Under the said charity or gift of 25th September 1647 the incorporation was empowered to apply its funds for the help of decayed freeman of the craft and their wives and children, and any other necessary uses belonging to the craft. The last occasion on which relief was afforded to a member was about fifteen or sixteen years ago, when one who had been in bad health and off work received temporary assistance. The relief afforded to such widows of members as were in poor circumstances has been a payment of about £2 each per annum. For a time there were generally four or five widows in receipt of that relief, but latterly the number has fallen to two. After these payments, as well as taxes, repairs, and other expenses have been met, the funds have been regularly accumulated in bank." The resolutions as to the future application of the funds of the incorporation which the petitioner stated that he had formed, and to which he desired the sanction of the Court, were that the funds should be applied by himself, and any other member of the incorporation who might be found to be alive or who might be assumed into it, along with the Provost, Dean of Guild, and Bailies of Haddington, in (1) payment of taxes due in respect of, and necessary repairs on, the property of the incorporation, and other expenses; (2) the charitable purposes authorised by the charter; (3) payment of the school fees of such children attending the public schools of Haddington, of members or deceased members of the incorporation, as were deserving of assistance; (4) promotion of secondary education in Haddington by means of bursaries, payment of salaries to teachers, or payment to provide school appliances for which assessment could not be levied on the burgh by Act of Parliament. The property of the incorporation consisted of heritable subjects of the value of £400, and a sum of £170 in bank.

The Court remitted the petition to Mr J. Balfour Paul, advocate, Register of Friendly Societies, who generally approved of the objects of the petition, but suggested certain amendments in the proposed scheme, to which the petitioner intimated his assent. The nature of these alterations will be seen from the interlocutor of Court printed below. The petitioner, on the suggestion of the Court, embodied the amendments proposed by the reporter in an amended series of resolutions which he submitted to the Court.

Counsel for him referred to the following similar petitions which had been before the Court:—*Guildry Incorporation of Arbroath*, July 5, 1856, 18 D. 1207; *Incorporation of Wrights of Leith*, June 4, 1856, 18 D. 981; *Skinners of Glasgow*, Dec. 4, 1857, 20 D. 211; also *Incorporation of Tailors of Glasgow*, before the First Division in July 1880.

The Court pronounced this interlocutor:—

"Approve of said bye-laws, regulations, or resolutions as hereby amended, and which bye-laws, regulations, or resolutions as thus amended are as follows—viz. 'That the income of the incorporation ought to be applied by the incorporation, or, when the members thereof resident within the parliamentary bounds of the burgh of Haddington shall be under twelve in number, then by such members, if any, along with the Provost, Bailies, Dean of Guild, and Treasurer of the royal burgh of Haddington for the time being; and in case it shall happen at any time that there is no member of the incorporation resident within the said parliamentary boundary, then, and so long as this state of things shall last, by the said Provost, Bailies, Dean of Guild, and Treasurer, for the following purposes, in their order—(1) in payment of taxes, repairs, and other necessary burdens and expenses; (2) to meet the charitable purposes authorised by the gift or charter granted by the Magistrates and Town Council of the burgh of Haddington on 25th September 1647, of new erecting and creating the incorporation—that is to say, to make allowances to members in destitute circumstances, and the widows and children of deceased members who have been left or at the time are in destitute circumstances, subject, however, to the declaration that the allowance to each widow may be increased to the extent of £2 per annum beyond what has formerly been allowed, provided this increase shall not diminish the fund requisite for the allowance to be paid to destitute members; (3) to pay or assist in paying the school fees of such children or grandchildren of deceased members of the incorporation as may stand in need of such assistance, the expediency of such payment in particular cases being left to the determination of those at the time in the administration of the funds of the incorporation; (4) for the promotion of secondary education in the burgh of Haddington by means of a bursary or bursaries to children attending the public secondary school of the royal burgh of Haddington, or towards payment of the salaries of the teachers thereof, or towards payment of the expense of appliances in connection with the school or schools, if any, for which assessment cannot be levied on the burgh by Act of Parliament,' and decern."

Counsel for Petitioner—A. J. Young. Agent—J. Smith Clark, S.S.C.

Tuesday, June 7.

SECOND DIVISION.

[Lord Lee, Ordinary.

RONALDSON AND OTHERS v. DRUMMOND & REID.

Reparation—Agent and Client—Loan.

The agent of a trust (who was himself a trustee), in which the trustees were empowered to invest funds on heritable securities, advised the loan of a sum of money out of the trust-funds to another client of his own on a bond and disposition in security over certain heritable subjects. The debtor having become bankrupt, and the trustees having failed to recover the sum lent by a sale of the security, they raised action against the agent to have him ordained to pay the sum lent on receiving an assignation to the security in question, on the grounds (1) that the security was leasehold and not feu, as was intended by

the trustees; (2) that the security was insufficient; (3) that the loan and consequent loss was ascribable to want of reasonable care and skill on the part of the agent. The Court being of opinion that the pursuers' allegations were established, gave decree in terms of the summons.

On 18th June 1873 George Gray, coalmaster, Leavenseat, by Whitburn, died leaving a trust-disposition and settlement and relative codicils. Under the said trust-deed the trustees, the Rev. James Ronaldson and others, were directed, after payment of the truster's debts, to pay the income of the estate to his sisters, and on their death to divide the fee or *corpus* of the estate among the appointed fiars. The trustees were left with a discretion as to the investment of the funds, but were empowered to invest on heritable securities. Mr William Drummond, one of the trustees, was appointed to be law-agent and factor for the trust, with the usual remuneration, power having been conferred on the trustees by the truster to make such a nomination, and thereafter the business of the trust was transacted by the firm of Drummond & Reid, W.S., Edinburgh, of which Mr Drummond became a partner in June 1874. In 1876, money of the trust falling to be invested, a sum of £6000 was lent to George Simpson, coalmaster, Benhar, on a bond and disposition in security over two properties in the west of Fifeshire. This bond was only a second security, but this was known to the trustees. At this date Messrs Drummond & Reid were acting as law-agents for Mr Simpson as well as for the trustees.

In May 1877 Messrs Drummond & Reid, acting on behalf of Mr Simpson, applied to the trustees for a loan to Mr Simpson of the sum of £3500, offering as security the reversion of his lands and estate of Kinglassie, Fifeshire. This proposal was rejected by them on the ground of the insufficiency of the security offered, there being prior securities over the estate to the extent of £25,500. Subsequently, however, another application was intimated to them, the security of the dwelling-house of Viewfield Villa, and offices and grounds, at Harthill, Lanark, which Mr Simpson personally occupied, being offered in addition to the lands and estate of Kinglassie. This application was agreed to by the trustees by minute of meeting dated 10th May 1877, which was in the following terms:—"Recorded that the bond and disposition in security by Mr Turnbull to the trust for £3500 was to be paid at Whitsunday, as Mr Turnbull had sold the subjects, and resolve to lend the same on bond and disposition in security by Mr Simpson over lands at Kinglassie, and dwelling-house at Harthill, there being a prior charge on the former, and the loan forming the only loan on the latter." At the said term of Whitsunday 1877 the trust-money was paid over by Messrs Drummond & Reid to Mr Simpson, and in exchange was given a bond and disposition in security, subscribed 4th June 1877, and recorded on the 5th June 1877, over the said lands and villa and other subjects for the said sum. In it George Simpson granted him to have instantly borrowed and received from the trustees the sum of £3500, which had been paid to him on the previous 15th May, and which sum he bound himself and his heirs and executors to repay, and to pay interest thereon at five per cent. It further bore that "in security of the personal obligation written in the said bond and disposition in security, the said George Simpson, in addition to the said lands and estate of Kinglassie, assigned to and in favour of the trustees foresaid, and their foresaids, heritably but redeemably as thereinafter mentioned, yet irredeemably in the event of a sale by virtue thereof—(*First*) A lease or tack of All and Whole that lot or piece of ground, part of the lands and barony of Harthill, lying in the parish of Shotts and shire of Lanark, consisting of 2 roods and 27 poles imperial measure or thereby, bounded as therein mentioned, and (*Second*) A lease or tack of All and Whole that lot or piece of ground, part of the lands and barony of Harthill, lying in the parish of Shotts and shire of Lanark, consisting of 3 roods and 38 poles imperial measure or thereby, bounded as therein mentioned; excepting always from the subjects contained in the said leases a portion thereof extending to 3 roods and 38 poles or thereby, particularly described in an assignation by the said George Simpson in favour of the said James Watt, which is dated the 21st day of February, and recorded in the said General Register of Sasines the 5th day of March 1867."

This deed did not convey Viewfield villa, offices and grounds.

George Simpson having become insolvent, his estates were sequestrated, and the interest on the bond and disposition in security which fell due at Martinmas remained unpaid to the trustees, who had received no interest since Whitsunday 1878. Messrs Drummond & Reid accordingly, as their agents, raised an action of poinding the ground against George Simpson; having obtained decree they raised letters of poinding and poinded effects of the bankrupt at the villa of Harthill amounting to £1200 or upwards. This, however, was inept, owing to the subjects in which it was executed not being covered by the bond, and for other causes, and the trustees were unable to realise the lands and estate of Kinglassie, which were twice unsuccessfully exposed to public roup and sale at the upset prices of £27,000 and £25,000. Thereafter, on the 29th April 1879, Messrs Drummond & Reid ceased to act as agents to the trust, and the trustees, having ascertained certain particulars connected with the loan in question, intimated to them that they held them liable for the sum of £3500 as well as the expenses connected with the action of poinding the ground. These demands were resisted, and the trustees then raised the present action against them, praying the Court to have them ordained to pay (1st) the sum of £3500 sterling, with interest thereon at the rate of £5 sterling per centum per annum from the 15th day of May 1878 until payment; (2d) of the sum of £10, 16s. 10d. sterling as the expenses of the poinding, with interest thereon at the rate of £5 sterling per centum per annum from the 5th day of February 1879 till payment.

The pursuers averred on record that "in agreeing to grant the foresaid loan of £3500 they relied on the defenders seeing that the money so lent was secured over the absolute property not only of Kinglassie but of the said villa, offices, and grounds at Harthill. They further relied on the defenders seeing that the security given by

Mr Simpson was sufficient and ample. They trusted to the defenders' professional skill and capacity to examine and ascertain that the titles of the said properties were valid and correct; and they relied upon them obtaining in exchange for the said loan of £3500 a valid bond and disposition in security embracing the property of the said lands and estate and villa and offices and grounds. In place, however, of so fulfilling their duty to the pursuers, the pursuers had now ascertained that the said defenders violated their instructions, and (by themselves or their clerks for whom they are responsible) acted with gross negligence and want of professional skill and capacity in the following or one or more of the following respects—(1) They failed to observe, or at least to inform the pursuers, that the said villa, offices, and ground at Harthill did not consist of heritable estate held in fee-simple by the said George Simpson, as was relied on by the pursuers, but were only leasehold property—the portion first above mentioned being held by Mr Simpson for ninety-nine years from 1859 under said first lease, and the portion second above described for ninety-nine years from 1864 under the lease second above mentioned, and the deed they took in exchange for the said loan of £3500, so far as it affected the said villa, offices, and grounds at all, conveyed only right to leases; (2) although the *solum* of the ground on which the said villa, offices, and grounds at Harthill have been erected and laid out extend to nearly 4 imperial acres, the said bond and disposition in security only conveys to the pursuers about 2 roods and 27 poles. Nearly the half of the said villa, and the whole of the offices, consisting of coach-house, stables, washing-house, and others, and large portions of the grounds, are entirely omitted from the security in favour of the pursuers; (3) They took as security from Mr Simpson what excepting through gross negligence or want of skill they could not but have known to be worthless or at least wholly inadequate for the protection and safety of the pursuers and the trust-estate under their management."

They pleaded—"(1) The defenders having been authorised by the pursuers to make payment of the said sum of £3500 of trust-funds to Mr Simpson only in exchange for a bond and disposition in security conveying to them (in security), first, the lands of Kinglassie, and second, the villa, grounds, and others at Harthill, and having made payment to Mr Simpson without getting such a deed, are bound to make repayment of the said sum to the pursuers, with interest. (2) The defenders having as agents for the pursuers been instructed by them to procure for a loan of £3500 ordinary heritable security over the said lands, villa, and others, and having failed to do so through gross disregard of instructions and negligence or want of skill on the part of themselves or their clerks, they are bound to restore the pursuers to the position in which they would have been had there been no such disregard of instructions or neglect of duty or want of skill. (3) The defenders having, while acting as the pursuers' agents, been guilty of gross negligence and want of skill in taking for the said loan of £3500 of trust-funds, security which by the exercise of ordinary care they would have known to be worthless, or at least grossly inadequate, they are liable to the pursuers in the loss, injury, and damage thence arising to the latter. (4) The pursuers not having given the defenders authority, and *separatim* not having the power, to invest on the security of leases, are in the circumstances entitled to decree as concluded for."

The defenders replied, with regard to the extent of the ground embraced in the title, that a small part of Mr Simpson's buildings had been erected on ground outside his boundary, of which ground he had verbally arranged for a long lease, but this fact was not known to the defenders. That as soon as it was ascertained, arrangements were made for bringing within the title the whole subjects occupied by Mr Simpson, and for Mr Simpson's trustee in bankruptcy granting to the pursuers a supplementary conveyance in security. This was communicated to the pursuers' agent, but the pursuers took no advantage of it and raised the present action. Further, they averred that the estate of Kinglassie was of the value of £34,500, and pleaded the stagnation in the market and great mercantile depression at the periods of exposure to sale.

They pleaded—"(2) The averments of the pursuers being unfounded in fact, and in particular the defenders having been guilty of no negligence in the premises, the defenders are entitled to absolvitor. (3) *Separatim*, the defenders are entitled to absolvitor, in respect the pursuers have suffered no damage by or through any act or default of the defenders."

After the record was closed a minute of amendment was put into process from which it appeared that on the 22d October 1879 the defenders lodged in process a supplementary assignation or disposition and security by Mr Adam Gillies Smith, the trustee on George Simpson's sequestrated estate, in favour of the pursuers, together with a copy of a lease between D. Montgomerie Bell and Adam Gillies Smith and George Simpson, dated 7th, 8th, and 13th October 1879. Its object was declared to be to place the pursuers in the same position as if the whole subjects thereby conveyed had been *ab initio* contained in the said bond of 4th June 1877. By this the bond and disposition in security of 4th June 1877 was remedied to the following effects:—The tack of the whole of the said 3 roods and 38 poles, with the exception of 34 poles assigned to neighbouring lessees, were assigned to the pursuers, their original security having excepted the whole of the said 3 roods 38 poles. The tack of the piece of ground containing 2 acres 3 roods 1 pole and 24 square yards, on which the villa was partially built, and which had been let by Mr Montgomerie Bell, as commissioner for J. C. Craigie Halkett Inglis, to Adam Gillies Smith for ninety-nine years from Whitsunday 1874 (which had been entirely omitted from the original security), was now assigned to the pursuers. The piece of ground consisting of 1 rood 23 poles and 3 square yards which had been acquired from a Dr Clark by Mr Simpson, which formed part of the grounds and garden of the villa, and which had also been entirely omitted from the original bond, was disponed to the pursuers in security of their loan. By a joint-minute for the parties, to which the Lord Ordinary (Young) interponed authority, it was agreed that without prejudice to their rights and

pleas *hinc inde*, the whole subjects at Harthill, and the furniture and other effects in Viewfield Villa and offices there, should be sold by the pursuers at public auction, the nett proceeds thereof being to be applied, firstly, towards payment of the pursuers' debt. In accordance with this agreement, Harthill Villa was sold for £2110, and as the furniture in the house under the poinding of the ground brought £1084, 18s., the difference between these two sums taken together and the £3500 with interest and expenses connected with the realisation came to be the pecuniary value of the controversy maintained in this litigation.

The import of the proof will sufficiently appear from the interlocutor of the Lord Ordinary and the Judges' opinions.

The Lord Ordinary (LEE) found "that on or about 10th May 1877 the defenders, as law-agents for the pursuers, as trustees under the trust-disposition and settlement, were authorised and employed by the pursuers to lend the sum of £3500 belonging to said trust to Mr George Simpson, coalmaster, Benhar, on the security of his lands at Kinglassie in the county of Fife, and dwelling-house at Harthill in the county of Lanark, known as Viewfield Villa; that in giving instructions for said loan the pursuers knew that the defenders were acting also as law-agents for Mr Simpson, were aware that there was a prior charge on the estate of Kinglassie, and were informed of the fact that the loan would form the only loan on the dwelling-house at Harthill, and that Mr Simpson had expended upwards of £10,000 on that property; that the borrower Mr Simpson was a person known to several of the trustees, and then in good credit; that the subjects at Kinglassie consisted of an estate recently purchased by him for £34,500, yielding a nett agricultural rental of over £1000 per annum, without being over-rented, and which had been accepted as affording first-class heritable security to the amount of £25,500; and the subjects at Harthill consisted of a dwelling-house and offices, with garden, greenhouse, and vinery, erected at an expense of about £12,000, upon ground extending to between three and four acres, held partly under the registered lease for the period of 99 years from 1859, partly under the registered lease for the period of 99 years from 1864, partly upon an arrangement with the proprietor to grant another 99 years' lease followed by possession, and to a small extent as a feu from the estate of Polkemmet, in terms of the disposition; that it is not proved that the defenders represented to the pursuers that the subjects at Harthill were the property of Mr Simpson by virtue of a feudal title, or that they gave the pursuers any ground for believing that the title thereto was other than that which was actually possessed, and which has been made good to the pursuers by the supplementary disposition and assignation; that the defenders having obtained the completion of a title to the dwelling-house, &c., at Harthill, in the persons of the pursuers, as trustees foresaid, in terms of said supplementary disposition and assignation and writs therein referred to, and having offered before the action was raised to obtain such a title, cannot be held to have failed to obtain security for said loan in terms of their instructions; that it is not proved that the said security was insufficient, or that the pursuers, as trustees foresaid, have suffered loss and damage through negligence or want of skill on the part of the defenders in making the said loan or in taking security therefor: Therefore sustains the defences, assoilzies the defenders from the conclusions of the action, and decerns."

The pursuers reclaimed, and in support of their pleas-in-law quoted the cases of *Haldane* v. *Donaldson*, 14 Sh. 610, *affirmed*, 1 Rob. 266; *Campbell* v. *Clason*, Dec. 20, 1838, 1 D. 270; *Graham* v. *Stewart*, March 4, 1831, 9 S. 543; *Stuart* v. *Miller*, Dec. 12, 1840, 3 D. 255; *Sim* v. *Clark*, Dec. 2, 1831, 10 S. 85.

At advising—

LORD CRAIGHILL—The reclaimers against the interlocutor now submitted to review are the testamentary trustees of the late George Gray, coalmaster, Leavenseat, who died in 1873 leaving a settlement by which the reclaimers were appointed trustees and executors on the trusts specified in the deed. These, after the payment of debts, were the payment of the income of the estate to the truster's sisters, and upon their death the division of the fee or *corpus* of the estate among the appointed fiars. The trustees were left with a discretion as to the investment of the funds; but for their guidance so far the truster empowered them to invest on heritable securities. The defender Mr Drummond was one of these trustees, and he, as did the reclaimers, accepted and has acted under the appointment. But though a trustee, he was named agent of the trust—power to make this nomination having been conferred on the trustees by the truster, and Mr Drummond's right to remuneration for his services as agent being declared to be the same as if he were not a trustee. The result has been that from the commencement of the trust until April 1879, Mr Drummond and the firm of which he was a partner acted as agents for the trust.

One of the most important duties of trustees and their agents is the investment of the moneys of the trust. The first occasion on which in the administration of Mr Gray's trust this duty had to be performed, so far as appears in these proceedings, occurred at Martinmas 1876, when £6000 was lent to George Simpson, coalmaster, Benhar, on a bond and disposition in security over two properties in the west of Fife. This bond was not a first, but only a second security. This was known to the trustees at the time the proposal for the loan was accepted, but the other circumstances submitted to their consideration have not been stated. No reflection, however, upon Mr Drummond or his firm is made by the reclaimers in connection with this transaction.

In May 1877—that is to say, six months after the previous loan—a proposal on the part of Mr Simpson for another loan was made through Mr Drummond to the reclaimers. The reason why he was the intermediary is explained by the fact that not only was Mr Drummond the agent of trust, but he was the agent also of Mr Simpson. This obviously rendered his position one of delicacy, perhaps one of difficulty, but in this no complaint is made by the defenders, as they knew that Mr Drummond was also agent for Mr Simpson.

The proposal which was submitted to the reclaimers in May 1877 was for a loan of £3500; and the minute of the trust in which the consent of the trustees to lend this sum is recorded bears that it was resolved "to lend £3500 of trust moneys about to come into the hands of the trustees on bond and disposition in security by Mr Simpson over lands at Kinglassie and dwelling-house at Harthill, there being a prior charge on the former, and the loan forming the only loan on the latter."

The character of this investment, and the circumstances in which it was authorised, will be considered in the sequel. Meantime it is only necessary to mention that the money passed from the trust to the credit of Mr Simpson; and that what was given in exchange was a deed by which, in addition to the personal obligation, which as usual was the first thing granted, there were disponed heritably but redeemably, under burden of two previous bonds for £25,500, the lands of Kinglassie in the county of Fife, and there were assigned the two leases of ground at Harthill in the county of Lanark, the one portion extending to 2 roods and 27 poles, and the other to 3 roods and 38 poles, but excepting 3 roods and 38 poles said to be described in an assignation by Mr Simpson to a person called James Watt. The pieces of ground so conveyed were supposed by Messrs Drummond & Reid to be the whole of the villa ground of Harthill. The bond thus given in security was afterwards registered in the Register of Sasines, and the security, such as it was, thereby rendered real. Interest on this loan was paid at Martinmas 1877 and Whitsunday 1878, but not at the rate specified in the bond and disposition and assignation in security. What was stipulated there to be paid was 5 per cent., but 4 per cent. was all that was paid, it having, as is alleged by Messrs Drummond & Reid in answer to the minute of amendment, been agreed between Mr Simpson and Mr Gray's trustees when the loan was made, that until otherwise arranged interest should be paid only at 4 per cent. This agreement, it is added, was never altered. All this is of importance, because it shows how the investment was regarded by the trustees. Had 5 per cent. been the rate to be exacted, the inference would have been that they must have known the security was not first-class, as 5 per cent. on a first-class security could not have been obtained—4 per cent. having at the time been the full market rate on such investments.

At Martinmas 1878 no interest was paid, nor has any been paid since; Mr Simpson indeed became bankrupt in 1879, and thenceforward all that could be looked to either for interest or principal was the subjects conveyed by the disposition and assignation in security.

In existing circumstances it was thought better that Messrs Drummond & Reid should not continue as the agents, and accordingly in April 1879 the agency was transferred to the present agent Mr Hill. The particulars connected with the loan in question subsequently became known to the reclaimers, and therefore extrajudicial demands that they should be relieved of this loan by Messrs Drummond & Reid having been resisted, the present action was raised against them.

The summons concluded that the defenders should be decerned to pay the £3500 in question, receiving on so doing an assignation to the security granted to the trustees, but as by agreement of parties Harthill Villa has been sold for £2110, and as the furniture in the house, under a poinding of the ground, has brought in £1084, 18s., the difference between these two sums and the £3500 with interest, and the expenses connected with the realisation, has come to be the pecuniary value of the controversy maintained in this litigation. This is set forth by the pursuers in their minute of amendment.

The grounds on which the defenders' liability is maintained are—first, that the security on which the trust money was lent was of a different kind and class from that which was brought before the trustees by the defenders; second, that the security was insufficient, and ought not to have been offered by the defenders for the acceptance of the trustees; and third, that the giving of the loan and the consequent loss are to be ascribed to want of reasonable care and skill on the part of the defenders, who neither ascertained for themselves nor communicated to the trustees all that ought to have been ascertained and communicated. The defence, again, is to be found in the second of the defenders' pleas, in which it is set forth that "the averments of the pursuer being unfounded in fact, and, in particular, the defenders having been guilty of no negligence in the premises, they are entitled to absolvitor."

The issues raised by these grounds of action, and this plea in defence, are those to be tried and decided, and they are truly issues of fact to be disposed of upon the proof before the Court. For it can scarcely be said that the parties are in controversy as to the law of the case. If the security was different in kind and class from that for which the pursuers gave authority, if it was insufficient, and if there was want of reasonable care and skill on the part of the defenders in their conduct of the transaction, it could not be, and it has not been, contended that sufficient ground for the defenders' liability has not been established.

On a consideration of the facts which appear to me to be proved, my opinion is that the pursuers ought to have judgment. I acquit the defenders of all intention to deceive, and of any conscious failure to perform their duty to the pursuers. Moral impropriety, indeed, has not been charged against them by the pursuers; but good faith on their part may co-exist with omission or commission of something involving amenability for consequences such as those of which the pursuers seek to be relieved. On this point reference may be made to the case of *Donaldson* v. *Haldane*, and the case of *Forsyth* referred to in the note of the Lord Ordinary. That there was in many things connected with this loan transaction want of care in inquiry, and in doing what was required, is too clear to be gainsaid. For example the trust money was put to the credit of Simpson, on the Whitsunday term-day of 1877, though the deed by which this money was to be secured was not signed until the 4th of June following. Again, only a part of the villa ground of Harthill, all of which was to be covered by the security, was embraced in the security conveyance, and one of the lots purporting to be conveyed was unwittingly taken out of this conveyance by a clause in which this

quantity of ground was excepted. Nay more, Simpson the borrower had at the time a completed title to only a portion of this ground; and last of all, even one of the deeds subsequently granted to rectify previous deficiencies or errors in the title, being the disposition to the bit of ground unexpectedly discovered to be held in feu, is inaccurate, because the subject conveyed to the reclaimers is so described as to convey minerals, while in the deed by Clark to Simpson and his trustee, which is their title to convey, the minerals are excepted. It is not, however, upon these errors and oversights that my opinion in this case is rested, these in the end having been substantially remedied. But I by no means suggest that they might not afford ground for a judgment in favour of the reclaimer. There are other oversights and mistakes not remedied, by which, as I think, such a judgment is necessitated. The first duty of an agent of trustees when an offer by an intending borrower is under consideration, is to give them full information on all particulars, and especially to advise them whether the transaction is one into which they ought to enter, and this duty is shown by the proof—parole and documentary—as I read it, to have been throughout neglected by the defenders. Mr Drummond, on the part of Mr Simpson, first offered a second bond over Kinglassie as the security for the £3500 wanted. In other words, he as good as recommended the proposal to the trustees; for the agent of a trust who introduces a proposal for an investment, saying nothing against it, must be taken to represent it as satisfactory. But this offer was rejected by the trustees in consequence of the doubts of Mr Waldie. And what was the next? It was the second bond over Kinglassie previously offered and a first bond over Harthill. Was this a suitable investment? Kinglassie no doubt had been bought in 1875 for £34,500, and there had been, subsequent to the purchase, a valuation which represented this sum to be even less than the full value of the property. But what it would bring should a sale be forced was only conjectural. Nor was this uncertainty the only objection, for the rental of the lands was no more than was required to meet the interest of the prior bonds. And what of Harthill Villa? Mr Drummond knew, only because the defender told him, that the buildings had cost over £10,000, and he put this fact before the trustees as if the cost price could safely be taken as the measure of its value. The contrary is known to every professional man, and the remarks on this subject of Judges by whom reported cases have been decided ought to have operated as a warning to the defenders.

The uncertainty as to value was not the only drawback. Simpson, who wanted the loan, was in occupation of the premises, and thus there was no rent by which value could be gauged, or to which lenders could look as a source from which interest might be derived. Mr Drummond says the trustees were satisfied with the information which was given by the mention of cost. They may have acted wisely or unwisely in not requiring a valuation, but their omission to do this did not relieve the defenders or the agents of the trust of the duty of furnishing all needful information and advice. These they did not supply. Had they said to the trustees, as they might have said, that the selling price, or, in other words, the fund which was to constitute the security, was uncertain, and at anyrate could not safely be calculated on as sufficient to cover the loan, increased as the debt might be by the accumulation of interest and the expense of realisation, the trustees on advice by the defenders to this effect never would have entered into the transaction; and this omission alone would be enough for the liability of the defenders. But there were other omissions. Mr Drummond knew that a portion, and he assumed that the whole, of the ground at Harthill was leasehold; nevertheless he left the trustees to conclude, and they were in the circumstances warranted in concluding, that the subject was a feu. That is the ordinary tenure, and if the tenure of Harthill was different the trustees were entitled to the information. They say—and there is no reason to doubt the statement—that if made aware that the subject of the proposed security was leasehold, they would not have agreed to lend the £3500 to Mr Simpson. The objection would not have been fanciful or sentimental. There is substance in it, because coming to a reasonable conclusion on the evidence of the witnesses who have been examined on this subject, Harthill is fully 20 per cent. less valuable than it would have been if a feu. Of course, had there been a valuation, this difference would have been allowed for, and so far as the mere value is concerned, this objection would in that case have been obviated; but there was no valuation, and the defenders were left without information and without advice to lay out the trust money on a subject which was 20 per cent. less valuable than it would have been had Harthill been such a subject as they took it to be, nothing to the contrary having been suggested or represented.

There still remains to be noticed another omission of the defenders to inquire and communicate what burdens in the shape of rent or feu affected Harthill. This was not inquired into, and was not made matter of communication to the trustees. Why Mr Drummond did not communicate these particulars he explains in his evidence by saying that no questions were put to him on the subject. But this is no excuse. His business and his duty were to make the trustees aware of everything material even without solicitation. Why he did not inquire is not explained. Perhaps the reason is that he assumed the rent-charge was disclosed in the two leases handed to him by Mr Simpson, which he took to be a title covering the whole ground; but these in the end proved to be only leases of comparatively small parts of the ground, and so it came to pass that the annual return to be paid for the ground, in place of being only £11 as Mr Drummond supposed, was more than £29. From all which it appears that the subject of the security was a subject of a different kind, and was of a different value, from that on which the money of the trust, as he misunderstood, was to be invested.

The defenders resist judgment on another ground. They say, that as Kinglassie remains unsold, it has not been proved that the loan transaction will in the end result in a loss to the trust. As things look at present, there seems little probability that loss will be avoided. But even if better hopes could be entertained than any wise man in the circumstances would adopt, this

consideration would not obviate the ground on which, as I think, the pursuers are entitled to judgment. They were led into a transaction into which they would not have entered if the duties incumbent on the defenders had been performed, and the defender's neglect to fulfil these duties entitles the pursuers to be relieved of the transaction, the defenders obtaining by the assignation they are to receive any benefit which may in the end be derived from the second bond held over Kinglassie. On this point the case of *Stewart* v. *Miller*, Dec. 12, 1840, 3 D. 255, may be consulted. I have only to say further, that in proposing that the defenders should be ordained to take over the loan on an assignation, I suggest nothing which is inconsistent in judgment with *Campbell* v. *Campbell & Clason*, Dec. 20, 1838, 1 D. 270, where the agents' failure was to discover and communicate a perpetual burden. The subject of the security was otherwise than what was represented. Therefore when the inhibition was discharged the subject of the lender's security was all that was expected. But here the subject of the security originally was, and still is, different from that on which the loan was authorised; and therefore the defenders, in my opinion, must relieve the trustees from all consequences resulting from their connection with this transaction.

Lord Young—When this case was before me in the Outer House at its earlier stage, I recommended parties to concur in having the subjects of the security sold, so that the question in dispute between them might have regard only to the loss incurred, if there should be a loss. Parties took that advice, and the subject of security being sold upon that arrangement, it has been found that loss has actually resulted, and they are agreed that in that case the liability for the same, or any part thereof, shall be determined in the present action. I think the exact amount of the loss was explained to us by the pursuers' counsel at the debate as being something under £1000, taking the principal and interest together. The question before us is, whether the defenders are liable for that loss or not?

The facts upon which the question depends are within very narrow compass indeed. They are found in terms by the Lord Ordinary in a short interlocutor. I can find no ground for taking exception to the facts as found by him, except (but it is a large exception, for it is the most material of the findings) that he finds it not proved that the said security was insufficient, or that the pursuers as trustees aforesaid have suffered loss and damage "through negligence or want of skill on the part of the defenders in making the said loan or in taking security therefor." With that exception all the other findings in point of fact are unexceptionable, and I think they exhaust the case.

Now, on the law of the case, as my brother Lord Craighill has said, there is hardly any controversy between the parties, the question being how the admitted law of the land is to be applied to the facts as they exist in this case. The Lord Ordinary, applying that law, is of opinion that the defenders are not liable, and it appears from his note that he has been influenced chiefly, if not altogether, by these two considerations. In the first place he has been influenced by the fact that the trustees had a meeting to consider the proposal for the loan in question, or the proposal which immediately preceded it—that they took it into their consideration, themselves judging of it, and in the exercise of their judgment, and not relying upon their law-agent, they agreed to it, and that with information from their law-agent of all material facts that he was bound to communicate to them, except only that one subject of the security, and as it turned out the most material one, was leasehold and not feu, which the Lord Ordinary, having regard to the nature of the property (a villa), thought was not such a material omission as to infer liability—I mean the omission on the part of the agent to inform his lending clients that it was leasehold.

The second circumstance to which the Lord Ordinary seems to have attached importance, and which therefore may be taken to have governed his judgment, appears to be, that the loss which has actually occurred was reasonably to be attributed to the recent, and since the date of the loan, fall in the value of property.

I am free to confess that I was originally not disinclined to be influenced by these considerations, but further consideration of the matter has removed that original inclination, and I am now satisfied that the Lord Ordinary has fallen into error, and that the conclusion arrived at by Lord Craighill is the right one. I think the trustees, who are testamentary trustees, and of whose number Mr Drummond, one of the partners of the defenders' firm, is one, did not so act as to take the liability upon themselves and relieve their man of business of that liability. Being testamentary trustees engaged in a duty so important as that of investing trust-funds, if they had so acted as to relieve their man of business of responsibility for the sufficiency of the security in such respects as are here in question, the result would have been that they personally would have been liable for the loss thence arising. I can find nothing in the case to suggest the idea that the trustees other than Mr Drummond have so acted as to relieve their man of business from his liability from the proper discharge of his proper duty, thereby taking personal liability upon themselves as in a question with their beneficiaries. I can hardly say that the position of Mr Drummond was, so far as my opinion goes, a delicate one. As himself one of a body of testamentary trustees, and as a man of business upon whose advice others who were not men of business—I mean professional men of business—necessarily relied, he had no delicate duty to advise them as to the investment of trust money—I mean his course was obvious, especially in advising them to lend the trust-funds to another client of his own. I suppose it is quite clear that a testamentary trustee could not lend trust money to himself. That is quite clear upon the ordinary law; and if he happens to be a man of business with clients, I think the transaction a very questionable one, upon other considerations than we have occasion to determine here, whether he could lend trust money for which he was a guardian, as in a question with beneficiaries, to a client of his own—at all events, the greatest circumspection of conduct would be required from him in such a case; and we would look at it not at all narrowly, but expecting nevertheless to be thoroughly satisfied as in a plain case that he, acting as a trustee

and the professional adviser of the other trustees, had not lent the trust-funds to a client of his own, except under circumstances and upon a security which any independent man of business would have recommended.

Now, regarding the conduct of the defenders here—for Mr Drummond was the defenders here; he was their partner acting for them in this matter—I cannot think that he made proposals and gave advice to the testamentary trustees which can be upheld. It is quite true that the trustees did not consent to act blindfolded, but exercised some judgment for themselves; and it is very lucky for the defenders that they did so; for if they had not they would have accepted Mr Drummond's first proposal, with the advice which such a proposal always implies, and have invested £3500 of trust money upon Kinglassie alone. That was the proposal that he made to them, and the advice which he gave to them; and, I repeat, it is very lucky that the trustees exercised judgment enough to reject that proposal and advice by their man of business, for if they had not, the liability would have been for the full amount of the loan, for it would all have been lost.

Now, just consider for a moment what the proposal and the advice implied in the proposal given by a professional member of the trust acting as agent for the trust was:—Kinglassie had a rental of £1000 a-year. That was the whole rental. The estate has no doubt, a few years before, brought £34,500. But, as I think, there is no suggestion that it was underrented, and we, of course, frequently find that people, if they fancy a property, are willing to give thirty-four years' purchase for it. But notwithstanding all that, the rental was £1000 a-year. The property was already burdened with £25,500, and the proposal and advice given is that this property with a rental of £1000 a-year would carry £3500 more, affording a safe security for the whole amount, that is, £29,000. The advice, therefore, given to the testamentary trustees about to invest trust money is that a landed estate is a good and safe security for twenty-nine years' purchase of the rent. I say it is lucky that that advice was not taken or acted on blindly, for then the loss would have been £3500. But then Mr Drummond consults with his client who was requiring the accommodation, and, as he himself expressed it, the client is willing to throw in a villa leasehold. Well, are Kinglassie and the villa together security for the money which these testamentary trustees were advised to lend their ward's money upon? I think, very clearly, they were not. It has proved insufficient within a very short period. It is not very much to the purpose to say that Kinglassie cost £34,000 and was valued at £35,000. Properties, when they are brought to the hammer upon pressure by a creditor wanting payment of his debt, do not bring valuation prices, or at least they may not. They are not security for them; and it is because of that that in taking a security men of business always allow a large margin. There may be security and safety at the time the purchase is made, by which large prices are got; but when a debt remains unpaid by a debtor, when the debtor is unable to pay the principal, and the creditor has to bring the estate to the hammer, it may be with considerable difficulty that the same price is got for it—it may be difficult indeed to secure the amount of the debt alone. The creditor cannot wait for a favourable opportunity although the property may be sacrificed. Now, thirty years' purchase of the rental would be only £30,000, and this estate in question was already burdened with £25,500. The trustees, or rather the trustees other than Mr Drummond, told Mr Drummond—"We don't like a second security over this property and we won't lend money on that." As I have said, it was considered advisable to add the villa leasehold. Well, what is that value that is thrown in? It is a property which within two years realised £2111. Is it possible to think that an independent man of business advising these trustees would have told them that this Kinglassie, already burdened up to the very teeth—that is to say, up to the amount that in ordinary circumstances a man of business would lend upon it—with this villa, was a security for testamentary trust money up to the amount of £3500? I cannot conclude that it was; and without dealing with the matter of leasehold, which is a new one, but looking only to the sufficiency, or rather the insufficiency, of the two subjects, I am unable to arrive at the conclusion which the Lord Ordinary has reached—that these testamentary trustees were rightly advised in this matter by a member of their own body who was at the same time their professional adviser

I do not wish to indicate any view which would reflect upon that course which is generally attended with much practical convenience—that a man of business may act for both borrower and lender. I should myself say that the case of a testamentary trust of which the agent is a member ought to be an exception to that rule. But, in truth, I think the rule is only followed where it is quite clear that it is a thoroughly safe security which is recommended for the money. Where you come to run fine, as in the most favourable view to the defenders you are doing here—sailing very close to the wind—not leaving anything like the margin which is customarily left even upon valuation prices—it is not convenient that the same party should act for both borrower and lender. A man who has no other security to go upon than a property already burdened to the teeth and a villa such as this ought not to get the accommodation through the instrumentality of his own man of business who happens to be one of a body of testamentary trustees.

Now, these are the features of this case, and I think the whole of the features of this case. I have, upon reconsideration—I confess very much in deference to what I know to be the opinion of both your Lordships,—been brought very strongly to a different conclusion from the Lord Ordinary. I think, with Lord Craighill, that upon these grounds, but upon these only, liability for the loss ascertained upon the realisation of the security here attaches to the defenders, and that the pursuers are entitled to decree accordingly.

Lord Justice-Clerk—I entirely concur in the result at which both your Lordships have arrived, and indeed in the observations you have made. With what Lord Young has added, Lord Craighill's opinion has my entire approval, and I therefore think it unnecessary to add anything more.

The Lords pronounced this interlocutor:—

"Having heard counsel for the parties

on the reclaiming-note for the pursuers against Lord Lee's interlocutor of 28th February 1881, Recal the said interlocutor: Find that the defenders are bound to pay, and accordingly ordain them to pay, to the pursuers (First) the sum of £643, 8s. 7d., being the balance due as at 11th November 1880 on the bond for £3500 mentioned in the record, after deducting the sums realised from the subjects at Harthill, all as brought out in the account or state, with interest on the said sum of £643, 8s. 7d. at the rate of four and one-half per cent. per annum from said 11th November 1880 till the date of this interlocutor, and thereafter at the rate of five per cent. per annum till paid; and (Second) the sum of £120, 12s. 3d., being the cumulo amount of the sums disbursed by the pursuers for advertising and other charges connected with the realising the said subjects at Harthill, as set forth in the said account or state, with interest on the said sum of £120, 12s. 3d. at the rate of five per cent. per annum from said 11th November 1880 till paid: Further, find the defender liable in payment to the pursuers of the account incurred to Messrs J. L. Hill & Company, W.S., relative to said subjects, as the same may be taxed by the Auditor of Court, and remit the same to him for taxation as between agent and client in relation to such business: Lastly, find the pursuers entitled to expenses," &c.

Counsel for Pursuers (Reclaimers) — Trayner —Dickson. Agents—J. L. Hill & Co., W.S.

Counsel for Defenders (Respondent)—Asher — Pearson — Guthrie. Agent — Thomas White, S.S.C.

Wednesday, June 8.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

SANDEMAN *v.* MACDONALD AND THE SCOTTISH PROPERTY INVESTMENT COMPANY.

Personal Action—Superior and Sub-Vassal.

Held that a superior has not a direct personal action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part.

By feu-contract dated February 1876 the pursuer Mr Frank Sandeman disponed to William Stiven and Henry Gibson five acres of building ground in Dundee at a yearly feu-duty of £480. In the same month a sub-feu was granted by Stiven and Gibson in favour of Alexander M'Culloch, the sub-feu-duty being £32, 12s. 4d. a-year. The ground thus sub-feued was afterward disponed by M'Culloch to the Heritable Securities Investment Association, and the said association disponed the same to the defenders, the Scottish Property Investment Company Building Society.

Although the original feu-contract was granted in favour of Stiven and Gibson, yet the subject of it was held by them truly in trust for themselves and a third party, the defender David Macdonald. It was afterwards arranged by Stiven, Gibson, and Macdonald to divide and allocate the ground, and accordingly in December 1876 they executed three separate dispositions, whereby Stiven and Gibson, as *ex facie* proprietors, and with consent of Macdonald, disponed to each of them a portion of the ground. The portion disponed to Gibson included the ground which had been sub-feued to M'Culloch.

Since Martinmas 1877 no part of the principal feu-duty had been paid, and at the date of the action there was due to the pursuer six half-years' feu-duty of £240 each, amounting in all to £1440. Stiven and Gibson were both sequestrated in February 1879.

The pursuer frequently demanded payment of the arrears from Macdonald, and also from the Scottish Property Investment Company, but without any result. He accordingly raised the present action. Decree in absence was taken out against Macdonald. As against the other defender, the pursuer pleaded, that having been owner infeft in part of the lands contained in the said feu-contract during the whole period for which the feu-duties claimed are payable they were liable therefor. The defenders pleaded, that being sub-vassals of the pursuer in a small portion only of the lands feued out by him, they could not be called on to pay the feu-duties effeiring to the whole lands.

The Lord Ordinary issued the following interlocutor:—"The Lord Ordinary having considered the cause, Assoilzies the defenders, the Scottish Property Investment Co. Building Society, from the conclusions of the summons, and decerns; reserving to the pursuer all claim competent to him for sub-feu-duty: Finds the pursuer liable in expenses," &c.

He added this note:—"The question in this case is whether a superior has a direct petitory action against a sub-vassal for the whole feu-duty payable for the lot of ground of which the property of the sub-vassal forms a part?

"It is conceded by the superior that the opinion of the Lord President in the case of the *Marquis of Tweeddale*, 7 R. 620, and of the majority of the Judges in the case of *Hyslop*, 1 M. 535, is against him. But he says that this opinion is expressed *obiter*, is inconsistent with the older authorities, and is contrary to the decision of the Court in *Wemyss*, 14 S. 233, and *Moncreiff*, M. 4185. But it appears to the Lord Ordinary to be so direct and authoritative as to be binding on him. He has given judgment accordingly.

"The said defenders do not dispute their liability for the sub-feu-duty in so far as in arrear. The pursuer contended that he was entitled to exact the sub-feu-duty even though it had been paid. But as this question is not raised in the record, the Lord Ordinary did not think it proper to decide it."

The pursuer reclaimed to the First Division.

Argued for pursuer—Where a superior has not consented to an allocation of the feu-duties among disponees of the vassal or among sub-vassals of his, each of the disponees or sub-vassals is personally liable for the whole feu-duty exigible under the original feu-contract. The opinions