in a previous case has called them "the main purposes" of the trust.

But as your Lordships think that the case is one where an order of sale would be inconsistent with the purposes of the trust, I am content that the petition should be dismissed, because power of sale should only be granted where the question of competency is free from doubt.

LORD KINNEAR—I agree. The statute requires in order to the exercise of the power which it gives the Court to enable trustees to sell where the trust-deed contains no such power, that two conditions shall be satisfied—*first*, that the sale shall be expedient for the execution of the main purposes of the trust; and *second* (and equally imperative with the *first*), that it shall not be inconsistent with the intention of the truster.

Now, a sale may or may not be expedient for the execution of the general purposes of the trust. I assume that it will be so, although there has been no inquiry for the purpose of ascertaining the facts. Mr Smith tells us that it will be, and I therefore take it for granted for the purposes of the argument. But assuming that it will be expedient the further question arises, whether it is consistent with what the truster intended? On this matter I can have no doubt whatever, because he says in so many words that the trustees are not to sell before 1898.

The Court refused the petition.

Counsel for the Petitioners—R. E. M. Smith. Agents—J. & A. Peddie & Ivory, W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MACGOWN *v.* CRAMB.

Process—Interlocutor Allowing Proof—Res noviter veniens—Nobile officium—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 28.

In an action of declarator of right to certain property the defender pleaded no title to sue, and the Lord Ordinary closed the record and allowed a proof.

Under a diligence subsequently obtained by the defender, an antenuptial marriage-contract was recovered whereby the pursuer had conveyed to trustees the whole means and estate belonging to her, or which might thereafter belong to her.

Two months after the date of the allowance of proof the defender obtained leave to amend his record by narrating the terms of the marriage-contract, and upon his motion for a recal of the interlocutor allowing proof the Lord Ordinary reported the case to the Inner House.

The defender having moved the Court to authorise the Lord Ordinary to discharge the order for proof, and to send the case to the Procedure Roll, *held* that under section 28 of the Court of Session Act 1868, the interlocutor allowing proof was final, not having been reclaimed against within six days.

Mrs Susannah Cramb or MacGown raised an action against Miss Susannah Cramb, to have it declared that by survivance of her uncle James Cramb she had acquired a personal right, as one of his heirs-portioners, to one-half *pro indiviso* of his heritable estate.

The defence was that James Cramb, who died in 1876, had by holograph settlement conveyed his whole property absolutely to his brother John, who died in 1894 leaving his whole means and estate to the defender; and that the validity of James' settlement had remained unchallenged by the pursuer for nearly twenty years.

The defender pleaded, *inter alia*—No title to sue.

On 3rd November 1896 the Lord Ordinary (KINCAIRNEY) closed the record and allowed the parties a proof of their respective averments, and on 20th November, at the instance of the defender, he granted diligence for the recovery of certain documents.

Among the documents recovered under this diligence was an antenuptial contract of marriage between the pursuer and her husband, executed in 1877, by which the pursuer conveyed to certain trustees, "All and whole, the whole property, means, estate, and effects, heritable and moveable, real and personal, wherever situated, presently belonging or which may hereafter belong to her by inheritance, gift, bequest, conquest, or in any manner of way whatsoever," but in trust always for the pursuer.

The defender on 5th January 1897 moved the Lord Ordinary to open up the record in order that she might add an amendment thereto setting forth the above-mentioned marriage-contract. She also moved the Lord Ordinary to recal the interlocutor allowing a proof, and to send the case to the Procedure Roll to discuss the plea of title, on which she maintained the marriage-contract had an important bearing.

The Lord Ordinary allowed the defender's amendment, of new closed the record, and reported the case to the First Division.

Note.—"At the closing of the record on 3rd November last the Lord Ordinary, on the motion of the parties, allowed to them a proof of their averments. On 5th January current the defender moved for leave to add to the record certain statements of the nature of *res noviter*. It appeared to me that these statements should be considered, and accordingly the record has been amended by the addition of these statements, with the pursuer's answers thereto.

"The defender has contended that the effect of these statements is to destroy the pursuer's title to sue, and that therefore the interlocutor allowing proof should be recalled. As I do not seem to have power to recal that interlocutor, the defender's

counsel moved that I should report the cause."

The defender moved the Court to authorise the Lord Ordinary to discharge the order for proof and to send the case to the Procedure Roll. The defender admitted that there was no statutory provision authorising such a course, but appealed to the *nobile officium* of the Court.

The pursuer opposed the motion and argued—Sections 27 and 28 of the Court of Session Act 1868 were absolutely binding. An interlocutor allowing proof was final, unless reclaimed against within six days, and *res noviter* made no difference. No reclaiming-note had been presented here within the statutory period.

LORD PRESIDENT—The section of the Act of Parliament which Mr Christie has referred to makes this a final interlocutor unless it is reclaimed against, and therefore it seems to me we can do nothing.

LORD ADAM—I never understood that the *nobile officium* could supersede an Act of Parliament.

LORD M'LAREN and LORD KINNEAR concurred.

The Court remitted to the Lord Ordinary to proceed, reserving all questions of expenses.

Counsel for the Pursuer—J. R. Christie. Agents—Sturrock & Sturrock, S.S.C.

Counsel for the Defender—Clyde. Agent—R. Ainslie Brown, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

MELROSE *v.* ADAM AND OTHERS (EDINBURGH SAVINGS BANK TRUSTEES).

Savings Bank—Dispute between Trustees and Depositor—Reference Clause—Savings Banks Acts Amendment Act 1863 (26 *and* 27 *Vict. cap.* 87), *sec.* 48.

By section 48 of the Savings Banks Acts Amendment Act 1863, any dispute between the trustees of any savings bank and any depositor therein is to be referred to arbitration.

The deposit-book of a depositor in a savings bank was stolen, and presented to the bank by the thief, who, on forging the depositor's name to a requisition, received payment of £50. The depositor called upon the trustees of the bank to credit her again with the sum so paid away, which they refused to do.

After withdrawing the balance remaining at her credit with the bank, she raised an action against the trustees for payment of the £50, averring negligence on the part of the officials of the bank in making the payment in question.

Held (*aff.* judgment of Lord Kincairney) that the dispute between the pursuer and the trustees of the bank fell within the arbitration clause of the statute, on the ground that the pursuer's claim was founded upon the contract of deposit.

In September 1887 Mrs Elizabeth Melrose became a depositor with the Edinburgh Savings Bank, established under the Savings Banks Acts Amendment Act 1863. In January 1895 her sister stole her deposit-book, presented it at the bank, forged her signature to a requisition for the withdrawal of £50, and obtained payment from the bank of that sum. The sister was apprehended, and convicted of the theft and forgery shortly afterwards. Mrs Melrose applied to the bank for repayment of the £50 thus withdrawn from her account, but this was refused. On 18th June 1896 she intimated to the trustees of the bank through her agent that she was about to raise an action against them, and on 24th June 1896 she withdrew the whole balance remaining at her credit in the bank's books, amounting to £15, 13s. 6d.

In these circumstances on 6th July 1896 Mrs Melrose raised an action against Robert Adam and others, trustees of the Edinburgh Savings Bank, under the statute, concluding for payment of £50, and averring that the officials of the bank had been guilty of negligence in making the payment in question.

The defenders founded in the first instance upon section 48 of the Savings Banks Acts Amendment Act 1863 (26 and 27 Vict. cap. 87), which is as follows—"If any dispute shall arise between the trustees and managers of any savings bank and any individual depositor therein, . . . the matter in dispute shall be referred in writing to the barrister-at-law appointed under the said hereby repealed Acts, or this Act, who shall have power to proceed *ex parte* on notice in writing to the said trustees or managers, left or sent through the post-office by the said barrister to the office of said savings bank, and whatever award, order, or determination shall be made by the said barrister shall be binding and conclusive on all parties, and be final to all intents and purposes without any appeal."

That Act has been amended by the Act 39 and 40 Vict. cap. 52, section 2—(1) . . . "The powers and duties relating to any dispute arising between the trustees and managers of any savings bank, . . . on the one hand, and any depositor or person claiming through or under a depositor on the other hand, shall be transferred to and vested in the Registrar, as defined by the Friendly Societies Act 1875."

Section 4 of the Friendly Societies Act 1875 (38 and 39 Vict. cap. 60) enacts—"The Registrar means . . . for Scotland or Ireland, the Assistant Registrar for either country respectively."

The defenders further relied upon certain Treasury regulations and rules of the bank, which need not be cited here, but which