ment if his doing so would put the banks of an adjacent owner in peril of injury. In *Bickett* v. *Morris* it was held that the channel could not be used for building purposes, although to a small extent, in a question with an immediately lower proprietor.

But all these cases simply show that if the operation on the channel of the stream be material and capable of producing an alteration on the interests of other riparian proprietors, it is not necessary to qualify or establish actual injury. When, however, these cases are carried further, to the effect that apart from injury to others such operations are beyond the title of the riparian proprietor, we are led into legal results contrary to well-established principles. It would follow that when a proprietor is owner of both sides of the stream for a considerable extent he can neither add to or take from or alter the *alveus* of the stream within his own land. But this is manifestly at variance with everyday practice. A man may embank his own land to protect it against floods if the only land affected is his own; and a lower proprietor whose property lay two miles down could not be heard to interfere with him. A similar state of matters exists as to making reservoirs and so forth. Nay more, a proprietor in these circumstances may divert the course of a stream within his own land subject to the same restriction. Now, if it were true that it is beyond the title of a riparian proprietor to interfere with the *alveus* of a stream, this could not be the case.

It may be, I think, laid down as a general principle that the ownership of the *alveus* is in the riparian proprietors, subject only to one limitation, and that is the interest of other proprietors who may be affected by anything done in or to the channel of the stream. Of course the probability of injury to the interests of others is very largely increased where the proprietor who undertakes operations *in alveo* only owns one bank of the river, or where upper owners enjoy further down stream and beyond the marches of their own lands such a right as salmon-fishing only.

Now, as to the present question with reference to these two boulders, it was quite legitimate to remove them in order to give proper facilities for fishing; that is clear, provided no one else was injured. It appears, however, that these boulders formed an old part of the *alveus*, and that truly their removal merely had for its object the prevention of the net catching as it was being drawn, to the loss of the fishermen. Now, such a removal has been effected without doing any harm, and therefore we may assume that it is possible, and especially in the case of smaller and more recent boulders quite legal. The case then is much narrowed. But in the present instance the exercise of the right is not one of an ordinary but of an extraordinary character. While it is true that the Tay is daily, almost hourly, changing its bed—while these boulders might at one time have been projecting as they were to the extent of three feet or so, and at another time be flush with the bed of the stream—while it is also true that other boulders may come down in place of those removed—the question still remains, whether your Lordships would be justified in permitting such operations as have here taken place? If so, why is there to be any prohibition as to the blasting of solid rock or the removal of waterfalls? Are they also to be subjected to the action of dynamite? I do not think we can adopt such a view. This case appears to me to go beyond the bare enjoyment of an ordinary right, and to partake of the nature of an extraordinary operation. I am accordingly in favour of adhering.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Defenders (Appellants)—Trayner—Johnston. Agents—Begg & Murray, Solicitors.

Saturday, July 19.

FIRST DIVISION.

[Lord Young, Ordinary.

CITY OF GLASGOW BANK LIQUIDATION — (*CUNINGHAM'S CASE*) — CHARLES ARTHUR CUNINGHAM AND OTHERS *v.* ROGER MONTGOMERIE AND ANOTHER (CUNINGHAM'S TRUSTEES) AND THE LIQUIDATORS.

Public Company—Winding-up—Relief—Liability where Trustees cannot Pay full Amount of Calls—Marriage-Contract—Power of Investment—Where Trustees empowered to Invest in "Bank Stock."

A Scotch marriage-contract empowered the trustees to invest the trust funds "on such heritable security or in such public and Government stock of Great Britain, or in bank stock, railway debentures, or in such other security as they may consider eligible and expedient." They invested part of the trust funds in a joint-stock bank of unlimited liability which was registered but not formed under the Companies Act of 1862. The investment was made at the request of the spouses. The bank failed, and the trustees proposed to apply the whole trust-estate in payment of the calls which were made upon them. What they were able to pay out of their own means was much less than what could be got out of the trust-estate. In an action by the spouses against the trustees and the liquidators to have it declared that the trustees were not entitled so to apply the trust-estate, either at all or at all events to a greater extent than they themselves had been able to pay the calls out of their own means —*held* (1) that as the term "bank stock" comprehended the stock of such a bank as the one in question, the investment was not *ultra vires* of the trustees; and (2) that the trustees, as the mandatories of the trusters, were entitled to be relieved by their mandants entirely and immediately of whatever liability they had incurred in the execution of the mandate, without reference to their own actual payments or power to pay.

Opinions (*per* Lord Deas, Lord Shand, and Lord Young) that in the circumstances stated above the liquidators would have been entitled to insist upon the trustees making their right of relief available to them.

The pursuers in this case were Mr and Mrs Charles Arthur Cuningham and their children, and the defenders were Mr Roger Montgomerie and Mr John Cuninghame, trustees under Mr and Mrs Cuningham's antenuptial contract, together with the liquidators of the City of Glasgow Bank. In the antenuptial contract, which was dated 5th and 7th November, and registered in the Books of Council and Session 7th December 1867, there was, *inter alia*, the following power:—"With full power to the said trustees or trustee, original or assumed, acting for the time, to enter upon the management of the whole estates before conveyed; to uplift, discharge, sue for, and recover the same, and the free interest or annual proceeds thereof, as fully as the said Caroline Madelina Blair could have done herself before granting these presents; with power also to make up titles in their own persons to said estates; with power also to the said trustees or trustee, original or assumed, acting for the time, to lend out and invest such part of the said means and estate as shall consist of money, or as shall be converted into money by sales or otherwise—power of sale being hereby expressly given—on such heritable security, or in such public and Government stock of Great Britain, or in bank stock, railway debentures, or in such other security as they may consider eligible and expedient; and with power also to the said trustees or trustee, original or assumed, acting for the time, to alter and vary from time to time the investments of the said trust-estates, or the securities in or upon which the same may be invested." A part of this money was on 6th December 1875 invested by the trustees in the purchase of £1000 of the capital stock of the City of Glasgow Bank. It was ultimately admitted by the pursuers that this investment was made at the request of the spouses.

The City of Glasgow Bank was formed in or about the year 1839 as a joint-stock company for carrying on the business of banking within the city of Glasgow, and such other towns as the ordinary directors might think fit. The company was constituted in terms of, and subject to, the provisions and regulations contained in a contract of copartnery; and it was subsequently on 29th November 1862 incorporated under the provisions of The Companies Act 1862, the contract of copartnery being registered as the articles of association of the company. The bank failed in 1878, and the trustees were found personally liable to the bank for the calls made upon shareholders. The purpose of this action was to have it found and declared "that the defenders are not entitled to apply the trust-estate under their management as trustees foresaid, or any part thereof, in payment of calls made or to be made on them by the liquidators of the City of Glasgow Bank in respect of £1000 of the capital stock of the said bank which stood in the books of the said bank in the names of the defenders . . . . . as trustees foresaid; and that the defenders are not entitled to pay to themselves, retain, or appropriate the said trust-estate, or any part thereof, for the purpose of indemnifying themselves for payments of money which they have made or may yet make to the said liquidators in satisfaction of said calls made or to be made on them in respect of the said £1000 of stock; Or otherwise . . . . . that the defenders are not entitled to pay to themselves, retain, or appropriate the said trust-estate, or any part thereof, for the purpose of indemnifying themselves for payments of money which they have made or may yet make to the said liquidators in satisfaction of said calls, to any further extent than they themselves have made payments to account of the said calls out of their own means and estate."

The pursuers pleaded—"(1) On a sound construction of the pursuers' antenuptial contract, the investment of the trust-funds in the stock of the City of Glasgow Bank was *ultra vires* of the defenders, and the trust-estate in question is under no liability to the defenders or the said bank in respect of the said investment. (2) The obligation to make payment of calls to the liquidators of the City of Glasgow Bank in respect of the £1000 stock in question being a liability attaching to the defenders personally and as individuals, and not being a liability of the trust in question, the defenders are not entitled to apply the trust-funds in satisfaction of the said liability. (3) The defenders are not entitled to apply the trust-funds to their own relief, in respect (1st) that the payments made or to be made by them in the way of meeting calls made by the said liquidators are not payments made in satisfaction of a liability of the trust; and (2d) that such an application of the trust-funds is not authorised by the deed constituting the trust, and is inconsistent with the trust-purposes. (4) The right, if any, of the defenders to recourse against the trust-estate being a right of indemnity, they are not entitled to apply the trust-funds towards indemnifying themselves to any further extent than they have actually paid sums to the said liquidators out of their own means and estate, and in no view are they entitled so to apply the trust-funds to an amount exceeding the total value of their own means and estate. (5) The defenders being bound to hold the trust-estate for behoof of the pursuers in liferent and fee respectively, and for the other purposes mentioned in the said antenuptial contract, the pursuers are entitled to declarator as concluded for, with expenses."

The defenders pleaded, *inter alia*—"(2) The defenders Messrs Montgomerie and Cuninghame being indebted to the defenders, the liquidators of the City of Glasgow Bank, in calls upon the £1000 stock held by them as trustees under Mr and Mrs Charles Arthur Cuningham's marriage-contract, which sanctioned the said investment, the liquidators are entitled to demand, and Messrs Montgomerie and Cuninghame are bound to make over to them, the trust-funds in payment of the said calls, so far as not paid by the said defenders out of their own means and estate. (3) *Separatim*, the defenders Messrs Montgomerie and Cuninghame are entitled to relief against the trust-estate, and to repayment therefrom of such sums as they may pay to the liquidators on account of calls, and the sums received by them from the trust-estate are assets belonging to them which they are bound to make over to the liquidators. (4) The defenders are entitled and bound to make over to the liquidators the whole trust-estate, in respect that the defenders have right to the said whole estate in virtue of their claims of indemnity, and that the same, taken along with their original private estate, is inadequate to meet the calls made upon the said £1000 stock. (5) In any view, the defenders Messrs Montgomerie and Cuninghame are entitled to relief against the

trust-estate, and to repayment therefrom of such sum as they may have paid to the liquidators on account of calls on the said stock. (6) The purchase of City of Glasgow Bank stock was within the powers of the trustees; and, *separatim*, the pursuers Mr and Mrs Charles Arthur Cuningham having requested the trustees to make the said investment in City of Glasgow Bank stock, and having approved thereof, are barred from maintaining that it was *ultra vires*. (7) The action being groundless, and the pursuers' pleas untenable, the defenders ought to be assoilzied, with expenses."

The Lord Ordinary (YOUNG) assoilzied the defenders, and added this note:—

"*Note.*—Two questions are raised in this case. The first is, Whether or not the defenders, the trustees under the marriage-contract referred to, exceeded their powers by investing trust-funds in the stock of the City of Glasgow Bank, and depends on whether or not the stock of that bank was bank-stock within the meaning of the marriage-contract, which authorises investment in 'bank-stock.' The counsel for the pursuers admitted that the investment was made at the request of the spouses, and did not suggest that it was indiscreet with reference to the character or reputation of the bank at the time, urging as the only objection that 'bank-stock' meant in the marriage-contract stock of the Bank of England, or at least of some chartered or unlimited bank. No authority was cited, and I know of none, and in the absence of authority impressing a particular meaning on the words I must assume that they were used in the sense which popularly attaches to them in Scotland, and so comprehend the stock of any bank in such good credit and repute that ordinarily prudent men who are not averse to such an investment may reasonably purchase it. On this question, therefore, my opinion is against the pursuers. The second question is, Whether the liability of the trust-estate to indemnify the trustees, or relieve them of the consequences of the investment, assumed to have been made in good faith and within their powers, is limited to reimbursement of such sums as they are able to pay, and in fact have paid, out of their own funds in fulfilment of the personal liability which, according to the decision, they incurred. On this question also my opinion is against the pursuers. It is true that the trustees are primarily and directly liable as partners of the bank, and that the calls in respect of the shares can only be made and directly enforced upon them. If they are able to pay, and do so, their right of relief against the trust-estate is conceded, with the result, of course, of making that estate the ultimate payment. But it is said that if they happen to be unable themselves to meet in the first instance the liability of which the trust-estate is bound to relieve them, the trust-estate shall benefit by the inability, and go free wholly or partially, according as the inability is total or partial. This seems unreasonable on the statement of it, and it is, I think, against the analogy of the familiar rule and practice in all other cases of primary obligants, with a right of relief against others who are not directly liable to the creditor in the obligation. Such an obligant may, and frequently does, bring his action of relief before payment, and I never heard of a defence founded on his pecuniary circumstances. He is entitled to be relieved, and is not bound to submit to distress and bankruptcy, so that the party bound and able to relieve him may escape with such composition as his estate may afford. Further, I am of opinion, although it may be unnecessary to decide the point here, that the primary and direct liability of the trustees may be joined to the ultimate and indirect liability of the trust-estate, so as to give the liquidators of the bank a direct remedy against the latter. The trustees are, I think, not only entitled but bound to make their right of relief available to the liquidators, whose debtors they are, in the very debt to which the right of relief applies, and circuity would, according to a well-known rule of practice, be avoided if a direct remedy were conducive to justice and attended with no injustice.

"I therefore sustain the defences, and assoilzie the defenders, with expenses."

The pursuers reclaimed, and argued—(1) the investment was one unauthorised by the marriage-contract. "Bank stock" included the stock of the Bank of England or of the Scotch chartered banks, and nothing else. It did not include stock of the City of Glasgow Bank—1 Bell's Comm. 107 (101 M'L.'s ed.); Bell's Prin. sec. 1344–7; Pupils Protection Act (13 and 14 Vict. cap. 51), sec. 5. But (2), assuming that the investment was authorised, the trust-estate was liable in relief to the trustees only to the extent to which they had actually been able to pay the calls. *Lumsden* and *Muir* settled that trustees were liable personally — that the bank and its liquidators had nothing to do with their trust character. It followed from this that the liquidators had nothing to do with the trust-estate. They could only get at that through the trustees. And the trustees' right of relief was measured exactly by the amount which they were out of pocket.

Authorities—*Lumsden* v. *Buchanan*, Feb. 26, 1864, 2 Macph. 695—H. of L., May 8, 1865, 3 Macph. 89, 4 Macq. 950; *Muir* v. *Liquidators of City of Glasgow Bank*, Dec. 20, 1878, *supra*, p. 139, 6 R. 392—April 7, 1879 (H. of L.), *supra*, p. 483, L.R., 4 App. Ca. 337.

Argued for the respondents—(1) The investment was within the marriage-contract. "Bank stock" was not limited to the chartered banks; it included all incorporated banks, whether the incorporation was by charter or by Act of Parliament; and the present bank was incorporated under the Companies Act of 1861. If all the chartered banks were of limited liability, there might have been some ground for the pursuers' contention, but some chartered banks at least were unlimited. (2) Since, then, the investment was authorised, the trust-estate was liable in relief to the trustees to its full amount, and not merely to the extent to which they had actually paid calls out of their own funds. They were bound to hand over to the liquidators what they had got in relief from the trust-estate; they were consequently entitled to further relief, and this they must in terms pay over, and so on. They were not bound, however, to wait until they had paid anything—they were entitled to relief whenever it was plain that they were liable.

Authorities—*National Financial Company*, June 26, 1868, L.R., 3 Chanc. App. 791; *Cruse* v.

Paine, July 30, 1868, L.R., 6 Eq. 641, *aff.* Feb. 24, 1869, L.R., 4 Chanc. App. 441; *Hemming* v. *Maddick*, Jan. 20, 1870, L.R., 9 Eq. 175, *aff.* Mar. 8, 1872, 7 Chanc. App. 375; *James* v. *May*, June 12, 1873, L.R., 6 Eng. and Irish App. 328; *Lacy* v. *Hill*, April 25, 1874, L.R., 18 Eq. 184.

At advising—

LORD PRESIDENT—The defenders Montgomerie and others are trustees under the marriage-contract of Mr and Mrs Charles Arthur Cuningham, the pursuers of the action; and the object of this action, as I understand it, is to prevent the trustees from applying any part of the trust-funds towards payment of calls upon certain stock of the City of Glasgow Bank which forms part of the trust-estate. That stock was acquired by the defenders under powers conferred upon them by the marriage-contract. They had power "to lend out and invest such part of the said means and estate as shall consist of money, or as shall be converted into money by sales or otherwise—power of sale being hereby expressly given—on such heritable security, or in such public and Government stock of Great Britain, or in bank stock, railway debentures, or in such other security as they may consider eligible and expedient; and with power also to the said trustees . . . to alter and vary from time to time the investments of the said trust-estates, or the securities in or upon which the same may be invested." And in connection with this there is also a declaration that the trustees "shall not be liable for omissions of any kind, or for the solvency of debtors or insufficiency of securities."

In the exercise of these powers the trustees bought this stock of the City of Glasgow Bank—a bank of unlimited liability no doubt, but a bank in perfectly good repute at the time the purchase was made—and it is not unimportant to add that the purchase was made by the desire of the pursuers, the husband and wife under the marriage-contract. The conclusions of the summons are, in the first place, for a declaration that these trustees "are not entitled to apply the trust-estate under their management, or any part thereof, in payment of calls" made by the liquidators in respect of this capital stock, and that the defenders are not "entitled to pay to themselves, retain, or appropriate the said trust-estate, or any part thereof, for the purpose of indemnifying themselves for payments of money which they have made or may yet make to the said liquidators in satisfaction of calls." There is an alternative, however, for declarator that they are not entitled to "pay to themselves, retain, or appropriate the said trust-estate, or any part thereof, for the purpose of indemnifying themselves for payments of money which they have made or may yet make to the said liquidators in satisfaction of said calls, to any further extent than they themselves have made payments to account of the said calls out of their own means and estate." The first alternative, it will be observed, is directed to secure the trust-estate against any portion of it whatever being used for the payment either of the calls or for indemnifying the trustees for what they have been called upon to pay, and have failed; and that conclusion I understand to be rested upon a particular construction of the powers contained in the marriage-contract. The pursuers contend that the authority to invest in bank stock will not cover bank stock of this kind. Now, as regards that, I agree entirely with the Lord Ordinary. I do not think that the term "bank stock" in a Scotch marriage-contract can be read as limited to any particular bank stock—to the stock of any particular class of banks. It is said that in one view it ought to be Bank of England stock and nothing else. I should think that a most unnatural and improbable construction to put upon such words in a Scotch marriage-contract, considering the very frequent investments which are in practice made of trust-funds in stock of other banks—the practice being entirely adverse to such a construction. But I am just as clear that if the parties intended to limit this favour to the stock of a particular class of banks, that ought to have been expressed, and in ordinary course would have been expressed, distinctly upon the face of the deed. The expression, however, being "bank stock," without any limitation whatever, must, I apprehend, be read to extend to the stock of any bank in good repute for the time.

But there is a second, and I think a much more important, question raised by this reclaiming note. It is said that the trustees are not able out of their own funds to meet the whole calls that have been made in respect of this stock, and that they are not entitled to use the trust-funds for the purpose of paying calls to any greater extent than they have themselves actually paid money out of their own funds. Now, here again I agree with the Lord Ordinary. I think that contention proceeds upon an entire misapprehension of the relation of trusters and trustees under a deed of this kind. Scientifically considered, the position of trustees under such a deed is this, that they are depositories of the trust-estate and mandatories for its administration. That is a combination of two well-known contracts in the civil law, and the character and quality of these contracts is perfectly well fixed both in the civil law and in modern jurisprudence. There can be no doubt whatever that the mandant is bound to relieve his mandatory not only of all expenses incurred by him in the execution of his mandate, but of all liability incurred by him in the exercise of his powers as mandatory and in the administration of the affairs of the mandant, and this obligation of relief on the part of the mandant may be enforced not merely upon the occasion of each payment that the mandatory is compelled to make on behalf of the mandant, but if any liability has been incurred by the mandatory in the due execution of his power, and if liability is threatened to be enforced against him, he is quite entitled to fall back upon the mandant's obligation of relief and demand that he shall stand between him and the creditor who is demanding the performance of this obligation. It is not mere reimbursement of money spent that the mandatory is entitled to have, but it is relief of obligation, and therefore before any call had been made at all upon the failure of this bank, and when it became perfectly obvious that these trustees would be made personally answerable for the payment of the calls that were certain to be made, they were in a condition at once to say to the trusters—"You must stand between us and this liability; we must be protected, and protected at the expense of the trust estate." Therefore it seems abundantly clear, I think, upon principle, that the trust estate must stand

between the liquidators and the parties who are sought to be made liable as registered owners of this stock, because they have become registered owners of this stock in fulfilment of the duty and power conferred upon them by the trusters.

To come to any other conclusion upon a question of this kind would involve something very like a practical absurdity, as I think the Lord Ordinary has very well explained. The liability of the trust estate according to the view developed in this alternative conclusion of the declarator would be, that the liability of the trust estate would be measured entirely by the solvency or insolvency, total or partial, of the trustees. If the trustees were men of wealth, the trust estate would be answerable for every shilling, because then the money would be disbursed in the first place by the trustees, and they would have a direct claim of reimbursement from the trust estate. But if they happened to be men of no personal means, then if they could pay nothing the trust estate would escape altogether, and if they could pay only a small portion of the calls demanded by the liquidators, then the trust estate would only be liable to the extent to which the trustees were able to pay out of their own means. Now, that is one of those absurd results which is a very good test of the unsoundness of the doctrine of which it is a result.

But there is another view also, which completely exposes, I think, the untenable character of this proposition. If the trustees are not able, either out of their own means or out of the trust estate, by reason of the trusters' intervention, to pay more than, we shall say, one-fifth part of the calls made upon them by the liquidators, what would be the consequence? The consequence would be that the trustees would then, at all events, at the very lowest view of this alternative, be entitled to be reimbursed by the trust estate to the extent to which they had paid money. Well, then, that would put the trustees in funds again, and as they have not been discharged by the liquidators, and as the liquidators certainly would not in such circumstances discharge them, the result would just be that the liquidators would come upon them for the payment of the new funds which they had got; and that operation would be performed successively, according to the various sums received by the trustees out of the trust estate as indemnity, until in the end the trust estate would be exhausted, just in the same manner as it would be according to the sounder doctrine for which the Lord Ordinary has pronounced. I therefore think on the whole matter that he has come to a perfectly correct decision, and that the conclusions of this summons cannot to any extent be entertained.

Lord Deas—The first question here is the construction of the investment clause in this antenuptial contract. It is contended that it limits the trustees, so far as bank stock is concerned, to investing or lending upon the security of Bank of England stock. But this is a Scotch deed in the Scotch form, prepared by a Scotch solicitor, and executed under his advice and directions in Scotland. If it had been an English deed, in the English form, prepared by an English solicitor, and subscribed in England under his direction, it may very well be—we do not require to determine that, but very probably "bank stock" would have been—held to mean Bank of England stock. But for the very same reasons it appears to me quite clear that in regard to a Scotch deed, in the Scotch form, prepared by a Scotch solicitor, and signed as I have mentioned, we must read this power according to what it would be understood and held to mean in Scotland; and I do not think it would admit of any doubt that in Scotland no one would understand anything but that this meant (as your Lordship has said) any Scotch bank in good credit at the time.

The other question, as your Lordship has said, arises out of the contention that the trustees having invested in the City of Glasgow Bank stock—quite within the power conferred on them—and having unfortunately had to pay calls on that stock, are not entitled to claim relief against the estate except to the extent to which they have been able to pay their calls. The short answer to that is that the proprietors of the estate authorised them to do what they have done. Now, if trustees do the thing they are authorised to do, on what principle are they not to have full relief against the truster and the trust-estate? There can be no doubt about our law and practice that when a party is entitled to relief against an estate, the relief must be out and out. The action of relief may be brought before they pay anything, and the conclusion of that action of relief would be, not for payment of any particular thing, but absolute out and out relief of all that they are liable for or may be made liable for. That being the sort of action competent, I cannot see the slightest ground or principle for holding that they are not entitled to claim that relief. They are liable for the whole calls as far as the estate will go. They are liable personally for the whole calls. Are they not to have relief for all the money for which they are liable from the estate of the truster under whose orders and authority they have made this investment? I can see no distinction whatever between that which they have been able to pay out of their means and that which they may not be able to pay, and for which they would remain debtors.

They are much in the same position as a cautioner. A cautioner is entitled to relief out and out—he is not bound to become bankrupt if the party from whom he is entitled to relief is able to relieve him. He is not bound to remain under any obligation of debt whatever. That is precisely the position of these trustees. The liquidators are entitled, and probably bound, not to discharge these trustees until they have got all that can be got. I cannot have any doubt about this part of the case any more than the other. I entirely agree with the very clear and distinct note of the Lord Ordinary on these matters. Perhaps the latter part of his note touches points which it may not be necessary to decide, but I cannot doubt that if the liquidators choose to think it their duty they will be entitled to insist upon an assignation of this claim. The trustees cannot be bound to remain under all this liability and get no discharge.

I entirely agree with what your Lordship has said.

Lord Mure—I concur on both points, and I think the Lord Ordinary has put both on quite

satisfactory grounds in his short and distinct note.

Lord Shand—I do not think there is any difficulty in this case on either part. In regard to the first point, the term used—"bank stock"—is of the most general description. If it had been proposed to limit the trustees to any particular class of bank stock, that could have been readily and easily done, and I think would have been done. We are familiar with cases in which trustees are tied down to a particular class of bank stock, and if the words here had been "the stock of any bank incorporated by royal charter or incorporated by Special Act," or any limiting terms of that description, the argument would have been sound. But in the absence of any such limiting expressions, I think the parties were right in holding that the terms used included stock in a joint-stock banking company such as the City of Glasgow Bank. The ground on which the argument was mainly rested was that the different stocks mentioned in the same clause were of a class rather of securities than of purchase of any stock which would infer personal liability, and that is quite true, but at the same time the term used is so general as to include bank stock of any kind, and I cannot doubt that it was so intended—the truth being that a great many people having had much confidence in the stability of joint-stock bank companies have only lately realised that bank stock is not of the proper nature of a security.

In regard to the second point the conclusions are limited. It is conceded by the conclusions that the defenders are entitled to relief in so far as they have made or may make payments, but the Court is asked to declare that they shall have no relief beyond that. I agree with your Lordship in holding that to be unsound, and I think the principle upon which the question turns, as brought under our notice very properly by Mr Asher, is well stated in the English cases. Trustees who become shareholders are partners in a question between them and the bank, but in a question between them and the beneficiaries the beneficiaries are truly the partners. It follows that the beneficiaries are bound to relieve the trustees to the full extent of their liability, and that as soon as the liability opens or arises, and that trustees who are in possession of the trust-estate are therefore entitled to realise the estate in order to meet that liability. A trustee becomes liable in calls which generally are not payable for some time after the call is made, but the moment the liability arises he is entitled to require that it shall be met by the true partners providing funds for his relief. A trustee is not bound to advance anything from his own funds, nor is he bound to submit to distress or diligence against him. There is no sound principle to support the contention that he must first pay away his own estate, and that his relief shall be limited to the amount he had then paid. Being entitled to total and immediate relief, it follows that the proposal in the conclusions of the summons cannot possibly receive effect in a question with the defenders, the trustees under Mr and Mrs Cuningham's marriage-contract.

I agree also with Lord Deas in holding that the bank can by diligence compel the trustees to make the right of relief available to them. The liability for calls lays the persons of the trustees as well as the whole of their estate open to diligence at the bank's instance. Part of that estate is the trustees' right of relief against the beneficiaries, and their right to employ the remainder of the trust-funds or estate in payment of the calls, and as a condition of refraining from diligence or granting trustees a discharge the bank is, I think, entitled to an assignation of the trustees' rights against the trust-estate and the beneficiaries.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Mackintosh—Jameson. Agents—Maclachlan & Rodger, W.S.

Counsel for Defenders (Respondents)—Kinnear—Asher—Lorimer. Agents—Davidson & Syme, W.S.

Saturday, July 19.

SECOND DIVISION.

SPECIAL CASE—PULLAR'S TRUSTEES *v.* PULLAR OR MACOWAN AND OTHERS.

Husband and Wife—Marriage-Contract—Conveyance of Wife's Acquirenda—*How far Effectual.*

Two ladies by their respective antenuptial marriage-contracts assigned to trustees all their *acquisita* and also all their *acquirenda*, their father being in one case expressly a party to the deed, and in the other causing it to be drawn up under his special directions. At the father's death he left sums of money to be held by his trustees as "portions" for these daughters and provisions for their issue, and a like sum in the case of another daughter married without a contract. He further left special legacies of £3000 to each of his three daughters, whom failing to their children. *Held* that in the case of the two daughters who had marriage-contracts the testator's trustees were bound to pay the special legacies of £3000 to the marriage-contract trustees, and were not entitled to pay these sums to the ladies on their own receipt or on that of themselves and their husbands.

Observations (*per* Lord Gifford) on the effect of provisions as to *acquirenda* in an antenuptial contract of marriage.

This was a Special Case submitted for the opinion and judgment of the Second Division by (1) The trustees of the late John Pullar, dyer in Perth; (2) Mrs Grace Pullar or MacOwan, his daughter, and her husband; (3) Mrs Eliza Pullar or Baxter, another daughter, and her husband; (4) Mrs MacOwan's marriage-contract trustees; and (5) Mrs Baxter's marriage-contract trustees. Mr John Pullar died on 16th December 1878 leaving a trust-disposition and settlement dated 20th July 1876, and codicil dated 30th October 1878, and survived by a widow, six sons, and three daughters. Mrs MacOwan was married in 1865, and Mrs Baxter in 1874, both having executed antenuptial contracts of marriage, to the first of which Mr Pullar was a party, while for the latter he gave special directions to the family agent.