This being the first application under the Act, the terms of the order of reference became the subject of **[548]** consideration. His Lordship penned the following form of order, which was afterwards delivered out to the registrar.

Refer it to the Master to "inquire and state to the Court, whether the Plaintiff is tenant for life of the lands in the petition mentioned to be called Revesley Park, according to the true intent and meaning of the Act of the third and fourth years of the reign of Her present Majesty, intituled 'An Act to enable the Owners of Settled Estates to Defray the Expenses of Draining the same by way of Mortgage;' and if the said Master shall find that the Plaintiff is such tenant for life, then he is to inquire and state to the Court, whether it would be for the benefit of the said lands, and proper and beneficial to all persons interested therein, to make, under the provisions of the said Act, any and what permanent improvement in the said lands, by draining the same with tiles, stones, or other durable materials in a permanent manner: and after the Master shall have made his report such further order shall be made as shall be just."

The Master reported, that the infant was now tenant for life of the lands proposed to be drained, according to the true intent and meaning of the Act; and that it would be for the benefit of the said lands, and proper and beneficial to all persons interested therein, that 250 acres should be permanently improved, under the provisions of the said Act, by draining the same with proper draining tiles in a permanent manner, at an expense not exceeding £5 per acre, or the sum of £1250 in the whole.

The matter coming before the Court on a petition to confirm the report, it appeared that there were large **[549]** accumulations of the rents to which the infant was absolutely entitled, and it was suggested that it would not be advisable to execute a mortgage or charge on the estate for the payment of the £1250, but would be more to the interest of the Petitioner, that the amount should be paid by the receiver out of the rents, placing the tenant for life in the situation of incumbrancer, so that his personal representatives, in case of his death, might have the benefit of the petition.

The Court confirmed the report, and gave liberty to the guardian to execute the improvements approved of by the Master; and it appearing to the Court to be beneficial to the infant Plaintiff, that the amount of such expense should in the first instance be advanced and paid by the receiver appointed in this cause, out of the rents and profits of the estates, the same was ordered. The order then proceeded as follows: "and when and in case it shall be alleged that any such improvement as aforesaid has been executed, it is ordered that the Master, on the application of the Petitioner, or the Plaintiff, if he shall then have attained the age of twenty-one years, do inquire and state to the Court, whether such improvement has been executed, and whether the annual value of the lands so drained has been increased by such draining, to an amount equal to £7 per cent. at the least on the sum so expended; and if the Master shall so find, he is to determine and recommend by what number of yearly instalments the sum so expended ought to be paid off, when and in case the same should be charged on the said lands; and after the Master shall have made his report, such further order shall be made as shall be just."

1942. 1 Ch 217.

[550] FYLER *v.* FYLER. *Feb.* 19, 20, 27, *March* 1, 1841.

[S. C. 5 Jur. 187. See *Harries* v. *Rees*, 1867, 37 L. J. Ch. 107; *Mara* v. *Browne*, [1896], 1 Ch. 209.]

A person knowingly inducing trustees to lend trust money to his debtor on a security not warranted by the trusts, in order that when advanced such person may obtain thereout payment of his debt, is accountable to the *cestui que trusts*.

Solicitor knowingly procuring trustees to commit a breach of trust for his benefit, must be considered as a partaker in the breach of trust.

Trustees investing trust money on an unauthorized security, are responsible for any future loss traceable to that first error.

A trustee, who was not authorized to lend the trust money on leasehold security, applied to his solicitors to procure an investment for some trust money, so as to produce a larger income. The solicitors had a client who was considerably indebted to them, and who wanted to borrow money on leasehold security, and they proposed it to the trustee. The trustee personally took measures to ascertain the value and validity of the security, and thereupon advanced the money, which was paid to the solicitors and carried to the credit of their debtor's account. The solicitors acted on behalf of the borrower, and, to some extent, for the trustee, but another solicitor also acted for him and for one of the *cestui que trusts* in the matter. The solicitors had notice that the fund was trust money in which infants were interested, but had no knowledge of the trusts or of the limited powers of the trustees. The security turned out ample, but part of the trust funds were afterwards lost by being transferred to a similar security of the same party. The lending on leaseholds being a breach of trust, Held, that the solicitors were not liable to the *cestui que trusts* for the loss.

In the answer to a bill for relief in respect of a breach of trust, it was alleged that some of the *cestui que trust* had assented thereto. Held, that the parties sought to be charged were entitled to an enquiry.

Solicitors against whom charges of fraud had been made which were unsubstantiated, and against whom the bill was dismissed, held not entitled to their costs, on the ground, that by the position in which they had placed themselves, they had exposed themselves to an investigation which had not unreasonably been instituted.

This bill prayed for the restitution of certain trust funds, which, it was alleged, had been lost by a breach of trust, and it also prayed a declaration of the liability of the several Defendants to make good the same.

The trust had its origin in the year 1814, when the Defendant James C. Fyler, being disposed to make a provision for his father, his mother-in-law, and their children, by deed made between himself of the one part, and Thomas B. Fyler and W. R. Glazier of the other part, assigned to the latter a sum of £10,000 Navy 5 per cent. annuities (in the deed incorrectly stated **[551]** to have been that day transferred into their names), in trust to pay the dividends to his father, Samuel Fyler, for his life, and after his death to pay the dividends to his mother-in-law Mrs. Margaret Fyler for life, for the maintenance, &c., of herself and children; and after her death to pay the principal to all her children by Samuel Fyler as should be living at her decease. The deed contained no power to change the securities, or to appoint new trustees on the resignation of any trustee.

It appeared that the money was not, in fact, transferred into the names of the trustees at the date of the deed, but that at various times in the years 1819 and 1820, James C. Fyler transferred into the names of the two trustees several sums which ultimately consisted of £9,458, 4s. 6d. four per cent. annuities.

Samuel Fyler died in 1825.

After his death Mrs. Margaret Fyler and her son Thomas B. Fyler acting, as was alleged, on her behalf, were desirous that some better income should be made from the trust fund, by means of a change in the investment; and Thomas B. Fyler, the active trustee, applied by letter to Messrs. Blunt, Roy & Blunt, his solicitors, to obtain an investment of part of the trust fund so as to produce £5 per cent. Messrs. Blunt, Roy & Blunt happened to have a client of the name of Baxter, who was largely engaged in building speculations; they had extensive transactions with him in the way of their business, and he was at the time indebted to them in a sum of about £3000. Baxter was desirous of raising £6000 by way of mortgage, at £5 per cent. on a leasehold house in Park Lane, and Messrs. Blunt, Roy & Blunt proposed this security to Mr. Thomas B. Fyler; a correspondence took place between them, and **[552]** full explanations were given as to the nature of the security proposed. Mr. Thomas B. Fyler himself engaged a surveyor to value the property. In his correspondence he stated, he "was acting for minors on his own responsibility," and he ultimately agreed to advance the money on the security proposed. Glazier, however, refused to concur, and retransferred the trust fund into the name of James C. Fyler the settlor.

£6000, part of the trust money, was afterwards sold out of the bank, and lent to

Baxter on a mortgage of the leasehold premises in Park Lane, which was executed to Thomas B. Fyler and Dr. Reed a new trustee; the whole £6000 was paid over to Messrs. Blunt, Roy & Blunt, on behalf of Baxter, and was placed by them to the credit of his account. Messrs. Blunt, Roy & Blunt at the same time entered into a guarantee for payment of the ground rent of the house, and the interest on the mortgage "until the premises were under-let or sold."

Messrs. Blunt, Roy & Blunt, though aware that the money advanced was trust money, in which infants were interested, seemed to have had no knowledge of the extent of the power of the trustees over it.

In the transaction, Mr. Dimond a solicitor, was in some manner employed for the trustees, and for the *cestui que trusts* or some of them; the mortgage deed, though prepared by Messrs. Blunt, Roy & Blunt, was sent to him for his perusal, and was afterwards settled by an eminent conveyancer on behalf of the parties for whom Mr. Dimond acted. After this transaction had been completed, the mortgage deed was retained in the custody of Messrs. Blunt, Roy & Blunt on behalf of the trustees.

[553] In February 1827 the house was sold for nearly £10,000; the purchase-money was consequently ample to provide for the mortgage; but it having been stipulated, that in case of a sale of that property, Baxter should retain the £6000 on giving security on other leasehold property, to the satisfaction of the mortgagees and their solicitors, the mortgage money was not paid off, but was retained by Baxter on another substituted security of leasehold property in Upper Grosvenor Street and Regent Street. The Regent Street house was afterwards sold, and a leasehold house in the Quadrant substituted, and on the sale of the latter, a sum of £1500 was received by the trustees.

In all these transactions, Messrs. Blunt, Roy & Blunt were concerned, but Thomas B. Fyler was active in seeing to the value of the properties. Baxter ultimately became bankrupt and died insolvent, and the mortgaged premises in Upper Grosvenor Street having proved deficient, a considerable part of the trust fund was lost.

This bill was filed by the children of Samuel Fyler by Margaret his wife, against the trustees, Mr. Munro, who had been newly appointed trustee, James C. Fyler, and Messrs. Blunt, Roy & Blunt, and it sought to make them responsible for the loss sustained.

The case as against the trustees, was for a breach of trust in improperly investing the funds contrary to the trusts of the deed; but as against Messrs. Blunt, Roy & Blunt the following charges were made by the bill, though not proved:—"That in the year 1825 Baxter was in great pecuniary difficulties, and that Messrs. Blunt, Roy & Blunt, who were not only his solicitors but in some manner connected with him in his building **[554]** speculations, or involved by his embarrassments, and had an interest in getting money for him to relieve him from his embarrassments, applied to Thomas B. Fyler, and proposed to him to lend Baxter a sum of £6000 out of the trust funds, upon the security hereinafter mentioned; and they recommended such security to Thomas B. Fyler as being a sufficient security."

"That Messrs. Blunt, Roy & Blunt acted upon the occasion aforesaid, not only as the solicitors of Samuel Baxter, but also as the solicitors of Thomas B. Fyler, as such trustee as aforesaid; and they approved of and accepted the proposed security on his behalf; and at their instance and under their advice, the sum of £6000 was afterwards lent and advanced to Baxter as hereinafter mentioned, and a great part if not the whole of such sum was retained by them for their own use."

"That in 1825, and when Messrs. Blunt, Roy & Blunt procured the said Thomas B. Fyler to lend the sum of £6000, part of the trust funds to Baxter as aforesaid, he, Baxter, was in great pecuniary difficulties, and was largely indebted to them, the said Messrs. Blunt, Roy & Blunt; and Messrs. Blunt, Roy & Blunt were, to some extent, concerned or interested with him in his building speculations, and were under pecuniary liabilities and engagements for him to a large amount; and that when they applied for and procured such loan to be made to him as aforesaid, they had a direct personal interest in procuring the same, and the whole of the said sum of £6000 was paid into their hands, in order that the same might be applied by them, partly in liquidation of the said Samuel Baxter's debt to them, and partly in or towards payment of debts, for which they or some of them were **[555]** personally liable, and had come under engagements to pay."

"That, under the circumstances, the aforesaid loan of the said sum of £6000, and the subsequent dealings with the said several securities were not only breaches of trust, in which Messrs. Blunt, Roy & Blunt were parties, but were direct frauds by them against the Plaintiffs and the trust estate; and that Messrs. Blunt, Roy & Blunt are therefore liable in equity to replace the said trust funds."

The bill prayed, as against Messrs. Blunt, Roy & Blunt, "that they might be declared liable, to the extent of the trust monies which came to their hands respectively, to make good the same, and that they might be decreed to do so accordingly."

The Plaintiffs failed in substantiating by evidence these grave charges of fraud, as will be found noticed in the judgment of the Court.

Mr. Kindersley and Mr. Teed, for the Plaintiffs, made no claim against James C. Fyler further than was necessary to charge the other parties. They directed their argument principally against Messrs. Blunt, Roy & Blunt, and contended, that the lending the money on leasehold security was unauthorised by the deed, and constituted a plain breach of trust against all parties concerned; that those who participated in the first fault, were liable for all that subsequently happened, unless they could shew that the fund had been brought back into a proper state of investment.

That Messrs. Blunt, Roy & Blunt, admitting that they knew that the money was trust money, had con-**[556]**-structive, if not actual notice of the trusts of the settlement, and must therefore be taken to have known that a breach of trust was being committed. They received the trust property with knowledge, and became accountable as trustees.

[THE MASTER OF THE ROLLS. Your argument would lead to this, that if trust property were committed to a carrier or a messenger, he would become liable as a trustee if he knew that it was subject to a trust.] This case goes far beyond; for here Messrs. Blunt, Roy & Blunt, with knowledge, assist in a breach of trust, and receive the money in discharge of their own debt. The case is precisely similar to that of *Wilson* v. *Moore* (1 Myl. & K. 126), and *Harvey* v. *Harvey*, before Sir John Leach and Lord Cottenham, on appeal. They are not merely agents, but have, for their own interest, mixed themselves up in the breach of trust, and have therefore become principals.

That they were the solicitors of the trustees is plain from their acts, they prepared the mortgage deed, which was part of the duty of a mortgagee's solicitor.

Mr. Pemberton and Mr. Evans, for the widow.

Mr. Tinney and Mr. Koe, for the representatives of Thomas B. Fyler.

Mr. Bethell and Mr. Heath, for Mr. Munro, a new trustee.

Mr. Girdlestone and Mr. Hall, for James C. Fyler.

Mr. Loftus Wigram, for Lawrence Fyler, one of the children.

[557] Mr. Turner and Mr. Campbell, for Messrs. Blunt, Roy & Blunt. The Plaintiff has wholly failed in making out as against Messrs. Blunt, Roy & Blunt, the case alleged against them by the bill. The proposal appears plainly from the correspondence to have originated from the Fylers, and not from Messrs. Blunt, Roy & Blunt. Throughout the proceedings Mr. Thomas B. Fyler appears to have been most active, and to have shewn the greatest care and caution in seeing to the validity and value of the security.

The case against the solicitors proceeds on the two grounds, of a breach of trust and a fraud having been committed by them; but unless fraud can be made out, there is no principle on which to charge them as trustees. There is no foundation whatever for the charge of fraud, £6000 were invested in property worth £10,000; the money was perfectly secure, and although the trustee, who acted with full knowledge, and, as he says, "on his own responsibility," committed a breach of trust, still there was no fraud, full value was given, and the £6000 when received became the property of Baxter. The case has no resemblance to that of *Wilson* v. *Moore*, in which agents, having notice, applied trust fund in payment of a private debt due to them from their principal, who was embarrassed in his circumstances; that was a case of fraud, and what the Court held was this that the Defendants could not retain a fund which they knew to belong to A. in payment of a debt due to them from B. There, no consideration at all was paid, but here full consideration was given for the trust money, and though technically a breach of trust as against the trustees, still there is no semblance of fraud.

If then, there was no fraud, Messrs. Blunt, Roy & Blunt, at the utmost, were mere agents, and as such **[558]** accountable to their principal only, and not to the *cestui que trusts; Adams* v. *Fisher* (2 Keen, 754; 3 Myl. & Cr. 526, 549), *Myler* v. *Fitzpatrick* (6 Mad. 360). They had no notice of the trustees' powers or duties, and if they had, they could not, by mere notice, be converted into implied trustees. *Nickolson* v. *Knowles* (5 Mad. 47). In *Keane* v. *Robarts* (4 Mad. 356), Sir J. Leach speaking of the agents of trustees says, "If they had reason to believe that Thomas and Fennell (the trustees) were so misapplying the assets, it would be difficult to find a ground which would make them responsible, for paying to their principals the monies which had been placed in their hands for the purpose of being remitted to them: that would be to make every trustee accountable for his conduct in the trust, to every agent whom he happened to employ, and would carry the principle of constructive trust to an inconvenient, and indeed to an impracticable length."

In *Davis* v. *Spurling* (1 Russ. & Myl. 64), "An executor, who was employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who handed over the price of the estate to his co-executor, was held not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain, although, by the will of the testator, the price of the estate when sold was to be considered as part of his personal estate." Sir J. Leach there said, "Colchester (the party selling), had no legal right to retain the price of Whimper Bradey's moiety of the estate; for it was in his hands, not as executor, but simply as agent of John Bradey, who alone had the power to sell that moiety, and to receive the price of it."

[559] Messrs. Blunt, Roy & Blunt could not have filed a bill of interpleader, *Crawshay* v. *Thornton* (2 Myl. & Cr. 1), or resist payment to Baxter.

There is no case in which a solicitor has been held liable, because with his knowledge his client has committed a breach of trust; were it otherwise, it would become the duty of a solicitor to denounce his client whenever he determined to act contrary to the trusts. If it were held, that a person dealing with a trustee has notice of everything relating to the trust, and is bound to see that no breach is committed therein, even bankers, agents, solicitors, clerks, or messengers when they have dealings with trustees would have the duty imposed on them, to see, in every case, to the due execution of a trust.

There was no loss on the first transaction, and whatever loss may have subsequently happened, arose from the trustees postponing the sale of the property, and from exchanging the securities at a time when it is not alleged that anything was due from Baxter to Messrs. Blunt, Roy & Blunt.

Any claim of the Plaintiffs is barred by the Statute of Limitations, which though not a bar to a direct trust is a bar to a constructive trust; *Beckford* v. *Wade* (17 Ves. 87).

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS [Lord Langdale] (after stating the principal circumstances of the case). It is said by some of the parties in answer to this bill, that although these proceedings in respect of the trust money must be admitted to have been irregular, **[560]** because there was no authority at all to change the security, yet it was done manifestly for the advantage of one of the *cestui que trusts*, and with the consent of some of the others; and if that were so—if all this has taken place with the consent of the parties now complaining, it certainly appears to me that they would not have any right to maintain this suit, for *volenti non fit injuria*. If they have authorized this course of dealing with their own fund, it would be in the highest degree unjust, to permit them to establish a claim against those who have acted under their authority. There is no evidence upon which I can properly act as to that matter; but I am clearly of opinion that there must be an inquiry whether these investments, or any, and which of them, took place with the consent of any of these parties, with liberty for the Master to state special circumstances.

But there are other persons sought to be charged, as to one of whom, namely, Mr. Monro, I conceive there is no doubt at all. The circumstances under which he came into this trust, are not such as appear to me to render him in any degree liable for the breaches of trust that have been committed. The other parties are Messrs. Blunt, Roy & Blunt, in respect of whom alone the argument of this day has been

addressed to me. Messrs. Blunt, Roy & Blunt, at the date of the first of the transactions which is now brought into question, happened to be the solicitors of Mr. Thomas Bilcliffe Fyler, who calls himself the acting trustee in this matter, and also the solicitors of Mr. Baxter, who desired to have this loan; and it is alleged, that their own personal interests were so involved in the transaction, that they must be considered to have acted not as solicitors and agents alone, but as persons, who, being solicitors and agents, took advantage of their **[561]** position, to acquire a benefit for themselves at the hazard, if not to the prejudice of the trust; and that, under those circumstances, the Court ought to impute to them the duty of seeing to the due application of this trust money; in other words, will impute to them the character of trustees. The argument, as it was first addressed to me, was certainly pushed to a greater extent than I have ever heard attempted with regard to charging persons with the duty of trustees. It has now been most properly reduced within narrower limits, and their liability turns upon the point which I have last adverted to—whether they can be considered as having so involved their own personal interests, in the matter in which they were concerned as agents, that this Court, in the exercise of its jurisdiction, ought to impute to them the character of trustees. I do not mean to decide it at this moment, because I think I ought to look at one or two cases before I come to a decision upon it; but, looking at the facts as far as they relate to these gentlemen, they stand thus:—Being such solicitors as I have mentioned, at the time when the first transaction took place, a large debt was due to them from Mr. Baxter. The sum which was raised, was received by them for him, carried to the general account between them, and applied therefore in immediate liquidation of the debt which was due to them from Mr. Baxter. So that there can scarcely be a doubt, that they had an immediate advantage from the completion of this transaction; but then it is said, that they got this advantage, by improperly inducing their client the trustee, knowingly to commit a breach of trust. Is that made out? Did they knowingly induce him to commit a breach of trust? They did not apply to him to have this done; on the contrary, he being desirous to effect this object—to change the security so as to procure a higher rate of interest, applied to them, in order that they might assist **[562]** him in finding a fit security for the purpose, and they, being applied to by him, did, in compliance with his request, look out for a security. Unfortunately they found that security from another client, and therefore got involved in that perplexity, which all solicitors get entangled in, when they are acting for persons who may have opposite interests. A gentleman of the name of Dimond seems undoubtedly to have been consulted for the interest of some of this family. In what capacity he was consulted, or what advice he gave, does not very clearly appear to me. It does appear by the whole of the transactions, that Messrs. Blunt, Roy & Blunt were acting as the solicitors of Thomas B. Fyler, by the preparation of the deeds, by the deeds being in their possession afterwards, and so on. The trust money, which was properly invested, was sold out, Mr. Roy being one of the persons named in the power of attorney for its sale; this fact has not been dwelt upon, but still it is in some respects an important circumstance to take notice of. It appears also that they received the £6000 for Mr. Baxter; Baxter was giving security which turned out to be ample, in exchange for this money, and the trustees, receiving ample security, pay the money to Mr. Roy as the agent, and on the account of Baxter. When the trustees got the security, they made it subject to the trust, and the money which was paid over could scarcely then be considered as trust money; it was intended to be given to Baxter for his own use, and was given to him by the hands of Blunt, Roy & Blunt. I do not mean to state finally my opinion upon it, but if this be the state of the transaction, can the case be considered exactly like that of Wilson and Moore, where the agent of the trustee had standing in the name of the trustee certain sums of money, which he afterwards, pursuant indeed to the order of the trustees, applied to a purpose contrary **[563]** to the trust? Was this money, at the moment it was placed in the hands of Blunt, Roy & Blunt, to be considered as trust money? Must they be considered as so involved with their client, the trustee, that the exchange of the security for the money cannot be considered as a complete substitution of one for the other, but as still continuing to retain its character of trust money? I apprehend really that the whole case depends on this; because it must be admitted that this was the trans-

action by which all the future loss was occasioned. If this money had been allowed to remain in its original state of investment, no loss could have afterwards taken place, by the diminution of the value of the house in Upper Grosvenor Street; but it was that transaction which led to all the rest. The Plaintiffs in this cause are not content to take up the transaction at the time when the trust money stood in that sufficient and secure investment, partly in stock and partly on the mortgage upon an estate of sufficient value; but professing themselves to be most exceedingly reluctant to do anything by which they may charge Mr. James C. Fyler their benefactor; say, in substance, we would rather attack him, however ungraciously, than leave Messrs. Blunt, Roy & Blunt unassailed. If they have a right to charge Mr. James C. Fyler, of course they must have the benefit of it; and whatever one may think of the feelings by which persons are actuated in such a case, there is an undoubted necessity to give effect to any rightful claim which they make. Cases which are very painful are not unfrequent in this Court; we find a married woman throwing herself at the feet of the trustee, *begging and entreating* him to advance a sum of money out of the trust fund to save her husband and her family from utter and entire ruin, and making out a most plausible case for that purpose; his compassionate feelings are worked upon; he raises and ad-**[564]**-vances the money; the object for which it was given entirely fails; the husband becomes bankrupt; and in a few months afterwards the very same woman who induced the trustee to do this, files a bill in a Court of Equity to compel him to make good that loss to the trust. These are cases which happen; they shock everybody's feelings at the time, but it is necessary that relief should be given in such cases: for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust would ever be preserved. The hardship, therefore, of individual cases must not be taken into consideration, and if these parties think fit to insist on their strict rights, they are entitled to have them.

I will look into the authorities which have been cited, and mention this case again; but this I must say, that if I should hold that Blunt, Roy & Blunt have made themselves liable, they are entitled, just as much as any other party, to the benefit of an inquiry, whether this was done with the consent of the *cestui que trusts*.

March 1. THE MASTER OF THE ROLLS. In this bill it is alleged, that Messrs. Blunt, Roy & Blunt, the solicitors of Thomas Bilcliffe Fyler, and also of Samuel Baxter, being creditors of Mr. Baxter to a large amount, and being connected with him in his building speculations, or involved by his embarrassments, and liable for the payment of debts which he owed to other persons, did, for the purpose of procuring payment of the debt due to themselves, and relieving themselves from their liabilities to other persons for Baxter, knowingly prevailed upon Thomas Bilcliffe Fyler, who was a trustee for the Plaintiffs, to violate his trust, and lend £6000 trust money to Baxter, in order that they, as Baxter's agents, **[565]** might receive the amount, and apply the same for their own benefit, in satisfaction of the debts due to themselves, and for which they were liable to other persons. And it is charged, that this loan and the subsequent dealings with the money were not only breaches of trust to which Blunt, Roy & Blunt were parties, but were direct frauds by them against the persons entitled to the trust money. If the facts were, as alleged, I conceive that the Plaintiffs would be entitled to the relief which they pray; but it appears to me, that in the commencement of the transaction, Blunt, Roy & Blunt had no knowledge of the trusts, or of the power of the trustees, and that although they were the solicitors of Thomas Bilcliffe Fyler the trustee, and at his request suggested the proposed security, yet that they neither advised him as to his powers under the trust deed, nor suggested to him the propriety or expediency of the loan; and that the proposed security was suggested by them only in consequence of Thomas Bilcliffe Fyler's application to them. In the progress of the treaty, Blunt, Roy & Blunt became informed that the money intended to be lent was trust money, in which infants were interested (letter of 18th September 1825), and it appears that Mr. Dimond, or the firm of Baker & Dimond, was in some manner employed for the trustees, and *cestuis que trusts*, or some of them. Mr. Roy, in the letter of the 19th October 1825, which was read in evidence, after representing the wants of Baxter, says, "Your surveyor has reported on the value, and we have explained to Mr. Dimond the exact nature of the security, which is simply a lease from Lord Grosvenor; any other circumstances attending it are particularly the subjects of consideration for you and Mr. Dimond;

but you should decide one way or other, as it is a serious inconvenience to Mr. Baxter **[566]** that the business should continue open." It further appears by the letter of the 20th October that the power of attorney, under which it was intended to transfer the stock, was with Mr. Dimond; and from the whole transaction it must, I think, be collected that the trustee did not rely on Blunt, Roy & Blunt alone. The loan was proposed by the trustee; on his application the particular security was proposed by Blunt, Roy & Blunt; the title was explained to Mr. Dimond; the value was ascertained by a surveyor employed by Mr. Fyler himself; Blunt, Roy & Blunt informed Mr. Fyler that other circumstances attending the transaction were particularly subjects of consideration for himself and Mr. Dimond; and the drafts of the deed and bond, though prepared by Blunt, Roy & Blunt, were sent by them to Baker & Dimond for their perusal and approbation, on the behalf (as it is expressly stated in a part of the answer of Blunt, Roy & Blunt which has been read against them as evidence) of Margaret Fyler and the trustees; and it seems to have been by the advice of Mr. Brodie, obtained by Messrs. Baker & Dimond, that a guarantee was demanded for payment of the ground rent of the house intended to be mortgaged, and of the interest of the mortgage money so long as the house should continue untenanted and unsold. The required guarantee was given by Blunt, Roy & Blunt, and the transaction being completed on the 29th of October 1825, Blunt, Roy & Blunt kept the securities including their own guarantee in their possession for the trustees.

To some extent, therefore, though not to the extent and in the manner alleged, Blunt, Roy & Blunt, notwithstanding the employment of Dimond, or Baker & Dimond were acting as solicitors for the trustees. They were at the same time creditors of Baxter to the amount **[567]** of nearly £3000, they personally gave the guarantee which was required for completing the security; they received the money and carried it to the credit of Baxter's account with them; and at a subsequent period the account between themselves and Baxter was in favour of Baxter.

But the allegations in the bill that Blunt, Roy & Blunt were connected with Baxter in his building speculations and embarrassments, and that they were liable for debts owing by Baxter to other persons, are wholly unsupported by evidence; and although it appears to me probable that before the transaction was concluded, Blunt, Roy & Blunt had the means of knowing, and possibly did know, that the leasehold security was not authorised by the trust, yet the fact is not proved to have been so, and they do not appear to have advised the trustee on the subject, and they had reason to think that in that matter he acted either on his own opinion or on other advice.

There can be no doubt, but that the transaction on the part of the Fylers, though erroneous, was *bonâ fide* intended to be beneficial to Mrs. Fyler, and not prejudicial to her children, but being unauthorised and a subsequent loss (which could not have occurred but for the first deviation from the trust) having happened, the principals may be liable. The transaction was conducted by Blunt, Roy & Blunt, and the charge against them is principally supported by inferences deduced from her interest, and leading, it is said, to the conclusion that they prevailed on the trustee, or being his solicitors permitted him to commit a breach of trust for their benefit, under semblance of the transaction being a loan to Baxter.

But a charge of this nature should be manifest from the transaction itself, and should be distinctly proved; **[568]** their knowledge of the limited powers of the trustees is not proved, and the facts established do not warrant the inferences drawn from them. The security was of ample value, no mere semblance, but a real and valuable security. Baxter, or Blunt, Roy & Blunt, by means of such security could have had no difficulty in procuring the loan elsewhere; the security in the hands of the trustees afforded them the means of recovering the money; and the facts admitted as to the state of the account between Blunt, Roy & Blunt and Baxter, so far from necessarily leading to the conclusion desired by the Plaintiffs, are consistent with the supposition, that the whole amount of the mortgage money was applied in payments to other persons pursuant to the orders of Baxter. How the case really stood does not appear, but the Plaintiffs who have had the means of investigating the account of the dealings between Baxter and Blunt, Roy & Blunt, and have produced no evidence on the subject, are not entitled to presume all the material facts to be such as will support their charge.

In the transaction of 1825 the breach of trust consisted, not in the misapplication of the money given as a consideration for the mortgage, but in the acceptance of a security not authorised by the trust.

The trustees having, without authority, procured and accepted in lieu of so much stock, an unauthorised but ample security for so much money, became responsible for any future loss traceable to that first error. Upon consideration it appears to me, that solicitors who knowingly procured this to be done for their own benefit, ought to be considered as partakers in the breach of trust; but the case should be proved, and not founded on uncertain and perhaps altogether untrue inferences.

[569] Blunt Roy, & Blunt, by the position in which they placed themselves in relation to the borrower and lender of this trust money, have exposed themselves to this investigation, which I own does not appear to me to have been unreasonably instituted; but I think that the charge against them is not established; and that they are not answerable to the Plaintiffs for the breach of trust which was committed in 1825, or for the unauthorised investment of the trust money which was then made. The ample security which was taken in 1825 was, in 1827, exchanged for other security, part of which ultimately proved to be deficient, and occasioned the loss which has occurred. Blunt, Roy & Blunt were also employed in this transaction, by means of which their guarantee ceased, and this interest has again, I think not unreasonably, subjected their conduct to investigation; but in this case also, Mr. Thomas Bilcliffe Fyler took on himself the sole care and responsibility of ascertaining the value of the security; and thinking that Blunt, Roy & Blunt are not answerable for the consequences of the unauthorisd investment in 1825, and seeing nothing wherewith to charge them in the transaction of 1827 taken by himself, it does not appear to me that they are chargeable for the loss occasioned by the deterioration of the house in Upper Grosvenor Street.

Though the direct allegations of fraud against Blunt, Roy & Blunt are unfounded; yet seeing that, by involving their own personal interests in the transactions, they have rendered an investigation into their conduct not unreasonable; I must, in dismissing the bill against them, do so without costs.

As to Mrs. Fyler, an inquiry must be directed as to her concurrence.

[570] COLVILE *v.* MIDDLETON. *Dec.* 18, 19, 21, 24, 1840.

[S. C. 4 Jur. 1197.]

A testator devised his estate X. to trustees, for sale, for payment of his debts and legacies, in exoneration of his personal estate; and after reciting that he became entitled on his marriage to a sum of £7442 of which he had received £2442, and the £5000 remained due, he bequeathed £2442 to be paid out of the produce of the estate X., and the sum of £5000 when and if the same should be received and got in, but not otherwise, to A., B., C. and D. equally; and in case the £5000 should be received by him in his lifetime, he directed the same to be raised out of the estate X. The testator received the £5000. Held, that the legacy was demonstrative, and that it was a charge upon the general personal estate as well as on the estate X.

Personal estate held, upon the context of a will, not exonerated from the payment of debts and legacies; where a real estate devised for the payment thereof, in exoneration of the personal estate, proved to be insufficient.

The testator, Nathaniel Lee Acton, being possessed of several estates, distinguished by the names of the Claydon estate, the Bamford estate, and the Baylham estate, by his will dated in 1823, devised his Claydon estate to trustees to sell the same, or such part thereof, as would, *in exoneration of his personal estate*, raise money sufficient to pay the mortgages thereon, and the legacies payable under his father's will, and all interest thereon, and all his debts due on simple contract, and the several legacies and sums by his said will given and directed to be paid, not charged upon any of his said real estates; together with such costs and charges as should be necessarily incurred by his said trustees and his executors, by reason of or in any manner