

Killey's assets transferred to the new firm were sufficient to pay his liabilities. Muirhead brought action on the notes against Killey and the Osbornes. Cameron, C.J., who tried the action, gave judgment against the defendant Killey, but dismissed the action as against the defendants the Osbornes, on the ground that they were not parties to the note sued on, and there was no direct liability to plaintiff and their liability was to defendant Killey, who did not require them to make payment. The Divisional Court reversed this judgment as to the Osbornes, on the ground that the circumstances established the relationship of trustee and cestui que trust, following *Gregory v. Williams* and *Tomlinson v. Gill*, Ambler 330.

Is the agreement to pay out of property the keynote of all these cases? Armour, J., in delivering the judgment of the Divisional Court, concludes that the agreement in *Gregory v. Williams* was not to pay out of property but to pay generally. On appeal to the Court of Appeal the Court were equally divided as to the result, and the appeal was dismissed: *Henderson v. Killey*, 17 A.R. 456. The majority of the Court however held that no trust was established by the agreement in question of the new firm in favour of Muirhead, and that Henderson was not entitled to enforce the payment of the notes against the new firm, but the Chief Justice while agreeing in this, held that the evidence established an independent agreement between the new firm and the plaintiff which could be enforced, and consequently there was an equal division of the Court in the result.

The majority of the judges did not think *Gregory v. Williams* governs this case. MacLennan, J.A. says, (p. 478): "It remains out of respect to the learned judges whose judgment is in review, to explain why I think the case of *Gregory v. Williams* does not govern the present. The learned judges consider that in *Gregory v. Williams* the agreement was not to pay out of property but to pay generally. As to this I respectfully differ from the learned judges. I think that the letters written by Williams when read in connection with the bill of sale make it apparent that the agreement really was to pay out of property. Goods had been assigned to him to sell and apply the proceeds to pay what was due to him, and to pay the surplus to Parker the debtor. These goods were not his, they were the goods of the debtor. Williams held them upon trust, and then he writes saying he will pay another debt of