Tuesday, December 9.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

KENNEDY AND OTHERS *v.* KENNEDY AND OTHERS.

(*Ante*, December 19, 1883, vol. xxi. p. 274.)

Trust—Trustee — Liability of Trustee — Culpa lata.

A gratuitous trustee is only liable, in the administration of trust affairs committed to him, for *culpa lata*, that is, failure to give to them the care and attention which an ordinary prudent man gives to the conduct of his own affairs.

A person resident in London consented, at the request of his brother, who resided in Glasgow, to become a trustee for the administration of a fund secured by marriage-contract to his brother and the children of his marriage. His co-trustees were resident in Glasgow, and one of them was a practising law-agent in Glasgow, and conducted there the affairs of the marriage-contract trust. Being asked to give his consent to an investment recommended by the law-agent as a sound and profitable one, the trustee in London consented, provisionally on the assent of his co-trustees, and of his brother, who was a valuator, being obtained. The brother inspected the property, and wrote to say he had done so, and the law-agent without getting the consent of the other trustee made the investment. The security proved worthless, and it appeared that, to suit a purpose of his own, the law-agent had invested the money on a fourth bond with no proper margin, and not on a second bond with a good margin as he represented. *Held* that the trustee in London was not liable for the loss thus caused to the estate.

George Penrose Kennedy, an architect in Glasgow, married Sophia Henderson Steele in 1858. By an antenuptial contract of marriage Miss Steele conveyed and made over to herself and husband in conjunct liferent during the subsistence of the marriage, and in liferent to the survivor, all the property which should be acquired by her during the marriage, and further, the spouses conveyed to the children of the marriage the fee of the said property. This contract of marriage contained a declaration that execution might pass thereon at the instance of certain trustees, including Robert Douie, John Eugene Kennedy, and George Fyffe Christie. The property was not conveyed to these trustees. On the death of her father Mrs Kennedy became entitled to certain property. She invested £1500 in a bond and disposition in security granted in her favour over subjects in Rutherglen by William Dalgleish & Sons, and interest on this sum was regularly paid to her during her lifetime upon her receipt. She died in 1869 leaving four children, all of whom were in pupillarity, and her husband continued to receive interest on the £1500 on his own receipt. Mr G. P. Kennedy was desirous that the sum contained in the bond should be administered by trustees for behoof of his children, and it was thought proper that the gentlemen named in the contract of marriage should assume the administration of Mrs Kennedy's property portion with the view of protecting it against the consequences of any business misfortune which might befall Mr G. P. Kennedy. Mr John E. Kennedy, his brother, and who resided and carried on business as a land-agent in London, was asked, but was unwilling to accept the trust, on the ground that his non-residence in Glasgow was a practical disqualification for the performance of his duties, but at his brother's request he was induced to accept, on the understanding that he only undertook to give such assistance as could be given through correspondence. The other trustees were Mr Robert Douie, who was a relative of Mrs Kennedy, his two sons (who never acted), and Mr Christie. The legal business of the trust was left to the care of Mr Robert Douie, who was a practising writer in Glasgow, and who undertook the business gratuitously. A writ of acknowledgment was executed by the borrowers of the £1500, by which they acknowledged these gentlemen as trustees for behoof of the children, the trustees also subscribing a minute of acceptance of the trust. The loan having been repaid the trustees endeavoured to obtain an investment for the £1500, and did so on the 19th May 1875 on a bond and disposition in security over certain subjects, granted by Peter Jardine Hamilton. The latter on 15th February 1877 repaid to the trustees a sum of £600, and on 15th August following, in consideration of the sum of £900, then paid to them by Simpson, Kirk, & Donaldson, writers in Glasgow, the trustees executed an assignation whereby they disponed to the partners of that firm the bond by Hamilton, but only to the extent of £900. A correspondence now ensued with reference to the investment of the funds. Mr George Kennedy and Mr Christie wished to know how the £600 had been invested by Mr Douie as the agent, and having some difficulty about asking Douie themselves, they got Mr John E. Kennedy to write on the subject to him. He on receipt of the letter seemed to have thought that Mr John E. Kennedy was showing an excess of zeal, but at the same time answered the letter fully. This letter was misdirected, and did not reach its destination till some time after. Then followed a somewhat angry correspondence between Mr Douie and Mr John E. Kennedy, but eventually matters were amicably arranged, and these gentlemen agreed to continue acting together as trustees. Mr Douie had previously, by letter dated on 9th February 1877, informed Mr John E. Kennedy that £600 of the trust-money was arranged to be lent on a second bond over property having such a margin of value which he considered a good security, and in the last letter (1st March 1877) of this correspondence which took place at this period Mr John E. Kennedy wrote to Mr Douie as follows — "I understand from your letter of yesterday that you are willing to remain a trustee with myself and Mr Christie on behalf of my brother George and his children by his former wife. I should wish to make one or two observations about this trusteeship. In the first place, I think we should only take the best security—that is to say, what you allude to as a first bond. If we cannot get 5 per cent., then we must take

4½ or even 4 per cent., which is a very fair rate of interest for trust-money. Next, if the money is lent on house property, my brother George should be asked to look at it and approve of the money being lent on it. And again I must protest against your taking offence at my asking questions relative to this trusteeship, or thinking that I mean a personal affront to you. It adds to your trouble, it is true; at the same time, it divides your responsibility. And lastly, you call me a stranger. Surely I am nearer related to my brother George and his children than you are, and having children of your own he could never look to you if he incurred further losses, as he would naturally do to his own relations. It is true that I have done nothing for him, but I have known that he has always had enough to supply his necessities, and his father ready to his hand. Having said this much, I may add that I am willing to continue a trustee." This letter was not answered.

About the same time when this correspondence was going on—the spring of 1877—Mr G. P. Kennedy had expressed a wish himself to become a trustee. Mr John E. Kennedy, however, was averse to the proposal and it was not carried out.

On 13th August 1877 Mr Douie wrote to Mr J. E. Kennedy a letter, in which he said—"I have the pleasure of sending to you herewith enclosed assignation, subscribed by Mr Christie and myself, of the balance of bond for £1500, being £900, to be granted by us in favour of Messrs Simpson, Kirk, & Donaldson, of this city. This assignation will be delivered by us in exchange for the money, and is in lieu of a discharge. . . . For the £1500 I have been offered a satisfactory investment to yield 5 per cent. on a good and high class property in Roselea Drive, Dennistoun, Glasgow, which I have explained to your brother George, but will take him to see the property, and be guided by him before laying matters finally before you. The rental of the property, after providing interest and feu-duty (on a first bond), will give a gross remainder of £350 yearly." On 15th August 1877 Mr J. E. Kennedy replied—"Your letter of the 13th inst. has been forwarded to me here, with the assignation in favour of Simpson, Kirk, & Donaldson, p. £900, which I have now signed before two witnesses, and return herewith. If my brother George approves of the investment you propose, and Mr Christie, I will sign also."

On 23d August Mr Douie wrote—"I duly received your favour, returning assignation subscribed by you. With regard to relending of the £1500, I shall be guided by your brother and Mr Christie's advice. Personally, I think the security a high class one. Your brother inspected the property along with me, and we were both much pleased with it as an eligible security."

On 30th August Mr J. E. Kennedy wrote to his brother G. P. Kennedy—"I had a letter from Mr Douie a little time ago about the payment of £600, the balance of amount due upon mortgage bond, and about re-investing the £1500 now in hand upon other property. I have agreed to do so, provided you and Mr Christie approve, and Mr Douie tells me that you have already seen and approve of the security." To this Mr Kennedy replied on 2d October—"I have seen the property at Roselea, Dennistoun, just out of Glasgow, a suburb, where the bond for the £1500 is placed."

Thereupon, on 27th September 1877, the £1500 was lent to Thomas Mitchell Henderson who granted a bond and disposition in security over the subjects at Roselea Drive. On the 15th November 1879 Henderson became bankrupt, and interest ceased to be paid. Before making the loan Mr Douie had never consulted Mr Christie at all, as Mr John E. Kennedy had stipulated for. He (John E. Kennedy) had not made further inquiry as to whether Christie approved. He did not know that he had not been consulted till the next year (1878). He came to know in January 1879 that Christie and his brother (G. P. Kennedy) were very anxious to see the bond. They could not get it from Douie till March 1879.

It was then ascertained that Mr Douie's representations were untrue. The security was not a second bond, but a fourth or fifth bond. There was no surplus rental of £350, the property was unlet, and the estimated rental was not a just or reasonable estimate. There was therefore no margin of rental on which the trustees could rely for payment of interest. The property was not of the class which Mr Douie's description indicated, and Mr Douie concealed the fact that the owner of the subjects was a client of his own with whom he had arranged to take up the property as a speculation.

Douie became bankrupt in 1879. He died in 1883. Christie died in 1881. His estates were thereafter sequestrated.

This action was raised by the children of the marriage of Mr and Mrs G. P. Kennedy, with their father's consent and concurrence, and by him for his own interest, against John E. Kennedy, the trustees of Mr Douie, and the trustee on the estate of Mr Christie, for an accounting for the sum of £1500 so lent, and to have the sum replaced, and failing the sum being replaced for £2000 as damages. The pursuers averred that the trustees in lending the money on such security acted recklessly and negligently, and without ordinary care and prudence.

They pleaded—"(1) The said trustees having intromitted with the capital sum of the said estate, the defenders are bound to exhibit and produce an account of their intromissions, and the pursuers are entitled to have decree for the balance of said account as ascertained in the course of the process, with interest and expenses. (2) Failing the production by the defenders of the account called for, the pursuers are entitled to decree in terms of the alternative conclusions of the libel. (3) The said trustees having recklessly, and without exercising ordinary care and prudence, invested the funds entrusted to them upon insufficient security, they or their representatives are liable for any loss arising thereby."

The action was ultimately defended only by John E. Kennedy, who, besides a plea of no jurisdiction, which the Lord Ordinary repelled, as previously reported (21 Scot. Law Rep. p. 274), pleaded—"(6) The pursuer G. P. Kennedy is barred by his own actings and by acquiescence from calling in question the investment complained of, and from insisting in the present action. (7) The defender is entitled to absolvitor, in respect (1st) that the investment complained of was not made by him or by his authority, (2d) that he is only liable for his own acts and not for those of his co-trustees, and (3d) that he has not been guilty of negligence. (8) The invest-

ment complained of having been made under the advice of, and upon the representations of, the duly qualified law-agent of the trustees, on whom the defender was entitled to rely, and with the pursuers' consent, the defender has incurred no personal liability in respect thereof."

A proof was led, the import of which very fully appears in the Lord Ordinary's note and in the opinions of the Lord Justice-Clerk and Lord Young.

The Lord Ordinary (M'Laren) pronounced this interlocutor—"Finds that the loss arising from the funds of the trust being invested in the security libelled was not caused by the negligence or breach of trust of the defender John E. Kennedy: Therefore assoilzies him from the conclusions of the action, &c.

"*Opinion.*—In this action the pursuers, who are beneficiaries under a marriage-contract trust, seek to make the defenders responsible for the loss of £1500 of trust money alleged to have been lost through an improper investment.

"The pursuer Mr Kennedy is one of the parties to the contract of marriage, and is interested as a liferenter in the fund referred to, which came from his wife's father. The other pursuers are the children of Mr and Mrs Kennedy, and they would be entitled to the fee of the fund in question were it now extant.

"Owing to deaths and bankruptcy, the defender Mr J. E. Kennedy (a brother of the principal pursuer) is the only trustee who is able to defend; and in relation to this case the question I have to consider is whether the fund was lost through his negligence or breach of trust—a different question from the general one raised by the summons, whether the fund was lost through the negligence of any of the trustees.

"On a careful consideration of the evidence (including a large mass of correspondence), I have come to the conclusion that the fund was lost in consequence of the negligent and wrongful investment of the money on worthless security by Mr Robert Douie, one of the trustees, and that the pursuer was participant in the investment of the trust money on insufficient security in the design of obtaining a larger income than could be got from first-class security, although he was not aware that this particular security was so bad as it proved to be.

"I further find that the defender Mr J. E. Kennedy did not contribute to the loss of this money in any way; that he is not chargeable with negligent administration or wrongful administration; and, on the contrary, that his intervention in the affairs of the trust (which was entirely by correspondence) is marked by uniform care, intelligence, integrity, and business-like attention to his duty as a trustee.

"It will be necessary that I should in a few sentences go back to the constitution of this trust. Under the contract of marriage the trustees appointed were only trustees for execution. But after the death of Mrs Kennedy's father, followed by the death of Mrs Kennedy herself, it was thought proper that the gentlemen named in the contract should assume the administration of Mrs Kennedy's portion with the view of protecting it against the consequences of any misfortune which might befall Mr Kennedy. Mr. J. E. Kennedy, who was then, and continues to be a land agent in London, expressed unwillingness to accept the trust, on the ground that his non-residence was a practical disqualification for the performance of its duties, but at his brother's request, conveyed to him and urged with some anxiety by Mr Christie (one of the trustees), he was induced to accept. The trustees were Mr Robert Douie, his two sons, Mr Christie, and the defender.

"The legal business of the trust was left to the care of Mr Robert Douie, who was a practising writer in Glasgow, and by whom this business (as he more than once mentions in correspondence) was undertaken gratuitously. To this proceeding I think no exception can justly be taken. There is no rule that a trustee professionally qualified shall not undertake the legal business of the trust. The rule is that he shall not be remunerated for his services, because whatever duty a trustee undertakes he is held to undertake it gratuitously. Mr Douie was related to the deceased Mrs Kennedy; it is not disputed that he was in good credit and repute as an agent and conveyancer; and seeing that he was willing to perform the law business of this small trust gratuitously, I consider that his co-trustees were fully justified in leaving it in his hands. This, of course, would not release the other trustees either from the obligation of consulting with Mr Douie as to the investment of the trust funds, or from the responsibility which attaches to a trustee for the consequences of an improper investment to which he gives his consent.

"There is another general consideration to which I may here advert. Mr J. E. Kennedy was a non-resident trustee, and only undertook to give such assistance in the performance of the trust as could be given through correspondence. If exception is taken to such a limitation of the functions of a trustee, it may be answered that it is a limitation which exists in a very large number, probably much the larger number, of all the trusts of the country. There is no rule of law which requires that all the trustees of a given trust shall reside in the same town or place, and it would be extremely inconvenient if such a rule were established by implication, because the truster's most trusted friends may be resident in different parts of the kingdom, and the law ought not to create technical obstacles to his obtaining their services. I am not now speaking of the case of a trustee who is resident in a colony or foreign country.

"Then, it being a necessity that there should be non-resident trustees, I am not to be understood as saying or implying that it is not the duty of such trustees on proper occasions, and even at some inconvenience to themselves, to attend a meeting or meetings of trustees at the place where the securities and papers of the trust are kept. But it will depend on the nature of the business to be transacted whether the trustee is to undertake a long journey for the purpose of assisting at its transaction. If the matter in hand is only the investing of a fund of £1500 on heritable security, that fund being a source of income to a family in straitened circumstances, I think it would be a great abuse that a trustee in London should go down to Glasgow at the expense of the trust to confer with his co-trustees as to the suitability of the investment. There is no doubt a certain disadvantage in non-residence—the trustee may be more easily imposed upon; but in such matters a trustee is only to exercise reason-

able supervision, and the beneficiary must submit to unavoidable disadvantages. Business could not go on if a trustee were at every step to act as if his colleagues or his agent were going to involve him in the consequences of a breach of trust.

"Before coming to the critical part of this case, I must further notice that the pursuers, Mr Kennedy and Mr Christie, through what I may term an indiscretion, put the defender in a position which latterly made it somewhat more difficult for him to perform his duty as a trustee.

"They wanted to know how the £1500 had in the first instance been invested, but instead of applying in a direct and straightforward way to Mr Douie they wrote to the defender to get him to make the inquiry for them. The defender complied, and Mr Douie on receiving this letter of inquiry seems to have thought that the defender was showing an excess of zeal, and that the inquiry might very well have been left to the resident trustees. However, he answers the letter fully. Unfortunately, Mr Douie's letter of explanation was misdirected, and did not reach the defender until long after, and meanwhile the defender found himself involved in a personal difference with Mr Douie, from which he extricated himself with good temper and tact, but with the result that his relations with Mr Douie were strained, and that he could not after this occurrence write to Mr Douie with the same freedom as he might otherwise have written. Yet in the last letter of this unpleasant correspondence the defender takes the opportunity of communicating to Mr Douie his views on the subject of the trust administration, and insists (1) that in future transactions only the best security should be taken, and that if 5 per cent. cannot be obtained the trustees should be content with 4½ or even with 4 per cent.; (2) that in such cases, his brother, the pursuer, should be asked to look at the house or subject of security with the view of giving his opinion or approval of the loan; and (3) that Mr Douie should not take offence at any inquiries which he (the writer) in his capacity of trustee might find it his duty to make with the view of taking his share of responsibility in the administration. [Letter, J. E. Kennedy to R. Douie, 1st March 1877.] Mr Douie had previously informed the defender that £600 of the trust money was lent under a second bond, which, however, in the circumstances, he considered to be a good security, and the defender in this letter intimated his wish that in future only first-class security should be taken by the trustees. No answer was given to this letter, and the defender's observations did not call for an immediate answer if they were concurred in; because they were only the expression of views of trust administration, which are generally admitted and acted on. As Mr Douie expressed no dissent, I think that the defender was entitled to expect that Mr Douie would comply with his instructions and wishes, or at least that he would not act directly contrary to them in every particular, without apprising him of the divergence of opinion and action which such conduct would indicate.

"Now, the next communication which the defender received from Mr Douie is a letter dated 13th August 1877, and as this letter is, in my judgment, the important and determining part in the case, I shall quote the passage I refer to. It is this—'For the £1500 I have been offered a satisfactory investment to yield 5 per cent. on a good and high class property in Roselea Drive, Dennistoun, Glasgow, which I have explained to your brother George, but will take him to see it, and be guided by him before laying matters finally before you. The rental of the property, after providing interest and feu-duty on a first bond, will give a gross remainder of £350 yearly.'

"This letter certainly indicated that there was a previous mortgage on the property, but it also indicated that Mr Douie had inquired into the matter, and that he considered the security satisfactory. If it had been true that there was a surplus rental of £350 (equivalent to a surplus capital value of £7000) the property would, in the opinion of most persons, be considered a good and safe security for a second loan of £1500. Then it is to be observed that Mr Kennedy had already stated his preference as a trustee for a first bond, even with the drawback of diminished interest. But Mr Douie was also a trustee, and the letter from which I have quoted contains expressions which imply that he had been giving consideration to Mr Kennedy's opinion. I am not prepared to say that it was necessarily Mr Kennedy's duty to separate himself from his co-trustees on the point of objecting to a second bond: What he actually writes is this—'If my brother George approves of the investment you propose, and Mr Christie, I will sign also.' It is difficult to see how the defender could have acted otherwise than he did. The information given to him was satisfactory, subject only to this remark, that the security was a second bond. The defender wished the matter to be referred also to his co-trustees and to the beneficiary, not being in a position to make an independent inquiry. He had already the opinion of Mr Douie that this was a good security, and if that was supported by the opinions of the resident trustee and of the principal beneficiary he was willing to give his concurrence to the loan.

"It has now been ascertained that the representations on which Mr Douie obtained the qualified consent of the defender to the loan were untrue. The security was not a second bond, but a fourth or fifth bond. The surplus rental of £350 was purely imaginary; the property was unlet, and the estimated rental was not a just or reasonable estimate, consequently the margin of rental which constituted the security for payment of interest on the loan had no real existence. The property was not of the class which Mr Douie's description indicated, and Mr Douie concealed from the defender the circumstance that the owner of the property was a client of his own, with whom he had arranged to take up the property as a speculation.

"These are the facts, and the question is, Am I to hold the defender responsible for negligence because he gave his consent to the investment on false representations made by his agent and co-trustee? Negligence, like the cognate ground of liability, fraud, is matter of fact. It may be inferred from circumstances, but the inference must be a legitimate one, and I cannot hold a defender to be responsible for negligence unless he has been really negligent in the performance of his duties. In the present case I think the defender did all that a non-resident trustee could do to protect the interest of the trust. The information given to him by the trustee who had undertaken the professional duties incident to

the trusteeship was satisfactory, and I do not think that according to the ordinary course of business in such matters it was the defender's duty either to go to Glasgow and make personal inquiries, or to employ a separate agent to examine into the accuracy of Mr Douie's representations, and virtually to supersede him. Such a course is never taken unless grave suspicion attaches to the agent or legal manager of the trust business. But I see no evidence of any occurrence which would have justified suspicion of Mr Douie. Mr Douie had written an intemperate letter to the defender, but that letter was quite consistent with his being an honest man, and it was so regarded by the defender. I therefore come to the conclusion that the defender in consenting to the loan acted on the best information, that he omitted no precaution which a non-resident trustee ought to take, and that he was deceived by his co-trustee. A trustee does not guarantee the trust investment; he only undertakes that he shall take reasonable care, and be guided by the rules of trust administration. If he signs a receipt for trust-money, he is chargeable with it until it is invested. In the present case the money was invested; there was no embezzlement or misappropriation. It was invested by the trustees as a body, and was so invested under circumstances which in my opinion exonerate the defender from personal responsibility."

The pursuers reclaimed; argued for them—A consideration of the proof disclosed very gross negligence of the trust affairs on the part of the defender. He had been extremely lax in his attention to them. He had good reason for suspecting that Mr Douie was speculating with the money of the trust and was not an honest man, but he involved himself in a personal quarrel with Douie and then washed his hands of the whole business, leaving the trust management entirely in Douie's hands. He was not entitled to trust alone to the statement of a valuator. But whether he was himself negligent or not, he was responsible for the negligent actings of Douie, his agent and co-trustee, and was liable for the loss arising therefrom. A trustee who gives his solicitor power to lose trust money is liable to make up the loss, on the well-settled principle that where of two innocent parties one must suffer by a fraud, he by whose means the fraud is made possible will be made the sufferer. The law of Scotland only contained three cases which were in point, which were—*Forsyth*, January 28, 1853, 15 D. 345; *Murray* v. *Murray*, May 30, 1833, 11 S. 663; *Gordon's Trustees* v. *Gordon*, March 18, 1882, 19 S.L.R. 549. There was, however, ample authority to be found in the law of England. In *Bostock* v. *Floyer*, November 21, 1865, 1 L.R. Ch. Cases, 26, it was held that a trustee was liable for the loss of a trust fund caused by the fraud of his solicitor, although in employing such solicitor he might have exercised ordinary care and discretion. This was also the import of the decisions in *Hopgood* v. *Parkin* (1870), 11 L.R. Eq. 75; *Sutton* v. *Wilders* (1871), 12 L.R. Eq. 377. In *Budge* v. *Gummow* (1872), L.R. 7 Ch. App. 719, trustees were found liable for loss of an investment on a security which was valued by a valuator but ultimately turned out insufficient. Douie was also a co-trustee, and in the following cases co-trustees were found liable for the neglect of a brother trustee—*Hanbury* v. *Kirkland*, November 26, 1829, 3 Sim. 265; *Mendes* v. *Guedalla*, 1862, 2 Johnson and Hemming, 259; *Thompson* v. *Finch*, April 1856, 22 Beavan, 316; *Lewis* v. *Nobbs*, May 9, 1878, L.R. 8 Ch. Div. 591; and *Sutton* v. *Wilders*, *sup. cit.*, proceeded on the view that a solicitor employed by a trustee is his servant for whom he is responsible.

The defender replied—The Lord Ordinary had decided rightly that in consenting to the loan he had acted on the best information, that he had omitted no precaution which a non-resident trustee ought to take, but had been deceived by his co-trustee. It was incorrect to say that there was no Scotch authority applicable to the present case. From the time of Lord Stair the law had been that a gratuitous trustee such as the defender was was only liable for *culpa lata* or supine neglect, or, in other words, for the want of such ordinary care as a reasonable man of business would give to the conduct of his own affairs—Stair, i. 12, 10; *Home* v. *Menzies*, July 10, 1845, 7 D. 1010; *Thompson* v. *Campbell*, February 16, 1838, 16 S. 560; *Ainslie* v. *Henderson's Trustees*, February 6, 1835, 13 S. 417; *Horne* v. *Pringle*, June 22, 1841, 2 Robinson's App. Cases, 384. The case of *Murray* v. *Murray* (*sup. cit.*) was inapplicable, as it was the case of gross negligence on the part of a trustee. The case of *Gordon's Trustees* v. *Gordon* (*sup. cit.*) showed that it required in the law of Scotland *culpa lata* to make a trustee liable. Many of the English cases founded on on other side were not law in Scotland, because they were not cases of *culpa lata*. *Hanbury* v. *Kirkland* (*sup. cit.*) was no doubt law in Scotland, because it was a case of gross neglect. The law was now practically settled by the recent case of *Speight* v. *Gaunt in re Speight*, January 1883, L.R. 22 Ch. Div. 727, *affd.* November 26, 1883, 9 L.R. App. Ca. (H.L.) 1. In this case the rule was settled that a trustee is bound to conduct the business of the trust in the same way in which an ordinary prudent man of business conducts his own, and has no further obligation. In this case *Bostock* v. *Floyer* was explained and *Hopgood* v. *Parkin* questioned. The same doctrine was given effect to in the case *in re Godfrey-Godfrey* v. *Faulkner*, May 25, 1883, L.R. 23 Ch. Div. 483. The test of liability, then, when applied to the defender's actings, entitled him to be assoilzied from the conclusions of the action.

At advising—

Lord Justice-Clerk—In this case, which is undoubtedly one of considerable importance as well as of interest to the parties, I am so completely of the opinion expressed by the Lord Ordinary, and so entirely agree in the views he has taken of the case, that I find it unnecessary to do more than make a few observations upon the more salient features of the dispute.

In the first place, let me advert to its legal aspects. We had from Mr Salvesen an exceedingly able and vigorous argument, but to my surprise he seemed to think the law of England was important on this matter, for the reason that we had no cases in Scotland that substantially dealt with the questions arising here. I am of another opinion. I think the law of Scotland has been fully illustrated both by decisions and by institutional writers on this matter, and that to a

much more satisfactory and more considerable extent than the law of England. The law of Scotland admits of no doubt upon the fact, and it has been the law since the time of Lord Stair at least, probably longer. The law is simply this, that a gratuitous trustee is only liable for *culpa lata*, and *culpa lata* when expressed in the vernacular means that a trustee is liable if he does not show such diligence as a man of ordinary prudence uses in his own affairs. That was our law from the first, and that is now the law of England, as we have learned from the late Master of the Rolls, who gives a most able and lawyer-like exposition of their law in the recent case of *Speight* v. *Gaunt*, Nov. 26, 1883, 22 Ch. Div. 727. Lord Stair says in a single sentence (i. 12, 10)—"The civil law inclineth most that mandatories are obliged for the exactest diligence and for lightest fault. But by the nature of the contract, mandatories, seeing their undertakings are gratuitous, ought to be but liable for such diligence as they use in their own affairs, and the mandant ought to impute it to himself that he made not choice of a more diligent person, which our custom follows, but still there must be *bona fides*."

It was suggested that in our law there were no cases, but if the parties would turn to the fourth volume of Dunlop's Reports, p. 310, in the case of *Seton* v. *Dawson*, December 18, 1841, there will be found references to at least twelve leading cases, which were substantially upon all the points we have had discussed before us here, and include opinions by some of the most learned lawyers that we ever had, and particularly the opinions of Lord Corehouse, Lord Fullerton, and Lord Mackenzie, upon questions coming as near the present case as anyone could desire. I am not going into these cases, but I only think it right to mention that fact, because it was urged upon us that we had no authority of our own, and this case must be ruled by the law of Scotland, and the law of Scotland alone. In the case of *Seton* v. *Dawson* Lord Moncreiff, who was in the minority, and thought the trustees ought to be liberated, goes into a very elaborate and, as I think, very clear argument upon the question what is and what is not actual intromission. In the view I take of this case, I do not think it is material for us to consider that point, but he states the law apart altogether from the protecting words, and on the assumption that they are not in the deed, thus:—"I put the point thus: Suppose there were no protecting clause in the trust-deed. It is in the nature of a gratuitous trust. The trustees would be liable for no more diligence than they are in their own affairs—*diligentia media* in the Roman law." And accordingly in the case of *Gordon's Trustees* in 1882 we assumed that *culpa lata*—that *culpa* alone—which would make the gratuitous trustee responsible was simply a want of the reasonable care which a man of ordinary prudence would use in his own affairs. And we thus have it on the authority of great lawyers that that only is the liability which gratuitous trustees incur, and that the former cases which were founded on by Mr Salvesen, not only are not to be considered as authority, but they are repudiated with the utmost deliberation. Therefore the real question here is—Has the trustee Mr John E. Kennedy done anything of which it can be said that he was guilty of culpable negligence—in other words, anything which a man of reasonable prudence could not and would not naturally have done in his own affairs?

Now, what is it that he is alleged to have done? He is said to have sanctioned an investment of the trust-funds which are the subject of the trust-deed under which he was a trustee, on the recommendation of the law-agent of the trust, himself a trustee, and with the approval of his brother, the present pursuer. The question is, whether in the circumstances that was an act which a prudent man in the management of his own affairs would not have done. I am very clearly of opinion that there is no ground whatever for imputing negligence to Mr John E. Kennedy in that particular transaction, but that he acted in a manner quite consistent with the nature of the duty he had to discharge. I come to that conclusion with great deliberation. I do not imagine it is any part of the duty of a trustee to investigate the question of whether a particular investment is desirable or not, if they have a law-agent who is an expert in that matter, and who probably alone can judge whether the investment is or is not desirable. I do not suppose there is a term that comes round, Whitsunday or Martinmas, that persons who have money to lend which they may have called up from some investment do not entrust it to their agent to find a new investment, and I should think it very unlikely in the general case that the client interfered with his agent in the slightest degree. If he—the agent—be a person well reputed in his profession, he takes his word for it, and is perfectly content that the money should go where his agent recommends. It was, I think, suggested in the course of the debate that the ladies might be clients, and that they would not interfere because they do not understand such matters. Ladies do not generally interfere as to whether an investment is eligible; they do only what is possible to them in such a case—they take and follow the advice of a person who is capable of giving it. Now, what was done here? That is what the case really turns upon. I do not go into the prior history of this rather singular trust, neither do I go into the rather singular conduct of the principal party concerned. I must say that to my mind the proceedings of George Kennedy are entirely unintelligible. He induced his brother to become one of his trustees, and after all his other investments, and after some considerable misunderstanding brought on entirely by Mr Douie, there comes to be an investment wanted for the sum of £1500, which was substantially the subject of the trust. The commencement of that matter is a letter from Mr Douie to Mr Kennedy, who is living in London, dated 13th August 1877; and Mr Douie, who is the brother-in-law of George Kennedy, and was on the most perfectly confidential terms with the trustees, and continued to be so until the very end, and who also stood high as a respectable practitioner in Glasgow, says:—"For the £1500 I have been offered a satisfactory investment of five per cent. on a good and high-class property in Roselea Drive, Dennistoun, Glasgow, which I have explained to your brother George, but will take him to see the property, and be guided by him before laying matters finally before you. The rental of the property

after providing interest and feu-duty (on a first bond), will give a gross remainder of £350 yearly." Now, that is the representation made by Mr Douie, who is the trusted and confidential agent of these trustees. In reply Mr Kennedy says:—"Your letter of the 13th inst. has been forwarded to me here, with the assignation in favour of Simpson, Kirk, & Donaldson, p. £900, which I have now signed before two witnesses, and return herewith. If my brother George approves of the investment you propose, and Mr Christie, I will sign also." So that he tells Mr Douie, whom he trusts, that he will sign if his brother and Mr Christie approves, and not otherwise, and Mr Douie was therefore aware of the condition he was expected to fulfil. Then on the 23d August Mr Douie writes to Mr John E. Kennedy:—"I duly received your favour returning assignation subscribed by you. With regard to re-lending of the £1500, I shall be guided by your brother and Mr Christie's advice. Personally, I think the security a high-class one. Your brother inspected the property along with me, and we were both much pleased with it as an eligible security." Then Mr John E. Kennedy, the defender, writes to his brother on the 30th August:—"I had a letter from Mr Douie a little time ago about the payment of £600, the balance of amount due upon mortgage bond, and about reinvesting the £1500 now in hand upon other property. I have agreed to do so, provided you and Mr Christie approve, and Mr Douie tells me that you have already seen and approved of the security." Then there is a letter from George to say that he had seen the property and agreed to it.

Now, as Mr Douie knew that Mr Christie's assent was necessary, and as George Kennedy knew that his assent was necessary, the brother in London was entitled to assume that he too approved and consented. That his brother, the pursuer, approved is certain, although he denies it upon his oath. He says he went to see the property. That is true. He says he did not know for what purpose he went. I regret very much to see such statements made by a party in this case. There cannot be the smallest doubt that Mr Kennedy knew perfectly well why he went to see the property. He even admits it in his letters. [In a letter of 18th March 1879 he had said—"I am glad you see by my letters to you that I went to see the property at Roselea Drive, and approved of it, because this is what I did, and am willing to admit still that I think the property substantial."] And for him to come and say on his oath that he had not the least notion for what purpose he went to see the property, certainly does not improve the general impression of the case.

But that is of little consequence. The question is whether Mr John E. Kennedy, on the assumption that his brother approved, which was true, and on the assumption that Douie had obtained the assent of Mr Christie, which he said was the condition on which he would sign, did anything that a reasonable man in the conduct of his affairs would not have done in giving his authority to this investment? I am of opinion that it is not so. I think he is very much in the position described by one of the Judges in the case of *Godfrey* I think. He said this—"It was not a question of what I or the Master of the Rolls might have done under such circumstances; we were lawyers, and have been taught to suspect people. But it is a question of what the general class of trustees would have done, and it is fair to say that they would have done the same thing." Therefore, on the general principle, I am of opinion with the Lord Ordinary.

It was said that there were warnings given in regard to the pursuer not being made a co-trustee. It was also suggested John E. Kennedy would not have his brother as a trustee. In regard to the warning, John E. Kennedy says he did not take it as a warning, and it is very clear that George did not. I do not think that John E. Kennedy attributed much importance to these mysterious hints of his brother. He knew the brother's general ways, and it is plain enough he did not know what he would be at, and he says so in the correspondence. That he supposed he was hinting that Douie was not an honest man and was not to be trusted is, in my opinion, entirely out of the question and out of the case. The brother (George Kennedy) was really trying to influence things so that the investment should be on a security yielding 5 per cent., and that was apparently the only thing he regarded in the whole matter. For that purpose he wished to be made a trustee, but I think that if John E. Kennedy had allowed his brother to be made a trustee in such a trust, he would have been guilty of negligence, rather than in anything he has done. He did not think his brother should be a trustee from his connection with the fund. I think, besides, he had probably the impression that his brother's influence in the trust would not lend to the security of the trust transactions. Be that as it may, he was quite entitled to judge of that matter. And he did judge of it, and I see no reason why we should think he did not judge quite correctly.

On the whole matter I am of opinion that it would be hard and unjust to make the trustee responsible for this £1500, in a trust in which he had not the smallest interest beyond a desire to help his brother.

Lord Young—I am entirely of the same opinion, and I hesitate very much about adding anything. If I add anything, it is only to express that the only difficulty I have ever had about the case is of this character. The £1500 was undoubtedly lost to the beneficiaries of the trust from having been lent upon already overburdened house property in Glasgow, or property which proved to be overburdened when a fall subsequent to the lending of the money took place in 1877, and it does not appear that the defender here, John E. Kennedy, resident in London, took pains to ascertain that the money had been lent with the approbation of both the trustees in Glasgow at the time. That is the only difficulty which I have or ever had, because I could not doubt for a moment that a trustee in London, as the defender was, could not have been accused of negligence of a character leading to personal liability if he had assented to a loan upon house property in Glasgow which was satisfactory to both of the trustees who were resident there, and reported to him to be satisfactory, and neither of whom he had any exceptional reason to suspect. But, taking the case exactly as it is, I concur in your Lordship's judgment, and generally in all the observations you have made.

To begin with, I think that there are here no exceptional reasons satisfactorily established upon which we can hold that Mr John E. Kennedy in London was not entitled to place the ordinary reliance which one trustee who is absent places on another who is on the spot, and who is in a position to take an active management in such trust affairs as lending money upon a local security. I must therefore take the case upon the footing of Mr Douie occupying the position of a managing trustee—a man of business capable on that account of managing a trust estate in Glasgow with advantage, and of Mr John E. Kennedy in London being entitled to place ordinary reliance upon him accordingly.

Nor do I think the origin and character of the trust unimportant upon the question—indeed, nothing which bears on the question of capable negligence or not is unimportant, for as the Lord Ordinary observes, negligence is a question of fact in the particular case, and whether it ought to be imputed in the individual case or not must depend upon the facts bearing legitimately upon that question in the particular case. The character and origin of a trust are two of these facts. £1500 came to Mr George Kennedy, the pursuer here, through his wife. It was her patrimony received from her father. She got it upon her father's death in fulfilment of an obligation under the marriage-contract with her husband. She and her husband were to have the liferent of the sum while they lived, and their children the fee. But there was no marriage trust. There were individuals named at whose suit proceedings might be taken under the marriage-contract, but there were no trustees. This property was not conveyed to marriage trustees, and apparently with the aid of Mr Douie, who had been the deceased Mr Steel's partner in business, the money was got and lent on heritable security, and the interest was drawn by Mrs George Kennedy while she lived, and after her death by her husband. She died in 1869.

Now, it very properly occurred to Mr George Kennedy, probably on the advice of Mr Douie, that it would be proper to interpose trustees for the protection of the children, and we see from a letter of his that he selected trustees to be interposed for the protection of his children, and his brother resident in London was one of them. Mr Douie, the deceased father-in-law's man of business, who had got the money for the family, was the second trustee, and Mr Christie, another man of business in Glasgow, was the third. And the trust was constituted in a very convenient way by Kennedy requiring the borrowers of the money who held it to execute a security in favour of those trustees of his own nomination. Therefore it was a trust really constituted by G. P. Kennedy, the pursuer of the action himself, for the children—very properly constituted for that purpose, and I think we may conclude at the suggestion of Douie. I should add that it was a very proper suggestion for a man of business to make. Now, Mr Douie had lent the money from the time it came into the family, that is, from the time of his partner Mr Steel's death. He lent it upon security down to the year 1877. In 1877 it is explained on the record that this happened—(Cond. 10) "The said Peter Jardine Hamilton repaid to the said trustees, on or about 15th February 1877, a sum of £600, and on the 13th and 15th August thereafter, in consideration of the sum of £900 then paid to them by Simpson, Kirk, & Donaldson, writers in Glasgow, they executed an assignation." It appears from Douie's letter of 13th August to which your Lordship referred, that the £600 was deposited in bank by Douie upon deposit-receipt, and the balance of £900 was paid up on the 15th August following. I put the question whether that had been deposited in like manner, and was told that neither party had positive information, but that we might assume it was so deposited; it was so, likely. Then Mr Douie, who had managed the matter hitherto—very simple management, seeing that £600 was in bank and £900 on the point of being put there—has to find a new investment, and in that letter of the 13th August he propounds a new investment to his co-trustee in London, saying—"For the £1500 I have been offered a satisfactory investment yielding 5 per cent. on a good and high class property in Roselea Drive which I have explained to your brother George, but I will take him to see the property and be guided by him before laying matters finally before you." And then he explains that there would be a surplus of rental of £350 after meeting feuduties and a prior security.

Now, this is a representation to John E. Kennedy in London by the managing trustee in Glasgow, who had theretofore managed this small trust property, and the question really turns upon this—in what spirit ought these representations to have been received? Here is virtually what the trustee said to his London co-trustee, not unfairly paraphrasing it—"I, who have invested hitherto,—it being necessary to procure a new investment, the old being paid up, and the money either in bank or on the point of being so,—have found an investment of which I think highly, yielding a surplus rental of £350; but before I ask your final assent I will consult your brother, who is an architect and valuator, and is immediately interested in the matter, and with his approval I will ask your consent to complete that security." The answer to that letter, which is really the foundation of the present action, is dated the 15th August—"Your letter of the 13th inst. has been forwarded to me here, with the assignation in favour of Simpson, Kirk, & Donaldson p. £900, which I have now signed before two witnesses, and return herewith"—(that is immaterial, for that was the authority to get up the £900). "If my brother George approves of the investment you propose, and Mr Christie, I will sign also." He receives an answer from Mr Douie on the 23d—"With regard to relending of the £1500, I shall be guided by your brother and Mr Christie's advice. Personally I think the security a high class one. Your brother has inspected the property along with me, and we were both much pleased with it as an eligible security." On the 30th August Mr Kennedy in London writes to his brother, the pursuer, in Glasgow—"I have agreed to do so, provided you and Mr Christie approve, and Mr Douie tells me that you have already seen and approved of the security." He seems to have been under the impression that he had something to sign, for he had already said—"If my brother George approves of the investment you propose, and Mr Christie, I will sign also." There was nothing for him to sign except a minute or letter of approval. There was nothing of course for him to sign in the convey-

ancing process of making the investment. But be that as it may, that is the way in which he writes. Well, Mr Douie, without asking any other approval other than the conditional one he had got, invests the money on this unfortunately overburdened house property on the 27th September. And it is here that the difficulty, and the only one so far as I am concerned, occurs to my mind, and which I began by stating. But for all that I think there are no grounds for liability. I think the defender is not responsible for the investment which was made by Mr Douie upon this assent of his. There is, be it observed, no case of this kind: "The investment was made on the 27th September, and the money might have been saved if you had used due diligence thereafter. If you had inquired and ascertained if the money had been lent with Christie's approval, you would have found that it had not, and the money might then have been rescued." That, I say, is not the ground of action. It was put more than once in the course of the argument—the money was irrecoverably lost, because it was paid over to the borrowers on the 27th September, and the ground of action was that this security was an utterly bad one. But I do not think the assent of Kennedy in London was without due inquiry, or was incautious. Taking all the circumstances together, and leaving none of them out of view, I think a trustee resident in London cannot have imputed to him negligence or a reckless disregard of the safety of the trust funds when in answer to such a communication from his co-trustee in Glasgow, who had theretofore managed the trust property, and who indeed had managed it before the defender had become a trustee at all, he assents in a provisional way—"If you and Mr Christie both approve, and my brother is satisfied, he being a very prudent man and a judge of such matters, and having the most material interest in it, I assent too." If the investment is then made, and turns out to be bad, there may be a good case against the trustee who made it, Mr Douie, but I do not think an action can lie, on the ground of negligence, against the trustee who gave the assent. Therefore, upon the whole matter, and really regarding the observations I have made as more superfluous than otherwise, I concur in the judgment proposed.

Lord Craighill—I also concur in the judgment of the Lord Ordinary, the affirmance of which your Lordship has proposed, and I do so for the reasons which the Lord Ordinary and your Lordship and Lord Young have explained. I feel that were I to say more to endeavour to expound the grounds upon which I individually have proceeded, it would only be to repeat that which has been better said. I therefore content myself with expressing my concurrence in the judgment.

Lord Rutherfurd Clark—I have shared the doubts that have already been expressed by Lord Young, and perhaps I felt them more than his Lordship did; but after giving the case such consideration as I have been able to give it, I have come to think that the interlocutor of the Lord Ordinary ought to be affirmed.

The Court adhered.

Counsel for Pursuers—Comrie Thomson—Salvesen. Agent—Thomas M'Naught, S.S.C.

Counsel for Defender—Trayner—Jameson. Agents—Dove & Lockhart, S.S.C.

Tuesday, December 9.

FIRST DIVISION.

BEEBY (INSPECTOR OF POOR OF THE PARISH OF FALKIRK) *v.* CALDWELL (INSPECTOR OF POOR OF THE PARISH OF AYR).

Poor—Settlement—Soldier—Poor Law Act 1845 (8 *and* 9 *Vict. cap.* 83), *sec.* 76.

Held that a soldier who had acquired a residential settlement in a parish before he enlisted had lost that settlement through absence with his regiment for more than five years.

This Special Case was presented by John Beeby, Inspector of Poor of the Parish of Falkirk, and David Caldwell, Inspector of Poor of the Parish of Ayr, to settle whether, in terms of the Poor Law Act 1845 (8 and 9 Vict. c. 83), a pauper by his absence on military duty lost the residential settlement he had acquired in the parish of Falkirk. Section 76 of the Act provides—"From and after the passing of this Act no person shall be held to have acquired a settlement in any parish or combination by residence therein unless such person shall have resided for five years continuously in such parish or combination, and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if during any subsequent period of five years he shall not have resided in such parish or combination continuously for at least one year."

The following facts were stated in the Case—John Brown, the pauper, was born in the parish of Ayr in 1857. When nineteen years of age he enlisted. For six years before enlisting he had been employed as a clerk in the parish of Falkirk, supporting himself there, and it was admitted that he had thereby acquired a residential settlement in the parish of Falkirk. After enlisting he was absent from Falkirk for six years with his regiment. At the end of this period he left the army and returned to Falkirk, and remained there for about two months. He was then called upon to serve in the army reserve, and went to Egypt with his regiment. At that time he was absent from Falkirk about twelve months, after which he was discharged, and again returned to Falkirk, shortly after which he became insane and chargeable as a pauper. He was never married.

The question of law for the Court was—"Whether the said John Brown lost his residential settlement in Falkirk by his absence from that parish on duty with his regiment for a period of upwards of five years?"

The parties were agreed that in the event of the question being answered in the affirmative the parish of Ayr would be liable for the support