case it may appear that upon the detailed incidents and facts which occurred, from which a conclusion is to be drawn, there was or was not serious or wilful misconduct. It may be that these facts do not justify the conclusion that there was, or do not justify the conclusion that there was not. But it is still a question of fact, although this Court, and I have no doubt the English Courts too, have corrected an erroneous conclusion upon the detailed facts which are submitted. I think we might here correct any error which the Sheriff had fallen into in holding that it amounted to serious and wilful misconduct, and which we thought an erroneous conclusion from the detailed facts of which he had informed us, and also negative a conclusion which we thought could not be drawn from the detailed facts. Here I am of opinion that upon the facts stated the conclusion and judgment of the Sheriff upon this question of law submitted to us is right.

LORD TRAYNER—I think the facts stated in this case deprive it of any difficulty. I have no doubt whatever upon the facts stated that this accident took place when the respondent's son was in "the course of his employment." I have equally no doubt that he was not guilty either of serious and wilful misconduct or of any misconduct whatever.

LORD MONCREIFF — I am of the same opinion. On the first question I have no difficulty. I think it is quite plain that the accident occurred in the course of the deceased's employment. The second question raises a more difficult point. The burden is upon the employer to show that the injury was attributable to the man's serious and wilful misconduct, and it is plain upon the findings in the Sheriff's statement that that has not been proved to his satisfaction. It may be that on the detailed facts found proved by the Sheriff he might have drawn the conclusion that the workman knew of the existence of the rule and disregarded it, and that his doing so amounted to wilful misconduct. But he has not done so. On the contrary, I infer that he drew the conclusion that the workman did not know of it, or at least that it was not proved that he knew of the rule. I therefore come to the conclusion that we cannot interfere with the judgment at which the Sheriff has arrived.

LORD JUSTICE-CLERK—I should have said, what I omitted to say, that I agree upon the first point, namely, that the accident took place in the course of the deceased's employment.

The Court answered the questions of law in the affirmative and dismissed the appeal.

Counsel for the Appellants—W. Campbell, K.C. — Younger. Agents — Morton, Smart, & Macdonald, W.S.

Counsel for the Claimant and Respondent—Baxter—A. M. Anderson. Agent—John Baird, Solicitor.

Thursday, June 27.

SECOND DIVISION.

[Lord Low, Ordinary.

MILLS *v.* BROWN'S TRUSTEES.

(*Ante*, June 19, 1900, vol. 37, p. 810, and 2 F. 1035).

Trust—Administration—Illegal Appointment of Trustee as Salaried Manager of Business—Repayment of Sums Received as Salary—Interest.

A testator empowered his trustees to appoint one of their own number to be their factor or cashier, and to pay him a salary. The trustees appointed one of their number as salaried manager of a manufactory which had been carried on by the testator, after obtaining the opinion of counsel that such an appointment was within their powers, and he acted as manager for several years, receiving a salary and commission. In an action brought by one of the trustees, who was also a beneficiary, the Court held that the appointment was *ultra vires* of the trustees, and that the trustee so appointed was bound to repay the amount of salary and commission received by him as manager. The pursuer maintained that the defender was liable in interest upon the amount falling to be repaid by him.

Held, that as the defender had been appointed manager, and had received his salary under a *bona fide* though erroneous view of the powers of the trustees, and as their action had resulted in no loss to the trust-estate, the defender was not liable in interest upon the sum falling to be repaid by him.

This case is reported *ante, ut supra.*

Robert Brown by his trust-disposition and settlement having empowered his trustees "to appoint one of their own number to be their factor or cashier, and to allow him a reasonable remuneration," the trustees appointed Robert Brown *tertius* (the present reclaimer) to be salaried manager of a manufactory which had been carried on by the testator, and which the testator had empowered his trustees to carry on after his death. They had previously obtained the opinion of counsel that such an appointment was within their powers. Robert Brown acted as manager and received a salary and commission for several years until the present action (reported *ut supra*) was raised. By interlocutor dated 16th March 1900, the Lord Ordinary (LOW) found that it was *ultra vires* of the trustees to pay salary or commission to the reclaimer, and appointed them to lodge a statement of the sums paid to Robert Brown by way of salary and commission as manager foresaid. On 19th June 1900 the Court, on a reclaiming-note by the defenders, adhered to the interlocutor of the Lord Ordinary.

The defenders thereafter lodged a statement of the salary and commission paid

to Robert Brown. Robert Brown lodged a note of deductions which he claimed as falling to be made therefrom. In said note he maintained, *inter alia*, that he was not liable in any interest, or at all events that he was not liable in interest at a higher rate than the trust funds would have yielded if invested in the investments authorised by the trust-deed, which he averred would not have exceeded 3¼ per cent. The pursuers lodged answers, and maintained that Robert Brown was liable in interest at the rate of 5 per cent.

The Lord Ordinary on 19th March 1901 pronounced an interlocutor whereby he found, *inter alia*, that the balance of salary and commission falling to be repaid by Robert Brown amounted to £3205, 10s. 5d., with periodical interest at 4 per cent., and granted leave to reclaim.

Robert Brown reclaimed, and argued—It had been decided that the reclaimer was bound to repay the money received by him as salary and commission, but the case was distinguishable from those in which a trustee had been held liable in interest. The trustees had appointed him manager, and he had received the salary in perfect good faith. That was clear from the fact that the trustees had taken counsel's opinion, and had been advised that the appointment was within their powers. The plea of *bona fide percepta et consumpta* therefore applied. Although it was now established that the trustees had acted *ultra vires*, their action had not resulted in a loss but in a gain to the estate, for if the reclaimer had not been appointed manager they would have had to appoint another person to act as manager, whose salary would have exceeded the present claim for interest. In any view, the rate allowed by the Lord Ordinary was excessive, and 3 or 3¼ per cent. was enough — *Heritable Securities Investment Association* v. *Miller's Trustees*, March 18, 1893, 20 R. 675; *Melville* v. *Noble's Trustees*, December 11, 1896, 24 R. 243; *Wick* v. *Wick*, December 2, 1898, 1 F. 199; *Cowan* (*Ferrie's Curator*), 1897, 5 S.L.T. 82.

Argued for the pursuer and respondent—The Lord Ordinary's judgment was right. The case was one of a trustee appropriating trust money to which he had no right, and the rule was invariable that a trustee in that position was liable in interest at the highest rate.

LORD JUSTICE-CLERK—This is certainly not an ordinary case. It is a very peculiar case indeed. I cannot have the slightest doubt on looking at the history of it that this gentleman was appointed by the trustees to act as manager in the perfectly *bona fide* belief that they had power to appoint one of their own number as manager, in respect that the truster had authorised them to appoint one of their own number to act as factor. It was held in the reclaiming-note which was before us some time ago that that was erroneous, and that legally he could not receive a salary as manager and at the same time be a trustee. The *bona fides* is plain, for no man would have remained a trustee in these circumstances if he had known that he risked his salary, because there were plenty of trustees, and in giving up his position as trustee it would have been open to him to take up the managership by which he was to make his livelihood and at the same time assist the business in which the beneficiaries were interested. Well then, for several years he does draw his salary. If he had not drawn it the trustees would have appointed somebody else not one of their own number to act as manager, and most undoubtedly they would have had to pay a considerable sum—whether as much as to this man I do not know, but at all events a considerable salary. It has turned out that he is legally bound to replace all this salary he had received in respect that the position was given him and the money paid him while he was a trustee; and the question before us is, not whether he shall replace the money but whether he shall, further, pay interest on it. It is quite plain that if he has to pay interest on it, it will be to a certain extent placing money in the hands of the trustees which they never could have had under any circumstances, because they have been saved by the decision against Mr Brown the expense of having a manager at all during these years, and they are to get back, according to the decision, the money which he received; and therefore to give them interest in addition would be giving them money they never could have had under the trust under any circumstances, for any salary they would have paid any manager must have reduced the estate by the amount of it. I think it would not be equitable or just that in the special circumstances of this case this gentleman, Robert Brown, should be compelled to pay interest on the money; and I think he ought not to be compelled to pay interest on it.

LORD YOUNG—I assume of course that the judgment to the effect that the trustees were not entitled to appoint one of their own number as manager with a salary is right. I was on the Bench and assented to that judgment as accurate, and I remain of opinion that it is accurate in point of law; and the order that he should restore to the trust all the money which he received for his services I also assume to be accurate, although attended with grave enough hardship here. Cases occur, and this is very near one of them, where an order of restoration would not be made. If a shopkeeper—one who gives his services for just enough to maintain himself and wife and family, or to maintain himself alone—is a trustee appointed at such a salary, and he gives his services and lives upon the salary which is given him for them for five years, I think it would not only be a hardship but contrary to law to order him to restore it. The plea of *bona fide percepta et consumpta* would apply, and restoration would not be ordered although the rule of law would be carried out to this effect, that while he remained a trustee the salary should be stopped. I

took an opportunity of glancing over my own previous opinion in the case, and I see I suggested that his proper course for the future would be to resign his trusteeship, and if his services were approved of by the trustees, that he should continue them upon the same terms—if they also approved of this.

But we are concerned now only with the question of interest, whether he is not now bound to pay interest on the money which he had received and which may have been necessary to his livelihood, to his living as he was honestly and sensibly making it, acting upon the advice of counsel, although contrary to the rule of law which we laid down. I am very clearly of opinion that he ought not to be ordered to pay interest upon it. And I am surprised at the conduct of this beneficiary in demanding it. I am surprised at it because every honest and reasonable consideration points to this, that Mr Brown had given his services honestly, and had received for them no more than the trust-estate would have had to pay to another for these services; and to demand not only that they should be given gratuitously but that he should be mulcted in interest upon the sums received is I think contrary to that equity which generally rules our decisions. I therefore entirely concur in the view that no interest ought to be allowed at all. I repeat that I think it is hard enough, although in pursuance of a rule of law in which I acquiesced, that he should be ordered to repay the money.

LORD TRAYNER—This is a special case, and I do not think we can apply absolutely to it the rule laid down in any of the cases cited to us. It is quite certain, and I desire to say nothing whatever to trench on the rule, that where trustees have improperly and contrary to their duty misapplied trust funds, the trustees must restore not only the misapplied fund but interest upon it, and for the reason that during the misapplication the trust estate has lost the benefit of that part of the fund so taken away from the trust. But in this case there is no such reason for making Mr Brown liable for interest, because the illegal misapplication of the funds has not resulted in any loss to the trust at all. As your Lordship pointed out, this gentleman gave his services for five years as manager of the businesss, and though he is now bound to restore the salary which for these five years was paid to him, it cannot be said that the payment has injured or diminished the trust fund, for if the trust had not had this gentleman's services, the services of someone else would have been required, and if you take it that that other person's services had been procured at even one-half of the salary paid to Mr Brown, the sum spent in five years in that way would far have exceeded the amount of interest which is now claimed from Mr Brown. I think there is no rule which compels us to admit the claim for interest, and the special circumstances of the case point entirely in the opposite direction. I think the demand for interest made by this beneficiary, who is pursuer of the action, is an unreasonable demand.

LORD MONCREIFF—I am of the same opinion. This case is clearly distinguishable from the cases to which we have been referred, in which trustees who had lost trust funds were made liable not only to replace the sums but to pay interest on them. In all these cases there were both *culpa* on the part of the trustees and loss to the trust-estate. In this case, as has been pointed out, there was no loss to the trust-estate, and there were reasonable grounds for Mr Robert Brown thinking that he was entitled to accept or continue in the office of manager. The terms of the trust-deed give colour to that view. Besides, if I remember, there was this circumstance in the case, that during the lifetime of the truster Mr Robert Brown had been acting as manager, and that gave some colour to the view that the truster, when he gave his trustees power to appoint one of their number factor with a salary, had in view Mr Robert Brown continuing to act as manager. Lastly, the trustees before they appointed Mr Robert Brown took the opinion of counsel on the point—the question having been raised—and got an opinion to the effect that it was within the trustees' power to appoint one of their number on salary. I think that in view of the peculiar circumstances of the case it would be unfair to charge Mr Robert Brown with interest.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for the defender Robert Brown against the interlocutor of Lord Low dated 19th March 1901, Recal the said interlocutor in so far as it finds the said Robert Brown liable in interest upon the sum of £3,205, 10s. 5d. thereby found due by him, and in so far as it finds the pursuer entitled to expenses: *Quoad ultra* adhere to the said interlocutor reclaimed against, and decern: Find no expenses due to or by any of the parties since the date of the interlocutor of the Second Division, dated 19th June 1900."

Counsel for the Pursuer and Respondent—C. K. Mackenzie, K.C.—Findlay. Agents—Gill & Pringle, S.S.C.

Counsel for the Defender and Reclaimer Robert Brown—Jameson, K.C.—R. Scott Brown. Agents—Davidson & Syme, W.S.

Agent for the Defenders Brown's Trustees—F. J. Martin, W.S.