cited as the "*Pathfinder*," I cannot suggest that this judgment should be altered. I am by no means prepared to characterise this assessment as unreasonable, although I should have been ready to agree had it been somewhat greater. It is supported by the cases decided in the Outer House, which were quoted, and also by the important case of "*The Werra*," in which the principles of assessment in such cases are discussed more fully than in the other cases cited. I think the cases of the "*Sea Eagle*" and "*M'Morran*" must be regarded as exceptional.

LORD YOUNG and LORD MONCREIFF were absent.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sol. Gen. Dickson, K.C.—Ure, K.C.—W. Brown. Agents—Alexander Morison & Co., W.S.

Counsel for the Defenders and Respondents—Salvesen, K.C.—Aitken. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, February 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

JOHNSTONE *v.* THORBURN.

(See *ante*, vol. 36, p. 453.)

Agent and Client—Responsibility of Agent—Trust Investment—Liability of Law-Agent for Sufficiency of Investment—Trust.

Losses were sustained by a trust-estate owing to part of the funds having been lent to a harbour trust upon an assignment of their revenues and property. By Act of Parliament passed shortly before this investment was made it was provided that assignments for money borrowed before the passing of the Act and in force at that date should have priority over assignments for money borrowed after the passing of the Act. The investment had been submitted by the law-agent of the trust along with another for the consideration of the trustees, and while expressing his preference for the other he stated his opinion that the harbour trust investment was "perfectly safe." One of the trustees was found liable to make good the loss, upon the ground that although the investment was one of a class in which the trustees under the trust-deed were entitled to invest the funds of the trust, it was not in the circumstances sufficient in point of value to make it a reasonably prudent investment for trust funds. He brought an action of relief against the law-agent of the trust. The Court found in fact that the investment had been made, not upon the recommendation or advice of the law-agent, but as the result of independent inquiries made by one of the trustees. *Held* that the law-agent was entitled to absolvitor.

Opinion (*per* the Lord President) that while the law-agent of a trust by submitting an investment to the trustees in effect represents that the investment is of a kind or class upon which they have power to place the trust-funds, and will be liable if loss results from the trustees having acted upon this implied representation, it is not the duty of the law-agent in respect of his appointment as law-agent to the trust, and without any express employment or instructions, to make inquiries as to the sufficiency in point of value of a proposed investment, and that consequently, even if it is not proved that the trustees proceeded upon their own inquiries in making an investment, the law-agent will not be liable unless it is proved that he was employed to advise the trustees as to the sufficiency of the security, and that the trustees acted upon his advice.

Dicta of Lord Mure and Lord Shand in *Raes* v. *Meek*, July 19, 1888, 15 R., at pp. 1049 and 1051, *approved*.

(This case is a sequel to the case of *Alexander* v. *Johnstone*, March 3, 1899, 1 F. 639, *ante*, vol. 36, p. 453.)

By his trust-disposition and settlement the late Mr Charles Alexander, who died on 3rd September 1879, conveyed his whole estate, heritable and moveable, to James Johnstone, Hunterheck, Moffat, and Peter Inglis, farmer, East Pilton, as trustees for the purpose, *inter alia*, of paying to his widow such sums as they should think proper for her maintenance and for bringing up her children. The trustees were appointed executors. They were authorised to invest the trust-estate "upon good heritable property in Scotland, . . . or upon any of the Government stocks of Great Britain or the United Kingdom, or on debenture bonds of any municipal or parliamentary trust in Scotland."

At a meeting held on September 8, 1879, the trustees and executors accepted office.

From the minute of this meeting it appeared that there were present thereat the two trustees and "also Robert Thorburn, writer, Peebles, agent for the deceased;" that the documents of value found in the repositories of the deceased were placed in the hands of Mr Thorburn; that "Mr Thorburn was instructed to have the deceased's personal effects valued forthwith for Government duty by Mr Cairns, licensed appraiser, Peebles; to advertise for claims against the deceased in the *Scotsman* and *Courant* newspapers and the *Peeblesshire Herald and Advertiser*; to have the trust-disposition and settlement by deceased placed on record; and to have a title made up to the deceased's estate forthwith;" and that "Mr James Johnstone was appointed factor and manager to the trust, with power to open an account with the Bank of Scotland, Peebles, and to

overdraw the same if necessary to the extent of £300 sterling."

The trustees gave up an inventory of the trust estate and obtained confirmation thereto. They arranged with the landlord for the renunciation of the lease of the farm of Easter Knowe, of which Mr Charles Alexander had been the tenant, and sold the whole stock, crop, &c. The trust-estate was practically ingathered and ready for investment on 8th June 1880, the net amount of it being £2718, 15s. 8d.

On 28th May 1880, in anticipation of the money being immediately ready for investment, the pursuer wrote to the defender:—"Mr Inglis and I will be glad to come through as soon as you have matters ready for us, as we would like the money invested as soon as possible." The following day the defender's clerk replied—"With reference to the investment of the money, now that Whitsunday is past, it will be somewhat difficult to get a satisfactory security, as all these matters are arranged at the terms of Whitsunday and Martinmas, but Mr Thorburn directs me to say that he will do his best to get the money put up with as little delay as possible." On 13th September the defender wrote to the pursuer—"I have been making enquiries regarding a suitable investment for £2000 of this trust's funds, and the best terms I can get for the money at Martinmas are as follows:—On debenture bond by the Caledonian Railway Co. for 4 years, 3¾ per cent. On debenture bond of the Greenock Harbour Trust for 7 years at 4 per cent. I made enquiry at the other leading railway companies and at several first-class parliamentary trusts, but found they were not open to borrow at Martinmas. Looking to the undoubted security of the Caledonian Railway, I feel disposed to recommend the trustees to lend the money to them, notwithstanding that they are ¼ per cent. below the Greenock Harbour Trust. The Greenock Harbour Trust I deem perfectly save, and have a large sum lent to them for various clients, but the Caledonian Railway Co. is exceptionally good, and hence my recommending it in preference to the other, the difference in rate being so small. Will you kindly consult with your co-trustee and advise me of the decision you arrive at?" The pursuer on behalf of himself and his co-trustee replied to the defender on 30th September 1880—"I had your letter anent the investing of the E. Knowe trust funds. Of course we have every wish to do the thing safely, but at the same time are anxious, if it were possible, that the investment could be got to give 4 p. c. in return. I hold debenture stock of Glasgow and South-Western, which yields 4 p.c., but probably that may not be had now." The defender replied to the pursuer on 1st October 1880—"I have your favour of the 30th ulto. It would be quite possible to get debenture stock in any of the leading railways yielding 4 per cent., but then you have to pay a premium of from £6 to £7 per £100 for it, and as no one could guarantee that you would get the same premium when you sold the stock, the capital might thus come to be infringed upon. It is, no doubt, very desirable to get a return of 4 per cent., and I think you might do worse than take the Greenock Harbour Trust bonds, which yield that rate. Of course I cannot guarantee that you will now get these bonds or the Caledonian Railway ones, as some time has elapsed since I wrote you, but I have little doubt but that we could if the matter was settled without delay. One recommendation I may mention which the Caledonian Railway bonds have, is that the company will take the money for a shorter period, viz., four years, at the end of which time we may get very much better terms, and probably you will keep that circumstance in view in deciding the question."

On 12th October 1880 the trustees held a meeting, at which the following resolution, as appearing in the minute of meeting, was passed:—"The trustees having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years, from Martinmas first, at 4 per cent., or for such shorter period as the agent may be able to arrange with the Trust."

On 16th October 1880 the trustees lent £2000 of the trust funds to the Greenock Harbour Trust upon the security of the rates, duties, revenues, and properties of that trust, and they received in return an assignment in statutory form, dated 19th November 1880, whereby, in virtue of the Greenock Port and Harbour Acts 1866, 1867, and 1872, the Greenock Harbour Trustees bound themselves to repay the sum of £2000 on 11th November 1887, and in security assigned "all and sundry the rates, duties, and other revenues of the Trust, and the works and property of the Trust, payable or belonging to the Trust."

The Greenock Harbour Act 1880 (43 and 44 Vict. cap. clxx.), which came into force upon 12th August of that year, by section 66 authorised the Harbour Trustees to borrow, on the security of the rates and duties, and other revenues of the Trust, any sum which together with the sum already authorised to be borrowed before the passing of that Act should not exceed £1,300,000. The amount actually borrowed prior to the Act was £878,000. It appeared from the Act that the additional amount authorised therein to be borrowed was for the construction of a new wet dock.

Section 72 of the Act provided that "all assignments for money borrowed by the trustees before the passing of this Act in force at the passing of this Act shall, during their respective continuance, and subject to the provisions of the Acts under which the same were respectively granted, have priority over any assignments for money borrowed by them after the passing of this Act."

The Greenock Harbour Trust was announced to be insolvent on 11th May 1887.

Questions having arisen as to the priority of the various assignments which had been granted by the Harbour Trustees, a special case was presented in which judgment was delivered on 27th January 1888, with the result that the assignments were classified in the following order—(1st) assignments under the Act of 1842, (2nd) assignments under the Act of 1866, (3rd) assignments under the Act of 1872 granted prior to the passing of the Act of 1880, (4th) assignments under the Act of 1872 granted after the passing of the Act of 1880 and under the Acts of 1880 and 1884. Thereafter, in terms of the Greenock Harbour Act 1888, which provided for the issue of preferable or A debenture stock to the holders of bonds issued prior to the passing of the Act of 1880, and of deferred or B debenture stock to the holders of bonds issued after that date, the trustees received in exchange for the original assignment a certificate for £2000 B debenture stock of the Greenock Harbour Trust. The market value of that amount of the said stock in 1898 was about £750.

Mr Inglis died in 1896 leaving no estate.

In these circumstances Mrs Alexander, the truster's widow, and her three daughters on 30th December 1897 raised an action against James Johnstone and against Mr Inglis' representatives, who did not appear, to compel them to make good the loss arising from the investment of the trust funds with the Greenock Harbour Trust.

The Lord Ordinary (KYLLACHY) after a proof, on 25th May 1898, found that the loan in question was not justified, and that the defender and the representatives of his co-trustee were liable conjunctly and severally to make good the loss which had thereby accrued or might accrue to the trust-estate.

The defender reclaimed, and the First Division, on 3rd March 1899, adhered to the interlocutor of the Lord Ordinary. The decision is reported *ut supra*.

Thereafter the Lord Ordinary pronounced decree for payment of £2000 and arrears of interest against James Johnstone.

In 1899 Mr Johnstone raised the present action against Mr Thorburn for payment of four sums, amounting in all to £2842, 5s. 2d., the two first being the amounts which he had paid back to the trust-estate in terms of the foregoing interlocutor, and the two last being the expenses of the action.

The pursuer averred that he had been unable to recover anything in relief from the estate of his co-trustee owing to the latter's insolvency.

He averred further — "(Cond. 4) The whole trust-estate being as above mentioned realised, or in course of realisation, the defender was applied to by the trustees, who were both farmers aud without skill and experience in the investing of trust funds, to advise them in the selection of an investment or investments for the trust moneys, and he did so advise them, and in relation to said selection acted not merely as a conveyancer but as their financial adviser. . . . (Cond. 5) Relying on the defender's recommendation, and assuming, as they were entitled in the absence of any information or warning from him to the contrary to assume, that money advanced by them to the Greenock Harbour Trustees on the bonds of the trust would rank *pari passu* with the existing indebtedness of the trust, and that no statutory preference had been or was about to be created in favour of existing bonds over those to be subsequently issued, the pursuer and his co-trustee, the late Peter Inglis, at a meeting held on 12th October 1880 in the defender's office, at which the defender was present, resolved to lend £2000 to the Greenock Harbour Trust for seven years at 4 per cent., or for such shorter period as the defender could arrange. Prior to said meeting the said Peter Inglis had, on behalf of himself and the pursuer, and in reliance that the bonds of the Greenock Harbour Trust proposed to them by the defender for investment were first bonds of that corporation, made general inquiries regarding the Greenock Harbour Trust bonds and had communicated the favourable result of these inquiries to the pursuer. At said meeting the defender repeated the assurances of his letters above referred to, and neither informed the pursuer and his co-trustee of the fact that a month or two previously a further statute had been passed, greatly affecting the position of the trust, and increasing the borrowing powers of the trustees, nor that that statute conferred a preference on all existing bonds over any subsequently issued, whether issued under the authority of the prior Acts or under that of the newly-passed Act of 1880. (Cond. 11) The defender knew that the Greenock Harbour Trust was constituted under various Acts of Parliament, and that the borrowing powers of the trust were regulated under these Acts; and in the summer of 1880 he knew or ought to have known that the Greenock Harbour Trustees were applying to Parliament for extended borrowing powers, in order to make a much larger dock than they had contemplated under the 1872 Act. It was the duty of the defender, as law-agent advising the pursuer and Mr Inglis, to have ascertained what were the provisions of that Act, and also of the prior Acts under which the borrowing of the Harbour Trust took place. . . . The defender also did not know the financial position of the Harbour Trust and had not examined the accounts of the Trust. His confident opinion of the Harbour Trust security was entirely founded on repute and on reports obtained from friends in Greenock. The defender was bound to take all reasonable care to ascertain the sufficiency of the security which he represented as 'perfectly safe,' and he was guilty of fault and gross negligence and breach of duty in making the said representation and not ascertaining and communicating to his clients the facts above stated. It was the defender's duty when carrying through the transaction at Martinmas 1880 to see that they got a first security, and not to take on behalf of his clients, in place of a first class

security, a fourth security postponed to the sum of £873,000 of prior debt."

The pursuer pleaded—"(1) The pursuer having suffered loss through the fault, negligence, and breach of duty of the defender, as his agent and adviser, to the extent sued for in the conclusions of the summons, the defender is liable to repay these sums to the pursuer as concluded for."

The defender averred—. . . "The trustees' minutes and the bond are referred to for their terms. *Quoadultra* denied. Explained that the investment in question was selected by the trustees, as the result of inquiries made by themselves and particularly by the late Mr Inglis. The defender was not asked or employed by the trustees to make any inquiries regarding the bonds in question, or to report upon them as securities, and he was in no way responsible for the decision to which the trustees came. The bonds were in good repute as investments at the time, and were within the investing powers of the trustees. The defender merely brought the bonds, along with the Caledonian Railway bonds, under the trustees' notice. As above explained, the trustees made their own inquiries, and made up their own minds regarding the investment without consulting the defender. At the meeting of 12th October 1880 Mr Inglis himself stated that he had made special inquiries both in Edinburgh and Glasgow as to the sufficiency of the harbour bonds, and was thoroughly satisfied of the safety of investing in them. The defender did not at said meeting repeat anything formerly said by him in his letters regarding the investment except that, after Mr Inglis had made the statement above mentioned, he again recommended the railway bonds as being undoubted securities. The proposal to endeavour to arrange for a shorter period than seven years was made by the trustees in consequence of a suggestion by the defender that the seven years term was too long."

The Lord Ordinary (KYLLACHY) allowed a proof, the import of which sufficiently appears in the opinion of the Lord President (*infra*).

On 30th April 1900 the Lord Ordinary pronounced the following interlocutor:—"Decerns against the defender to make payment to the pursuer of (1) the sum of £2000, and (2) the sum of £198, 16s. 6d., making together the sum of £2198, 16s. 6d., in full of the conclusions of the summons, the said defender on making payment of said sum receiving in exchange at his own expense an assignation or transfer of the £2000 B Debenture Stock of the Greenock Harbour Trust at present held by the pursuer, with all right, title, and interest which the pursuer at present has in the said debenture stock, and with any interest due and to become due thereon: Finds the pursuer entitled to expenses," &c.

Opinion.—"This case is the sequel of an action which was lately before the Court, and in which certain trustees were held liable to make good to their beneficiaries the loss arising upon an investment in the bonds of the Greenock Harbour. The pursuer—the survivor of the trustees, who as it happens has had to bear the whole loss—now brings the present action to obtain relief by way of damages from the solicitor to the trust, on whose advice the investment was, it is said, made, and who carried through the transaction; and the ground of the demand is that the solicitor failed in his duty, and is liable to his employers on the head of professional negligence.

"It must be assumed in this action that the trustees were responsible to the beneficiaries, notwithstanding the advice which they obtained. It was not pleaded in the former action that the matter was one which they were entitled to delegate, and accordingly that point was not decided. But whether they could or could not have successfully defended themselves on that ground, it is not, I apprehend, doubtful that if they prove as against their solicitor a case of professional negligence of which the bad investment was the result, they (or the pursuer as now sole surviving trustee) have a good action against the solicitor on the contract of employment.

"There can be no doubt that the investment was an improper investment of trust funds. It has been decided finally in this Court that it was grossly imprudent; and it is, I think, important to notice wherein its imprudence was held to consist. Speaking generally, it came to this, that the investment was a speculative investment, depending as it appeared on the success or failure of a certain commercial enterprise—an enterprise which was in course of being initiated, and which had not been in any degree tested by results. It therefore belonged to a class which (whether prudent or imprudent for a man risking his own money, and setting the chance of gain against the chance of loss) was, as established by repeated decisions of the Courts, grossly imprudent for a trustee; as indeed it would in general be for any person who, although dealing with his own funds, was making a provision for the future of others.

"It has also, I think, to be kept in view that the vice of the investment arose by virtue substantially of the operation of certain Acts of Parliament, by which the affairs of the Greenock Harbour Trust were regulated, and particularly of an Act passed in the month of August 1880, shortly before the date when the investment was made. That Act—the bill for which was before Parliament when the trustees and the defender had first occasion to consider the matter—provided (upon its just construction) that all bonds issued after its date should be postponed in priority to all bonds previously issued. It also provided for the application of the money borrowed to the construction of a new dock—known as the James Watt Dock—which it was hoped would divert a certain class of traffic from Glasgow to Greenock, and thereby augment largely the revenue of the Greenock Harbour. The result of course was that to anyone proposing after August 1880 to

invest in the bonds of that harbour, the question of safety or risk was one of considerable complexity, involving for its proper appreciation points of construction of Acts of Parliament, as well as points of accounting arising on the published accounts of the Harbour Trust.

"In these circumstances the questions now for decision appear to be these—(1) Did the defender bring the investment in question before the trustees as a safe and proper investment of trust funds; (2) did he do so after due inquiry and in the exercise of a due and careful judgment; (3) did he act in the matter on his professional responsibility; and (4) did the pursuer and his co-trustee act on his (the defender's) advice, and did they make the investment relying upon and induced by it.

"On the first two of those questions, controversy is hardly possible. The facts sufficiently appear from the correspondence, and from the quite candid testimony of the defender himself. There was it appears in the summer of 1880 a sum of £2000, forming the bulk of the trust estate, for the investment of which the defender was asked to arrange. He wrote in reply that it would be somewhat difficult at the time to get a satisfactory security, but that he would do his best to get the money put up with as little delay as possible. After some months he again wrote stating that he had been making inquiries regarding a suitable investment and had found two, viz., debentures of the Caledonian Railway and bonds of the Greenock Harbour, and that while disposed to recommend the first of these as preferable, he deemed both investments perfectly safe. He went on to ask the pursuer to consult with his co-trustee and to advise him as to their decision; and in a subsequent letter, in reply to one from the pursuer pointing out that the trustees while wishing to do the thing safely, desired, if possible, a 4 per cent. return, he finally stated that it was no doubt very desirable to get a return of 4 per cent.; and that he thought that the trustees might do worse than take the Greenock Harbour bonds, which yielded that rate. Such was his advice given as the result of inquiries which he had made. There can be no doubt as to its import. It was an unequivocal recommendation of the Greenock Harbour bonds as perfectly safe.

"Neither is there any doubt that as it now appears the advice was bad advice, and also, I am afraid, advice given rashly, upon mere general repute, and without investigation such as might have been easily made into the actual merits of the security. That is really implied in the recent judgment by which the pursuer has been held liable to the beneficiaries; and the only point specially to be noted is that the defender quite frankly states that although he knew when he was first consulted that the Bill for the Act of 1880 was before Parliament, and knew when his recommendation was made that it had passed in the interval, he did not refer to the Act or take any steps to ascertain the bearing of its provisions.

"The controversy is therefore really limited to the last two questions, which, as I have said, are involved; and the first of these is, Whether and how far the defender in this matter acted in his professional character, and on his professional responsibility?

"Now, it is not, I understand, disputed that the defender was the solicitor to the trust, and as such occupied a perfectly understood position, combining the functions of law-agent and clerk or factor. Accordingly, it is not, I suppose, doubtful that if the investment had been beyond the trustees' powers, or if the bond had been granted outwith the Harbour Trustees' powers, the defender would have been responsible as for a failure of professional duty. For he was not, it will be observed, acting gratuitously or otherwise than in ordinary course,—it being a mere accident that his remuneration was in the shape of an *ad valorem* fee or commission, which as generally happens was paid by the borrowers. So far, I apprehend, there can be little doubt. But the contention which the defender makes is of this kind. He says that the vice of the security being simply in its insufficiency, he was no more an expert in that matter than the trustees themselves,—that he was therefore acting, and necessarily acting, outside the scope of his professional employment,—and that his advice (unfortunate perhaps, but quite honest) was given really on the same footing as if he had been merely the trustees' banker, or some friendly adviser. He puts the case of an ordinary heritable security, where the solicitor, having investigated the title and put before his client the rental of the estate, and a note of the prior bonds and public burdens, may or may not express an opinion on the sufficiency of the margin, but if he does so incurs no responsibility—at all events if the opinion is honest.

"Now, I am not prepared to admit that even on mere questions of value—questions of the sufficiency of margin—it can at all be affirmed generally that the responsibility of the solicitor is thus limited. He may of course decline to say anything except on matters of law; although I should think that course would be unusual; or he may express an opinion incidentally, or in such a way as to make it plain that he is speaking merely from general knowledge; and all that may not count. But if, being consulted as to the sufficiency of a security, or if, on his own motion, or by request, he submits a security or a choice of securities for the consideration of his clients, it is, I apprehend, his professional duty (to use the words of Lord Rutherfurd Clark in the case of *Stirling* v. *Mackenzie, Gardner, and Alexander*, 14 R. 170) 'to take all reasonable care in seeing to the sufficiency of the security which he recommends.' As

put by Lord President Robertson in the case of *Cleland* v. *Brownlie, Watson, and Beckett*, 20 R. 152, 'If besides introducing an investment as worthy of consideration an agent expresses a favourable opinion of it, he will be liable if the opinion was either not honest or given when he had no adequate information entitling him to give an opinion at all.' It may be that no case has yet occurred in which this kind of liability has been enforced. But there is no case in which it has been negatived; and I doubt much whether if the question arose purely, the solicitor's responsibility could well be put much lower than I have now put it.

"It is not, however, in my opinion necessary to the decision of the present case to lay down any general doctrine. There are at least two elements in the present case which make it, in my opinion, special. In the first place, the sufficiency of the security offered by the Greenock Harbour bonds depended, and necessarily so, upon the provisions of the Harbour Acts, read of course in connection with the Harbour accounts. Now that was, I think, a matter much more in the province of the solicitor to the trust than of the trustees themselves. If they had formally remitted to the defender to examine the Harbour Acts and to inquire into the position of the Harbour Trust, there could not, I should think, be much doubt that, if he had reported favourably, he would have failed in his professional duty. But if that be so, I do not at present see why it should make any difference that, without being specially asked to inquire and report, he accepted the duty of making inquiries, and as the result of those inquiries recommended this security as perfectly safe.

"In the next place, however, it does not seem quite correct to describe the vice of the present investment as arising merely on the question of sufficiency—that is to say, the question of value. The vice mainly was that it belonged to a class which on the principles of trust law, as laid down by the Courts, was an improper investment of trust funds—that is to say, it was, whatever its merits otherwise, a speculative investment depending on the success of an enterprise which, however promising, was as yet untried. Now, it seems to me that, in the lowest view of the solicitor's duty, he should have warned his clients against such an investment.

"It remains, however, to consider the defender's second point, viz., that whatever was his original responsibility, he was relieved of it by the trustees undertaking to make inquiries for themselves, and by their (as he says) making the investment really as the result of their own inquiries. And it is here, as it seems to me, that the difficulty of the case, if there be difficulty, really lies. For, however bad the advice given was, the pursuer requires to show that he and his co-trustee acted on it. And it is undoubtedly true (1) that the deceased trustee Mr Inglis did himself make inquiries of some sort, although there is no evidence as to what they were; and (2) that the minute of the trustees of 12th October 1880 is thus expressed—'The trustees having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years from Martinmas first at 4 per cent., or for such shorter period as the agent may be able to arrange with the Trust.'

"I had at first, I own, an impression that these facts formed a serious obstacle to the pursuer's claim. But further consideration has led me to a different conclusion. The important point is, I think, this—It cannot, as it seems to me, be assumed that the inquiries made by Mr Inglis, the deceased trustee, whatever they were, were made otherwise than on the footing that the proposed investment was at all events 'safe'—safe, that is to say, according to the standard of safety applicable to trust investments. He had certainly been so advised, and there is no proof and no presumption that he ignored that advice and did not rely on it. The likelihood, I should think, is that having two investments put before him as both perfectly safe, he did really no more than decide between the two. But apart from that, one thing at least seems certain, viz., that Mr Inglis did not have his attention directed, nor is there any reason to think that he applied his mind to the really salient question, viz., whether the Greenock Harbour bonds were as matters stood a proper investment for trust funds. As it happens, we do not know what inquiries he made or what elements he considered. But assuming even that he made the most thorough examination, and ascertained all the facts as we know them, it may yet well be that having in view the defender's advice, and taking from his own inquiries a hopeful view of the prospects of the James Watt Dock, he so reached a conclusion favourable to the security. Now, as against that he should, in my opinion, have been warned. He should have been told that investments of that character—investments depending on the success or failure of commercial enterprises—were not open to trustees. In point of fact, however, he was not so warned. On the contrary he was told by the solicitor to the trust that the proposed investment was perfectly safe. I cannot in these circumstances hold that for the vice of the investment he was alone responsible.

"The pursuer is therefore, in my opinion, entitled to recover from the defender the sums concluded for in the summons other than the two sums of expenses of process. As to these, I do not see my way to holding that they were the direct and natural result of the defender's negligence, more especially as no formal intimation of the former action and the proposed claim of relief was made to the defender. The pursuer will, however, have the expenses of this action, and he will of course be bound,

as offered in the summons, to transfer to the defender the Harbour bond for what it is worth."

The defender reclaimed, and argued—(1) The investment was made by the trustees not on the advice of the defender but as the result of the independent inquiries made by Mr Inglis. That was clear from the minute of the meeting of 12th October 1880, which showed that they had considered the propriety of the investment apart altogether from the defender's advice. Accordingly, even if the defender had originally advised the investment, seeing that the trustees had taken on themselves to make inquiries and had acted in consequence of them, they had no recourse against the defender — *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31; July 19, 1888, 15 R. 1033, at 1049 and 1051. But apart from this point, there had been no employment of the defender to make special inquiries as to the investment, but merely an expression of opinion by him when the securities were submitted to him, and accordingly no liability could attach to him—*Cleland* v. *Brownlie, Watson, & Beckett*, November 30, 1892, 20 R. 152, at 164; *Stirling* v. *Mackenzie Gardner, & Alexander*, December 7, 1886, 14 R. 170; *Learoyd* v. *Whiteley*, 1887, 12 A.C. 727. The duty of considering the sufficiency of an investment was primarily on the trustees, and must not be delegated by them, and the facts and circumstances must be very strong to counteract that presumption. Here it had in fact been decided in *Alexander* v. *Johnston*, March 3, 1899, 1 F. 639, that the trustees alone were guilty of personal negligence. (2) Nor was the defender rendered liable for neglect as regards the completion of the security. All the cases on which the pursuer relied in this branch of his argument related to heritable bonds. The failure to search for encumbrances, &c., in those cases which rendered the agents liable had no analogy to the defenders' conduct here. There was no defect in title which it was his duty to point out to the trustees. The security if it had been sufficient was an admissible investment under the terms of the trust. The sole question was that of sufficiency. That was a question for the consideration of the trustees themselves, and in this case it had in fact been determined by them for themselves.

Argued for the respondent—There were two stages in the process of investing money, viz. (1) the selection, and (2) the completion of the investment, and the agent in a case such as this had responsibilities at both these stages. With regard to the first, it was true that in the ordinary case an agent, by his employment as an agent merely, incurred no responsibility for the sufficiency of an investment. But he might undertake such a responsibility, or by his actings put himself in the same position as if he had undertaken it. The latter was the case here, for the defender by his recommendations had held himself out as having made due inquiries as to the financial sufficiency of the investment. Looking to the nature of his employment as the agent for the trust generally, and to the fact that the trustees were not experienced men of business, the latter were entitled to rely, and did in fact rely, upon the inquiries made by the defender—*Raes* v. *Meek, supra*, 15 R., at 1051 and 1059; *Ronaldson* v. *Drummond & Reid*, June 7, 1881, 8 R. 767, at 778-9; *Cleland* v. *Brownlie, Watson, & Beckett*, November 30, 1892, 20 R. 152. The defender had not obtained information justifying his recommendation, and accordingly he must abide the consequences. If that were so, nothing that followed on his letter would relieve him from responsibility. The meaning of the minute of 12th October was somewhat obscure, but evidently the inquiries made by Mr Inglis, whatever they were, were made in reliance on the defender's opinion that the investment was safe. Probably, having two investments before him which, relying upon the defender, he believed to be safe, he did nothing more than decide between them. Mr Inglis should certainly have been told by the defender that the investment was of a speculative nature, and not a fit one for trustees—*Blyth* v. *Fladgate, &c.* [1891] 1 Ch. 337, at 360. (2) When the matter reached the second stage, viz., that of completing the investment, the defender had failed in his duty, and accordingly he was liable on that ground. It was his duty to obtain a first security instead of a fourth. If he had made proper inquiry he would have seen that all the bonds granted prior to the Greenock Harbour Act of 1880 would have priority over this security—*Fearn & Gordon* v. *Craig*, February 2, 1893, 20 R. 352; *Campbell* v. *Clason*, December 20, 1838, 1 D. 270; May 30, 1843, 5 D. 1081; *Graham* v. *Hunter's Trustees*, March 4, 1831, 9 S. 543; *Haldane* v. *Donaldson*, March 3, 1836, 14 S. 610; *Struthers* v. *Lang*, February 2, 1826, 4 S. 418.

At advising—

LORD PRESIDENT—In this action the pursuer seeks to obtain decree against the defender for the amount of certain moneys which he (the pursuer) has had to pay into the estate of the late Charles Alexander, farmer at Easterknowe, in the parish of Stobo, on which he is now the sole surviving trustee, to replace money lost upon an investment of a portion of the trust funds upon a bond of the Greenock Harbour Trust; and his claim is founded upon the allegation that it was the duty of the defender as law-agent of the trust to advise, or at all events that the defender took upon himself the duty of advising, the pursuer and his co-trustee Mr Inglis, now deceased, as to the sufficiency of the investment in point of security and value, and that he failed to perform this duty. The important questions therefore are—(1) whether it was the duty of the defender as the law-agent of the trust to advise, or (2) whether the defender took upon himself the duty of advising, the trustees as to the sufficiency of that investment in point of security and value? and (3) whether the trustees acted upon the advice of the defender in making the investment?

The following are the circumstances under which these questions arise.

Charles Alexander, the truster, died on 3rd September 1879, leaving a trust-disposition and settlement under which the pursuer and the now deceased Peter Inglis, East Pilton, near Edinburgh, were appointed trustees and executors. After Mr Alexander's death the pursuer and Mr Inglis accepted these offices.

The trust was for family purposes, substantially providing a liferent of the estate to Mr Alexander's widow, and the fee to his children.

The defender had prepared Mr Alexander's trust-disposition and settlement, and at a meeting held at his (Mr Alexander's) house on 8th September 1879, at which the pursuer Peter Inglis and the defender were present, the defender read the trust-disposition and settlement, and the pursuer and Peter Inglis accepted the offices of trustees and executors under it. The minute of meeting bears that the defender was instructed to have the deceased's personal effects valued forthwith for Government duty, to advertise for claims, to have the trust-disposition and settlement recorded, and to have a title to the deceased's estate made up forthwith. The minute further bears that the pursuer was appointed factor and manager to the trust, with power to open an account with the Bank of Scotland, Peebles, and to overdraw it, if necessary, to the extent of £300. The minute, while it bears that the defender was instructed to do certain specified things, does not contain any general appointment of him as law-agent to the trust, but from his subsequent actings it may be taken that it was understood to do so in effect. It is, however, to be observed that the defender was not employed to perform some of the duties usually discharged by the law-agent to a trust, these duties being confided to the pursuer, and in particular that he (the pursuer) was charged with the duty of managing the practical and monetary business of the trust.

The trustees gave up an inventory of the trust estate and obtained confirmation thereto, they also arranged with the landlord for the renunciation of the lease of the farm of Easterknowe, and sold the whole stock, crop, and instruments of husbandry on the farm. The trust estate was practically ingathered and ready for investment on 8th June 1880, the net amount of it, after deducting debts, sickbed and funeral expenses, Government duties and executry expenses, being £2718, 15s. 8d. It appears from a letter from the defender to the pursuer, dated 9th June 1880, that he on the previous day paid in to the pursuer's credit with the Bank of Scotland at Peebles, the sum of £1625, 18s., being the proceeds of the displenishing sale of the truster's farm.

On 28th May 1880, in anticipation of the proceeds of the trust estate, in so far as realised, being immediately ready for investment, the pursuer wrote to the defender that Mr Inglis and he would be glad to come through as soon as the defender had matters ready for them, as they would like the money invested as soon as possible; and on the following day the defender's clerk replied that as the Whitsunday term was past it would be somewhat difficult to obtain a satisfactory security, but that the defender would do his best to get the money put up with as little delay as possible; and on 13th September the defender wrote to the pursuer mentioning that he had been making inquiries regarding a suitable investment for the £2000, and that the best terms he could get for money at Martinmas were on debenture bond by the Caledonian Railway Company for four years at three and three-quarters per cent., or on debenture bond by the Greenock Harbour Trust for seven years at four per cent. He then stated that, for reasons given, he felt disposed to recommend the trustees to lend the money to the Caledonian Railway Company, although he deemed the Greenock Harbour Trust perfectly safe, and that he had a large sum lent to that trust for various clients, but that the Caledonian Railway Company was exceptionally good, and hence his recommending it in preference to the other. He added, "Will you kindly consult your co-trustee, and advise me of the decision you arrive at?" Thus far it is clear that the defender merely submitted information and suggestions to the pursuer and Mr Inglis for their consideration, but that he left the decision as to the investment upon which the money should be placed entirely to them. The pursuer replied on 30th September, indicating his desire for an investment which would give a return of four per cent., and the defender wrote on 1st October 1880 a letter in which he said, "It is no doubt very desirable to get a return of four per cent., and I think you might do worse than take the Greenock Harbour bonds which yield that rate." In the result, the trustees, exercising their own judgment, decided to place the money on the Greenock Harbour bond, although, as between the two investments, the defender had recommended a loan to the Caledonian Railway Company as preferable.

A minute of meeting of the trustees, dated 12th October 1880, dictated by the defender and signed by the pursuer and Mr Inglis, bears that "The trustees, having taken into consideration the propriety of investing £2000 of the funds under their management, and being thoroughly satisfied from inquiries made by them of the sufficiency of the Greenock Harbour Trust, resolved to lend that sum to them on debenture bond for seven years, from Martinmas first, at four per cent., or for any such shorter period as the agent may be able to arrange with the trust." It will be observed that this minute bears that the resolution of the trustees to invest the £2000 upon a bond of the Greenock Harbour Trust proceeded, not upon the advice of the defender, but upon their being thoroughly satisfied of the sufficiency of the trust "from inquiries made by them," and it is very material, in view of the position taken up by the pursuer in this action, to ascertain whether this statement under his own

hand, and which is entirely at variance with his present contention, is or is not correct in point of fact. *Prima facie*, the minute is strong evidence against him.

The defender was examined by the pursuer as his first witness in this case, and he stated in evidence that his ground for saying that he deemed the Greenock Harbour Trust perfectly safe was from public repute and from his knowledge, resulting from having dealt so long with it, of its financial position, and he added that by public repute he meant the general repute amongst agents. He also mentioned that he had made general inquiry at friends in Greenock who knew the trust well, and that he occasionally saw the trust accounts, but he said that the trustees never instructed him to make inquiries with regard to the sufficiency of the trust, being themselves thoroughly satisfied. He also stated that Mr Inglis said that he had made careful special inquiry in regard to the trust both in Glasgow and Edinburgh, and was satisfied that it was a safe investment to take.

The pursuer, when asked at the proof in this case whether, prior to the meeting of 12th October 1880, Mr Inglis had been making any inquiries on the subject of the investment, said that perhaps he might, but that he forgot what passed, and that his memory was a blank upon the subject. He afterwards stated that he relied entirely upon the defender, but he subsequently admitted that Mr Inglis was to make inquiries both in Edinburgh and Glasgow, because he was more in the way of getting information. In this connection, however, it is to be kept in view that in the action at the instance of Mrs Alexander and others against the present pursuer, which resulted in his being ordained to restore the portion of the trust estate which was lost by the investment, he said in evidence that by arrangement with him Mr Inglis made inquiries in Edinburgh and Glasgow with regard to the Greenock Harbour Trust, and communicated the result of his inquiries to him, and that as the result of these inquiries and the defender's recommendation he was satisfied that they were making an investment in a safe concern. He also said "It was on account of my co-trustee Mr Inglis being anxious to get four per cent. that the investment with the Harbour trust was agreed on." In so important a question as whether the investment was in fact made upon the recommendation of the defender, or as the result of inquiries made by the trustees, or by Mr Inglis on their behalf, I think it would be safer to rely upon the pursuer's recollection when he was examined in the previous case, than upon his forgetfulness when he was examined in this case, as to whether such independent inquiries had or had not been made, and if they were made, whether the money was not invested on the Greenock Harbour bond in reliance upon the information obtained in answer to these inquiries.

Upon the question of fact, whether the investment was made on the recommendation or advice of the defender, or as the result of the independent inquiries made by Mr Inglis, I think the proper conclusion is that it was made upon the latter, and not, if at all, to any material extent upon the circumstance of the Greenock Harbour bonds having been one of the two investments submitted by the defender for the consideration of the trustees; and if this view is correct, it would of itself afford a sufficient ground for a decision in favour of the defender. I may add that if this conclusion was more doubtful than it appears to me to be, I should consider that the lapse of time which has occurred since the investment was made, and the loss of evidence (especially the evidence of Mr Inglis), which has resulted from the delay in raising the action, should militate rather against the pursuer than against the defender. The action was not raised until nearly nineteen years after the investment was made—until fifteen years after the Greenock Harbour Trust had ceased to pay interest on the bond—until eleven years after the decision determining the priorities of the bonds, and until three years after the death of Mr Inglis.

But as the questions of law arising upon what the defender did in the matter (assuming it not to be proved that the trustees in making the investment proceeded upon their own independent inquiries, or upon the inquiries of Mr Inglis) were fully argued before us, I shall express my opinion upon them.

As already stated, I think that it may be taken that the defender was appointed law-agent to the trust, that is agent to perform the duties for which the services of a law-agent are required in realising the estate of a deceased person and placing the funds upon permanent investments, although, as I have already pointed out, the pursuer was appointed factor and manager to the trust, offices in which he was succeeded by Mr Inglis in 1882. The question thus arises, Whether it became the duty of the defender merely in respect of his appointment as law-agent to the trust, and without any express employment or instructions, to make inquiries in regard to the financial sufficiency of the Greenock Harbour Trust? and I think that this question should be answered in the negative. If the question had been whether an investment on a bond of the Greenock Harbour Trust was within the powers of the trustees, the case would have been different, and I think it would have been the duty of the defender, as law-agent of the trust, to advise the trustees as to whether the investment which he submitted for their consideration was or was not one of a kind or class upon which they had power to place the trust funds. It appears to me that the law-agent of a trust by submitting an investment for the consideration of trustees would in effect represent to them that it was one which they had power to make either by the general law of trusts or by an investment clause in the trust-deed, and that if loss arose in consequence of the trustees having acted upon this implied representation, the agent would be liable to make good the

loss. But in the present case no such question arises, because by the investment clause of the truster's testamentary settlement the trustees are authorised to invest "on debenture bonds" of, *inter alia*, any "parliamentary trust in Scotland," and it is not disputed that the bonds of the Greenock Harbour Trust fall under this definition. But it is a wholly different question whether the law-agent for a trust is, by virtue of his appointment as such, and without any express employment or instructions by the trustees, bound to inquire into the sufficiency in point of security or value of an investment upon which it is suggested that the trust funds might be placed. In the present case the defender in his letter of 13th September 1880 mentioned that the best terms he could get for the money at Martinmas would be either upon debenture bond of the Caledonian Railway Company or on debenture bond of the Greenock Harbour Trust; but it appears to me that in so doing he merely placed these debenture bonds before the trustees for their consideration as well-known and favourite investments, and that it was for them to obtain, in such manner as they thought fit, information as to the financial soundness or value of the investments. I think that a law-agent by so submitting an investment to trustees, unless he does something more than the defender did, only puts forward the investment as one which the trustees may properly consider, and it is for them to make such inquiries and obtain such information as they think fit before arriving at a decision as to whether they should place the trust funds upon it or not. The defender only stated his honest opinion and belief in regard to the investments, but he did not warrant the opinion and belief, or state that they were founded upon any examination or inquiry, and he was not instructed by the trustees to act in the second stage of the duty which the trustees had to perform, *videlicet*, that of making inquiries and obtaining information as to the financial sufficiency of the Greenock Harbour Trust. The defender gave to the trustees such information as he possessed, but that information was of quite a general kind, and did not purport to proceed upon personal knowledge or upon facts or figures obtained as the result of particular inquiry. I am therefore of opinion that the defender was not charged by the trustees with the duty of making inquiries as to the financial sufficiency of the Trust, and that he has consequently not incurred liability upon the ground of his having failed to make such inquiries.

The present case affords a good illustration of the kind of duty which the pursuer maintains the defender undertook by merely submitting an investment on a bond of the Greenock Harbour Trust for the consideration of the trustees. The staple trades of Greenock at the time when the investment required to be made were sugar and timber. The sugar trade became bad owing to the bounties granted by certain foreign countries to their sugar growers; and an unexpected change occurred in the timber trade, in respect that instead of the timber being unloaded in logs at Greenock, where it was sawn, the sawn timber being afterwards sent to Glasgow or elsewhere, the practice was introduced of sawing the timber in Canada, or the other places abroad from which it was brought, and taking it in steamers directly to Glasgow and other places where it was to be used. The James Watt Dock was thus little required for these trades, and it failed to attract the Atlantic Liners (with one exception) as it was expected to do. It was not, in my view, the duty of a law-agent (without express employment or instructions), to embark upon an inquiry as to the prospects of the harbour and the condition of the trade of Greenock, although this may have been a very fit matter for the trustees themselves to investigate, as I think it is proved that Mr Inglis did on their behalf.

It is, however, maintained by the pursuer that even assuming that the defender was not employed by the trustees to make inquiries on their behalf in regard to the financial sufficiency of the Greenock Harbour Trust, "he took upon himself" the duty of doing so. I am not quite sure what legal conception it is intended to express by this phrase, unless it means that although the defender was not employed as an agent to make the inquiries in question, he charged himself with the duty of doing so as a volunteer. It is only necessary to say with reference to this suggestion, in itself antecedently improbable, that it does not appear to me to be supported by any evidence.

But on this part of the case I think, *separatim*, that it is proved that the trustees themselves undertook to perform the duty of inquiry which rested upon them from their position as trustees, and that in point of fact Mr Inglis, on behalf of the pursuer as well as for himself, did make inquiry, and that upon the results of the inquiry so made their resolution to invest the money on the Greenock Harbour bond was arrived at. The evidence bearing on this point has already been referred to. I may add that the fact of Mr Inglis having undertaken to make inquiries, and of his having done so both in Glasgow and Edinburgh, affords strong confirmation of the view that the trustees never employed or instructed the defender to obtain information as to the financial position and prospects of the Greenock Harbour Trust, and that he never undertook to do so.

Before passing from this part of the case I may point out that the judgment in the action at the instance of Mrs Alexander and others against the pursuer, in which he was held liable to replace the funds in question (1 Fraser 639), proceeded upon the view, not that the present defender, but that the present pursuer, had failed in the duty of inquiry; in other words, the pursuer was found liable for his own personal fault. Lord Kyllachy, in the note to his interlocutor in that case, said—"The deceased co-trustee, who was a near relative of the pursuer's, undertook to make in-

quiries, and reported that he had done so, and the investment was made by the two trustees with the assent of the law-agent, beyond doubt in the best of faith, and in the honest belief that the security was sound and sufficient." His Lordship further said that "It would have been a different matter if he (the present pursuer) and his co-trustee had remitted, say to the agent of the trust, to inquire into the merits of the investment, and to report on his professional responsibility. In that case if the law-agent had failed to ascertain the facts, or to appreciate their significance, it may very well be that the trustees would be held to have done their duty, and that the law-agent would be alone responsible. But no case of that sort was presented upon the evidence, nor was it argued to me that the trustees were entitled to rely or did rely upon the initial statement by the law-agent that although he preferred a certain other investment he deemed the Greenock Harbour bond 'perfectly safe.'" And Lord Adam said—"Mr Inglis, the defender's co-trustee, undertook the duty of inquiring into the matter. The transaction took place nearly twenty years ago, Mr Inglis is dead, and all we know is that he reported as the result of his inquiries that he was perfectly satisfied as to the soundness of the investment." It thus appears that the pursuer is now seeking to fix responsibility upon the defender upon a view of the essential facts, not only different from, but wholly inconsistent with, that upon which he was himself held liable in the previous case. This is a singular position to take up in a case which the Lord Ordinary rightly describes as an "action to obtain relief by way of damages," and it brings the case very nearly if not quite within the rule laid down in the case of *Colt* v. *Caledonian Railway Co.* (21 D. 1108, 3 Macq. 833) that the original claim and the claim of relief must be, to a certain extent at least, commensurate and founded on the same kind of liability—*vide* also *Ovington & Co.* v. *M'Vicar* (2 Macph. 1066).

It was, however, argued by the pursuer that when the matter reached the second stage, *videlicet*, that of completing the investment, after the trustees had decided to make it, a duty rested upon the defender as law-agent which he failed to perform. It was contended that he was bound to have seen to the sufficiency of the title or security offered in respect of the loan, and that he would, upon inquiry, have found that it was not a first charge upon the funds of the Trust, but that all the bonds granted by the Trust prior to the passing of the Greenock Harbour Act 1880 would have priority over it. It appears to me, however, that this argument is not well founded. There was no defect or informality in the title which led to any eviction or failure of the charge which it purported to create. The assignment was in statutory form, and it was and is entitled to receive effect according to its terms. It is true that bonds or assignments had been granted for loans under previous Acts, and that they gave priority of claim to bonds or assignments under subsequent Acts, as is usual, or at all events not uncommon, in the case of great public undertakings, such as harbour trusts, borrowing money. But the fact that earlier lenders would have prior recourse upon the funds was not a defect of title, although it was a circumstance which affected the value or sufficiency of the security. This, however, was in my view, for the reasons already given, a matter for the trustees to judge of, not for the agent, unless he was specially instructed to inquire, or specially undertook to inquire, into that matter, and to form a judgment upon it, for the guidance of the trustees.

The authorities relied upon by the pursuer in this part of the case were—*Struthers*, 4 S. 418, 421; *Campbell* v. *Clason*, 1 D. 270, 2 D. 1113, and 5 D. 1081; *Graham*, 9 S. 543; *Haldane*, 14 S. 610; *Fearn*, 20 R. 352. The ground of claim in the first of these cases was that an agent, who had been employed to obtain and complete a heritable security, had failed to do so, inasmuch as he did not get the infeftment confirmed by the superior. This was not a question of value or sufficiency, but of conveyancing, as to which the agent pledged his professional skill. The first point decided in *Campbell* v. *Clason* was that where a law-agent employed by a lender to effect a heritable security for a loan had failed to ascertain the existence of inhibitions affecting the estate, he was liable to the lender for the loss which he thereby sustained; and the second point was, that where the law-agent had failed to communicate to his employer that arrears of interest had accumulated on prior heritable securities, he was responsible for the resulting loss. In the case of *Graham* a law-agent employed to complete a heritable security, who had omitted to search the record for prior burdens which prejudiced the security, was held liable to make good the loss thereby caused. In the case of *Haldane* it was held that where a law-agent was employed to effect a security over a distillery belonging to another client, on which there were large prior burdens, and he failed to communicate these to the lending client, he was liable to make good the sum lent. And in the case of *Fearn*, where a law-agent, employed to prepare a conveyance of heritage in his client's favour, had failed to make a search for encumbrances, and his client was evicted, he was held bound to make good the loss. All these cases thus relate to failures of law-agents rightly to perform the duties of conveyancers in matters of heritable title, to which there is nothing analogous in the present case.

The pursuer further maintained that as the defender had been instructed to complete a title, he should have told the trustees that they had no power to invest on second bonds. If he had so advised the trustees, it appears to me that his advice would not have been correct, because a bond is not, according to the law of Scot-

land, inadmissible as a security for a loan merely because it is a second bond, provided there is sufficient margin of value over the sum secured by a first bond to make it a good security; and if this be so in regard to a security charged upon heritable estate, it appears to me that it would be still more the case in regard to a bond or bonds of a parliamentary trust, where the sole question is whether the funds of the trust are or are not adequate to secure payment of the principal and interest. In such a case the security is not over a definite and limited heritable subject, but over the whole property and assets of the trust, which may be much enlarged by the expenditure of the money borrowed.

Upon the general question of the character and extent of a law-agent's duty in making an investment, I concur in the views expressed by Lord Mure and Lord Shand in *Raes* v. *Meek*, 15 R. 1049, and 1051; and the conclusion at which Lord Herschell, 16 R. (H.L.) 31 (whose opinion was concurred in by Lord Watson and Lord Fitzgerald), arrived in that case—that it was not proved "that the law-agents were employed to advise the trustees as to the sufficiency of the security, or that the trustees acted on such advice"—appears to me to be also the proper conclusion in the present case.

I have only to add that I do not think that the commission which the defender received was paid to any extent as remuneration for inquiries supposed to have been made by him with respect to the sufficiency in value of the investment now in question.

For these reasons I am of opinion that the Lord Ordinary's interlocutor should be recalled, and that the defender should be assoilzied from the conclusions of the summons.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defender.

Counsel for the Pursuer and Respondent—H. Johnston, K.C.—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for the Defender and Reclaimer—Solicitor-General (Dickson, K.C.)—Clyde. Agents—Davidson & Syme, W.S.

Friday, February 22.

FIRST DIVISION.

[Lord Pearson, Ordinary.

CLIPPENS OIL COMPANY, LIMITED *v.* EDINBURGH AND DISTRICT WATER TRUSTEES.

(See *Ante*, June 7, 1899, 36 S.L.R. 710, and 1 F. 899; November 27, 1900, *ante*, p. 121.)

Arbitration — Compulsory Powers—Statutory Notice — Award—Finality — Waterworks Clauses Act 1847 (10 *and* 11 *Vict. c.* 17), *sec.* 22.

Where the undertakers of waterworks, on the receipt of a notice under the Waterworks Clauses Act 1847, from the owner of minerals lying under their pipes, to the effect that he proposes to work the same, serve a counter-notice requiring the owner not to work, they thereby agree to pay compensation for the minerals as the same shall be ascertained, failing agreement, by arbitration, and the award in such an arbitration is final both as to the amount of compensation to be paid, and (assuming that the title of the mineral owner is not in dispute) as to the obligation of the undertakers to pay that amount.

Arbitration — Compulsory Powers—Statutory Notice—Reservation in Notice.

The A Company, who were the owners of a mineral field, through which two water-pipes, known respectively as the C. and the M. pipes, were laid, in 1821 and 1877 respectively, but in the same pipe-track, received a notice, under the Waterworks Clauses Act 1847, from the Water Trustees to whom the pipes belonged, requiring them to abstain from working the minerals in the vicinity of the pipes, and undertaking to make compensation therefor "in so far as you are entitled thereto," subject to the following reservation: — "Declaring that the foregoing notice is given without prejudice to and under reservation of . . . all objections to your working out the said minerals competent to us, and of our right of support of the C. pipe passing through the said mineral field." The amount of compensation to be paid in respect of the non-working of the minerals was fixed by arbitration. Subsequently the Water Trustees obtained decree in an action, whereby it was found, independently of the provisions of the Waterworks Clauses Act, that the A company were not entitled to work the minerals adjacent to or under the C. pipe in such manner as to injure the said pipe, or interfere with the continuous flow of water through it.

Held that the above reservations in the notice did not entitle the Water Trustees to refuse to implement the arbiter's award, on the ground that, as they averred, the support of the C.