of complaint, from making that complaint and obtaining his appropriate remedy in a new and separate proceeding.

I therefore think that the judgment in the terms in which it was pronounced by the Lords of the Second Division ought to stand, as your Lordships have already proposed, as the judgment of this House.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Complainer and Appellant—Balfour, S.-G.—Benjamin, Q.C. Agents—A. Beveridge—William Officer, S.S.C.

Counsel for Respondents—Charles, Q.C.—R. V. Campbell. Agents—Thomson, Son, & Brooks—William Archibald, S.S.C.

Wednesday, August 3.

(Before Lord Chancellor Selborne, Lord Blackburn, and Lord Watson.)

ROBINSON *v.* MURDOCH AND OTHERS (FRASER'S TRUSTEES.)

(*Ante*, vol. xvii. p. 524, 7 R. 694.)

Trust—Powers and Duties of Trustees—Bank Stock.

A truster directed her trustees to pay the interest of two sums of £2000 to each of two legatees, and thereafter to divide the residue among certain persons. She empowered her trustees to continue to hold any or all of such shares or stocks as should belong to her estate, "with power to lend out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively." *Held* (1) that the terms of the deed authorised the retention of certain bank stock as part of the capital, to be set apart for payment of one of the said legacies, and that the trustees, although of opinion that such an investment was not suitable for trust funds, did not act in breach of duty by continuing to hold the bank stock after consulting with the beneficiary and obtaining her approval; but (2) (*rev.* judgment of the Court of Session) that the trustees having allocated and appropriated certain investments to each of the two capital funds from which the legacies were to be paid, and having held the funds as separate and distinct, were not entitled to recoup themselves for calls paid by them upon the bank stock belonging to one of these funds out of the other capital fund.

This case was reported of date March 10, 1880, 7 R. 694, in the Court of Session. Application was made to that Court by Mrs Robinson to prevent the trustees under her mother's trust-settlement from operating relief to themselves out of the fund of £2000, to the interest of which she was entitled, in respect of losses incurred by them in payment of calls in the liquidation of the City of Glasgow Bank on account of stock held by them under the same trust-settlement. The Court of Session refused the remedy asked, and Mrs Robinson now appealed to the House of Lords. The House of Lords granted interdict as craved.

At delivering judgment—

Lord Chancellor—My Lords, the two first questions to be determined in this case are, Whether the authority given by the trust-disposition and settlement of Mrs Fraser to her trustees to continue to hold any of her shares in public or other companies enabled them to set apart and appropriate, for the second and third purposes respectively of that settlement, the bank shares and other securities which they did in fact retain for those purposes,? and whether, if they had that authority, it was duly exercised?

Upon the first point it was argued that because the power of the trustees "to continue to hold" the shares, &c., should they consider it advisable or expedient to do so," is followed in the settlement by a power also "to lend or place out" the two legacies of £2000 each "on such security or securities, heritable or moveable, as they shall consider advantageous," the former power could not properly be used for the investments contemplated by the latter, but must be construed as merely authorising some delay, which might not otherwise have been proper, in the conversion of the truster's shares, &c., in public companies before the distribution of her residuary estate. I think that this is not a necessary, and that it would not be a reasonable, construction of the settlement. A power to "continue to hold" particular investments made by the truster herself (without more) must, I think, be taken *prima facie* to refer to those trusts which were to continue, and the only continuing trusts in this case were those expressed in the second and third purposes of the settlement.

Upon the second point I cannot concur in the view which seems to have been taken by some of the learned Judges in the Court of Session, that because the trustees on the 20th November 1876 stated it to be their view that bank stock was not a suitable class of stock for trustees to hold, their subsequent decision to hold £200 City of Glasgow Bank stock for the investment of part of the legacy of £2000 given to Mrs Sinclair and her children ought to be regarded as an abdication of their duty of judgment, and for that reason a breach of trust. When the truster had expressly authorised the retention, for the purposes of the trust which she created, of these investments made by herself, of which some were to her knowledge of a character not free from risk, and were at the same time productive of a variable amount of income, those facts alone could not make it a breach of trust for the trustees to act upon that authority, although their own preference might have been for securities unattended with any risk. The truster did not, indeed, direct them to take into consideration the wishes or the opinions of the liferenters, but I think it was proper and reasonable for them to do so as long as they did not unduly favour the liferenters at the expense of their children, or either set of legatees at the expense of the other. In this case I find no indication of any improper purpose. It is true that some risk was neeessarily incident to every such investment in bank stock, but there was no special reason for believing (and it is plain

to me that neither the trustees nor Mrs Sinclair did believe) that this particular investment in stock of the City of Glasgow Bank was attended with any extraordinary risk which might not equally attach to shares or stock in any other well-established bank in Scotland. This stock, at the time of appropriation, bore and was valued at a price sufficient to prove the credit in which the City of Glasgow Bank then stood, and to make the gain to the liferentrix in point of income very inconsiderable. I am satisfied that the trustees acted in good faith, and that their decision to retain this stock was an honest exercise of the discretion given to them by the will. It would be extremely dangerous to hold that trustees having such a discretion to exercise, might not freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment if they should disregard in the end objections to which they had thought it right in the first instance to direct attention.

These investments, therefore, having been *bona fide* retained under sufficient authority, the next question is, Whether the appropriations, as they were actually made, had the effect of severing the funds and securities set apart and appropriated for the second purpose of the will from those set apart and appropriated for the third purpose, so that the latter would not thenceforth be liable to make good any subsequent loss or deterioration of value sustained by the former, as between the two sets of beneficiaries? If such a severance is possible, it appears to me to be clear that the intent and the effect of the discharge of the 22d March and 31st May 1877 was to make it. And not only was such a severance legally possible, but it also appears to me to have been the most proper (if not the only proper) mode of fulfilling the directions of the will. Before the residue of the truster's estate could be distributed provision was to be made by some authorised investment or appropriation for these two legacies given to different families under different purposes of the will, and necessarily payable at different periods of time. If different sets of trustees had been nominated for them, it would have been impossible to contend that after the fund appropriated to each had been transferred to its proper trustees there could be any subsequent community of loss or gain between them as to either income or capital, or that any fund was to be in any way responsible to the other. It cannot, in my opinion, make any difference that the same persons were trustees for both, and were also trustees for the general purposes of the will. The English authorities collected in the first volume of Mr White's 4th edition of Roper on Legacies, p. 942, rest upon principles equally applicable on both sides of the Tweed.

From this conclusion it seems to me to be a necessary consequence that neither the beneficiaries under the third purpose of this will nor the trustees could have any right to be indemnified against a loss sustained on the City of Glasgow Bank stock at the expense of the appellant, or of the funds and securities set apart for the appellant's legacy. So far as the trustees were concerned, the retention of this bank stock as an investment of part of the legacy given to the Sinclair family under the second purpose of the will (together with the personal liability incident to it) was their own voluntary act. That liability was not undertaken for the general purposes of the will, which necessarily ceased when the residue was divided, but only for the purposes of this particular Sinclair trust. The retention of such stock necessarily involved risks of trade, and entitled the trustees to be indemnified from those risks out of the trust funds of the legatees from whom it was held. But to employ other funds set apart for other legatees in the same or any other trade there was no authority. To do so would have been, in my opinion, a breach of trust. Here, again, the principles of well-known English authorities (*ex parte Garland*, 10 Ves. 119; *ex parte Richardson*, Buck. 209; *Cutbush* v. *Cutbush*, 1 Bevan 187; *M'Neillie* v. *Acton*, 4 D. M. G. 750, &c.) are in point, and they appear to me to be as much applicable in Scotland as in England.

The result therefore is that I am unable to concur in the interlocutors of the Court of Session now under appeal, and that I think those interlocutors ought to be reversed and decree of suspension and interdict granted as prayed by the appellant, with expenses below—and with the costs of this appeal; and I so move your Lordships.

Lord Blackburn—My Lords, at the time when the City of Glasgow Bank failed in October 1878, £200 stock of that bank stood in the name of James Fraser Robb and William Murdoch, and they were placed on the list of contributories in respect of that £200, and calls amounting in the whole to £5500 were made upon them. They claimed a right to indemnify themselves out of some trust funds, and those beneficially interested were made aware that they intended so to do. The appellant Mrs Robinson applied for an interdict to prevent the application of certain stock specified (in which she was interested, inasmuch as £2000 of which she had the life interest was invested therein), or any part thereof, in payment of those calls or in relief of any obligations that might have been incurred in consequence of those calls. Murdoch alone appeared and resisted this application. There was a statement and answers thereto, from which it appears that there was scarcely any controversy as to what was done, but a great deal as to the legal effect of what was done. No *viva voce* evidence was gone into, the parties having by a joint minute admitted the genuineness of all the letters and documents produced, and agreed that the Court should be entitled to draw all inferences both of fact or law from the terms and contents of the said letters and documents.

I think it will be most convenient first to consider what was the duty created by the trust-disposition of Mrs Elizabeth Robb or Fraser, and imposed by it on the trustees who accepted the trust. She was the mother of John Fraser Robb and two daughters, one Margaret being the wife of a Mr Sinclair, named as one of Mrs Fraser's trustees, who predeceased Mrs Fraser, and the appellant Elizabeth, then the wife and now the widow of Mr Robinson.

Mrs Fraser by her settlement, after explaining that it was otherwise provided that her son should have her lands of Thorax, conveyed to four persons, one of whom predeceased her, another declined to act, and the other two, James Fraser Robb and William Murdoch, accepted the trust, all her property (with the exception of Thorax) on trust for the uses or purposes after mentioned:—First, to pay all her just debts, funeral, and testamentary expenses; second, to make payment to Mrs Sinclair of the interest or annual-rent of £2000, payable at the term of Whitsunday yearly, beginning the first payment at the first term of Whitsunday which should happen after the expiry of one year from the date of her decease, and after her decease "my trustees shall be bound and obliged to make payment to her child or children of the foresaid sum of £2000;" thirdly, a precisely similar trust as to £2000 in favour of Mrs Robinson (the appellant) and her children; fourthly, four legacies of £5 to the four trustees.

On the construction of the next part of the trust-deed there has been some difference of opinion below, and I think it better to read it at length—"And lastly, that my trustees shall, after payment of my debts, death-bed and funeral expenses, and the expenses of this trust, and making provision for payment of the legacies above mentioned, divide the free residue and remainder of my said heritable and moveable means and estate (excepting always the said town and lands of Thorax and others) equally between and among James Fraser Robb, Margaret Fraser or Sinclair, and Elizabeth Fraser or Robinson, share and share alike; with full power to my trustees to enter into possession of the said trust-estate and effects, to call and sue for, uplift, and receive the rents, mails, and duties, interests, and annual profits of the same, and to grant discharges therefor, which shall be valid and effectual to the receivers as if granted by myself; as also to sell and dispose of all or any part of the said trust-estate and effects, and that either by public roup or private bargain, as my trustees shall consider most proper; and to execute all and whatever deed or deeds containing all necessary clauses for rendering the said sale or sales effectual, in the same manner and as amply as I could have done myself; with power also to my trustees to continue to hold any or all of such shares or stocks in public or other companies as may pertain or belong to me at the time of my decease should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained; with power also to my trustees to lend or place out on such security or securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2000 and £2000 respectively, the said security or securities to be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise; as also to vary such security or securities in or upon which they shall have lent or placed out the moneys coming into their hands in virtue of the present trust for other security or securities of the like nature when and so often as it shall seem to them expedient; with power also to my trustees to appoint either one of their own number or any other person, with or without caution, to be their factor, agent, or cashier for uplifting, discharging, and conveying the funds of the trust hereby created, and the securities held by them for the same, and for applying the same for the purposes of the trust, and to give a reasonable allowance to such factor, agent, or cashier for his trouble; and further, with power to my trustees hereby appointed or to be appointed in pursuance hereof from time to time to nominate and appoint any person or persons to be a trustee or trustees along with them, or in place of any trustee or trustees who shall die or desire to be discharged, or refuse, decline, or become incapable to act in this trust; and when and so often as any new trustee or trustees shall be so nominated and appointed, all the trust-estate and effects, heritable and moveable, real and personal, shall forthwith be disponed and assigned in such form as that the same shall be vested in such new trustee or trustees jointly with the continuing trustee or trustees, or solely with the new trustee or trustees in case of there being no continuing trustee, and that for the purposes of this trust and no otherwise."

Mrs Fraser died on the 11th January 1876, and by the inventory, admitted to be correct, it appears that at the time of her death she was possessed of personal property of the value of £5333, part of which consisted of £850 stock of the City of Glasgow Bank, then valued at £1955. I do not think that it can be doubted that in the absence of something in the trust-deed to the contrary the duty of the trustees would have been to dispose of this stock, involving as it did a possible liability, which most people at that time thought would never come into operation, but which in fact did within three years come into operation in a very disastrous way. But Mrs Fraser had expressly provided that her trustees might continue to hold such stock or shares as might belong to her at the time of her death should they consider it advisable or expedient to do so.

The Lord Ordinary came to the conclusion of fact that the trustees retained the £200 which they did retain, not because they deemed it advisable or expedient so to do, but because they surrendered their own judgment to that of Mrs Sinclair.

I do not differ from the propositions of law involved, though not expressed, in this opinion. I think that trustees who incur a liablility which, having reference to the trust which they have accepted, they ought not to incur, cannot claim to be indemnified for so doing out of the trust-funds; on the contrary, they in general are liable personally to make good any loss which the trust-funds have sustained in consequence of their so acting contrary to their duty. And I further agree that trustees are to exercise their own discretion. But I think they may inquire as to what are the wishes and opinions of others, especially of those who are interested, before they finally determine what in the exercise of their own discretion they think expedient, and I think that in this case there is no evidence that the trustees did more than they properly might. The Lord Ordinary seems to ground his opinion principally on a letter of 28th November 1876. Mr Murdoch was a member of a firm of writers—Murdoch & Mac-

pherson—at Huntly, and that firm acted for the trust. In that letter, which, whether it was composed by Mr Murdoch or his partner Mr Macpherson, binds Murdoch as a member of the firm, it is said that their brokers recommended that this stock should be realised, "and our own" (that is, the firm's) "view is that bank stock is not a suitable class of stock for trustees to hold." This was not, however, the view which Mrs Fraser, the framer of the trust, had entertained; and though I suppose everyone connected with the matter now regrets that this view of the firm was not acted upon, I can see nothing to justify the conclusion that the trustees did not, in the exercise of their own discretion, *bona fide*, though as it turns out unfortunately, come to the conclusion that it was expedient to hold this £200. I therefore differ from the Lord Ordinary on the inference of fact to be drawn from the letters.

Lord Gifford says:—"It appears that Mrs Fraser, the truster, at the time of her death held various stocks in railways and other companies, and, in particular, she held £850 of the consolidated stock of the City of Glasgow Bank. It was in reference to this condition of her estate, as I think, that she inserted in her trust-deed the following clause:—'With power also to my trustees to continue to hold any or all of such shares or stock in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained.' The question is, what is the true construction, and what is the true effect of this clause? Now, it is contended that this is a general clause perfectly unlimited, which entitled the trustees not only to defer the winding-up of the trust and the paying of the general residue for some indefinite but reasonable time, and until they found it expedient to sell or realise any shares in joint-stock companies which might be temporarily depressed, but it is said it was a general power entitling the trustees to select and continue, as the permanent investment of the two special legacies of £2000 each, all or any part of the bank stocks or any stocks of which the testatrix might die possessed. After full and repeated consideration I am really unable to come to this conclusion. I think it contrary to the very explicit powers and directions which the testatrix had given in reference to the two legacies of £2000 each, and contrary to the very conception of these legacies themselves. The truster knew, or she had been told—and quite rightly and properly told—that it would be the duty of her trustees immediately after her death to sell out and realise all her shares in trading, joint-stock, and other companies, and she knew, or she had been told, that this was their duty, even if at the time of realisation it should happen that the market was depressed or unfavourable for the realisation of high prices for such descriptions of property. I think she intended to provide for this contingency and no other. She gave her trustees a certain latitude or discretion that they might abstain from selling for such reasonable time as they might consider expedient, and she exempted them from personal responsibility if they should deem it expedient to delay realisation. But all this had reference to her general trust. This discretionary power was granted to the trustees in order to save the estate from loss, from forced realisation at an unfavourable time, to the disadvantage of the residuary legatees. It was for the benefit of the residuary legatees, who were interested only in the residue, that the realisation should not be hurriedly made, and made at a loss. The possible risk of loss from unfavourable realisation had really little or nothing to do with the two specific legacies of £2000 each, which were quite fixed in amount, and the beneficiaries in which as such had no concern with how the residue might turn out, or whether the stocks in public companies were sold at a time of depression or not, so long as there was a residue at all—and the residue here was £1200—it did not matter to the special legatees, who as such had only fixed pecuniary legacies, what loss might occur in the realisation of the general estate, so long as the realisation was not so low as to destroy the residue altogether. That was the concern of the residuary legatees, and these were the whole three children of the testatrix. The continuing to hold stocks which formed part of the trust estate, and the abstaining from selling or realising them, was, I think, all to be before the division of the general residue, and before the payment or the lending out of the pecuniary legacies. The clause, I think, was not intended to govern, and had no reference to the permanent management and investment of the special legacies of £2000 each—a management which might endure for many a long year, and for which the trust-deed makes separate and ample provision. This is the conclusion to which I have been forced to come, though not—as I have said, and especially after hearing your Lordships' opinions—without difficulty and hesitation. It leads to the result that it was *ultra vires* of the trustees to take £200 of the stock of the City of Glasgow Bank as part of the investment of the legacy of £2000 which Mrs Sinclair and her children are interested in."

If this was the true construction of the deed, I think that the trustees could not maintain any claim to be reimbursed from the trust estate for a liability which they ought not to have incurred, whatever might be their claim against the personal interest of those at whose instance and for whose benefit they incurred the liability. But I cannot agree in this construction. I think that if Mrs Fraser had meant to give her trustees a discretion to continue to hold the stocks only until the residue was realised, and no longer, she would have said so in plainer terms, which she certainly has not done. I need not inquire what would have been the case if the trustees had invested some of the money in the purchase of more City of Glasgow Bank stock; that is not what they did. But Mrs Fraser thought that she had invested her property well, and therefore allowed her trustees to continue to hold any of those stocks, though she did not direct them so to do. On this part of the case I agree with the Lord Justice-Clerk and Lord Ormidale, and need not repeat their reasons.

But this does not dispose of the case. The complainer's pleas-in-law below contains these:—"(2) Two separate and distinct trust-estates having been created as applicable to the complainer and Mrs Sinclair respectively, the respondents are not entitled to burden the com-

plainer's estate with losses sustained through the investments made for Mrs Sinclair's trust-estate and behoof. (3) In any view, the trustees having made separate and distinct investments, the one set applicable to Mrs Sinclair, and the other to the complainer, there was thereby, and by the correspondence which preceded and the actings of parties which followed, an arrangement constituted whereby the risk of the investments made on behalf of Mrs Sinclair was left with her, and her share of the trust funds in the trustees' hands, and in no respect with the complainer or her investments. (4) The respondents are barred, by the arrangement entered into with Mrs Sinclair condescended on, from claiming relief against the complainer or the investment made for her behoof."

The pleas-in-law for William Murdoch are, among others—"(2) The trustees having acted within their powers in continuing to hold the bank stock, are entitled to be indemnified out of the trust-estate in their hands for any loss incurred or to be incurred by them in consequence of holding the said stock. (3) The investments of the trust funds having all along stood in the names of the trustees as such, and the trust being one and indivisible, the trustees' lien or right of indemnity subsists and extends over the whole trust estate. (4) The trustees not having by their actings, or by acceptance of the discharge founded on, or in any other way, renounced or restricted the said indemnity as against the complainer, the interim interdict should be recalled, and the reasons of suspension repelled with expenses."

Which is right depends, in my opinion, mainly upon the true construction of the trust instrument which regulates what the trustees could do, but partly on the inference to be drawn by the Court from the documents as to what they did do.

This is, in my opinion, the most difficult part of the case, and I am here obliged to differ from the majority of the Court below both as to the fact and as to the law, for I think the second and third pleas-in-law for the complainer below are well founded, and that it is not made out that the three pleas of the respondent Murdoch apply to it. I do not think it necessary to form any opinion as to the fourth plea of the complainer.

The trustees are by the trust-deed required, before paying over the residue, to make provision for payment of the legacies, and they are empowered "to lend or place on such securities, heritable or moveable, as they shall consider advantageous, the aforesaid legacies of £2000 and £2000 respectively, the said securities to be conceived in favour of my trustees, and that for the purposes of this trust and not otherwise," and to vary the securities from time to time. I have already given my reasons for thinking that they might continue to hold any of the stocks belonging to Mrs Fraser at the time of her decease, though not such as trustees would generally be justified in holding, and were not bound to sell them and invest the £2000 and £2000 in other securities. And I think, therein agreeing with Lord Gifford, and differing from the Lord Justice-Clerk and perhaps from Lord Ormidale, though of that I am not quite sure, that the true construction of the trust-deed is such that the trustees, if not required to sever the securities for the two sums of £2000 and £2000, and set aside certain securities for the one legacy and certain securities for the other, were at least empowered to do so; and I think that they have done so, the two being from the time they so did two distinct branches of the trust for two distinct parties. It certainly, where the trusts remaining to be fulfilled are for the benefit of different parties and quite independent of each other, would be the ordinary and convenient course to do so; and I cannot resist the conclusion from the words of the trust-deed that Mrs Fraser, or rather those who drew up the deed for her, meant that ordinary and convenient course to be followed. It was argued at your Lordships' bar that if such was the intention it ought to have been provided that there should be, or at least might be, separate trustees for the Sinclair family and the Robinson family, and that in the trust-deed now under consideration not only are the same trustees originally appointed, but the power to assume fresh trustees is so worded as to show that they must always be the same.

I quite agree that the intention, if it be what I think it is, could have been more clearly expressed. If it had been provided that the securities for the Sinclair £2000 should be invested in the names of the original trustees and such persons as they might from time to time appoint as trustees for the Sinclair £2000, and a similar provision made as to the Robinson £2000, no one could have doubted that the trusts were intended to be severed. It is because this is not so clearly expressed that the question is one of difficulty. The Lord Justice-Clerk seems to have thought it not a question of any difficulty. He takes the opposite view from that which I do, but he hardly explains his reasons for that opinion. Lord Gifford gives his reasons for taking the view which I take. Lord Ormidale says:—"The separation and allotment of the trust-estate referred to consisted in nothing more than book entries and accounts made, so far as I can discover, for no other purpose than convenience in dealing with the interest of two separate individuals, Mrs Sinclair and Mrs Robinson. There was certainly no transference or investment in any form of the bank stock in name of Mrs Sinclair. It was held at the last and throughout, as it was at the commencement of the trust, in the names of the trustees for the purposes of the trust. Supposing, however, that such a separation and allotment as that alleged by the suspender did take place, the bank stock still continued part of the trust estate as it had previously been. Nor can I find anything in the deed of discharge which was executed by the parties interested, after the trustees had laid aside what they at the time considered sufficient to meet the two legacies of £2000 each. On the contrary, I find that in the trust-deed it is expressly declared that the securities for these legacies shall be conceived in favour of my trustees, and that for the purposes of this trust and no otherwise. Keeping this in view, and that Mrs Sinclair and Mrs Robinson were respectively only entitled to the annual rent or interest arising out of the two legacies of £2000, the capital sum ultimately going on their deaths to others, it cannot admit of doubt, I think, that there were no new and separate trusts in reference to these legacies contemplated by the truster, or could have been created under the deed of settlement."

The inference I draw from the documents, more particularly the deed of discharge, and Messrs Murdoch and Macpherson's mode of stating it in their books, is, that the trustees did (if they had power to do so) sever the investments for the behoof of the Sinclairs from those for behoof of the Robinsons, and declare that the £2000, less legacy-duty, held for behoof of Mrs Robinson and her children was invested in the stocks which are now the subject of the interdict. I think this was done for convenience in dealing with the interests of two separate families, and it is principally because I think this so obviously convenient and usual in such cases that I put the construction on the words of the trust-deed that the intention was to authorise, if not require, this to be done, though I think that this intention might have been more clearly expressed.

If this is right, I think that the second plea of the complainer correctly states the law, and that the right which the trustees have to come upon the fund for indemnity is limited to the trust funds on account of which the £200 bank stock was retained and the liability incurred. The Lord Justice-Clerk says that the amount of the calls which the trustees paid was "a direct debt of the maker of the trust for which the whole of her trust funds in the hands of the trustees must be liable." I think, if it was a direct debt of Mrs Fraser, the whole of her funds, whether included in the trust or not, would be liable; but I cannot agree that it ever was a debt from her at all. It did not accrue till more than two years after her death, and the liability is incurred, not because the shares had been hers at the time of her death, but because her trustees chose (justifiably as I think, though most unfortunately) to continue to hold them till after the bank stopped, and that, according to the view I take, they did for the benefit of the Sinclair family, and not for the benefit of the maker of the trust or the trust generally.

It was argued that the maker of a trust is personally bound to indemnify the trustees for all costs and liabilities properly incurred in the execution of the trust, but I do not think this is the law. No doubt anyone who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound at law, as well as in equity, to indemnify him; this principle applies to many cases, and where a trust is for the benefit of the maker of the trust, it may apply to a trustee. *Balsh* v. *Hyam*, 2 Peere Williams, 453, is a good example of a case where it did apply; and there are many others. In *Jervis* v. *Wolverston*, Law Reports 18 Equity 24, the Master of the Rolls goes so far to say—"I take it to be a general rule that where persons accept at the request of another, and that other is a *cestuique* trust, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust." Perhaps this rule is too broadly stated, as something must depend on the nature of the trust and of the interest of the *cestuique* trust, but it is not necessary now to say more than that this rule has no application to a case where the maker of the trust is not a *cestuique* trust. When he is not, I think he cannot merely as maker of a trust be so liable. The trustee voluntarily accepts the trust, and can only incur liability in consequence of his own act in so accepting; unless there be an express or implied bargain for indemnity from the maker of the trust, he must be taken to accept the trust, relying on the trust funds. He has, no doubt, a right to charge the trust funds with all just allowances.

Lord Cottenham, in *Attorney-General* v. *Norwich*, 2 Mylne and Craig, 244, states the rule thus—"I apprehend it to be quite clear, according to the rule which applies to all cases of trust, that if necessary expenses are incurred in the execution of a trust, or in the performance of the duties thrown on any parties, and arising out of the situation in which they are placed, such parties are entitled, without any express provision for that purpose, to make the payments required to meet those expenses out of the funds in their hands belonging to the trust." But this, I think, does not extend so far as to enable them to apply all funds, part of the property which they took in trust, and of which they are not divested, in relief of expenses incurred on behalf of a separate branch of the trust, and not at all on behalf of the funds from which it is sought to obtain relief. In the *Attorney-General* v. *Lawes*, 8 Hare, 43, Vice-Chancellor Wigram states it to be "a well settled rule, that where a legacy has been severed from the bulk of an estate, and become the subject of litigation, that particular fund, and not the general estate, is to bear the costs." If this was merely a rule of practice as to costs, however well settled it might be in England, it could have no effect in a Scotch case, but it seems to me to be an application of a general principle, which, I should think must be the same in every system of jurisprudence in which trusts exist.

That principle is, I think, involved in the decision of Lord Eldon in *ex parte* Garland, 10 Vesey junior, 110. There a miller made his will, dated 17th February 1798. He left all his personal property to three trustees, one of whom was his wife, Margaret Ballman. He also appointed them his executors, but that I think not material. By the will the testator directed that his trade of a miller, and the farming business then carried on by him, should be carried on by Margaret Ballman until his trustees should think proper to establish his sons or either of them therein, and he directed his trustees, upon so settling his sons or either of them in the business, to permit them to take off the stock, crop, and other effects in the said business at a fair valuation, and to take a bond or note from them for the amount. He also directed that as long as the businesses should be carried on by his wife, the profits thereof should be applied for her own use and for the maintenance and education of his children, and that an inventory and valuation of his stock, crop, and effects in his said businesses should be taken within six weeks after his decease, and that any sums not exceeding £300, which by a codicil he increased to £600, should be paid by his trustees to Margaret Ballman out of his personal estate for the purpose of enabling her to carry on the businesses, and that she should give notes of hand to the other trustees for the sums so advanced to her and the amount of the valuation.

It is not stated when the testator died—probably it was not long after the date of his will. After his death Margaret Ballman carried on the

trades till December 1801, when she became bankrupt. She had given notes of hand to the trustees for the sum of £1351, 5s., the amount of the valuation, and £600 which they had advanced to her in pursuance of the directions in the will. She also had received £768, 12s. 4d. of the testator's assets. The surviving trustee proved under the commission. The assignees presented a petition praying that the proof might be expunged, and that it might be declared that the whole of the personal estate of the testator was liable to all the debts contracted by the bankrupt in carrying on the trades under the directions of the will. The Lord Chancellor expressed a clear opinion that the surviving trustee as a creditor on the notes must be postponed to the creditors of the bankrupt, but directed a further argument as to the other point.

The counsel for the assignees argued that if a trustee is directed to carry on a trade, and does so, he makes himself personally liable for the whole of the debts contracted in that trade, which, hard as it may be, is clearly law. He then argued that it followed that he must have the right of resorting for his indemnity to the whole personal estate given to him with a direction to carry on the trade, and that it followed that the creditors must have it, at least by circuity, to the same extent.

Lord Eldon, however, said that the case of the executor was no doubt very hard, as he might be proceeded against as a bankrupt though he was but a trustee, "but he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility." He says that the creditors "have something very like a lien upon the estate embarked in the trade; they have not a lien upon anything else." No more is said as to the argument that the trustee had a personal right to indemnity, and that consequently her assignees had a similar right at least by circuity.

The extent of the right which trustees have to be indemnified, and the manner in which creditors can by circuity work it for their own benefit, were discussed by the Master of the Rolls *in re Johnston* (L.R. 15 Ch. Div. 548). The Master of the Rolls there says that what *ex parte Garland* decides is "that the claim of the creditors is limited to the assets devoted to trade."

On the question whether the whole assets of the testator were directly liable to the debts incurred in the trade which the testator directed to be carried on, Lord Eldon proceeds very much on the general inconvenience that would be produced if the estate could not be wound up effectually so long as the trade was carried on, perhaps for a century. In the case before him the trade had not been carried on for more than two years, and at most a few months more, but in laying down the law he had to consider what might have happened. I think it clearly must have been the Lord Chancellor's opinion that the trustee who of his own choice placed himself in the situation of incurring liability for a trade which the framer of the trust directed to be carried on with a particular part of his assets, had no right to come for indemnity upon the rest of the assets.

And this is, I think, the guiding principle to be applied in this case, as soon as it is determined that the two branches of the trust—that for the Sinclair family and that for the Robinson family—were severed. On that subject I have already said what is my view. I think, therefore, that the interlocutor of the Lord Ordinary was right, though not for the reason given in his note, and that the appeal should be allowed with costs, and that interlocutor restored.

Lord Watson—My Lords, I am of opinion that the interlocutors under appeal ought to be reversed, and that the judgment of the Lord Ordinary, which was approved by Lord Gifford, one of the three Judges of the Second Division, ought to be restored. It is necessary to explain the grounds upon which I have come to that conclusion, because I concur in part only of the opinion of Lord Gifford, and am unable to assent to the reasons assigned by the Lord Ordinary for his judgment.

The trusts of the late Mrs Fraser's settlement are not complicated. After providing in common form for payment of her debts, deathbed and funeral expenses, the testatrix appoints her trustees to make payment of the interest or annual rent of £2000 to her daughter Mrs Sinclair during her lifetime, and of the capital to her children after her decease, and to make payment in like manner of the interest or annual-rent and of the capital to her daughter Mrs Robinson and her children. The testatrix then bequeaths £5 to each of her trustees, and directs them after payment of debts, and after "making provision for payment of the legacies above mentioned," to divide the free residue of the trust estate equally between her son James Robb and her two daughters Mrs Sinclair and Mrs Robinson.

The estate falling under the trust, amounting in value to £5000 or thereby, consisted chiefly of railway stocks and £850 consolidated stock of the City of Glasgow Bank, which was duly transferred to the respondent William Murdoch and his co-trustee James Fraser Robb. The trustees in the course of their administration sold bank stock to the extent of £650, and after paying debts, expenses, and minor bequests they proceeded to make provision for payment of the two legacies of £2000 to the daughters of the testatrix and their issue by appropriating to them severally the remaining stocks which had belonged to the testatrix at their current value in the market. In this division the unsold balance of £200 City Bank stock was, with the knowledge and consent of Mrs Sinclair, appropriated to her and her children as representing part of their £2000. The funds remaining in the hands of the trustees after such appropriation were equally divided among the three residuary legatees. These arrangements are narrated in detail in a deed of discharge executed by the residuary legatees in March and May 1877. It proceeds upon the recital that the trustees "have invested" each of the two legacies of £2000 upon the respective stocks therein specified; and in respect that they had been paid or received credit for their several shares of the remainder the residuary legatees thereby exoner the trustees of their whole actings and management, and discharge all claims of residue competent to them under the provisions of the deed of trust. The books and accounts of the trust show that from the time the two legacies were thus severed each of the daughters of the testatrix received the income of the stocks which

had been assigned to herself and her family, under deduction of expenses applicable to her own stocks.

It appears to me that all these acts of administration were authorised by the terms of the trust-deed, and were not therefore *ultra vires* of the trustees.

Lord Gifford was of opinion that in assigning these stocks to the beneficiaries the trustees acted in excess of their powers; and it would certainly have been their plain duty to realise had not the testatrix given them express power "to continue to hold all or any of such shares or stocks in public or other companies as may pertain and belong to me at the time of my decease, should they consider it advisable or expedient to do so, without any personal responsibility on my trustees for loss, if any, thereby sustained." His Lordship held that this was not a continuing power applicable to all the purposes of the trust, but merely a power to delay realisation, and consequently to postpone the distribution of the residue. I am unable to adopt that view. A general power to retain stocks in which the testatrix has already invested does not differ in its scope from a general power to invest in these stocks. What the trustees can do in the one case by making a new, they can effect in the other case by retaining an old investment; and in the present instance the terms of the power are wide enough to cover all purposes of the trust requiring investment. I therefore think that the trustees were entitled in their discretion to retain these stocks as an investment of the £2000 legacies, instead of realising the stocks and then investing £4000 upon moveable or heritable securities.

The Lord Ordinary decided against the respondent in this appeal on the ground that in retaining the £200 City Bank stock as part of Mrs Sinclair's legacy the trustees did not act within the power entrusted to them by the testatrix, that they surrendered their independent judgment, and acted in accordance with the wishes of Mrs Sinclair, and against their own convictions. There does not appear to me to be any evidence sufficient to bring such a serious charge home to the trustees. No doubt they did consult the beneficiary most interested in the matter, and what they did had her approval; but I do not think there is ground for the inference that the trustees did not regard the retention of the bank stock as a proper act of administration, or that they thought it would be attended with any appreciable risk either to the beneficiaries or to themselves. I am further of opinion that the trustees had power to sever these £2000 legacies, and to place them in separate investments for behoof of the respective beneficiaries. The trust-deed authorises them to lend out upon certain securities "the foresaid legacies of £2000 and £2000 respectively," and these words appear to me to confer upon the trustees, by plain implication, a right to make the severance if they chose. It may be doubted whether in the due administration of the trust the trustees could have declined to sever these legacies, but in the view which I take of the case it is unnecessary to decide that point.

If, instead of severing the two legacies, the trustees had been entitled and had thought fit to make provision for their payment by retaining in their hands an undivided fund of £4000, the present question could hardly have arisen, assuming always that the trustees had power to retain the £200 City Bank stock as a trust investment after distribution of the residue. In that case the two families of Sinclair and Robinson would have been equally interested in the investment; they would have shared in any increment of the value of the stock, and would have borne alike any loss arising from its depreciation. I did not understand it to be disputed, and I think it clear, that had matters stood in that position the trustees would have been entitled to recoup calls made by them to the liquidators of the City Bank out of the remaining funds or stocks held by them for the purpose of paying the two legacies.

The real question in this case, according to my apprehension of it, comes to be, What was the effect of the severance of the two legacies upon the right of indemnity competent to these trustees so long as they held, and were justified in holding, the trust estate as an undivided whole? I cannot agree with the opinion expressed by the late Lord Ormidale, one of the two Judges composing the majority of the Second Division, to the effect that the appropriation of the stocks held by the trustees consisted of mere book entries, made for convenience in dealing with the interest of the liferenters Mrs Sinclair and Mrs Robinson. The appropriation of these stocks, if authorised—as I hold it to have been—by the terms of the trust-deed, was an act of administration which the trustees of themselves had no power to undo. The immediate effect of that act was to alter the pecuniary interests of the two sets of beneficiaries concerned, and the relations subsisting between them and the trustees. The beneficial interests of Mrs Sinclair and her issue on the one hand, and of Mrs Robinson and her children on the other, were thenceforth limited to the stocks severally assigned to them, and the trustees ceased to be under any liability to account to either liferentrix and her children for the stocks appropriated to the others. Two trusts were created instead of one, with separate funds and different beneficiaries, having no community of interest. Such being the legal results of the appropriation, it is, in my opinion, immaterial whether the authority to constitute these two trusts was derived from one and the same deed, or whether each was constituted by virtue of a separate deed under the hand of the testatrix.

In that state of circumstances I am at a loss to conceive upon what principle of law or equity the respondent can claim to be indemnified for loss arising upon the £200 City Bank Stock appropriated to Mrs Sinclair out of the funds assigned to the appellant and her children. There is no positive rule of law upon which such a claim can be supported, and I do not know of any equitable claim to indemnity recognised by the law of Scotland which does not rest upon the maxim of civil law "*Cujus est commodum ejus quoque debet esse incommodum.*" Those authorities in the law of England to which your Lordships have referred lead to precisely the same result. It may be a hard thing that the respondent has personally to bear loss arising upon a trust investment in which he had no personal interest; but he voluntarily undertook the risk when he consented to hold City Bank stock as trustee for behoof of Mrs Sinclair and her children. In my opinion, it would be a still harder thing to inflict

that loss upon the appellant, who had as little personal interest in the matter as the respondent, but, unlike the respondent, had no power either to prevent such an investment of Mrs Sinclair's legacy or to protect herself from its consequences.

In the Court below the Lord Justice-Clerk decided in favour of the respondent, solely on the ground that the calls made by the liquidators of the City Bank constituted a debt of the truster Mrs Fraser, and if that assumption had been well founded it appears to me that the judgment of the Second Division would have been right. But it seems clear that these calls were never in any sense, a debt due by the truster or by her estate. The claim of the liquidators was a claim against the trustees personally, arising out of that course of administration by which they became and continued to be partners of the bank. But if any doubt could be raised on this point it is completely disposed of by the judgment of Lord Eldon in *ex parte Garland*, 10 Vesey 119.

I therefore concur in the judgment proposed by your Lordship.

Interlocutors appealed from reversed, and interlocutor of the Lord Ordinary restored.

Counsel for Appellant—Balfour, S.-G.—F. Moncreiff. Agents—Holms, Anton, & Greig—Alexander Morison, S.S.C.

Counsel for Respondents—Chitty, Q.C.—Pearson. Agents—Martin & Leslie—Davidson & Syme, W.S.

Tuesday, May 17.

(Before Lord Chancellor Selborne, Lords Blackburn and Watson).

MACDOUGALL *v.* LORD BREADALBANE.

(*Ante*, p. 40, 8 R. 42.)

Superior and Vassal — Non-Entry — Superior's Title.

Held (*aff.* judgment of the Court of Session, and following *Innes* v. *Gordon*, Nov. 20, 1844, 7 D. 141) that in an action by a superior for payment of a casualty against the singular successor of a vassal who has recognised the superior's predecessors by taking entry from them, it lies upon the defender to establish that the superiority lies with some other than the pursuer if he denies the title of superiority.

This case was reported in the Court of Session of date Nov. 4, 1880 (*ante*, p. 40, 8 R. 42). The defender appealed to the House of Lords, and their Lordships without calling on the respondent's counsel dismissed the appeal.

Counsel for Appellant and Defender—Davey, Q.C. — Grosvenor Woods. Agents — William Robertson—H. & H. Tod, W.S.

Counsel for Respondent and Pursuer—Balfour, S.-G.—Young. Agents—R. S. Taylor, Son, & Humbert—Davidson & Syme, W.S.

END OF VOLUME XVIII.