only difficulty I ever entertained was as to whether the obligation sought to be enforced had not come to an end in respect that the canal, with regard to which it existed, had ceased to be a canal for navigation substantially for upwards of half a century, and literally in the sense that there had been no navigation for thirty years. That difficulty (and it was my only one) has disappeared. I think the canal exists, and it is the subject with reference to which the obligation sought to be enforced was imposed. That being so, the case is clear. There is no feudal relation between the parties whatever. The property is held burgage. Sir Charles Tennant, as the successor of Tennant & Company, holds the *solum* burgage. The defenders hold burgage their property on the south side of it—I think the canal is the northern boundary—and just as Sir Charles Tennant holds the canal burgage, they are under obligation to Sir Charles to pay a ground-annual—in other words they hold subject to a proper rent-charge in favour of Sir Charles and his heirs. But they assert a right over his property, the adjoining canal. I put the question pointedly at the end of the discussion, whether they repudiated any right in the canal, or whether we were to decide the case on the footing that they claimed it. The answer was that they did claim such a right. Then the specimen contract of ground-annual in favour of John M'Aslan was referred to, and the right which it confers and to which the defenders now assert their right is "the privilege of taking water from the said side-cut for the use of the works to be erected on the said lot of ground, provided the said water be returned into the said side-cut, and not suffered to run to waste, and that no impurities be suffered to run into the said side cut, together with the right of using the said side-cut as a navigation to and from the said cut of junction, under the conditions and provisions hereafter written." That is a valuable right over a neighbour's property It is a servitude, and the dominant tenement is the property on the south side—the right to use this piece of ground covered with water, taking the water out of it on certain conditions and also navigating on certain conditions. These conditions are that "the said John M'Aslan shall be obliged to be at the expense of maintaining and keeping in good order and repair the south bank of the said side-cut or canal, which will bound the said lot of ground on the north. . . . and the parties hereto being jointly obliged to defray all other expenses of maintaining and keeping in good order and repair the said side-cut or canal, so far as it bounds said lot of ground, . . . which groundrent and grassums, and also the proportional expense of maintaining and keeping in good order and repair the said side-cuts as aforesaid . . . shall be real liens and burdens affecting the ground above conveyed, and each part and portion thereof, and in the house and other buildings erected and to be erected thereon, and as such shall be inserted in the instrument of sasine to follow hereon, and in all the future transmissions." That is to say, a servitude, quite legal—a right to use in a lawful manner property adjoining—is conferred on the dominant tenement on certain terms and conditions. The owner of the dominant tenement is maintaining the right to exercise the servitude, and is refusing to comply with the conditions attached to it, and hence this action to enforce them. I think there is no answer to it. I can see no question whatever about real burdens. It is just a servitude subject to conditions in favour of the dominant tenement, the owner of which is assuming the right and refusing to comply with the conditions attached to it. On the ordinary principles of law I think the condition ought to be enforced. Mr Asher put the case of the defenders thus—The obligation is a condition of my right, good against my author, who parted with the right to use Sir Charles Tennant's property in this way, and transferred it to me the disponee, but the condition of the obligation remains with the disponer.

That was maintained to us as a proposition in the law of contract—for, as I have said, there is no feudal relation. It is said that the right of the grantee of the property now belonging to the defenders has been transferred to the defenders, the obligation which is the condition of it remaining with the disponer of it. No one could so read the contract without causing a feeling of amazement. The right to use Sir Charles Tennant's property has been transferred to the defenders by the title on which they hold their adjoining property, and they maintain that the right is transferred but that the obligation which is the condition of it is not. I think it a plain case for the enforcement of the condition, and I think it ought to be enforced, and that the defenders are liable to have it enforced against them.

LORD RUTHERFURD CLARK concurred.

LORD CRAIGHILL was absent.

The Court refused the reclaiming-note, and adhered to the interlocutor reclaimed against, and remitted the cause to the Lord Ordinary.

Counsel for the Reclaimers—Asher, Q.C.—Watson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for the Respondents—D.-F. Mackintosh—Jameson. Agent—F. J. Martin, W.S.

Tuesday, March 20.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

RITCHIE AND ANOTHER *v.* CUTHBERT.

Trust—Trustee—Personal Liability—Loan to Trustee—Investment in a Trading Company.

A truster directed his testamentary trustees to hold the trust-estate for the alimentary liferent use of his brother, and his wife, and the survivor of them, and for the child or children of the marriage in fee. The trustees were empowered "to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, or in such other way or in such other securities as my trustees shall think proper." The trustees, after the truster's death, lent to the brother, who was a trustee, a sum of money to assist

him to build a house for the occupation of himself and his family. The loan was secured by bond and disposition in security over the house. The trustees also, at the request of the brother, invested a portion of the trust funds in a trading company with limited liability, and deposited part of the trust-funds with a heritable securities company. In an action after the death of the brother, at the instance of his widow, the liferentrix, along with her son, the fiar, against the surviving trustee, and the executor of a deceased trustee, *held* that the loan to the brother, who was a trustee, was illegal, and that the trustees had no power to invest the trust funds in a trading company, and that therefore the defenders were personally liable for any loss occasioned by the trust-funds being invested in these ways, but that the deposit of trust funds with the heritable securities company was within their powers.

James Ritchie, sometime merchant in San Francisco, thereafter residing in Newton-upon-Ayr, died on 27th May 1871. He left a trust-disposition and settlement, dated 6th June 1871. By this deed he appointed his brother Joseph Ritchie, Gavin Gemmell, banker in Ayr, James Bowie King, residing in Ayr, and Alexander Cuthbert, shoemaker, Ayr, his trustees. The trustees were directed to hold his estate for the alimentary liferent use of his brother Joseph Ritchie, and his wife Margaret Boyd or Ritchie, and the survivor, and on the death of the survivor for the use and behoof of Alexander Ritchie, the only child of the marriage, and any other children that might be born, in fee. The trust-deed contained a clause empowering the trustees "to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, or in such other way, or on such other securities as my trustees shall think proper, and to continue the investments, or to vary or alter the same from time to time at their discretion: . . . And I hereby provide and declare that my trustees shall not be liable for the solvency of any person or persons to whom they may sell or dispose of any part of the trust-estate, or to whom they may lend any part of the trust-funds, further than that such person or persons were habit and repute solvent at the time of transacting." The amount of the trust-estate was between £10,000 and £12,000. All the trustees accepted office. Joseph Ritchie died in 1876, and James Bowie King in 1877.

This action was raised in 1887 at the instance of Mrs Margaret Boyd or Ritchie and her son Alexander Ritchie, against Alexander Cuthbert, as trustee under James Ritchie's settlement, and as an individual, and Alexander King, as executor of James Bowie King. John Milligan and Thomas Gemmell, trustees who had been assumed to act under the said settlement, were also called as defenders, but the conclusions of the action were not directed against them.

The conclusions of the summons were (1) that the trustees were not entitled to make any payments to the deceased Joseph Ritchie in excess of the free income of the estate of the deceased James Ritchie, and that the trustees were liable to replace payments which had been made to him out of capital; (2) that the trustees were not entitled to lend any part of the trust funds to Joseph Ritchie, and that they were liable to replace a sum of £1000 so lent; (3) that the trustees were not entitled to invest the trust funds, or any part thereof, in the purchase of stock of the Anglo-American Telegraph Company (Limited), or to deposit the trust funds, or any part thereof, with the Scottish Amicable Heritable Securities Association (Limited), and that they were personally liable to make good to the pursuers the amount of the loss occasioned by part of the trust funds having been invested and deposited in this manner.

Defences were lodged for Cuthbert.

With regard to the first conclusion the Lord Ordinary remitted the accounts of the trust-estate for audit, by agreement of parties, and it is not necessary further to refer to this conclusion.

With regard to the other conclusions the pursuers averred—"(Cond. 6) Further, the said trustees were not entitled to lend any portion of the trust funds under their charge to one of their own number. At a meeting of the said trustees, held on 3d July 1872, an application was made by the said Joseph Ritchie, one of the trustees of the deceased, for a loan of £1000 out of the trust funds on the security of a villa in Ayr, then in course of erection. As appears by the minute of the said meeting this application was granted, and a bond and disposition in security, dated 19th August 1872, was afterwards executed by Joseph Ritchie in favour of himself and his co-trustees. No valuation was obtained of the property which forms the subject of the said security, nor any means taken by the said trustees to ascertain its true value. In point of fact it was an entirely insufficient security for the amount contained in the said bond."

The defender in answer stated—"The said Joseph Ritchie after the truster's death determined to erect for the occupation of himself and family a house in the town of Ayr suitable to the income which, through his brother's bequest, he and they were to enjoy, and with the approval and concurrence of his wife, the pursuer Mrs Margaret Boyd or Ritchie, he applied to the trustees for an advance on the security of said house. Knowing that the trust funds had been left by the late James Ritchie for the comfort in life of his brother and his family, and believing that they would have been entitled to purchase a house for them, the trustees thought that it was their duty to comply with this request, provided the sum to be advanced was reasonable in amount, and that proper security was given therefor. Mr Joseph Ritchie erected the house known as Vancouver Lodge at a cost of £1300, and the trustees in 1872, when the bulk of the trust funds recently recovered from San Francisco were still in bank uninvested, advanced him £1000 on bond and disposition in security thereof. The said house was at the time ample security for that sum, and the defenders believe that it still is so. Mr Joseph Ritchie and his wife and family resided in it from 1872 till his death in 1876. The pursuers resided in it for some time after his death. The pursuer Mrs Ritchie has recently purchased a smaller house out of her own funds, into which the pursuers removed. Since then the pursuer Mrs Ritchie has let Vancouver Lodge at a rent of £45 a-year, which she has received and continues to receive. The house has been let for the current year at a rent of £50."

The pursuers also averred—"(Cond. 7) Further, the said trustees had no powers of investment beyond the ordinary common law and statutory powers of trustees. Notwithstanding, they invested large sums belonging to the trust-estate in trading companies which did not fall within their common law or statutory powers. On 20th January 1874 the defender Alexander Cuthbert and the deceased James Bowie King and Joseph Ritchie, who were the then acting trustees, resolved to invest a sum of £1000 or thereby in the stock of the Anglo-American Telegraph Company (Limited), and did actually on 30th January 1874 purchase that stock to the extent of £979, 8s. 2d. By a subsequent resolution the trustees on 29th October 1875 increased their holding in the said company to £2374, 19s. 1d. The said stock was sold on 18th February 1884 for £1182, 1s. 3d., being a nett loss of £1192, 17s. 10d. On 16th May 1876 the then acting trustees, Alexander Cuthbert and James Bowie King, lodged £1400 of the trust funds with the Scottish Amicable Heritable Securities Association (Limited) on deposit-receipt. That association is now in liquidation, and it is believed there will be a considerable loss on the said deposit."

The defender in answer stated—"Explained that at a meeting of trustees held on 20th January 1874 Mr Joseph Ritchie, with his wife's concurrence, requested the trustees to invest a portion of the trust funds in the fully paid-up stock of the Anglo-American Telegraph Company (Limited), about which he had been making inquiries. Relying upon the advice which Mr Joseph Ritchie had obtained, and in the belief that they had power to make the said investment, the trustees complied with Mr Joseph Ritchie's request. Accordingly £1200 of said stock was purchased in January 1874 at a price of £979, 8s. 2d. In December 1874 Mr Joseph Ritchie, with the concurrence of his wife, requested the trustees to make a further investment of the trust funds in the purchase of another £2000 of the said stock. The trustees, on the same footing, complied with the request, and purchased said £2000 stock at a price of £1395, 10s. 11d., making with the previous investment £3200 stock purchased at a price of £2374, 19s. 1d. After Mr Joseph Ritchie's death, in compliance with the regulations of the company, it became necessary to transfer the said stock into a new name, and the question of retaining it was then considered by the trustees. Mrs Ritchie, who was then the liferenter of the trust funds, requested the trustees to retain the investment for her benefit, and the trustees resolved accordingly by minute of 10th November 1876, which was signed by Mrs Ritchie in token of her request and concurrence. In 1880, there having been some depreciation in the value of said stock, the pursuers, Mrs Ritchie and her son, with her special advice and consent, executed a letter of request and guarantee, dated 26th October 1880, in which they requested the trustees (Messrs Milligan and Gemmell having then been assumed as additional trustees) to continue to retain the investment made at the request of Mr Joseph Ritchie, their husband and father, in the stock of the Anglo-American Telegraph Company, ratified and approved of the investment, and jointly and severally guaranteed the trustees against all risk, responsibility, loss, and damage thence arising. In 1883–84, the depreciation in the said stock having increased, the trustees, who were of opinion that the stock should be sold, again, in respect of their foresaid letter of guarantee, brought the matter before the pursuers, Mrs Ritchie and her son, at meetings on 30th May 1883 and 4th February 1884, the minutes of which are referred to, and obtained their consent to the realisation of the stock. The pursuer Alexander Ritchie was not present at said last meeting, but having received explanations from his mother he called some days later and signed a docquet of concurrence appended to it. He had then attained majority. The said stock was realised on 18th February 1884 at a price of £1183, 1s. 3d. The income from said stock was received by Mr Joseph Ritchie, and after his death by the pursuer, his wife, without objection. . . . On 16th May 1876 the investment of £1400 on deposit with the Scottish Amicable Heritable Security Association (Limited) was authorised by the trustees. This investment was within the powers of the trustees, and was selected in the exercise of their best discretion."

The pleas of the pursuers were (1) that the actings of the trustees having been *ultra vires* and illegal, they were personally liable; and (2) that the trust-estate having suffered loss and damage through the illegal actings of the trustees, they were personally liable.

The defender pleaded—"(5) The actings of the trustees so far as complained of having been within their powers, and in *bona fide* exercise of their best discretion, and *separatim*, being protected by the terms of the testator's settlement, the defender is not liable for any loss which has been or may be incurred thereby to the trust-estate. (6) The actings of the trustees having been homologated by the pursuers, and *separatim*, the trustees having been guaranteed by the pursuers against any risk or loss which might arise therefrom, the defender is entitled to be assoilzied."

The Lord Ordinary (M'Laren) on 16th August 1887 pronounced this interlocutor—"The Lord Ordinary having considered the cause, . . . Finds (2) that the loan of £1000 to Joseph Ritchie, one of James Ritchie's trustees, on heritable security ought to be carried to a suspense account, and directs the trustees to call up the said loan, and, if necessary, to exercise their powers of sale under the said heritable security, reserving all questions of ultimate liability for the loss, if any, arising out of said loan: Finds (3) that the investments in the purchase of Anglo-American Telegraph Company's stock, and in the loan of money to the Scottish Amicable Heritable Securities Company, were within the powers of James Ritchie's trustees: *Quoad ultra* continues the cause.

"*Opinion.*—This is an action directed against the survivor of a body of trustees and the executor of a deceased trustee for the purpose of enforcing a claim of personal liability for alleged breaches of trust or errors of administration. Two trustees who were assumed into the trust at a later period in the administration are also called as defenders, but the conclusions of the action are not directed against them.

"The truster James Ritchie, who died in May 1871, left all his property to his brother Joseph

and his spouse and the survivor in liferent, and to their child or children in fee. Joseph died in May 1876 after enjoying the usufruct of his brother's estate for five years; and the present action is instituted by his widow and his son, an only child.

"The errors of administration charged against Mr Cuthbert, the surviving trustee, and Mr King, the executor of a deceased trustee, are classed under three heads—(1) Treating certain sums as income which ought to have been placed to the credit of capital; (2) lending money to the life-renter Joseph Ritchie; and (3) investing a sum of money in the purchase of stock of the Anglo-American Telegraph Company, and lending another sum to the Scottish Amicable Heritable Securities Company. . . .

"(2) The next question is the validity of the loan to Joseph Ritchie. The trustees say that Joseph Ritchie, after his brother's death, determined to erect a house in Ayr for the occupation of himself and family, and that they, knowing that the trust funds had been left by the late James Ritchie for the comfort in life of his brother and family, lent Joseph part of the trust funds on the security of the house. The cost of the house is stated by the pursuers to be £1109, 4s. 5d., and by the defenders to be £1300. The sum lent on the security of the house was £1000. The objection to the investment is that Joseph Ritchie was a trustee.

"This is a very ungracious objection, coming as it does from the widow and son of the gentleman who was accommodated. It is, however, a valid objection if properly insisted in. Now, the pursuer Alexander Ritchie has become owner of the house, which is said to be a bad security, by inheritance, and to the extent of the estate inherited from his father he is liable to make good his father's personal obligation in the bond and disposition in security. He ought therefore to pay up the bond and to allow the trustees to invest the money in other security. He has not done so. The trustees on record propose to call up the bond, and in my opinion this is the first step to be taken. It will then be seen whether there is a resulting loss for which the two first called trustees are liable.

"I proceed to consider the objection taken to two other investments, and first as to the purchase of stock of the Anglo-American Telegraph Company.

"The pursuers' husband and father evidently had a high opinion of the credit and prospects of this company, because it was at his request that the two investments in its stock were made. These amounted to the nominal sum of £3200 purchased at the cost of £2374, 19s. 1d. Eight years after Joseph Ritchie's death the stock was sold (at the request of the pursuers), and realised £1182, 1s. 3d., the transaction resulting in a loss of £1192, 17s. 10d., against which may be set the dividends drawn in excess of ordinary mortgage interest.

"The first question is, whether the purchase of stock in a trading company is an investment in the sense of the power in the trust-deed? I think it is an investment. The word investment covers any employment of the trust money as capital—that is to say, as an income-producing fund. It is not limited to the case of a loan on security, otherwise the purchase of Government securities would not be an investment, which it undoubtedly is, according to the ordinary use of language.

"As to the loan to the Scottish Amicable Heritable Securities Company, it is not disputed that this was an investment in the proper sense of the term; and then as to both investments the main question is, whether they are in excess of the power given by the truster to his trustees.

"The power is quoted in answer 2. It purports to empower the trustees 'to invest the trust funds in any of the Government securities, or upon heritable security in Scotland, or in such other way, or on such other securities, as my trustees shall think proper.' Now, here it is at once seen that the trustees are not limited to what are called legal investments, but have a discretion given to them. Is there any limit to that discretion? There is none that I can see. If I were to say that under these words the trustees might invest in one class of stocks—railway stocks for example—but were not entitled to invest in telegraph stocks, I should not be interpreting the power, but would be setting up a power or a new order of legal investments, different from the recognised order, and not corresponding to anything written in the will.

"I find in the will an absolute reference to the judgment of the trustees in the matter of the choice of investments outside those which the law has recognised as suitable investments for trust money. Such a reference to the judgment of persons selected by the truster, as good managers, is neither an illegal nor a senseless thing. Being legal and rational, the power ought in my opinion to receive effect. The trustees exercised their judgment by investing in Anglo-American Telegraphs and Scottish Amicable Debentures, which they deemed good investments, yielding somewhat higher interest than heritable securities; and in my opinion the truster's authority is an indemnity to them against such a claim as the present.

"Of course if a trustee or a body of trustees were to abuse a power of this description—if, for example, they were to invest money in an undertaking which they knew to be bad, or which they had no reason to suppose to be good—the clause would not protect them. But no such charge is made in the present action. It would be unfortunate if powers of investment were interpreted otherwise than according to the natural meaning; because a testator ought not to be allowed to lay a trap for his trustees, inviting them to do something which the beneficiaries may either accept or repudiate according to the degree of success of the speculation. I am therefore for assoilzieing the trustees from this branch of the action."

The pursuers reclaimed, and argued—The trustees had acted *ultra vires* in investing the trust funds in a trading company such as the Telegraph Company was. Under a general power of investment such as that in the trust-deed trustees had only power to invest in the manner authorised by law. Under no circumstances did the law allow them to invest in a trading company. It had been decided that trustees investing trust funds in a trading company the liability of which was unlimited exceeded their powers, and investment in a limited liability company was subject to the same rule as it was merely a question of degree. In such an investment as this

there was no one who was bound to repay loss, and that was essential in the case of investment by trustees. The depositing of the funds in the Heritable Securities Company was merely an advance upon personal security. It was decided by the Lord Ordinary that the loan to the deceased Joseph Ritchie was *ultra vires*, and that was right, but the loan ought not to be carried to a suspense account—Lewin on Trusts, 306, 316, 319; *Grant* v. *Baillie*, Oct. 27, 1869, 8 Macph. 77; *Cochrane* v. *Black*, Feb. 1, 1855, 17 D. 321; *Brownlie* v. *Brownlie's Trustees*, July 11, 1879, 6 R. 1233; *Bon Accord Marine Insurance Company* v. *Souter's Trustees*, Dec. 11, 1850, 13 D. 295; *Stewart* v. *Sanderson*, Jan. 13, 1870, 10 L.R. Eq. 26.

The respondents argued—As regarded the loan of £1000 to Joseph Ritchie, even assuming that the loan of trust funds to a trustee was *ultra vires*, could this transaction be said to be of that nature? It was rather an investment by the trustees in the purchase of a house for the residence of the liferenter and his family. It would have been quite within the powers of the trustees to have purchased a house for that purpose, and this was just the same thing. In regard to the purchase of the telegraph shares, it came within the discretionary power given in the trust-deed. The word investment included the laying out of money to profit. There was no prohibition in the common law against trustees making such investments. The putting of the money into the Heritable Securities Company was just the same transaction as if it had been deposited in a bank, and that was lawful—*Sanders* v. *Sanders' Trustees*, Nov. 7, 1879, 7 R. 157; *Grainger's Curator*, Feb. 23, 1876, 3 R. 479; *Seton* v. *Dawson*, Dec. 18, 1841, 4 D. 310; *Lamb* v. *Cochran and Others*, March 23, 1883, 20 S.L.R. 575.

At advising—

Lord Craighill—This reclaiming-note brings up an interlocutor of the Lord Ordinary in an action of count and reckoning, and of declarator of liability of the trustees in the administration of the trust affairs of the late James Ritchie, sometime merchant in San Francisco, and afterwards residing in Newton-upon-Ayr. The pursuers are Mrs M. Ritchie, the sister-in-law of the truster, her deceased husband Joseph Ritchie having been a brother and one of his trustees, and one of the principal beneficiaries under the trust. The other pursuer, Mr Alexander Ritchie, is a son of the female pursuer Mrs Ritchie and her husband, the late Joseph Ritchie. The defenders are Mr Cuthbert, the only surviving trustee of those named in the trust-deed, and the trustee or executor of another of the trustees who died during the trust administration.

To say the least, as the Lord Ordinary observes, the action is singularly ungracious. Assuming that advances were made which were not conformable to trust administration, or that money was laid out in a way not conformable to trust administration, it was well-known to the pursuers that this was done upon the urgent instigation of Mr Joseph Ritchie, and he and his wife and son were the only persons who took benefit by that which was done. It may be that necessity is the explanation, but most people would have suffered far more than the pursuers have suffered before they could or would have consented to bring into trouble those who did that which is now objected to solely to oblige the pursuers.

These considerations of course make no change on the legal merits of the controversy, but all the same it is right that persons like the pursuers should be exposed when they try to make money out of their own wrong.

There are four questions which are presented for consideration and determination. One is as to the validity of the loan to Joseph Ritchie, the brother of the truster, and the husband of the pursuer Mrs Ritchie. The trustees say that Joseph Ritchie, after his brother's death, determined to erect a house in Ayr for the occupation of himself and his family, and that they, knowing that the trust funds had been left by the truster for the comfort in life of his brother and family, lent Joseph part of the trust funds on the security of the house. The cost of the house is stated by the pursuers to be £1100 odds, and by the defenders to be £1300. The sum lent on the security of the house was £1000. The objection to the investment is that Joseph Ritchie being a trustee could not, without violation of trust law, borrow any more than the trustees could lend. The Lord Ordinary obviously thinks that if there is to be a loss the loss must be made good by the trustees, but he has by the second finding in his interlocutor found that the security ought to be carried to a suspense account. He therefore directs the trustees to call up the loan, and if necessary to exercise their powers of sale under the said heritable security, reserving all questions of ultimate liability for the loss, if any, arising out of the said loan. For my own part, I consider that the question of liability ought to be determined at once, and there cannot be any doubt as to that which is the legal result. Joseph Ritchie was a trustee. He was needy, and he sought to borrow £1000 of trust money that therewith a house for his own and his family's occupation might be erected. He had no money of his own. He granted a bond to the trustees for the £1000, and that bond is still a charge upon the property. Now, it seems to me to be for the interest of all that the question of liability should be at once determined, and that the trustees should be left to call up the loan, sell the property if the loan is not paid up, and should there be any deficiency, make up that deficiency to the trust-estate. That is beyond doubt the legal result, and it would only be to put off the evil day without advantage to any one if the Court were to postpone its judgment and await the realisation of the property. With people like the pursuers the more strictly the course of legal procedure conformable to law is pursued the safer it will be for all concerned.

The next question relates to the purchase of stock of the American Telegraph Company. It appears not to have been a prosperous undertaking, even when the trustees resolved to buy, and unfortunately for the trustees and the beneficiaries of the trust the value of the property did not improve. The consequence was that there was a loss of something like £1100 upon the buying and selling of the stock of this company. The question is whether this purchase was within the powers of the trustees. Ample powers are given to them—as ample as ever I saw for the investment of trust money—and truly the question is,

whether the purchase of the stock of a trading company is in the sense of law and in the sense of the trust-deed an investment. I am of opinion that it was not. I think it was a partnership in a company, and that the trustees became partners. The shares that were bought formed their contribution of the capital. But there can be no investment of money, so-called, where the trustees become partners. In investing money the trustees remain outside of the company. Here the trustees joined the company, and so far as money was concerned all that they did was to pay what was their stipulated share of the capital. Therefore I am obliged to come to the conclusion that the purchase of these shares—the joining of the company by the trustees as partners—was a breach of trust. I regret extremely that I am obliged to come to this conclusion, but I see no escape from it unless on considerations of sympathy with those who have been very ill-used, and the law cannot be disregarded that wrongdoers like the pursuers here may not reap the benefit of their own discreditable misconduct.

On the last part of the case I have no difficulty. I agree with the Lord Ordinary that the lending of money to the Scottish Amicable Securities Company was within the powers conferred by the truster on his trustees. I think there is no reasonable doubt on this subject. Judgment ought therefore to be pronounced to this effect.

Lord Young, Lord Rutherfurd Clark, and the Lord Justice-Clerk concurred.

The case was thereafter continued in order that certain matters might be adjusted before an interlocutor was pronounced.

Counsel for the Appellants—D.-F. Mackintosh —Dickson. Agent—David Turnbull, W.S.

Counsel for the Respondents — Mackay—H. Johnston. Agents—Henderson & Clark, W.S.

Thursday, May 24.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HUTCHISON AND OTHERS *v.* PATTULLO AND OTHERS.

Patent — Construction — Disconformity between Provisional and Complete Specification.

The provisional specification of a patent for improvements in treating oils and fats set forth—"This invention has for its object the treating of oils and fats in an improved manner and so as to render them more suitable for various applications, and it consists in subjecting the oil whether mineral, vegetable, or animal, or the fat, to a temperature about equal to that of boiling water for eight or ten days, the oil or fat being exposed to air in layers of about half-an-inch in depth. . . . The treating of vegetable or animal oils or fats in the described manner has the effect of at once developing any tendency to thicken, so that when the thus thickened oil or fat is thinned to the desired consistency by combination with the mineral oil it forms a superior lubricant having less tendency to thicken when in use. The thickening of the vegetable or animal oils or fats, which is believed to be due to oxidation, makes them better adapted for saponification and other uses besides that of forming lubricants." The complete specification set forth—"My said invention has for its object the treating of oils and fats in an improved manner, and so as to render them more suitable for making lubricants, and it consists mainly in subjecting the oil, whether mineral, vegetable, or animal, or the fat, to heat, whilst exposed to the air in shallow layers. . . . In practically carrying out my said invention in dealing with vegetable or animal oils or fats, I prefer to expose them in shallow pans or dishes to the combined action of atmospheric air and heat, with or without the addition of water, for a lengthened time. The addition of water accelerates the process, but the colour of the oxidised oil or fat is generally paler if treated without water. . . . The mixing of a thickened or oxidised vegetable or animal oil or fat with mineral oil to form a compound of consistency and quality suitable for a lubricant is part of my invention, irrespective of the precise means adopted for thickening or oxidising the oil. . . . What I believe to be novel and original, and claim as the invention . . . is—(1) The subjecting of oils and fats in shallow layers to the joint action of air and heat, substantially as and for the purposes hereinbefore described. (2) The combining of oxidised or thickened vegetable or animal oils or fats with mineral oils, substantially as and for the purpose hereinbefore described."

In an action of damages for infringement of the patent, in which it was proved that the defenders had thickened vegetable and animal oils by the influence of air and heat for the purpose of mixing them with mineral oil as a lubricant, but that their method of applying the air and heat was different from that described in the patent—*held* (1) that if the first head of the pursuers' claim in his patent was to be regarded as a claim for a process, the defenders' process constituted no infringement, as it was a different process; (2) that if it was to be regarded as a claim for a product, the patent was bad on the ground of want of novelty, there being no novelty in the mere thickening of mineral or vegetable oils by the influence of air and heat, apart from the particular process employed; and (3) that the complete specification was disconform to the provisional specification, in respect that the second head of the claim in the complete specification claimed as part of the invention the combination of thickened vegetable and animal oils with mineral oils, irrespective of the process by which the thickening had been effected, whereas the provisional specification was limited to the thickening of vegetable and mineral oils in the particular manner therein