Friday, July 20.

SECOND DIVISION.

(Before Seven Judges.)

[Lord M'Laren, Ordinary.

RAES *v.* MEEK AND OTHERS.

Trust—Bad Investment—Liability of Trustee and of Law Agent in Trust—Title to Sue.

Trust funds, which were held in terms of an antenuptial marriage-contract, were lent on the security of houses in the course of erection, and were lost through the insufficiency of the security. The marriage-contract empowered the trustees to lend on heritable securities, or personal securities or obligations, and contained a clause which declared that the trustees should not be answerable "for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." An action was raised by the beneficiaries, who had a contingent right to the fee of the trust-estate, against the trustees and the law agent in the trust, "conjunctly and severally, or severally, or in such other way or manner" as should seem just, to restore the money to the trust. Defences were lodged for one of the trustees and for the law agent.

The Court, after a proof, unanimously *held* that the security was bad, but, by a majority of seven Judges (*diss.* Lords Mure, Shand, and Rutherfurd Clark), *assoilzied* the trustee, and (*diss.* Lord Young) *assoilzied* the law agent.

The Lord President, Lord Justice-Clerk, and Lord Adam were of opinion that gratuitous trustees are only liable for such diligence, prudence, and knowledge as they actually possess in the management of their own business, and that, judged by this standard, the evidence showed there had been no negligence on the part of the trustee.

Lord Young was of opinion that the trustee was not liable, as he had acted on what he considered the best advice, that of the law agent.

Lord Mure, Lord Shand, and Lord Rutherfurd Clark were of opinion that gratuitous trustees must show the same reasonable care that a man of ordinary prudence would exercise in the management of his own business, and that the trustee was liable, as the evidence showed he had failed in this.

Opinion per the Lord President that the indemnity clause in the marriage-contract protected the trustee—*Opinions contra per* Lords Mure, Shand, and Young.

The Lord President, Lord Justice-Clerk, Lords Shand, Rutherfurd Clark, and Adam, were of opinion that the pursuers had no title to sue the law agent, (1) because he was under no contract of employment with them, and (2) because they might never become entitled to the trust-estate, and would in that event suffer no damage.

Lords Mure and Shand were of opinion that there was no liability, even assuming a title to sue, because a law agent is not responsible for the sufficiency of a security, unless there is a special undertaking to that effect, which was not averred in the present case.

Lord Young was of opinion that as all the parties were before the Court the liability of the law agent should be determined in the present action, and, on the evidence, that he was liable, as there had been a failure of duty on his part.

In 1852 the Rev. Robert Reid Rae, minister of the parish of Avondale, was married to Miss Jessie Croil, daughter of James Croil, Esq., a merchant in Glasgow. They entered into an antenuptial contract of marriage, by which Mr Rae settled his furniture on his wife, and bound himself to pay punctually the rates to the Ministers' Widows' Fund; Mrs Rae conveyed property of the value of £5000 to the marriage-contract trustees, for the following purposes, viz.—"(First), for behoof of the said Jessie Croil herself in liferent during the subsistence of the said marriage, exclusive of her husband's *jus mariti* and powers of administration as aforesaid, and in order that she may, by herself, without her husband's concurrence, receive, discharge, use, and dispose of the whole rents, interest, and profits of the said means and estate, and in case of the dissolution of the said marriage by the decease of the said Reverend Robert Reid Rae, for behoof of the said Jessie Croil, and her heirs and assignees whomsoever in fee; (secondly) in case of the dissolution of the said marriage by the decease of the said Jessie Croil, for behoof of the said Reverend Robert Reid Rae in liferent from and after her decease, so long as he shall survive her, and remain unmarried, and in order that he may, during the said period, receive, discharge, and enjoy the said rents, interest, and profits; and (lastly) in the case of the dissolution of the said marriage by the event last mentioned, and of there being a child or children thereof surviving at the decease or second marriage of the said Reverend Robert Reid Rae, and attaining twenty-one years of age, or (if a daughter or daughters) being married, for behoof of such child or children so surviving, and attaining majority, or (if female) being married, in fee."

The trustees had a power of sale of all or any part of the trust subjects, "they being bound always to invest or re-invest the proceeds of such sales, and all other principal sums to be realised by them, either in the purchase of heritable property, feu-duties, or ground annuals, or Government or bank stocks, or heritable securities, or even upon such personal securities or obligations as they may approve of as good and sufficient, taking the titles, securities, and obligations always in favour of themselves as trustees for the purposes of these presents." There was a clause of indemnity, which declared "that the said trustees shall not be answerable for errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only, under deduction of all payments *bona fide* made in fulfilment of the premises." Amongst the trustees appointed were Mr and Mrs Rae, the latter being a *sine qua non*, John Meek, Esq. of Fortissat, and the Rev. John Ellis Rae, minister of Duntocher, near Glasgow,

a brother of Mr Rae. Five children were born of the marriage.

In January 1874 the trustees received the sum of £4750, being nearly the whole capital of the trust-estate, for re-investment. Accordingly a meeting was held on 30th January 1874, at which were present Mr Meek, Mr and Mrs Rae, the Rev. John Ellis Rae, and Mr Hotson, of the firm of Hotson & Howie, who acted as solicitor to the family. The minute of this meeting bore that "it being necessary to re-invest the sum, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive."

On the 5th May 1874 another meeting of trustees was held at the chambers of Messrs Hotson & Howie, at which were present Mr and Mrs Rae and Mr Meek. The minute of this meeting bore—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which, the trustees resolved to make a loan of £4500 to Mr William Henderson, one of the applicants, on the security of buildings in Gallowgate valued by Mr Burnet, architect, at £6500: Provided always, that Mr Hotson shall be satisfied with the title, and that such part of the loan shall be deposited in bank in the joint names of the parties' law agents, as Mr Burnet shall judge to be sufficient for finishing the buildings, to be drawn out and paid over to Mr Henderson, when Mr Burnet shall, at his expense, report the full completion of the work." The subject of this security was part of a large block of buildings then in course of erection in Gallowgate, involving an outlay of from £25,000 to £30,000. Mr Anderson, who was a spirit dealer in Glasgow, was building them as a speculative and new experiment for shops below, and for warehouses and workshops above. They were at the date of the loan unfinished, and were charged with a ground annual of £191, 19s. 1d. They were in a part of Glasgow where there had been previously no buildings of the same class or character. Mr Burnet had been employed by Mr Henderson to value the subjects, and he stated in April 1874 that he was of opinion "that when the buildings were finished, papered, and painted, ready for occupation, this property will be worth £6500, over and above the annual feu-duty." On 20th May 1874 a bond and disposition in security for £4500 was granted in favour of the trustees. The principal sum in the bond was therein declared to be payable at Martinmas 1874. The whole sum was not paid at once, but at the settlement the sum of £2800 was retained in terms of a report by Mr Burnet to await the completion of the buildings, and deposited in bank in the joint names of Mr Hotson and Messrs Brownlie & Watson, the pursuers' agents. It was paid by instalments as the work proceeded, the last payment being made on 18th October 1875, the buildings being completed in the end of that year. Their cost did not exceed £4000. These payments were made upon reports by Mr Burnet in terms of the trustees' resolution. The rate of interest due under the bond was 4½ per cent. It was paid up to Whitsunday 1878. On the 24th January 1879 Mr Henderson was sequestrated, and a trustee appointed on his sequestrated estate. The buildings proved a financial failure, and did not realise sufficient to pay even the feu-duty. The sum of £4500 contained in the bond was thus wholly lost to the trust-estate.

This action was raised by the two surviving children of the marriage, Jane Donaldson and Agnes Lloyd Reid Rae, against John Meek, and their father and mother Mr and Mrs Reid Rae, the accepting and surviving trustees who were acting in May 1874, and also against the firm of Hotson & Howie, and Robert Howie, the surviving partner of that firm, as such and as an individual, and Hamilton Andrew Hotson, as universal disponee of his father the deceased John Hotson, the other partner, and also against the whole trustees as trustees, the conclusions of which were for declarator that the defenders were "conjunctly and severally, or severally, or in such other way or manner as to our said Lords shall seem just," bound to make payment to the said trustees as trustees of the sum of £4500, in conformity with the purposes of the trust created by the antenuptial contract of marriage, and for decree for such sum.

The pursuers stated that they had a right on the decease of their surviving parent to have the trust funds paid over to them. They averred—"The said sum of £4500, and interest thereon, was lost to the trust-estate through the gross negligence and violation of duty of the said trustees who were present at the meeting of the 5th May 1874, and through the gross negligence and want of skill of the said Messrs Hotson & Howie, the agents in the trust. The investment was one which no prudent or reasonable man would ever have made, and there were plenty of good and safe investments to be had for the money. The said Mrs Rae and her husband were ignorant of business affairs, and of what was a prudent investment, and they relied upon the knowledge and skill and carefulness of Mr Meek and of Messrs Hotson & Howie. It was gross negligence and want of skill on the part of Mr Meek and the latter to allow the trust funds to be invested on the said subjects, because, *inter alia*, the buildings which it was proposed should be erected were of a purely speculative character, for which there was no demand in the locality, because their value had not been tested by an actual rental, and the defenders had not even before them at the time of granting the loan any estimated rental, and because the feu-duty annually payable was such that no person of prudence would have lent £4500 or any sum over the buildings subject thereto. The nature of the locality was well known to Mr Meek and the agents. It was impossible without the grossest negligence to make an investment which would immediately thereafter result in almost the whole of the trust-estate being lost. The said Hotson & Howie grossly failed in their professional duty by allowing the trustees to invest in such a speculation. It was through their advice and on their instigation that the investment was made. It was their duty as the professional advisers of the trustees to have prevented their investing the trust funds on unbuilt or unlet property, the investment being of such a nature as is never sanctioned by agents for trustees."

No appearance was made for the Rev. Mr and Mrs Reid Rae or the Rev. Mr Ellis Rae, but sepa-

rate defences were lodged for (1) John Meek, (2) for Hotson and Howie and Robert Howie, and (3) for H. A. Hotson, the substance of which on the merits was that the investment was carried through with all ordinary prudence and care both on the part of the trustees and the agents. The security was a perfectly eligible one, and ample at the time when the advance was made. It continued so until the failure of the City of Glasgow Bank in 1878, and the consequent depression of trade and deterioration of all kinds of property in Glasgow. The loss could not have been foreseen. Mr Meek maintained that the pursuers under their parents' marriage-contract had no vested interest in the trust funds, and therefore no title to sue, and that he had in the circumstances acted with all ordinary care and prudence, relying on the advice of competent professional men. Hotson & Howie and Robert Howie stated that the trustees were capable of forming and acting on their own judgment, having the guidance of Mr Burnet's report.

The pursuers pleaded—"(1) The said principal sum of £4500, and interest thereon since the term of Whitsunday 1878, having been lost through violation of duty and gross recklessness and negligence of the trustees present at the meeting of 5th May 1874, and through the gross negligence and want of skill of their said law agents, the pursuers are entitled to decree as concluded for.

Mr Meek pleaded—"(1) The pursuers have no title to sue. (2) The defender not having been guilty of violation or neglect of duty as libelled, is entitled to absolvitor, with expenses."

Messrs Hotson & Howie and Robert Howie pleaded—"(1) The pursuers have no title to sue. (2) The averments of the pursuers are irrelevant. (3) No relation of agency having existed betwixt the defender Robert Howie, or the firm of Hotson & Howie, and the trustees acting under the contract of marriage libelled with reference to the loan of £4500, he and the said firm should be assoilzied. (4) In any event, the trustees having taken upon themselves to consider the sufficiency of the security for the said investment, and thereafter accepted the same, and the said John Hotson never having undertaken or professed to advise them as to the sufficiency of the security, the defenders Hotson & Howie, and the defender Robert Howie, should be assoilzied. (5) In any event, the defender Robert Howie is not responsible for the negligence or want of skill of the said John Hotson in executing business which it was beyond his implied authority as a partner to accept. (6) The said loan having been an investment within the powers vested in the said trustees at common law, or in any event, by the said contract of marriage, the defenders Hotson & Howie and Robert Howie should be assoilzied. (7) In any event, there having been no negligence or want of skill on the part of the defenders Hotson & Howie, or the defender Robert Howie or John Hotson, the other partner of the said firm, with reference to the said investment, the defenders Hotson & Howie and Robert Howie should be assoilzied."

H. A. Hotson pleaded—"(1) No title to sue. (2) The pursuers' averments are not relevant. In particular, it is not said that the law agents were employed by the pursuers, but by the trustees, to whom alone they are answerable. (3) The trustees having on full information and proper advice selected the investment in question, which was within the powers of the marriage contract, no liability attaches to the representatives of the law agents. (4) The security at the time being perfectly sufficient, and forming a safe and suitable investment for the trust funds, there was no negligence on the part of the law agents, and their representatives are not liable for any loss that may afterwards have arisen. (5) The loss having arisen through the general depreciation of property, from subsequent and unforeseen causes, no liability attaches to the defender."

The Lord Ordinary (M'Laren), after hearing counsel in the procedure roll, dismissed the action. The pursuers having reclaimed to the Second Division of the Court, their Lordships on June 29, 1886, recalled the Lord Ordinary's interlocutor, and allowed a proof before answer [*vide* 13 R. 1036, and 23 S. L. R. 760].

The proof established the facts above narrated, and its import otherwise appears from the opinions of the Judges, and especially from the opinion of Lord Shand.

The Court, after hearing argument for the parties on 23rd December 1887, appointed the cause to be argued before seven Judges.

The pursuers argued—The security was a bad one for the following reasons. It was over uncompleted buildings, erected on ground feued from the City of Glasgow Improvement Trustees, who had swept away the old streets and the old population. The buildings were put up by a spirit-dealer as a speculative venture. No independent valuation was taken, the trustees relying on the valuation of the borrower, which was at most a mere estimate when it was got. The matter was taken up and concluded with undue haste. There was an enormous ground annual. The cost of the buildings was less than the sum lent on them. There was never any real security at all. For these reasons the security was a bad one, and the parties responsible for it were liable, conjunctly and severally, to make good the loss on it to the trust. (1) *As regards the liability of the trustees*—There were only three cases bearing on the point in the law of Scotland. These were *Forsyth*, Jan. 28, 1853, 15 D. 345; *Millar's Factor* v. *Millar's Trustees*, November 2, 1886, 14 R. 22; *Wyllie Guild* v. *Glasgow Educational Endowment Board*, July 16, 1887, 14 R. 944. They showed three things—(1st) That trustees who advance trust funds on a borrower's valuation alone are liable for loss; (2d) that an indemnity clause, such as the trustees had here, will not protect them against want of due diligence; (3d) that buildings in course of erection are not a security on which to lend trust funds. There were, however, in the law of England a number of cases on the point, where the trustees had been held personally liable. In *Jones* v. *Lewis*, June 26, 1849, 3 De G. & S. 471, the security was unlet houses, as also in *Waring* v. *Waring*, December 4, 1852, 3 Irish Ch. Rep. (N. S.) 331, *reversing* a decision on February 26, 1852; Lewin on Trusts, p. 325. In *Drosier* v. *Brereton*, December 2, 1851, the houses on which the loan was made were out of repair, and there was an indemnity clause. In *Stretton* v. *Ashmall*, November 7, 1854, 3 Drewry, p. 9, the

subject was trade buildings, and there was an indemnity clause. In *Ingle* v. *Partridge*, February 18, 1865, 34 Beavan, 411, the valuation was that of the mortgagor. In *Bridge* v. *Gammon*, July, 20, 1872, 7 Ch. App. 719, the security was a hotel which was dependent for its value on whether the licence was continued or not, and there was an indemnity clause. In *Smethurst* v. *Hastings*, March 2, 1885, L.R., 30 Ch. Div. 49, the buildings were unlet, but the security otherwise was within the trustees' powers. In *Olive* v. *Westerman*, June 28, 1886, 34 Ch. Div. 70, the trustees obtained no independent valuation; *vide* also *Seton* v. *Dawson*, December 18, 1841, 4 D. 310; Lewin on Trusts, p. 325; *Hopgood* v. *Parkin*, November 21, 1870, L.R., 11 Eq. 74; *Learoyd* v. *Whiteley*, August 1, 1887, L.R., 12 App. Cases, 727, *per* Lord Watson; *Smith* v. *Stonehurst*, November 13, 1886, Times Law Reports, p. 77, *per* Mr Justice Stirling; *Partington* v. *Allen*, August 6, 1887, *ibid.* p. 828; *Speight* v. *Gaunt*, November 26, 1886, L.R., 9 App. Cases, 1, did not apply. The trustees were released because they bought through a stockbroker. Plainly, then, on authority in England and Scotland, the trustees were liable. Though the pursuers' interest in the trust-estate was contingent, yet it existed, and was quite a sufficient title to enable them to sue this action. (2) *As regards the liability of the law agent*—He was employed by the trustees not for their own protection, but for the protection of the trust-estate, and at its expense, and he was therefore liable to the beneficiaries of the trust. The fact of laying this investment before the trustees was a guarantee on his part that it was a good one. Indeed, in his evidence Mr Meek had deponed that he had stated at the second meeting of the trustees that the investment was quite a usual one. In *Partington's* case, *supra*, the law agent was found liable, conjunctly and severally, with the trustees. He was also found liable in *Graham* v. *Hunter's Trustees*, March 4, 1831, 9 S. 543. In *Ronaldson, &c.* v. *Drummond & Reid*, June 7, 1881, 8 R. 767, the agent laid his proposal before the trustees just as here, *vide* opinion of Lord Craighill, p. 779; *vide* also *Black* v. *Curror & Cowper*, May 27, 1885, 12 R. 990; *Oastler* v. *Dill, Smillie, & Wilson, &c.*, October 29, 1886, 14 R. 12; *Stirling* v. *Mackenzie, Gardner, & Alexander*, December 7, 1886, 14 R. 170, *per* Lord Rutherfurd Clark, p. 179; *Robertson* v. *Fleming*, May 30, 1861, 4 Macq. App. 167, *per* Lord Wensleydale, p. 199. There was no objection to suing the law agent in the same action as the trustees—*Taylor* v. *Rutherford*, March 17, 1888, 15 R. 608. It was obviously a simpler plan than applying to the Court to have a judicial factor appointed, or to have the trustees ordained to raise an action in their own name against the agent. All the parties interested were before the Court in the present action.

Argued for Mr Meek—It was not disputed that the pursuers had no vested interest. The action was therefore premature, inasmuch as it was not certain that they would ever sustain any loss. The pursuers had therefore no title to sue. As regarded their liability it might be admitted that the measure of the responsibility of trustees was that they should act in regard to investments in the way a man of ordinary prudence would act in the management of his own private investments. How stood the case here? In the first place, it must be noticed that the trustees had ample powers to make the investment in question. Indeed, if the object of the spouses, who were themselves to have the main interest in the estate, had been to secure to the trustees all the powers of investment which they as beneficiaries would have had, they could hardly have used more appropriate language. Further, there was a clause in the marriage-contract indemnifying them from "insufficiency of securities." The investment, then, being within their powers, was there anything in it, or in the way it was laid before them, which should have warned them? It was laid before them by the family law agent as a suitable investment, and accompanied by a valuation by Mr Burnet, a competent man. If that valuation was honest and sound, then the security was a good one. They were quite entitled in virtue of their powers to judge and to trust to the opinion given by their legal adviser, that there was a demand for such premises, and that the investment was one of daily occurrence. Mr Meek was certainly entitled to rely on that opinion, and it was just a case of the family and the family legal adviser consulting about their money, and Mr Meek not interfering. There was no reason to suppose at that time that the premises would remain unlet. The property was a tenement built and roofed, and already partially let, and though not completed at the time of the loan, it was subsequently completed, and for the purposes of this case the transaction must be considered as at the time when it was completed and the last payment made. The loss could not be said to have occurred more at one time than at another. The investment, then, was just an ordinary one on house property in Glasgow, and reasonably safe, and Mr Meek was entitled to be assoilzied. In any view, the sum could not be restored so as to let Mr and Mrs Rae get back the money.

Argued for the law agent—This was not a case where a law agent was charged with aiding and abetting trustees in breach of trust involving their fraud — where he was held a constructive co-trustee, and liable jointly and severally with them as art and part in a crime, *e.g.*, *Barnes* v. *Barnes*, February 12, 1874, 9 Ch. App. 251, *per* Lord Selborne, p. 244; *Alleyne* v. *Darcy*, June 16, 1854, 4 Irish Ch. 204. The suggestion here was that the law agent allowed the trustees to make an investment which was imprudent or beyond their powers. It must be admitted as settled that an agent was bound to exercise due professional care and skill to get for the trustees for whom he acted a good title, and also that if he undertook the duty of selecting an investment he must discharge that duty as faithfully as the trustees—*Oastler, supra; Smith* v. *Pococke*, February 22, 1854, 23 L.J., Ch. 545. There was, however, no authority for the contention that a law agent undertaking to collect proposals and to submit them to the judgment of his clients, and expressing an opinion, whether asked or unasked, incurred professional responsibility as a law agent. There had been *dicta* doubtless both ways. In *Ronaldson, &c.* v. *Drummond & Reid, supra*, the Lord Justice-Clerk and Lord Craighill indicated that an agent might be liable in respect of bad advice as regards the prudence of an investment. But these *dicta* were not necessary for the judgment. The only

case where an attempt had been made in England to make the agent liable was in *Chapman* v. *Chapman*, January 20, 1870, 9 Eq. 276, and in that case Sir J. Stuart negatived liability where there was no fraud, no question of title, and no undertaking to act as the trustees' "scrivener." The investment here was certainly within the powers of the trustees. True, the buildings were not finally completed at the first date of the loan, but *Wyllie Guild's* case, cited on this point, did not involve the proposition that a heritable security over buildings which are completed contemporaneously with the completion of the advance is not a good investment. This very question had come up in *Whiteley's* case. The Court of Appeal repudiated the view that the transaction was so rash that trustees exercising their judgment were not entitled to lend on such a security. It might be that where a trustee had to act outside his own province, and was under the necessity of delegating to a professional man—*e.g.*, to a stockbroker in a transaction as to shares, to a solicitor in conducting a litigation, to a conveyancer in a matter of title—the beneficiaries might have a direct action against the person to whom the matter was delegated, and the issue adopted in *Robertson* v. *Fleming*, *supra*, might be allowed to the beneficiaries if the trustees declined to sue; but then in that case there was no case against the trustee, who was a mere intermediary—*vide Speight* v. *Gaunt*, *supra*—the trustee acting merely as agent of the beneficiaries. On the other hand, there were matters which the trustee could not delegate; he could not escape the responsibility of executing his trust by taking the advice or assistance of another. The trustee might employ a solicitor to advise him as to his power to do something under the trust-deed. He was not acting then on behalf of the beneficiary, but on behalf of himself. He could not escape responsibility to the beneficiary by showing that he had taken legal advice—*Learoyd* v. *Whiteley*, *supra*; *Millar's Factor* v. *Millar's Trustees*, *supra*; *Gourlay* v. *Stretton*, June 15, 1827, 5 S. 804, n.e., p. 743. Trustees who committed a breach of trust were not exonerated even if they did so by counsel's advice—M'Laren on Wills, p. 2428, and cases there cited. There was no class of case in which the beneficiary was held entititled to bring an action against both the trustee and the agent. If he adopted the delegation to the agent, the trustee was free. If he repudiated the action of the trustee in consulting the agent, the agent was free. The liability of the agent involved the immunity of the trustee. If the beneficiary sued both in one action, then the simultaneous adoption and repudiation of the contract of employment between the trustee and the agent was involved. The claim against the trustee was based on the assumption that he was not entitled to delegate; the claim against the agent was based on the assumption that he should have kept the trustee right. The first involved adoption, the second repudiation of the trustee's contract with the agent—*vide Scarf* v. *Jardine*, June 13, 1882, L.R., 7 App. Cas. 350. To allow an action against both was to deprive the Court of the very materials necessary for forming a judgment on the circumstances; for as against the trustee the action must be based on the contract under which he took office, and as against the agent it must be based on the contract of employment between the trustee and the agent. Thus Mr Meek's evidence was not evidence for or against the agent, who was deprived of the benefit of cross-examining the very person who employed him—Taylor on Evidence, p. 663; *Ayr Road Trustees* v. *Adams*, December 14, 1883, 11 R. 326. Both agent and trustee had an interest to say the claim was not well founded, because—(1) The judgment would not be *res judicata* as between them. (2) The present action involved the anomaly that the agent did not join issue with his employer. (3) They suffered prejudice from the pursuer taking up first one ground of liability and then another. (4) If the agent were sued by the trustee, all personal exceptions would be open to him; but being sued by the beneficiary, he must raise an action of relief against the trustee, and if the trustee was sued by the beneficiary, his action of relief against the agent was still open to him. The only way out of the difficulty was to follow *Fleming* v. *Robertson*. The relation of trustee and beneficiary was not one of principal and agent, but of debtor and creditor. The relation of trustee and agent was also one of debtor and creditor. The beneficiary had no direct action against the debtor of his debtor. A beneficiary could not sue an ordinary debtor to the trust-estate—Mackay's Court of Session Practice, i. p. 280. No judgment in such an action would be *res judicata*, and that was the principle underlying the plea of irrelevancy here. This was not a case of an agent failing in his professional duty as regards an investment. There was no question as to the power of the trustees in the matter, or the legality of their professed acting. The agent had no control over the investment. He did no more at the worst than express an opinion as to its sufficiency. But his only employment was to collect proposals for investment. These were submitted to the trustees, who exercised their own judgment on them. It was no part of a solicitor's ordinary business to take such employment—*Chapman* v. *Chapman*, Jan. 20, 1870, 9 Eq. 276, *per* Vice-Ch. Stuart, 296. It was said there were certain well-defined rules about the proper investment of trust moneys which the agent should have imparted to the trustees and seen observed. There might be in the Courts of Chancery in England, but there were none in Scotland. The rule in Scotland was that no higher degree of diligence was necessary than a man of ordinary prudence would exercise in the management of his own private affairs. Even applying that rule to the investment of trust moneys on buildings in course of erection, (1) there was no duty on the agent to keep the trustees right as to this, unless specially consulted; (2) even if there was such a duty, no action lay directly against the agent at the instance of the beneficiary, because the trustee exceeded his powers. The only action possible was against the trustee.

At advising—

Lord President—This is an action against the surviving and accepting trustees under the marriage-contract of the Rev. Robert Reid Rae, and the lady who is now his spouse, and whose maiden name was Miss Jessie Croil. The object of the action is to have a certain sum replaced in the trust which has been lost, as it is said, by the breach of trust or misconduct of the

defenders. The action is also directed against the law agent who acted in the trust, and one of the peculiarities of the case is that one of the conclusions of the summons, I should rather say the conclusions of the summons, are against these defenders, the trustees and the law agent, "conjunctly and severally, or severally, or in such other way or manner as to our said Lords shall seem just."

The number of trustees appointed by this deed was very considerable, but the only surviving and acting trustees, as I understand, are the two spouses and Mr Meek, and another reverend gentleman, who is described in the marriage-contract as a student of divinity, but who is now, like the truster, a minister of the Church of Scotland.

The provisions of the marriage-contract are simple enough. The intending husband had nothing to settle on his wife but his furniture, and the only other obligation he undertook was to be punctual in the payment of his rates to the Ministers' Widows' Fund. But Miss Croil had some fortune of her own which she derived from her father, and it turned out to be £5000. The lady, Mrs Rae, is a *sine qua non* among the trustees, and her husband and a relative of theirs apparently—the gentleman who is described as a student of divinity—and Mr Meek are the existing body of trustees.

The lady's fortune is settled in this way. It is given to herself in the first place in liferent. If her husband predeceases her, then it reverts to her in absolute property, and there is an end of the trust. But if she predeceases her husband, then the husband enjoys a liferent of the money, and after his death it goes to their children. These children are the pursuers of the present action.

The case against Mr Hotson—or rather against the representative of Mr Hotson, who was the family solicitor, and the law agent in the trust—is that he recommended to the trustees a very bad investment for the trust money, which has in consequence been lost, and the contention against him is that he is bound, just as much as the trustees who made the investment, to replace the money which has been lost to the trust-estate. Now, it appears to me that this action does not lie against Mr Hotson or his representative at the instance of these parties. It must be observed that the pursuers have no vested right or interest in the trust-estate or any part of it. Their eventual and contingent interest depends on a variety of circumstances. If their mother survives their father, they never will have any interest in the trust funds at all. They may of course succeed to their mother as her executors if she dies intestate, or their mother may provide for them in any way she thinks fit, but they can never in that event have any interest in this trust. They must survive both their parents before they can have any interest in this trust; I think that is the only other contingency on which their right depends. As regards the law agent, therefore, I do not think that parties in such a position as the pursuers occupy, and with this sort of right and interest in the trust-estate, have any title to sue the law agent at all. The law agent is employed by the trustees, and of course he is responsible to them for any professional negligence or want of skill which may be shown in advising them or in conducting the affairs of the trust. That liability arises out of a contract of employment, and it might be that if the trustees were suing the law agent for liability under that contract of employment, the form of action might be that which we have here—that is to say, the demand by the trustees might be in the form of a conclusion that the law agent should replace the money which had been lost. But the position of these pursuers with regard to this law agent is entirely different. There is no contract of employment between them. Therefore the same liability cannot exist as exists on the part of the law agent to the trustees; it must be a different kind of liability altogether. I doubt whether any liability at all exists, because I think there is no foundation for the law agent's liability except a contract of employment, and to such a contract of employment in this case the pursuers are not parties.

But even suppose it should be held that the law agent might be answerable to these pursuers for any loss or damage which they may have sustained, is this a sort of action that can be maintained? I apprehend not. The only action that would then lie at the instance of the present pursuers would be an action for any loss or damage they themselves would sustain through the breach of trust and the loss of the money. Now, they have sustained no damage, and it is not at all clear that they ever will sustain any damage. Indeed, it is extremely doubtful if they ever will sustain any damage. Certainly they will sustain no damage if their mother survives their father, because then they would cease to have any interest in the trust, and they will not sustain any damage if they do not survive both their parents. Still more, when they come to have an interest in this trust-estate *quomodo constat* that this money may not be replaced, and not lost to the trust at all. It may be replaced by that time. It may be replaced by making the trustees or some of them liable to replace this money. It may be replaced—although this is not a very probable contingency—by an improvement in the security. At all events, one thing is perfectly clear, and that is, that the pursuers have suffered no damage, and it is extremely doubtful whether they will suffer any damage by the fault imputed to the law agent. I am taking it for granted that the fault imputed to the law agent in this action is professional negligence or fault. It may be doubtful whether it is what it is described as being in the summons or the condescendence, but I am assuming that for the sake of the argument in thus dealing with the law agent, and I come to the conclusion, and pretty clearly, that this action cannot be maintained against the law agent.

The case against the trustees of course stands in a very different position, because an allegation made by parties interested even eventually under a trust deed, that by the misconduct of the trustees a large portion of the trust-estate has been lost by being invested on a bad security, is *prima facie* a perfectly competent and relevant action. But this case is very peculiar in some of its circumstances. The defenders called are the whole accepting and surviving trustees, but only one of them has appeared to defend the action. Mr and Mrs Reid Rae do not appear at all, and the other rev. gentleman also fails to appear, so that

Mr Meek is the only defender. Therefore the case is narrowed to this point, whether Mr Meek is to be made answerable to replace this money.

Now, it must be taken for granted here, I think, in dealing with this question that this was a very bad security. I do not think anybody can say a word in its favour. The circumstances under which it was taken appear in the minutes of the meetings of the trustees. The money had been invested previously in a different way, but it required to be re-invested. The first minute with which we are concerned bears this (it is dated 30th January 1874)—"It being necessary to re-invest the two sums to be received at Whitsunday, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive." Upon the 5th May Mr Hotson did report accordingly, and the minute of that day's meeting bears—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which the trustees resolved to make a loan of Four thousand five hundred pounds (£4500) to Mr William Anderson, one of the applicants, on the security of buildings in Gallowgate, valued by Mr Burnet, architect, at £6500: Provided always that Mr Hotson shall be satisfied with the title, and that such part of the loan shall be deposited in bank, in the joint names of the parties' law agents, as Mr Burnet shall judge to be sufficient for finishing the buildings, to be drawn out and paid to Mr Anderson when Mr Burnet shall, at his expense, report the full completion of the work."

Now, one great objection to a security of this kind is that the work may never be completed. But that objection did not occur in the present case. The work was completed, and the money was afterwards paid in terms of this minute. But the failure of the security arose from this, that the erection of buildings of the character of those which were erected in this locality—that is, in the Gallowgate of Glasgow—was in itself a very great risk and an experiment. It turned out to be an entirely unsuccessful experiment. There had never been buildings of that description in that part of the town before. It was thought that they would take the market, but they did not, and the consequence is that this money cannot be recovered.

Now, Mr Meek's share in those proceedings consisted in this, that he was present at those meetings. There were also present, however, the husband and the wife, who were the parties directly and immediately interested in this money and in the investment, and Mr Hotson, the law agent. The question thus comes to be, whether if Mr and Mrs Rae, the parties chiefly interested in the money, desired to have this investment, and Mr Hotson advised the trustees to accept it, Mr Meek must nevertheless be held personally answerable for the loss of the money. One cannot help seeing at once that that is a very hard position in which to place Mr Meek, and I humbly think that in the circumstances Mr Meek is not liable. It is said that a trustee must under all circumstances show in the conduct of trust affairs all the prudence and intelligence that a prudent man would show in the management of his own affairs. I am not quite sure that that is either a very definite or a very satisfactory statement of the ground of liability of a trustee—that he shall fail to exercise that amount of prudence which a prudent man would use in the conduct of his own affairs, because there are many degrees of prudence. One man is a great deal more prudent than another, and one man is a great deal more intelligent than another, and it must depend a good deal on the prudence and intelligence of the particular trustee whether he is to blame or not. If he brings to the consideration of the question before him all the mental capacity with which he is endowed, can he be expected to do more? I rather think that the rule of liability in such a case is much better stated by Lord Stair than in any of the more recent cases. He says—"By the nature of the contract, mandators, seeing their undertakings are gratuitous, ought to be but liable for such diligence as they use in their own affairs, and the mandant ought to impute it to himself that he made not choice of a more diligent person, which our custom follows; but still there must be *bona fides*." Now, if we apply that rule to the present case we must not demand of Mr Meek any more prudence or diligence or knowledge than he actually possesses and uses in the management of his own business. For that purpose we must consider what Mr Meek is.

Mr Meek is a man who has been in business, but who has been retired for a long time. He was a West India merchant, but that was forty or fifty years ago. He is now a landed proprietor in Lanarkshire, and not apparently engaged in any business. He was a personal friend of Mr and Mrs Rae, and was induced by them to give them his assistance and advice as a trustee, and I think they must be held to be answerable for selecting Mr Meek in having made a judicious or injudicious choice. That is the view of Lord Stair, and I think it a very sound one. Now, judging from Mr Meek's actings and proceedings in this trust business, and from his evidence, he does not appear to me to be a man of business habits, or a man of great intelligence or great discretion. But he certainly had sense enough to do this. When he saw what kind of security this was that Mr and Mrs Reid Rae wanted to take for the trust money, he consulted the law agent, and asked him whether this was a proper kind of security to take, and the advice he got, according to his own statement at least, was that it was quite a common security, and that there was no difficulty about it. There is no contradiction of that statement, and looking to the candour with which Mr Meek's evidence is given throughout his deposition I think that we are well entitled to take that as proved as matter of fact.

There is one other consideration that weighs with me very strongly with respect to the position of Mr Meek as I have described it, and that is the clause of immunity in the trust-deed. It is very strongly expressed, and I think goes a long way to support the conclusion at which I am disposed to arrive. In the first place, there is a direction as to the sort of investments which the trustees are to take, and the sort of investments they are to take includes heritable securities, and this is undoubtedly a heritable security although it is not a good one. There may be very bad heritable securities, and

of course the meaning of the clause I am now referring to is not that they have power to take bad heritable securities, but that they are to have power to take heritable securities, and they are to be the judges of how far they are to go in that direction. But then it is declared that the trustees shall not be answerable for "errors, omissions, or neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases." Now, what can be charged against Mr Meek here? You may charge against him certainly that he committed an error—an error of judgment, and a very serious error of judgment. You may charge against him also that he was guilty of neglect of diligence; and we are certainly entitled to charge against him that he has taken an insufficient security. But these are three things for which the trust-deed says that he is not to be answerable. They are just the very things from which he is protected; errors, which means errors of judgment, neglect of diligence, and insufficient security. Can anybody charge anything more against him in this case? I think not. I have not heard anything more against Mr Meek than that he committed an error of judgment, that he neglected to be diligent—that is, prudent—and that the security which he accepted has turned out to be insufficient. If these are the only things which can be charged against him, then is it not plain that according to the very letter of this marriage-contract he is not to be answerable for these things?

These are the grounds on which I think Mr Meek ought to be assoilzied.

Lord Justice-Clerk — I concur with your Lordship. The only doubt I have had was with regard to the liability of the law agent for the advice of the investment, but on the whole matter I am rather inclined to think that at all events there is no case relevantly stated on the part of these pursuers against the agent. Therefore I concur in the result at which your Lordship has arrived on both points.

Lord Mure—This case is one of considerable importance and difficulty, but after giving it the best consideration in my power I have come to the conclusion that Mr Meek is liable to make good to the trust-estate the money that has been lost through the investment in question. I do not think it was an illegal investment, as was at one time maintained at the bar, in the sense of its being beyond the power or authority of the trustees to make. The trustees had power to lend upon heritable securities, and this was an investment of that description. But I think it was an improper investment for a trustee to make of funds committed to his care, and so very imprudent as to subject him in liability for the loss of the money. In dealing with questions of this kind the rule according to which the conduct of gratuitous trustees fall to be judged is, that they require to exercise the same prudence which a man of ordinary care would do in the management of his own affairs. The law, as I understand the matter, was so laid down in this Court in the case of *Kennedy*, 12 R. 275, after apparently considerable discussion, by the Lord Justice-Clerk, where his Lordship says that gratuitous trustees are liable in such personal diligence as a man of ordinary prudence would use in his own affairs. Other cases were quoted to us to a similar effect. The question therefore for consideration on the evidence is, whether the defender acted with that prudence in lending the trust funds in the way he did?

Now, the evidence as to the nature of the investment is very distinct. It was an investment on house property which was in the course of erection. The subject was not in existence at the time the money was advanced, and it was not finished, and could not be finished for some months after the loan was made—not, I think, till the month of May 1875, when the last instalment was paid up. It is plain, moreover, on the evidence that this was well known to the defender Mr Meek, because it was matter of arrangement when the loan was made in the spring of 1874, that a very considerable portion of the money was to be retained by the agents of the trustees, and only to be paid on certificates from the architect that the work certified had been finished to his satisfaction. It was in respect of that money that the work was enabled to be carried on, and it was in respect of that arrangement that the money was retained by the trustees, and finally paid up somewhere in the year 1876. Moreover, it does not appear that at the date of the loan any part of the properties had been let or was capable of being let.

That being the nature of the security, the money was advanced upon substantially an admittedly speculative transaction, to some builders who were building large blocks of houses in that part of the town. And I cannot see any evidence before us that there was anything laid before the trustees to satisfy them that there was any rent to come in for a considerable time, and consequently any rent out of which the interest on the loan was to be met, because there was a ground annual over the block which required £190 a-year to pay it, and it of course had precedence of the loan. There was no rent to meet the ground annual when the loan was made. Then the locality, as your Lordship has remarked, was a bad locality, and that, I think, is plainly the opinion of the architect consulted at the time as to the valuation of the property over which the loan was desired. Mr Burnet admitted that it was not exactly the locality in which blocks of houses of that description were built. Accordingly the rent, as I understand, when the subject came to be a letting subject, was not sufficient to pay even the ground annual. The interest was paid by the man who was building the block or his agents, for a certain time, but ultimately no interest came to be paid, and then this question arose.

Further, the only rental that was submitted to the trustees at the time the loan was agreed upon was a speculative rental, framed on the basis of calculating what, on the supposition of houses of this class letting, would be got for them. That was the only thing laid before the trustees. Now, to my mind it is difficult to see from what sources these parties were to be sure that they were to get their interest. The buildings were unfinished, and they were not to be finished for a considerable period. The borrower had no money to build with, and these trustees actually lent their money to build the subject out of which they expected

to get the interest on the loan—out of the rents of the subject when it came to be let. I hold that to be as imprudent a transaction as any man could enter into. There being no rents drawn for the subject at the time, it appears to me that that is of itself sufficient to induce any man to say that it would not be sufficiently safe for him to invest his money on such a security. In advancing money you do not look to security for your capital only, but to security for the payment of your interest, and all the more so when the whole of the trust fund is advanced on the one particular security and on a property of this sort. Where was the interest to come from for this amount of money—£4500—if the personal bond of the party to whom the principal was lent was not good for it? His personal bond was not good for it. Where was the interest for this money to come from at the date when this money was advanced? The subject was not in existence that was to yield the rental. Looking at it from that point of view, it must, I think, be considered as risky a concern as ever I saw, and I think it is one which no man of ordinary prudence would ever have entered into in the management of his own affairs. Upon that ground I hold that Mr Meek was not justified in assenting to this investment. He was evidently very doubtful about it himself. That is very clear, because he frankly says in his evidence that he put the question to the agent, whether advancing money on this sort of property was the thing to do, and he says the agent assured him it was. But I do not think myself, with all submission, that when an agent gives his client bad advice that can free the client from responsibility for the act which he was going to do—the responsibility, I mean, which would otherwise attach to it. In this matter of the sufficiency of the money value of a security I have always understood that it was the client who was to judge and deal with the question, and not the agent. I think the minute of the meeting of the trustees to which your Lordship referred bears that out. It proceeds on that footing. It is dated the 30th of January 1874, and it says —"It being necessary to re-invest the two sums thus to be received at Whitsunday, it was resolved to look for heritable securities of adequate value, and Mr Hotson was directed to be on the outlook for such, and to report to the trustees any proposals he might receive. In case the funds, or any part thereof, should not be thus taken up, it was resolved to deposit the uninvested money in the Glasgow branch of the Royal Bank on deposit receipt in favour of the Messrs Rae and Mr Meek on behalf of the trustees." Then the matter came up again on the 5th of May, and the minute of that meeting bears—"There were laid before the meeting rentals and valuations of several heritable properties on which loans were wanted, after considering and comparing which"—it was the trustees who did that —"the trustees resolved to make a loan of Four thousand five hundred pounds (£4500) to Mr William Anderson, one of the applicants, on the security of buildings in the Gallowgate, valued by Mr Burnet, architect, at £6500; provided always that Mr Hotson shall be satisfied with the title." I put the question to counsel in the course of the discussion whether, when the individual employed his agent to get a security for him, the agent becomes responsible for the goodness or value of the security, and the answer was that unless there was a special arrangement by which the agent undertook that liability he was not responsible. But judging from what I have seen myself I think that what is always done is this. A rental is laid before the parties making the loan. I have had it done in my own case. These rentals show what is the revenue of the security and what burdens are on it, and what is the margin which is over for the payment of the interest on any loan that may be advanced. The agent leaves it to the client to say whether he is satisfied with the value of the security. The agent's responsibility, in my view of it, applies to the title, and to seeing that the security in point of law is a good security for his client to take. That is what the agent has to look after—the matter of value is what the client whose money is to be laid out has to be satisfied with. In this case the security before us is plainly one which a trustee ought not to have taken. But the bad advice given by the agent cannot free the client.

On these grounds the conclusion I have come to is that Mr Meek took an excessively bad security, which as a trustee he was not entitled to take. I am quite aware of the clause of immunity in the trust-deed to which reference had been made, but I think that when the mistake is so flagrant a one as that which we have to consider here, the clause of immunity is not enough to protect the trustee. On these grounds I think Mr Meek must be held responsible for the loss of this money. It is to be regretted no doubt, for Mr Meek seems to have acted very much on what took place between him and Mr and Mrs Reid Rae. They were anxious for the security, and Mr Meek seems to have been anxious to benefit them. But brought before us in the way that it has been I do not see any escape from the conclusion which I have expressed.

LORD PRESIDENT—What about the agent?

LORD MURE—On the question of the law agent's responsibility, I am of opinion that he is not responsible for the loss that has here arisen, and that quite distinctly. I do not see anything in the minute I have referred to which imposes liability on the agent for advising a loan of this amount on an insufficient security. I do not think he was employed to advise the trustees on the matter of value. I do not think that matter falls within the ordinary employment of an agent. I think the agent is in such a case responsible only for mistakes in the preparation of the title, and that unless he is specially employed to see to the value of the security he has no responsibility if the security turns out to be bad. If it were otherwise, it would come to this, that the agents in trusts would be held to guarantee the trust-estates against such loss as has occurred here. That is a position which it seems to me no agents could be expected to put themselves in. If subjected to such liability they must find a way of getting out of it. I never understood that the fee that is paid to an agent on the advance of money covers also the risk that may arise from the security turning out to be of insufficient value. An agent is employed to see that everything is right in the preparation of the title. If that is all his responsibility there can be no question as to his responsibility for

the money that may be lost through the insufficiency of the security. I therefore think the agent in this case is free.

Lord Shand—In regard to the question of the liability of the agent, I concur with your Lordship in thinking that the pursuers of this action have no title to sue; and I also concur with my brother Lord Mure in thinking that, even if the pursuers had a good title to maintain the action against the agent, liability has not been established.

It appears to me that a law agent's proper professional duty and obligation is to see that the title to the security which is proposed to be taken shall be in all respects valid and effectual. *Prima facie*, I do not think his duty goes further. He may undertake more, and in the course of their employment law agents often do undertake more, but if nothing more is undertaken, that appears to me to be the limit of their professional duty. In dealing with the question of title to sue, however, I shall assume that there was a failure to perform a duty in regard to a matter for which there is liability to the trustees as representing the beneficiaries, as, for example, in taking a bad title to a heritable security. In that case it appears to me the persons entitled to maintain an action against the law agent for failure to perform a professional duty are the trustees and not the beneficiaries. The trustees are the employers of the law agent. The direct relation of employment arises between them, while no such relation exists between the beneficiaries and the law agent. It is true that the employment which a law agent undertakes for the benefit of the trust-estate, is consequently for the benefit of the beneficiaries, but the persons who are to vindicate the rights of the trust-estate are the trustees who are vested with the management. Suppose an agent to fail in professional duty, and loss is thereby caused, what is the nature of the claim that arises against him? He has committed a breach of duty, or failed to exercise professional skill. The claim against him is one of damages, and the measure of the claim is the loss which he has caused to the estate. Trustees are in a different position, for they may be required to replace money lost by the beneficiaries merely objecting to their taking credit for the amount in their trust accounts. The law agent in the case supposed is simply a debtor to the estate in respect of a claim of damages. Can it then be maintained that debtors to trust-estates may be called in actions by any of the beneficiaries who think fit to do so? Persons may owe debts to a trust-estate on a great many grounds. A truster may die having a great many debts owing to him. If the trustees do not think fit to raise an action against the debtors for certain debts, having doubts, it may be, how far they may be certain of success, is it for a beneficiary or beneficiaries to do so in their own name? I think they have no such right. And I do not think this is a matter of mere form; it is, in my view, a matter of substance, because if the law were otherwise, then the debtors of trust-estates, including amongst them law agents who may have been employed by the trustees, would be liable to actions at the instance of many different persons—of anyone having a beneficial interest in the trust-estate—requiring them to pay the amount of their debts to the trustees. I think such an action is not competent, and that the only persons who can maintain actions to recover debts due to an executry or trust-estate are the administrators of the estate, the trustees or executors. A beneficiary could not discharge the liability for a claim due to the trustees, and I do not see that a judgment in an action at the instance of a beneficiary could be *res judicata* in a question with the trustees. And so it appears to me that the law would get into extreme confusion if we were to sanction an action of this kind raised by a beneficiary against one with whom he had no contract. The beneficiary no doubt has his rights against the trustees, for the trustees are in direct relation with him because of their having undertaken a trust for his behoof. It appears to me that if beneficiaries seek to enforce by action a claim of any kind against a debtor to the trust, they must either compel the trustees to raise the question directly in their own names, or get authority to use their names, or get an assignation to the claim, and thereupon sue as assignees. So that in my opinion there is no title in this case to sue this action. I concur, however, with your Lordship's observation that as in a question with the agents this is an action of damages, and it is clear that the present pursuers are unable to qualify present damage (for it may yet be that there may be no damage suffered by them at all); that is a second reason for holding that this is a bad action against the agents. I shall only make this additional observation on this branch of the case, that if the agents' liability were sought to be enforced because of their having given bad advice to the trustees when asked to advise as to whether they would incur personal responsibility in making the investment now complained of, I would hold that this would give rise to a claim personal to the trustees, and to be made by them alone, and to which the beneficiaries never could get right unless the claim was assigned to them by the trustees voluntarily. So that, looking at the case in any view that can be taken of it, it humbly appears to me that there is no title to sue the law agent.

But I am further of opinion with my brother Lord Mure, and on the grounds he has stated at the close of his opinion, that there is no liability on the part of the agent, even if the pursuer had a title to maintain the action. I do not think there is any ground of liability averred in this action, for it is not alleged on record that he was employed to perform any duties beyond the ordinary duties of a law agent.

It is for the trustees themselves to judge of the propriety of making an investment of the trust funds, to select the investment or to sanction it, and that duty they are not entitled to devolve either on their law agent or anyone else whose advice and assistance they may very properly take to enable them to arrive at a sound judgment. The security having been resolved upon, the agent's ordinary professional duty is, as I have said, to see that a valid title is completed. No other duty and obligation arises from the mere relationship of agent and client, although in the case of trustees I should further hold that if an agent is consulted

about an investment which the trustees propose to make, and which—being in the knowledge of the terms of the trust-deed—he has reason to think would be beyond the powers committed to them, he is bound to warn them of this. No doubt he may undertake further duties. This undertaking may arise either from express employment or from circumstances which show that it was the understanding of himself and his client that his duties should not be limited merely to seeing to the validity of the title. Thus he may be asked to inquire for and report upon securities for the consideration of his client, and may undertake to do so. This is so often done by law agents that it might almost be said to be part of their ordinary duties as law agents, but I do not so regard it, for trustees themselves, or persons with whom they are acquainted, may look out for suitable securities for trust funds just as an agent may do so. Where this duty is undertaken it is of course incumbent on the agent to give the fullest information he has obtained in regard to the security, and especially to inform his client of any disadvantage or drawback to the security of which he is aware, and which the client may not justly be expected to know, but which it is material he should know; but his duty does not go further or involve any responsibility for the sufficiency of the security. The agent's failure to give full information when he was bound to do so seems to me the true ground of judgment in the case of *Ronaldson* v. *Drummond & Reid*, 8 R. 767, as Lord Fraser has pointed out in his opinion in the case of *Stirling*, 14 R. 177.

Still further, a law agent may expressly or by his conduct undertake not only to report upon securities for the consideration of his client, but to select and take a security for a client who devolves that duty entirely on him, and in this special case, in which the client trusts entirely to him, he becomes of course bound to use all reasonable care that the investment is a safe and proper one. In such a case the law agent, by agreeing to do all that the client would do for himself, undertakes at the least the whole duties and obligations which devolve on a trustee making investments of trust funds. The case of *Oastler*, 14 R. 12, is an illustration of this class of case, for there the lady trusted entirely to her agents to make an investment for her, and in the case of *Black* v. *Curror & Cowper*, 12 R. 990, the law agents undertook not merely to see to the validity of the title but to the sufficiency of the security.

In the present case there is no averment of any special employment, or of any undertaking under any special employment. All that the agent was asked to do was in terms of the minute of 30th January 1874, "to be on the outlook for securities, and to report to the trustees any proposals he might receive." Then came the meeting at which the proposals received were reported, and the security in question was agreed to be taken by the trustees. Now, the single piece of evidence of what occurred at the meeting as presented by the pursuers, beyond the terms of the minute itself, is to be found in the testimony of Mrs Rae. She was examined about what occurred at the meeting, and what she says is this—"What were you told at the meeting about the investment?—(A) That an investment would be found; it was not found, but would be found. Perhaps it was found by the meeting of the 5th May. (Q) What else were you told?—(A) That it was a first-class investment—a good investment. (Q) Who told you that?—(A) Mr Hotson and Mr Meek." She passes from that to say something about the ground annual, and then this question is put—"Who did you rely on?—(A) Mr Meek. (Q) Anyone else?—(A) No, he took the management. (Q) Did you rely on Mr Hotson?—(A) No, I did not think of him." Now, that is the sole evidence in this case as to the part taken by Mr Hotson, the agent, in the proceedings at the meeting of the 5th May. The pursuers examined Mrs Rae, but not Mr Meek, or anyone else present at the meeting, and what I have read is all that Mrs Rae has to say on the subject. What it amounts to really is, that the law agent at that meeting, in conversation with the trustees, expressed his opinion that the security was a good one—an opinion which it is not doubted he honestly entertained. Now, I cannot see any ground for holding that this should infer responsibility on his part for the sufficiency of the security. He had merely to inquire about securities, and report any proposals to the meeting. He did not undertake to perform the duty of the trustees; to judge of the proposed investment, and to sanction it. This the trustees did for themselves, and having done so, they directed the law agent to see that a satisfactory title was got.

Persons with money to invest frequently consult brokers about their investments. The broker, who gets a commission for his trouble on any transaction he carries through, is frequently asked for advice, and recommends particular investments. Advice honestly given often turns out bad and results in loss, but it is needless to observe that no one would think of maintaining that the broker was liable in damages. I am unable to distinguish between the two cases—the case of the broker and the case of a law agent in the position of the agent here. Both are paid for their services, the broker for purchasing the required stock and having the title by transfer completed; the law agent for attendance at the trustees' meetings and for completing the title to the security taken; but neither of them has undertaken to see to the sufficiency of the investment as a trustee undertakes to do so.

There is a further passage in the proof which the pursuers sought to found upon in regard to the agent's responsibility—I mean the passage in the evidence of Mr Meek, who was examined on his own behalf. That passage is in these terms—"(Q) Do you remember discussing Mr Anderson's loan?—(A) I remember that with respect to the Gallowgate. I was not much pleased with it, but great improvements had been made by the Improvement Trust, and it was becoming a very valuable part of the city. When Mr Anderson's application was laid before us I pointedly put the question to Mr Hotson whether we were doing right in lending upon a property that was in the course of being built. He answered that there could be no objection on that score—that it was a matter of common, almost daily, occurrence in Glasgow." Now, in so far as that is of any value in the case, it is evidence for Mr Meek, and for Mr Meek alone. The pursuers had closed their

case in a question with the law agent, and any evidence which the pursuers had led upon that matter was in the course of Mrs Rae's deposition. Mr Meek is entitled to the benefit of this evidence as against the pursuers in his favour, but it cannot be taken into view in the question between the pursuers and the law agents. It would, I think, be unjust that it should be taken. The evidence was not led by the pursuers, and there was no arrangement that the evidence of Mr Meek should be taken as part of the general evidence in the case as in a question between all the parties. But I am bound to say, further, that even if this part of Mr Meek's evidence were any part of the pursuers' case, it would not affect my mind so as to alter the conclusion to which I have come. For after all the question put to Mr Hotson was not a question put to him as a lawyer—it was not such a question as this, "Are we the trustees acting within our powers?" or, "Are we doing anything *ultra vires*, looking to the terms of the trust-deed?" but simply this, "Are we right in lending on property that is being built—is it a security which your judgment would recommend?" His answer was that there could be no objection on that score—that it was a matter of common, almost daily, occurrence in Glasgow. There is only too good reason to think that was the practice. Being invited to give his opinion on the propriety of the investment by the parties present, he did so, but I can see no undertaking of any responsibility arising out of this. And I should just like to repeat what was very well stated by the Dean of Faculty from the bar, that the test of this was, had Mr Hotson any power to control an investment? I quite think that if an illegal investment was proposed—one *ultra vires* of the trustees, because the deed prohibited anything of the kind—Mr Hotson would have been bound as the law agent to advise the trustees of this, and if he failed to do so, might and probably would have incured responsibility. But if what occurred was simply an expression of opinion as to the quality of the security, as I think it was, then Mr Hotson undertook no responsibility, because he was not charged with the duty of making the investment, and had no control over the trustees in the matter. If indeed the case could be brought up to this, that under the deed a certain class of investments was prohibited, and if the law agent ought to have advised them as a lawyer that the investment was beyond their power, that state of the facts would have raised a different question. But I do not think that the facts here raise a question of that kind. For these reasons, and on these grounds, I am of opinion that even if the pursuers had a title to sue the agents, they have not proved any grounds for holding the agents responsible.

But with regard to Mr Meek I am of opinion with Lord Mure that a case of responsibility has been made out. Your Lordship, I think, said that the investment was a bad one. Lord Mure said he thinks it about as bad as could be, and I am rather of Lord Mure's opinion on that point. In the first place, the subject of the security was an enormous block of buildings in the course of being built, involving an outlay of some £25,000 or £30,000, and the loan was to be given on a part of the buildings which was unfinished. It is true, as your Lordship has observed, that the building ultimately was finished, and no doubt Mr Meek is entitled to the benefit of that circumstance. If that had been the only circumstance against the investment, it was undoubtedly cured in the end. But besides being unfinished, and so of the class of property so much condemned in the case of *Wyllie Guild*, 14 R. 944, these buildings were necessarily untenanted, and there was a very large amount of space to be filled up before any rental could be drawn from the property. Then there was a ground annual amounting to about £200 a-year, forming a preferable burden over that part of the property on which the loan was to be given. It further appears that the trustees lent £4500, and the actual outlay on the building was only about £4000. It further appears—and I think this is the main blot on the investment—that the buildings were erected by Mr Anderson as a speculation which was attended with considerable risk. He had not the money to put them up with, and when they were built with borrowed money he proposed to open warehouses of a class unknown in that locality, and which were to be tried then for the first time to the east of the Cross of Glasgow. Indeed, warehouses had never existed there before. The result of the risk thus undertaken has turned out what might have been anticipated. A great part of the buildings have remained untenanted, and the portion with which we are more immediately concerned has never produced rent enough to cover the ground annual. Then it is further to be borne in mind that the transaction was taken up and closed at a single meeting of the trustees, and the only valuation, which was not a detailed valuation, which was laid before the meeting, was one sent in by the proposed borrower, and made by a gentleman who had been employed on his behalf. It was a mere statement of opinion by Mr Burnet, no doubt a man of great eminence in his profession, but all the trustees had to go upon was his opinion that the buildings when completed and papered and painted would be worth so much on the assumption that they would then be let. The *data* on which Mr Burnet proceeded were not given in his report, and no *data* were asked for or laid before the trustees to enable them to test the value of Mr Burnet's opinion. Now, I think with Lord Mure, that taking all the circumstances I have mentioned into account, the security is one which must be condemned. It is not a security which any prudent man exercising reasonable care would have accepted in the management of his own affairs. The test in this class of cases is, and I think must remain, that a trustee must show the reasonable care that a man of ordinary prudence would exercise. I think Mr Meek, though acting with complete *bona fides*, was entirely awanting in that care.

The last point to which I have alluded, the general terms of the valuation and the absence of all *data* to justify it, seem to be sufficient alone to show that the investment was made without that reasonable care which a man of ordinary prudence would exercise, and was therefore an investment which the trustees were not warranted in making, for in the recent case of *Learoyd*, L.R., 12 App. Cases, Lord Watson said—"If they employ a person of compe-

tent skill to value a real security, they may, so long as they act in good faith, rely upon the correctness of his valuation. But the ordinary course of business does not justify the employment of a valuator for any other purpose than obtaining the *data* necessary in order to enable the trustees to judge of the sufficiency of the security offered. They are not in safety to rely upon his bare assurance that the security is sufficient, in the absence of detailed information which would enable them to form, and without forming, an opinion for themselves. At all events if they choose to place reliance upon his opinion without the means of testing its soundness, they cannot, should the security prove defective, escape from personal liability, unless they prove that the security was such as would have been accepted by a trustee of ordinary prudence, fully informed of its character, and having in view the principles to which I have already adverted."

If this had been a question with Mr and Mrs Rae as pursuers, then I should have seen very good grounds for holding that they could not succeed in such a demand as the present, for they themselves were parties to the whole proceedings. But unfortunately for Mr Meek there were other beneficiaries whose interests he and Mr and Mrs Rae were bound to protect. Those interests no doubt were contingent, but they existed, and the trustees had a duty to those parties, the present pursuers, who no doubt must say, that just as Mr Meek is responsible so are Mr and Mrs Rae, and I see no reason to doubt that this is so.

I concur with Lord Mure in thinking that it is no answer in a case of this kind for the trustees to say that they consulted the law agent. I have read the passage in the evidence upon that matter. I think the trustees merely asked the agent as to his view of the value of the security. That was a matter on which he would naturally give his opinion if asked, but without thereby incurring any responsibility if he gave an honest opinion. It will not free the trustees from liability that they acted on the opinion of anyone else, even of their law agent, in regard to a matter as to which it was for them to judge, and responsibility for which lay with them.

It has been suggested that a new principle for determining the liability of trustees should be adopted—perhaps I am wrong in calling it new, as it is suggested in the passage from the work of Lord Stair which your Lordship has read. The suggestion, as I understand it, is, that responsibility for improper investments should depend on the capacity of the trustee, so that one trustee, if a person of intelligence and ability, might be held responsible, while another of less business capacity would not be so. If the trustee is able to say, "Well, it is quite true I have made a very bad investment, but I am a very stupid man," he shall be free from responsibility. I do not think a principle of that kind can receive effect in the administration of the law of trusts. If it were to be introduced now, and made a foundation for legal decision, the issue in each case would come to be, what was the capacity of the trustee? and it is easy to see that this would open up a very curious inquiry, and leave the Court with no settled rules or principles to be applied as cases occurred. We must, I think, keep to the much broader rule, and the only rule which we can proceed upon is that which has been recognised for years, namely, that a trustee shall be responsible if he does not in the transaction challenged show the reasonable care which a man of ordinary prudence shows in the conduct of his own affairs. On that point I may quote the words of the Lord Chancellor (Halsbury) in the case of *Learoyd*, *supra*—"I do not think it is true to say that one is entitled to consider the special qualities or degree of intelligence of a particular trustee. Persons who accept that office must be supposed to accept it with the responsibility at all events for the possession of ordinary care and prudence."

I have only further to say, in regard to the clause of immunity founded upon, that I do not think it will relieve Mr Meek of responsibility in this case. By that clause it is no doubt declared that the trustees shall not be answerable for "insufficiency of securities." But that surely means "insufficiency of securities" which when they were taken had reasonable consideration at the hands of the trustees. As to the other words of the immunity clause, I do not think they can be held to cover the case of taking such a security as was accepted with so little care or consideration in the circumstances already stated.

I am therefore of opinion with Lord Mure that the pursuers are entitled to succeed in this case against Mr Meek—of course subject to this, that so far as Mr and Mrs Rae are concerned, I should reserve any question of liability to them, my strong impression being that there can be no liability to them, and no right on the part of either of them, to take any advantage of the money to be paid to the trustees inasmuch as they took the security just as Mr Meek did. Subject to that reservation, I am of opinion that Mr Meek is responsible.

Lord Young—I think it has been the practice of this Court, and the practice of the Court is the law of the Court, when properly appealed to, to take a beneficent charge of trust interests—I mean interests which are committed to the charge of trustees—of any property in the hands of trustees, and out of the hands of the parties really interested. The case before us is one in which a trust-estate is competently or incompetently brought before the notice of the Court. It is averred and established to the satisfaction of, I think, all your Lordships who have spoken that this trust-estate has suffered in the meantime at least a great loss—a loss to the extent of the whole of it. This trust-estate consists of a capital sum of £4500, and for some years that sum has had no existence. The parties having an interest in that sum—in that trust-estate, the property to answer which ought to be in the hands of others—come into Court and tell the Court that it has gone out of the hands of these trustees who were charged with the custody and the management of it. They tell us that it is lost. The action is at the instance of the ultimate fiars. I do not stop at this moment to notice the contingency to which your Lordship referred, and which you quite accurately stated. The right of these fiars, although subject to that contingency, is nevertheless an existing right. They bring an action into Court. They bring into Court in connection

with that loss of the trust fund—its disappearance out of the hands of the trustees—the trustees and the law agent who was employed by them in that business which led to the loss which they allege. All of your Lordships who have delivered judgment are of opinion that it is a competent action as directed against the trustees. There is therefore nothing in the contingency affecting their right which prevents them in your Lordships' opinion directing their action against the trustees. It is competently directed against them, and in the opinion of two of your Lordships it is well founded against them. I agree with all of you in thinking that the action is competent by these beneficiaries against the trustees.

But I differ from those of your Lordships who think that the action is well founded against the trustees. I am of opinion with your Lordship in the chair, and with the Lord Justice-Clerk, that the action is not well founded against the trustees. Only one of the trustees has appeared. Of the other three, two are the parents of the pursuers, and the third trustee is their uncle. These three other trustees have not appeared. But in examining into this trust matter, I take them all into account. I do not think they are in any different position from Mr Meek in this question. For the reasons stated by your Lordship in the chair, I think Mr Meek is not answerable. But I do not go upon the terms of the protection clause in the marriage-contract in thinking that Mr Meek is not liable here. I go on the fact that he gave his attention to the matter, and consulted and acted on the best, what he thought the best advice—the advice of the family agent, who was quite properly employed by the trustees in this business. Upon that ground I think the trustees are not answerable. I do not go on the indemnity clause, for which, I think, there would be a great deal more to be said but for the decisions. But the decisions are very much in the way, for in many, almost in all of the cases in which liability has been held to attach to trustees for neglect, the indemnity clause was much in the terms of the indemnity clause here, and in the argument in favour of applying that indemnity in favour of the trustees it was always urged that there was an exemption for neglect. It was said by the trustees that although there was exemption for neglect, neglect was charged; although there was exemption for error, yet error was charged. Then as to insufficiency of security, why, here the whole case was insufficiency of security whereby money has been lost. The trustees would say as regards that, "I am protected against liability for that." All that has been disregarded in the past decisions of the Court in this country and in England also. Therefore I do not proceed on the protecting clause at all. I proceed on the other ground, and on that ground I am of opinion that the trustees here did not incur liability for the loss, and that chiefly because they took the proper course of consulting and acting upon the advice of the family agent in the matter. Indeed they put the matter into the hands of the family agent, who undertook the business.

Well, then, is the action properly directed against the family agent? If he incurred no liability, if his conduct led to no responsibility on his part, of course there is an end of the matter. Nobody can sue him. He performed his contract. But one can hardly well say, after the language that has been used, that he performed the duties under his contract in such a manner as to avoid consequences—liability for the consequences. I understood your Lordship in the chair to desire to avoid deciding whether he incurred liability or not, and to put the judgment on the ground that he is not liable to the pursuers of this action in this action. I understand that to be the opinion of the Lord Justice-Clerk also. But, on the other hand, two of your Lordships are for deciding the question of liability, and in the judgment of two of your Lordships there is no liability. But in my opinion there is liability, and liability which may be enforced in this action. This action is in no sense an action of damages. It is no more an action of damages against the law agent than it is an action of damages against the trustees. If it had been an action of damages it would have asked money to be paid into their pockets. That is an action of damages. I never saw an action of damages with any other conclusion than one for payment to the pursuer. I could have well understood such an answer to that as this—"Why, you have suffered no damage. You may never suffer any damage. Your right is contingent, and may never become absolute, or it may become absolute so long hereafter that prosperity may have returned to this part of Glasgow, and everything may have become right by that time." But this is in no sense an action of damages. And I should, besides, be very sorry to see the ends of justice frustrated on a mere question of form of process.

I will begin by assuming liability in order to deal with the views presented by your Lordship in the chair, and from which I dissent, on the assumption of there being liability. What, I should ask, is the consequence if there is liability, which I am now assuming? Let me put a clear case of liability by the agent employed by trustees. He takes a bad title. That is a clear case for liability. There is not a good title to the property over which he lends the trust money. He is therefore liable. What is his liability? Liability in damages? That is not the language which one would employ. But I think if one called it damages, that would not affect the result.

But that is not accurate language to employ. It does not express the true view of the matter. What an agent incurs in such a way to an ordinary client is not damages. It is liability to restore the money. The position is not this; the agent does not say—"You are to take the bad article I have given you, and I will make up the deficiency, or any loss that may accrue to you. I will pay you damages." That is not what would be said. What would be said by the injured party would be this—"No, you give me back the money which you had out of my hands, and take my security to yourself." So that it is not damages in any sense whatever. But call it what you will, the liability is to pay the amount of money back into the hands of the client, or, in such a case as the present, into the hands of the trustees. That is the liability. Is it doubtful that, if under a contract of employment by trustees to invest the money the agent took a bad title, which I am putting as a specimen case of incur-

ring liability under that employment, the agent's obligation would be to pay the money back into the hands of the trustees—in this case the £4500? That is just the conclusion of this action—that the agent must pay into the hands of the trustees the amount of money that has been lost to the estate for the benefit of whom it may concern. It is ludicrous to speak of it as an action of damages at the instance of beneficiaries who may never receive a sixpence of the money. Their conclusion simply is that this agent shall pay back into the hands of the trustees the money which through his misconduct has been lost. And why, if that misconduct is established, shall that not be? And how shall it be done? Liability is to be enforced somehow. If not in this action, how is it to be done? Oh, it is said, you must apply to the Court to appoint a judicial factor, or apply to the Court to compel the trustees to bring an action in their own name against the agent. Is not that the idlest matter of form of process, to be followed merely for the purpose of incurring expense and wasting time? Are the facts not all before us? Can we not judge upon these facts whether there is liability or not? Is there any other remedy asked here than would be asked in an action at the instance of the judicial factor or the trustees? There is only the one remedy, and that is what is asked for here. It is, I repeat, the same remedy that would be asked for in an action at the instance of the judicial factor. Then why not consider the matter in this action? The whole estate is before us in this action. All the questions connected with this trust are here before us. All the parties who can be interested in those questions are here also—the trustees and the beneficiaries and the law agent. There is not anybody who has a vestige of interest in those questions who is not before us. And the only conclusion which would result from establishing liability is the conclusion which is directed against the defenders in this action, which is not an action of damages in the least. Cannot the question of liability be tried in this action with perfect safety to the legitimate interests of everybody concerned. It can be tried with perfect safety to the legitimate interests of everybody concerned? It certainly can be tried with perfect safety to the legitimate interests of the trustees; why then can it not be tried with safety to the interests of the law agent? What risk would he run? How would he be prejudiced by defending his conduct in this action? I put that question repeatedly and got no answer. There is no answer. The agent is exposed to no risk and there is no danger whatever to his legitimate interests, which are perfectly protected. I think, therefore, on the assumption of liability being established—and it may be established with perfect safety in this action in which all parties interested are present—that we should give effect to the result of this action, and not say to these beneficiaries:—"Oh, apply to the Court to compel the trustees to raise an action in their own name against the law agent," or "Apply to the Court to appoint a judicial factor, who will raise the question on these very grounds, which will all be investigated and decided in the same way as in this case."

I now come to the question of liability itself, which, for my part, I must protest against being allowed to stand over and be tried again on the same facts and grounds in another action at the instance either of the trustees or the judicial factor. What was the nature of the investment which was here made? I noted how your Lordships characterised it. Your Lordship in the chair said it was very bad—so bad that there was not a word could be said in its favour. Lord Mure characterised it as excessively bad. He used language of condemnation which Lord Shand rendered "as bad as bad could be." Well, that was work done under a contract of employment, and the result is the loss of money. Well, are we to determine the liability for that in this action, or are we to let it stand over till the judicial factor can bring an action, or until the trustees are compelled to bring an action in their own name against this same party? Are we to determine that an agent when he is employed to invest trust money incurs no liability for advising and carrying out an investment in favour of which there is not a word to be said, which is "excessively bad," and "as bad as bad can be," and which resulted in the loss of money? Are we to decide that there is no liability incurred by him unless there is an error in the conveyancing? I am not prepared to affirm that. Lord Mure put it tersely when he said that if we decided otherwise it would be making the law agent guarantee the security, and his fee will not cover that. But two of your Lordships—and Lord Mure is one of them—think that without any fee Mr Meek is to guarantee the security. But I do not think it is a case of guaranteeing the security at all. I think it was a case of avoiding making an investment which was so bad that "there is not a word to be said in its favour," which is "as bad as bad can be," and which led to the loss of money, of the whole of the estate which might come to belong to these beneficiaries. I say I do not think it is a case of guaranteeing the security, and I should not hold a law agent responsible upon the ground of guaranteeing a security, but on the ground that the work that he did is capable of being judicially characterised by the language to which I have referred as being used by your Lordships.

Upon these grounds my opinion is that the trustee Mr Meek ought to be assoilzied from the conclusions of the action, but that the action ought to be sustained at the instance of the present pursuers against the law agent, not for the purpose or to the effect of putting a shilling of money into the pockets of the pursuers or anyone else, but merely for the purpose of making the law agent do the duties which the Court is at the instance of such parties accustomed to exact—that is, to order the trust estate to be restored, to order the money to be replaced which has been lost through the misconduct of anyone connected with it against whom liability has been established. In this case the money would be put into the hands of the trustees, or we might appoint an officer to receive it and to administer it for behoof of those whom it might concern.

Lord Rutherfurd Clark—On the question of the liability of the agent, I concur with your Lordship. As regards the liability of the trustees, I concur with Lord Mure and Lord Shand.

Lord Adam—I concur with your Lordship on both points.

The Court pronounced the following interlocutor:—

"The Lords having, along with four Judges of the First Division of the Court, heard counsel for the parties on the reclaiming-note for the pursuers against Lord M'Laren's interlocutor of 12th June 1886, proof adduced, and the whole cause, in conformity with the opinion of the majority of the Judges present at the hearing, Assoilzie the defenders from the conclusions of the action: Find them entitled to expenses," &c.

Counsel for the Pursuers—Rhind—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Mr Meek—Asher, Q.C.—G. W. Burnet. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Mr Hotson—D.-F. Mackintosh—Law. Agents—R. D. Ker, W.S., and Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Tuesday, August 7.

(Before the Lord Chancellor (Halsbury), Lords Watson, Fitzgerald, and Macnaghten.)

MACKINNON (MILLAR'S FACTOR) *v.* KNOX AND OTHERS (MILLAR'S TRUSTEES).

(*Ante*, Nov. 2, 1886, 24 S.L.R. 355; 14 R. 22.)

Trust—Liability of Trustees—Personal Liability of Trustees for Imprudent Investment.

Circumstances in which family trustees, with the fullest powers of investment on such securities, heritable or personal, as they should think proper, were made liable for the loss of a sum lent to a member of the family on insufficient security.

The trustees of a draper in Glasgow, who died in 1863, held his estate consisting, *inter alia*, of £4400 of capital in his business and his business premises, for the purpose of paying his widow an annuity of £400, and of dividing the residue among his children. They had the fullest powers to invest the estate "on such securities," heritable or personal, as they should think proper. The eldest son, who subsequently carried on the business, in 1874 bought the premises for £25,000, and applied to the trustees, after paying £13,000 of the price, for a loan of £12,000 to meet the balance, offering as security the premises themselves, on which he had already borrowed £17,000, and other subjects belonging to him. All these subjects were already burdened. The margin of value of the whole subjects, including the business premises—taking as the gross value in each case the prices paid for them within a year of the loan—was £12,150. He also offered the security of a policy on his life for £2160, the surrender value of which was less than £500, and his share, viz., one-seventh, of the sum of £10,000 held by the trustees for security of the widow's annuity. In addition he offered the personal security of his father-in-law, engaged in business in Glasgow. Both he and the offerer were then in good credit. The offer was accepted, but no communication was made to the other beneficiaries, several of whom were of age. One of them shortly afterwards, on hearing of the loan, protested for himself and the other beneficiaries, but no notice was taken of his letter. In 1884, the debtor and his father-in-law having both become bankrupt, and the prior bondholders having entered into possession, an action was raised by the beneficiaries against the trustees for repayment of the loss sustained by the estate through the transaction.

Held (*affirming* judgment of Second Division) that the trustees were personally liable, as having invested on unsubstantial and insufficient security, contrary to the law and practice of trust administration.

This case is reported *ante*, November 2, 1886, 14 R. 22, and 24 S.L.R. 355.

Millar's trustees appealed.

At delivering judgment—

Lord Chancellor—My Lords, in this case I have come to the conclusion that the judgment of the Lord Ordinary is one which, so far as it is a question of fact, is very satisfactorily supported by the evidence, and if the facts are as his Lordship found them to be it seems absolutely impossible to controvert the legal conclusion.

Certain family trustees appear to have lent a sum of £12,000 on what they ought to have known to be a very doubtful security. It is quite possible that the trustees were only actuated by an honest desire to do what was best for the whole family, and it may be that they were quite right in endeavouring to aid and assist William Millar to become the purchaser of the property of which they had the disposition; but there was upon them the overwhelming obligation to see that the property which they disposed of to William Millar was paid for.

Now, I am satisfied the trustees were or ought to have been conscious of the fact that William Millar was not in a position to pay for what he had bought; they nevertheless permitted it to be conveyed to him; they allowed him to raise £17,000 upon it, and then lent him £12,000 on the property so previously charged, not in truth as an investment at all, but as a method by which he should in form pay the purchase money of the property they had sold him.

I asked the same question as Lord M'Laren—"Why did not the trustees agree themselves to lend the £17,000 on a first bond, and allow Mr Millar to raise the £12,000 on what he offered as unexceptionable security?" They knew, or Mr Black knew on their behalf, that Mr Millar could not have got the £12,000 from any source but the trust, and I have the less difficulty in arriving at the conclusion at which I have arrived when I remember that Mr Black was to the knowledge of the trustees the adviser of Mr William Millar as well as their own. If trustees will permit such a mixture of interests to take place, they have but themselves to thank when such a misfortune as has resulted in this case overtakes them.