on their part in respect that they had failed (*a*) to provide her with a safe berth; (*b*) to warn her owners of the risk from ice; and (*c*) to remove her to a place of safety when the ice came down.

Held that as the harbour authorities had taken all reasonable means to provide a safe berth for the "Trustful," and as no fault or negligence on their part had been established, they were not liable in damages, and must be *assoilzied*.

Observations, per Lord M'Laren, on the duties of harbour authorities.