had been done, presented a reclaiming note, but subsequently to the expiry of the reclaiming days, asking to be reponed against that interlocutor.

Authority—*Milne* v. *Maccallum*, Jan. 22, 1878, 5 R. 546.

At advising—

LORD PRESIDENT—On looking into this case I have no doubt as to the competency of this proceeding, dealing with it as a reponing note. It is a proceeding in the absence of a creditor, and though there is no provision in the Bankruptcy Statute as to reponing in such circumstances, we are entitled to treat reclaiming notes in bankruptcy questions as we should a reclaiming note in ordinary actions. By the provisions of the Act of Sederunt of 11th July 1828 a note to repone may be presented, and though that Act does not say that such a note may be presented after the reclaiming days are past, yet that is a matter of decision in the leading case of *The Scottish Union Insurance Company* v. *Calderwood*, July 8, 1836, 14 S. 1114. It would be very inconvenient and very unjust if we could not apply the principle of the Act of Sederunt, and the cases which followed on it, to reclaiming notes in bankruptcy cases as well as to others. This is clearly a reponing note, for the interlocutor was pronounced in absence, and though there is no statutory provision ordaining intimation to a dissenting creditor of the presentation of a petition for a trustee's discharge, still it has been adjudged by the Court that such intimation ought to be given wherever it appears that any creditor dissented from the resolution of the body of the creditors allowing the trustee to apply for his discharge. The complaint here is that no notice was given to the dissenting creditor, and therefore I think that we are in a position to repone. The Court in *Milne's* case dealt with the application as a reponing note, and did not enter into the merits, but remitted to the Lord Ordinary to hear the reclaimer's objection to the trustee's discharge; and I propose that we should follow that course here.

LORD DEAS, LORD MURE, and LORD SHAND concurred.

The Court therefore recalled the interlocutor, and remitted to the Lord Ordinary to hear the reclaimer's objections to the trustee's discharge.

Counsel for Hendrie—Shaw. Agents—

Counsel for Trustee (Respondent)—Macfarlane. Agents—Boyd, Macdonald, & Co., S.S.C.

Friday, July 11.

OUTER HOUSE.

[Lord Rutherfurd Clark.

MP.—THE ANGLO-FOREIGN BANKING COMPANY.

Process—Multiplepoinding—Where Decree given, but not extracted, in favour of Claimant who afterwards became Bankrupt—Riding Claim by Creditors.

In a multiplepoinding a riding claim was tendered on behalf of creditors of a claimant who had obtained decree for payment, but had not extracted it. The Lord Ordinary refused to allow the claim to be received, on the ground that he could not give two decrees for the same sum to different claimants, and that to render a riding claim admissible it must be lodged before the original claimant had obtained a decree for payment.

Counsel for Creditors of Claimant—J. C. Smith. Agent—A. Clark, S.S.C.

Counsel for other Claimants—Innes—Thorburn. Agents—Wallace & Foster, S.S.C.—Boyd, Macdonald, & Co., S.S.C.

Friday, July 11.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—(*BROWNLIE'S CASE*)—BROWNLIE AND OTHERS *v.* BROWNLIE'S TRUSTEES.

Trust—Realisation of Trust Property—Bank Stock—Right of Relief—Duty of Trustee to Realise where Truster's Funds invested in Bank Stock.

In an antenuptial contract of marriage the husband made over to trustees the whole heritable and moveable subjects belonging to him, "the foresaid subjects to be held and administered by the said trustees for the following purposes." These purposes included the payment of an annuity to his wife and provisions to his children, which were payable at certain postponed periods. He predeceased his wife, and on his death his trustees accepted office. The trust-funds consisted, *inter alia*, of 74½ shares of a bank of unlimited liability. The trustees sold the greater part of the shares immediately after the death of the truster in order to pay off advances made to him by the bank, but the balance, consisting of $5\frac{3}{10}$ shares, they continued to hold as part of the trust-estate. Thirteen years after the trustees had accepted office the bank failed with very large liability. The trustees were placed on the list of contributories, and sought to recoup themselves out of the trust-fund for the calls.

In a suspension and interdict by the beneficiaries, *held* (*diss.* Lord Deas) (1) that the retention by the trustees, after a reasonable time had been allowed for realisation, of an investment which they themselves had at

common law no power to make (and the shares in this case were held to be of that nature), was as much a breach of duty as if they had made the purchase themselves, unless the truster in some way authorised them to retain the investment; and (2) that there was nothing in the circumstances of the present case to bring it within the exception to the general rule—*trustees therefore held not entitled to relief.*

The respondents in this suspension and interdict were two of the children of the late Thomas Brownlie, builder in Glasgow, and the complainers were his other children. Mr Brownlie was married in 1843, and died in 1865, survived by his wife. An antenuptial contract of marriage had been executed at the date of the marriage in favour of certain trustees, of whom two only survived Brownlie's death and accepted office. They resigned in the following year—in April 1866—having accepted merely for the purpose of assuming new trustees. The respondents were the surviving trustees so assumed.

By this antenuptial contract "the said Thomas Brownlie hereby dispones, assigns, conveys, and makes over to and in favour of the said [names the trustees], and the survivors or survivor, acceptors or acceptor of them, and to such other person or persons as the said trustees acting for the time, or the major part of them, shall appoint, all and sundry lands, heritages, and other heritable subjects, and all goods, gear, debts, sums of money, and other moveable estate pertaining and belonging, or that shall pertain and belong, or be due and addebted, to him at the period of his death, with the whole writs and evidents of said subjects, and other documents and instructions of the same, the foresaid subjects to be held and administered by the said trustees for the following purposes." These purposes were—(1) To pay debts and set aside a sum sufficient to meet an annuity to his widow; (2) to hold the remainder of his estate for behoof of his children, including the respondent Eliza Barr Brownlie, his daughter by a former marriage, the shares of the said children being payable at certain postponed periods, and the income, and if necessary part of the capital, to be applied as provided in the deed for behoof of the children; (3) provision for the truster retaining the full power of administration over his whole property in the event of his surviving his wife, and for the whole funds reverting to his estate in the event of failure of issue of the marriage; (4) payment of an allowance for mournings, and an allowance to the truster's widow of the use of his household furniture during her life.

At the date of this action Mrs Brownlie, the widow, was still alive, and the postponed periods at which the children's shares were to become payable had not arrived.

At the date of Mr Brownlie's death his estate included 74½ shares in the City of Glasgow Bank. These shares were held by the bank as a security for advances to him, and on his death the original trustees under the marriage-contract sold so much of them as was necessary to pay off the advances. There remained a balance of $5\frac{2}{5}$ shares, equal to £515 stock, which was retained by the original trustees and by their successors in office down to the failure of the bank on 2d October 1878. The trustees having been placed on the list of contributories, proposed to recoup themselves out of the trust-estate for any calls they might have to pay. This suspension and interdict was in consequence presented.

Pleaded for the complainers—"The respondents having had no power under the deed constituting the trust or otherwise to hold the bank stock in question, but having been bound to realise the same with all due despatch, they are not entitled to apply the trust-funds in payment of calls due by them in respect of said stock, and the complainers are entitled to interdict against their doing so as craved."

Pleaded for the respondents—"In respect that the said bank stock was the property of the truster, and is not an investment made by the respondents, the respondents were not bound to realise the same, but were justified in relying upon the judiciousness of their author, and the present application should therefore be dismissed with costs."

The Lord Ordinary (YOUNG) granted suspension and interdict, and in giving judgment observed—"The question here regards the conduct of marriage-contract and testamentary trustees—for they are both—in retaining for a period of over thirteen years, I think, certain shares of the City of Glasgow Bank which had been left by the truster at his death in 1865. He was at his death proprietor of seventy-four shares, and he conveyed these with all his estate, heritable and moveable—the conveyance being general—to his trustees, subject of course to the directions of the deed. In 1869 the trustees realised sixty-nine of these shares, retaining five, and these five they retained from the truster's death in 1865—the particular trustees before us were assumed in 1866, and therefore it is more accurate to say they retained them from 1866—till the stoppage of the bank in 1878; and the question is, Whether they shall have relief from the trust-estate for the calls for which in the first instance they are of course, according to the decided cases, personally responsible? The beneficiaries in the trust-estate say that they are not entitled to such relief, because it was misconduct and breach of trust on their part—that is to say, contrary to their trust duty—to retain these shares, their duty being to realise them. They answer that the shares were in truth an investment made by the truster himself, and left by him at his death, and that when an investment, however hazardous, or at least so hazardous as this, is made by the truster himself, and left standing at his death, his trustees are in safety to retain it, and shall have relief against the trust-estate for any liability thence arising. I am of opinion that the trustees did not act according to their duty, although I am thoroughly persuaded that they acted in perfect good faith and believed that they were acting for the best in retaining these shares unrealised. The matter depends upon the rules of the common law applicable to the conduct of trustees in the matter of investment, for the trust-deed contains no directions or restrictions on the subject. Now, I think it is the law that trustees are not at liberty to retain any more than to make an investment in shares of an unlimited banking company; that it is their duty to put the funds committed to their charge in a position of security, and that they are no more at liberty to continue a trade, or any hazardous business in which the truster

was engaged, or to hold shares in a trading concern which he held, than themselves to make a trade investment. It is their duty to put the trust-funds in a position of safety although the truster may have left them in a position of danger. Trustees retaining or making a hazardous investment, act at their own risk, and in a manner most unfavourable to themselves, because they can derive no profit from the increased return which the trust-funds thereby yield. That must go to the trust-estate; while, on the other hand, if a loss occurs, they will have to bear it themselves. I use the word investment for brevity, although it is misleading without explanation, for shares in a banking company are not investment. The holders of such shares are engaged in the trade of banking. Here the deceased truster was a partner of the bank, and to the extent of the shares retained by the trustees after his decease they continued the trade at their own proper risk as partners of the bank. The only question here being whether or not they shall have relief for the consequences of that risk against the trust-estate, I am of opinion that they cannot have that relief, and that I must therefore sustain the suspension and prohibit the trustees from applying trust-funds in payment of these calls, and I am sorry that I must add to the hardship by finding them liable in expenses."

The respondents reclaimed, and argued—(1) In Scotland there was no rule of law obliging trustees to sell shares like the present which the truster had left as part of his estate. There might be such a rule in England—*Grayburn* v. *Clarkson; Skullthorpe* v. *Tipper*. In Scotland a trustee must withdraw the trust-funds from a private partnership, and he was not at liberty himself to make an investment in the shares of companies, but beyond these the decisions had not gone. And a trustee's powers of investment even were now very considerable, much wider than in England—*Grainger's Curator—Lloyd's Curator*. (2) The matter therefore depended entirely upon the truster's intention. Now, he had left his money invested in these shares, which were an investment of a sort highly thought of in Scotland, and he directed that the foresaid subjects were to be "held and administered" by his trustees for certain purposes, which were not fulfilled even yet. So far therefore as the truster's intention was concerned, he plainly meant that his trustees might continue to hold these shares if they thought fit.

Authorities—*Pearson* v. *Grierson*, Nov. 19, 1825, 4 S. 205; *Accountant of Court* v. *Baird*, June 29, 1858, 20 D. 1176; *Accountant of Court* v. *Gilray*, May 21, 1872, 10 Macph. 715; *Grainger's Curator*, Feb. 23, 1876, 3 R. 479; *Lloyd's Curator*, Dec. 1, 1877, 5 R. 289; *Grayburn* v. *Clarkson*, May 2, 1868, L.R., 3 Ch. App. 605; *Skullthorpe* v. *Tipper*, Dec. 20, 1871, L.R., 13 Eq. 232.

Argued for the complainers—The rule in England was well settled that there must be realisation of money belonging to a trust which was exposed to the perils of trade as soon as the circumstances of each case permitted. That rule had not perhaps been laid down so broadly in Scotland, but the principle of Scotch law was the same in directing trustees to withdraw trust-money embarked in a private partnership, and in prohibiting them from making fresh investments with the trust-funds in trading companies of any sort. That last really settled the question, for it was impossible to distinguish an investment made by the trustee from one made by the truster and continued without express authority by the trustee. Because a truster chose to speculate, that was no reason for his trustee doing so after his death, and was no guide to the truster's intention with regard to his trustee's course of management.

Authorities—*Cochrane* v. *Black*, Feb. 1, 1855, 17 D. 321; *Hughes*, 22 Beavan, 81; *Marsden* v. *Kemp*, L.R., 5 Chanc. Div. 598; Lewin on Trusts, 264, 5.

At advising—

LORD PRESIDENT—The respondents in this application for interdict are the trustees under an antenuptial contract of marriage dated 6th May 1843, between Thomas Brownlie and his spouse. They have been made contributories of the City of Glasgow Bank in respect of certain shares, being part of the trust-estate in their hands, and which shares or stock is entered on the register of shareholders as owned by them. Calls have been made, and the trustees propose to pay the amount of the calls out of the trust-estate. The application for interdict is at the instance of the beneficiaries under this trust, and is based upon the allegation that the trustees had no power to hold any part of the trust-estate invested in such a trading concern as the City of Glasgow Bank. The antenuptial contract among other things conveyed to the trustees the whole estate of Mr Brownlie, and it made provision for the lady in the event of her surviving her husband, and also for the children of the marriage, and so it came to be in effect not merely a deed *inter vivos*, but also in its ultimate operation and effect a testamentary settlement. Mr Brownlie died on the 25th of October 1865, and it appears that among other personal estate which he left behind him he was possessed of 74½ shares of the City of Glasgow Bank. He was also owing a very considerable sum of money to the bank upon overdrafts on his account, and the trustees very soon after the testator's death, with a view to pay off the balance of his account, sold the greater part of his stock in that bank, and with the proceeds of the sale they paid off the balance. But they did not sell the whole of that stock. They retained five shares and some fractions, equal to £515 of stock; and that amount of stock they retained down to the time when the bank went into liquidation. The question is, whether the trustees are personally liable not merely as contributories to the bank, but in a question with the beneficiaries under this trust, for what they did in retaining this £515 of stock at the time when they sold the rest of the stock which had been possessed by Mr Brownlie?

There are no special powers in the deed as to investment, and therefore the powers of the trustees in this respect must depend either upon common law or upon statute. The Trusts Act of 1867, which was not an existing Act at the time when this trust came into operation, but which still may be considered as regulating existing trusts after it was passed, makes this provision regarding investments by trustees in the 5th section—"Trustees under any trust-deed may, unless the contrary be expressly provided in such trust-deed, invest the trust-funds in the purchase of any of the Government stocks, public funds, or securities of the United Kingdom, or stock of the

Bank of England, or may lend the trust funds on the security of any of the aforesaid stocks or funds, or on the security of heritable property in Scotland, and may from time to time at their discretion vary any such investment or loan." And the 6th section provides that "the powers of investment conferred by this Act shall not be held or construed as restricting or controlling any powers of investment of trust funds expressly contained in any trust deed." Now, it appears to me that the powers here specified are very much what trustees possess at common law, and that these sections of the Trusts Act of 1867 are really very little more than declaratory of the common law of Scotland in this respect, and therefore if the investment in City of Glasgow Bank stock had been made by the trustees themselves, I think it could hardly have been made a question that that would have been an investment which they had no power to make, and that they would have been answerable for the consequences.

But then it is contended that as the stock belonged to the truster himself, and as he left it as part of his trust-estate, the trustees were thereby authorised to retain it or some portion of it if they thought fit. Now, I am not able to give effect to that contention. It appears to me that the retention by trustees after a reasonable time allowed for realisation of an investment which they had no power themselves to make is as much a breach of duty as if they had made it themselves, unless the truster has in some way authorised them to retain it. While the truster is alive he is absolute master of his own estate, and he may do with it what he will. He may be of opinion that by his own superior knowledge and skill he can invest in perilous undertakings with little risk of loss and great probability of gain, or he may choose to gratify his own desire for excitement by what other people would think to be imprudent speculation, and he may even to a certain extent be justified in speculating by a well founded confidence in his own judgment and foresight. But trustees receiving a conveyance of his estate from him *mortis causa* are not entitled to deal with it as if they were owners, and the deceased owner cannot reasonably be supposed, unless he has expressly said so, to authorise them to continue his speculation. He selects them, not with that view, but because he believes them qualified for a different office and purpose altogether—for prudent administration, realisation, and distribution. The limits of the trustees' powers and liabilities as to investment must depend of course primarily on the provisions of the deed, if there be any deed, and otherwise on the rules of common or statute law, and not on the character and conduct of the truster in the management of his affairs during his lifetime, or on an inquiry how far he was a prudent and safe investor or a rash and imprudent speculator. Accordingly, I think it is well settled that to retain an unsafe and improper investment after it could be converted and realised is equivalent, as regards the duty and liability of trustees, to making the same investment by the trustees themselves. They are just as little entitled to continue the truster's imprudence as to commit it themselves. This is nowhere more accurately or clearly expressed than in the judgments of the late Lord Justice-Clerk (Hope) and Lord Wood in the case of *Cochrane* v. *Black*, 17 D. 321. The latter learned judge distinctly affirms "that it makes no difference in the case that the trustee has not directly embarked the trust money in trade or business, but has only not withdrawn it from the parties in whose hands it had been placed by the truster, if the trust-deed give no special authority to allow it to be made. What the truster may have done during his life is no rule for the conduct of trustees appointed by him for the management of his estate after his death." I entirely adopt that view of the law, and upon that ground I feel compelled to adhere to the Lord Ordinary's interlocutor.

Lord Deas—The deed upon which this question arises is a marriage-contract between Mr and Mrs Brownlie entered into upon the 6th of May 1843. Mr Brownlie died on the 25th of October 1865, and then his succession came to be regulated by the clauses in the contract which provided for that event. Mr Brownlie held 74½ shares in the City of Glasgow Bank. The trustees sold a large portion of these, but they retained five and three-twentieths of stock, equal to £515 of stock, and it is the calls upon that £515 of stock which are here in question.

Now, I look to see in the first place whether these trustees had any power to sell anything which belonged to the deceased except at their own risk. The marriage-contract contains no power of sale. The only way in which a power of sale can be inferred at all is from the Statute of 1867—the 30th and 31st of Victoria, c. 97. Section 2 of that statute confers a variety of powers which trustees were not understood to have before unless they had them conferred upon them. But among these powers in section 2 the power of sale is not one. The power of sale is conferred by section 3, which provides that it shall be competent to the trustees on their petition to the Court to sell, and the words are "on being satisfied (*i.e.*, on the Court being satisfied) that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof." Under that statute the trustees cannot sell at their own hand. They can only apply to the Court to give the power, and the Court are only to grant it if they are satisfied of these two things—in the first place, that it is expedient in the execution of the trust, and in the second place, that it is not inconsistent with the intention of the truster as expressed in the trust-deed. I do not see therefore where the power of sale is in this case at all. I am not aware that trustees had the power of sale at common law. The enactment in section 3 was passed simply because they had not that power, and where that power is not conferred—which is this case—they can only get it by applying to the Court and satisfying the Court of these two things. There is no application to the Court here; there is no power to sell given by the Court here; and consequently I deal with this as a case in which there is no power conferred unless there is something in the deed which necessarily implies a power, and which something I cannot find, but I find what I think the reverse.

The truster makes over to the trustees the whole estate, heritable and moveable, that shall pertain or belong to him at his death, and with the whole writs and evidents of said subjects, "the foresaid subjects" [*i.e.* the whole] "to be held and administered by the said trustees for the fol-

lowing purposes, viz."—First, after the payment of the debts and the annuity, they are to hold "the remainder of the estate and effects above conveyed for the use and behoof of the children of the said intended marriage, if any such there be, and also of Elizabeth Barr Brownlie," his daughter by a former marriage. And what is to be done with it? They are to hold it "to be distributed among them share and share alike in manner hereinafter mentioned." And then it goes on that upon the decease of the widow, or if she enters into a second marriage, there is to be a sum set apart for the annuity; and it is declared that if there is more than one child of the marriage the trustees shall have power to make an additional allowance for their maintenance and education, with a due regard to the amount of the trust funds, "and declaring that the respective shares of the children shall be payable to them upon the youngest of the said children attaining twenty-five years of age complete and not sooner; but in the event of any of the said children entering into business after having attained the age of twenty-one years complete, or in the event of any of the said children, being daughters, entering into marriage, the said trustees shall have full power to advance and make payment to such child or children of a portion of their share," and so on. I read the deed therefore as directing that the trustees are to hold these funds until the youngest child attains the age of twenty-five, and then to distribute them among them. There is not a word there to imply a power of sale—quite the reverse. And therefore in place of the power of sale being consistent with the trust-deed, it seems to me to be just the very opposite.

For my own part, I am not in the least prepared to hold that trustees retaining investments of funds in the shape and position in which the truster held them during his life and left them at his death is the same thing as themselves making the investments. I think it is a very different thing, and that, where they hold the funds as they were at the truster's death, the only ground of liability must be that it is a malfeasance or breach of trust for which they are to be personally liable. I do not know anything in the law or practice of this country to sanction a doctrine of that kind. The position of trustees has of late years become perilous enough, and in *Muir's* case we decided that they were personally liable under circumstances of very great hardship. I am not aware that the decision in *Muir's* case implies that the law of trusts is the same in all respects in Scotland as it is in England. The very reverse was explicitly laid down in the House of Lords in that case, and I am not aware that by the law of Scotland the mere fact of trustees keeping investments exactly as the truster left them is a breach of trust for which they are to be held liable unless there is something in the trust-deed to imply that result; and still less am I aware that we have any such law where, according to the fair reading of the deed, the very opposite was the intention of the testator—where he directs that the estate is to be held until the youngest child attains the age of twenty-five, and then, without saying a word about its being sold, says it is to be distributed among them, each getting a share of that estate. I think it would be very unfortunate if that were held to be the implication of the law. I had occasion to say so in *Muir's* case, and anything we have here seems to me to imply that the truster had satisfied himself of the safety of the investment, and intended his trustees to hold it. It may not be quite accurate to call it an investment, but it has always been understood to be in substance an investment, although involving certain risks and liabilities. No implication of that kind arises even from the clauses about investment in the Trusts Act. The 5th section gives certain powers to invest in Government stock, public funds, and Bank of England stock, or to lend upon the security of these; and section 6 says "the powers of investment conferred by this Act shall not be held or construed as restricting or controlling any powers of investment of trust-funds expressly contained in any trust-deed." It is very difficult to say that that is a restriction even of the powers of investment by trustees. I see nothing there or in the deed to lead me to the result that these trustees, acting according to the best of their judgment and discretion for the benefit of the minor children in allowing the trust-estate to stand as the truster left it, are personally liable for the consequences. That is not a doctrine that recommends itself to my mind, and I do not believe that that was the intention of the testator. I think his intention and his expectation must have been the very reverse; and with all deference to your Lordship and the Lord Ordinary I come to an opposite conclusion from that at which you have arrived.

Lord Mure—I should be very glad indeed if I saw my way to concur with Lord Deas in the views he has stated, because it is quite plain that this is a case of hardship to the parties who have been acting as trustees—members of the same family as those who bring this suspension against them. But after carefully considering the case I have come to the same conclusion as your Lordship in the chair.

It is quite plain that in the ordinary case trustees having got no power to invest in this way could not have bought shares in this bank without personal liability attaching to them. That is plain under the common law rules, and under the terms of the Act of Parliament which your Lordship has quoted. But the peculiarity of the case is that there are no directions in this trust-deed as to how the money is to be invested, but a simple direction to hold and administer the estate. Now, the argument addressed to us upon the words "to hold the estate" was, that because the estate was invested at the time of the testator's death in bank stock, the trustees were justified in continuing the investment—that is to say, they as trustees were from that circumstance entitled to do what they could not at common law have done of themselves—they were entitled to continue to trade with the trust-estate because the truster had himself traded withit. Now, I think the case of *Cochrane* v. *Black*, which your Lordship has referred to, as well as the case of *Laird* v. *Laird*, 17 D. 984, settles the law quite differently in that respect, for the opinions of the judges in these cases are quite clear against the propriety of the trustees continuing to allow the trust-funds to remain in securities which are in law not held to be proper securities for such estates. Here, no doubt, there is no continuing in trade in the sense of *Cochrane*

v. *Black*, where the money was left in a bleaching or manufacturing concern. But I do not see that there is any difference in principle between that case and their remaining in a bank with unlimited liability, as has been done here. No doubt, as Lord Deas has said, there is no express power to sell contained in this deed. But in point of fact they had been selling since the death of the truster. They thought they had power to do that, for they sold a large portion of this very stock. But I am unable to read the terms of the directions of the trust-deed without coming to the conclusion that there is an implied direction there to sell, and I do not see how the estate could be administered if they did not sell. The first purpose of the trust is the payment of just and lawful debts. If this gentleman's debts had been larger than they were, the trustees would have had to sell a large portion of the trust-estate to pay the debts before they could fix on any sum out of which the widow's annuity was to be paid. The second purpose is, that in the event of the widow surviving, the trustees are to set aside a sum for securing that annuity. The estate seems to have consisted of a variety of different kinds of investments, and I think it is implied that the trustees in carrying out the first and second purposes of the trust must necessarily sell and dispose of certain portions of it in order to comply with the truster's directions.

In these circumstances I think there was an implied power to dispose of the trust-estate and to re-invest it, and that having allowed it to remain in a speculative investment of this sort the trustees must be subjected to the liabilities attaching to them for having done so.

Lord Shand—The respondents, the trustees of the late Mr Brownlie, have retained the City of Glasgow Bank stock in question for a period of thirteen years after the death of the testator, and until, unfortunately, it has become a source of very serious obligation against themselves as shareholders of the bank; and the question now raised is, whether they had power to continue to keep the testator's funds in the condition of what is called an investment in that bank stock? The view of the parties is distinctly enough stated in their respective pleas. The complainers on the one hand plead that "the respondents having had no power under the deed constituting the trust or otherwise to hold the bank stock in question, but having been bound to realise the same with all due despatch, they are not entitled to apply the trust funds in payment of calls due by them in respect of said stock." And the respondents answer—"In respect that the said bank stock was the property of the truster, and is not an investment made by the respondents, the respondents were not bound to realise the same, but were justified in relying upon the judiciousness of their author."

I am of opinion with the majority of your Lordships and the Lord Ordinary that it was contrary to the trust which the respondents held that they should continue to hold these shares as part of the trust-estate.

It was suggested in the course of the argument—I can scarcely say it was argued—that by the terms of the contract of marriage the respondents had no power to dispose of these shares. I am very clearly of opinion that if that argument had been maintained, it is thoroughly unsound. The deed is in terms a conveyance of the whole estate, heritable and moveable, for specified trust purposes, one of them being a liferent provision, and another the distribution of the estate ultimately amongst the children of the marriage. After the conveyance of the estate the words occur which are said to support the view that the trustees were entitled to hold the estate as it came into their hands, viz., "The foresaid subjects to be held and administered by the said trustees for the following purposes." It is suggested that these words empowered the trustees to retain the estate precisely in the form in which they got it, and indeed required them to keep it in that form. But I must say it would be most unfortunate and extremely startling to me if a general direction to hold a trust-estate for trust purposes, or the absence of a power of sale, should in the slightest degree trammel an executor in the realisation of every part of the moveable estate which it is his duty to administer, or warrant him to continue the trust-funds on investments of a perilous kind. An executor-nominate on confirmation and an executor-dative have by virtue of their office the power to realise the whole moveable estate, and it is clearly their duty in a due course of administration to realise all funds not in a position of security. This deed is not in the least degree peculiar in the respect to which I am alluding. A conveyance of heritable and moveable estate without a special power of sale is a common enough form of deed, and I never heard it suggested until now that there could be the slightest doubt that the executors had the entire control of the moveable estate, so as to be entitled to sell it in the same way as their author could have done. It is said there is something in the Trusts Act (30 and 31 Vict. c. 97), sec. 3, which countenances an opposite view. But it is surely known to everyone acquainted with the history of that Act that the purpose for which the enactment was passed was not to enable trustees or executors to deal with moveable estate, but entirely to meet what had been felt to be an evil in the administration of trusts, viz., the absence of power given in the deed, either expressly or by clear implication, to sell heritage. We have had applications to this Court repeatedly under this statute for authority to sell heritable estate. I need not say there never has been such a thing as an application by trustees and executors holding and administering moveable estate for authority to sell part of it. If such an application were made, it would simply be refused as unnecessary. The direction in this deed is not to hold the estate *in forma specifica* as received by the executor, but in the form in which it shall be placed in a due and proper course of administration. I take the deed as one in which the executors are made absolute owners and administrators of the personal estate, without special directions or special powers in regard to investment, and taking it so, I agree with the Lord Ordinary in the view which he states, in these words—"I think it is the law that trustees are not at liberty to retain, any more than to make, an investment of shares of an unlimited banking company; that it is their duty to put the funds committed to their charge in a position of security; and that they are no more at

liberty to continue a trade or any hazardous business in which the truster was engaged, or to hold shares in a trading concern which he held, than themselves to make a trade investment. It is their duty to put the trust funds in a position of safety although the truster may have left them in a position of danger."

I do not thereby mean, and the Lord Ordinary did not mean, that it was the duty of trustees instantly to realise funds which they found at the death of the truster in a position of insecurity. A reasonable discretion must be allowed as to the time of realisation. The question of time must always be one of circumstances, but although that be so, the attitude of the trustees must be that of persons having it in view without delay to realise the moveable estate in so far as it is not held on investments which they themselves might make, and to put the funds in such securities as they are themselves entitled to invest in. The principle of the rule has, I think, been very clearly stated by your Lordship. I think trustees as administrators and not proper owners in their own right of an estate—as administering for behoof of others (in many cases minors who can have no voice in the management)—must look primarily to the security of the funds, and in a secondary degree to the income which these funds will produce. Your Lordship has referred to what Lord Wood said in the case of *Cochrane* v. *Black*. The same thing is there very clearly stated by the Lord Justice-Clerk—"What a man chooses to do and runs the risk of, be it for high interest during his lifetime, is the act of the absolute proprietor of the fund. But when with a view to the management and security of his estate and effects after his death he appoints trustees, they are not the owners of the funds—they are not entitled to act as such to the same effect—they are not entitled to place or keep the funds in jeopardy."

As to the time which may be regarded as reasonable for the realisation of such an estate, I have said that must be a question of circumstances. It may probably be reasonable to hold here, as in England, that unless there be something special to justify retaining money in a hazardous investment, a period of a year should be the limit. We know that executors are held liable after the lapse of a year for interest upon funds which they have not ingathered as they ought to have done. But I do not think that any absolute rule can be laid down. In the present case we are saved from considering any question of that kind, for it is impossible to justify the retaining of the funds in this stock for so long a period as thirteen years. Of course in anything that is decided in this case there is no suggestion that a testator may not, if he think fit, give the largest possible powers of investment to his trustees, enabling them to put and leave money at hazard if he pleases, but in the absence of any directions or powers to that effect, I think the law must be as stated by your Lordship and the Lord Ordinary.

I regret with your Lordships the result in this case. There is no doubt that the trustees were acting in perfect *bona fides*, and there is hardship to them in being made personally responsible without recourse upon the estate. But I think the rule to which we are now giving effect is one that is absolutely necessary for public ends in the administration of trusts, and although it may lead to hardship in a few cases—cases of this kind—it will save hardship in a very much larger class of cases. If trustees were left the option of retaining the trust-funds precisely in the position in which the truster left them, for it might be a period of years, with the risk of the whole estate being swept away, the consequences would in many cases be ruinous to the beneficiaries, who are often widows and children in minority. Accordingly, I agree with your Lordships in thinking that the Lord Ordinary's judgment should be adhered to.

The Court adhered.

Counsel for Complainers—Asher—Mackintosh. Agent—J. Young Guthrie, S.S.C.

Counsel for Respondents (Reclaimers)—Dean of Faculty (Fraser)—Ure. Agent—J. Gillon Fergusson, W.S.

Friday, July 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

LOCAL AUTHORITY OF CADDER *v.* LANG.

Public Health (Scotland) Act 1867; *Interpretation Clause; secs.* 16, 18, 19 *and* 22—"*Author of a Nuisance*"—*Local Authority—Cost of Removal—Procedure to make Author of Nuisance Liable in Cost of Removal.*

Held that under the above-quoted sections of the Public Health (Scotland Act) 1867, in order that the local authority may recover from "the author of a nuisance" the cost of removing it, it is necessary either that the Sheriff should have ordained him to execute the removal himself, and only on his failure have then ordained the local authority to do so, or that at the date of the order on the local authority it should have appeared that the author of the nuisance was unknown.

This action followed upon a litigation which was previously before the High Court of Justiciary, and the facts will be found fully narrated *supra*, vol. xiv. p. 567, and 4 R. (Just. Ca.) 39, and in the opinion of the Lord President *infra*. The question related to the removal of a nuisance under the Public Health (Scotland) Act 1867, and the Cadder Parochial Board brought this action in the Sheriff Court of Lanarkshire to recover from Mr Lang, one of the parties in the former action, the expenses of executing the removal, which had been carried out by them in terms of an interlocutor of the Sheriff dated 17th April 1875.

The pursuers pleaded—"(1) It being provided in 'The Public Health (Scotland) Act 1867' that all expenses incurred by the Local Authority in executing the works may be recovered from the author of the nuisance or the owner of the premises, and the sum sued for being the judicially ascertained expense of the works in question, and the defender being the owner of the premises, the pursuers are entitled to decree. (2) The defender being the owner of the premises