application of the general rule, and to exclude the exception, and that is the condition as to remuneration. The payment of commission, being on the sale of all goods, is distributed between the two companies, but the weekly salary is a lump sum for the whole services rendered. There is nothing to infer the joint liability of both companies for the entire salary, or the separate liability of either to pay for the services rendered to the other, and there is no means of apportioning the liability between the two so as to make each liable for its own share. It is quite clear that the pursuer can look to nobody but the defender for payment of the salary, which the defender undertakes shall be paid. I think therefore that the substance of the agreement is in accordance with the general rule of law. The Lord Ordinary has examined in some detail the actings of parties which followed on the engagement. I think his Lordship's view as to their conduct is correct, but I do not think it necessary to consider it minutely, because I do not attach so much importance to this part of the case. The one sentence in his Lordship's judgment with which I am not prepared to concur is that in which he says that "the letter is not by itself conclusive either way." I think, on the contrary, that it is conclusive, and that it puts an end to the whole question. I agree with the Lord Ordinary in attaching no importance to the evidence of directors of the companies who were called to prove that the defender was the companies' servant. It does not appear that the question was ever brought before the board in any definite or practical form, and the evidence amounts to nothing more than the *ex post facto* opinion of individual directors who were not parties to the contract. Even therefore if it were admissible it would have no weight, but I have doubts as to the admissibility of a large part of the evidence to control the written contract.

It was stated at the bar—and I observe that the Lord Ordinary also notices a statement to that effect—that the companies are willing to pay the pursuer. If they are willing and able to do so, there can be no objection to their putting an end to the controversy in that way, but that point is not before us in such a form as to affect our judgment.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuer—W. Campbell, Q.C. — Hunter. Agents — Carmichael & Miller, W.S.

Counsel for the Defender—Salvesen, Q.C. —Findlay. Agent—W. Marshall Henderson, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.

HENDERSON *v.* HENDERSON'S TRUSTEES.

Trust—Administration—Liability of Trustees—Investment of Trust Funds—Investment in Trading Enterprise—Reasonable Prudence—Power to Invest in "Stocks"—Investment in Fully Paid-up Shares.

A marriage-contract empowered the trustees acting under it to lay out the trust funds on, *inter alia*, "Government funds, debentures, or purchases of stocks." The trustees in 1881 invested a certain sum out of the trust-estate in the purchase of fully paid-up shares in the British and Canadian Lumbering and Timber Company, Limited, a company which had been formed in 1880 for the purpose of working timber lands in Canada and the United States, and which had its registered office and board of directors in Scotland. The company went into liquidation in 1883. An action was raised by the beneficiaries against the trustees for repayment of the sum thus invested, on the ground (1) that it was not within their powers to apply the trust funds in the purchase of shares in a limited liability company, and (2) that even if it was, the purchase of these particular shares was not a reasonably prudent exercise of the power. It appeared that the collapse of the company was due to the want of sufficient working capital, and to mismanagement by the managers in Canada; that the trustees had made full inquiries into the integrity and fidelity of the managers; and that they had special grounds for believing in the security of the investment owing to the special information possessed by one of them who was a promoter and manager of the company. *Held*, without deciding the first question, (*rev.* the judgment of Lord Pearson) that the investment was necessarily a speculative one, that it was not a reasonably prudent exercise of the trustees' powers, and that accordingly they were liable to replace the funds.

Held (*per* Lord Pearson) that a power to invest in stocks includes a power to invest in fully paid-up shares.

Trust—Breach of Trust—Consent of Beneficiary—Liability of Beneficiary to Recoup Trustees—Trusts (Scotland) Amendment Act 1891 (54 *and* 55 *Vict.* c. 44), *sec.* 6.

Section 6 of the Trusts Act 1891 enacts that "where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing of a beneficiary, the Court may, if it shall think fit, . . . make such order as to the Court shall seem just for applying all or any part of the interest

of the beneficiary in the trust-estate by way of indemnity to the trustee or person claiming through him."

Trustees committed a breach of trust by investing trust funds in a speculative investment, with the result that the funds so invested were lost. In an action against them at the instance of the beneficiaries for restitution of the funds so lost, the trustees maintained that in terms of the enactment quoted above and at common law they were entitled to impound the interest of one of the pursuers in the trust estate by way of indemnity to themselves, in respect that he had pressed them to obtain a high rate of interest and that he had consented in writing to the investment in question being made. The investment was made without his knowledge, and without any previous communication with him. After hearing that it had been made he wrote—"As to the investments you have made, I quite approve of them. I know nothing about the company. I would like reports or any papers about it." Thereafter he wrote other letters expressing doubts as to the soundness of the company, but he did not urge the trustees to change the investment. *Held* that the defenders were not entitled to have any part of the beneficiary's interest in the trust-estate impounded for their indemnification, on the ground that to justify such a claim the concurrence of a beneficiary in a breach of trust must be clear and direct, and that the defenders had failed to establish such concurrence.

Trust—Breach of Trust—"Illegal Profits"—Bonus Earned on Transaction Outside Trust Powers.

Trustees invested trust funds in debentures of a bank. Under a reconstruction scheme they acquiesced in the conversion of these debentures into debenture stock of the same amount. A bonus of 4 per cent. was offered to persons guaranteeing the new debenture stock, and the trustees having guaranteed it to the amount of £2000 became entitled to this bonus of £80. They had to take up under the guarantee a part of the amount guaranteed by them, viz., £1285, and in paying for this they paid only £1205 out of the trust funds, the balance being covered by the bonus. The investment having been found to be illegal, the beneficiaries claimed that the trustees were bound to replace the whole £1285, on the ground that the trust was entitled to all profits made out of any transactions connected with it. *Held* that the beneficiaries had no claim for the bonus made upon a transaction which had been successfully repudiated as not being within the trust powers.

By an antenuptial contract of marriage between Alexander Henderson and the late Mrs Agnes Robertson or Henderson, dated 3rd October 1855, Mr Henderson, in security of the provisions which he thereby made for his wife and children, assigned to trustees the balance of his share of the succession to his deceased father "in order that they may lay out the same on good securities, heritable or moveable, Government funds, debentures, or purchases of stocks taken to themselves as trustees foresaid and may make payment of the interest thereof to the said Alexander Henderson during his life." Mrs Henderson in like manner assigned to the trustees her whole estate for the purposes set out in the contract, these being primarily for the benefit of her husband and herself in liferent and of the children of the marriage in fee. There was no investment clause in the conveyance specially applicable to Mrs Henderson's estate, but among the general powers conferred on the trustees by the contract were the following:—"With power also to said trustees under both trusts, or their foresaids, to uplift, receive, and discharge all the means and estate conveyed to them, and to lend out and dispone the same upon security, heritable or moveable, in England or Scotland, or Government funds or debentures or purchase of stocks, as they shall think best, and to take the rights and securities thereof in their own names as trustees for the intents, uses, and purposes respectively before expressed." The contract also contained powers of nomination of other trustees, and the following clause:—"And for the encouragement of the said trustees to accept of both the said trusts, the said Alexander Henderson and Agnes Elder Robertson, with his consent, hereby declare that they shall only be liable to re-employ the said trust-estates when the same shall require to be uplifted in the hands of a person or persons habite and repute responsible, or of a safe investment at the time of lending or investing the same, and they shall noways be liable for omission or neglect of any kind in the management or for the intromissions of each other or of their factor, but each for his own actual and personal intromissions only." Nine children were born of the marriage. Of the five trustees appointed by the contract four died, and the fifth resigned prior to 1880. In March 1878 Mr William John Menzies, W.S., Edinburgh, and Mr John Henry Robertson, stockbroker, Edinburgh, were assumed as trustees, and after that date the management of the trust was in their hands. Mrs Henderson predeceased her husband. On 11th March 1881 the trustees invested the sum of £550 or thereby in the purchase of 50 fully paid shares in the British Canadian Lumbering and Timber Company, Limited, of which Mr Menzies was managing director. On or about 18th July 1881 the trustees invested £480 or thereby in the purchase of forty more of the same shares. The company went into liquidation in 1883. In 1897 an action was raised against the trustees by Alexander Henderson and the five surviving children of the marriage, who were all of full age, craving the Court to find that the two trustees were "per-

sonally liable conjunctly and severally, or severally, in such proportions as to our Lords shall seem just, to replace and make good to the trust-estate under the said antenuptial contract of marriage out of their own proper funds—(1) the sum of £1040, 13s. wrongfully invested by them in shares of the British Canadian Lumbering and Timber Company, Limited." There were conclusions for payment of three other sums which the pursuers averred were wrongfully invested, the cost price of which to the trust-estate was £4880. This last-mentioned sum was offered by the defenders to the pursuers in satisfaction of their whole claims, but was not accepted by them. In the course of the procedure in the action these sums were replaced in the trust by the defenders. There was a further conclusion for interest at 5 per cent. on the sums claimed, under deduction of such sums of dividend and interest as had been paid on the investments.

With reference to the first conclusion the pursuers averred—"Such investment was outwith the powers conferred by the trust-deed, and was in any event a most imprudent one, the company being only about a year old, and its business being of a highly speculative character. By 1883 the British Canadian Lumbering and Timber Company, Limited, had collapsed and was in liquidation, and a loss to the trust-estate of over £1000 ensued. On 27th October 1884 Mr Robertson wrote to Mr Henderson in regard to these shares—'I really can't blame *myself* in this matter—W. J. M. (Mr Menzies) as the older man, and a lawyer, with at the time a great reputation, advised the purchase, and would'nt agree to my proposal to invest in debentures of the Land Mortgage Bank of Victoria, because (and he was right so far as the deed goes) we had not the power under the marriage-contract. . . . I only wish I felt rich enough to write a cheque for the shares and take them over.' And with that letter Mr Robertson enclosed one from Mr Menzies to him in which Mr Menzies wrote—'I paid Henderson's dividend last year and it cost me £180 to do so as I took stock on which I have had to pay £90. When better times come I hope to be able to do something to make this up.' And on 19th May 1885 Mr Menzies wrote to Mr Henderson direct—'It was John Henry (Mr Robertson) who took the investment of the lumber shares. I would never have dreamt of such an investment. He should pay his shot."

The pursuers further averred that while Mr Henderson was always desirous that the trustees should get as high interest as they lawfully and prudently could, he had never urged them to exceed their powers in regard to the investments complained of, or, knowing that they had done so, consented to such acts. With regard to one of the other investments, viz., one of £1315 in debentures in the Land Mortgage Bank of Victoria Limited, the pursuers averred—"In or about 1893 the difficulties with which the bank had for some years been struggling came to a head, and it was compelled to put forward a scheme of reconstruction, the leading feature of which, so far as the present trust interest is concerned, was a proposal that holders of terminable debentures should voluntarily convert these into debenture stock, getting a bonus of 4 per cent. on doing so. The trustees not only adopted this course in regard to the £1315 terminable debenture which they held, but also adopted the more extraordinary course of offering for £1285 more of the debenture stock on 12th November 1894. They thus increased the stake of the trust in this tottering bank from £1315 of a terminable debenture debt to £2600 of debenture stock, upon which, so far as market quotations go, there is now a very heavy loss, but which is practically unsaleable at all."

The defenders averred that the defender Mr Menzies was managing director of the Lumber company and was holder of £2000 of its stock, and that he was fully acquainted with its character and prospects, which were excellent. They further averred—"In March 1881 the trustees invested £550 in the purchase of fifty of the preference shares of the British Canadian Lumbering and Timber Company, £10 paid, which purchase was immediately reported to the pursuer Alexander Henderson, who upon 28th March wrote to the defender Mr Robertson, 'As to the investments you have made I quite approve of them.' In August 1881 a further purchase of forty shares in the said Lumbering Company was made and communicated to Mr Henderson, who upon 21st August 1881 wrote to the defender Mr Robertson with reference thereto, 'You have done very well with the investments.' As following upon these communications, the pursuer Alexander Henderson made full inquiry in Canada into the merits of the company's investment, and in writing expressed himself satisfied that the shares were such as the trustees should hold. . . . (5) In view of the favourable prospects and good repute of the company, and of the urgent and frequently expressed desire of Mr Henderson for Canadian investments offering a high return, the defenders resolved to invest in the preference shares of this company. The said investment was authorised by the terms of the trust. The said shares at the period of investment were in high public favour in this country, and were then quoted in the market at considerably above par. The defender Mr Robertson purchased the said shares in the open market, and it was no object to either of the defenders to make the said investment beyond obtaining what they believed to be a sound investment for the trust funds accompanied by a good rate of return. After the defenders purchased the shares rose considerably in value. . . . (7) . . . The whole circumstances of said investment and of the loss arising therefrom were well known to the pursuer Alexander Henderson and to all the pursuers, but they have not up to the date of raising the present action made any claim in respect thereof. On the contrary, the pursuer Alexander Henderson was all along well aware that he had no claim against the defenders in

respect thereof, and in writing about this matter stated that he had no intention whatever of making any claim upon the trustees, and resented the suggestion that any such should be hinted."

The defenders pleaded—"(4) The investments complained of being all of a character authorised by the deed under which the defenders act, and having been prudently selected, the defenders ought to be assoilzied from the conclusions of the summons. (5) In any event, the pursuer Alexander Henderson, having consented in writing to the investment in British Canadian Lumber Company shares. . . . the income falling to him should be applied by way of indemnity to the defenders for any claim which is made against them by him or by the other beneficiaries in respect of the said investments."

The Lord Ordinary (PEARSON) on 24th November 1898 allowed the parties a proof before answer. The pursuers reclaimed to the First Division, and on 19th January 1899 the Court refused the reclaiming-note. A proof was led, the import of which, together with that of the correspondence between the parties, and other documents connected with the case, sufficiently appears in the opinions of the Lord Ordinary and of the Lord President *infra*.

On 31st August 1899 the Lord Ordinary pronounced the following interlocutor—"Finds that in laying out the trust-funds in the purchase of shares of the British Canadian Lumbering and Timber Company, Limited, the defenders were acting within their powers, and that the said purchases were not in breach of the trust or contrary to the defenders' duty as trustees, and appoints the cause to be enrolled for disposal of the remaining conclusions, and grants leave to reclaim."

Opinion.—"The pursuers of this action are Mr Henderson of Montreal and the five children of the marriage between him and his late wife Mrs Agnes Robertson or Henderson, who died in 1895. They seek to have the defenders, as trustees under Mr and Mrs Henderson's antenuptial marriage contract, ordained to replace and make good to the trust-estate certain of the trust funds which they allege to have been wrongfully invested by the trustees, to the amount of about £6000, with interest.

[*After quoting the clauses of the marriage-contract set out above, His Lordship proceeded*]—"In the summons the pursuers challenge four of the trustees' 'investments,' namely, (1) of the sum of £1040, 13s., in fully paid shares of the British Canadian Lumbering and Timber Company, Limited, in March and July 1881; (2) of the sum of £2600 in the Land Mortgage Bank of Victoria, Limited, whereof £1315 was laid out upon terminable debentures in June 1888, and was afterwards converted into debenture stock, and £1285 was laid out in taking up debenture stock in November 1894; (3) of the sum of £1000 laid out on a debenture of the California Pastoral and Agricultural Company, Limited, in April 1888; and (4) of the sum of £1360, which was laid out on debentures of the Edinburgh Lombard Investment Company, Limited, partly in May 1889 and partly in November 1894. These sums the pursuers seek to have replaced in the trust-estate, with interest at five per cent. from the respective dates of investment, under deduction of the sums of dividend or interest, of which the pursuer Mr Henderson has already got the benefit.

"In their statement of facts the defenders, without prejudice to their rights and pleas, offered, in full satisfaction of the conclusion, to bring into the trust the sum of £4880, being the cost price to the trust-estate of the last three investments above enumerated, and to credit income with the interest earned on each of them (being not less than four per cent. on the average, as from the date of each investment) to the date of realisation, or prior acceptance of the tender; and also to transfer a small sum from income to capital, and to pay the expenses of process up to and 'including the date of the record.' The offer was made on the footing that the first investment (the purchase of shares in the Canadian Lumbering Company) was one which the trustees were not liable to make good.

"This offer not having been accepted by the pursuers, I allowed a proof before answer on the whole case. Shortly before the proof was allowed the defenders had lodged a minute stating that they had realised the California Pastoral Company and the Edinburgh Lombard Company investments without loss to the estate, and had invested the proceeds in Consols. In the course of the proof the defenders lodged another minute undertaking to take over the Land Mortgage Bank of Victoria debenture-stock at the sum of £2520, being the price paid therefor.

"Having assumed this attitude towards the three later investments in debentures and debenture-stock, the defenders maintained that these were out of the case, and that it was no longer necessary to deal with the conclusions regarding them, nor competent to lead any evidence about them. I admitted the evidence, however, in view of the pursuers' contention that it was relevant, as showing the course of investment fellowed by the trustees, and also as bearing on the conclusion for interest, and on the question of expenses.

"But the thing mainly in controversy is the purchase of shares of the British Canadian Lumbering Company in 1881. As to this the pursuers maintain (first) that it was not within the trustees' powers to apply the trust funds in the purchase of fully-paid shares in a limited company; and secondly, that even if it was, this particular purchase of shares was contrary to the duty of the trustees.

"First, then, as to the trustees' powers, the defenders found on the expression 'purchase of stocks' occurring in each of the two clauses already quoted which fill the place of the usual investment clauses. The trustees are empowered to 'lay out' the husband's security fund, and 'to lend out and dispone' the wife's estate upon, *inter alia*, the purchase of stocks.

"The terms 'invest' and 'investment' do not occur in either of these clauses, but only in the later clause above quoted, to which I shall recur presently. Even if these terms had been used, a power to invest in the purchase of stocks would in my opinion support a purchase of stock in a limited company, although that involves partnership and trading. It would then be plain that the word 'investment' was not used in the narrower sense which it was held to bear in the case of *Ritchie* (15 R. 1086), where the power was to invest in any of the Government securities or upon heritable security in Scotland, 'or in such other way or in such other securities as my trustees shall think proper.'

"Here the purchase of stocks is expressly authorised, and the question is, whether that expression, on a fair reading of the clause, includes or excludes what the trustees did?

"The pursuers' first contention is, that this was not a purchase of stocks, but of fully paid shares. The distinction is an obvious one, and though the words are often interchanged in common use, this would not be sufficient to render the distinction immaterial in a question of the powers of trustees if it can be shown that the distinction touches the safety of the money so laid out. But the risks attaching to a stockholder are just the same as those which attend the holding of fully paid shares. A right to stock is a right to a share in the capital of the company, and it involves partnership equally with a right to shares. The opinions in the case of *Morrice* v. *Aylmer*, 1875, L.R., 10 Ch. App. 148, 7 Eng. and Ir. App. 717, are instructive on this point. The clause there under construction was a bequest of 'all such stocks in the public funds or shares in any railway of which I may die possessed.' The testator possessed railway shares not fully paid up, and also railway stock, and it was held that both passed under the word 'shares.' The actual decision does not, of course, rule the present case, being in a different department of law, and turning upon the construction of 'shares' and not of 'stock.' But the opinions are valuable as pointing out the immateriality of the distinction, and they apply as aptly to a case under the Companies Acts as to the case then in hand, which arose under the Companies Clauses Acts. I think that where fully paid-up shares are in question, shares may fairly be held as covered by the word 'stocks' in determining the powers and liabilities of trustees in the laying out of trust money in the absence of any suggestion that the distinction is material to the risk. The pursuers might possibly have made a case of this sort, that the conversion of shares into stocks is usually undertaken in companies of established position whose shares are readily dealt with in the market, and that the mention of stocks should therefore be held to import a more assured class of company investments than shares. But this is neither averred nor proved, and rests upon a mere impression, which may be quite misleading.

"The pursuers further contend that the term 'purchases of stocks' must be held as restricted by the context; and that either the word 'Government' must be carried down as applicable to the stocks to be purchased, or that the very high class of the securities and investments specified in the first part of the clause excludes the idea that shares of a limited trading company are to be associated with them under the power. The first of these suggestions is, I think, inadmissible upon the words of the clause. As to the second, this is not a case of general words following an enumeration of particulars, but the addition of a distinct class of investments, which, though it marks a declension from those previously enumerated, must I think, include everything which on a fair construction falls within the descriptive words used.

"I have already adverted to the subsequent clause inserted 'for the encouragement of the trustees to accept' the trusts. That is not the place where one would except to find a restriction upon the powers already conferred, and such a clause would not be readily so construed. But indeed it does not appear to me to bear on the question I am now considering, unless it could be held that by the use of the term 'investment' it excluded the power to purchase stock in a company. I cannot so construe it. Assuming (as I think it may be assumed) that the clause is not confined to the 're-employment' of the trust funds after they have been once laid out, it seems to me that the 'lending or investing' there spoken of must necessarily apply to all the acts which the trustees have been empowered to do by way of laying out the money of the trust according to the fair construction of the enabling clauses, and that the case is the same as if those clauses had empowered them to 'invest in the purchase of stocks.' That the investment is to be a 'safe' one at the time of investing I take to be no more than an expression of the trustees' duty to limit themselves to prudent investments of the classes permitted.

"But this duty must be fulfilled, and the pursuers' next contention is, that even assuming the purchase of fully-paid shares of the British Canadian Lumbering Company is within the class of investments authorised, the trustees acted imprudently and in breach of their duty in purchasing them, the company being less than a year old, and its business being in another country, and being, moreover, of a highly speculative character.

"In considering this question, it is, of course, necessary to keep in view that the test is not what a prudent man would have done in his own affairs. And therefore it avails very little to point, as the defenders do, to the share-register of this company as showing that persons known as ordinarily prudent men put their money, and in some cases a good deal of money, into it. As Lord Watson expressed it in the English case of *Learoyd* v. *Whiteley*, 1887, 12 App. Cas. 733—'Business men of ordinary prudence may and frequently do select investments which are more or less of a speculative

character, but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard.' But these last words cannot, I apprehend, be applied literally to a case where investments are expressly permitted by the trust which are in themselves attended with hazard. It is because trading is hazardous, and because partnerships involve risk that these are not permitted to a trustee. But if and in so far as the trust-deed permits them, then the trustees' duty must be to see that no exceptional risk is run, and to make such inquiry as would satisfy a man of ordinary prudence acting prudently, that all risks except the ordinary business risks are eliminated. A trustee acting honestly on these lines may commit an error in judgment, but he will not, in my opinion, be responsible for the event. I proceed to consider whether the purchase of shares now under consideration stands this test.

"The circumstances of the actual purchase were these. In March 1881 Mr Robertson, as factor of the trust, had funds in hand which had been handed over to him by Mr Patrick Turnbull, who had assumed the two defenders as trustees some time previously, and had afterwards resigned. The money had come from the estate of Mr Henderson's father. On 11th March 1881 the trustees laid out £555, 12s. 6d. of it in the purchase of fifty £10 shares of this company, which then stood at £1 premium. On 21st June 1881, when the shares had risen to £2 premium, the trustees bought other forty shares, partly out of Mr Henderson's trust funds, at the price of £485. The shares were fully paid, and were classed as *A* shares, which were entitled to a dividend of 10 per cent. before the postponed or *B* shares (which had been taken up by the vendors) got any dividend. The company, which was registered in Scotland, had only been formed a few months previously in August 1880, to take over and work timber lands and limits of very large extent, situated mainly in Canada, but also (though to a much smaller extent) in the United States. There had therefore been no test of the success or stability of the company by even one year's working when either purchase was made. The second general meeting of the company for the election of directors and auditors was held on 25th March 1881, a fortnight after the date of the first purchase. There was submitted to that meeting a report signed by the defender Mr Menzies, as 'vice-president' of the company, and dated 17th March, stating that lumbering operations had been begun in September 1880, that the season had been favourable, and that a large quantity of wood had been got out in excellent condition from certain of the limits, which would be cut up and sold in the course of the next summer and autumn. The report further stated that the balance-sheet necessarily contained only the cost of production to 31st December 1880, there having been no opportunity of making sales; but that the demand continued good, and that prices were firm, so that the company might reasonably expect a favourable result of the year's operations.

"If this had been all, it might fairly have been said that this purchase of shares by trustees was entirely speculative, and that they must be regarded as accepting all the risks which might be inherent in such a company. But it is a special feature of this case that while Mr Robertson must be regarded as having taken all his information on this subject from his co-trustee Mr Menzies, the latter had been very closely connected with the inception of the company, and had taken a leading part in it from the first. The purchases must therefore be regarded as having been made, as they were in fact made, in the light of all that had come to the knowledge of Mr Menzies in the course of the inquiries that were made. It thus becomes necessary to examine the prior facts, to which both parties appeal in support of their contentions.

"The negotiations began with the visit to this country early in 1880 of a Mr Lockhart Gordon of Canada on behalf of a firm of Messrs Cook, lumbermen and timber merchants there. Mr Menzies represents that Mr Gordon's visit was with the view of turning the business of Messrs Cook into a limited liability company. But this is hardly accurate, if it means that the company were to step into and take over a going business in the ordinary sense of the term. The Messrs Cook had indeed been for years in the timber trade, and the company would get the benefit of their connection; but it was formed rather to take over and develope extensive tracts of timber which had been acquired by Messrs Cook from time to time, and which they found themselves unable to finance.

"Mr Gordon was armed with testimonials from business men of high standing in Canada (including Mr Alexander Mackenzie, formerly prime minister of Canada), which spoke in the highest terms of the business ability, experience, and trustworthiness of the Messrs Cook. Mr Menzies, who had known Mr Gordon favourably in business, called a meeting to consider the propriety of forming a company. A provisional agreement was entered into on 28th February 1880 between Mr Gordon and certain parties interested, by the second article of which it was agreed that the second parties should be entitled to make such inquiry as they thought fit to enable them to judge of the merits of the proposed scheme, and of the correctness of the statements in the prospectus.

"A meeting 'called in support of the company' was held in Edinburgh on 17th March 1881, Mr H. Cook being present, and Mr Menzies being in the chair; and those present agreed to recommend the scheme to their friends for subscription on the terms mentioned in the provisional agreement. A provisional committee of Edinburgh and Glasgow gentlemen (including Mr Menzies) was formed to make the necessary inquiries, the formation of the

company being contingent on their being satisfied.

"The provisional committee resolved to entrust the investigation as to titles to a firm of solicitors of good standing in Toronto; as to which I need say no more than that I do not understand there is any allegation of any defect or error in this department of the inquiry. As to the quality of the land and timber, and the prospects of the business, the inquiry was entrusted to Mr Alexander Mackenzie above mentioned, to whom Mr Menzies, on behalf of the committee, forwarded on 8th April 1880 a letter of instructions containing suggestions for the inquiry, and adding—'Most of the gentlemen who have been induced to go into the concern are men who, like myself, are totally unacquainted with the timber business. We feel that we are engaging in a commercial enterprise at a great distance from home, and that we ought not to do so unless perfectly satisfied that the statements made to us are in every respect correct.'

"There followed three interim reports from Mr Mackenzie dated 25th June, and 10th and 22nd July 1880, and a final report dated 24th July. The provisional committee (which included two Glasgow timber merchants of good standing) having examined these, reported that the statements in the prospectus had been substantiated, and that the company should be formed. Mr Mackenzie's reports, especially the interim reports, were criticised on the part of the pursuers on several points. But I must say that, taking them as a whole, they appear to me to justify the finding and recommendation of the committee.

"The company was launched in August, the price being £206,000, of which one-half was agreed to be taken by the vendors in deferred shares, not ranking for dividend until the other shares had received 10 per cent. and an annual sinking fund had been set apart to replace the capital of the preference shares in twenty years. The capital was £206,000 in £10 shares, one-half of which were issued to the public as preference or A shares. These were all taken up at once, applications being received for more than the total issue. The shares rose to a premium, standing (as I have said) at £11 in March, and at £12 in June 1881, when the purchases now in question were made, the first purchase being made just prior to the report laid before the second general meeting of the company, to which I have already adverted.

"In the autumn of 1880 Mr Menzies visited Canada, and made various investigations, which he describes, and the result of which was to confirm him in his approval of what had been done.

"The subsequent history of the company is a brief one. It will be found sketched in the reports to the annual general meetings held in March 1882, April 1883, and March 1884; and it is of some importance for the light which it throws upon the causes of failure. The report of March 1882 was the first report of a full year's operations. It bears that although the amount of wood cut during the winter 1880-81 was less than half of what was contemplated in the prospectus, enough profits had been earned to pay all the preliminary expenses, to set aside the sinking fund, to pay a 10 per cent. dividend on all the shares, and leave a balance over. A 10 per cent. dividend was declared and paid accordingly. The report, however, contains this note of warning, that the sum authorised to be borrowed for working capital had proved inadequate. This had been fixed at £60,000, on the basis (as I understand) of the figures as to cost of production which had been reported by Mr Mackenzie after inquiry. This, the report bears, was to be increased to £80,000.

"The next annual report disclosed a much less satisfactory state of matters, mainly owing to the sales of timber having been very much curtailed. Various causes are assigned for this: among others, that Mr H. Cook had resigned his post as general manager, and also that the square timber had not reached the coast until too late for autumn shipment. The working expenses having again exceeded expectation, the directors suggested a restriction in the more costly parts of their business, and also an increase of £50,000 in the capital of the company. They recommended that a dividend of 10 per cent. should be declared on the A shares, to be paid when the company should be in funds, and that if the increase of capital should be resolved on, 'the deferred dividend warrants should be receivable towards payment of the new stock.'

"The last report (March 1884) recapitulates the history of the company, re-affirms the entire inadequacy of the proposed £60,000 of working capital, makes grave charges of mismanagement against the Messrs Cook, and suggests that 'the best thing which can now be done is to put the company in liquidation with the view of gradually realising its effects.' The directors further point out circumstances calling for a rigid inquiry, and state that they have instructed an investigation to be made.

"The company thereupon went into liquidation. The liquidator was Mr Chiene, C.A., and to him Mr William C. Smith (who had been asked to conduct the investigation) reported in December 1884. His whole report is instructive, but among its salient features are his opinion that the scheme was launched without sufficiently detailed information to determine the cost of production, and without sufficient time for a satisfactory examination of the subjects purchased; and also his conclusions as to the causes of failure, which are thus expressed—'Among the causes which have contributed to the failure of the company I should be disposed to give a prominent place to the following:—(1) Want of management, and mismanagement. The company were practically deserted by Messrs Cook and Dollar. There were only sixteen board meetings in three years. The work in Muskoka was not properly superintended, and at Ottawa the management of

Grant was unfortunate. (2) Insufficient working capital for carrying on a business commensurate to the magnitude of the investment.' He adds as a third cause the disappointing character of the timber in one property, and the shortage of timber on nearly all the properties; also the forfeiture of one considerable property by the Government on the ground that the company were denuding the district of timber. And he refers to the annual reports for other unfavourable circumstances.

"I think it is plain that the root error on the part of the promoters was in according to Messrs Cook a confidence of which it turned out they were entirely unworthy. It is not that they took all Messrs Cook's representations for granted. On the contrary, they tested them with what I hold to be reasonable care, having regard to the exceptionally high character which the Cooks had received from responsible men; and in my opinion they had reasonable grounds for believing, and did honestly believe, that the Messrs Cook would prove to be capable and reliable managers. It is clear that their mismanagement and want of management must have been largely responsible for the increased cost of production, and that this increased cost was a chief cause of the insufficiency of the working capital. These, and not the shortage of timber, were the operative causes of the breakdown; and if the conduct of the trustees in purchasing the shares is to be tried with reference to what Mr Menzies knew, or honestly and on reasonable grounds believed, regarding the position and prospects of the company, then, in my opinion, while they may have been guilty of an error in judgment, they are not liable as for *culpa lata* or dereliction of duty as trustees. I think they did nothing but what might have been done by an ordinarily prudent man acting prudently in his own affairs.

"The pursuers examined two professional accountants, Mr Wilson and Mr Tait. I was disposed to allow the pursuers some latitude—perhaps too much—in the examination of these gentlemen, in case there might be some suggestions from the accountant's or auditor's point of view which would bear on the case, and, as regards Mr Tait, because he was intimately associated with the liquidation of the company. But I think that their evidence, which is based mainly if not entirely on the documents produced, is of no independent value, and that in stating that as auditors they would not have passed these as trust investments, and that the company was a speculative concern, and the purchase of shares an imprudent act, they really add nothing to the inferences to be drawn from the documents.

"The pursuers, however, appeal to another series of facts, more personal to the trustees, as inferring liability on their part to make good this investment; and I may say that I do not accept the defenders' argument that the pursuers or any of them are barred from challenging it, either by delay and acquiescence or by the circumstances attending the discharge to the trustees, which was signed but remained undelivered. The defenders were assumed into the trust in 1878, Mr Menzies being an old friend of Mrs Henderson's, and Mr Robertson being her half brother. At that time the sole surviving trustee was Mr Patrick Turnbull, W.S. In the previous year, while two of the trustees were alive, the Hendersons had spoken to Mr Menzies about their marriage trust, and their desire to have new trustees assumed, Mr Henderson saying that he desired Mr Menzies to become a trustee, as being able from his experience to invest the money to better advantage than the trustees had been doing, 'so as to get a larger return.' Mr Menzies also states that the Hendersons were always pressing them to get as big a return as possible. It appears that Mr Turnbull, who resigned the trusteeship after the defenders were assumed, had disapproved of a proposal to invest the trust funds in the purchase of a house for the family in Montreal, an *ultra vires* act which the assumed trustees carried out upon getting a guarantee from the spouses against any loss in connection with it. Then three years later came up the question of purchasing shares in the British Canadian Lumbering Company, and as soon as that company broke down, each of the defenders excused himself by laying the responsibility on the other. Mr Robertson took up this attitude in October 1884 and maintained it. On the other hand, Mr Menzies, in writing to Mr Henderson on 19th May 1885, says—'It was John Henry (Mr Robertson) who took the investment of the lumber shares. I would never have dreamt of such an investment. He should pay his shot.' On being asked as a witness to explain this, he says—'I mean that it would not have been an investment which I would have taken if it had not been suggested by Mr Robertson. It was a 10 per cent. investment. I have got no trust investments at 10 per cent.' In this connection the pursuers point to the conduct of the trustees as regards the other three investments challenged—(1) The Land Mortgage Bank of Victoria debentures were pronounced to be *ultra vires* by Mr Menzies when they were suggested in 1881, on the ground that there was no clause authorising investment outside Great Britain. Yet the investment was made in 1888, the reason stated by the defender Mr Robertson being 'because Mr Henderson pressed us for a higher rate of interest than we could get otherwise.' (2) The other two investments challenged were debentures in two companies, both indeed registered in Scotland, but which both employed the borrowed money abroad; and, moreover, Mr Menzies was managing director of one of the companies, and Mr Robertson was a director of the other, a circumstance much more significant when trustees are lending money on debenture than when they are laying it out in the purchase of shares.

"I was a good deal impressed by the argument on this aspect of the pursuers' case, and I still have some hesitation in

holding that the defenders' answer to it is sufficient in law. But in the first place I am of opinion that no inference can be justly or fairly drawn against the trustees in the matter of purchasing the shares from their conduct as regards other investments not falling under the same part of the investment clause, even assuming (as I do on this part of the case) that those other investments were contrary to their duty as trustees. Then as to the investment being a 10 per cent. investment, and the admission of Mr Menzies that because it was so, he would never have dreamt of it as a trust investment but for Mr Robertson, my opinion is that this is not enough for the pursuers. If it is to be read as an admission in fact that the investment was at the time it was made an imprudent one, and that this was Mr Menzies' view at the time, of course there is an end to the dispute. I do not think it amounts to that, and if it does not, then the defenders are in my view not liable except in the view (to which I cannot assent) that Mr Menzies' admissions in the letter and in the witness-box amount to a waiver of the defenders' legal position.

"The opinion which I have expressed will lead to the defenders being assoilzied from the conclusions so far as regards the purchase of shares in the British Canadian Lumbering Company. The case will be put to the roll for discussion of the remaining parts of the case, particularly the question of interest, and the question of expenses as affected by the two minutes lodged by the defenders, and the offer made by them on record. These were mentioned in argument, but were by no means fully discussed in consequence of the question of liability for the purchase of shares being still open. I grant leave to reclaim, leaving it to the pursuers to consider whether it would not be in their interest to have the whole case decided in the first instance."

On 21st December 1899 the Lord Ordinary (PEARSON) pronounced this interlocutor:—"Assoilzies the defenders from the conclusions of the summons, so far as these relate to the trust funds laid out in the purchase of shares of the British Canadian Lumbering and Timber Company, Limited, and interest thereon: *Quoad ultra* in respect (*first*) that the defenders have replaced in the trust the sum of Four thousand eight hundred and eighty pounds (£4880), being the amount of the capital of the trust funds expended by them in acquiring the other three investments libelled in the summons, and *second* that the interest yielded by the said last-mentioned investments, and paid or accounted for to the pursuer Alexander Henderson down to the respective dates of the realisation thereof, has been at the rate of four per cent. per annum and upwards, except as regards the investment in debenture stock of the Land Mortage Bank of Victoria, Limited, on which the return was at the rate of 3½ per cent. per annum from and after 4th December 1896, Finds it unnecessary to dispose of the remaining conclusions of the action, and therefore dismisses the same, and decerns," &c.

Opinion.—"It follows from my last interlocutor that the defenders will be assoilzied from the conclusions, so far as these relate to the British Canadian Lumber Company shares.

"As regards the other three investments challenged, the defenders have now brought into the trust the sum of £4880, which they say was the cost price to the trust-estate of these investments. The pursuers say that this sum should be increased by £80 in the following circumstances:—One of the investments challenged is a holding of debenture-stock of the Land Mortgage Bank of Victoria, Limited, of the nominal value of £2600. Originally the trustees laid out £1315 of the trust funds on debentures of this bank in 1888. In 1893, under a reconstruction scheme, the trustees acquiesced in the conversion of these debentures into debenture stock of the same amount. The bank at the same time offered a bonus of 4 per cent. to persons who guaranteed the new issue of debenture-stock. The trustees seem to have guaranteed or underwritten this to the amount of £2000, and thus became entitled to a bonus of £80. In the result they had to take up under this guarantee not £2000 but £1285. The bonus of £80 went to account of that, so that in taking up the £1285 of the new issue the trustees paid only £1205 out of the trust funds. The pursuers maintain that they ought to make good not only the £1205, but also the £80 with which they were credited. The £80, however, though in a sense a trust asset, had been produced by the personal interposition of the trustees as guarantors in a transaction which is challenged by the pursuers as having been illegal throughout, and against which they are to be restored. It is not the case of an incidental profit earned by the misapplication of trust funds. The bonus was not a profit but was payment or credit in consideration of the trustees interposing their personal guarantee, and in my opinion the trust funds properly so-called were only used in the matter to the extent of £1205.

"The pursuer Mr Henderson claims interest at 5 per interest. The states now lodged show that he has had interest all along at 4 per cent. and upwards except as regards the debenture stock just mentioned, which yielded 3½ per cent. from and after 4th December 1896. In my opinion this is not a case in which he is entitled to more than has already been paid or accounted for to him."

The pursuers reclaimed, and argued—(1) The investment in the Canadian Lumbering Company was not within the class of investments authorised by the trust. There were two clauses of investment, one governing the husband's trust alone and the other applying to both trusts, but the estates had been intermixed, and the most stringent clause must rule. In order to show that the investment was within their powers the defenders must establish that it was a laying out of the trust funds in a "purchase of stocks." The word "stocks." occurring in the clauses was qualified by the word "Government" occurring a few

words before it, and would therefore apply only to such stocks as Bank of England, East India, etc., but even if "Government" were not the key-word, the stocks must at any rate be of a high class nature, *e.g.*, railway debenture. The word certainly did not mean shares of any trading company—*Murphy* v. *Doyle*, 1892, 29 L.R., Ir. 333; *Ritchie* v. *Ritchie's Trustees*, July 20, 1888, 15 R. 1093, at 1063. (2) Even if the purchase of shares in a limited liability company was authorised, the purchase of these shares was not a reasonably prudent exercise of that power. The standard of prudence requisite was set in *Learoyd* v. *Whitely*, 1887, L.R., 12 App. Cas. 733; *Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H.L.) 83. This investment was a mere gamble, a speculation in a new business. Such a business conducted in a foreign country with the head office and directorate in Scotland, must necessarily be of a very hazardous nature, involving all the risks of an ordinary trading enterprise with certain additional ones. It was said by the defenders that before investing they made all necessary inquiries, but their inquiries were only directed to ascertaining whether the prospects of the business were encouraging *qua* successful speculation, not as to its worth *qua* trust investment, and in no event did they free the defenders from liability.—*Hutton* v. *Annan*, February 28, 1898, 25 R. (H.L.) 23; *Alexander* v. *Johnston*, March 3, 1899, 1 F. 639. It was no defence to say that the company had failed owing to the mismanagement of the Messrs Cook. The failure of employees at a distance to perform their duties was one of the risks which made this investment so hazardous. (3) Assuming the defenders to be liable, they were not entitled to impound the pursuer's life interest towards their indemnification. In order to justify such a plea, as founded on the Trusts (Scotland) Act 1891 (54 and 55 Vict. c. 44), sec. 6, the breach of trust must have been committed "at the instigation or request, or with the consent in writing of a beneficiary." The facts here did not disclose any such case. There must be something beforehand, instigation, or request, or contemporaneous with the breach, consent, not consent *ex post facto*.—*Bateman* v. *Davies*, 1818, 3 Madd. 98. Moreover, the beneficiary must be aware that it was a breach of trust he was sanctioning—*Somerset* v. *Earl Poullet*, 1894, L.R. 1 Ch. 231; *Rehden* v. *Wesley*, 1861, 29 Beav. 213. Here the trustees assured Mr Henderson that the investment was sound and legal, and his views if mistaken were due to their assurances. They were in any event not now entitled to say he ought to have known—*Sanders* v. *Sander's Trustees*, November 6, 1879, 7 R. 157. There had been no homologation on Mr Henderson's part, for that implied full knowledge, which did not exist here—*City of Glasgow Bank* v. *Parkhurst*, March 20, 1880, 7 R. 749. It might bar the consenter from profiting through the replacement of the funds, but at common law it would not authorise impounding of his interest by way of indemnity to the trustees. There was no case where this had been ever done. Moreover, here the funds had been so intermixed that it would be impossible to attach the interest of Henderson's funds as distinguished from those of his wife, since it was impossible to tell if it was his or hers which was put in this investment. (4) The pursuers were entitled to any profits made with trust funds, and therefore the bonus of £80 must go to them.

Argued for respondents—(1) In 1855, at the date of the contract, there were many joint-stock companies and unlimited companies whose stock was taken by trustees—*Muir* v. *City of Glasgow Bank*, Dec. 20th 1878, 6 R. 392. The truster certainly thought that stocks included paid-up shares, and in point of fact the only difference between them was that the latter could only be dealt with in fixed quantities. For all practical purposes they were identical—*Morrice* v. *Aylmer*, 1875, L.R., 7 Eng. & Ir. App. 717; *Ritchie* v. *Ritchie's Trustees*, *supra*. (2) Where trading companies were admitted as a class of investment for trust estate, "prudence" was used in a wider sense than in cases where they were not. As was pointed out by the Lord Ordinary, it was impossible in the former case to avoid all hazard, since investments which necessarily involved a certain amount of hazard were expressly authorised. The true test in such a case was—What was the cause of the failure, and could it have been foreseen? The evidence here showed that the sole cause was mismanagement. No doubt Messrs Cook had turned out to be unworthy of the reliance reposed in them, but the defenders had made the most anxious inquiries beforehand, and no *a priori* investigation could have revealed the mismanagement which was the cause of the failure. The defenders had, before making the investment, taken every step which ordinary prudence could have suggested. (3) The pursuer Henderson not only acquiesced in, but gave explicit approval to the investment. It was true he did not do so antecedently, but he did contemporaneously, because breach of trust was a continuing offence, and his letters approved of the trustees holding, if not of their purchasing, the shares. The correspondence and evidence showed that there had been on the part of the pursuer what amounted to consent at common law. There was no suggestion that any material facts had been concealed, and, in fact, the pursuer had kept in touch with the investment, and was constantly making inquiries, The result was that he must share responsibility for the investment with the trustees *Sanders* v. *Sanders' Trustees*, *supra*; *City of Glasgow Bank* v. *Parkhurst*, *supra*. Under the Act of 1891 admittedly the consent must be in writing, and to a known breach of trust, but both these conditions had been fulfilled. The statute did not, however, say that the consent must be given contemporaneously with, *i.e.* at the moment of the investment being made. That depended on the circumstances of the case—*Greenham* v. *Gibbedson*, 1834, 10 Bing. 363 at 374. Henderson here knew

the facts which constituted the investment a breach of trust. The statute did not supersede the common law, but merely introduced a new case to fall under the rule, and the combined effect of the two was to make Henderson liable to recoup the defenders—*Somerset* v. *Earl Poullet, supra*; *Chillingworth* v. *Chambers*, 1896, L.R., 1 Ch. 685; *Raes* v. *Meek*, August 8, 1889, 16 R. (H.L.) 31. (4) No claim could lie against the defenders for the bonus of £80. This was not the case of an incidental profit made by the misapplication of trust funds, but of interposing their personal guarantee in a matter which was beyond their powers as trustees. As the investment had been repudiated, and the amount had been replaced by the defenders, no claim could lie against them for this bonus.

At advising—

LORD PRESIDENT—This action, in which Mr Alexander Henderson and the five surviving children of his marriage with the now deceased Mrs Agnes Elder Robertson or Henderson are pursuers, is directed to have it found and declared that four investments of trust funds made by the defenders as trustees under an antenuptial contract of marriage entered into by Mr Henderson and his said wife, on 3rd October 1855, were unauthorised by the terms of the marriage-contract, and that the defenders are bound personally to make good the loss which has resulted from the funds having been placed upon these investments. This has now been done as regards the three investments last mentioned in the summons, and the only remaining question is, whether the defenders are bound in like manner to replace the funds paid by them as the purchase price of shares in the British Canadian Lumbering and Timber Company, Limited, the investment first mentioned in the summons.

Three separate questions are raised with respect to this investment—(1) whether it was in point of class or description within the powers of investment conferred by the marriage-contract, (2) whether, assuming that it was in point of class or description within these powers of investment, it was a proper investment in point of security and value, and (3) whether, assuming either of these questions to be answered in the negative, Mr Henderson so instigated or consented to the investment as to entitle the defenders to retain the income payable to him from the marriage-contract trust funds or any part of that income, and for a possible eventual interest in part of the capital, in recoupment of any loss which they (the defenders) may sustain by having to make good the amount lost in the investment.

There is a fourth question of small pecuniary importance, viz., whether the defenders are bound to pay into the marriage trust funds a sum of £80 which they received, or with which they were credited, as a bonus for underwriting or guaranteeing £2000 debenture stock of the Land Mortgage Bank of Victoria, Limited.

Such being the questions raised, it is necessary in the first instance to advert to the powers of investment conferred upon the defenders by the marriage-contract. By that contract Mr Henderson, in security of the provisions which he thereby made for his wife and children, assigned to the trustees under it the balance of his share of the succession to his deceased father then unpaid "in order that they may lay out the same on good securities, heritable or moveable, Government funds, or debentures, or purchases of stocks, taken to themselves as trustees foresaid," and that they may make payment of the interest thereof to Mr Henderson during his life, and that after his death they may apply the balance and the proceeds thereof, in payment of the provisions made by the contract for his wife and children, and if any residue should remain, for payment of it to Mr Henderson's heirs and assignees.

Mrs Henderson in like manner assigned her means and estate to the marriage-contract trustees for the purposes therein mentioned, being primarily for the benefit of the spouses and their children. The conveyance of Mrs Henderson's estate does not contain an investment clause, but amongst the general powers conferred by the contract upon the trustees there is the following—"with power also to said trustees under both trusts, or their foresaids, to uplift, receive, and discharge all the means and estate conveyed to them, and to lend out and dispone the same upon security, heritable or moveable, in England or Scotland, or Government funds or debentures, or purchase of stocks, as they shall think best." There is also what is termed an "encouragement clause," that is, a clause intended to encourage the trustees to accept office, but it does not seem to me to have any material bearing upon the questions now to be considered.

The defenders were assumed as trustees under the marriage-contract in 1878, and after the original trustees had all either died or resigned, the defenders made the investments complained of in this action, the one with which alone we are now concerned, consisting of two purchases made in March and July 1881 respectively, amounting together to £1040, 13s. of shares of the British Canadian Lumbering and Timber Company, Limited. On 11th March 1881 the defenders purchased fifty £10 shares of that company at the price of £555, 12s. 6d., and on 21st July 1881 they purchased other forty shares at the price of £485, 0s. 6d. The shares were fully paid A shares, having right to a dividend of ten per cent. before the postponed, or B shares, received any dividend. The history of the company, briefly stated, was this. It was formed in August 1880 to acquire certain timber limits, chiefly situated in Canada, from the Messrs Cook. It appears that the concession of these limits held by the Messrs Cook did not involve a right of property in the land bearing the timber, but merely a right to cut and remove the timber, and it further appears that the concession was liable to forfeiture by the Government, and that, in point of fact, a part of it was so forfeited not very long after the constitu-

tion of the company in consequence of its being alleged that the ground was being denuded of timber, or that too much large timber was being cut, by the company. The second general meeting of the company was held on 25th March 1881, when directors and auditors were elected, and a report by the defender Mr Menzies, as vice-president of the company, was presented. The company had not, so far as appears, sold any timber at the date of either of the purchases of its shares on behalf of the marriage-contract trust, nor had it taken over a going business in the ordinary sense, so that there was no experience to show whether it was or was not likely to be successful. One dividend was paid on the A shares, although it does not appear that any profit adequate to provide the dividend had been earned, and another dividend was declared but not paid. No further dividends were declared, nor were any profits earned from which they could have been paid, and the company went into liquidation on 21st April 1884. The shareholders have received nothing under the liquidation, nor does there appear to be any probabilty of their doing so. The investment thus proved a total loss.

The first question, as already stated, is whether the investment was within the powers of the defenders as trustees under the marriage-contract, and it appears to me that it could only be justified as falling within these powers if it was a laying out of the trust funds on "purchases of stocks" within the meaning of the first investment clause above quoted, or a disponing of these funds upon or in a "purchase of stocks" within the meaning of the second investment clause above mentioned. The money was expended in the purchase of shares in a limited liability company, and it could only be brought within the powers of investment by its being held that these "shares" were "stocks" within the meaning of investment clauses occurring in a marriage-contract executed on 3rd October 1855. The shares were not "stock" in the strict or proper sense, as "stock" of a trading company means its capital or an aliquot part of that capital—a different thing in ordinary acceptation, as well as in legal incidents, from "shares," in a limited liability company, which may or may not be fully paid up. It is further to be kept in view that the qualities and legal incidents attached to shares in companies constituted under the Companies Acts (from the Act of 1862 onwards), are different from those attaching to "stocks" as generally known in 1855, although powers then existed in some undertakings to convert shares into stock if and when fully paid up. Upon this question the defenders referred to the case of *Morrice* v. *Aylmer*, L.R., 10 Ch. App. 148, 7 E. & I. App. 717, in which it was held that a testamentary bequest "of such stocks in the public funds or shares in any railway of which I may die possessed," carried both railway shares not fully paid and railway stocks. This case, however, involved a construction, not of the word "stock," but of the word "shares," and the principle of construction applicable to a testamentary instrument might be to give the largest, effect reasonably practicable to the bequest, while it might be held with respect to an investment clause in a marriage-contract, the main object of which is security, that the persons making an investment not literally within its language, are bound to show clearly that the investment falls within the presumable intention of the contracting parties as that intention is to be collected from the language used in the contract.

It does not, however, appear to me to be necessary for the decision of the present case to form an opinion as to whether the investment in the Lumbering Company's shares was or was not authorised by the terms of the marriage-contract, as I consider that a sufficient ground of judgment is to be found in the answer to the second question, which should in my view be, that even assuming the purchase of "shares" in a limited liability company to have been warranted by the power conferred by the marriage-contract to purchase "stocks," the purchase of the Lumbering Company's shares was not a reasonably prudent exercise of the power. A trustee does not adequately discharge his duty by placing trust funds upon an investment falling within the class or classes of investments specified in an investment clause—it is also his duty "to avoid all investments of that class which are attended with hazard." Now, it appears to me that the investment in question did not satisfy this criterion, but that, on the contrary, it involved a plain disregard of it. The purchase of the Lumbering Company's shares, so far from possessing the requisites of even a reasonably safe investment, seems to me to have been a pure speculation. The establishment and carrying on of a lumber business in Canada must, in any view, have been a speculation, and it was all the more so when the head office and directorate were not in Canada but in Scotland. It involved all the hazards ordinarily incident to a trading enterprise, with dangers which do not usually attach to such an enterprise. It is said that the failure of the company resulted from the Messrs Cook—from whom the concession was purchased—having failed in their duty as managers of the company's business in Canada, but this was one of the risks necessarily incident to such a venture. Again, it appears that the whole capital of the company was expended in paying to Messrs Cook the price of the concession—no provision being made for working or trading capital, and it appears that for the carrying on of the business of such a company, a working or trading capital of £60,000 would have been quite inadequate, and that not less than £80,000 would have been required. The result was that the working or trading capital had to be borrowed from Canadian Banks at the high rates of interest ruling in Canada, upon the security of the company's cut timber, and possibly of its other assets, and there could be no profit until that interest, as well as the work-

ing expenses, was paid. A company so circumstanced could not afford, when markets were unfavourable, to hold its timber for better times and prices. It must necessarily realise to repay the advances made by the banks, and the interest upon these advances, whenever payment was demanded by the banks, as it was sure to be in times of financial stringency. It therefore seems to me that there was nothing at all surprising in the early collapse of the company, and that from the causes already adverted to, it must from the first have been obvious to any prudent man that such a collapse was, if not probable, at all events far from improbable.

It is, however, said by the defenders that they made all due inquiries before purchasing the shares, and that they had reason to believe that the company got the whole, instead of apparently only about half, the timber limits which purported to be sold, as also that they might safely rely on the integrity and fidelity of the Messrs Cook, and on the enterprise proving successful. They further submit that they had special grounds for believing in the safety of the investment owing to the information and knowledge acquired by the defender Mr Menzies from the part which he took in the promotion of the company and in its subsequent management. A Mr Gordon came to this country early in 1880 with the view of endeavouring to float a company on behalf of the Messrs Cook to take over their interest in the timber concession in question, and Mr Menzies seems to have co-operated with him in the matter. He presided at a meeting called "in support of the proposed company" on 17th March 1880, at which one of the Messrs Cook was present, and he obtained a number of reports from persons of position in Canada as to the character of the Messrs Cook, and the prospects of the enterprise. He also visited Canada in the autumn of 1880, and the information which he then obtained confirmed him in his belief that the enterprise was likely to be successful. Still, it was, in my judgment, a pure speculation, and it appears to me to be no answer to say that the speedy collapse of the company was due to the Messrs Cook having proved to be unworthy of the confidence which had been reposed in them. The failure of employees, on a different continent, and not under any adequate supervision, rightly to perform their duties, is just one of the risks which persons incur who enter into such speculations, and consequently just one of the things which makes shares in such companies unsuitable and unsafe for the investment of trust funds.

The third question is, whether, assuming the investment in the Lumbering Company's shares to have been one which the defenders should not have made, and assuming them to be liable to replace the capital of the trust estate lost by its having been so invested, they are entitled to impound and apply towards their own indemnification Mr Henderson's life interest in that estate or any part of it, and any contingent reversion which he may have in the capital.

The defenders do not maintain that Mr Henderson is bound to make to them full indemnification in respect of what, *ex hypothesi* of this part of the argument, was a breach of trust, but they contend that both at common law and under the Trusts (Scotland) Amendment Act 1891, they are entitled to retain and apply his life interest in the trust estate, or at all events in the part of it which they may be found liable to replace, in respect of the loss which resulted from the purchase of the lumbering company's shares, towards their indemnification. They do not allege that Mr Henderson either in writing or otherwise requested that the investment in the Lumbering Company's shares should be made, or antecedently consented to, or approved of, its being made, and it was impossible that he could have done so, seeing that the investment was made without his knowledge, and without any previous communication with him in regard to it. It is, however, said by the defenders that Mr Henderson had expressed a desire that the trust funds should be invested in Canada, where a larger return by way of income could be obtained from them than in this country, and that when he was informed that the investment in the Lumbering Company's shares had been made, he expressly approved of it, or at all events acquiesced in it, waiving all inquiry in regard to it. They further say that at some time subsequent to the purchase it was proposed that the marriage-contract trustees should assume Canadian trustees, and then resign the trust, obtaining a discharge, and that Mr Henderson assented to this, thereby homologating their previous trust administration, including the investment in question. It appears that such a discharge was in 1896 signed by Mr Henderson, by his two sons, and by two of his daughters, but that, for reasons which he explains in his evidence, it was not signed by the third daughter, and that it was not delivered to the defenders, or to anyone representing them. This undelivered discharge cannot, in my judgment, have any effect in precluding claims which otherwise might be open to Mr Henderson or his children, and I find no evidence that he otherwise did anything which could debar him from insisting in the claim which he now makes.

It is further maintained by the defenders that if Mr Henderson did not antecedently consent to the investment, he did so subsequently, and that this is sufficient for the purposes of the present question. On 28th March 1881, Mr Henderson having apparently been informed by Mr Robertson's letter of 11th March that certain investments of the trust funds had been made, including the first investment of £550 in fifty shares of the Lumbering Company, wrote in reply—"As to the investments you have made I quite approve of them. I know nothing about the Lumbering Company. I would like reports or any papers about it." It is plain that at that time

Mr Henderson had not the means of forming any opinion in regard to the investment, and that he was relying upon the defenders seeing, as it was their duty to see, that it was within their powers, and otherwise proper and sufficient. I find nothing in this or in any other letter which amounts to an acceptance by Mr Henderson of responsibility for the investment, or to an undertaking on his part to relieve the defenders from any responsibility which they might have incurred by making it. The defenders argued that Mr Henderson waived inquiry, but this expression appears to me to be inappropriate to the circumstances. It was for them, and not for him, to see to the legality and sufficiency of the investment, and he did not, in my judgment, do anything to discharge them of this responsibility and take it upon himself. The correspondence, however, shows that Mr Henderson had some misgivings in regard to the Lumbering Company, as on 24th January 1882 he wrote to the defender Mr Robertson—"W. J. Menzies gave me all information about the Lumber Company, and placed things in quite a different light —in fact I found I knew nothing about it," and again—"I do not like the Cooks from many things I have heard, but as long as they are well looked after it will be all right." These and other passages in the letters confirm the view that Mr Henderson throughout relied on the defenders, who appear to have led him to believe, first, that the investment was within their powers under the marriage-contract, and second, that it was in point of security a proper trust investment.

The defenders found upon section 6 (1) of the Trusts (Scotland) Amendment Act 1891, which provides that "where a trustee shall have committed a breach of trust at the instigation or request, or with the consent in writing, of a beneficiary, the Court may, if it shall think fit . . . make such order as to the Court shall seem just for applying all or any part of the interest of the beneficiary in the trust-estate by way of indemnity to the trustee or person claiming through him," but the investment in question was not, in my opinion, made either at the instigation or request, or with the consent in writing, of Mr Henderson, in the sense of this section. Nor is it, in my view, established either that he was aware that it was a breach of trust, or that he was cognisant of the facts which would have made it a breach of trust. It is further to be observed that the section does not give to trustees an absolute right of indemnity, but only empowers the Court to grant it if they shall see fit, and even if the Act applied to the present case, I do not think that there would be any sufficient ground for giving the defenders this discretionary remedy.

The defenders relied upon the case of *Somerset*, 1894, 1 Ch. 231, in which, while it was held that in order to make a beneficiary liable under section 6 of the Trustee Act 1888 (which is similar to, though not identical with the Scotch Act of 1891) in respect of an improper investment, it must be shown not only that he instigated, requested, or consented in writing to the investment, but that he knew the facts which would make it a breach of trust, as also that the trustees were not entitled under section 6 of the Act to have the interest of the tenant for life impounded by way of indemnity to them for the loss to the estate by reason of the improper investment, and further, that during the life of the tenant for life he was entitled to receive the income of so much of the trust funds as was not lost, it was decided that the trustees were entitled to retain for their own use the interest of the money paid by them to make good to the trust fund the amount of the loss. In that case, however, the beneficiary (tenant for life) had instigated, requested, and consented in writing to the particular investment, and apparently for this reason the trustees were allowed to retain for their own use the interest of the money paid by them to make good to the trust estate the amount of the loss which had resulted from the investment. But there is nothing corresponding to this in the present case. The concurrence of a beneficiary in a breach of trust must be clear and direct to raise a claim of indemnity in favour of the trustees by whom the breach was committed—*Rehden* v. *Leslie*, 1861, 29 Beav. 213-15. I therefore think that the defenders have not established any sufficient grounds for claiming that any part of Mr Henderson's interest in the trust estate should be applied for their indemnification.

I may add that we were informed that the funds contributed by Mr Henderson and his wife respectively to the marriage-contract trust have been immixed, so that it cannot be known whether the sum invested in the Lumbering Company's shares was contributed by him or by her. If this be so, it would, in my view, create an additional difficulty in the way of making an order that any part of the income should be applied for the indemnification of the defenders.

The remaining point as to the £80 is a very short one. One of the investments successfully challenged in this action, and now replaced by the defenders, was the acquisition of debenture stock of the Land Mortgage Bank of Victoria, Limited, of the nominal value of £2600. The trustees seem to have invested £1315 of trust funds on debentures of this bank in 1888. Under a reconstruction scheme in 1893 they acquiesced in the conversion of these debentures into debenture stock of the same amount.

A bonus of 4 per cent. was also offered by the bank to persons who guaranteed the new debenture stock, and the defenders guaranteed it to the extent of £2000, thus becoming entitled to a bonus of £80. They had to take up under the guarantee only £1285, and the bonus went towards payment of this, so that only £1205 was paid out of the trust funds. But as the investment in the Land Mortgage

Bank of Victoria has been successfully repudiated, and the funds have in effect been replaced by the defenders, it seems to me that no claim can lie against them for the £80. The case is not one of trustees making a profit by the execution of their trust, but of trustees making a profit upon a transaction which in legal estimation and effect was their own, because it was not within their trust powers. Under these circumstances I think that there is no ground for the claim for the bonus of £80.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced this interlocutor—

"Sustain said reclaiming-note so far as relating to the trust funds laid out in the purchase of shares of the British Canadian Lumbering and Timber Company, Limited: Recal said interlocutor so far as relating thereto: Find, declare, and decern against the defenders as trustees and as individuals, conjunctly and severally, in terms of the declaratory conclusions of the summons *quoad* the investments made in the said British Canadian Lumbering and Timber Company, Limited: Decern and ordain the defenders William John Menzies and John Henry Robertson as individuals, conjunctly and severally, to make payment to themselves as trustees libelled, and to produce receipts therefor in process, of (1) the sum of £555, 12s. 6d., with interest thereon at the rate of three pounds per centum per annum from 11th March 1881 till payment; and (2) the sum of £485, 0s. 6d., with interest thereon at the said rate from 18th July 1881 till payment: Under deduction (1) of such sums of dividend as may have been paid to the defenders by the said company and been invested by them on behalf of the pursuer, the said Alexander Henderson, or paid over to him; and (2) of such sums as may have been paid by the defenders or either of them voluntarily, as in place of such dividends to the said pursuer or his family: Adhere to said interlocutor so far as regards the three other investments complained of by the pursuer, but which have now been replaced or repaid, and decern: Recal said interlocutor so far as it deals with the question of expenses: Find the defenders as individuals jointly and severally liable to the pursuers in expenses other than those already disposed of by the interlocutor of 19th January 1899."

Counsel for the Pursuers—Lees—Berry. Agents—Hagart & Burn-Murdoch, W.S.

Counsel for the Defenders—Ure, Q.C.—Macphail. Agents—Menzies, Black, & Menzies, W.S.

Thursday, July 19.

FIRST DIVISION.

(With Three Consulted Judges.)

[Lord Pearson, Ordinary.

EARL OF HOME *v.* LORD BELHAVEN.

Superior and Vassal—Composition—Minerals—Method of Ascertaining Amount of Composition from Minerals.

Held (1) (*following Allan's Trustees* v. *Duke of Hamilton*, Jan. 12, 1878, 5 R. 510) that the returns derived from minerals in the course of being worked are to be taken into account in fixing the amount of a composition due to a superior; and (2) (*aff.* judgment of Lord Pearson, Ordinary, the Lord President, Lord Adam, and Lord Moncreiff *dissenting*) that the amount due to the superior in respect of such minerals was not the sum received by the vassal for the year in which the composition became exigible, but was a sum to be arrived at by taking a fair percentage on the capital value of the lordships receivable by the vassal from the minerals which still remained unwrought at that date.

Superior and Vassal—Composition—Minerals—Wayleave—Shaft in Land Held by Vassal of Another Superior.

A superior claimed a composition from an estate in which minerals were being worked, and were brought to the surface through a shaft situated in another part of the estate which belonged to the same vassal, but was held by him of a different superior. *Held* that in estimating the amount of the composition due in respect of the minerals, the vassal was entitled to make a reasonable deduction in respect of the wayleave which the superior would have had to pay had he worked the minerals himself.

Alexander Charles Hamilton, Lord Belhaven and Stenton, was infeft by extract-decree of special service recorded in the Division of the General Register of Sasines applicable to the county of Lanark on 27th July 1894 in certain lands on which the Earl of Home was the superior. These lands included parts of the coalfields known as Knownoble and Glenclelland.

On 1st February 1897 the Earl of Home, the immediate lawful superior in the said lands, brought an action of declarator and for payment of a casualty against Lord Belhaven, in which he claimed one year's rent of the lands in question as a composition. In support of this claim he made the following averment:—"(Cond. 8) The defender is a singular successor in the whole lands described in the summons, and the casualty of a year's rent thereof became due to the pursuer as superior on the 27th day of July 1894, being the date of the infeftment of the defender in the whole of the said lands described in the summons, at which date the said defender became impliedly entered with the pursuer as superior under and in virtue of