Irvine telling him to go to 15 Jessfield Terrace on Sunday, 16th July, at four o'clock to see his child. He did so. He saw Mrs Irvine, but after waiting until after five o'clock the child was not brought to the house, and he has not received from the respondent any explanation of her failure to send the child as she had arranged. Although his agents have applied to the respondent's agents for an explanation, they say they have not received any from the respondent. The petitioner on Monday, 17th July, made inquiries, the result of which was that he came to the conclusion that the respondent had removed from No. 22 Barnton Terrace, taking the child. His agents at once applied to the respondent's agents asking where the respondent had gone, but they state that the address of the respondent is unknown to them and to the respondent's mother, but that they believe that she has sailed for some port to them unknown. The petitioner believes that the respondent's request for delay was made to enable her to make plans for carrying off the child.

"In the circumstances above set forth the petitioner is entitled to a warrant to take the child, the said Elizabeth Irvine Robertson, into his custody. As there is reason to believe that the child will be removed from the jurisdiction of the Court unless the respondent is prevented from carrying out her designs (if indeed she has not already been removed therefrom) the petitioner is entitled to an interim warrant pending the running of any inducia which the Court may grant."

The prayer of the petition was—"May it therefore please your Lordships to appoint this petition to be intimated on the walls and in the minute book in common form, and also by sending a copy to Messrs Young & Falconer, W.S., the respondent's known agents, and to be served on the said Mrs Mary Irvine or Robertson personally, if she can be found, and if not, edictally, and at her last known place of residence, and at her mother's address, and to order the said Mrs Mary Irvine or Robertson to lodge answers hereto within eight days, if so advised, and thereafter on resuming consideration hereof, either with or without answers, to find that the petitioner is entitled to the custody of the said Elizabeth Irvine Robertson, and in the meantime to grant warrant to messengers-at-arms and other officers of the law to take into their custody the person of the said Elizabeth Irvine Robertson, wherever she may be found, and to deliver her into the custody of the petitioner, and authorise and require all judges-ordinary in Scotland and their procurators-fiscal to grant their aid in the execution of such warrant, and recommend to all magistrates elsewhere to give their aid and concurrence in carrying the warrant into effect: Further, to prohibit and interdict the respondent or anyone acting on her behalf and all others from withdrawing or attempting to withdraw the said Elizabeth Irvine Robertson from Scotland: Further, to authorise execution to pass on a copy of the deliverance and warrant to follow hereon certified by the Clerk of Court: And to decern *ad interim*," &c.

Counsel appeared in Single Bills, and in support of the granting of the prayer of the petition referred to *Hutchison* v. *Hutchison*, December 13, 1890, 18 R. 237, 28 S.L.R. 190; *Marchetti* v. *Marchetti*, June 7, 1901, 3 F. 888, 38 S.L.R. 696; *Lumsden, Petitioner*, December 9, 1882, 20 S.L.R. 240. [The LORD PRESIDENT pointed out that the interest of the child was the main thing to be considered, and referred to *Stevenson* v. *Stevenson*, June 5, 1894, 21 R. (H.L.) 96, 31 S.L.R. 942.]

The opinion of the Court (LORD PRESIDENT, LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE) was delivered by

LORD PRESIDENT—The Court will order intimation and service, but is of opinion that a summary order cannot be pronounced authorising a messenger-at-arms to take a child of two from its mother. The Court will, however, pronounce an interim interdict against the mother removing the child from the jurisdiction.

The Court pronounced this interlocutor—

"The Lords appoint the petition to be intimated on the walls and in the minute book in common form, and also by sending a copy to Messrs Young & Falconer, W.S., the respondent's known agents, and to be served on Mrs Mary Irvine or Robertson mentioned in the petition, if she can be found, and if not, edictally, and at her last known place of residence, and at her mother's address, and ordain the said Mrs Mary Irvine or Robertson to lodge answers, if so advised, within eight days after service: Meantime prohibit and interdict the respondent or anyone acting on her behalf, and all others, from withdrawing or attempting to withdraw Elizabeth Irvine Robertson, the only child of the marriage mentioned in the petition, from Scotland."

Counsel for the Petitioner—R. S. Brown. Agents—Bruce & Stoddart, S.S.C.

Monday, July 17.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

DICK *v.* ALSTON.

Agent and Client — Transaction between Agent and Client — Agent Financing Client's Commercial Business — Wife of Client Assisting her Husband's Business through Agent.

Circumstances in which a law agent and banker was assoilzied in an action brought against him for damages and repayment of alleged improperly made gain, by a wife who had lost her fortune through making advances to and

supporting her husband's business, although he was the only law agent employed in the transactions leading to this result, and although he and his bank were interested in the success of the husband's business.

Bank of Montreal v. *Stuart*, [1911] A.C. 120, *distinguished.*

Mrs Dick, wife of John Dick, ironfounder, Coatbridge, *pursuer*, with the consent and concurrence of her husband as her curator and administrator-in-law, brought an action against John Motherwell Alston, solicitor, Coatbridge, *defender*, for recovery of £10,000 in name of damages for breach of duty and repayment of gain improperly made by the defender out of transactions with the pursuer as his client.

The pursuer pleaded—"(1) The pursuer having suffered loss, injury, and damage through the fault and negligence of the defender, is entitled to reparation. (2) The pursuer having suffered loss, injury, and damage through the defender's breach of duty, is entitled to reparation. (3) The amount sued for being a fair and reasonable estimate of the damage sustained by the pursuer, decree should be pronounced as concluded for. (4) The defender having illegally and improperly made gain out of his transactions with the pursuer, is bound to restore the same to the pursuer."

The defender pleaded—"(2) The material averments of the pursuer being unfounded in fact, the defender is entitled to absolvitor. (3) The pursuer having suffered no loss, injury, or damage through the actings and conduct of the defender, the defender is entitled to be assoilzied from the conclusions of the action."

After a proof, in which the evidence led and the purport of the documents referred to sufficiently appear from the opinion of the Lord Ordinary (Salvesen) and of the Judges in the Inner House, the Lord Ordinary on 21st January 1910 assoilzied the defender.

Opinion.—"The pursuer in this case sues the defender, who is a solicitor in Coatbridge, for a sum of £10,000. Speaking generally, her case is that between 1897 and 1908 the defender acted as her law-agent; that he advised her in making investments, and that through his negligent advice or breach of duty towards her she has suffered loss to the extent concluded for. Pleas 2 and 4 for the pursuer raise a separate and entirely different case, to wit, that the defender, as the pursuer's law-agent, illegally and improperly made gain out of his transactions with the pursuer, and is bound to restore such gain as he made.

"The history of the pursuer's connection with the defender goes back to the year 1897. In that year she succeeded to a sum of about £12,000 from an aunt. Prior to this she had been for twelve years married to Mr John Dick, who was a partner with his father in the business of ironfounders which they carried on under the name of John Dick & Company. It is common ground that Mrs Dick was introduced by her husband to the defender shortly after the money in question was available, and that she consulted him generally as to its investment. As the result of the interview she signed a cheque for £10,000 to enable the defender to get the money into his own hands; and he thereupon, with her consent, deposited it with the Commercial Bank of Scotland, of which he is the agent in Coatbridge; and sent her five separate deposit-receipts for £2000 each. About the end of 1897 or beginning of 1898 a little over £2000 of this sum was invested in the purchase of 70 preference shares of A. & J. Stewart & Clydesdale, Limited, and £1000 Coatbridge 2¾ per cent redeemable stock. These investments were carried through by the defender on the pursuer's behalf; but it is not necessary to consider whether they were made on his advice or not, as it is not said that any loss has been incurred, or that the investments when made were not perfectly suitable. In March 1898 the defender also carried through a transaction on the pursuer's behalf, under which she lent to Mr Hugh Ross, a personal friend of her own and her husband, a sum of £1000 for the purchase of a pawnbroking business. As security for repayment of the loan Mr Ross granted a promissory-note for the amount, and assigned two policies of life insurance. No question arises as regards this investment, as apparently Mr Ross is quite able to repay the loan if and when required. The pursuer was quite aware from the first that repayment of the loan depended on Mr Ross's success in the business which he acquired; and from motives of personal friendship she was willing to give the loan on the terms stated.

"The main question in the case relates to the investment by the pursuer of the bulk of the sum to which she succeeded in the business in which her husband was interested. This firm had an account with the branch of the Commercial Bank of which the defender was agent. He and his firm also acted as law agents for the firm, and the defender personally from time to time made advances to the firm out of his own pocket. The business had been founded by the pursuer's father-in-law as far back as 1868, and had been carried on with a fair measure of success, although on a somewhat small scale. As early as November 1888 the defender had advanced to John Dick senior the sum of £1200, and on the 20th of the same month he advanced a further sum of £500. He obtained as security for these two loans a conveyance of the foundry and an assignation of a policy of insurance over the life of John Dick junior. From that time down to September 1897 the defender made further advances amounting in all to about £1100 in connection with the extension of the works. The defender considered the securities already obtained as ample to cover the loans. The total sum due to him in the latter half of 1897 was £3250, interest on which had been regularly paid. It is to be noted that the first loan of £1200 which the defender made to John Dick & Company took the place of another loan

of similar amount, on which a higher rate of interest was paid. The defender says that he never had any doubt as to the security subjects being ample to meet the loans which he made, and I think it proved that their value in 1897 was largely in excess of the advances.

"In 1897 the pursuer's husband came to know of the legacy to which his wife was entitled. He seems to have thought that with his wife's money he would be enabled to pay out his father from the firm and obtain the control of the business. Negotiations were accordingly opened between him and his father with that object, and an arrangement come to. Although there was an attempt by Mr Dick and the pursuer to deny that it had been arranged before Mrs Dick actually got possession of her legacy that her money was to be used in paying out Mr Dick senior, I have no doubt that that was the fact. On 10th September 1897 she advanced to the firm £500, and on 11th November of the same year she paid £3000 for the express purpose of enabling the firm to pay off the defender's loans, and in return she received from the defender an absolute conveyance of the firm's heritable property, and also an assignation of a policy of insurance over the life of her husband, which he held as security for his loans to John Dick and John Dick & Company. At the time when she received the absolute conveyance, the pursuer granted a back-letter acknowledging that she held the subjects only in security. The disposition is dated 23rd November 1897, the same day that an agreement was signed between John Dick senior and his two sons John Dick junior and Thomas Dick, under which the senior partner retired from the firm and the pursuer's husband became entitled to three-fourths of the profits of the business, which he was then to carry on in copartnery with his brother Thomas. In face of these documents it is difficult to understand why the pursuer should be so disingenuous as to state on record that she was not aware that her money was being applied in paying off the defender, especially as at that time she undoubtedly got adequate security for all the money she had advanced.

"In the course of the year 1898 the pursuer made four further payments to the firm, of which her husband was now the leading partner, of £500 each. As vouching these advances she received from the firm promissory-notes. She says that before making the advances she consulted the defender, and that he, having particular knowledge of the financial position of the firm, advised her that she might safely lend the money. Beyond her statement there is not a scrap of evidence to this effect. The defender's books contain no record of any meetings with the pursuer on the subject of these advances by her to her husband's firm, and I am satisfied that Mrs Dick never either asked nor received advice from the defender on the subject. The pursuer cannot recall a single incident that took place at any of the interviews which she says that she had with the defender on the subject, and I may say that neither what she said in the witness-box nor her manner of saying it was in the least convincing. This matter, however, is not really important, as the securities which the pursuer held covered the advance of £2000 as well as the £3500, and were at the time regarded as ample for the whole sum of £5500.

"The next matter founded on is the fact that the pursuer in April 1900 transferred to the defender the Coatbridge Burgh Redeemable stock in security of advances to John Dick & Company. A similar transfer took place in the defender's favour in December 1900 of the preference shares in Stewart & Lloyds, Limited, the name under which A. & J. Stewart & Clydesdale, Limited, at that time carried on business. These preference shares were transferred in further security of advances by the defender to John Dick & Company. The pursuer's account of this is that the defender sent for her and said the firm wanted more money, and that he would advance it if she would give him security; that she asked him if she was quite safe in doing so, and he assured her that she was. She gives a similar account of the transfer of the preference shares, although she does not profess to have any recollection of what passed. She disclaims having consulted with her husband at all, or of having given him any authority to tell the defender that she would pledge her securities to him if he made advances to the firm. The defender's account of this transaction is that in the spring of 1900 Mr John Dick requested him to give the firm a loan of £750, that he agreed to do so on condition that he obtained security for that sum and a prior loan of £250 which had been overlooked when the remainder was repaid at Martinmas 1897, that Mr Dick suggested that his wife would give as security the £1000 of Coatbridge Burgh stock which she held, that he had no communications with pursuer whatever on the subject, and that he neither was asked for nor gave any advice. As regards the December transaction, the bank account was by that time considerably overdrawn, and the defender says that Mr John Dick offered to give the bank certain securities through him; and that the pursuer accordingly conveyed her share in Stewart & Lloyds, and the bill which she held from Ross. The defender is corroborated by his son Mr John Alston, who remembers of Mr Dick calling in April 1900 and desiring a loan of £750, and says that Mr Dick distinctly told him that if the loan was given he would get his wife to transfer to the defender as security for the proposed loan, and the £250 already due, her Burgh stock, and that on the defender agreeing to do so the pursuer and her husband signed a transfer of the stock in his favour. He says that he was not aware of the pursuer ever coming to his office at that time, and that there are no entries in the books showing that she was there. He gives a similar account of what took place in December 1900, when the other securities

belonging to Mrs Dick were transferred to the defender in security of the bank overdraft. There is no corroboration of Mrs Dick's statement at all, and I cannot therefore hold it proved that she either asked for or received any advice from the defender. Mr Dick professes not to recollect having called and asked for the loan of £750, and denies having offered to obtain a transfer from his wife in the defender's favour of the Coatbridge Burgh stock. I am sorry to say I attach very little importance to his evidence. The probabilities are all in favour of the view that Mr Dick, who wanted the money to meet the obligations of the firm, in which he held the largest interest, should have persuaded his wife to transfer her securities in order that he might get the necessary advances.

"In cond. 9 the pursuer narrates that her husband's firm had in June 1900 a large overdraft at the Commercial Bank of Scotland, and that the defender, being well aware of the financial position of the firm, insisted on security being obtained. Two guarantors for the overdraft were secured, but they stipulated that they should receive security, and the pursuer came under an obligation to relieve them. She goes on to say that before coming under that obligation she consulted the defender, who advised her that she might safely become security. This latter statement, which is the only one which is controversial, is I think entirely disproved. Here again, as might be expected, it was the pursuer's husband who induced her to intervene for his benefit, as shown by the letter of 18th June 1900 addressed by Mr Dick to the defender in answer to a letter of 14th June from the defender to him, in which he says, 'Mrs Dick is agreeable to signing the letter of relief.' It may be noted that this letter of relief came in place of a similar letter which Mrs Dick had already granted in reference to a former cash-credit bond for £1200.

"Up till June 1902 the pursuer held an absolute disposition of the works in security of the advance of £5500 already referred to. In that month, however, she signed a conveyance of the works to the defender, which is dated 16th and 17th June 1902. She says that she was induced by the defender to grant this conveyance while he was still acting as her law agent and adviser, that she was not aware that its effect was to postpone her security to that of the defender and the bank, and that she believed that the defender was safeguarding her interests. She admits having received a back-letter declaring that the conveyance was granted for the purpose of securing advances made by the defender to the firm, and that on payment of these advances he would reconvey the subjects to her. This back-letter was recalled, and another dated 4th July 1902 granted in its place; the chief difference between the two back-letters being that the second one referred to obligations incurred to the Commercial Bank as well as to the defender's personal advances to the firm, and declared that the property would be reconveyed to the pursuer only on repayment of both. No objection was taken by the pursuer to the second back-letter; but she says that throughout this transaction she acted on the advice and at the request of the defender, that she was ignorant of the purpose of the disposition, was unaware that she was thereby ousted from her position as a secured creditor in favour of the defender and the bank, and that she simply signed the various deeds placed before her in reliance on the defender safeguarding her interests. In the witness-box she professed to have no recollection at all about the transaction, or of any conversation she had with the defender. She adds that occasionally she called on the defender to ask him how the works were getting on, as she felt anxious about them seeing that she was not getting any interest on her money. I decline to attribute to the pursuer such simplicity or ignorance of business as she now professes; for I think it is quite clear from a passage in her own cross-examination that she knew perfectly well that in granting the conveyance in favour of the defender of the works she had parted with her security. Referring to a meeting that pursuer had with Mr Ballantyne, at which Ballantyne says her husband was pressing her for further accommodation, she makes the following statement:—'I was surprised at Mr Alston sending a stranger to me saying they wanted another loan when he knew that he had all the securities.'

"In 1902 the defender was consulted with a view to converting the firm of John Dick & Company into a limited liability company. He had previously had their instructions to endeavour to obtain increased working capital by getting other parties to join the firm as partners, and to put money into it. Three gentlemen were all successively approached; but all of them, after consideration, refused to take any interest in the business. The partners of the firm accordingly resolved to go on with the scheme of converting the concern into a limited company; and such a company was ultimately formed on 12th February 1903, with a capital of £20,000, divided into 12,000 ordinary shares of £1 each, and 8000 cumulative preference shares of £1 each. The firm was to receive as the price of the business the whole of the ordinary shares and 4208 preference shares, or an equivalent amount in cash. Preference shares to the extent of £510 only were subscribed for by outside parties, although the whole balance had been offered to the public. This sum, along with £2500 supplied by Mr James Clark, was the only fresh capital put into the concern; and there was no cash available, therefore, to pay off the debt due by the old firm to the pursuer. She accordingly accepted 5000 ordinary shares in the limited company in lieu of her claim as a creditor of the old company. For the same reason the limited company was not in a position to pay off the loan received from the defender, in security of which he held a conveyance of

the works; and the defender agreed to take the limited company as his debtor instead of the firm for this loan, on the footing that he retained his security over the works. The pursuer says that in giving up, as she did, her claim as a creditor of the old firm, and taking shares in the limited company, she acted on the advice of the defender; and that she was not aware that she was thereby postponing her claim against the company to that of the creditors; that the defender was aware of the unsound position of the business, and that he ought to have warned the pursuer that in taking shares her position was being greatly prejudiced. None of these statements have been substantiated. The defender's firm was acting solely in the interests of John Dick & Company in the flotation, and Mr John Alston became secretary of the concern. There is no evidence at all that the pursuer applied to the defender for advice as to whether she should give up her claim as a creditor and take shares in the new concern. What she did I have no doubt was done on the suggestion of her husband, who was very sanguine as to obtaining fresh capital by the allotment of preference shares to his friends, and who believed that his business was sound and would be profitable to the shareholders. Unfortunately his expectations were not realised, and during the years following the flotation the business was carried on annually at a loss until about the middle of 1908, when it was obliged to go into liquidation. The pursuer had meantime become still further interested in the company, as she had taken over at half price 250 preference shares subscribed for by a Mr Ballantyne, who had threatened to raise an action for repetition of the money paid by him. To avoid this the pursuer was induced by her husband to pay Mr Ballantyne, on 9th October 1904, £125, in exchange for the 250 preference shares which he held. In February 1905 the defender was approached for a further advance of £1500 to the company. Before doing so he stipulated that he should hold the securities which he had obtained from the pursuer in security not only of the loans which he had previously advanced, but also of this sum of £1500. To this the pursuer agreed, and the amount was advanced by the defender accordingly, and enabled the company to carry on business for some years. The net result of these transactions is that the pursuer's whole funds which she had invested in her husband's business have been lost, and she has also lost the £3000 or thereby which she originally invested in other securities, but assigned to the defender in security of advances which he made either to the firm of John Dick & Company or to the limited company. It is probable also that the defender will sustain a loss of some hundreds of pounds, the securities which he holds being insufficient to meet the advances to the company.

"As regards the transaction with Ballantyne, the pursuer admits that she knew about the purchase of the preference shares from him; and as regards the loan of £1500, the material facts rest on correspondence between Mrs Dick and the defender's firm, dated 18th and 21st February 1905. As regards both these transactions, I hold that the pursuer has entirely failed to prove that she was in any way advised by the defender. I believe she acted as she did because she fancied that by doing so she would promote her husband's interest.

"The pursuer, however, maintained that apart from any proof that the defender advised her to make these investments, all the transactions between her and the defender are challengeable in respect they were between agent and client, and resulted in profit made by the agent at his client's expense. It is sufficient by way of illustration to consider the transaction by which the defender obtained from the pursuer a conveyance of the heritable security, for if the pursuer is not entitled to be restored against this she has still less to go upon in any of the others. Now it is undoubted that between 1897 and 1908 the defender was the only law agent whom the pursuer consulted and who transacted law business on her behalf. He was originally introduced to her in order that she might have some one to advise with in the investment of her money. He did in fact make various investments on her behalf, and when she desired to buy a house he carried through the purchase for her. He collected and remitted to her the interest on the securities which he held in his hands; he made a will for her; and, in short, whenever Mrs Dick wished to consult a lawyer she invariably went to the defender. She employed no other law agent, and she was never advised by the defender to avail herself of the services of any other. The conveyance of the heritable property in his own favour was prepared by the defender, and it had of course the effect of depriving the pursuer of the security she held (then considered ample) and leaving her as an unsecured creditor of her husband's firm. It was contended that it was the duty of the defender to explain to the pursuer exactly what he was doing, to make a full disclosure of all that he knew with regard to the financial stability of the company in which her husband was interested, and that if he did not make such disclosure and concealed anything the whole transaction must be set aside and the pursuer restored to the position in which she was before she signed the conveyance. Reference was made to various authorities, some of them of very recent date, of which the following may be noted—*Ronaldson*, 8 R. 769; *Osler*, 14 R. 121; *Clelland*, 6 R. 156; *Macpherson*, 5 R. (H.L.) 9; *Gillespie*, 1909 S.C. 1053; and *Aitken*, 1909 S.C. 1213.

"These cases resolve themselves roughly into two categories. In the first category may be placed such cases as that of *Ronaldson*, where the agent was held liable for the loss of an investment which he negligently advised his client to make. In the second are included such cases as *Gillespie* and *Aitken*, decided in 1909, where contracts between an agent and client were sought

to be reduced on the ground that the agent secured to himself an unfair benefit. I have already held that the defender never advised the pursuer with regard to any of the transactions which she entered into and which have proved to her prejudice. The mere fact that a client is known by her ordinary law agent to be making investments which if he had been consulted he would possibly not have advised is no reason for holding the law agent responsible if these investments turn out bad. The pursuer was perfectly aware that when she signed the conveyance in favour of the defender she was giving up her security over the heritable property of John Dick & Company. If she had done so in order to oblige the defender, and so as to confer a benefit upon him, the transaction would no doubt have been open to challenge; but the defender in no case received any benefit, with the single exception of the occasion when he obtained security for the unsecured advance of £250 when he was advancing a further sum of £750. His advances were made only on the footing that the securities which the pursuer owned were assigned by her to him. In these transactions the pursuer's husband was her natural adviser, and if she chose to act upon his advice she has only herself to blame. The loan of £250 is not really an exception, because there is no question that at that time the defender could have made it good against John Dick & Company, who remained solvent for years afterwards. The case seems to me to be the common one of a wife with separate means being induced by her husband to part with these means in order to keep his business afloat; and the case would have been precisely the same if Mr Dick had got some friend who ordinarily consulted the defender on legal business to become cautioner for a loan which the defender was willing to make to Mr Dick. No doubt any independent law agent if he were consulted as to such a transaction would advise his client never to enter into cautionary obligations on behalf of another; but it would be absurd to make any difference between the case where a mercantile firm was the lender and where the loan was made by the ordinary law agent of both parties. I cannot see any trace of unfairness in the defender's dealings with the firm of John Dick & Company or with Mrs Dick, and unless it be the law that an agent for spouses, each of whom has separate estate, has a duty to prevent the one from pledging his or her means for advances made to the other (whether by himself or by a third party does not seem to matter) there can be no liability here. In the various years in which these transactions took place which have proved so disastrous to the pursuer she never consulted the defender at all. Had she asked him for his advice in the matter and he had advised her negligently or dishonestly, the case would have been entirely different; but on that issue the pursuer has in my judgment completely failed. I have therefore no difficulty in assoilzieing the defender."

The pursuer reclaimed, and argued—Transactions had been entered into by the defender with the pursuer which he knew to be to her prejudice and to his own advantage. He had taken security from the pursuer for Dick & Company, obtaining for himself a large balance of security, not only as an individual but also as agent of the Commercial Bank, responsible to the bank for the position of Dick & Company's account. As an individual he had taken security in this way for past advances which were unsecured; and in the case of one of these, for £250, security had been taken by him without disclosure to the pursuer. The defender was the pursuer's only law agent, and financial transactions which he entered into with her while acting as her law agent were to be strictly scrutinised—*Aitken* v. *Campbell's Trustees*, 1909 S.C. 1217, 46 S.L.R. 830; *Gillespie & Sons* v. *Gardner*, 1909 S.C. 1053, 46 S.L.R. 771; *M'Pherson's Trustees* v. *Watt*, November 29, 1877, 5 R. (H.L.) 9, 15 S.L.R. 208; *Cleland* v. *Morrison*, November 9, 1878, 6 R. 156, 16 S.L.R. 90. The defender had failed to disclose his own interests in his transactions with the pursuer, and had taken no steps to see that she was independently advised—*Willis* v. *Barron*, [1902] A.C. 271. Even if the defender had acted innocently, he had failed in his duty to the pursuer, whose husband was also his client, because it was the duty of a law agent to see that his client's wife was not subject to undue influence—*Bank of Montreal* v. *Stuart*, [1911] A.C. 120. The defender should have refused to act for the pursuer because of his connection with Dick & Company.

Argued for the respondent—The ground of the decision in the case of the *Bank of Montreal* v. *Stuart* (*cit. sup.*) distinguished that case from the present, as in that case undue influence of the husband was within the knowledge of the bank that took advantage of it, and in the present case the element of undue influence was entirely absent. The case of *Willis* v. *Barron* (*cit. sup.*) was also distinguished from the present, in which there had been no misrepresentation. The pursuer had shown a complete understanding of all the transactions in question, and without cause sought in the present action to have an *onus* imposed upon the defender of showing that no undue influence had been employed—*Forrests* v. *Low's Trustees*, 1907 S.C. 1240, 44 S.L.R. 925; 1909 S.C. (H.L.) 16, 46 S.L.R. 639. The transactions in question had been initiated by the Dicks, and if they had gone to third parties they could not have got better terms than they got from the defender. No case had been made on record as to taking securities for past advances without disclosure. The defender had obtained no unfair advantage and had treated his clients, the Dicks, generously.

At advising—

LORD MACKENZIE—This is an action of damages by a married woman against a solicitor to recover £10,000. The grounds

upon which the action is now insisted in are that the defender acted as the pursuer's law agent, and was guilty of breach of duty in failing to warn her against making certain investments; and that he entered into transactions with her which resulted in a profit to himself or in avoidance of loss to which he was exposed. Since the case was before the Lord Ordinary a decision has been pronounced in *The Bank of Montreal* v. *Stuart* by the Judicial Committee of the Privy Council, which was strongly founded upon by the pursuer's counsel, and to which more particular reference will be made later on.

It was not disputed that the defender did act as the pursuer's law agent. One of the main grounds of the action maintained before the Lord Ordinary, viz., that the defender was asked to advise as regards the investments in question and gave bad advice, for the consequences of which he is responsible, has been abandoned. It may be observed that the matters here involved are not such as ordinarily fall within the duty of a law agent to advise about. They do not relate to the nature of a deed or the sufficiency of a security. They are questions of investment.

Mrs Dick, the pursuer, succeeded to some £12,000 in the year 1897. At that time her husband John Dick junior was a partner along with his father in an iron foundry business, and wanted to pay his father out and get control. The defender had previously from time to time made advances to the firm, and it is clear from the evidence and correspondence, especially the letter of 18th August 1897 written by the pursuer's husband to Mr Alston, that it had been arranged between the pursuer and her husband that the advances made by the defender were to be paid off out of the money which was coming to Mrs Dick. The amount of these advances in 1897 was £3250, and as security the defender held a conveyance of the foundry and an assignation of a policy of insurance over the life of Mr Dick. It cannot be contended that the security held by the defender was not ample to cover his advances. The duty of the defender was merely to carry out what had been previously arranged between the pursuer and her husband. She advanced to the firm the sum of £3000 on 11th November 1897, which was applied in paying off the defender's advances to that extent, leaving the sum of £250 unpaid, which has been the subject of some controversy at a later stage of the case. In return she received from the defender the securities which he held. This transaction, though attacked by pursuer's counsel on the ground that the wife should have been independently advised, seems quite unobjectionable as regards the part the defender took in it.

When Mrs Dick obtained the absolute conveyance of the works, she granted a back-letter to the effect that the subjects were held in security of the advances. On 10th September previous she had advanced £500 to the firm. She advanced four other sums of £500 each to the firm on 1st April, 28th May, 19th November, and 17th December 1898, and for these as well as the first advance of £500, making £2500 in all, she received five promissory-notes each for £500. These notes were in her husband's handwriting. At the time these advances were made Mr Alston was in ignorance of the matter. He never was consulted on the subject, and knew nothing about them until the promissory-notes were handed to him by Mr Dick in May 1899. The three promissory-notes for £1000 each which Mrs Dick got for her advances of £3000 were in Mr Alston's handwriting. As regards these transactions, which resulted in the pursuer advancing £5500 for the benefit of her husband's business, upon security which was at the time considered sufficient, I am unable to see that the pursuer has proved any valid ground of attack. The pursuer's contention on this branch of the case comes really to this, that if Mr and Mrs Dick had gone to Mr Alston and told him that Mrs Dick had money with which they wanted to pay him off, and Mr Alston had said nothing and taken the money, he would have been liable.

In April 1900 Mr Dick applied to the defender for a loan of £750, who agreed to give it on condition that Mr Dick found security for that and the £250 which was the balance unpaid of his original £3250, of which £3000 had been repaid at Martinmas 1897. The security proposed by Mr Dick was £1000 of Coatbridge Burgh stock, an investment which had been made for his wife by the defender in 1897. This stock was then approximately worth about £900. The defender agreed to give the loan on this security, and Mrs Dick and her husband accordingly signed a transfer of the stock. The defender had no meeting with the pursuer at this time. Two points are now stated against him in regard to this transaction. In the first place, the fact which has to be admitted, that he did not give Mrs Dick any advice on the matter, is now turned against him, and it is maintained that as her husband's solicitor Mr Alston had a duty to send for Mrs Dick and warn her against what she was about to do, and that he could not excuse himself from having failed to advise her by saying that even if he had given her advice she would not have accepted it. This, as I understood, it was maintained was the result of the decision in the case of the *Bank of Montreal*. I am unable to regard that case as laying down a general rule to this effect. It was held in the particular circumstances of that case that there was such a duty, looking to the nature of the transactions in question. Where, however, as here, a transaction with a law agent is perfectly fair, and when his advice was never asked, I am unable to hold he has a duty to take such steps to prevent a wife giving security over her property for the benefit of her husband. The second point is that Mrs Dick could by going elsewhere have obtained an advance of £750 upon the security offered without having to pledge the reversion to meet the previous debt of £250. Except as regards this

£250 the pursuer has no case to support her fourth plea-in-law, which is to the effect that the defender has illegally and improperly made gain out of his transactions with the defender. In point of fact, so far from making a profit, the defender will be the loser by several hundreds of pounds. A sufficient answer to the pursuer's argument on this point is that Mr Alston could at that time have got payment of the £250 from the firm. Interest was being paid on the advance and he was not pressing for payment of the capital. It is not said that Mrs Dick did not know the stock was to be held to cover the £250. In these circumstances she is not now entitled to complain of what was then done with her complete assent.

The next transaction which is challenged was in December 1900. At that time the cash credit account for £800 which Mr Dick's firm had with the Commercial Bank at Coatbridge, of which Mr Alston was agent, was considerably overdrawn. The bank were pressing Mr Alston to get additional security, and this was communicated to Mr Dick. He then said that he would get his wife to transfer shares held by her in Stewart & Lloyd's worth about £940, and endorse to Mr Alston a bill she held for £1000 from a Mr Ross. There is no question that the Stewart & Lloyd's shares were then transferred, and I take the view, agreeing with the Lord Ordinary, that the bill was endorsed at the same time. I do not think that the absence of mention of the bill in the reports by the defender to the head office is sufficient to outweigh the distinct evidence of Mr Alston and his son that it was in 1900 the bill was endorsed and not in 1905, as was maintained by the pursuer. The ground of attack upon Mr Alston as regards this is that he was liable to the bank for the overdraft allowed by him in excess of the amount in the cash-credit bond, and that he therefore had an interest to get the additional securities. The true nature of the transaction is that it was not one between agent and client at all. It is not suggested that the bank, had they done diligence at this time, would not have recovered payment in full. They were satisfied to take additional security, and this they did through their agent. He did not advance any money himself upon the securities. It is somewhat difficult to understand what the ground of challenge is as regards this part of the case, because the overdraft has been paid and these securities are not now held by the defender to cover advances made by the bank. Mr Alston's position as regards Stewart & Lloyd's shares and Ross's bill must accordingly stand or fall not on what was done in December 1900 but on subsequent transactions.

In June 1902 the firm sustained a loss through the failure of customers who were acceptors on two bills. One of these for £750 was past due, and the other for £100 was current. Mr Dick wanted assistance to enable him to take up these bills. His account with the bank was overdrawn to the extent of £2315, which was covered by the securities previously granted. What was arranged was that Mrs Dick should convey the works which she held in security for her advances of £5500 to the defender, and that he should provide the money required by the firm. Mr Alston did not see the pursuer about this matter. The arrangement was carried out. A conveyance was executed by Mrs Dick in favour of the defender on 16th June 1902, and he signed a back-letter of even date. A second back-letter was, however, substituted on 4th July, as the first did not authorise the defender to hold the security for behoof of the bank. Between June and November the defender made advances which amounted in all to £2830. The complaint made about this by the pursuer on record is that she was ignorant of the purpose of the disposition, and did not understand that she was to be ousted from the position of a secured creditor in favour of the defender. When the evidence upon this point is examined it is seen that the pursuer fails to formulate her position in regard to this matter. Mr John Alston, the defender's son, gives most distinct evidence on this point. He says that she called at their office in connection with the signature of the disposition, that he read it over most carefully to her, and explained the purport and effect of it. There was no cross-examination on this. An attempt was made to make a point for the pursuer out of the substitution of the second back-letter for the first, but the security would have been effectual even if there had been no back-letter at all. There are no sufficient grounds for attacking this transaction.

The next step in the history of the case is that in 1903 Mrs Dick ceased to be a creditor of the firm, and became instead a shareholder in the limited company which took over the business. She discharged the debt of £5500 due to her by the old firm and took 5000 shares in the new company. Mr Alston was not asked to give her any advice about this, nor did he advise her. He was guilty of no breach of duty in regard to this matter. A few months afterwards Mrs Dick represented that she had not got shares to the full extent of her debt, and it was arranged that she was to get additional shares for the balance. Mrs Dick now asks in this action that she should get back the heritable property she held as security or £3000 as its value. She cannot, however, claim under either alternative as for damages, because in 1903 she discharged the debt in respect of which she held the security. This action is not one for reduction of the transaction, but one in which the pursuer seeks damages. At the date of the flotation the firm was indebted to the defender to the extent of £3845, 5s. 6d. including interest. It was arranged that to the extent of £3000 this should be continued to the new company, on the footing expressed in the letter of 11th May 1903 from the defender to the pursuer, that he should retain his security over the works and her shares in Stewart & Lloyd's. This

was agreed to by the pursuer by letter of 13th May. The intention was that the balance of £884 should be repaid to the defender when the new company went to allotment. Little money was, however, obtained from the public. The sum of £2500 was subscribed by Mr Clark, and the bulk of this went to pay off the old firm's overdraft. Only £384 was paid to Mr Alston. The balance of £500 was allowed by the defender to stand on the footing that a promissory-note for that sum should be taken in Mrs Dick's name as a loan by her to the old firm and endorsed by her to the defender.

Subsequently Mrs Dick took over 250 preference shares in the concern which were held by a Mr Ballantyne, at the price of £125.

Lastly, in February 1905, a further loan from Mr Alston of £1500 was arranged. The footing upon which he was willing to make this advance is set out in his letters of 14th February 1905 to the company, and 18th February to Mrs Dick. He stipulated that he was to retain the securities he then held, and in addition was to get an assignation of Mr Ross's loan, and the matter was carried through on that footing. Mr John Alston explains that before the arrangement was made he saw Mrs Dick and told her he did not think she should give the loan at all. Her reply was that she was very anxious to assist her husband—that personally she had a large sum of money at stake in the business, and that she thought it right she should do what she could. The defender came in at the time and his son explained what he had told Mrs Dick, when the father said he thought she was acting very unwisely in the matter.

The defender now holds the securities in respect of this transaction. The company went into liquidation, and when this happened the defender was a creditor for (1) £500 due by the old firm, (2) £3000 which had been taken over by the company, and (3) £1500 advanced in February 1905. The securities which he holds for these advances are not sufficient, and he will suffer a loss.

In these circumstances I am unable to hold upon the cases cited that any ground of liability has been made out against the defender.

The judgment in the case of the *Bank of Montreal*, already mentioned, was strongly founded on by the pursuer's counsel, and it is therefore necessary to consider what the facts in that case were. It differed from the present as regards the form of the action. It was not an action of damages, but was one to set aside transactions in connection with the Maritime Sulphite Fibre Company, in which the plaintiff, a married woman, became involved at the instance of her husband. The view taken by the Supreme Court of Canada was that the case was concluded by *Cox* v. *Adams*, 35 C.S.C. Rep. 393, which was supposed to have decided that no transaction between husband and wife for the benefit of the husband can be upheld unless the wife is shown to have had independent advice. Lord Macnaghten, who delivered the judgment of the Privy Council, stated that this doctrine could not be supported, and that no attempt had been made by counsel to support it. Judgment was given by the Privy Council in favour of the plaintiff, but it was on the facts and circumstances of the case, which were these—Mrs Stuart, the plaintiff, was possessed of real property of the value of $35,000, and on her father's death in 1886 became entitled to property of the value of $250,000. From that date her husband assumed the entire management of her property. It is pointed out by Lord Macnaghten that throughout all the transactions complained of, Mrs Stuart, who was a confirmed invalid, acted in passive obedience to her husband's directions. She had no will of her own, nor had she any means of forming an independent judgment even if she had desired to do so. She was ready to sign anything her husband asked her to sign, and Lord Macnaghten goes on to observe that her declarations in cross-examination that she acted of her own free will, and not under her husband's influence, merely showed how deep rooted and lasting the influence of her husband was. The result of the transactions was that Mrs Stuart surrendered to the Bank of Montreal the whole of her estate, real and personal, in respect of advances made to or for the benefit of the Sulphite Company. Her husband was president of the company. Mr Alexander Bruce, Q.C., who was solicitor for the defendant bank, and also during the earlier part of the transactions solicitor for Mr Stuart, was a director and secretary of the Sulphite Company as well as a shareholder. From the first the company was unsuccessful. They were largely indebted to the bank, who held a guarantee from Mr Stuart. He in turn received a counter guarantee from the other shareholders, under which Mr Bruce became liable for $26,500. Thereafter, when the company were in great straits the series of transactions commenced by which Mrs Stuart made over her means to the bank. The view taken by the Privy Council was that Mr Bruce was in a position in which it was almost impossible for any man to act fairly. He was solicitor for the bank and for Mr Stuart. He had, as the manager of the bank knew, a strong personal interest in getting Mr Stuart to guarantee the advances by the bank. He negotiated with his fellow shareholders on behalf of Mr Stuart. He knew that unless someone came forward and guaranteed the bank in respect of further advances his own interest and the interest of his associates as shareholders were worth nothing and his claim as a creditor probably valueless.

In these circumstances the view was taken in the judgment that Mr Bruce ought to have endeavoured to advise the wife, and place her position and the consequences of what she was doing fully and plainly before her. If she rejected his

advice, he ought then to have gone to the husband and insisted on the wife being separately advised. If that was impossible, then he ought to have retired from the business altogether and told the bank why he did so. The effect of the judgment was that the bank could not retain the benefit thus obtained by Mr Bruce. The bank was regarded as really being in the same position as Bruce. As Lord Macnaghten puts it, the bank left everything to Mr Bruce, and the bank must be answerable for what he did.

The facts of the present case did not, in my opinion, impose upon Mr Alston a duty such as Lord Macnaghten says rested on Mr Bruce in the *Bank of Montreal* case. There the wife had no will or judgment of her own. Here Mrs Dick, judging from her letters, was not wanting in intelligence. There the company to whom the advances were made had never paid a dividend. Here the family business had been carried on with some measure of success for thirty years, and had made one year as much as £800 of profit. There it was quite irrational that the advances should be made by Mrs Stuart. Here Mrs Dick was a shareholder and interested in the prosperity of the company for whose benefit the guarantees were granted. There Mr Bruce was a director and large shareholder in the company. Mr Alston had no interest in Dick & Company. Mr Bruce benefited himself, and was relieved of the necessity of becoming himself guarantor by getting Mrs Stuart's obligation. Mr Alston obtained no profit out of the transactions with Mrs Dick. It was considered that Mr Stuart had exercised undue influence over his wife. In the present case the idea that Mr Dick influenced his wife when she advanced the sums amounting to £5500 to the firm is expressly disclaimed.

The judgment of Lord Davey in *Willis* v. *Barron*, 1902 A.C. 283, is referred to by Lord Macnaghten in the *Bank of Montreal* case, and was founded on by the pursuer's counsel here. That, however, was also a case in which the solicitor was himself personally interested, because by the transaction complained of his son was brought in to take a reversionary interest.

Upon the whole matter I agree with the Lord Ordinary, and am of opinion that the defender is entitled to be assoilzied.

LORD JOHNSTON—There is, I think, greater difficulty in disposing of this case than at first sight would appear.

The defender Mr J. M. Alston and his firm of J. M. Alston & Son were undoubtedly agents, from a period long before the circumstances which gave rise to this action occurred, of John Dick the elder, of John Dick & Company, and from 1903 of John Dick & Company, Limited. From 1897 onwards John Dick junior had the substantial and controlling interest in John Dick & Company and John Dick & Company, Limited, and he had neither concerns nor means outside the business. From 1897 onwards his wife, the pursuer of this action, to whom he was married in 1885, was possessed of substantial means. These have practically all been involved in her husband's business and are now engulfed in its failure. But the method of her involvement is to a considerable extent indirect, and so much by the mediation of the defender that she has some encouragement in the endeavour to lay the responsibility of the resulting loss upon his shoulders as her law agent and adviser, as well as law agent and adviser of her husband and his firm. While differing as I do from your Lordships, I think that the defender has incurred liability to a certain extent. I wish at the outset to state that his action has throughout been clear of all taint of intentional unfair practice. He has indeed himself been the victim of his confidence in the pursuer's husband, and has only, I am persuaded, incurred liability to the pursuer through failure to appreciate that he had a duty towards her.

The fact that, or at any rate the extent to which, the defender was charged with any duties to the pursuer as her law agent is disputed by the defender. But there is no doubt that, from 1897 down to the failure of the limited company in 1907 or 1908, the defender made advances to and came under obligations for John Dick junior's business; that he did so entirely on security provided by the pursuer; and that he stands to lose in any event, but very heavily if she is able to get clear of her obligations of relief to him and to recover the funds and subjects assigned in security or their value.

The circumstances are complicated. But they raise directly the question how far a third party is safe in transacting with a husband and wife, and taking from the wife security over her estate for advances to her husband, when that third party occupies the position of law agent to the wife, and does not resign that position and secure that she is independently advised before he embarks on a contract with her, particularly where that contract is to secure his advances to her husband.

That the pursuer's claim is far too wide and her case pitched far too high, and that her own evidence, and for that matter that of her husband also, is unreliable, I have no doubt. But there is a point in the case at which the answer to her demand becomes by no means easy, and entails a more careful examination of the whole relations and transactions of the parties than would otherwise have been necessary.

To unravel the circumstances it is, I think, convenient first of all to enumerate the steps by which the pursuer and her estate were drawn practically into entire involvement in her husband's business.

In February 1897 the pursuer, who prior to that date had nothing of her own, succeeded to a share, amounting I understand to about £12,000, of the estate of a relative in England. In September of that year she received in one sum £10,000 of her fortune. Presumably she got payment of further sums at later dates, but as to this

there is no information in the case. The cash so received was thus disposed of:—

(1) On 18th September 1897 pursuer advanced to John Dick & Co. on promissory-note - - - - - -	£500	0	0
(2) On 11th November 1897 she advanced to or on their behalf on three promissory-notes for £1000 each - -	3000	0	0
(3) Abont 11th November 1897 she invested in 70 preference shares of A. & J. Stewart & Clydesdale, Ltd. - -	1060	17	0
(4) About same date, in Coatbridge Corporation 2¾ per cent. redeemable stock	1000	0	0
(5) On 1st April 1898 she advanced to John Dick & Co. on promissory-note - -	500	0	0
(6) About 15th May 1898 she made an advance on promissory-note, secured by the assignation of policies of assurance, to Hugh Ross, pawnbroker, Coatbridge, of - - - - -	1000	0	0
(7) At Whitsunday 1898 she purchased a house called Whittington at Coatbridge for about - - - - - -	2000	0	0
(8) On 28th May 1898 she advanced to John Dick & Co. on promissory-note -	500	0	0
(9) On 19th November 1898 a further -	500	0	0
(10) On 17th December 1898 a further -	500	0	0
Total -	£10,560	17	0

This, it will be seen, more than exhausted the £10,000 received in September 1897.

I pass now to the history of the pursuer's gradual involvement in the fortunes of John Dick & Company and John Dick & Company, Limited, so far as we are concerned with them in this case. For the above statement of the direct disposal of her funds does not disclose the whole extent or history of such involvement. But that history will also show the relation of the defender to that involvement.

1st. The pursuer advanced to her husband's business in 1897 and 1898 on the five promissory-notes (1), (5), (8), (9), and (10) above, the sum of £2500.

2nd. Between 1888 and 1897 the defender having advanced to John Dick senior and his firm of John Dick & Company various sums to assist in the development of the business, the sum outstanding at September 1897 in fact amounted to £3250. In order to enable John Dick & Company to liquidate this debt, the pursuer advanced to them on the three promissory-notes No. (2) above, the sum of £3000. It was intended to liquidate the whole amount of the debt to the defender. But *per incuriam* a sum of £250, which had been advanced so recently, after the payment of September 1897, as 4th December 1897, was omitted from the calculation and remained due to the defender.

For the advances which he had made to John Dick & Company the defender had received in security a conveyance of their works and an assignation of a policy for £500 on the life of John Dick junior. When at Martinmas 1897 the defender was repaid his advances, all but £250, he disponed and assigned these security subjects to the pursuer. As the conveyance and assignation were *ex facie* absolute a backletter was granted to the firm by the defender, "as agent for Mrs Mary Ann Learoyd or Dick, wife of your Mr John Dick junior"—and I note this circumstance as having a material bearing on what follows—acknowledging that she held the subjects only as security of sums "advanced or that may be advanced to you."

Pursuer therefore came to be thus covered for the £5500 advanced by her to or for behoof of John Dick & Company in 1897, and the defender had at that date been refunded all the firm's debt to him except £250, but had parted with all security for that £250.

3rd. On 29th June 1899 John Dick & Company having obtained a cash-credit to the extent of £1200 from the Commercial Bank of Scotland, for which the defender was agent in Coatbridge, on the security of four names, the pursuer executed a bond of relief in favour of the co-obligants, on the narrative that they had become parties to the cash-credit "on the express understanding that this bond of relief should be executed in their favour."

On the death of one of the co-obligants a new cash-credit was granted to the firm by the bank on the security of two names for the reduced amount of £800, and on 2nd July 1900 the pursuer executed a fresh bond of relief in favour of the co-obligants.

This was the cash-credit operative down to the formation of the limited company of John Dick & Company in 1903 as after mentioned.

4th. In May 1900 John Dick & Company obtained from the defender an advance of £750 in consideration of the pursuer transferring to him in security, not only of this sum of £750 but also of the sum of £250 which had been left over unpaid at Martinmas 1897, her £1000 Coatbridge Burgh Stock, No. (4) above.

5th. In the latter part of 1900 John Dick & Company considerably overdrew their cash-credit, and at the instance of the head office of his bank, and for his own protection, as he was personally responsible for the unauthorised advances, the defender required them to find further security. This was effected by the pursuer's interposition, who transferred to the defender for his own behoof and that of his bank her seventy shares in A. & J. Stewart & Clydesdale, No. (3) above, and endorsed to him Ross's bill, No. (6) above. The securities held by pursuer for Ross's bill were not, however, at this time transferred to the defender, though her continued holding of them implied a resulting trust for the defender. I do not find any special backletter in regard to this transaction.

6th. In June 1902, John Dick & Company having met with a heavy loss through the failure of a firm of Stewart & Company, again came to the defender for assistance, particularly to enable them to take up certain acceptances of Stewart & Company for goods delivered, which they had discounted. The defender agreed to give the necessary assistance, but only on condition that the pursuer again interposed and made over to him the security over the firm's works which she had obtained in 1897 for her advances to the firm. This she did in 1902. From this point onwards,

therefore, the pursuer was directly a creditor of her husband's firm for £5500, but she had transferred the security which she held therefor by *ex facie* absolute conveyance of the works to the defender, to the extent, of course, only that she herself could make use of it, that is, to the extent of her £5500. The advances which the firm received from the defender between June and November of that year in respect of this security amounted to £2830. In addition, their overdraft stood much above the authorised amount.

At the date of transfer of the firm's business to the limited company, which was assumed to be 20th May 1903, the firm's total indebtedness to the defender, with accrued interest, was struck at £3884, 15s. 11d.

7th. In the end of 1902 and the beginning of 1903 negotiations proceeded for the flotation of the business of John Dick & Company as a limited company in the hopes that further working capital, the want of which had always hampered the firm, might be obtained. Without going into detail the result was, so far as this matter was concerned, the registration of John Dick & Company, Limited, on 12th February 1903, under an agreement whereby the pursuer accepted ordinary and preference shares to the face value of £5000 in satisfaction of £5000 of the firm's debt to her, leaving a balance still outstanding on the old footing. This balance consisted of £500 of the original advances of 1897-98, constituted by promissory-note, and of some smaller sums which need not complicate this question. On the other hand, the defender received payment of £384, 15s. 11d., and accepted the limited company as his debtor in place of the old firm for £3000 of their indebtedness, leaving £500 standing on an undertaking of the firm that he was to be paid at the flotation, which was not fulfilled. As fresh capital was subscribed to a limited extent chiefly by a Mr Clark, who throughout took an active share in the flotation and management of the limited company, the bank overdraft of the old firm was paid off. The limited company obtained no authorised overdraft.

8th. The amount of new capital obtained left no margin for working capital, trade was bad, and in the beginning of 1905 the new company had to come back to the defender for further advances; and on 25th February he agreed to give them a further £1500 on condition that the pursuer again interposed. She had practically no further security to give. She could only consent to securities already transferred being held to cover this new advance, which having regard to the terms of their transfer they probably would have done in any case. The transaction therefore partook very much of the nature of a recapitulation and rearrangement of obligations and securities. This was involved and confused, and leaves the actual position obscure and difficult to follow. The result so far as I can make out—for I confess to no certainty—was that no conveyance of the works was then made to the limited company; already vested in his person, as I have already explained, they continued to be held by the defender *primo loco* in security of his former advances to the old firm so far as now undertaken by the limited company, viz., to the extent of £3000 (no reference being made to the £500 still due to him by the old firm and not undertaken by the limited company, but covered notwithstanding by the existing security), and of his new advance to them of £1500, and of any further advances he might make, and *secundo loco* in security of the pursuer's indemnity for all her guarantees; and further, that the defender held the pursuer's seventy shares in Stewart & Clydesdale, the Coatbridge stock, Ross's bill and policies, an assignation of which was now granted in his favour in security of a bill or promissory-note for £500, dated 15th May 1903, granted by the limited company in favour of pursuer and endorsed by her to him, and of a bill or promissory-note for £1500, dated 25th February 1905, granted by the limited company directly in his favour. Though it is not explained in the proof and productions, the inference is that the old firm being due £500 to pursuer on promissory-note, which was not covered or extinguished by the shares she took in the limited company, she was given a new promissory-note of the limited company for that amount; that the old company being still due the defender £500 which had not been paid, and for which he had not accepted the limited company as his debtor, the pursuer endorsed to him the above-mentioned promissory-note as cover.

The endorsement of this £500 promissory-note and the transfer of the securities for Ross's loan were, I think, the only really new elements in completing pursuer's divestiture and defender's investiture in securities in 1905.

At this time and out of the new advance the unauthorised debit balance of the limited company in their account with the bank was liquidated, and the defender did not allow them further to overdraw.

Such is the history in chronological sequence, so far as I can disentangle it, of the gradual involvement of pursuer in her husband's business and of defender's relation to that involvement.

On 17th April 1907 John Dick & Company, Limited, went into liquidation. Neither preference nor ordinary shareholders will recover anything and the dividend for creditors will be small. In these circumstances the pursuer's fortune, if the transactions above enumerated are to stand, is practically lost to her.

It is not possible to determine with sufficient discrimination the relation of the defender to the pursuer in the more crucial transactions above enumerated without a consideration of the whole history of their dealings as connected with the affairs of John Dick & Company, both firm and company. That consideration is made doubly difficult by the unreliable nature of the evidence given by the pursuer and her

husband on the one hand, and by the fact, on the other, that the defender's whole evidence and that of his son bears the complexion of supporting a thesis, viz., that it was sufficient for the defender to say from stage to stage—"I was asked to do so-and-so; I said I would only agree on certain conditions; those conditions were acceded to, and there is an end of the question." In the circumstances, and having regard to his position at the time, which I hold to be that of law agent of the pursuer, I think that that contention cannot be accepted and that it is necessary to go deeper. Fortunately there is some guidance from contemporaneous correspondence and documents.

In my consideration of the circumstances my first object is to determine the duty to the pursuer which his relations to her and her husband and his firm laid upon the defender.

Prior to 8th September 1897 the defender was never brought in contact with the pursuer. But he had been and was the confidential law agent of John Dick the father, of John Dick & Company, of which at that date John Dick senior and his son John Dick junior were sole partners, and of John Dick junior so far as he had any independent business. Not only was he their confidential law agent, but to a considerable extent he was financing their business in its development. But—and this is equally material in the sequel—the defender was the Coatbridge agent of the Dicks' bankers, not only in 1897 but throughout, and their bank account was constantly overdrawn, largely on his sole responsibility.

At this time—8th September 1897—and till 1st January 1903 the defender was without a partner. His son John Alston was employed in his business from 1892, with the exception of 1899, and was taken into partnership under the firm name of John M. Alston & Son on 1st January 1903. I mention this in passing to enable me to say that I entirely reject the defender's contention, not expressed but implied, to the effect that he entirely cleared himself of responsibility by leaving the pursuer in the hands of his son and standing aside as if he were an outsider. I cannot accept that view. Whether Mr John Alston was his father's employee or partner, in relation to the pursuer he was *eadem persona* with his father, and the latter's abstention and his intervention in no way removes the objection not only that the defender was contracting with his client, but also of double agency in respect that he was acting for pursuer, for her husband and his firm, and for their bankers, which will be seen to arise at important points in the history of the case.

But though the defender was not brought into personal contact with the pursuer until 8th September 1897, he had been in the earlier part of the year made aware by pursuer's husband of the fact that his wife had succeeded to money, and that at any rate in his, the husband's, mind, it was prearranged that part at least of that money was to be used in facilitating the retirement of his father John Dick senior, the freeing of the business from financial dependence upon the defender, and the enabling himself, the pursuer's husband, to obtain control of the business. How far the pursuer had been taken along with him in this scheme it is impossible to ascertain from the evidence of the pursuer and her husband, but the defender was at least justified in assuming, from the course which the parties concerned took, that the pursuer was a willing party to the pre-arrangement, and in acting accordingly. He would have been still more justified had he known, although there is no evidence that he did so, that the pursuer was not merely supplying the £3000 required to pay him off, but was on 18th September 1897 advancing a further sum of £500 to her husband's firm, to be followed in the course of the next twelve months by four other advances of the same amount.

I do not think it necessary to go into any detail regarding the evidence at this stage. It is enough to refer to the two letters passing between the defenders and the firm of 16th and 18th August 1897, and to Mr John Dick junior's very lame explanation of these at the close of his cross-examination; to the agreement of 23rd November 1897 between the members of the firm; and to the fact that while the three promissory-notes for £1000 each, granted for the advances necessary to pay off the defender, were prepared by the defender's cashier as part of the agency business for which the defender was employed, the five notes for £500 each were prepared by Mr John Dick junior, and were in quite different terms. It is impossible to believe the pursuer when she says—"On 18th September I lent the firm the sum of £500. I got a promissory-note for that. My husband asked me for that loan. I went and asked Mr Alston if I was quite safe in doing so, and he assured me that I was"; and it is equally impossible to believe her when she makes the same stereotyped statement regarding the other four advances of the same amount. The result of these transactions was to make the pursuer creditor of the firm in £5500 applied to the extent of £3000 to liquidate its debt to the defender, for that the small balance of £250 remained unpaid was an oversight, and to transfer from him to the pursuer the security which he had held over the firm's works. It is perfectly futile for the pursuer to attempt to throw on the defender any responsibility for the advances she thus made with ultimately such disastrous consequences. At the best for her she was a party to misleading the defender, and I think that the history of these initial transactions forms some explanation and excuse, though not justification, for what immediately followed, for it led the defender to assume, I think wrongly, that he might always accept the pursuer's instructions through her husband, *per aversionem*, without any reference to

their nature, the husband's own interest in them, and his, the defender's, relation to them.

But while in the above matters the defender is, I think, blameless and free of all responsibility, it is impossible to blink the fact that on 8th September 1897 the pursuer was brought to the defender, as a client to an agent, with reference to the investment of her money, that having brought her to him, her husband left her in the defender's hands, and that from that date to the final catastrophe she continued to be the client of the defender and his firm. He did, following on that interview, make two investments for her in securities to which no exception is taken, viz., Stewart & Clydesdale's shares and Coatbridge Burgh stock. He made also a third investment for her, in the matter of the advance of £1000 to Mr Ross. But in the latter he was merely carrying out an arrangement, already made by pursuer and her husband, on instructions, so far as I can see, received through her husband, for I entirely disbelieve the pursuer when she says, "I asked if he (the defender) was satisfied with that security, and he said he was." When the matter of the security is considered, it is inconceivable that any agent, and particularly one of the known position and experience of the defender, could have made such a reply. But he continued to the end to collect Mr Ross's interest. Again at Whitsunday 1898 the defender acted for the pursuer in the purchase of the house of Whittington.

He was thus in 1897 and 1898 largely seised with her affairs as his client's.

In the years 1899 and 1900 we come to the two cash-credits and the pursuers' bonds of relief to the cautioners. Here the defender was acting for his bank as well as for the firm, and for the pursuer. I must say that the defender's easy-going conduct in this transaction, without seeing that the pursuer, who was thus made, though indirectly, the real primary co-obligant to the bank, was separately advised by someone who made proper inquiry into the firm's affairs, which he never did, appears to me not only incomprehensible but highly improper. But as no direct loss was suffered by the pursuer in the circumstances, I do not think it desirable to occupy time in examining the transaction in further detail.

But the next item in the programme is one which sharply brings up the question of the defender's responsibility. In the spring of 1900 the pursuer's husband came to the defender for an advance of £750. I take the defender's own account of the matter—"In the spring of 1900 Mr Dick requested me to give his firm a loan of £750. I agreed to do so on condition that he found security for that and £250 which had been overlooked and had not been repaid to me at March 1897. . . . When he wanted this other £750 I said I would give it provided I got security, and it was arranged that the £1000 of Coatbridge Burgh stock should be given me. I would not have granted this further loan unless I had got security. It was Mr Dick who suggested that his wife would give the security. (Q) Did you in any way influence Mrs Dick to give that security?—(A) Up to that time I had only seen Mrs Dick when she called in September 1897, and in 1899, when she handed me the bills. (Q) Did you give her any advice in connection with that matter, or were you asked to give it?—(A) I neither was asked nor did I give it. About this time the firm's account at the bank was considerably overdrawn. The head office was writing me frequently about the account, desiring that it should be put right and squared."

Now from the defender's books the date of this transaction is seen to be 21st April 1900. Though he may not originally have known the true amount of pursuer's initial advances to the firm, it was, on 27th May 1899, nearly a year before this transaction, fully brought to his knowledge that these amounted to £5500, for on that date she handed him the promissory-notes she held for that amount. Further, though I am not certain that the reference in defender's evidence to the head office pressure for reduction of the overdraft applies to this period or to the period succeeding the advance, it is unquestionably the case that in March and April 1900 the account was very heavily overdrawn — on March 24th, for instance, more than £800 above the authorised amount—and that it was only on 21st April, the date of the advance, reduced by its means to a few pounds below the authorised amount. In these circumstances was the defender, having regard to his own relations to the wife, justified in arranging with the husband to make him an advance to clear off an unauthorised advance for which he as bank agent was responsible, on the husband's assurance that he would get his wife to transfer her property in security not only for this new advance but for the balance of an old debt, without sending for the wife and telling her that in the circumstances of the firm an advance which he himself would not make without security was one which he could not allow her as his client to guarantee or secure, unless she had independent advice—that his position as agent for her husband and his firm and as an individual personally interested by reason of his bank agency, and as the proposed lender, precluded his advising her, and that she ought to place herself in other hands? I cannot answer that question otherwise than in the negative. And I cannot doubt that had the defender been in the position of advising pursuer alone, and had he had no other interests, he would at once have told her that to do as she was asked would be imprudent to a degree, and only to be done if she was knowingly determined to peril her fortune further in a business which was on the face of things struggling, and of the real financial position of which he had had and sought no opportunity of satisfactorily judging. It is clear that even on the information he had he would not himself have done, and would not have advised

a client to do, what he was a party, though he now maintains not a responsible party, to the pursuer doing.

I did at first think that the defender might find explanation and excuse for his action at this stage also, in the ambiguous conduct of the pursuer and her husband at the outset of his business relations with the pursuer, and the manner in which that business was conducted by them. But on more careful consideration I have come to the conclusion that this transaction, and not the next, must be treated as the parting of the ways. I have done so for these reasons. Undoubtedly the defender was employed by the pursuer as her agent in relation to the investment of her money in 1897 and 1898; though he was not responsible for the manner in which a large part of it was advanced by pursuer to her husband's firm, he was the instrument to a large extent in carrying through the transaction, and particularly in transferring security from himself to her, and as her agent he granted the firm a back-letter; he retained the security deeds for these advances, and though not at first, yet by the middle of 1899, he was made fully cognisant of what the security covered; he made and retained the securities of her other investments and the titles of her house; he collected the interest of her loan to Ross; and with all this before him he could not, on the one hand, fail to regard himself as her agent, and on the other to have a pretty full understanding of the position of her capital. All these considerations have led me to the conclusion that the defender failed in his duty to the pursuer when he in April 1900 took from her in the manner he did a security to himself for an advance to her husband's firm. That the advance was for the purpose of reducing indebtedness to the bank, for the unauthorised excess of which he was personally liable, is not necessary to my conclusion, but certainly confirms it.

I cannot leave this branch of the case without adverting more at length to what in my mind is a most significant item of evidence, viz., the handing by the pursuer to the defender of the eight promissory-notes which she held from her husband's firm on 27th May 1899. That circumstance calls for explanation. The pursuer does not refer to it in her evidence. But the defender says in cross—"(Q) You did collect the interest on Mrs Dick's loan for a short time — the £5500?—(A) I never collected any interest at all. So far as I recollect, the position of matters was that Mrs Dick called on me and handed me all the bills she had got when she paid me the £3000 and other five bills for £500 each. She had been getting no interest on these latter bills, and asked me to apply to the company for payment, but I never at that time or any subsequent time received any interest on her loans. (Q) But the point is that she called upon you and handed you certain promissory-notes and asked you to act for her in collecting interest?—(A) She asked me to apply to the firm as she was not getting interest, and I daresay I did." Now it is the case that he did so apply on 27th May, the very day the notes were placed in his hands — defender's letter of that date, the terms of which indicate that, as was to be expected, he had been placed in full possession of what was due. No notice was taken by the firm of his letter, and on 17th June he sent them a reminder. And then on 20th June he received from the pursuer this very pregnant recal of his instructions to collect:—"Dear Sir—I have been shown your letters to Messrs John Dick & Company. Mr Dick asked me before May term, when half year's interest on £3000 was due, if I would allow it to lie over for a time. I agreed to do so. Through a misunderstanding on my part I made a mistake, and have arranged to have it paid direct to myself.—Yours truly, Mary A. L. Dick."

I do not think it possible for anyone, let alone an experienced law agent, to be a party to this short corrrespondence, or even to read it, without at once seeing that a check had occurred to the unquestioning reliance of wife upon husband, that the husband's firm had not been in funds to meet the interest due to the wife, which, looking to the condition of their bank account, even after a further loan from the defender, was not surprising, that the wife had become sufficiently anxious and perhaps rebellious to lead her to place herself in the hands of her law agent, but had been smoothed over and induced to withdraw her instructions by her husband's influence and representations. It appears to me that this episode ought at least to have awakened the defender, if he required awakening, to the position in which the parties concerned stood to one another and he to them.

It is impossible, without occupying too much of your Lordship's judicial time, to go into further detail either relating to the period preceding this transaction or to that succeeding it. I would merely say that a perusal of the documentary evidence, supplemented by the parole, leaves the distinct impression on my mind that not merely in the early stages but throughout, from 1897 to the end of the day, the defender and his firm stood in the relation of law agents to the pursuer directly, and irrespective of the fact that she was the wife of their client John Dick junior.

The method in which the husband and the defender dealt with the pursuer is fully illustrated by the transaction just reviewed. There is little difference except in detail in the transactions which followed.

Within six months the firm's cash-credit, in August 1900 reduced to the authorised £800, had mounted to £1500. To this the defender's head office took decided exception. He says in the passage I have above quoted—"About this time the firm's account at the bank was considerably overdrawn"; and then proceeds—"The head office was writing me frequently about the account, desiring that it should be put right and squared. In December 1900 Mr Dick gave the bank certain securities through me. He gave a conveyance of his

wife's shares in Stewart & Lloyd's" (same as A. & J. Stewart & Clydesdale), "and the bill she held from Ross was endorsed to me." Now the correspondence which defender had with the bank's head office cannot, I think, have been fully produced, for we have only one letter applying to this period, dated 13th November 1900, and I do not know over what period defender means to represent that he was under pressure from his head office about John Dick & Company's account. But in the letter of 13th November 1900 the head office tell defender this firm's "financial position scarcely entitles them to the unsecured overdraft they sometimes have." I should have thought the defender hardly needed this information. But with full means at least of knowledge of the firm's financial position and resources, with this call to caution by his own superior, the defender, without any inquiry into the firm's real position, and without apparently any direct communication with pursuer, simply took over from pursuer two more of her securities, viz., her Stewart & Clydesdale shares and Ross's note, not in favour of his bank to guarantee an increased authorised overdraft, but in favour of himself to guarantee him against his personal responsibility for an increased unauthorised overdraft. As in all the other transactions under review, a certain amount of conveyancing was necessary to carry out this transaction, and that conveyancing was done by defender and his firm without pursuer having any independent agent to attend to her interest. I do not think that an independent agent would even have undertaken the conveyancing without making inquiries, which would have at once disclosed the impropriety of the transaction proceeding. This action on the part of defender in relation to a client who, he must have known, was more ignorant even than himself of the real condition of the firm's affairs was, I think, wholly indefensible. And I say so, not merely because he was agent and pursuer his client, and he was thus obtaining security for his advances from his own client, but because he did nothing to satisfy himself as to the real condition of the firm's affairs, though every appearance obliged him in prudence to do so and would so have obliged him had he had no personal interest in the matter whatever. In consequence of this transaction of December 1900 the cash-credit advance authorised at £800 but standing at £1500 rapidly mounted up until in 1901 its average was £2000, while in May/June 1902, when the next important circumstance occurred, it stood at £2500.

Now at this latter date the firm of John Dick & Son met with a serious loss from the failure of a Glasgow firm of Stewart & Company. It is clear to me, however, that this involvement, though represented as such, was not the sole cause of the still further decline of their financial position and credit which by that time had taken place. And here the old course is followed. The defender says—"Mr Dick came to me for assistance, and I agreed to give him assistance provided I got security. It was then proposed that if I assisted him, the works, which stood in his wife's name, should be conveyed to me. In connection with that matter I did not see the pursuer at all. A conveyance in my favour was executed, and I made a number of advances, viz.—

5th June 1902	. . .	£350
16th ,, ,,	. . .	750
21st July ,,	. . .	700
24th Aug. ,,	. . .	130
7th Nov. ,,	. . .	300
20th ,, ,,	. . .	500
Total	. .	£2830"

Now let me here note that there was no limitation on the advances which might be made either under the arrangement of December 1900 or under this of June 1902. Under them the pursuer's husband and his firm were put in the position of being enabled to dip into the pocket of his wife to the full extent which the defender chose to allow or thought her estate would bear, for the result of these transactions was to put into his hands practically her whole tangible estate, except the house property of Whittington, for advances made or to be made. Thus he had her Coatbridge Burgh stock, her Stewart & Clydesdale shares, and Ross's note directly, and he had her £5500 of the firm's notes indirectly, through the transfer of the security over the works which she held therefor, and all this without any communication with the pursuer except through her husband, any advice or explanation to her, or any suggestion that she should take independent advice.

It is very symptomatic of the way in which she was treated by defender and her husband, as a mere lay figure, that the terms of the back-letter which defender granted on 16th June 1902 in her favour on obtaining the transfer of her security over the works (which, by the way, his firm prepared, and which no one else ever saw, on behalf of the pursuer) was, without apparently any communication to pursuer, exchanged for another dated 4th July 1902, embodying totally different conditions, and postponing the pursuer's security over the reversion to that of the bank.

The defender, as it appears to me, went on blindly advancing to the firm, without himself taking steps to ascertain their true financial position, trusted to the sanguine or specious representations, and I am afraid misrepresentations, of Mr John Dick junior, and simply continued advancing so long as he thought himself covered by the securities he held from the pursuer.

Now at this stage a great difficulty arises in discriminating between the pursuer's involvement and consequent loss through the defender, on the one hand, and her involvement and loss through her husband's business direct, on the other, owing to the forming of the firm into a limited company in 1903, and the shifting and juggling with obligations and securities which that entailed.

At the date of the registration of the

company in spring of 1903, all that the pursuer possessed, so far as we know, except her house, was pledged to the defender and his bank—her three thousand pounds worth of outside investments and all the security which she held from the firm for her advance of £5500 (and therefore in effect the advance itself) were signed over to the defender in security of advances made by him personally and by his bank to her husband's firm. The advances which the defender had made himself amounted at that date to £3884, 15s. 11d., according to Mr R. C. Millar, and the bank's advances on cash-credit amounted so far as I can ascertain to a further £2026, 12s. 9d. What then the pursuer stood to lose through her engagements to the defender for her husband and his firm was her £3000 worth of outside securities and the works for what they were worth as a security for her £5500 lent to the firm, and she stood to lose so much more, as the value of these securities failed to meet the obligation to the defender for £3884, 15s. 11d., and the obligation to the bank for £2026, 12s. 9d.

Assuming that the pursuer was entitled to relief from the obligations in which she is involved, the most difficult question in the case I think is—What is the measure of her right now? For six things have happened—first, the firm in which the pursuer's husband John Dick junior and his brother Thomas Dick were the sole partners, was turned into a limited company in the spring of 1903; second, one new partner, Mr J. M. Clark, was obtained and put in a substantial amount of money; third, the pursuer was induced to exchange £5000 of the firm's indebtedness to her for shares in the new company; and fourth, the bank overdraft was paid off, and the defender also received payment to the extent of £384, 15s. 11d. of the firm's debt to him, and agreed to accept the company as his debtor in a further £3000, leaving the remainder of his claim, viz. £500, still standing against the old firm. But he retained hold of all the securities which he had obtained, including the works. Fifth, further advances were made by the defender to the limited company in 1905, on the security of the pursuer's undertaking; and sixth, the company went into liquidation in 1907.

So far as the pursuer was concerned in the negotiations which resulted in, and the whole details of the creation of, this new situation she was left as before absolutely without independent advice and guidance, while the defender's firm acted in the flotation of the new company, and in all the relative arrangements, as agents for all concerned. It is true that these arrangements and the flotation and subsequent liquidation of the company, involving the interest of other parties and particularly of Mr J. M. Clark's representatives, render it impossible to restore things to the *status quo ante*. It appears to me, however, that it is not in the mouth of the defender to take this exception to pursuer's present action, because if pursuer had any claim against him as at the date of the inception of the company, her consenting to the arrangements necessary to admit of the flotation of the company, and all consequent thereon, would never have taken place if the defender and his firm had realised their true position and had placed the pursuer in the hands of independent agents. I cannot read the evidence of the defender and his son, and those connected with the company, without unhesitatingly concluding that though they had made no proper investigation into the firm's affairs, they knew quite well that the flotation of the company was a forlorn hope, and that without closing their eyes they could not help knowing that the pursuer should do nothing to facilitate it or to alter further her own position, and without concluding further that had they regarded themselves as independent agents and advisers of the pursuer, they would have insisted on thorough inquiry into the firm's position, and would have most emphatically dissuaded the pursuer from having anything to do with the limited company. If the defender and his firm were responsible to the pursuer for what preceded the flotation of the company and led to the position in which she found herself then, the defender cannot escape liability, because he and his firm are also responsible for the alteration of her position for the worse by participation in the flotation of the company and all that ensued.

No direct authority for a judgment in this case has been quoted to us. But several cases were referred to from which the principles on which it falls to be decided can, I think, be deduced. I recapitulate the essential facts which I think the proof, which I have already analysed, discloses:—

1. The defender was employed by the pursuer in 1897 in relation to the investment of the fortune to which she succeeded. She became the defender's client in 1897, and she continued as such to the end of the day, to such effect that he was bound, in any transactions in which she was concerned during that period, to recognise that the relation of agent and client subsisted between him and the pursuer directly, and not merely because she was the wife of his other client Mr John Dick.

2. More particularly was this the case where in relation to such transactions he and the pursuer were both interested and had conflicting or divergent interests.

3. Defender was primarily agent for the pursuer's husband and his firm, and in all the transactions with which we have to deal he was not only himself concerned, but he was agent both for pursuer and for her husband and his firm, and pursuer on the one hand and her husband and his firm on the other had conflicting and divergent interests.

4. The transactions with which we are concerned, so far as they involved contracts between the defender and the pursuer, were beneficial to the defender.

Though I do not think that when he reckoned things up in the end of the day there would have been found much profit to the defender, even if things had gone

on smoothly to the end, still when a man lends his money at interest to a borrower, and obtains security from a third party, the contract between him and that third party, though it is directly beneficial to the borrower, must in point of principle be regarded as a contract indirectly beneficial to the lender. At the same time I do not consider this matter of fact essential or even of material importance in the view I take of the ground on which the case falls to be decided.

5. All the transactions in question between the defender and the pursuer, whether the pursuer acted directly for herself or her husband assumed to act for her, were transactions entirely for the benefit of the husband and his firm, at the expense of the wife, and without consideration to her, and she not only in the defender's knowledge had no independent information or advice, but the defender took no steps to give her the opportunity of obtaining such.

6. The defender had throughout the most sufficient grounds for concluding that the business of the pursuer's firm was struggling, and for a long time prior to its collapse in desperate straits. But even assuming that he failed to appreciate the information in his hands, the defender made no inquiry into the firm's real condition, and transacted with pursuer entirely on the footing that that was no concern of his so long as her husband induced her to interpose her credit and afford him security for his advances.

This last matter of fact I do consider to be of the first importance in the view I take of the ground on which the case falls to be decided.

The pursuer has based her claim on two grounds of action — First, that she has suffered loss through the fault, negligence, and breach of duty of the defender; second, that having illegally and improperly made gain out of his transactions with the pursuer, he is bound to return the same to her.

I think that it is very difficult to apply the law on which the second proposition is based to the circumstances of the present case, owing to the cross current of consideration introduced by the fact of the marital relations between pursuer and John Dick junior, and I think that I would be only withdrawing attention from what I conceive to be the real issue in the case by canvassing that ground of action.

I think that the appropriate ground for the disposal of this case is the first, which is simply damages for breach of duty as agent.

And here I would note that the case of *Aitken* v. *Campbell's Trustees* (1909 S.C. 1217), though cited by the pursuer as an authority for her first ground of action, is a direct support to my view that the relation of agency is completely made out here. I venture to adopt the words of your Lordship in the chair as exactly applicable to this case—"You have to find out whether the general relationship of law agent and client exists, and then if you find it does exist you must apply the strictest scrutiny to the contracts. Well, here I do not think there can be any question for one moment that the general relationship of law agent and client did exist. Campbell was the agent of the pursuer from 1893 up to his death. Every one of the legal pieces of business which this transaction involved was carried through by Campbell, and they were in continual relationship all along." This may be applied *totidem verbis* to the present case.

But defender owed to pursuer a duty, not merely as her own agent, but as her husband's agent, and I think I may also appropriately cite the words of Lord Davey in *Willis* v. *Barron* ([1902] A.C. at p. 283), which were adopted with approval in the case of the *Bank of Montreal* v. *Stuart*, to be afterwards referred to—"My Lords, I think it is a sound observation that a wife usually has no solicitor of her own apart from her husband, and I think she is *prima facie* entitled to look to her husband's solicitor, the solicitor of her husband's family, for advice and assistance, until that solicitor repudiates the obligation to give such advice, and requires her to consult another gentleman." And if that is true in the general case, it is, I think, *a fortiori* applicable where the agent is acting in the husband's interest and also in his own.

If ever there was a case where a married woman required the protection of independent advice, it appears to me that this was that case. The defender though occupying the position of pursuer's agent, first, deliberately abstained from acting as her agent, except so far as the mechanical offices of conveyancing required; second, contracted with her on his own behalf; and third, acted as agent for her husband and his firm, in transactions with her, in which he himself was concerned, every one of which was to their benefit and for his security and to her very grave risk, if not certain loss; and all without awaking to the fact that she required that advice and protection, which only an independent agent could give. He so acted without inquiry into the condition of the business which he was financing on her guarantee, or even using the information which was to his hand, or the knowledge which I must infer to have been in his possession. Thus the defender allowed the pursuer to enter into transactions with him which he would never have contemplated had he himself been such independent agent, or even had she been an independent client.

Is, then, a married woman entitled to such advice and protection? I am not concerned with the position of a third party, say a banker, entering on a transaction with husband and wife where the wife intervenes for her husband's credit or benefit and without other consideration. I confine myself to the case before me, where the third party occupies the position of law agent to the wife directly, or to the husband and therefore to the wife.

I have given my reasons for holding that

the defender occupied the position of law agent to the pursuer personally and in relation to her separate estate. But even if this were found not to be the case, the position would, I think, have been the same. He was bound in either case, but *a fortiori* when he was the wife's separate agent, to see that the wife with whom he was contracting for his own interest, or for his own interest and for that of his other client, her husband, had the advantage of independent advice and protection, or if you like so to call it, support. It is no answer to say, as the defender in effect does, "husband's and wife's interests are one, pursuer and her husband had consulted together and determined what they would do, and came to me, or at least her husband came to me. Her husband was her natural adviser, and it was not for me to interfere between them. Nay, had I done so, this lady would have followed the course which she actually took in spite of me." I think that there is quite enough to show that though pursuer in 1897-98 was an active if not an initiating party in her wifely generosity towards her husband, in the after transactions she was anxious, if not restive, and that it would have taken little independent advice to stay her hand in the interest of wifely prudence. And there is equally quite enough to make clear what advice any informed and independent agent would have given (*cf. Aitken* v. *Campbell's Trustees*, 1909 S.C. at p. 1227). But it is not necessary to speculate on what pursuer would have done if independently advised. It is enough that she never got the chance, and that through the defender's insufficient appreciation and consequent neglect of his duty.

The circumstances of the two cases were, I am aware, very different in detail, and I cannot rely upon the *Bank of Montreal* v. *Stuart* in the Privy Council ([1911] A.C. 120) as a direct authority. But it has much in it that is analogous to the present case. There Lord Macnaghten says, his (the bank's solicitor and also the husband's) "course was plain. He ought to have endeavoured to advise the wife, and to place her position and the consequences of what she was doing fully and plainly before her. Probably, if not certainly, she would have rejected his intervention. And then he ought to have gone to the husband and insisted on the wife being separately advised, and if that was an impossibility owing to the implicit confidence which Mrs Stuart reposed in her husband, he ought to have retired from the business altogether and told the bank why he did so." That is exactly what I think was the defender's bounden duty here.

I am accordingly unable to agree with the Lord Ordinary either in his judgment or his reasoning. I think that he has entirely missed the point of the case, and in no respect more entirely than when he says—and I think it is the fundamental ground of his judgment—"I hold that the pursuer has entirely failed to prove that she was in any way advised by the defender" in these transactions; "I believe she acted as she did because she fancied that by doing so she would promote her husband's interests." The ground of action on which I proceed is, not that the pursuer was advised by the defender, but that she was not advised at all, and particularly not advised to seek independent advice, as she ought to have been by reason that the defender was precluded by his double agency and by his personal interest from advising her.

That the above conclusion is the fundamental ground of the Lord Ordinary's judgment is, I think, made more abundantly clear where he says in the sequel—"In these transactions the pursuer's husband was her natural adviser, and if she chose to act upon his advice she has only herself to blame." And again—"I cannot see any trace of unfairness in the defender's dealings with the firm of John Dick & Company or with Mrs Dick; and unless it be the law that an agent for spouses, each of whom has separate estate, has a duty to prevent the one from pledging his or her means for advances made to the other (whether by himself or by a third party does not seem to matter), there can be no liability here." That the advances were made not by a third party but by the solicitor himself does matter, and I cannot understand the Lord Ordinary's statement that it does not seem to do so; I think indeed that the judgment would be the same, the agent for both the husband and the wife acting as he did here, had the person making the advances on the wife's credit been a third party. But I am not concerned with that phase of the question. I am content to deal with the actual case, which is that the person making the advances on the wife's credit was the law agent himself. In such case the duty is not, as the Lord Ordinary puts it, "a duty to prevent," but a duty to see that the dependent wife receives independent advice, and, if she declines, to retire from a transaction which he cannot himself advise, and which he knows is being entered upon on the advice, if not solicitation, of a natural adviser, also his client, who is as debarred as himself, the transaction being *in rem suam*, from advising because of his personal interest.

The practical conclusion to which I have come therefore is that the pursuer is entitled to succeed to the effect of recovering her £3000 worth of outside securities, and the works of John Dick & Company, Limited, or so far as that is impossible, from their conversion, their value in money.

LORD PRESIDENT — I agree with the opinion delivered by Lord Mackenzie, but in view of the difference of opinion as evidenced by the opinion just delivered by my brother Lord Johnston I wish to say a few words.

First of all, I think it is absolutely necessary in case this action should go further to say distinctly that the pursuer gave up and did not argue before this Court the

contention which she had argued before the Lord Ordinary, that the fault of the defender which subjected him to liability was a fault in giving bad advice to the pursuer as her agent in the matter of investments. That is dealt with in the Lord Ordinary's interlocutor. The Lord Ordinary held that there was no proof to support such a contention. But that part of the case was given up and was not argued before us. The argument of the pursuer before us was really entirely based upon what she conceived was the general principle laid down by the Privy Council in the case of *Bank of Montreal* v. *Stuart*, [1911] A.C. 120. If I thought there was any general principle of law laid down by the Privy Council in that case I should give effect to it. The judgments of the Privy Council are technically not binding on your Lordships, but as they are pronounced by the same Judges as sit in the House of Lords on Scottish appeals, we have always been in the custom of bowing to their judgments. I do not find that there is any general principle laid down in the case of the *Bank of Montreal*. I think that case was extremely special in its circumstances, and was so treated in the judgment of Lord Macnaghten, which was the judgment of the Privy Council. I think everything there turned upon the peculiar position of Mr Bruce. I think that the pith of the judgment may be found in the words of Lord Macnaghten, p. 137. He says there— "It seems to their Lordships that in this case there is enough, according to the recognised doctrine of courts of equity, to entitle Mrs Stuart to relief." May I say first of all that the Court below there —that is, the Supreme Court of Canada— had given relief upon what they had treated as a general rule of law, which was that no transaction between husband and wife for her husband's benefit could be upheld unless the wife could be shown to have had independent advice—a doctrine which the counsel for the respondent did not attempt to support. He then goes on to say— "Unfair advantage of Mrs Stuart's confidence in her husband was taken by Mr Stuart, and also, it must be added, by Mr Bruce. Their Lordships do not attribute to Mr Bruce intentional unfairness, but Mr Bruce was in a position in which it would have been almost impossible for any man to act fairly." I take it that the meaning of this is that he did act unfairly, but what Lord Macnaghten means is that there is no moral stain upon him. "He was solicitor for the bank. He was the legal adviser of Mr Stuart. He took upon himself to enter into negotiations with his fellow-shareholders on behalf of Mrs Stuart. Above all he had, as the managers of the bank well knew, a strong personal interest in procuring Mrs Stuart to give the guarantee. He knew that all Mr Stuart's means were embarked in the company, and no one knew better than he that unless some one came forward and guaranteed the bank in respect of further advances his own interest and the interest of his associates as shareholders were worth nothing, and his claim as a creditor in all probability equally valueless. He and his associates other than Mr Stuart were unwilling to risk their own moneys. Mr Stuart had no money to risk. The game Mr Stuart was playing was desperate. It was the throw of a gambler with money not his own. No man in his senses with any regard to the interest of Mrs Stuart or the interest of Mr Stuart could have advised Mrs Stuart to act as her husband told her to do." That is surely ample justification for the judgment there. Their Lordships were of opinion that Bruce was in the position of adviser to Mrs Stuart, and he was in such a position that he knew that every penny he got was directly to his own advantage, and therefore it could not be held that any advice which he gave to Mrs Stuart was impartial; and so far as the Bank of Montreal was concerned, their Lordships held that the bank had so identified themselves with Bruce that they must bear the burden of anything Bruce did. I find in the present case absolute discrepancy with such facts in every chapter. Alston here had no direct interest in the engineering business of John Dick & Company. It did not matter to him whether Dick's business foundered or prospered, and as I say the idea of wrong advice being given to Mrs Dick was absolutely given up, and I think her counsel were quite right in so doing, because it is almost an absurdity to talk of this being advice as to investments. It is not advice as to investments if a woman comes forward and says, "My husband wants money for his business. I shall give security if you will advance it." It is an obligement by the woman to her husband, and I know of no law why a woman should not give such an obligement to her husband. Now the effect of the law after the passing of the Married Women's Property Act was to make a woman's property her own, exclusive of the *jus mariti* of her husband. But for all that she can give her husband money if she likes. There are only two grounds of liability. I quite conceive that if a law agent takes upon himself the burden of advising a woman upon investments and gives her wrong advice, he is liable. In many cases this duty has been put at its very highest, for in ordinary circumstances it is no part of the duty of a law agent to advise about investments. But that branch of the case is not before us. That was found untenable before the Lord Ordinary, and was not argued before us. What else is there about this law of advice between law agent and client? I am perfectly content to take the view of the matter quoted by my learned brother Lord Johnston. In the ordinary case where a woman comes into business connection with her husband's agent, that agent is held to be agent for the woman though he holds no appointment from her. *Spondet peritiam artis.* But beside the *peritia artis* the canon is the one which we had to consider very narrowly in the case Lord Johnston quoted, and is this, that quite apart from the question of giving advice, if a solicitor

chooses to enter into bargains with his clients, the position of the solicitor is such that the bargain will be carefully scrutinised He is not in the position of an ordinary party, who is quite entitled to make such a bargain as he may choose, even although that bargain may be very favourable to him. The solicitor cannot say that. His bargain must be judged of as to whether it is a fair bargain or not. I am quite content that the bargains of this lady should be treated as bargains would be treated between the husband and the solicitor. No one here says that the solicitor made an unfair bargain by saying, "I am not going to lend money unless I get fair security." The interest is the ordinary interest which would be given on such a loan, and here I do cavil a little at what my learned brother said about the beneficial contract, because there the root of the difference of opinion between us lurks. If A goes to B and says, "I will lend you the money," but, B having no security to offer, A goes to C and says, "I have got no security for this loan, as you know B better than I do you grant the security." That is a beneficial bargain. But if A goes to B and says, "I will not lend you the money unless you give security," and B says, "I have no money but will ask C," and then C grants the security, that is not a beneficial contract to A in the sense in which the word "beneficial" is relevant to setting aside the contract. The bargain with B is not in any sense beneficial to A. Accordingly after this man said "I cannot lend you money unless you give security," and the other said "I have no security, but my wife can give it," I do not think that that was a beneficial bargain to Alston. The real loss to Mrs Dick is not because the bargain of loan was a bad one, but because the money she got for her husband has been lost in her husband's business. I do not think I should have troubled the Court with this explanation except for this difference of opinion.

The only portion of the case which has given me any trouble is as regards the £250. There was, I think, material for holding that Alston got something for himself gratuitously. But I think that Lord Mackenzie has given the right decision upon this matter.

LORD KINNEAR—I agree with Lord Mackenzie and with everything that has been added by your Lordship in the Chair.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Blackburn, K.C.—MacRobert—MacGregor. Agents—Steedman, Ramage, & Company, W.S.

Counsel for the Defender and Respondent—Sol.-Gen. Hunter, K.C.—Morison, K.C.—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Wednesday, July 12.

FIRST DIVISION.

CITY OF EDINBURGH *v.* MIDLOTHIAN COUNTY COUNCIL.

Road—Road Trustees—Power to Take Materials from Enclosed Lands—"Policy"—General Turnpike Act 1831 (1 *and* 2 *Will. IV, c.* 43), *sec.* 80—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. c.* 51), *sec.* 123—*Edinburgh Municipal and Police Extension Act* 1882 (45 *and* 46 *Vict. cap. clxi*), *sec.* 8—*Edinburgh Extension Act* 1896 (59 *and* 60 *Vict. cap. cciii*), *sec.* 30.

The General Turnpike Act 1831, section 80, empowers road trustees to search for, dig, and carry away stone and other road materials "in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same shall be carried or landed, as such trustees shall judge reasonable."

The Roads and Bridges (Scotland) Act 1878, sec. 123 (which incorporates sec. 80 of the General Turnpike Act 1831), provides that "it shall not be lawful for the trustees or local authority, as the case may be, or anyone authorised by them, under the powers conferred by the eightieth section of the recited Act, to carry away any materials to be used by them for any purpose whatsoever, from any place beyond the county or burgh, as the case may be, or to a greater distance than three miles from the place where such materials have been obtained, unless satisfaction shall be made for the same in the manner provided in said section in the case of stones to be used for building."

The Edinburgh Municipal and Police Extension Act 1882, sec. 8, enacts—"Subject to the provisions of this Act, all jurisdictions, rights, powers, and authorities heretofore exercised or exerciseable by any local, road, or other authority within or over the districts annexed or any part or parts thereof, shall cease and determine from and after the commencement of this Act."

The Edinburgh Extension Act 1896, sec. 30, enacts that all separate authorities and jurisdictions, and all rights,