as a punishment, but is only the usual means adopted of enforcing an order *ad factum præstandum.* That such imprisonment is not punishment is clear from the consideration that the defender may at once put an end to it by restoring the goods. Indeed, he may prevent it altogether by restoration of the poinded goods before imprisonment has taken place. Accordingly it appears to me that this is a civil complaint before a civil court with which the Procurator-Fiscal has nothing to do.

I think it is a mistake to suppose that this statute necessarily uses the term "summary complaint" in the sense in which it is employed in the Summary Jurisdiction Acts. A summary complaint such as this means rather a complaint before the Sheriff which, requiring despatch, is not required to submit to the delays which attend a case going through the ordinary roll. I think that is the sense in which it is used here.

LORD MONCREIFF—The only question submitted to us is whether the concourse of the Procurator-Fiscal to such an application is essential. In the Court below the defender raised no objection to the form of the application; and although in this Court he was given an opportunity of amending the record he declined to avail himself of it.

I agree with Lord Trayner that the words "summary complaint," as used in the 30th section of the Personal Diligence Act 1838, simply mean a summary application *ad factum præstandum* as distinguished from an ordinary action. They are used in the same sense in regard to removings in the 8th section of the Sheriff Court Act of 1838; and in the schedule of the Small Debt Act 1837 the initial event in a civil cause is described as a "summons of complaint." The process is a civil and not a criminal process, the imprisonment concluded for being not *in modum pœnæ*, but in order to compel restoration.

Even if such an application could be competently brought under the Summary Jurisdiction Acts, which may be doubted, it would still be a civil and not a criminal process, and might be sued by a private person without the concurrence of the procurator-fiscal.

I agree with all your Lordships that the concourse of the Procurator-Fiscal is not essential, and that the judgment of the Sheriff should be recalled.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Affirm the interlocutor of the Sheriff-Substitute dated 7th August last; and remit the cause back to the Sheriff to proceed therein as accords."

Counsel for the Pursuer—Watt—Horn. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders—M'Lennan. Agents—Miller & Murray, S.S.C.

*Friday, December* 11.

## SECOND DIVISION.

[Lord Kincairney, Ordinary.

## MELVILLE *v.* NOBLE'S TRUSTEES.

*Process—Count, Reckoning, and Payment—Liability of Trustees for Additional Interest on Trust Funds.*

In an action of count, reckoning, and payment brought against trustees in their character as such, where they produced vouchers accounting for the whole sums of principal and interest that had passed through their hands—*held* that their liability for additional interest on the ground that the trust funds had not been properly invested might be inquired into and determined.

*Trust—Liability of Trustees—Investment—Trust Funds Placed on Deposit-Receipt—Interest—Neglect to Invest—Scope of Indemnity Clause.*

A trust-deed provided that the trustees were not to be liable for omissions of management, or for the omissions or neglect of their factors. The trustees never met to consider the question of investing the trust funds, but left the entire management in the hands of one of their number, who was a bank agent. He placed the trust funds under his charge on deposit-receipt in a Scottish bank. There they remained for nineteen years, the average interest yielded during the period being $2\frac{5}{8}$ per cent.

*Held* (*diss.* Lord Young) (1) that to place money in bank on deposit-receipt is not a proper permanent investment of trust funds; (2) that the trustees were liable to pay interest upon the trust funds at 3 per cent.; and (3) that the clause of indemnity in the trust-deed did not protect the trustees against liability.

William Noble, a butcher in Aberdeen, died on 23rd April 1875, leaving a trust-disposition and settlement dated 9th April 1875, by which he appointed James Noble, master mariner, Aberdeen, Thomas Park, merchant, Fraserburgh, Alexander Watson, bank agent, first at Fraserburgh and then at Invergordon, and Andrew Ritchie, fisherman, Inverallochie, his trustees for the purposes therein mentioned. The whole of the trustees accepted office, and entered into possession of the trust-estate. Under the trust-deed Mrs Noble, the widow of the truster, was to get the whole income of the residue of the trust-estate on certain conditions, and for five years after the death of the truster this was paid to her. In 1880 Mrs Noble claimed her legal rights and these were paid.

In December 1894 two beneficiaries under the trust-deed, viz., Alexander Melville and William Noble Melville, whose shares, though vested in them prior to 1880, had remained unpaid and uncalled for in the hands of the trustees, raised an action of count, reckoning, and payment against

Park, Watson, and Ritchie as accepting and surviving trustees. The defenders admitted liability to account, and lodged accounts of their intromissions and relative vouchers.

The pursuers lodged objections to these accounts in which they, *inter alia*, stated—"During the whole course of the trust the trustees have had large sums of money in hand, but they have never made any investments therewith. They have allowed the money to remain on deposit-receipt or in current account with the North of Scotland Bank's branches at Fraserburgh and Invergordon, of which one of the trustees, Mr Alexander Watson, was successively agent. The sums credited in the various accounts produced for interest on deposit-receipts are as follows:—

| | £ | s. | d. |
|---|---|---|---|
| "1. In the account from 23rd April 1875 (the date of the truster's death) to 13th February 1880 . . . . . . . | £406 | 13 | 4 |
| "2. In the account to 18th January 1884 . . . . . . | 449 | 5 | 9 |
| "3. In the acconnt to 11th February 1886 . . . . . | 161 | 15 | 4 |
| "4. In the account to 28th February 1891 . . . . . | 193 | 11 | 3 |
| "5. In the account to 20th January 1894 . . . . . | 43 | 19 | 1 |
| | £1255 | 4 | 9 |

It was the duty of the trustees to have invested the trust funds, and if they had done so on good heritable securities, interest at the average rate at the least of 4 per cent. per annum could have been realised."

The pursuers further averred that if the funds had been properly invested the interest during the first account would have been £633, 8s. 1d., during the second £700, during the third £327, during the fourth £356, 9s. 2d., and during the fifth £148, 15s. 5d., so that deducting the sums credited by the trustees for deposit-receipt interest, they fell to charge themselves with a further sum of £930, 7s. 11d under-credited for interest on the trust funds, which the trustees were liable to make good.

To this objection of the pursuers the defenders answered—"Denied. The trustees have accounted for all the money received by them. There is no direction given in the deed of settlement to invest the funds. The beneficiaries knew of the sums lodged in bank, and never made any objection thereto. . . . At first, and until the widow declared her option between the provisions of the settlement and claiming her legal rights, the trustees could not do otherwise than have the money deposited in bank. Mrs Noble approved of that course. Thereafter it was convenient to have it in bank to be ready for making payments to the beneficiaries. Futher, the law-agents of the trustees informed them that they could not get any suitable investment for the money. The claim for a difference of interest beyond what the trustees received is not relevant. In any case, the trust-deed expressly provides that the trustees 'shall no ways be liable for any omissions in management nor for the omissions and neglects of their factors, agents, or cashiers, . . . but that they shall be bound to act honourably, and shall nowise be liable *singuli in solidum*, or for one another, but each for himself only, and for his own personal intromissions and wilful default, and no farther."

A proof was led which disclosed the following facts:—The trustees never met to consider as to the question of investing the trust funds, they left the entire management in the hands of Watson. He gave evidence that he considered a deposit-receipt a proper investment for the trust funds. The highest amount in bank on deposit-receipt during the period of the first account was £4500, of the second £4400, of the third £3900, of the fourth £2450, and of the fifth £1300. The average rate of interest which had accrued on the capital sums during the nineteen years in which they had lain in bank on deposit-receipt was $2\frac{3}{8}$ per cent. The average rate of interest on money invested in Consols during the same period was about $2\frac{4}{5}$ per cent. Mr J. A. Robertson, C.A., and Mr R. C. Millar, C.A., gave evidence on behalf of the pursuers that there would have been no difficulty in investing the trust funds on heritable security at at least 4 per cent.

On 23rd July 1896 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that it was the duty of the trustees to invest the funds of the estate, where practicable, in safe investments profitable to the estate; (2) that there was no difficulty in so investing the said funds; (3) that the trustees failed in so investing the said funds; (4) that they thereby lost to the estate the sum of £881, 0s. 1d.; (5) that the said trustees are bound to make good the said sum to the estate as at 1st January 1894."

*Opinion.*—"The principal question discussed at last debate was that raised on Objection 7 to the trustees' accounts by the pursuers Alexander Melville and William Gordon Melville, sons of Sarah Noble or Melville, a daughter of the truster William Noble. The objection is that the trustees were bound to have invested the trust-estate so as to have produced an adequate return in the form of interest, and were not entitled to keep the money in bank on deposit-receipt as they had done, and were bound to debit themselves with the difference between such interest as might have been obtained from a prudent and safe investment and the interest which they have obtained from the bank. The pursuers are not said to be in any way barred or precluded from stating this objection. It is admitted that the funds were not invested, but the trustees explain on record that until the widow declared her option to claim her legal rights they could not do otherwise than have the money deposited in bank; that it was afterwards convenient to have it in bank, that they might be ready to make payments to the beneficiaries, and that the law-agents of the trustees informed them that they could not get any suitable investment. These reasons or excuses are, however, wholly unsupported by the proof,

and they were hardly maintained in the argument. I think it is clearly proved that there was no exceptional difficulty about investing, and that the greater part of the trust funds might have been invested safely at 4 per cent.; and the witness Mr Robertson, C.A., has prepared a state purporting to show that if the funds had been duly invested, leaving sufficient sums on deposit to meet occasional requirements, there would have been on 26th January 1894 a return of interest of £881, 0s. 1d. more than the trustees had actually drawn on the bank deposits at that date. That is to say, that that amount would have been gained to the estate. The correctness of that state has not been challenged, and it, with the evidence of Mr Robertson and Mr Millar, affords the only proof before me on the point. There appear to be no reported cases as to the liability of trustees who have simply lodged their money in bank to account for interest at the rates procurable on proper trust investments. There have been cases where trustees have been held liable for money allowed to remain in bank and lost through the failure of the bank—*Cann* v. *Cann*, 33 Weekly Reports, p. 40; Lewin on Trusts, 9th ed., 315. Such cases stand on a different principle. It is, however, a settled rule that trustees who fail to invest the trust-estate shall be charged with interest at a rate not below 4 per cent. —*Jones* v. *Foxall*, 1852, 15 Beav. 388; *Williams* v. *Powell*, 1852, 15 Beav. 461; Lewin on Trusts, pp. 315, 326; M'Laren on Wills, sec. 2254. I think this rule equally applicable where the trustees have without good reason allowed the trust funds to remain on deposit-receipt. The rule as to the duties of trustees is that they are bound to manage the trust-estate with the care and prudence with which reasonable men manage their own affairs; and certainly no one managing his affairs with ordinary prudence would allow his capital to lie in bank on deposit-receipt. I think that the rule applicable to funds which have not been invested at all is applicable in principle to the case of trust funds left without excuse permanently in bank. The defenders appeal to the clause of indemnity, which is no doubt wide and liberal, but still does not differ materially from the usual clause of indemnity in trust-deeds. But I think they are not in a position to avail themselves of that clause. Their neglect of the trust appears proved. There seems to have been no meeting of the trustees at all after 1880. It does not appear that they ever considered the question of investments. They left the management entirely in the hands of their factor and co-trustee, who paid no more attention to this question than they did. In these circumstances, I think that they cannot be protected by the clause of indemnity. It is, of course, always to be much regretted when gratuitous trustees are made to answer for the mismanagement of the estate, but in this case the result seems unavoidable, and I am of opinion that on this point the pursuers must succeed." . . .

The defenders reclaimed, and argued—(1) The question as to whether the defenders were liable for not investing the trust funds properly could not be competently decided in the present action. It was in effect a mere action of accounting, not an action involving personal liability of the individual trustees. The defenders had been called in their collective capacity as trustees and not in their individual capacity. A question of personal liability for negligence could not be raised in a summons of simple accounting against trustees called in a body and not as individuals—*Pearson* v. *Houstoun's Trustees*, Jan. 29, 1868, 6 Macph. 286. The defenders were not even called conjunctly and severally, so no decree could be pronounced against them making them liable as individuals—*Carruthers* v. *Hall*, Nov. 25, 1830, 9 S. 66. This showed that the action was one solely of accounting in which a claim for damages for breach of trust could not be appropriately settled. The trustees had produced vouchers accounting for the whole of the trust funds. If it was said that they had invested the money improperly, an action of damages could be brought against them. In such an action the trustees should be called as individuals as well as in their joint capacity, for their individual defences might conceivably vary from their joint defence as trustees. (2) The deposit of money in bank was a good investment. It was a loan to the bank, with a written obligation on the part of the latter to pay the principal with interest. It was in many respects a highly desirable investment of trust funds, as there was no risk attached to it, and the capital could be produced at any moment. (3) Even if a deposit in bank was held not to be an investment, the trustees escaped liability under the indemnity clause in the trust deed. They had omitted to invest money so as to obtain a certain rate of interest, and in terms of the deed they were not to be liable for omissions. The cases quoted by the other side in which it was held that the trustees were not exculpated by the indemnity clause were all cases in which part of the trust capital had been lost. There were four categories under which trustees had been held liable—(1) For bad investments, (2) for neglect of supervision of their agent, (3) for keeping the trust funds in their own pockets, and (4) for making no investment at all, as by putting the funds into current account. But there was no case where trustees who had invested the money and accounted for both capital and interest were held liable for the difference between the interest received upon the investment made and the interest which might have been received from another investment. The cases quoted on the other side were cases where *culpa lata* or gross negligence on the part of the trustees had been proved. In the case of *Carruthers* v. *Carruthers' Trustees*, July 13, 1896, 33 S.L.R. 809, the trustees had committed a breach of an express direction of the truster, while in *Seton* v. *Dawson*, Dec. 18, 1841, 4 D. 310, and *Rae* v. *Meek*, July 19, 1888, 15 R. 1033, the trustees were found guilty of gross negligence. It could

hardly be suggested here that the defenders had been guilty of any *culpa lata*, and it was ridiculous to accuse them of gross negligence where they produced the whole of the capital and interest at $2\frac{3}{8}$ per cent., it not being suggested on the other side that they could have been found fault with if they had invested in Consols which would have yielded $2\frac{4}{5}$ per cent. In such circumstances it was vain to allege that the trustees had never met to consider about investments; they had left the matter in the hands of the person among them best qualified to judge of these matters, and the result showed that they had acted prudently in doing so. (4) In any event the rate of interest (4 per cent.) found by the Lord Ordinary was too high. If the money had been invested in Consols the interest would have averaged $2\frac{4}{5}$ per cent., and in estimating the difference to be paid by the trustees the Court must take the lowest rate of interest yielded by recognised trust investment. In *Heritable Securities Investment Association, Ltd.* v. *Miller's Trustees*, Dec. 17, 1892, 20 R. 675, the rate of interest for which trustees were held liable was 3 per cent., and in that case part of the trust funds had been improperly paid away. (5) Whatever the decision might be, the interlocutor of the Lord Ordinary should be restricted so as to apply only to the present pursuers.

Argued for the pursuers — (1) The trustees were called in that character because they were only liable to the pursuers in their capacity as trustees. The liability for interest on the trust funds arose quite properly in an action of accounting. The action was brought to determine what was the proper amount of the estate due by the trustees to the beneficiaries. When trust funds had been in the hands of trustees for a number of years, interest upon them was necessarily a part of the estate for which the trustees required to account—*Donaldson* v. *Findlay, Bannatyne & Co.*, Mar. 3, 1860, 22 D. 937. Where trustees produce accounts, even although these accounts may be correct, the trustees will not get their discharge until they show that they have dealt with the trust funds properly—*Forman* v. *Burns*, Feb. 2, 1853, 15 D. 362. In an action of accounting the trustees did not require to be called as individuals in order to make them personally liable—*Cochrane* v. *Black*, Feb. 1, 1855, 17 D. 321. (2) The placing of money on deposit-receipt was not a proper investment of the money at all. Money might be placed on deposit-receipt temporarily till a good investment was secured, but a deposit-receipt could not in any view be called a permanent investment. The bank might alter or terminate the rate of interest on its deposits at any time. No prudent man acting on his own behalf would be satisfied with deposit-receipt interest. If an investment in any sense of the word, it was one on personal security, and as such not an investment under the Trust Acts. (3) The indemnity clause did not protect the trustees from liability. The Lord Ordinary had found that the trustees had never honestly applied their minds to the question of the investment of the funds. They had thus not acted in a prudent manner, but committed a breach of duty. The construction put by the decisions on a clause of indemnity of this kind was, that although it might confer on trustees immunity for small errors, it did not protect trustees who stood by and did nothing to carry out their duties—*Seton* v. *Dawson*, *supra*, *Rae* v. *Meek*, *supra*, *Knox* v. *Mackinnon*, Aug. 7, 1888, 15 R. (H.L.) 83; *Carruthers* v. *Carruthers' Trustees*, *supra*. The evidence showed that the trustees neglected to perform their duties, and the money was left on deposit-receipt simply because they would not take the trouble to find a proper investment. (4) Where trustees had acted in violation of their duty, the Court would not allow the lowest rate of interest obtainable on a first-class trust security, but would make the trustees pay a fair rate on the money—the amount which could have been earned on a prudent investment. The proof showed that 4 per cent. could have been got on good heritable security, and the Lord Ordinary was right in fixing the rate at 4 per cent. It was the duty of trustees to see that trust funds were profitably invested, and 4 per cent. had been held to be the rate which money could earn under prudent administration—*Ross* v. *Ross*, June 16, 1896, 23 R. 802. Where trustees allow money to lie in bank uninvested they are liable at the rate of 4 per cent.—*Jones* v. *Foxall*, 1852, 15 Beavan, opinion of M.R. Romilly, p. 392. If the money had been invested in Consols there would have been a rise in value in the capital which would have accrued to the estate. The case of *The Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, *supra*, was a very exceptional case.

At advising—

LORD JUSTICE-CLERK —The question now before us is, whether the trustees are liable to bring into the trust accounting a return for funds in their hands greater than the interest on deposit-receipt with which they debit themselves. I do not consider it necessary to say anything upon the argument addressed to us to the effect that the trustees being only called as such, the pursuers cannot maintain the case against them. The question now before us is truly one of the balance to be brought out in the trust-accounts on a true accounting. Are they liable, as I have said, to bring into the accounting what are the proper profits of sums in their hands? I am of opinion that the trustees are so liable. Trustees holding trust-funds should invest them so as to yield an investment return. I cannot hold that they so invest them by placing them on deposit-receipt with a bank. It is true that many private individuals often keep large sums on deposit-receipt for long periods, but this cannot be called an investment in the usual sense of that term. There is no stipulated return. The interest to be paid may fluctuate at the will of the holders of the money, and it is never equal to the

amount which ordinary and recognised investment yields. But had the trustees really addressed their minds to the question of investment, and given it consideration, and resolved to keep the trust-funds on deposit-receipt, there would have been a great deal to say for the view that if they were wrong it was an omission from error of judgment, and that they might plausibly appeal to the "indemnity clause." I do not say that would have exonerated them, but at least they would have shown intention to do their duty. But here they did not as trustees exercise their judgment. They just let matters slide for twenty years without giving their duty any consideration. I must therefore hold that they were in breach of the duty they had undertaken in accepting the trust—to manage it for the beneficiaries so as to make the capital yield a return from investment.

This being so, the question is, what in the circumstances must be held to be the return that with such management they would have obtained. On this question I am unable to hold that their liability can be tested by merely taking the investment which yields the lowest rate of return among those investments which were open to them, viz., consols, and ascertaining how much consols have yielded for the period in question. I think the question must be decided by considering what they might have got consistently with sound trust-management. The Lord Ordinary has fixed the amount at 4 per cent. That as it appears to me is too high for the period in question. It is distinctly higher than could have been obtained during the period on first-class heritable securities. And further, the trustees say with some force that (1) that expense of investment was saved, (2) they should be credited with time for making investments, and (3) that for five years at least they required to keep money in hand, as they had large payments to make in the way of advances to beneficiaries. I would suggest to your Lordships that the justice of the case would be met by their being charged with 3 per cent. interest for the whole period of the trust.

It is, of course, only in a question with the present pursuers, and with a view to ascertaining what is payable to them as their share, that this question is decided at present. It will be open to the trustees in any after question with other beneficiaries to maintain any plea of bar they may have against them, based upon their knowledge and acquiescence in what was done.

LORD YOUNG—This is a count and reckoning brought in 1894 against the testamentary trustees of a butcher in Fraserburgh, who died in 1875. The pursuers are two of the beneficiaries in the trust. The defenders admit liability to account, and have lodged accounts and vouchers accordingly. The only question argued to us, and which we have to consider, is that which is raised by the 7th objection by the pursuers to the defenders' accounts. It is, whether testamentary trustees who deposit trust-money in bank are under any circumstances, or at least under those which occur here, liable to account for more interest than the money yielded at the bank deposit rates.

I think we may take judicial cognisance of the fact that the bank deposit rate of interest is periodically fixed and published by the public banks acting in concert, and that any reduction or rise is immediately announced.

The defenders' intromissions are specified in five accounts. No. 1 embraces the period from 1875 to 1880, No. 2 from 1880 to 1884, No. 3 from 1884 to 1886, No. 4 from 1886 to 1891, and No. 5 from 1891 to 1894. We must consider the question before us on the footing that the accounts are satisfactory, subject only to the question which I have stated.

The highest amount in bank on deposit during the period of the first account was £4500; of the second, £4400; of the third, £3900; of the fourth, £2450; and of the fifth, £1300. It is admitted that the money was all along in perfect safety, and that the defenders have well accounted for it, together with the interest (bank deposit interest) received therefor.

The pursuers' 7th objection (the only one for consideration) is that the defenders ought "to have invested the trust-funds, and if they had done so on good heritable securities interest at the average rate at the least of 4 per cent. per annum would have been realised." Their case of course (and necessarily) is that by putting and keeping the trust-money in bank to the extent which they did, instead of investing it on heritable or other security at a higher rate of interest than bank deposit rate, they violated or failed in their duty as trustees, and so are liable for the loss or damage thereby occasioned to the trust-estate.

As the bank accounts show exactly the sums paid in and drawn out by the trustees, with the interest allowed on the balances and credited to them, and as there is no dispute on the subject, I presume that the Lord Ordinary, when he allowed the pursuers a proof in support of their 7th objection, intended that they should have an opportunity of proving that the sums deposited could have been invested more profitably to the estate. As the result of the proof the Lord Ordinary has found "that there was no difficulty in so investing the said funds," and that had the trustees so invested them they would have received interest thereon exceeding by £881, 0s. 1d., the interest which they drew from the banks on the deposits. His Lordship is of opinion that a loan to a bank on deposit at the current rate of interest is not an investment, and that a trustee who thus deals with trust money acts unwarrantably and in breach of his trust, and incurs the same personal liability as a trustee who himself uses the trust money, referring in support of this view to cases in which it was held, first, that a trustee who allows trust money to remain in his business as a trader (in which the deceased truster had been a partner) is personally responsible for both principal and interest;

and second, that a trustee, who puts trust money to the credit of his own private bank account incurs the like liability. I differ from the Lord Ordinary, and think the authorities which he cites are not in point, but deal with another and quite different matter. A trustee who himself uses trust money, or puts it to his own credit in bank, acts in breach of his trust, and is personally liable accordingly for the principal, plus interest at the rate commonly allowed against anyone who retains the money of another. To say that a trustee who deposits trust money in bank properly earmarked as a trust deposit, thereby commits a breach of trust is, I think, quite unwarrantable.

It has not been suggested that bank deposit is objectionable as investment for trust money because it is unsafe, the bank being a public chartered bank and known as of good repute. The objection is therefore confined to the rate of interest. But the rate varies according to the rise or fall in the market value of money. At what rate then, or down to what rate is bank deposit a lawful investment for trust money, and when does it cease to be? Or if there is no rule of trust law affording an answer to the question so put, can we announce this as the rule of law that trustees will be held to have performed or violated their trust duty in putting and leaving trust money on bank deposit according to the result of a proof at large on the question whether or not they could by due diligence have invested otherwise at a higher rate of interest? I have already said that in my opinion a bank deposit at the current rate of interest is an "investment," and we certainly know that millions of pounds sterling are thus invested by quite reasonable and prudent people. But it is, I think, immaterial whether the term "investment" is applicable or not. It is safe and yields interest, and if the interest is as high or higher than an investment in consols would be—as it may be and certainly has been — could it be rationally maintained that the trustees were in duty bound to draw out the deposit and buy consols, the deposit not being an "investment."

The Lord Ordinary is of opinion on the evidence that the trustees could have procured safe investments at 2 per cent. more interest than the deposits yielded. Your Lordship in the chair thinks at only 1 per cent. more. I am of opinion that the objection is on the face of it bad in law, and that the evidence is quite out of place. The objection is confessedly unprecedented, and so certainly is the evidence, as indeed proof on an unprecedented objection was most likely to be.

The Lord Ordinary notices the clause of indemnity in the trust-deed, which, he says, "is no doubt wide and liberal," but thinks the defenders cannot avail themselves of it because "there seems to have been no meeting of the trustees at all after 1880," and because "it does not appear that they even considered the qnestion of investments." No reason has been pointed out why there should have been a meeting of the trustees after 1880. Nor does it occur to me that the question before us would have been affected had the trustees held a meeting or any number of meetings, at which they formally directed Mr Watson, the only man of business of the three, to do exactly as he did—that is to say, to put and keep the unspent trust money upon bank deposit. If that was misconduct inferring liability in damages, it does not occur to me that its character would have been changed by meetings and resolutions. But I think it only right to add that irrespective of the indemnity clause my opinion is adverse to the pursuers.

I have characterised the liability which the Lord Ordinary has by his interlocutor imposed on the defenders as liability in damages. It can be nothing else, for the whole trust money—principal and interest —has been ingathered, accounted for, and made forthcoming. No ground for a claim of damages has, in my opinion, been proved or even averred. With respect to the defenders Park and Ritchie, I see no ground for any reflection on their conduct. They were, I think, warranted in leaving the deposited money in the charge of Mr Watson, who was in fact, and I assume to their knowledge, qualified by integrity and business good sense to be entrusted with the duty. He in fact performed it with uprightness and safety, and without complaint from anyone interested (and there were several) till this action was brought. With respect to Mr Watson himself, I appreciate what he says in his evidence (which is really more of an argumentative discussion between him and the examining counsel than evidence of facts) otherwise than the Lord Ordinary seems to have done, and I am not prepared judicially to censure his conduct, although it may be true that had he put the matter in the hands of a professional accountant like Mr Robertson he might have got more interest than he did. To hold, upon any facts proved or even averred, that he subjected himself and his co-trustees in damages for breach of trust is what I am am not prepared to concur with the Lord Ordinary in doing.

LORD TRAYNER—I think the question as to the liability of the defenders for interest on the trust funds in their hands may competently be inquired into and determined in this action. The purpose of the action is the ascertainment of the balance, on a fair accounting, which the defenders as trustees are owing to the pursuers. Such a balance cannot be struck without debiting the defenders with all sums with which as trustees they are bound to debit themselves, and it does not appear to me to be material whether such debit arises from funds once in their hands having been lost, or funds not recovered which should have been recovered, or not received which should have been received. The funds immediately in question are of the latter class. The defenders are sought to be made liable, that is debited in their accounts, with interest which would have accrued on the trust funds had those funds been properly

treated, and which has not accrued or been earned through the neglect or fault of the defenders in the course of their management. Whether the defenders are liable for such interest in the circumstances of this case is the main question. I am of opinion with the Lord Ordinary that they are. The defenders were bound to deal with the trust funds in the same way as a man of ordinary prudence would deal with his own, and I cannot think that a man of ordinary prudence would leave his fortune, or a very large part of it, lying in bank on deposit-receipt for a period of about twenty years. He would certainly seek some investment which would yield a higher return than bank deposit rate. I think the trustees here neglected their duty. It was not a mere omission in management; it was a total neglect of a duty incumbent upon them, to the direct injury of the trust estate under their charge.

I am not satisfied, however, that the defenders could easily have found first-class investments yielding 4 per cent. for the whole period of their trust management. I think if the defenders are found liable for 3 per cent., that that would represent a very fair return to the beneficiaries. In coming to this conclusion I have been partly influenced by two considerations—first, that some expense would have been occasioned to the trust by the investment of the trust funds which the trust estate has not actually been put to; and, second, that for some part of the period of administration part of the trust funds might and probably would have remained in bank while investments or renewals of investment were being sought.

LORD MONCREIFF—I am of opinion that to leave money in bank on deposit-receipt is not a proper permanent investment for trust funds. It is an excellent temporary use to make of them pending selection of a permanent investment. There might even be circumstances which might warrant trustees, if they applied their minds to the matter, in leaving trust funds on deposit-receipt for a considerable period. If, for instance, it were necessary for the purposes of the trust frequently to uplift the funds, or if in the state of the market there was serious difficulty in getting safe permanent investments. Evidence that the trustees had honestly applied their minds to the matter might in such a case be held to free them from personal liability although it might be thought that they had been unduly cautious.

But in the present case I think it is proved that during the whole currency of the trust the trustees did not apply their minds to the investment of the trust funds. They were bound from time to time to consider the question of investment with a view to getting for the beneficiaries as large a return as they could consistently with the safety of the capital. It is proved that they totally neglected this duty, and although it is proved that during most of the time safe investments yielding 4 and 4½ per cent. could easily have been obtained, they allowed the money to remain for about 20 years on deposit-receipt. This in my opinion was default, not mere omission.

The only remaining question is as to the rate of interest with which they shall be debited. In charging them with only 3 per cent. I think we shall impose a very moderate penalty upon them. The evidence shows that a considerably larger return than 3 per cent. could have been obtained, and although an investment in Consols could not have been objected to if it had been made, as no proper investment was made, we are not bound to take the lowest allowable investment as the measure of the trustees' liability. But the amount of interest to be charged is a matter in the discretion of the Court, and as during the first five years of the trust there may have been some excuse for leaving the money on deposit-receipt, it may be sufficient to charge the trustees with 3 per cent. over the whole period of the trust.

Decree in favour of the pursuers will be limited to their own interest in the trust funds.

The Court pronounced this judgment:—

"Recal the 2nd, 4th, and 5th findings in the interlocutor reclaimed against, and in lieu thereof Find (1) that the trustees having failed to invest the funds of the trust estate, a loss has been incurred to the trust estate to the extent of £353, 17s. 11d. as at 1st January 1894 through such failure; and (2) that in a question with the pursuers the defenders are bound in their trust accounts to debit themselves with said sums: *Quoad ultra* adhere to said interlocutor, and remit to the Lord Ordinary to proceed."

Counsel for Pursuers—W. Campbell-Brown. Agents—Winchester & Nicolson, S.S.C.

Counsel for Defenders—Ure—Salvesen. Agents—Gill & Pringle, W.S.

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*Friday, December* 11.

## FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

## WEMYSS AND OTHERS *v.* THE LORD ADVOCATE.

*Prescription—Barony Title—Coal under Sea ex adverso of Barony Lands.*

Under a general title of barony a right to the coal lying under the sea *ex adverso* of the lands (so far as the same is workable from the lands) may be acquired by possession for the prescriptive period, unless such right is expressly excluded by the title.

An express conveyance of the coal of barony lands does not, without possession, confer a right to coal under the