v. *Watson*, January 16, 1897, 24 R. 330, 34 S.L.R. 267—unless the deed were declared irrevocable—*Murray* v. *Macfarlane's Trustees*, July 17, 1895, 22 R. 927, 32 S.L.R. 715—or unless a *jus quæsitum* were created at the date of the deed—*Byres' Trustees* v. *Gemmell*, December 20, 1895, 23 R. 332, 33 S.L.R. 236. No *jus quæsitum* was here conferred upon the children—*Mackenzie* v. *Mackenzie's Trustees*, July 10, 1878, 5 R. 1027, 15 S.L.R. 690,—and the children obtained only a *spes successionis*—*Watt* v. *Watson*, *cit.*, *per* Lord Trayner, at 24 R. p. 341. Here there was an *acquirenda* clause, which distinguished the case from *Smitton* v. *Tod*, December 12, 1839, 2 D. 225. Reference was also made to *Somerville* v. *Somerville*, May 18, 1819, F.C.

Argued for first and third parties—This was a delivered trust for behoof of beneficiaries who were now in existence. The ground of decision in *Watt* v. *Watson* (*cit.*) was that no beneficiaries existed, *per* Lord M'Laren at 24 R. p. 339. *Lyon* v. *Lyon's Trustees*, *cit. sup.*; *Stevenson* v. *Stevenson's Trustees*, October 31, 1905, 13 S.L.T. 457; *M'Gregor* v. *Sohn*, February 1, 1908, 15 S.L.T. 926. All the purposes of this trust were marriage-contract purposes, and there was an ordinary *acquirenda* clause. In *Mackenzie* and *Byres' Trustees*, *cit.*, the trusts were not in contemplation of marriage, and there were no beneficiaries existing at the time of revocation. This case fell under the main rule that delivered trusts are irrevocable *quoad* existing beneficiaries. *Smitton* v. *Tod*, *cit. sup.*; *Shedden* v. *Shedden's Trustees*, November 29, 1895, 23 R. 228, 33 S.L.R. 154.

LORD ARDWALL—I have come without much difficulty to the conclusion that this case is decided by authority, and in particular by the case of *Lyon* v. *Lyon's Trustees*, 3 F. 653, as contrasted with the cases of *Watt* v. *Watson*, 24 R. 330, and *Mackenzie* v. *Mackenzie's Trustees*, 5 R. 1027, and as supported by the earlier case of *Smitton* v. *Tod*, 2 D. 255. I think that the result of the decisions in these cases is, that where a person has granted a trust deed by which the granter is divested of certain estate in favour of trustees, and where the deed has been delivered, such deed is irrevocable if it confers a beneficial interest on persons in existence, or on persons who come into existence before the trust deed is revoked and who are entitled to a beneficial interest under the deed. In the present case if the deed had been revoked before the children came into existence the question would have been very different. But here the deed has stood unrevoked and the estate has been administered under it until now, and in the meantime no less than five children have come into existence who have a *jus quæsitum* under the deed. It is true that in *Lyon's* case there was the element of mutuality, but that element was specially put aside as a ground of decision. The ground of judgment was that a child of the marriage in contemplation of which the deed had been executed had acquired a *jus quæsitum* which could not be defeated by the act of the truster. I am therefore of opinion that the question of law must be answered in the negative.

LORD LOW—I concur. I think that by the deed in question there was a *jus quæsitum* conferred on the children of the marriage when they came into existence, which prevents the grantor of the deed from revoking it.

LORD JUSTICE-CLERK—That is my opinion also.

The Court answered the question of law in the negative.

Counsel for First and Third Parties—Constable, K.C.—T. A. Menzies. Agents—Wallace & Pennell, W.S.

Counsel for Second Party—Thomson—Macdonald. Agent—Alexander F. Fraser.

Tuesday, November 3.

EXTRA DIVISION.

[Lord Johnston, Ordinary.

BUCHANAN AND SPOUSE *v.* GLASGOW UNIVERSITY COURT AND OTHERS.

Trust—Power to Borrow—Duty of Lender to Inquire into Application of Money—Exercise of Power—Ultra vires—Misapplication of Money—Liability of Lender.

A truster by his settlement provided—"And to enable my trustees to carry out the purposes of this settlement . . . I empower them . . . to borrow money on the security of the trust estate or any part of it: Declaring that parties paying monies to my trustees . . . shall not be entitled to inquire into or see to the application of the same." The settlement provided an annuity to one child, and directed the trustees to convey the whole estate under burden of the annuity to another child. This direction was never carried out. The trustees, to permit of payment of a sum exceeding the whole moveable estate, which they had agreed to pay to other children of the truster in consideration of their not challenging the validity of the settlement and discharging their claims for legitim, borrowed money from a corporation incorporated under Act of Parliament, and granted a bond and disposition in security over part of the heritable estate of the trust. The remainder of the estate was insufficient to pay the annuity. The annuitant raised action against the trustees and the bondholders concluding for (1) declarator that the bond should be postponed to the annuity, (2) reduction of the bond *pro tanto*. The pursuer averred that the payment to the other children and the granting of the bond were *ultra vires*; that it was the duty of lenders to examine the

terms of the settlement before lending money; that had the bondholders done so, they would have seen that the loan was *ultra vires* unless it was applied to "the purposes of this settlement," which it was not; that the transaction was carried through by the law agent of the trust, who was also chairman of the finance committee of the lending corporation. *Held* that the defenders (the bondholders) were entitled to be assoilzied, in respect that (i) the terms of the clause empowering the trustees to borrow absolved lenders from all duty to inquire as to the application of sums lent by them, and (ii) there was no relevant averment of fraud on the part of the bondholders.

John M'Gregor Buchanan and his wife brought an action of declarator and reduction against the trustees under his father's trust-disposition and settlement, and against the University Court of the University of Glasgow. The trustees did not appear.

The following narrative is taken from the opinion of the Lord Ordinary (JOHNSTON):—"The late James Buchanan, who died on 29th September 1897, left a settlement by which he conveyed to James Eaton, clothier, Bridge Street, Glasgow, his son George Buchanan, grain miller, Glasgow, and his second wife Mrs Jane Stewart or Buchanan, and three others who declined the trust, his whole estate, heritable and moveable.

"He left three children and the issue of a fourth by his first marriage, and three children, including George Buchanan, the trustee, and John M'Gregor Buchanan, the pursuer, by his second marriage. His provisions for his family, after the usual direction to pay debts, were as follows:—In the second place he gave his widow the contents of a small policy of insurance on his life. In the third place he gave her the liferent of a heritable property in Glasgow, and of another in Girvan, and his furniture absolutely. In the fourth and fifth places he gave his widow alimony at the rate of £300 a-year, and an annuity of the same amount from the first term after his death. In the sixth place he directed his trustees to pay to the said John M'Gregor Buchanan, and to his wife and the survivor of them, an annuity of £200 a-year. And in the seventh and last place he directed his trustees, as soon as convenient after his decease, 'to assign, dispone, convey, and make over to and in favour of my son George Buchanan the whole residue of my means and estate, heritable and moveable, real and personal, including my several businesses, but that always with and under the burden of the liferent before mentioned to my said wife of my properties in Glasgow and Girvan, and also under burden of the payment of the before-mentioned annuities to my said wife, and to my son John and his wife.' He made no provision for his three children and the issue of his deceased child by his first marriage, or for his daughter by his second marriage, and expressly declared that the children excluded should have no right to any share of his estates. At the same time he declared that the provisions which he did make in favour of his wife and children should be in full of all claims to terce, *jus relictæ*, and legitim.

"The testator's estate as given up for duty showed net moveable estate £2400, and net heritable estate £11,633. I am not informed what the amount of the legitim fund was, but it must have been something less than £2400, and as the testator was survived by a widow, the legitim divisible among his six surviving children must at best have been something under £800.

"Those of his children who were cut out of his will claimed legitim, and they and the issue of his deceased child threatened an attack on the validity of the will. A settlement was come to between them and the trustees without consent of, or apparently making any communication to the annuitants, John M'Gregor Buchanan and his wife, under which £800 each was paid to the four surviving children excluded from the will, and £500 to the issue of the deceased Mrs Ramsay. . . . . .

"The sum required to make the payments under this agreement was £3700, which more than exhausted the moveable estate, and made it clear that the heritable estate must in some way be encroached upon. In point of fact the trustees resorted to borrowing, and instead of applying *pro tanto* the amount of the moveable estate they borrowed £4000, being the whole sum required and something more, from the University of Glasgow, and in security of the loan they granted to the University Court a bond and disposition in security dated 10th and recorded 12th February 1898 over the principal heritable subjects belonging to the trust, and situated at West Street and Dale Street, Glasgow.

"This action has been raised at the instance of John M'Gregor Buchanan and his wife against the trustees and against the University Court of the University of Glasgow for declarator (*First*) that under the seventh purpose of the testator's settlement the trustees, after providing for the primary purposes of the trust, were bound to convey and make over to the said George Buchanan the whole residue of the testator's estate, heritable and moveable, but under burden always of, *inter alia*, an annuity of £200 to the pursuers and the survivor of them, bequeathed by the sixth purpose of the settlement; and that in particular they were bound to convey to the said George Buchanan the heritable subjects belonging to the trust situated at West Street and Dale Street, Glasgow, subject to a real burden in favour of the pursuers and the survivor of them of the said annuity of £200; (*Second*) that the bond and disposition in security granted by the trustees in favour of the University Court falls to be postponed to the said annuity in favour of the pursuers and the survivor of them, and that the said trustees are bound to execute and deliver all deeds, instruments, or writings necessary to render the said annuity a first charge or real burden on the said subjects. To these conclusions the

trustees, had they appeared, would in my opinion have had no answer.

"Then the summons craves further declarator that the disposition of said heritable subjects contained in the said bond and disposition in security is accordingly of no force and effect, at least in so far as it purports to affect or prejudice the rights of the pursuers and the survivor of them as annuitants foresaid, and is invalid to defeat their prior rights. And there is added a conclusion for reduction, so far as necessary, of said bond and disposition in security. In these latter conclusions the University Court is interested and they have appeared to defend.

"Their defence is that the truster's settlement contained an ample power to borrow, and declaration that lenders should not be concerned with the application of the sums borrowed. The actual terms of the settlement in this respect are—'and to enable my trustees to carry out the purposes of this settlement and of any codicils thereto, I confer upon them all requisite powers and particularly, but without prejudice to the said generality I empower them to sell my heritable estate in such lots, at such prices, and with such warrandice as they may think proper, and also from time to time to lend out the trust funds or any part thereof on such property, stocks, or securities, heritable or personal, as they may think proper, and to call up and change the said investments from time to time, to borrow money on security of the trust estate or any part of it, declaring that parties paying moneys to my trustees, whether on the realisation of my means and estate or otherwise, shall not be entitled to inquire into or see to the application of the same."

The pursuers averred—"(*Cond.* 10) The whole transaction embodied in the bond and disposition in security was *ultra vires* of the trustees. They had no power under the trust-disposition and deed of settlement to borrow money on the security of the trust estate for the purpose of paying the extortionate claim of the testator's first family and of the said Mary Buchanan or M'Dougall whom he had disinherited. The power to borrow conferred on the trustees was subject to the proviso that it must be exercised in order to enable the trustees to carry out the purposes of the settlement. The said sum of £4000 was not borrowed in order to be applied to any of the purposes of the trust. On the contrary, it had the effect of defeating certain of these purposes, in respect that the disposition in security of the subjects at West Street and Dale Street to the University Court made it impossible for the trustees to convey that property to George Buchanan, as they were directed in the settlement to do under a primary burden of the annuity to the widow and the annuity to the pursuers. The transaction was therefore greatly to the prejudice of the annuitants. The transaction was accordingly an invalid one and the bond and disposition in security null and void. In any event, if the settlement with the testator's first family had been a proper one for the trustees to make, which it was not, it was the duty of the trustees to exhaust the moveable estate left by the testator, which as stated amounted to about £1600, before borrowing upon the security of any part of the heritable estate. They failed in the exercise of this duty, and the bond and disposition in security should in any event be reduced to the extent of the said sum of £1600. (*Cond.* 11) It was the duty of the other defenders, the Glasgow University Court, before lending money to the trustees, to satisfy themselves by an examination of the settlement under which the trustees acted or otherwise, that the trustees had power to borrow on the security of the heritable estate of the trust for the purpose for which they proposed to apply the money borrowed. It was also the duty of these defenders, in view of the terms of the power to borrow in the settlement, to satisfy themselves that any moneys lent by them to the trustees upon the security of the heritable estate were applied in the carrying out of the purposes of the trust and not to a purpose which would greatly prejudice them. They entirely failed to perform their said duty. In point of fact the loan in question was arranged for and consented to by the University Court, and the bond and disposition in security was prepared without any warrant from the trustees at all. It is believed that the agents for the University Court, Messrs Mitchells, Johnston, & Company, writers, Glasgow, were not informed of the proposed transaction until a very short time before its completion, and that the trustees' title and the titles of the property were only sent to them the day before the bond and disposition in security was engrossed for signature. The transaction was really carried through on behalf of both the trustees and the University Court by Dr Colquhoun, who was at that time a member of the Court. Had the University Court fulfilled their said duty they would have seen that the trustees had no power to borrow in the circumstances, and the transaction would not have been carried through. Further, the University Court took no steps whatever to see to the application of the money lent by them to the trustees. Had they done so they would have seen, as was the fact, that the money was not borrowed in order to be applied towards carrying out any of the trust purposes, but for the ostensible purpose of settling the claims of the testator's disinherited children, and further, that it was not so applied until months after the money was lent."

The defenders, Glasgow University Court, pleaded—"(1) The pursuers' averments being irrelevant and insufficient to support the conclusions of the summons so far as directed against these defenders, the action should be dismissed as against these defenders. (2) The said bond and disposition in security having been granted by the deceased's trustees within the powers conferred upon them by his trust-disposition and deed of settlement, and these defenders having no duty to see to

the application of the money lent by them thereunder these defenders are entitled to absolvitor. . . . (4) The said bond and disposition in security being valid and effectual, and constituting a first charge on the subjects thereby conveyed in security, the defenders are entitled to decree of absolvitor."

On 23rd July 1908 the Lord Ordinary allowed a proof before answer.

Opinion — [*After the narrative above quoted*]—"Unless the University Court is absolutely protected by the provisions of the trust-deed, the pursuers set forth a state of circumstances which in my opinion calls for inquiry. The transaction of borrowing was the work of the notorious James Colquhoun, LL.D., who was in 1898 the trustees' agent and at the same time a member of the University Court, and in point of fact chairman of the meeting of the finance committee of the Court, which on 8th February resolved to grant the loan of £4000 over the trust property. It would not be appropriate that I should say more—though I have read the correspondence and the minutes of the trustees and of the finance committee of the University Court produced—than what I have already stated, viz., that unless the terms of the trust settlement are absolute protection to the University Court, there is ample justification for inquiry into the circumstances under which the loan was granted.

"There is not much authority in Scotland on the subject of what is incumbent on lenders who make advances to trustees on security of trust property. I think that there is a distinction drawn between heritable and moveable estate, and that though trustees have inherent power to realise moveable property, they have no inherent power to realise heritage belonging to the trust. As regards borrowing, they may have express power to borrow. If they have not express power to borrow, it is not very easy to define their position. But I think that it may be deduced from the case of *Binnie's Trustees*, 15 R. 417, and 16 R. (H.L.) 23, that where there is a direction to pay debts and no power to borrow, a power to borrow on heritable estate, after the moveable estate is exhausted, must be implied; and from the case of *Macmillan* v. *Armstrong*, 11 D. 191, that if trustees borrow in such circumstances the lender is concerned in the application of the money borrowed, for it was there held that the security will only be held good to the extent to which it can be shown that the money lent has been profitably applied for behoof of the beneficiaries, and will be reduced *quoad ultra*. I am not satisfied that the last cited judgment would now be repeated if it must be applied as I have applied it. But I am bound to accept it as an authority, and I think its necessary result is as I have stated it. But this does not help to solve the question — What is the responsibility upon a lender to trustees where the latter have express power to borrow? That they have no responsibility to follow the money and see it applied to the trust purposes where it has been properly borrowed, but afterwards misapplied or embezzled, there can be no doubt. But have they any responsibility for inquiring and satisfying themselves whether there is a trust purpose which justifies the borrowing? As matter of first impression I should say that the natural if not necessary course of business requires that lenders to trustees should have no further duty than to inquire whether the trustees have power to borrow, and should have no further concern to inquire into the trust management and the purposes for which it is proposed to apply the money any more than into its actual application. Yet when I look to the circumstances of the present case so far as disclosed, it would be with the utmost reluctance that I should apply such rule *de plano*, and without regard to circumstances. A fraud has been perpetrated upon beneficiaries, in that the security which the truster directed they were to have for their annuity has been postponed to a debt incurred by the trustees for money borrowed after the moveable estate had disappeared, and which was not required for a proper trust purpose. I think that there is much to lead to the inference that the transaction was made possible only because the agent of the trustees was at the time a leading and trusted member of the lenders' finance committee. He appears to have concluded his arrangement for borrowing with his finance committee after, to say the most, a very curt inquiry, two days before his proposal to borrow was placed before the trustees.

"I accept what was said by the Master of the Rolls in the case of *Elliot* v. *Merryman*, 2 Atk. 43, quoted in *Corser* v. *Cartwright*. L.R., 7 E. & I. App. at p. 737—'If there be a charge on the divisee in fee, taking an estate charged with the payment of debts alone, or debts and legacies, if he sells, the great convenience of mankind requires that it should be just as if an executor sells when property comes to him, unless it can be shown that the purchaser knew that the purchase money was not going to be so employed, and that he was ancillary to something like a fraud. It is to be presumed, because he may presume that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor by the will.' Applying this expression of opinion to the case of borrowing by trustees, I think that where trustees have express power to borrow—and personally I would add, notwithstanding the judgment in *Macmillan* v. *Armstrong*, *supra*, where they have implied power to borrow arising from the direction to pay debts—a lender may presume that the borrowing has taken place in the ordinary administration of the duties imposed upon the trustees by the settlement, unless it can be shown that the lender knew that the money borrowed was not going to be so employed, and so that he was ancillary to something like a fraud.

"That Dr Colquhoun must be charged with that knowledge there can be little doubt. But it is a question how far the University Court are made responsible by

their actings for the fraud to which he was ancillary.

"I think therefore that there is sufficient ground to require that the facts should be definitely ascertained before the defenders' plea is disposed of."

The defenders reclaimed, and argued—There was no relevant averment to go to proof. The case could be disposed of on consideration of the terms of the settlement, and on such consideration the defenders were entitled to be assoilzied. In general there was no obligation on a party lending to trustees to see to the application of the money lent—M'Laren on Wills and Succession (3rd ed.), sec. 1812. The case was all the more clear where there was an immunity clause in the settlement. The immunity clause here provided that parties paying money to the trustees should not be "entitled" to inquire into the application thereof. The power to borrow here was not conditional, except in the sense that every power given to trustees is conditional, *i.e.*, only for the purposes of the trust. The annuity in favour of the pursuers, and the obligation to convey the estate subject to the annuity were no more than general obligations of the trust, and did not in the least affect the power to borrow in question with lenders. A lender or purchaser was entitled to presume that the money paid by him to the trustees was going to be applied in pursuance of the trust purposes. Even if the law of England had any application, it had been held there that there was no liability on the lender in respect of the misapplication of the money advanced by him, unless he could be shown to have known that the money was not to be applied to trust purposes—*per* Lord Cranworth in *Colyer* v. *Finch*, 5 H.L.C., cited in *Corser* v. *Cartwright*, 1875, L.R., 7 E. and I. App. 731 at p. 736. There was here no relevant averment of such knowledge on the part of the defenders. The knowledge of Dr Colquhoun could not be construed as knowledge of the defenders, but in any event the pursuer had laid his case on the defenders' failure to know. The cases of *M'Millan* v. *Armstrong*, December 6, 1848, 11 D. 191, and *Binnie* v. *Binnie's Trustees*, August 8, 1889, 16 R. (H.L.) 23, 26 S.L.R. 794, had no application because there there was no power to borrow, and the question was between trustees and beneficiaries; while the case of *Galletly* v. *Ross*, July 20, 1881, 18 S.L.R. 718, was a question as to whether trustee or beneficiary was vested so as to give a title to a third party.

Argued for the respondents—The case could not be disposed of without inquiry. It was the duty of a party lending to trustees on the security of trust estate, to satisfy himself as to the power to borrow. *Macmillan* v. *Armstrong*, *cit.* Even when there was unlimited power to borrow, express or implied, the trustees might be liable for loss, consequent on his exercise of his power. *Binnie* v. *Binnie's Trustees*, *cit.* Here the power to borrow was not absolute; it was limited. The clause conferring the power was introduced by the words "to enable my trustees to carry out the purposes." The effect of that was that the obligation to convey, contained in the seventh purpose of the settlement, constituted a very material restriction on the power to borrow—*Galletly* v. *Ross*, *cit.* A general power could not override express direction—*Galloway* v. *Campbell's Trustees*, July 11, 1905, 7 F. 931, 42 S.L.R. 712, *per* Lord Stormonth Darling. Any lender making such examination of the power to borrow as he ought to have done would have seen that the loan in question was *ultra vires* without the concurrence of the annuitants. In England where the purposes of the will were specific, and not merely general, there was a duty on the lender to see to the application of the money. In *re Rebbeck*, 1894, 63 L.J. Ch. 596, 71 L.T.R. (N.S.) 74; *Horn* v. *Horn*, 1825, 2 Simons & Stuart 448, Lewin on Trusts, p. 532. Further, if the lender knew that the money was not to be applied to trust purposes, then he was liable for its misapplication—*Corser* v. *Cartwright*, *cit.*; *Howard* v. *Chaffer*, 1863, 32 L.J. Ch. 686. It was sufficient if the solicitor of the lender knew—*Watkins* v. *Cheek*, 1825, 2 Simons & Stuart 199. Here Dr Colquhoun, who acted as chairman of the finance committee of the University Court, knew that the sum to be borrowed would not be applied to trust purposes. The effect of the immunity clause was only to safeguard the lender if the money had been properly applied—*Steven, Glen, &c.*, February 19, 1811, F.C.

At advising—

LORD DUNDAS—The nature of this action, and the terms of the late Mr Buchanan's settlement, so far as material, are fully set forth in the Lord Ordinary's opinion, and need not be repeated. Mr Buchanan's trustees have not appeared to defend the case; and the argument before us was conducted as between the pursuers on the one hand, and the compearing defenders, the University Court of the University of Glasgow, on the other. These defenders lent £4000 to Mr Buchanan's trustees upon a bond and disposition in security; and the question is whether or not, in the circumstances explained by the Lord Ordinary, the security ought to be postponed to an annuity bequeathed by the testator to the pursuers, and the disposition contained in the bond reduced, in so far as may be necessary for that purpose. The Lord Ordinary has allowed a proof, and the University Court reclaim against his interlocutor. I think the reclaimers are right, and that the interlocutor should be recalled. Much, indeed most, of the Lord Ordinary's opinion tends in favour of the reclaimers' contention that no relevant case has been stated against them. Very near the end of his opinion the Lord Ordinary says—"I think that where trustees have express power to borrow . . . a lender may presume that the borrowing has taken place in the ordinary administration of the duties imposed upon the trustees by the settlement, unless it can be shown that the lender knew that the money borrowed was not going to be so employed, and so that he was ancillary to

something like a fraud." But his Lordship goes on to say—"That Dr Colquhoun must be charged with that knowledge there can be little doubt. But it is a question how far the University Court are made responsible by their actings for the fraud to which he was ancillary. I think, therefore, that there is sufficient ground to require that the facts should be definitely ascertained before the defenders' plea is disposed of." The use of the word "fraud" is, I apprehend, inaccurate, for there was no fraud in the matter, so far as appears; and the better phrase would be "misapplication of the borrowed money." But it seems to me that Dr Colquhoun's knowledge is irrelevant, for I do not see how it could in any view be held to amount to knowledge on the part of the University Court. Besides, the case (and the only case) stated upon record against that body is based not upon the assumption that the Court knew anything about the matter, but upon an assumption to the contrary. The pursuer's averments are that these defenders failed to satisfy themselves (as it is alleged it was their duty to do) that the trustees had power to borrow "for the purpose for which they proposed to apply the money borrowed," and that the money was "applied in the carrying out of the purposes of the trust and not to a purpose which would greatly prejudice them." The case thus averred seems to me to raise no matter of disputed fact; the pursuer's counsel were unable when interrogated to point to any specific fact which they desired to prove; and their allegations are really, I think, propositions in law which we are now in a position to determine. We have the terms of the truster's settlement before us. It was argued that the borrowing power of the trustees is limited and made conditional by the words "to enable my trustees to carry out the purposes of this settlement," which (it was said) are sufficient to impress the lender with knowledge that the trustees could not legally borrow money upon the heritable subjects in question unless they had previously burdened them with the pursuers' annuity. I do not so read the settlement. It gives the trustees express power "to borrow money on the security of the trust estate or any part of it," and these words are immediately followed by a declaration "that parties paying monies to my trustees, whether on the realisation of my estate or otherwise in any manner of way, shall not be entitled to inquire into or see to the application of the same." In view of this ample borrowing power I think it is impossible to accept the pursuer's argument. The settlement contains no special direction in regard to the heritable subjects in question, and nothing to suggest that the trustees intended to apply the borrowed money otherwise than in terms of their trust. The lenders had in my judgment no duty to inquire into the matter. I am therefore of opinion that the pursuers have failed to state any relevant case against the University Court, and that the Lord Ordinary's interlocutor ought to be recalled and the compearing defenders assoilzied.

LORD PEARSON—The Lord Ordinary's note, in the main part of it, defines the liability of the University Court in terms which may be accepted for the purposes of this case. He says that "as matter of first impression, I should say that the natural if not necessary course of business requires that lenders to trustees should have no further duty than to inquire whether the trustees have power to borrow, and should have no further concern to inquire into the trust management and the purposes for which it is proposed to apply the money any more than into its actual application;" and he adds that "where trustees have express power to borrow, a lender may presume that the borrowing has taken place in the ordinary administration of the duties imposed upon the trustees by the settlement, unless it can be shown that the lender knew that the money borrowed was not going to be so employed and so that he was ancillary to something like a fraud." Then follows the opinion on which the present question turns, which is thus expressed—"That Dr Colquhoun must be charged with that knowledge there can be little doubt. But it is a question how far the University Court are made responsible by their actings for the fraud to which he was ancillary. I think, therefore, that there is sufficient ground to require that the facts should be definitely ascertained before the defenders' plea is disposed of."

But then there is the prior question, whether there is any relevant allegation by the pursuers on record as to the alleged actings of the University Court which are said to have made them responsible for the fraud to which Dr Colquhoun is said to have been ancillary.

We have had the averments examined in argument before us with the greatest care, and I am unable to affirm that there is any relevant averment whatever inferring liability on the part of the University Court.

The 10th article of the condescendence is framed so as to bring out the grounds of liability of the trustees, and has no bearing on the legal position of the University Court. It avers—and I assume—that the granting of the bond was in the circumstances *ultra vires* of the trustees, and contrary to their trust.

It is in the 11th article that the grounds of liability as against the University Court are to be sought for; and it will be found that this article from beginning to end assumes that it was part of the duty of the University Court, before lending the money to the trustees, to satisfy themselves that the trustees had not merely power to borrow on the security of the heritable estate, but power to borrow "for the purpose for which they proposed to apply the money borrowed." The pursuers attempted to show that there was such a duty; I doubt it as a general proposition, and there

are no relevant averments here to make out a case against the University Court on the special facts.

The only remaining averment which touches this matter is the statement that "the transaction was really"—*[quotes supra, Cond.* 11]. But that is really an averment, not that the University Court had a guilty knowledge, but that the matter was left in Mr Colquhoun's hands, and was carried through by him on behalf of both parties. And if this is not an averment of guilty knowledge, then in a case *de damno vitando*, as this is, the loss must lie where it falls. It certainly cannot be regarded as a relevant averment of facts and circumstances inferring knowledge on the part of these defenders, that they were participating in a fraud, or even that they were putting the trustees in a position to commit a breach of trust.

On these grounds I agree that the allowance of proof should be recalled.

LORD M'LAREN concurred:

The Court recalled the interlocutor of the Lord Ordinary, found that the pursuers' averments were not relevant to support the second conclusion of the action, therefore assoilzied the defenders the University Court, and remitted to the Lord Ordinary.

Counsel for Pursuers (Respondents) Morison, K.C.—Mair. Agent—James Ayton, S.S.C.

Counsel for Defenders (Reclaimers) — Dean of Faculty (Dickson, K.C.)—Macmillan. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, November 7.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

JACKSON *v.* GENERAL STEAM FISHING COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1, *sub-sec.* (1)—"*Arising out of and in the Course of the Employment*"—*Question of Fact or of Law—Watchman Returning after Absence for Obtaining Refreshment.*

A workman was employed as a watchman to keep watch over certain vessels while in harbour, his period of duty lasting for twenty-five hours. While on duty it was necessary for him to be at times upon the quay. He had to provide his own food. While still on duty he left the vessels and went a short distance from the harbour to obtain refreshment. On returning he was drowned between the quay and the vessels. In a claim by his widow for compensation under the Workmen's Compensation Act 1906, the arbiter found in fact that the accident arose out of and in the course of the employment, and upon the ground that that was a question of fact and that there was no question of law between the parties, refused to state a case.

Held (1) that the arbiter should have stated a case, the finding being a finding in law, not in fact, which should have been so stated, and (2) taking the finding as a finding in law, that the arbiter had erred, the accident not having arisen "out of and in the course of" the employment. *Observed* by the Lord Justice-Clerk—"When the Sheriff finds certain facts proved, and then decides that these facts fall under the statute, a consideration of the law is necessarily involved."

Mrs Mary Ann Low or Jackson, in the Sheriff Court at Edinburgh, claimed from the General Steam Fishing Company, Limited, compensation under the Workmen's Compensation Act 1906 in respect of the death of her husband, the late Robert Slimon Jackson, watchman.

In the arbitration the Sheriff-Substitute (GUY), on July 8th 1908, found the defenders liable for £150 as compensation, and refused to state a case.

The defenders appealed to the Court of Session by note, stating that—"The facts admitted or proved are as follows:—(1) That the respondent is the widow of the late Robert Slimon Jackson; (2) that the appellants are a limited company carrying on business as trawlers at Granton; (3) that the said Robert Slimon Jackson was in the employment of the appellants, his employment being to watch the trawlers while they lay at Granton Harbour between their voyages; (4) that about 4 p.m. on Saturday, 22nd February 1908, he went on duty as watchman of four trawlers belonging to the appellants, moored to Granton quay, his duty in connection with these being expected to terminate about 5 p.m. on the following day; (5) that in connection with said duty it was necessary for him to be at times on the quay at Granton; (6) that during the twenty-five hours of his continuous duty he had to provide his own food, which was sometimes brought to him by members of his family; (7) that on the night of said Saturday, 22nd February, between nine and ten p.m., he left the trawlers and went to Wardie Hotel, which is a short distance from the harbour, to obtain some refreshment; (8) that the refreshment partaken of by him at the hotel consisted of half a glass of whisky and a glass of beer; (9) that he was absent from the boats for a very short time, and on returning to the quay along with two friends he proceeded to descend the fixed ladder attached to the quay for the purpose of getting on board one of the trawlers, and while doing so he slipped and fell into the water and was drowned; (10) that said accident arose out of and in the course of his employment with the defenders; (11) that the average weekly earnings of the deceased were 6s.; (12) that the respondent was wholly dependent upon her said husband's earnings, and was the only person so dependent.