The Court recalled the Lord Ordinary's interlocutor and refused interdict.

Counsel for the Reclaimers (Respondents)—Craigie, K.C.—Hon. W. Watson. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents (Complainers)—Scott Dickson, K.C.—Orr Deas. Agents—Deas & Co., W.S.

Thursday, July 19.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

SIM AND OTHERS *v.* FERGUSSON AND OTHERS (MUIR'S TRUSTEES).

Trust—Investment—"Personal Security"—Power to Invest on Heritable or Good Personal Security—Mere Personal Obligation—Deposit-Receipt of Colonial Bank—Ultra Vires.

By an antenuptial contract of marriage trustees were authorised "to invest the trust funds on heritable or good personal security." They invested in deposit-receipts of colonial banks. There was no suggestion that these were not in good credit or that the investments were not sufficiently good of their class.

Held, affirming the Lord Ordinary (Salvesen), that "personal security" covered security depending on personal obligation only, and that the trustees had acted within their powers.

Process—All Parties not Called—Trust—Liability of Trustees—One Trustee Called—Delict.

The representatives of one of several trustees having been sued for an accounting, they pleaded that the action should be dismissed, as all the trustees or their representatives had not been called.

Opinion, per Lord Ordinary (Salvesen), that the rule established by *Croskery* v. *Gilmour's Trustees*, March 18, 1890, 17 R. 697, 27 S.L.R. 490, that where a defender is liable *in solidum* in respect of a delict or *quasi* delict the pursuer is entitled to proceed against him alone, even although there may have been others who acted along with the defender and against whom the defender might have a right of relief, might well be reconsidered in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible.

On 7th October 1905 Alexander Sim, residing at Contlee, Nicola Valley, British Columbia, and others, the children of the marriage between John Sim, bank-teller at Arbroath, and Christina Jane Mackay or Sim (both of whom were dead), brought an action of count, reckoning, and payment against David Scott Fergusson and others, trustees of the deceased James Muir, merchant in Arbroath, one of the trustees under the antenuptial marriage contract of their parents, dated 24th and 26th September 1864 and registered 11th September 1866. In it they sought an accounting of the intromissions of Muir, who died on 16th March 1903, and his trustees with the trust estate constituted by the said antenuptial marriage contract, to the fee of which they were entitled, and to recover £1000 or such sum as should be found to be the balance due on such accounting.

The defenders, *inter alia*, pleaded—"All parties interested not having been called, the action should be dismissed."

Certain accounts were produced by the defenders and objections to these were stated by the pursuers. Of these objections the following alone came to be of importance:—"(Objection III) The account produced shows that the trustees under the said marriage contract lent certain of the trust funds on deposit-receipts with the following colonial banks, viz., The City of Melbourne Bank (now the Melbourne Assets Company), the Australian Joint Stock Bank, and the New Oriental Bank. The said loans were not such as the trustees were entitled or authorised to make either at common law or under the Trusts (Scotland) Amendment Act 1884, neither were they within the powers conferred by the investment clause in the said marriage contract. Persons who lent money to the said colonial banks received no security for repayment of their advances, and the said trustees, including in particular the late James Muir, in so lending out the funds of the trust estate committed a breach of trust. The sums so invested have been partially lost through the failure of the said banks to meet the said deposits as they fell due, and the pursuers claim that they are entitled to have the accounts re-stated so as to credit the trust estate as at the date of Mr Sim's death, viz., 10th January 1897, with the face value of the amount of the deposits. . . ."

The power of investment conferred by the marriage contract was in the following terms:—"And they authorise the before-named trustees, if they see cause, to invest the trust funds on heritable or good personal security for the purposes foresaid, declaring that in so investing and lending the trust funds the trustees shall not incur any personal responsibilities."

On 29th March 1906 the Lord Ordinary (SALVESEN) pronounced the following interlocutor:—"Repels *in hoc statu* the first and . . pleas-in-law stated for the defenders: Repels the third objection for the pursuers to the accounts of the late James Muir as trustee under the marriage contract between Mr and Mrs Sim, libelled in the summons: Appoints the case to be enrolled for further procedure: Grants leave to reclaim."

Opinion.—"The pursuers of this action are the children of the marriage between John Sim and his wife Mrs Christina Sim, and are the fiars of certain estate settled under a contract of marriage entered into by their parents. The income of the property so settled was payable to Mrs Sim

during her lifetime, and on her death to her husband, and the capital was directed to be paid for behoof of the children of the marriage equally on their severally attaining twenty-one years of age. They are now all major.

"The defenders are the trustees of the late Mr James Muir, who was one of the trustees appointed by the marriage-contract. The pursuers aver that from 1892 he acted as sole trustee. The other trustees accepted office under the contract, but there is no information in the pleadings as to when they died or resigned or otherwise ceased to act.

"The defenders have lodged accounts of the intromissions of Mr James Muir from 20th January 1897 until 11th November 1905. They explain that prior to that date Mr John Sim, the pursuers' father, managed the whole estates as the factor on the trust, and that they have no materials from which to make up any account during that period. This would not be a sufficient answer but for the fact that no question is raised as regards revenue (to the whole of which Mr John Sim was entitled), and that the only loss of capital on which the pursuers condescend amounts to £139, 10s. 8d., which is all accounted for by the objection which they raise to the investment of trust money on deposit-receipts of certain Australian banks. This objection seems, accordingly, to be the only substantial matter in dispute between the parties, and I gather that on its being decided all other matters may readily be adjusted.

"Before I deal with the merits of the case I must notice two arguments which were addressed to me by the defenders. The first was in support of their plea of all parties not called. This is an equitable plea which it may be proper to sustain in cases where a defender suffers a plain disadvantage by other defenders not being called who know more of the transaction out of which the dispute arises, and therefore may be able to state defences which are unknown to the actual defender. Here no circumstances of that kind are averred. It does not even appear that there were any other trustees than Mr Muir who authorised the investment of the trust money in the deposit-receipts challenged, and it is certain that Mr Muir was at all events one of the trustees who did so. Even if I had thought there was a *prima facie* reason why the representatives of the co-trustees should be called along with the present defender, the case of *Croskery* v. *Gilmour's Trustees*, 17 R. 697, would form a serious obstacle to my giving effect to the plea. As I read the decision in that case it proceeds upon the footing that in all cases where a defender is liable *in solidum* in respect of a delict or *quasi* delict the pursuer is entitled to proceed against him alone even although there may have been others who acted along with the defender and against whom the defender might have a right of relief. The law so laid down may sometimes operate very harshly, and in a suitable case where a defender was being sued alone with the object of shielding others who were equally responsible I think it might well be reconsidered. The averments of parties in this case, however, disclose no such state of matters.'

". . . [*His Lordship here dealt with another plea.*] . . .

"The pursuers' case with regard to the deposit-receipts is that they were loans upon personal credit without security, and that they were *ultra vires* of the trustees. The defenders admit that they were not such investments as the trustees were entitled to make, either at common law or under the Trusts Act 1884, but they say that they were within the powers conferred by the investment clause of the marriage contract. There is no averment of negligence, and therefore the sole question for decision is whether the trustees in lending money to the banks mentioned on deposit-receipt were guilty of a breach of trust.

"The investment clause in the marriage-contract is in these terms:— . . . [*quotes clause supra*] . . . The question is thus whether a loan to a bank on deposit-receipt at a time when the bank was in good repute could be described as an investment on good personal security.

If the question were open I think much might be said for the view that such a loan was not a loan on security at all. In reality it is a loan on the personal credit of the borrower. But the same might be said of a loan by a bank on a cash-credit bond where several persons are joined with the principal debtor to guarantee payment of the debt. Such a loan would properly be described as one on personal security, but it is simply a loan on the personal credit of those who subscribed the bond, and it does not alter the quality of the investment that the persons who are bound for the debt are more than one. The pursuers made the further suggestion that a loan of money was not a loan on personal security unless personal property had been pledged in security. I do not think so. A loan on security of moveable property is not a loan on personal security in the common acceptation of that phrase, although it would no doubt be so if the borrower was also personally bound for repayment of the loan.

"In my opinion, however, the question is no longer open so far as the Outer House is concerned. It was carefully considered and decided by Lord Fraser in the case of *Lamb* v. *Cochrane*, 20 S.L.R. 575. The trustees there were directed to invest the trust estate 'on such security, heritable or personal, or in such stocks as they shall think fit.' They invested it by taking an assignation to a bond granted by a heritable security company of limited liability which was in good credit at the date of investment, but which afterwards went into liquidation. After a full argument Lord Fraser held 'that trustees authorised to lend on personal security are entitled to lend on personal bond to a person reputed solvent at the time of the transaction.' In the note to his interlocutor Lord Fraser reviewed the prior authorities, including an opinion

to the contrary expressed by Lord M'Laren in the Treatise on Wills and Succession, and he concludes as follows:—'The word "security," in short, has obtained a meaning when coupled with the word "personal" different from its common acceptation, and a clause, therefore, authorising a loan upon real or personal security may mean upon the security of real estate or upon the security of personal obligation.'

"Further on the same Lord Ordinary says—'A deposit with a bank which undertakes to repay money on demand or after a certain interval is a loan upon personal security, the creditor having the limited or unlimited liability of the shareholders in the bank for repayment of their money. Now it can hardly be contended that trustees commit a breach of trust when they deposit the trust funds (which they are authorised to lend on personal security) with the banks; and if this be the case, wherein is the difference between a deposit with any of the Scottish banks and a deposit with a property investment company.' What holds good with Scottish banks must apply to Australian banks, the only possible difference being as to the credit of the respective institutions, a question which is not raised in this case.

"The next case in point of time which was cited was that of *Morrison* v. *Allan*, 23 S.L.R. 846. The investment clause there was as follows—'Our trustees shall, with all convenient speed, invest the said sum of £1500 sterling on bond, heritable or personal, railway debentures, bank stock, or otherwise.' In commenting on this clause Lord Shand said—'It is to be noticed that this clause does give very wide powers of investment, which may be even on personal security alone.' The actual loan was on heritable security, which proved insufficient, but the lender stated that he relied upon the personal obligation as being of considerable value. After narrating the facts, Lord Shand continued—'Now, under all the circumstances, was the trustee who was able to lend upon personal bond not entitled to lend on heritable security?' The inference from that passage is that Lord Shand's opinion concurred with that of Lord Fraser as to the meaning to be put on a power to invest on personal security. It was, however, unnecessary to pronounce a decision to that effect in that case.

"In *Ritchie* v. *Ritchie*, 15 R. 1086, the matter was expressly decided in the Inner House. The trustees were empowered to invest the trust funds 'in any of the Government securities, or upon heritable security in Scotland, or in such other way or in such other securities as my trustees shall think proper.' The trustees lent a sum of money to the Scottish Amicable Heritable Securities Company, Limited. There was no security for repayment except the personal obligation of the borrower, and Lord M'Laren held that this investment was within their powers. His judgment was unanimously affirmed by the Second Division on this poiut. The argument which was submitted to the Inner House with regard to this investment was that it was a mere loan at interest, which the creditor was obliged to leave three years with the debtor. It could not even be called a loan on personal security, for that expression involved not the mere personal obligation to the debtor but his personal obligation fortified by some security. This argument was one of those rejected by the Court.

"The question arose again in the case of *MacKinnon* (*Miller's Factor*) v. *Knox*, 14 R. 22, 15 R. (H.L.) 83. The decision did not touch the point in either Court, the finding of the Lord Ordinary being to the effect that the loan was made on unsubstantial and insufficient security according to the law and practice of trusts administration. If, however, the loan had been *ultra vires* it would not have been necessary to have considered the sufficiency of the security. In the House of Lords, Lord Watson, after quoting the investment clause which empowered the trustees to lend out the funds of the trust 'on such security, heritable or personal, as they may think proper,' said—'Power to lend on personal security has been held in Scotland to include lending on personal credit.' If he had been of opinion that that was not so, nothing more would have been required for the decision of the case, as the loan in question was one, as Lord Watson himself said, 'upon no further security than the personal guarantee of two individuals, whose ability to repay was dependent upon the vicissitudes of trade.' The true ground of the decision in that case, however, I take to be that the transaction complained of was not a *bona fide* investment of the trust funds, but an accommodation to the borrower to enable him to buy certain property belonging to the trust. In other words, the loan was not upon personal security, which the trustees had reason to believe was good and sufficient at the time when the loan was made, and they were thus liable to replace the lost money upon the ground of negligent administration of their office.

"On these authorities I have come to the conclusion that the trustees here acted within their powers. But another argument was maintained by the pursuers, founded upon the opinion of Lord Watson in *Knox's* case, to the effect that the trustees were not entitled to lend money on personal obligation so long as it was possible for them to obtain a pledge of heritable or moveable property. Lord Watson's dicta on this subject are, however, obiter, and I find that Lord Fitzgerald guards himself against being held to concur in certain of the propositions which Lord Watson had laid down, and which in his judgment were not necessary for the decision of the case. Nor do I find that these dicta received any countenance from the reported opinions of the Lord Chancellor and Lord Macnaghten, who based their judgment on the same grounds as the Lord Ordinary. I think, therefore, that the dicta in question must be considered with reference to the facts of the particular case under considera-

tion, and are not capable of general application. I do not suppose that it would ever be affirmed that trustees could not get money lent on heritable security if they were to take a slightly lower rate of interest than the market rate. There would therefore be no object in giving trustees the power to lend upon heritable or personal security, nor do I think there is any authority for holding that such words are to be read, not as giving alternative powers of investment, but as if the word 'heritable' was followed by 'or failing their being able to obtain heritable security, then they shall be authorised to lend on personal security.' There is no suggestion of such a limitation in the older authorities, which I think I must follow."

The pursuers reclaimed, and argued—The Lord Ordinary had held that personal security was equivalent to personal obligation; but any money lent implied an obligation to repay, and therefore, according to the Lord Ordinary, was lent on personal security. Personal security meant something more than mere personal obligation or credit, a right by preference or diligence, an assignation to personal property; at lowest it implied one or more persons to fall back on as debtor if the original debtor failed to meet his obligation. Thus a promissory-note was not a security but a voucher—*Bow* v. *Spankie*, June 1, 1811, F.C. There were dicta to the effect that a personal obligation was not a security—*Clark and Others* v. *West Calder Oil Company and Others*, June 30, 1882, 9 R. 1017, L.-P. Inglis, at p. 1024, 19 S.L.R. 757; and in *Graham & Company* v. *Raeburn & Verel*, November 7, 1895, 23 R. 84, Lord M'Laren, at p. 89, 33 S.L.R. 61. As to the cases referred to by the Lord Ordinary—*Lamb* v. *Cochran and Others*, March 23, 1883, 20 S.L.R. 575—the decision of Lord Fraser that authority to trustees to lend on personal security entitled them to lend on personal bond to a person reputed solvent was not necessary to decide that case. Moreover, it proceeded on a misunderstanding of a dictum of Lord Moncreiff in *Seton* v. *Dawson*, December 18, 1841, 4 D. 310, at p. 328. In *Morrison and Others* v. *Allan* (*Gerrard's Trustee*), July 14, 1886, 23 S.L.R. 846, no question as to the meaning of personal security was raised. A mere inference had been drawn by the Lord Ordinary from a dictum of Lord Shand. The power to the trustees in *Ritchies* v. *Ritchie's Trustees*, July 20, 1888, 15 R. 1086, 25 S.L.R. 514, included the words "or in other such way," which did not occur here. In *Millar's Factor* v. *Millar's Trustees*, November 2, 1886, 14 R. 22, 24 S.L.R. 355, reported in House of Lords *sub nomine Knox* v. *Mackinnon*, August 7, 1888, 15 R. (H.L.) 83, 25 S.L.R. 572, no question was raised or decided as to a personal security, and the dictum of Lord Watson had no foundation other than *Lamb* (*cit. supra*). (2) Even if personal security meant mere personal obligation, "trustees who make a permanent loan on that footing," *i.e.*, personal security, "must in my opinion, if any loss results from it, justify their action by showing that no safer investment was open to them"—*Knox* v. *Mackinnon* (*cit. supra*), Lord Watson, at p. 86 of 15 R. (H.L.). The trustees here could not show that.

Argued for the defenders (respondents)—Authority to invest on "personal security" included the deposit-receipts in question. If the phrase used had been "moveable security" it might have given colour to the idea that there should be corporeal moveables as security, but the phrase used was "personal security." Personal security meant personal obligation—*Lamb* v. *Cochran* (*cit. supra*) and other cases cited by the Lord Ordinary. Reference was also made to *Breatcliff and Others* v. *Bransby's Trustees*, January 11, 1887, 14 R. 307, 24 S.L.R. 233. This seemed to be beyond dispute in England—*Forbes* v. *Ross*, 1788, 2 Cox 113 and 2 Bro. C.C. 430; *Pickard* v. *Anderson*, L.R. 13 Eq. 608; *in re Rayner*, [1904] 1 Ch. 176; Lewin on Trusts (11th edition), p. 343-4; Williams on Executors (10th edition), vol. 2, p. 1447. (2) Even if the construction put upon their power of investment by the trustees were wrong they had acted in *bona fide*, and in the circumstances were not responsible for any loss—*Warren's Judicial Factor* v. *Warren's Executrix*, June 4, 1903, 5 F. 890, 40 S.L.R. 653.

At advising—

LORD KYLLACHY—In this case the question is whether the defenders, who are testamentary trustees and have power to invest the trust funds "on heritable or good personal security," are personally liable for loss sustained on deposits made by them with certain colonial banks, incorporated, as it appears, under certain colonial statutes, but which were sometime ago forced to compound with their creditors.

There is no doubt that the deposits in question were "investments" in the sense of the power. That is not disputed, and was indeed expressly decided in the case of *Ritchie* (15 R. 1086) referred to by the Lord Ordinary. Neither are the investments impeached as improvident. It is not suggested that the banking companies were otherwise than in good credit, or that the investments were not sufficiently good of their class. The question is one entirely of power, and depends on the meaning of the expression "personal security" as used in the settlement.

It is clear that if that expression covers only investments made on the security of personal property the deposit was *ultra vires*. On the other hand, if the expression means or covers security depending on personal obligation the deposit is clearly enough good, for it at least involved the personal obligation of the borrower, which was in each case the banking company, and no distinction is possible between the personal obligation of one person and the personal obligation of several. The addition of other obligants, directly or indirectly, may affect the value of the security but not its character. The security constituted by the personal bond of A is just of the same charac-

ter as that constituted by the personal bond or bonds of A, B, and C. Nor is it of a different character although it should be also fortified, say, by assignations, duly intimated, to debts or obligations due to A by B, C, or D.

The question therefore is, whether "personal security" means and covers only a security constituted by way of real right over moveable property? And to that question an affirmative answer does not appear to me to be possible.

For one thing I do not quite follow how a security can be called "personal" which, as regards the nature of the right conferred by it, is real, and which is only personal in the sense that the subject of it consists of moveable property. Further, it seems to me that if from the category of "personal securities" there are to be excluded all securities depending on personal obligation as distinguished from real right, two things would follow, each of which would be contrary to all received ideas. In the first place, the category would be confined to a very limited class of securities, viz., pledges of corporeal moveables—a class of securities which are *hardly* in practice within the range of investment at all. In the next place it would, on the other hand, fail to cover a class of securities its extension to which has never been questioned, viz., loans, say, upon assigned policies of insurance, or upon collateral obligations by third parties bound as co-principals with, or as cautioners for, the primary debtor.

Apart therefore from authority, I should be quite prepared to concur with the Lord Ordinary's judgment; but I may add that I think it is clear that the point in question is settled in England in the defenders' favour, and has long been so, and that it is also so settled in Scotland, if not quite expressly, at least by necessary implication. I refer in particular to the Scotch cases cited by the Lord Ordinary, and as regards the English rule to Lewin on Trusts, p. 317 (8th edition), and to the cases there cited, which seem fairly conclusive.

Lord Stormonth Darling, Lord Low, and the Lord Justice-Clerk concurred.

The Court refused the reclaiming note and adhered to the interlocutor reclaimed against.

Counsel for the Pursuers (Reclaimers)—A. R. Brown. Agents—Alex. Morison & Company, W.S.

Counsel for the Defenders (Respondents)—Hunter, K.C.—Chapel. Agents—Bruce & Black, W.S.

Thursday, July 19.

FIRST DIVISION.

[Sheriff Court at Inverness.

WARRAND *v.* WATSON AND OTHERS.

(*See ante* December 14, 1905, 42 S.L.R. 252, 7 F. 253).

Fishings — Salmon-Fishing — Trespass — Parties Nominally Fishing for Trout—Facts Held Sufficient to Warrant Interdict.

A *pro indiviso* proprietor of salmon-fishing having the exclusive right on seven out of every eight week days, raised an action of interdict against certain persons, the townsmen of a town which was the other *pro indiviso* proprietor of the salmon-fishing having the exclusive right on the eighth day and which exercised its right by leaving it open to the townsmen, to have them prohibited from unlawfully trespassing on his fishing. The defenders averred that they were fishing for brown trout, which class of fishing was in fact open to them.

Interdict *granted* where it was established, though no salmon had actually been taken, that the defenders (1) had made no difference in their method of fishing on the days when they were not entitled to fish for salmon, and (2) had used minnow-tackle or large sized flies (though not technically salmon flies), and (3) had fished in the months of August and September, months when, broadly speaking, only salmon and sea trout are taken with the rod.

This case is reported *ante ut supra.*

Captain Redmond Bewley Warrand of Bught, residing at Ryefield House, Conon-bridge, *pro indiviso* proprietor of the salmon-fishings on the river Ness from the Stone of Clachnahagaig to the sea, with exclusive right on seven out of every eight week days, having brought an action to interdict Donald Watson, fishing tackle maker, Inglis Street, Inverness, and others, indwellers of Inverness, the other *pro indiviso* proprietor having exclusive right on the eighth day, which right it left open to its indwellers, from unlawfully trespassing on his fishing, the defenders averred, *inter alia*, that they were not unlawfully trespassing on the fishing but were fishing for brown trout, which fishing it was not questioned was open to them.

On 14th December 1905, the case having been appealed from the Sheriff, the First Division allowed a proof, which was led before Lord M'Laren on 21st March 1906. The nature of the evidence adduced appears from his Lordship's opinion *infra.*

At a hearing on the evidence, argued for the pursuer—Trout-fishing was not an independent right—Rankine on Landownership, p. 508—and must be exercised subordinately to the higher right of salmon-fishing. Any reasonable apprehension of an invasion of the pursuer's rights justified an application