this topic, the opinion which I have on the question of property being sufficient for the decision of the case. My opinion is that the Caledonian Company having a recorded title of property to the ground in question, or a right to receive it from the persons from whom they purchased, are the proprietors, and that their statutory obligation does not require them to transfer the property to the two companies. I have already stated, or sufficiently indicated, that in my opinion that obligation was performed by using their ground to support that part of the station which they erected over it. This support they will never be permitted to withdraw, or to interfere with in any way prejudicially; and the statute did not require them to provide the two companies as owners of the joint line with ground in common on which they might erect shops as a speculative adventure.

It is, perhaps, proper to say that I think the question is not affected by the circumstance that the company on whom the statutory obligation was imposed was one of the two companies in whose favour it was imposed. It would in my opinion have been the same had the obligation been put upon a third company, or even on an individual, as the condition or price of some benefit accorded.

I have said enough to signify that in my opinion the statutory vesting of the station in the two companies does not imply a title of property in the ground over which the station is elevated, and by which it is supported. To a large extent lines of railway, and sometimes, as here, railway stations, are constructed on viaducts and bridges, and in all or most of these cases the vesting of the lines and stations in the companies implies no property in the ground over which they are carried and by which they are supported. The thing vested is the line or station, and not the ground supporting it, beyond the right to support which is all that is needed.

With respect to the reservation in the Lord Ordinary's interlocutor, my only objection to it is that there is no suggestion on the record of the probability or even the possibility of station accommodation being required on the ground level—not the station level but the ground level,—that is, on the level of Commerce Street. The obligation put by the statute on the defenders is to extend, improve, and remodel a high-level station, the level being already fixed. It seems to me analogous to an obligation to widen an existing bridge or viaduct, which would not suggest to my mind the notion of providing in any event whatever storage or other accommodation underneath. Accordingly the pursuers say nothing on record of any use for railway purposes now or hereafter, but put their claim distinctly and exclusively on an alleged right to share in the shop-building adventure. I should therefore rather prefer to omit the reservation. In other respects I concur in the Lord Ordinary's views and judgment.

Lord Justice-Clerk—As regards the reservation, I think it should not be inserted.

Lord Rutherfurd Clark—I rather thought that the proposal to reserve came from the Caledonian Company.

Lord Craighill concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Mackintosh—Robertson. Agent—John Clerk Brodie & Sons, W.S.

Counsel for Defenders (Respondents)—Johnstone—Pearson. Agents—Hope, Mann, & Kirk, W.S.

Saturday, March 18.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GORDON'S TRUSTEES *v.* GORDON OR SCOTT AND OTHERS.

Trust—Trustee—Personal Liability for Omissions—Culpa lata.

Testamentary trustees having appointed one of their own number as factor, and carefully superintended his proceedings for a number of years until the major part of the purposes of the trust were fulfilled, instructed him to bring an action of multiplepoinding for their exoneration and discharge. This process remained in Court for a number of years, during which time the factor rendered his accounts, not to the trustees, who ceased to take any active part in the management of the trust, but to the agents for the beneficiaries. During this period the factor began and continued a practice of keeping in his hands, uninvested, and mixed up with his own funds, a large balance of trust-funds. This sum he regularly stated in the accounts, and the beneficiaries received interest on it at 4 per cent. After some years he became bankrupt. *Held* that the trustees had been guilty of *culpa lata* by their omission to superintend the actings of the factor, and that they were therefore liable to make good to the beneficiaries the sum which had been lost by his insolvency.

Francis Gordon of Kincardine died in 1857. He left a trust-disposition and settlement whereby he appointed certain gentlemen to be his trustees, among the number being Mr Alexander Simpson, advocate in Aberdeen, and afterwards Procurator-Fiscal of Aberdeenshire. Mr Simpson acted as factor for the trust, and his firm of Simpson & Cadenhead as law-agents for the trust. Mr Gordon left a widow and a son and daughter. The latter succeeded to the entailed estate of Craig, which did not fall under the trust-deed. She afterwards married, and became Mrs Johnstone Gordon. The trust was chiefly intended for the maintenance of the son Mr James Gordon, who received under it the liferent of the estate of Kincardine. The widow had by her marriage-contract an annuity of £400. The duties of the trustees were to manage the investments of the personal estate and the estate of Kincardine. The trust-deed contained a clause declaring that the trustees "shall not be liable for omissions, errors, or neglect of management, nor *singuli in solidum*, nor for the solvency of those to whom they may lend the moneys under their management, further than that the person or persons to whom they may so lend are habit

and repute responsible at the time of lending, nor for the fall in the value of Government or other securities, but that each shall be liable for his own actual intromissions only; and that they shall not further be liable for any factor or factors whom they may appoint, than that such factor or factors are habit and repute responsible at the time of appointment." There was some difficulty as to the vesting of the residue of the estate previous to the death of the liferenter Mr James Gordon. He died in 1871 unmarried and without issue. Up to the year 1870 the trustees had received regular accounts from Mr Simpson, their factor, and these accounts were regular and formal, and no balance of trust-funds remained in his hands uninvested. Mr Simpson's accounts were until 1871 regularly sent by the trustees to an auditor to be reported on. In the end of 1871, certain questions having arisen between the beneficiaries under the trust, the trustees—Mr Milne, advocate in Aberdeen, the Rev. Mr Matheson, Mr Gordon of Parkhill, and Mr Skene of Pitlurg and Dyce—instructed their factor Mr Simpson to raise an action of multiplepoinding and exoneration for their discharge. The chief question in this process was the question whether the marriage-contract annuity of the widow was a burden on the truster's heritable estate or on his moveable estate; and that question having been decided by the Court, the multiplepoinding remained in Court until the present dispute, consequent on the insolvency of Mr Simpson, arose. In this multiplepoinding Messrs Mackenzie & Kermack, W.S., represented the beneficiaries, and after the process was brought into Court and the condescendence of the fund *in medio* had been prepared, there were no further meetings of trustees, and Mr Simpson corresponded directly with them. The accounts produced in process showed a balance in Mr Simpson's hands of £436, 8s. at 1st April 1872, and a balance of £763, 7s. 6d. as at 1st June 1873. On this balance Messrs Mackenzie & Kermack, writing on behalf of the beneficiaries to Messrs Richardson & Johnston, W.S., the Edinburgh agents of the trustees, on 27th June 1873, remarked as follows:—"Part of this sum should be invested, and the interest of the sums deposited should be uplifted each half-year." A balance, however, of varying amount remained in Mr Simpson's hands down to the summer of 1880, when Mr Simpson became insolvent, and was obliged by the embarrassed state of his affairs to resign the public offices which he held and to leave the country. On his returning he was tried before the High Court of Justiciary on a charge of breach of trust, and received upon conviction a sentence of six months' imprisonment. At that time the balance in his hands amounted to £525. Interest had been paid by him at 4 per cent. on the balance thus left in his hands, and the amount of this interest was regularly entered in the half-yearly statement of accounts made by Mr Simpson to Mackenzie & Kermack in rendering to that firm an account of the sum requiring to be paid by their clients to make up the amount of the widow's annuity. The beneficiaries thus received interest at 4 per cent. on the money thus lying in Mr Simpson's hands. The trustees were not aware of this balance in their factor's hands, which had not existed during the period preceding the multiplepoinding when they had been in the active management of the trust After the death of Mr James Gordon and the raising of the multiplepoinding they confined themselves to signing such documents relating to the investing of the residue of the estate as required to be signed, and relying on the fact that they knew Mr Simpson to be in correspondence with the agents of the beneficiaries, did not require him to exhibit to them accounts of any kind.

In consequence of the loss to the estate through Mr Simpson's defalcation of the sum of £525 as above mentioned, the beneficiaries objected to the trustees being found entitled to exoneration, on the ground that by their negligence in supervising the affairs of the trust the factor had been allowed to keep a large sum uninvested and mixed up with his own funds, and that this sum had thus through the *culpa lata* of the trustees been lost to the beneficiaries. They likewise averred that for a considerable period, and at least from the year 1870, Simpson had been well known in Aberdeen to be in an impecunious condition, and not habit and repute responsible for the sums which had been allowed to remain in his hands.

The Lord Ordinary (Rutherfurd Clark), after a proof, found "that the trustees of the late Francis Gordon are personally bound to make good to the trust the sum which has been lost by the bankruptcy of Alexander Simpson, factor to the trust."

He added this opinion—"Alexander Simpson, the factor to the trust, retained in his own hands a considerable sum of money belonging to the trust which has been lost by his bankruptcy. He became bankrupt in July 1880. The loss is admitted by the trustees, and the question is whether they are personally responsible for it. I am of opinion that they are.

"The truster died in 1857, and from that date till 27th March 1871, when his son James Gordon also died, the trustees seem to have shown great care in the administration of the trust. The several beneficiary interests created by the trust vested on the death of James Gordon. From that time forward the trustees took no further charge of the trust. This is their own statement. They considered themselves freed from all duty—1st, because they relied on the beneficiaries looking after their own interests; and 2d, because they had raised an action of multiplepoinding and exoneration on 18th January 1872.

"I am of opinion that the trustees took a very wrong view of their duty. So long as they were trustees they were under all the obligations and responsibilities which attached to their office. Even if it were possible that they could relieve themselves of their duties by requiring the beneficiaries to attend to their own interests, they were bound to make very distinct intimation that they had assumed that position. No such intimation was made, nor, so far as I can see, was it ever intended that such an intimation should be made. The trustees continued to hold their office, and were to all appearance in the ordinary administration of the trust.

"Nor is the fact that an action of multiplepoinding was raised any justification of the conduct of the trustees. The fund *in medio* remained in their hands, and they were responsible for the due care of it until it should be paid over.

"The last account which the trustees ever examined was the account which closed on 31st July 1870. At that time the balance in the factor's hands was very small. As I have already said, James Gordon died on 27th March 1871, and on the next account, which closed on 1st April 1871, the balance in the factor's hands was £438 or thereabouts. This account the trustees never saw, nor did they ever desire to see it, or subsequent accounts. It does not appear that any subsequent accounts were made up. The amount which remained in the factor's hands fluctuated from time to time, and stood at his bankruptcy at £525 or thereabouts. The money was never lodged in any separate account, but was all along mixed up with the factor's own funds.

"I recognise fully the doctrine that in order to the personal responsibility of trustees they must be guilty of *culpa lata*. But I cannot conceive a greater neglect, and therefore greater *culpa*, than when trustees systematically abstain from the discharge of the duties of their office. *Culpa lata* consists in the failure to observe a certain amount of diligence. It must therefore exist when no diligence is shown at all.

"No doubt the trustees say that at an early stage of the multiplepoinding the beneficiaries were aware that the sum of £438 was in the factor's hands; and this is true. But the beneficiaries did not know that it was not lodged in a separate account. Further, they urged that so large a sum should not remain uninvested, and it was arranged, through the agents of the trustees, that it should bear 4 per cent. Of course the trustees were ignorant of all this, because the correspondence was conducted between the agents of the beneficiaries and the Edinburgh agents of the trustees, who were in communication with the factor alone. The factor for obvious reasons was desirous of concealing from the trustees the true state of matters, and he easily gained his object, because the trustees had withdrawn from all exercise of their duties and left him to do as he pleased. Hence it was just this neglect that caused the loss.

"Another ground of liability is brought forward. But it affects two only of the three trustees. In 1872, or in 1873 at the latest, Mr Simpson, the factor was in very embarrassed circumstances, and he continued to be in this condition till his bankruptcy. This was known to Mr Milne and Mr Matheson though not to Mr Skene. It seems to me that it was the duty of Mr Milne and Mr Matheson to remove Mr Simpson from his office, or at least to take the utmost care that no part of the trust funds should be lost through the intromissions of a factor on whose pecuniary responsibility they could no longer rely. But they did nothing. They excuse themselves on the ground that he held an important office (procurator-fiscal) in Aberdeenshire, that nothing was urged against his moral character, and that he continued to be largely trusted both with public and private money. How far the confidence which he continued to enjoy was due to ignorance I do not inquire; it can in my opinion form no excuse to trustees who were aware of his condition, and who abstained from the slightest supervision of him.

"On this separate ground I think that liability would attach to Mr Milne and Mr Matheson. But I am of opinion that all the trustees are responsible for the loss on the more general ground to which I have already adverted."

The trustees reclaimed, and argued—It was admitted that till the death of the liferenter in 1871 the estate was managed with the greatest care, and that no uninvested balance was left in the factor's hands. That event brought the business of the trust practically to an end though the trust continued to exist. The beneficiaries themselves then took up the case of their own interests; they had the accounts of the trust before them in a multiplepoinding; their agents saw (as the trustees did not) that the factor had a large sum in his hands, but no complaint was made by them—on the contrary, they took interest on these sums for a period of years. The trustees were entitled now to say—"If you saw all this going on, and tacitly approved of it, we were not called upon to interfere." The beneficiaries should have called attention to the irregularity themselves. Mere knowledge that a factor had such sums in his hands, assuming it to have existed, did not necessarily fix trustees, acting under such a clause as the trustees had in this trust-deed, with responsibility. As to Simpson's position, the evidence only showed that some persons who were likely to be professionally acquainted with such a matter knew him to be impecunious, but it negatived the averment that he was well known in Aberdeen to be so. On the contrary, he had enjoyed good credit almost to the last.

Authorities—*Home* v. *Pringle*, Nov. 30, 1837, 16 S. 142, *aff.* June 22, 1841, 2 Rob. Ap. 384; *Cowan* v. *Crawford*, 8 Jurist 342; *Ainslie* v. *Cheape*, Feb. 6, 1835, 13 S. 417; *Home* v. *Menzies*, July 10, 1845, 7 D. 1010.

The defender Mr Skene adopted the argument of the other trustees, and urged in addition that he had no personal knowledge of Simpson's embarrassed circumstances.

Argued for the objectors (beneficiaries)—The circumstances of the case of *Home* v. *Pringle* were totally different from those of this case. The trustees were not entitled to put the responsibility of drawing the inference that something was amiss upon the beneficiaries. The beneficiaries were entitled to suppose that the trustees were supervising their factor. The trustees might trust their factor, as had been done, but it must be at their own risk. There was no stronger case of *culpa lata* than simple neglect to do anything at all.

Authorities—*Seton* v. *Dawson*, Dec. 18, 1841, 4 D. 310; *Sym* v. *Charles*, May 13, 1830, 8 S. 741; *Blaine* v. *Paterson*, Jan. 28, 1836, 14 S. 361; *Edmond* v. *Blaikie and Anderson*, June 29, 1866, 4 Macph. 1011.

The Court made avizandum.

At advising—

Lord Justice-Clerk (who delivered the opinion of the Court)—I do not think it necessary to deliver at length the grounds upon which I have come to agree with the Lord Ordinary, because these grounds have been very fully stated by Lord Rutherfurd Clark, who was the Lord Ordinary in the cause. After giving full consideration to the argument that we heard, and to the circumstances out of which the case arises, I

have come to the same result as his Lordship, and, I must own, with very great regret. I would very gladly have adopted a sufficient and reasonable ground for arriving at a different result.

But I have sought in vain to avoid the plain and clear result of the case. The circumstances of the case seem to leave no alternative. These trustees, beyond all doubt, permitted one of their number, without authority and without security—without any formal or legal step to secure themselves or the beneficiaries—to retain a considerable part of the trust-funds under their administration. There can be no doubt they allowed that state of matters to go on for several years without requiring their co-trustee to render any account. That co-trustee in the end became insolvent and bankrupt, and the funds which he was allowed by these trustees to retain were, as a consequence of their conduct, lost to the beneficiaries and the trust-estate.

There are two grounds on which the trustees say they should not be held responsible. The first is, that during the time in which it is said they neglected their due administration and watchfulness over this defaulting trustee the whole trust administration had been thrown into Court in a process of multiplepoinding, and that from that time forward, the funds being the subject of competition here, it was the duty of those who had an interest in the administration and distribution to see that the funds were properly invested.

The second ground is, that the main beneficiaries under the trust entered into a correspondence with the defaulting trustee, and that those beneficiaries undertook the supervision of the funds, and consequently the investing of them, and that it was their own fault if the trustee was not called upon to account.

I have considered both these grounds, and I am very clearly of opinion that neither the one nor the other constitutes any ground for exonerating the trustees for failing in their duty. That the funds are the subject of a multiplepoinding will not exonerate the trustees from discharging the duty of having their accounts furnished to them, and examined and audited periodically. That is one of the first duties of trustees, and I think it would be a dangerous thing to say that because it was necessary to take the judgment of the Court with regard to competing claims the beneficiaries under the trust are to lose entirely the protection which the appointment of the trustees was intended to secure.

The second ground is still less tenable so far as changing the responsibility to the beneficiaries is concerned. Those who were acting for them in those proceedings only did what they were entitled to do for behoof of their clients, but they did not undertake further responsibility than they would have had if they had not communicated with the trustees. They were anxious to have the estate wound up, which they were quite entitled to, and in the correspondence, so far as I can see, nothing passed which in any degree relieved the trustees of the oversight of the funds under their charge.

These are the grounds, shortly stated, on which my opinion in this case proceeds. I think your Lordships generally agree in that opinion, and I propose that we adhere to the interlocutor of the Lord Ordinary.

That will be the opinion of the Court.

The Court adhered.

Counsel for Pursuers and Reclaimers (Gordon's Trustees)—D.-F. Macdonald, Q.C.—M'Kechnie. Agents—Richardson & Johnston, W.S.

Counsel for Mr Skene—Douglas. Agents—Richardson & Johnston, W.S.

Counsel for Objectors (Beneficiaries) — Mackintosh—H. Johnston. Agents—Mackenzie & Kermack, W.S.

Tuesday, March 14.

OUTER HOUSE.

[Lord Fraser.

SMITH *v.* SMITH'S TRUSTEES.

Aliment—Parent and Child—Representatives of Grandfather, whether Liable to Aliment Grandchild.

Held (*per* Lord Fraser, Ordinary) that representatives holding and vested in the whole estate of a grandfather on whom no claim for aliment has been made during his life, are not liable to aliment his grandchild, who would, if the grandfather had been in life, have been entitled to aliment from him.

A lady, who was an orphan in destitute circumstances, and whose health had given way, brought an action for aliment against the trustees holding and vested in the whole estate of her grandfather, who had recently died leaving a large heritable and moveable estate which was still undivided. Her destitution had arisen during her grandfather's life, and had been known to him, but no aliment was claimed by her till after his death. *Held* that she was not entitled to aliment from the estate.

Observed that such a claim would have been good against the representatives of a father.

This was an action at the instance of Mary Constable Smith, residing in Aberdeen, against John Rae Smith and others, her uncles, as trustees holding and vested in the whole estate of her grandfather, the deceased Lewis Smith, wholesale bookseller and stationer in Aberdeen, under his trust-disposition and codicils thereto annexed. The pursuer was a daughter of James Smith, likewise a wholesale bookseller and stationer in Aberdeen, eldest son of Lewis Smith, who had a large family. James Smith was for ten years previous to the month of September 1862 in partnership with his father. In that month, in consequence of disagreements between them, the partnership was dissolved, and James Smith received £903 as the value of his share of the capital stock of the firm. Thereafter he began business on his own account, but was sequestrated in May 1863. His estates yielded a dividend of 9s. 2d. per pound, and his father, who was a creditor on his estate for certain trade debts, ranked on his estate and drew his dividend. About two months after his sequestration he died, leaving a widow and six children, of whom the pursuer, then under thirteen years of age, was the eldest. Thereafter the family were supported in part by the kindness of various friends,