The respondents argued on the grounds stated in the Sheriffs' notes.

At advising—

LORD JUSTICE-CLERK—This is a narrow case, but I am inclined to think that the Sheriffs are right, and in coming to that conclusion I am not conflicting with any of the *dicta* laid down in the cases which have been quoted to us.

In the first place, this was a level-crossing, where the public were within their right in being on the line; and secondly, the man who was killed was going to his work on a dark morning by that level-crossing. It was obstructed on this occasion by a stationary engine, which was blowing off steam and making a great noise; and the man had consequently to go round the engine, and apparently had some three steps to take in order to make himself clear of the other line when the engine which caused the accident came up. His companion saw the light of the approaching engine, and made a jump, but the pursuer was too late, and was killed. It turned out that it was a single engine, which consequently made less noise and attracted less attention than a train would have done.

The first question therefore is, Was this engine bound to whistle? I think it was. It was upon an extraordinary service, and I think it was bound to give some notice of its approach, partly because it was on an extraordinary service, and partly because it was a comparatively small object. I think it was the duty of those in charge, unless there was some very good cause for an exception, to give reasonable notice, especially on a dark morning. I think there was fault on the part of the driver.

The only other question is, Whether this poor man was guilty of contributory negligence? I think he did the best he could. He could not look in front and up and down the line at the same time. I do not see any evidence of negligence of any sort except in making use of this level-crossing; but that he was obliged to do. The case is not free from doubt, but on the whole I am for adhering.

LORD GIFFORD—I am of the same opinion. These miners were obliged to go across the railway by this level-crossing at six o'clock on a dark winter morning. That should make them very careful, but they must cross somehow. Now, on that morning an engine is obstructing the crossing, making a loud noise, but they were not bound to wait till it had gone away. It would hardly do to say that. The man wanted to cross, and he was entitled to cross. Well, he goes, makes the attempt, and is killed. Now, I think the single engine which came up and caused the accident ought either to have showed or given a warning of some sort. The driver must have known that men were likely to be crossing at that hour. I think therefore he was to blame. And I cannot say, on the other hand, that there was any contributory negligence on the part of the poor man who was killed. He was anxious to get to his work, and he took what he had reason to believe was a safe way. I also am for adhering.

LORD YOUNG—(who had been called in in the absence of Lord Ormidale)—I concur. This is a question of fact. The law is quite clear. The Sheriffs have grounded their judgment on evidence taken in their presence, and that evidence is in my opinion such that they may reasonably have reached the conclusion they did. I should not have been surprised had they come to another result, and I am far from saying that I should have dissented from that result. But their judgment is a perfectly reasonable one.

The Court adhered.

Counsel for Pursuers (Respondents)—Moncreiff—Young. Agents—W. Adam & Winchester, S.S.C.

Counsel for Defenders (Appellants)—Lord Advocate (Watson)—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, November 7.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

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

Bank—Trust—Power of Investment—Meaning of "Chartered Bank."

A truster empowered his trustees to lend out and invest certain funds in, *inter alia*, "the stock of any chartered bank."—*Held* (*diss.* Lord Deas) that that did not authorise an investment in a bank incorporated under the Companies Act 1862.

Observations upon the constitutions of banking companies in Scotland.

Observed that the expression "chartered bank" includes a bank incorporated by letters-patent.

Question per Lord Shand, Whether the expression used in the Pupils Protection Act 1849 (12 and 13 Vict. cap. 51), sec. 5, viz., "One of the banks in Scotland established by Act of Parliament or royal charter," includes a bank incorporated under the Companies Act 1862?

Trust—Homologation—Homologation of Trustees' Illegal Actings by Beneficiary.

A truster left the liferent of a certain sum under the declaration "that the said interest and proceeds shall be paid to the said liferentrix for her alimentary use only, and exclusive always of the *jus mariti* and right of administration of any husband she may marry; and further declaring that the said interest and proceeds shall not be assignable by her, nor shall it be in her power to anticipate the same in any manner of way, nor shall the same be capable of attachment or arrestment by her creditors or the creditors of any husband she may marry." Where the trustees placed the funds in investments which were unauthorised by the trust-deed, and afterwards pleaded that they had acted with the knowledge and sanction of the beneficiary—*held* that even if the beneficiary had been made aware that the investment was *ultra vires* of them, no homologation would in the circumstances relieve them from liability.

By assignation dated 14th February 1868, Robert Sanders, farmer, Masterton, near Dunfermline, on the narrative that he was desirous of making an absolute and irrevocable provision in his own lifetime for behoof of Janet Sanders, daughter of his son Robert Sanders, assigned to Robert Ebenezer Beveridge and certain other trustees three policies of assurance on his life for £600, £400, and £200 respectively, in trust for the following purposes:—*First*, The trustees were directed to apply the trust funds, under deduction of expenses, in payment to Miss Sanders during all the days of her life of the free annual interest or proceeds of the same, "for her alimentary use only, and exclusive always of the *jus mariti* and right of administration of any husband she may marry; and further declaring that the said interest or proceeds shall not be assignable by her, nor shall it be in her power to anticipate the same in any manner of way, nor shall the same be capable of attachment or arrestment by her creditors or the creditors of any husband she may marry." *Second*, The whole capital of the trust was directed to be paid to the lawful child or children of Miss Sanders who might survive her and attain majority, and that in the proportions, at the terms, and under the provisions and declarations all therein set forth. The *third* purpose provided that in the event of Miss Sanders marrying, and of there being no issue or likelihood of issue by her marriage, the trustees should have power to make over to her absolutely one-half of the capital, "provided always that she shall make application therefor, and that my trustees shall in the exercise of their discretion (to which it is entirely left) consider it at the time to be for her real comfort and advantage that they should comply with her request." The *fourth* purpose provided that in the event of Miss Sanders' decease without lawful issue the whole trust funds then in their possession should be paid over to the testamentary trustees of the truster, to be disposed of by them as part of the residue of his estate, in conformity with the directions in his *mortis causa* trust-disposition and settlement.

The assignation further contained this power of investment in favour of the trustees:—"And I hereby provide and declare that my trustees shall have full power to lend out and invest the said whole sums to be recovered as aforesaid, or any part thereof, on heritable or personal security, or in the stock of any chartered bank, or in the preference stock or shares or debentures of any railway or other company, and that without incurring any responsibility on their part."

The truster died on 7th March 1874, and the trustees accepted the trust and entered upon the possession and management of the trust estate, which amounted to about £1820. Mr John Ross, writer, Dunfermline, and agent for the City of Glasgow Bank there, was appointed agent to the trust.

On the 14th July 1874 the trustees purchased in their names as trustees £170 of stock of the City of Glasgow Bank, at the price, including expenses, of £401, 12s. 3d., and applied part of the trust funds and estate conveyed to them under the assignation in payment of the price. They subsequently sold £55 of this stock in order to pay Government duties.

On the failure and winding-up of the bank the trustees proposed to pay the calls on this stock out of the trust funds, and Miss Sanders thereupon presented this note of suspension and interdict against the trustees using any part of the trust estate in that way.

On 26th December 1878 the Lord Ordinary on the Bills (CURRIEHILL) passed the note without caution, and continued the interdict which had been already granted. A record was afterwards made up, and along with that process there was conjoined an action of declarator, dealing with the same matter, which had also been brought into Court by Miss Sanders.

She pleaded in the suspension, *inter alia*—"(1) The investment of part of the trust funds in the purchase of the said stock of the City of Glasgow Bank not being authorised by the trust-assignation libelled, the respondents are not entitled to use any part of the remaining trust funds in payment of the calls made or to be made on them in respect of the said stock. (3) The respondents having purchased the said stock on their own responsibility, and in violation of the express directions in the trust-assignation, are not entitled to relief from the trust-estate for any obligations incurred by them in respect of the said stock, or for any interest, costs, expenses, or other disbursements that may be incurred by them in connection therewith."

The respondents pleaded, *inter alia*—"(2) The respondents were justified in their investment by the terms of the trust-deed. (3) The investment having been made with the knowledge and sanction of the complainer, the complainer is not entitled to challenge the same."

With reference to their third plea the respondents averred as follows in their statement of facts—"(2) The complainer was born on 13th August 1846, and she was therefore about twenty-seven years of age at the death of the truster. She received a copy of the assignation in trust, under which the respondents are trustees, shortly after the truster's death, and she was well acquainted with the powers of investment thereby conferred. The investment in bank stock above mentioned was made by the respondents acting in good faith under their trust powers, and was, as they believed, for the benefit of the complainer in securing her an increased income. (3) The complainer at the time of the said investment in bank stock knew, authorised, and approved of the said investment. She was so much satisfied with the investment, that subsequently, when the original heritable security for £1400 was paid up, she caused to be communicated to the respondents her wish that this sum also should be invested in City of Glasgow Bank stock, offering at the same time her formal approval of the investment. The respondents not thinking it expedient to invest all the trust funds in one way, resolved, conform to minute of 30th November 1875, to invest the said £1400 on a postponed bond, on obtaining the complainer's approval. This resolution was intimated to the complainer by letter from the agent of the trustees, dated 1st December 1875, in which the reasons of the respondents for refusing further investment in bank stock were explained to her. (4) Further, since the date of the said investment in bank stock the complainer has frequently had her attention called to the fact that the trust funds were in part so invested. By both oral and

written communications, among which are the letter to her from the agent for the trust, dated 16th May 1877, and the annually published lists of bank shareholders, this fact was brought distinctly within the complainer's knowledge. She knowingly drew her income in part from the bank stock held by the respondents as aforesaid, and she has all along homologated and acquiesced in the investment. (5) On the failure of the bank the complainer, in personal communications with the agent for the trust and with some of the respondents, intimated that she in no way blamed the respondents—that the investment in bank stock had been made with her approval—that she had desired the whole funds to be so invested—and that she had prepared herself for the consequences of the trust-estate being exhausted by calls by taking a situation. The agent for the trust, conform to minute of 3d December 1878, intimated his willingness to continue payment of the complainer's income. This offer has been declined, and the complainer has taken up her present position, in violation of her own previous approval of the investment made by the respondents."

A proof was led in the case, the purport of which will be found in the note of the Lord Ordinary *infra* and in the opinions of the Court.

The Lord Ordinary (CUBBIEHILL) pronounced this interlocutor:—

"*Edinburgh, 6th March* 1879.—The Lord Ordinary having considered the conjoined actions, In the first place, in the action of declarator, Finds, decerns, and declares in terms of the declaratory conclusions of the summons: Decerns and ordains the defenders, on or before the term of Whitsunday next 1879, to lend out and invest the sum of £401, 12s. 3d., under deduction of the sum of £127, 12s. received by them as the price of £55 of the City of Glasgow Bank stock sold by them on or about 10th April 1877, on heritable or personal security, or in the stock of any chartered bank, or in the preference stock or shares or debentures of any railway or other company, in conformity with the powers and directions contained in the trust-assignation libelled; and to exhibit and produce in process, on or before the 5th sederunt day in May next, the bond, stock certificate, debenture, or other security writ that may be obtained by them for the sum to be so lent out and invested by them: In the second place, in the process of suspension and interdict, sustains the reasons of suspension and interdict, suspends the proceedings complained of, interdicts, prohibits, and discharges in terms of the prayer of the note of suspension and interdict, declares the interdict already granted perpetual, and decerns: Reserving to the defenders and respondents all claims of relief which may be competent to them against the pursuer and complainer and her estate other than her liferent interest in the trust-estate held by the defenders and respondents as trustees under the said trust-assignation; and to the pursuer and complainer her answer thereto: Finds the pursuer and complainer entitled to expenses, &c.

"*Note.*—[*After stating the facts*]—Three questions arise, viz.—*First*, Whether the purchase of stock of the City of Glasgow Bank was an investment authorised by the trust-assignation, or within the powers of the respondents and defenders as trustees? *Second*, Assuming the investment to be *ultra vires* of the trustees, did Miss Sanders (the complainer and pursuer) sanction or homologate the purchase? And *Third*, Had she the power so to do?

"As to the first question, I have no doubt. The purchase of the stock or shares of a joint-stock banking company by trustees is an application of trust funds which the Court cannot sanction unless it be authorised by the trust-deed. Such a purchase is neither more nor less than trading with the trust funds in a business adventure attended with risk. In the present case it is certainly not authorised by the trust-deed. The powers to invest the trust funds are in the following terms, viz.—[*reads ut supra*]. Under these powers of investment, which are undoubtedly extensive, the stock of any 'chartered bank,' *i.e.*, of any bank incorporated by royal charter, is authorised. But *expressio unius est exclusio alterius*, and the use of the word 'chartered' excludes all power of investing in the stock of any unchartered bank. The City of Glasgow Bank was not a chartered bank; it was for many years a private joint-stock banking association, although latterly it had been incorporated under the provisions of The Companies Act 1862. A company, however, so incorporated is in no sense of the word a 'chartered bank,' and I must therefore hold that the purchase of the bank stock in question was *ultra vires* of the trustees.

"As to the second question, viz., Whether the complainer and pursuer sanctioned or homologated the purchase of the bank stock? I think a negative answer must also be returned. It appears from the proof (in which, I may observe, great candour was exhibited by all the witnesses) that at or about the time when the stock was purchased in July 1874 Miss Sanders was made aware by one or more of the trustees, and by their law agent Mr John Ross, that trust funds to the amount of about £400 had been or were about to be invested in the purchase of City of Glasgow Bank stock, and that she approved of the funds being so applied. It further appears that in 1875, when the sum of £1400 already mentioned was paid up, and was lying in bank until a suitable investment could be procured, Miss Sanders wished the trustees to purchase more bank stock; and I think it may fairly be inferred that if the trustees had yielded to her wishes and invested that sum, or part thereof, in the purchase of City of Glasgow Bank stock, she would have approved of such purchase. They, however, prudently declined to invest more of the funds in bank stock, and they re-invested the £1400 on heritable security. On this branch of the case, then, the proof shows that Miss Sanders was aware of the purchase of the bank stock in 1874; that she approved of it as being a profitable investment of the trust funds; and that until the failure of the bank in 1878 she regularly and knowingly received from the trustees, as part of her income, the dividends periodically paid by the bank upon the stock in question. But it appears to me that in the circumstances of this case mere knowledge and approval on the part of Miss Sanders were not enough to liberate the trustees, as in a question with her, from the responsibility which they incurred by making this unauthorised investment of the trust funds. What they plead is homologation on the part of Miss

Sanders. Homologation implies the existence of some defect in the transaction which may be obviated by subsequent assent or adoption by the party entitled to object to the defect; but it is obviously of the very essence of homologation that the defect should be known to the party who is alleged to have waived the objection. Now, it is very clear in the present case that Miss Sanders had no knowledge of the all-important fact that the City of Glasgow Bank was not a 'chartered bank,' and that an investment in the purchase of its stock was one which the trustees had no power to make. It was the primary duty of the trustees to invest the funds in one or more of the investments authorised by the trust-deed, and when they informed Miss Sanders of the purchase of the bank stock she was entitled to assume that they had satisfied themselves that the investment was within their powers. And if by asking her approval they intended to obtain from her the adoption or approval of an unauthorised investment, it was clearly their duty to make her aware that they were exceeding their powers. But it is certain that no such information was given to Miss Sanders by or on behalf of the trustees. On the other hand, it is proved that the purchase was made by the trustees in the belief, not that it was unauthorised by the trust deed, but that the City of Glasgow Bank was a 'chartered bank,' and that the investment was therefore fully within their power. Mr Ross, the law agent of all the parties, expressly says that he was at the time of the purchase under the belief that the term 'chartered bank,' as used in the trust-deed, included the City of Glasgow Bank, and the object of the trustees in taking Miss Sanders along with them was that she might be satisfied that as liferentrix of the fund she was obtaining as large an income as could reasonably be expected. Mr Ross, indeed, says that in 1875, although he still believed the investment to be within the powers of the trustees, he had begun to doubt the soundness of that belief, and he says that he communicated that doubt to Miss Sanders. But I think that he is under some misapprehension as to this. Miss Sanders says she heard nothing from Mr Ross or the trustees, or from anyone else, until after the stoppage of the bank, to lead her to doubt the power of the trustees to hold such stock, and the trustees also say that no such doubt was ever suggested to them by Mr Ross or by anyone. It therefore appears to me impossible for the trustees now to maintain that Miss Sanders, knowing the investment to be *ultra vires* of them, sanctioned and homologated it.

"But even assuming Miss Sanders to have been aware of the objection, and to have waived it, the third question still remains, viz., Whether she had power effectually to do so? Her position with reference to the trust funds must be distinctly kept in view. [*The terms of the trust-deed were here referred to*].

"The pursuer and complainer Janet Sanders is unmarried, but she is only thirty-two years of age, and she may marry and have children. As regards the fee, therefore, of the trust-estate, it is plain that under present circumstances neither she nor the trustees have any power whatever to alienate the same either in whole or in part. Should she marry and have children, the whole capital is destined to these children; and if she should die unmarried, she never can receive one shilling of the capital, the whole being destined to her grandfather's residuary legatees. It may be that she has no title to protect the interest of these legatees, and if I had entertained any doubt (which I do not) as to her right to protect the fee for her unborn children, I should have sisted process and ordered intimation of the dependence of the action to be made to the parties contingently interested in the residue of old Robert Sanders' trust-estate. The pursuer and complainer, however, has in my opinion a good title to protect the fee of the trust-estate for behoof of her children *nascituri*. This being so, let us see what is the position now maintained by the trustees. They maintain not merely that they are not bound to replace the funds which have been lost by the disappearance of the capital of the bank, but also that they are entitled to apply the £1400 of trust funds still extant in payment of the past and future calls made upon them as shareholders by the liquidators. It appears to me that whatever may be said as to the pursuer's and complainer's own liferent interest, no homologation on her part can possibly deprive her of the right or relieve her of the duty of protecting the fee of the trust-estate for behoof of her unborn children, and that she is entitled to insist on the trustees replacing the capital already lost, and to have them interdicted from applying any part of the capital in payment of calls. As regards her own life-interest, the case is more difficult, but I have come to be of opinion that even as regards that interest her alleged homologation cannot be founded on by the trustees. As regards the £1400 presently invested on heritable security, there can, I think, be no question. Whatever risk Miss Sanders may be supposed to have undertaken as regards the money invested in the City of Glasgow Bank, she certainly cannot be held, by approving of the purchase of that stock, to have undertaken any risk as regards the money invested on heritable security. She may, as regards the bank stock, be held to have contemplated the possibility of it becoming unprofitable and being lost, but in no view can her liability be extended to her income from the other trust funds still extant. And even as to the funds invested in the bank stock, and now to be replaced by the trustees, I think the pursuer will still be entitled to her liferent thereof. I do not think that the trustees are entitled to claim from Miss Sanders relief from their liability to the liquidators out of any part of her liferent interest. That interest is by the trust-deed declared to be an alimentary allowance to her, which she is not to have power to assign or anticipate, and which is not to be attachable for her debts. Had she been herself a shareholder in the bank, the liquidators could not have enforced payment of calls out of her liferent; still less, in my opinion, can the trustees, who were appointed for the very purpose of preventing her from anticipating or assigning her income, or subjecting it to liability for her debts, now claim relief out of that income for their own obligations to the bank.

"The result of the whole matter is that in my opinion the purchase of the bank stock must be declared to be *ultra vires* of the trustees; that the trustees must forthwith invest in good and sufficient security the sum which lately stood in the City of Glasgow Bank stock; and that the trustees must be interdicted from applying any

part of the trust funds in payment of the past and future calls made by the liquidators of the bank in respect of the said stock. But as Miss Sanders may be possessed of other estate than her liferent interest in the trust funds, and may in one contingency become entitled to one-half of the fee of the trust funds for her own absolute use—as to which, however, I express no opinion —I have inserted in the interlocutor a reservation for the purpose of keeping open all questions as to the right of the trustees to be relieved from any of such sources.

"I have felt this to be a very hard case for the trustees, who have unquestionably acted with perfect *bona fides* in the matter; but the law is in my opinion against them, and I have therefore with great reluctance been constrained to pronounce judgment in terms of the foregoing interlocutor, with expenses."

The respondents reclaimed, and argued — (1) "Chartered bank" meant "incorporated bank." The effect of a charter was nothing more than to confer the privilege of incorporation. There was no distinction in the matter of liability, for some chartered banks were unlimited. In so far as the truster's intention was of any value, there was everything to suggest that he had in view the City of Glasgow Bank, in the branch of which at Dunfermline he took a great interest. (2) Admitting that there was an error, it was a venial one. Trustees were bound to take as much care of the trust-estate as prudent men would do of their own, and they had done so here. (3) Miss Sanders was by her actings barred from objecting to the trustees paying the calls out of the trust funds. She knew what they had done—had in fact suggested the investment in the City of Glasgow Bank. (4) At all events, she was bound as regards her life interest.

Authorities—Lands Clauses Act 1845 (8 and 9 Vict. cap. 19), sec. 9; Pupils Protection Act 1849 (12 and 13 Vict. cap. 51), sec. 5; Railway Clauses Act 1845 (8 and 9 Vict. cap. 33), sec. 2; Parliamentary Papers, 1826, vol. 23, p. 1; Fleming on Scotch Banks, Edin., 1877; Edinburgh Review, vol. 43, p. 282; *Scott* v. *Handyside*, March 30, 1868, 6 Macph. 753; *Ramage* v. *Baillie*, October 27, 1869, 8 Macph. 77; *Jones* v. *Higgins*, L.R., 2 Eq. 538; *Brice* v. *Stocks*, 2 White and Tudor's Leading Cases, 877; *Polloxfen* v. *Stewart*, July 14, 1841, 3 D. 1215; *Barns* v. *Barris Trustees*, March 5, 1857, 19 D. 652.

Argued for respondent—(1) If "chartered" meant "incorporated," then all banks in Scotland were chartered. But "chartered," according both to usage and its natural meaning, meant a bank having a charter. It might be a question whether in strictness the Bank of Scotland ought so to be designated, but long custom had given it the title. Incorporation under the Companies Act of 1862 was in no sense a means of giving a charter to the company so incorporated. (2) As to the alleged slight nature of the error, the trustees ought to have taken advice. (3) Miss Sanders could not in law, under the terms of the deed, homologate what the trustees did. They were there to prevent her from acting; and in point of fact she did not homologate, for she did not know what the trustees themselves say they did not know, namely, whether the City of Glasgow Bank was a chartered bank.

Authorities—Parliamentary Papers, 1864, vol. 32, p. 165; *Smith* v. *Campbell*, May 30, 1873, 11 Macph. 639; *White's Trustees* v. *Whyte*, June 1, 1877, 4 R. 786.

At advising—

Lord President—The question decided by the Lord Ordinary in this case depends upon the construction of a deed of trust which was executed by the late Robert Sanders in 1868. The object of it was to provide for a young lady, whom he described to be a Miss Sanders, residing in family with him, "daughter of my son Robert Sanders." It is a deed *inter vivos*, and conveys to the trustees certain policies of insurance, which they are to hold, and after his death to realise, and then invest the proceeds in certain described securities for behoof of Miss Sanders.

The first purpose of the trust is declared to be the payment to Miss Sanders of the proceeds of the trust funds during her life "for her alimentary use only, and exclusive always of the *jus mariti* and right of administration of any husband she may marry; and further, declaring that the said interest and proceeds shall not be assignable by her, nor shall it be in her power to anticipate the same in any manner of way, nor shall the same be capable of attachment or arrestment by her creditors or the creditors of any husband she may marry."

The capital of the sums recovered is to be settled upon the children of Miss Sanders, if she has any, and in the event of her marrying and having no issue one-half is to be paid to her, and the rest is to fall into the testamentary trust of the truster; and in the event of her dying without leaving lawful issue, then the whole funds in the hands of the trustees is to fall to the general estate of the truster.

Now, that is a trust obviously created for the benefit of this young woman, and upon the footing that she was to have no concern in the management of the fund set apart for her, but that it was to be exclusively under the administration of the trustees. The object of the deed is to protect Miss Sanders not only against third parties but against herself—an object we are quite familiar with in trusts of this description—and therefore she could take no part in the administration of the estate. Nor were the trustees in any way entitled to allow her to have any voice as regards the investment of the funds or the management of the trust. The powers of the trustees are not unusual, but there is a particular provision and declaration as to their powers of investment, upon which the whole case before us turns. That clause is in these terms—"And I hereby provide and declare that my trustees shall have full power to lend out and invest the said whole sums to be recovered as aforesaid, or any part thereof, on heritable or personal security, or in the stock of any chartered bank, or in the preference stock or shares or debentures of any railway or other company, and that without incurring any responsibility on their part."

Now, the trustees having accepted of their office, proceeded after Mr Sanders' death in 1874 to realise the policies of insurance, and they took into consideration how they should invest the funds, and at a meeting on 7th July 1874, having taken into consideration the best mode of investing the sum then standing for investment

in bank, "and being informed by Mr Ross that Ex-Provost Whitelaw required a loan of £1400 as a first security on the Dunfermline Foundry and houses in Foundry Street, in order to pay off an existing loan of that amount, they agreed to lend the same to him at 4½ per cent. interest. They further resolved to invest the balance of the money in City of Glasgow Bank stock." Now, as far as we can see, this seems to have been done without much consideration, and that was very unfortunate, because if they had taken legal advice they would probably have found that if not exceeding their powers, they were at least doing something which might be construed into such a case very easily. The question is, Whether in making this investment and retaining it to a certain extent down to the time when the City of Glasgow Bank failed they exceeded their powers as trustees, and particularly the power of investment which I have read? They are empowered to invest in the stock of "any chartered bank," and it is maintained by the pursuer and complainer that that limits the power to the stock of chartered banks as distinguished from other banks. The contention on the other hand is that "chartered bank" is a term that may fairly be construed as to include such a bank as the City of Glasgow Bank. That is the first question for our determination.

Now, if the phrase here employed—"stock of any chartered bank"—can be construed so as to include the stock of the City of Glasgow Bank, I confess I am not able to see how it can be limited at all, or how it can be said that the stock of any bank whatever can be excluded from the power of investment; and yet it seems very plain that the truster intended something by these words different from the stock of any bank. We must always give a meaning to words which are deliberately employed, as these have been, and when we find that "chartered banks" is a term which has often a fixed meaning, it is the duty of the Court to attach that meaning to it in a case of this kind. I confess I do not find any difficulty in ascertaining the meaning of the term "chartered bank." It is a phrase perfectly familiar to men of business in Scotland, and has always, I think, had the same kind of meaning. I do not say it has at all times in the history of Scotland comprehended the same banks, but it has always had a meaning which distinguishes a certain class of bank or banks generally. It is not necessary to go further back than the Commentaries of Mr Bell, published in the year 1826 (the fifth edition), for the purpose of seeing how the term was understood at that time. He is writing, in the part of his work to which I refer, on "Incorporeal rights not connected with law, considered as a fund for the payment of debt," and in that part of his work, at pages 106 and 107 of the fifth edition, he expresses himself thus—"The most important operations of banking are carried on partly by chartered companies, partly by private adventurers. In England the latter have, till lately, been under restraint by the monopoly given to the Bank of England—that not more than six persons should be allowed to join in a private banking company. The peculiar sort of property called banking stock is to be understood only of the shares of the public chartered banks. It is alienable and may be attached by creditors, directly or indirectly." He then proceeds to give an account of the Bank of England, as being the only public or chartered bank in that country; and then adds—"In Scotland there are three public or national banks." He then mentions the incorporations — (first) The Bank of Scotland, incorporated by statute, (second) the Royal Bank, incorporated by a charter of erection in pursuance of the Act 5 Geo. I. chap. 20, and (third) the British Linen Bank, which was erected in the reign of George II. These are the three public or national banks in Scotland, which plainly is equivalent in his understanding to the three chartered banks, because he states at the commencement that there is a marked distinction between a chartered bank and private adventurers, and that the three chartered banks known in Scotland as chartered or public or national banks are those he mentions.

Now, therefore, if the term "chartered bank" had occurred in any deed executed in or about 1826, I do not think any intelligent man of business could have doubted for one moment that what would have thereby been meant would have been the Bank of Scotland, the Royal Bank, or the British Linen Company Bank, to the exclusion of all others; and the question comes to be how far this term varied in signification as time went on. In Mr Bell's Principles, published somewhere about 1829 or 1830 (first edition), he makes use of just the same phraseology, and then he proceeds to mention what are the chartered banks, and these are, as before, the Bank of Scotland, the Royal Bank, and the British Linen Company Bank.

Down to that time therefore there was certainly no variation in the meaning of this term, but about the year 1830 there were two banks which received royal charters under somewhat peculiar circumstances. Down to that time a charter of incorporation necessarily carried with it a limitation of the liability of the incorporators, and it was thought desirable to give the Crown the power of creating incorporations for trading purposes with unlimited liability, it being assumed that the Crown could not do so without statutory authority, and accordingly a statute having been passed giving that power to the Crown, there were erected in Scotland two new banks, which may very fairly be called chartered banks, because they were incorporated by royal charter. The only distinction between them and the old chartered banks was that the liability of the incorporators was unlimited, whereas the liability of the incorporators of the old banks was limited. Now, from this time it may fairly be said that the meaning of the term "chartered banks" was more comprehensive than it was before, and might be held to include the two new banks—the Commercial and National Banks—which were then created by charter and incorporated.

But it remains to be seen what effect this had upon the language of the statutes passed after that time, because we find that particular classes of banks are very often mentioned in statutes affecting Scotland, and are described in various ways as incorporated and chartered banks and so forth. But after the time I am now speaking of, the first statute of importance bearing upon this question is the Lands Clauses Act of 1845, which provided in various places for the depositing of money in bank, and the way in which money is directed to be deposited is always in

these words—"to be deposited in one of the incorporated or chartered banks." There it is quite plain that the words "incorporated" and "chartered" are used as synonymous terms. A chartered bank is necessarily an incorporated bank, because a charter is a charter of incorporation, but it does not follow that all incorporated banks must necessarily mean chartered banks, although at the time that this statute was passed it was so. Then in 1846 there is the statute of 9 and 10 Vict. chap. 20 (Standing Orders of Parliament), which in the second section provides for the custody of deposits which are made by joint-stock companies when applying for bills in Parliament, and there the phraseology used is "the banks in Scotland established by Act of Parliament or royal charter." Again, in 1849 there is the Pupils Protection Act, in which the words are precisely the same as in the statute I have last cited—"the banks in Scotland established by Act of Parliament or royal charter." We were referred to a number of other places in which chartered banks are mentioned. I think it is unnecessary to go further. There are some Parliamentary papers in which the words chartered banks are found just in the same sense as in Mr Bell's books and in the Acts of Parliament. For example, in certain Parliamentary returns which were printed in 1826 there is an enumeration or list of all the banks in Scotland, and they are classed under two heads, the "chartered banks" and "other banks," and under the head "chartered banks" are classed three, and three only—the Bank of Scotland, the Royal Bank, and the British Linen Company Bank.

It appears to me, therefore, that in the law language of Scotland and in the popular language the term "chartered bank" is one perfectly well known. Every man of business knows what it means. It means those banks which are established either by Act of Parliament or by royal charter, and are so distinguished from ordinary trading adventures.

Now, the question comes to be, whether in any proper sense the City of Glasgow Bank can be represented as a chartered bank? If it be, as I said already, I do not know any bank in Scotland that would not come within the same description, because it is just a joint-stock bank, not established by Act of Parliament, not established by charter, but no doubt incorporated under the operation of the Companies Act of 1862 for certain purposes and with certain limitations. I am therefore of opinion, and do not entertain any doubt about it, that it is impossible to read the power of investments here given to the trustees as entitling them to embark the funds of the trust in any bank such as the City of Glasgow Bank, and that they are limited in investing them, in so far as bank stock is concerned, to the stock of banks that are known as "chartered banks" only.

But then it is said that although the trustees may have exceeded their power, they did so with the full knowledge and approbation of the beneficiary herself, and that she is not now entitled to challenge what they have done, because she approved of it at the time. Now, this amounts, if I understand it rightly, to a plea of homologation, and it must be kept in view that in order to infer homologation against a party it is indispensable that the party should know what it is that he or she is consenting to and homologating. But the question naturally occurs to one, Did Miss Sanders know that these trustees were exceeding their powers? It will hardly do for them to say that she did. It cannot be taken off their hands, because they did not know themselves; but if they had had any doubt about the construction of their powers, they were bound, as I have already said, to take legal advice. But it would be a very strong thing to say that if these gentlemen—men of business to a certain extent—did not know that they were exceeding their powers, Miss Sanders knew it—the lady whom they were bound to protect, not only against third parties, but against herself and her own acts and deeds. The plea of homologation, I apprehend, is quite inadmissible, and it seems the more inadmissible when we come to consider that under this deed she could not have directly consented to such an act. She is tied up in such a way that she could not alienate or consent to an alienation, just as little as she could consent to any investment of the funds. And supposing she were to ask these trustees to make a perilous investment for the purpose of increasing the fund, they would not be bound to comply with her request, and she would not be bound by their having done so, because the deed permits no exception in her favour. She cannot control it in any way, and it is left to the trustees to say how they shall invest the funds within the powers committed to them. I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

Lord Deas—The late Robert Sanders, baker in Dunfermline, and tenant of a farm in that neighbourhood, being desirous to make a provision for his grand-daughter Miss Janet Sanders, the pursuer, who lived in family with him, consulted his law-agent Mr John Ross, solicitor in Dunfermline, as to the best mode of doing so. Miss Sanders appears to have been a natural daughter of a son of Mr Sanders, and as Mr Sanders was quite inclined to make the proposed provision irrevocable, and so to avoid the heavy legacy-duty of ten per cent. which would otherwise have been payable, the provision was made, by Mr Ross' advice, in the form of the *inter vivos* irrevocable assignation to trustees under which the present question arises. The deed is dated 14th February 1868. Five of the trustees accepted of the trust in the truster's lifetime, on the same day on which it was executed, and two more of them accepted within a few days after his death, which did not happen till 7th March 1874.

The trust-funds, including the proceeds—which came into the hands of the trustees at the truster's death—of certain policies of insurance on his life, and which policies had been assigned to them by the deed, amounted to about £1880. Of this sum the trustees resolved, by minute of meeting held on 7th July 1874, to invest £1400 on heritable security (which was done), and the balance in the purchase of City of Glasgow Bank stock. It is unnecessary to trace the investments further than to say that, as stated in the Lord Ordinary's note, a purchase was made of £170 of that stock at the gross price of £401 odds, of which at the stoppage of the bank in October 1878 the trustees still held £115 stock, on which calls have been made, with the heavy amount of which per share

we have had too much occasion in the liquidation to become familiar. The difference of £55 stock had been sold in order to pay Government duties which were ultimately exacted on the main portion of the funds as having been the proceeds of policies of insurance, which only became payable by the insurance companies at the truster's death. The reasons which induced the trustees to make a partial investment in City of Glasgow Bank stock may not be very material, but they are apparent enough on the face of the evidence of Mr Ross, whose candour and accuracy nobody doubts, and which character, indeed, attaches, as the Lord Ordinary (who took the proof) observes, to all the evidence. The truster had taken a very lively interest in the opening of the Dunfermline branch of the City of Glasgow Bank under Mr Ross' agency in January 1873, and had caused Miss Sanders to become the first customer of the bank by depositing money in it on the morning of the opening, and continuing to be a depositor from time to time afterwards during his life; and Miss Sanders herself had such entire confidence in the bank that she urged the trustees to invest more money than they had done in the purchase of its stock, and which they only declined to do on the ground that too large a proportion of the trust-funds should not be placed in any one investment.

It is not to be inferred from what I am now saying that I contemplate any immunity in favour of the trustees, or any claim of relief against Miss Sanders personally on account of her approval of what was done. I think the case must be decided on other grounds. But the observations are at the same time favourable to the good faith and reasonableness of the actings of the trustees, which in one aspect of the case may not be immaterial.

The leading question, however, undoubtedly arises, where the Lord Ordinary puts it, in regard to the powers of the trustees under the clause in the trust-deed which he quotes, and the terms of which are these:—"I provide and declare that my trustees shall have full power to lend out and invest the said whole sums to be recovered as aforesaid, or any part thereof, on heritable or personal security, or in the stock of any chartered bank, or in preference stock or shares or debentures of any railway or other company, and that without incurring any responsibility on their part."

The Lord Ordinary quotes the maxim "*Expressio unius est exclusio alterius*," and I do not dispute the force of that maxim. But I am humbly of opinion—1st that in the deed in question the truster used the words "any chartered bank" in a sense which included a bank in the position in which the City of Glasgow Bank then stood as a bank registered and incorporated under the Act of 1862; and 2d, that at all events the trustees might naturally understand the words to have been so used by the truster, and were not therefore guilty of a breach of trust in acting upon that understanding.

If I am right in either of these propositions, the result is that the trustees ought not to be deprived of the same recourse against the trust-estate which we have accorded to other trustees throughout the liquidation, in relief of the personal liability incurred by them as registered partners of this bank.

To reach a sound and just result in this case it is necessary to attend to the history of banking in Scotland, and to what had become the well-understood character and legal position of the different Scotch banks, and more particularly of banks situated as the City of Glasgow Bank was at the date of the deed in question in 1868, and the date of the truster's death in 1874; for I can have no doubt it was the Scotch banks that the truster had mainly, if not solely, in view in the clause now in question.

1st, The Bank of Scotland, which is the oldest of the Scotch banks, has not and never had a charter of any kind. But by Act of Parliament passed on 17th July 1695 it was created a full incorporation, which, of course, had the effect of limiting the liability of its individual partners to the possible loss of their stock; and this character of a full incorporation has been preserved to it in all the successive Acts of Parliament by which additions to the amount of the stock of the bank have from time to time been authorised. Your Lordship has observed that the Bank of Scotland has always been considered and called a chartered bank. Assuming that to be so, we begin with the fact that a chartered bank in Scotland has from the first meant an incorporated bank, for except incorporation the Bank of Scotland had and has nothing else to entitle it to that appellation.

2d, But to continue the history in the order of dates we come next to the Royal Bank of Scotland, which originated thus:—An Act of Parliament passed in the year 1719 empowered His then Majesty, by letters-patent under the Great Seal of Great Britain, to incorporate the company, then called "The Equivalent Company" (which was done), and thereafter His Majesty, by royal charter passed under the Great Seal of Scotland on 1st May 1727, incorporated all the members of the Equivalent Company who should comply with certain prescribed requisites into a full corporation, with the privilege of banking in Scotland, by the name of the Royal Bank of Scotland, and this has been followed by a variety of royal charters, passed from time to time down to the present date, sanctioning additions to the capital, &c., and continuing to the bank the character and privileges of a full corporation.

3d, The difference between the position of the British Linen Company Bank and that of the Royal Bank of Scotland consists substantially in a difference in the history of the two banks. The British Linen Company was originally fully incorporated as a trading company for the encouragement of the manufacture of British linen, by letters-patent under the Great Seal of Scotland, on 5th July 1746. These were followed by additional letters-patent on 5th June 1806, and by further letters-patent on 8th September 1813, and latterly by royal charter passed on 19th March 1849 under the seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal formerly used there. By this charter, on the narrative that the corporation had been accustomed to carry on the business of banking in Scotland for nearly one hundred years, much to the benefit of the general trade, manufactures, and improvement of that part of the United Kingdom, the company were authorised to increase their then stock of £500,000 to an extent not exceeding one million of pounds sterling additional, "for the purpose of carrying on the business of banking as heretofore accus-

tomed," and all the rights of a full corporation, and other rights, privileges, and authorities previously conferred on the company by the letters-patent and charters therein recited, were confirmed to the company.

Here it is not irrelevant to keep in view that a company may be equally well incorporated by letters-patent as by royal charter, and I do not suppose it can be doubted that the expression "chartered bank" includes a bank incorporated by letters-patent, although these last are not literally a charter. Accordingly, throughout the grants to the British Linen Company, and eminently in this last-mentioned charter of March 1819, the words letters-patent and the words royal charters are used indifferently. The essence and virtue of each consists in the Act of Incorporation, which is common to both.

In consequence of the limited liability of the partners of the three banks just enumerated, these banks were *nominatim* exempted from the obligation imposed by the Statute 8 and 9 Vict. c. 38 (passed in 1845) on all the other Scotch banks to make an annual return to the Commissioners of Stamps and Taxes of the names and designations of all the partners and of the places where each bank carries on business. Besides these three banks, the other Scotch banks existing at the date of the truster's deed and of his death all stood incorporated either by royal charter or under the Act of 1862. The Commercial Bank of Scotland, instituted in 1810, obtained its charter in 1831; and the National Bank of Scotland, instituted in 1825, obtained its charter also in 1831. But the individual partners of the banks incorporated in the one way have no advantage over the individual partners of the banks incorporated in the other way. All of them remain, as yet, equally subject, on the one hand, to unlimited liability, and on the other hand, all of them enjoy the same protection, which in the Act of 1862 is express, that no action or diligence shall go out against any of the partners directly, but only against the corporation, leaving the personal liability to be given effect to in a general accounting, which can hardly be anticipated except in the event of a stoppage and winding-up.

The contract of the City of Glasgow Bank was entered into in or about 1840, but the existing constitution of the bank is to be taken as of the date when the Act of 1862 came into operation, viz., 2d November 1862. The truster's deed, as I have already said, was executed six years after that date, and his death, as I have also said, did not occur till the elapse of six years more—making twelve years in all after the Act had come into operation. It is not said that in the interval the one set of unlimited banks had been supposed to be less prosperous or less trustworthy than the other set, while as regards the City of Glasgow Bank itself, the truster had recently before his death shown a lively interest in it in the way I have already pointed out. In short, no reason or motive whatever can be suggested why the truster should have meant to empower his trustees to invest in the stock of banks incorporated in the one way, and to exclude them from investing in the stock of those incorporated in the other way. If he has unequivocally made such a distinction, that of course is sufficient, but on the question what he really meant by the phraseology he used, I cannot help thinking that, if the phraseology be at all capable of construction, the absence of all object for a distinction is not immaterial.

If it could have been consistently maintained that by the stock of any chartered bank the truster meant the stock of any bank which had not only a charter, but a charter in terms inferring that liability of the partners was limited to the stock, the argument would have been at least intelligible. There could, in that view, have been no such investment except in the stock of the British Linen Company, and perhaps of the Royal Bank of Scotland, which last is incorporated like the Bank of England, partly by charter and partly by Act of Parliament. That construction of the deed, however, was not only not contended for, but was not even suggested at the bar. It would have excluded investment in stock of the Bank of Scotland, unless it were conceded that there may be a chartered bank without a charter. On the other hand, it would have been a startling construction of the deed which led to the result that if the trustees had invested in stock of the Bank of Scotland, and the fate of the City of Glasgow Bank had unhappily overtaken that bank, the trustees must from their own private means have replaced to the beneficiaries the stock which had been lost. Such a construction would, moreover, have been inconsistent with the pursuer's contention (unwarrantable on the pursuer's part) that a purchase of Commercial Bank stock or of National Bank stock would have been within the powers conferred by the deed, both of these banks being chartered banks in the most literal sense of the words, while the partners of both of them are at the same time subject to the same unlimited liability with the partners of the banks incorporated under the Act 1862, which Act followed out more fully the object of previous Acts unnecessary to be here enumerated. If, therefore, it had been suggested for the pursuer—which it certainly was not—that the power of purchase under the deed was confined to the stock of banks whose partners were not liable beyond the loss of their stock, that argument must have been at once rejected.

The virtue of a charter in favour of any of our Scotch banks has always, so far as I know, been understood to consist in its constituting the bank incorporation, with or without limited liability to the partners. By our common law an incorporation by the Crown implied that liability attached only to the corporate funds or stock, and the Crown could not create a corporation the members of which were to be individually liable for its debts and obligations. But by modern legislation (6 Geo. IV. c. 90, and 7 Will. and 1 Vict. c. 73) the Crown was empowered to create a corporation, leaving the individual liability of its members to stand, in whole or in part, as it previously did. On this footing the charters incorporating the Commercial Bank of Scotland and the National Bank of Scotland were granted.

In the meantime a variety of statutes and Acts of Sederunt had been passed which familiarised everybody with the fact that in Scotland chartered banks and incorporated banks were synonymous expressions, the virtue of the charter consisting, as I have said, in its being an Act of Incorporation. For instance, the Act of Sederunt 24th December 1838, regulating proceedings in the Bill Chamber, declared "that in all cases in which

consignation is to be made in the Bill Chamber, with the exception of suspensions of decrees in absence pronounced in the Court of Session, the sum to be consigned shall be paid into one of the incorporated banks, therein to remain for the disposal of the Court."

The Lands Clauses Act (8 and 9 Vict. cap. 19), passed in May 1845, provides (sec. 9) that in certain cases the purchase or compensation money for lands taken shall be "deposited in the bank for the benefit of the parties interested," and the interpretation clause enacts that the expression "the bank" shall mean any of the incorporated or chartered banks in Scotland.

The interpretation clause of the Railways Clauses Act (8 and 9 Vict. cap. 33), passed in July same year, is in the same terms, and a permanent and very extensive meaning is thereby attached to the expression "the bank;" for sec. 1 declares "that the provisions of this Act shall apply to every railway in Scotland which shall, by any Act which shall hereafter be passed, be authorised to be constructed;" and further, that the interpretation clause shall be applicable to all relative Acts incorporated or to be incorporated therewith.

The Act 9 Vict. cap. 20, passed in June 1846 as to deposits required in connection with Scotch railway bills presented to Parliament, provides (sec. 2) that such deposits are to be paid "into any of the banks in Scotland established by Act of Parliament or royal charter."

Then we have the Pupils Protection Act (12 and 13 Vict. cap. 51), passed in July 1849, which enacts substantively, without reference to any interpretation clause, "that the factor shall lodge the money in his hands in some one of the banks in Scotland established by Act of Parliament or royal charter."

Now, no doubt these statutes, at the dates when they were passed, could take immediate effect only in regard to banks which had then been incorporated. But so soon as other banks came to be incorporated, whether by royal charter (as in the case of the Commercial Bank of Scotland and the National Bank of Scotland) or under the Act of 1862, the enactments became equally applicable to the new incorporations as they had been to the old. All these banks therefore were within the express terms of the statutes at the date of the truster's deed, and at the date of his death, and continue to be so still.

The state of the case then comes to be this—The Bank of Scotland was called a chartered bank simply and solely because it was an incorporated bank. A series of statutes in force when the truster made his deed and at his death were so framed as to imply that all incorporated banks equally with the Bank of Scotland were in future to be regarded as chartered banks. These statutes are still in force for permanent purposes, and the question is, whether, contrary to the obvious truth of the case, the law constrains us to hold that the truster meant to exclude his trustees from investing in the stock of banks incorporated under the Act of 1862, while authorising them to invest in the stock of other recently incorporated banks, although the partners of the one set of banks had no advantages whatever over the partners of the other? I am not of that opinion.

If, however, I could have any doubt upon this point, I should be of opinion that it was reasonable and natural for the trustees to understand the truster's deed in the sense which they did. He used, to say the least of it, language which in the circumstances was not unequivocal, and for that the beneficiaries and not the trustees ought to be responsible. Our system of open and recognised trusts in Scotland is of vast advantage to the community, and to discourage acceptance of these trusts by technicalities contrary to good faith has nothing to recommend it. I cannot think that in any view the trustees have here been guilty of breach of trust so as to infer personal liability to the beneficiaries.

I am therefore for recalling the interlocutor, assoilzieing from the declarator, and repelling the reasons of suspension and interdict.

Lord Mure—I have examined this important case with anxiety, and have come to the same conclusion as that which your Lordship in the chair has now so fully explained. The first or main question raised is, Whether the investment of this trust fund in the City of Glasgow Bank can be held to have been within the power of the trustees?

The provisions of the trust-deed are very distinct. There is no doubt a considerable latitude given to the trustees in the matter of investments when they are authorised to lend on "personal security;" but when the truster comes to deal with the special question of bank stock, the words are the "stock of any chartered bank." In the circumstances in which this question has arisen what we have to consider is, whether these words limit the power of the trustees to any particular kind of bank stock in which they may invest the trust funds, or leave it open to them to invest in the stock of banks like the City of Glasgow Bank, not constituted by royal charter. Now, it appears to me that the words are in themselves very clear and distinct, and must, in the absence of any qualifying expressions, be held to mean banks with a charter. The question therefore which the trustees had to ask themselves, or their legal adviser, was whether the City of Glasgow Bank was one of that description; and if the question had been duly entertained and considered, I do not think that there could have been much difficulty in solving it. Your Lordship has referred to the authority of a leading and well-known legal writer, whose opinion is very distinct on the subject; and as I observed on reading the evidence that reference was made by one of the witnesses to the description given of the various banks in the Edinburgh Almanack, I thought it as well to look into that periodical, and I there find very distinct and separate phraseology used with reference to the banks in this country. The one set of banks are described as "incorporated by royal charter," viz., the Royal Bank, the British Linen Company, the Commercial, and the National Bank, while the others, among which the City of Glasgow Bank came, are described as "incorporated under Act of Parliament." Anyone making proper inquiry, therefore, would, I think, have found that there is a recognised distinction between those banks which are chartered banks and those that are incorporated by Act of Parliament. Then the Acts of Parliament to which your Lordship has referred appear to me to corroborate this view, and in particular the Pupils Protection Act, in which expressions are used which show that banks established by Act of Parliament without being incorporated by royal charter are under-

stood to be different from those which are "incorporated by royal charter." In these circumstances I think that the truster by using the special expression "chartered bank" must be held to have intended to confine his trustees to those banks which were known to be chartered or "incorporated by royal charter," of which the City of Glasgow Bank was not one. The Lord Ordinary has, I think, stated very shortly and distinctly the argument in support of the view which he has adopted with reference to this part of the case, and I have only to add that I concur with him both in his argument and conclusion.

With regard to the second question, viz., the alleged homologation by the pursuer of the acts of the trustees, the Lord Ordinary has also stated his views in his note. I quite concur in those views, and in the observations your Lordship has made on that branch of the case. Having regard to the alimentary nature of the provision in favour of the pursuer, and to the fact that she had no right to the fee of the trust funds, the duty of the trustees was to see that she had a certain income secured to her, and also to protect the fee; and I do not think that by taking her along with them in making an investment in stock of this description they can be held to have released themselves from liability. They were placed where they are by the truster for the purpose, among others, of protecting the pursuer against her own acts; and I do not think that anything of the nature of knowledge or consent on the part of Miss Sanders to an investment being made which was not authorised by the truster, even if she had known that it was beyond their power as trustees, which she did not, can be raised up as an act of homologation of an illegal proceeding.

I am therefore for adhering to the interlocutor of the Lord Ordinary.

Lord Shand—I have come to be of opinion with the majority of your Lordships that the judgment of the Lord Ordinary is sound, and ought to be adhered to. I confess I was impressed by the able argument of my friend Mr Guthrie Smith on behalf of the defenders, and by the considerations which have been so powerfully stated by Lord Deas in the opinion which he has just delivered, and I have also felt the extreme hardship of the defenders' position. But full consideration of the whole case has led me to the conclusion which I now entertain without serious difficulty that the judgment is sound.

The decision of the case turns upon the meaning to be attached to the clause in the trust-deed which empowers the trustees to make certain investments. That clause authorises the trustees to invest the sums recovered "on heritable or personal security, or in the stock of any chartered bank, or in the preference stock or shares or debentures of any railway or other company." It is to be noticed of this clause that while it authorises investments in bank stock and in the shares or stock of railway companies, there is a limitation in both cases. Power is not given to invest the funds in the stock of any bank. The power is to invest in the stock of a chartered bank. So, in like manner, power is not given to invest in the ordinary stock or shares of a railway company. The power is to invest in the preference stock or shares of any railway company. I presume it would be impossible to maintain successfully that this power being limited to preference stock or shares in a railway company the trustees would be warranted in making an investment in ordinary shares; and as there was a limit in regard to the stock of a railway company, so there was a corresponding limit in the mind of the testator in regard to the other class of investments, for he provided that the trustees should be restricted in the investment of the funds in bank stock to the stock of a chartered bank. The argument of the parties involves the inquiry, What does the expression "chartered bank" mean? and if I could have agreed with my brother Lord Deas in thinking either that the expression "chartered bank" could be held to include a company such as the City of Glasgow Bank, which had no charter, or that there was such ambiguity in the expression as might fairly mislead the trustees or warrant them in holding it to include any banking company registered under the Companies Act of 1862, I should have concurred with his Lordship in the result of his opinion. I agree with your Lordship in the chair that the term "chartered bank" has a distinct meaning, alike in popular language and in our law, and it would, I think, be dangerous to extend that meaning so as to include the stock of any bank in this country registered under the Act of 1862.

There can be no doubt as to what the meaning of this expression would have been if used in a deed executed prior to 1831. It would have included the Bank of Scotland, the Royal Bank, and the British Linen Company Bank. The Royal Bank and the British Linen Company Bank are chartered banks, for each has a royal charter. It is true that the Bank of Scotland had no royal charter strictly speaking. That bank—the earliest banking company in Scotland—had its origin in a Special Act of the Scottish Parliament, passed, not with reference to the establishment of banking companies generally, but for the purpose of incorporating this bank alone. The Scottish Act of Parliament of 17th July 1695 recited that "Our Sovereign Lord, considering how useful a publick bank may be in this kingdom, according to the custom of other kingdoms and states, and that the same can only be best set forth and managed by persons in company with a joynt stock sufficiently indued with these powers and authorities and liberties necessary and usual in such cases;" and "a joynt stock amounting to the sum of twelve hundred thousand pounds money" (equal to £100,000 sterling) "was allowed to be raised by the company hereby established for the carrying and management of a publick bank;" and the subscribers to the joint stock were "declared to be an body corporat and politick, by the name of the Governor and Company of the Bank of Scotland."

For a number of years prior to 1831 there had been frequent reference in our law-writers and Acts of Parliament and otherwise to the existing chartered banks, and there is no doubt that although perhaps in a very strict sense of the term the Bank of Scotland was not a chartered bank, it was recognised as a chartered bank and included in the term "chartered bank." It had an Act of Parliament of its own, which gave it the status of an incorporation, and all the benefits which a charter

usually confers, and so it came to be distinctly recognised as one of the companies included in the expression "chartered banks" in this country.

In 1831, on the 5th of August of that year, two other banks obtained royal charters—the Commercial Bank which had been established in 1810, and the National Bank, which had been established in 1825—both of them having in the meantime been carrying on business without incorporation. If, therefore, after 1831, and indeed from that time to the present, a testator in his deed gave power to invest in the stock of any chartered bank, I do not doubt that to the three recognised and well-known chartered banks which existed before that year must be added the Commercial and National Banks, which had then obtained royal charters; but I know of no authority, and I can see no good reason, for extending the meaning of the term to any other bank.

It was argued that the testator could not have had in his mind the five particular banks which I have named, because all other banks now registered under the Act of 1862 had obtained privileges similar to those conferred by charter, and in particular the privilege of incorporation. In support of the argument it is observed that the testator cannot have had limited liability as his object, because the power given includes the Commercial and National Banks, in which the liability is unlimited. But in answer to this view I must observe that the testator having used the term "chartered bank," the qualifying word "chartered" must receive its due effect. I think it must be presumed from the testator having used that word that he must have had special confidence in the five Scottish banks which were chartered, including the Bank of Scotland, for the reasons already stated. And it must be borne in mind that it is well known that chartered banks have this circumstance in their favour, that before a charter has been given to any banking company the Crown has been always in use, through certain Crown officials, to require certain information, if not certain guarantees, as to the position of the particular company as a condition of granting the special privileges conferred by a charter. It may well be that the testator desired to have the benefit of that security such as it was; but whatever may have been his motive, I do not think we are at liberty to speculate upon it with a view to extending the effect of the words used beyond their ordinary meaning. If we find he has given a power of investment in terms which according to their ordinary meaning include a limited class and number of banks only, we cannot extend the meaning of the words from such considerations as that the testator, though not a shareholder in the City of Glasgow Bank, yet kept a bank account there and took an interest in the success of that bank. The argument really comes to this, that the word "chartered" is to be read as if it were "incorporated," with the effect of including all banks registered under the Act of 1862, and none of which have a charter. But I see nothing in the terms of the deed to authorise this extended construction, or to warrant the Court in holding the word "chartered" as equivalent to the wider term "incorporated." If the truster had used the words "chartered or incorporated bank," I should then have certainly said the investment made was authorised. The use of the word "incorporated" would have made all the difference, because while the word "chartered" would have included the class of banks incorporated by royal charter, the word "incorporated" would have included that other class of banks which had become incorporated by registration under the Act of 1862.

But this would not have been on the ground that the words "chartered" and "incorporated" are synonymous—I think they are not synonymous—but upon the ground that the testator had used words giving authority to the trustees to invest in any banking company, whether incorporated by royal charter or by registration under the Act of 1862. I do not think it necessary to say more in regard to the different statutes and Acts of Sederunt that have been referred to than this, that where under the later Acts the alternative of chartered or incorporated banks is given, there is great room for holding that the latter term includes banks registered under the Act of 1862. I am not prepared to say that the expression used in the Pupils Protection Act of 1849 (12 and 13 Vict. c. 51), sec. 5—"One of the banks in Scotland established by Act of Parliament or royal charter"—would include a bank incorporated by registration under the Act of 1862. The words "established by Act of Parliament" seem to refer to such a bank as the Bank of Scotland, established and incorporated by its own Special Act.

As to the alternative view expressed by Lord Deas, that at least there was such ambiguity in the expression used by the testator as to account for what the trustees did, I am unable to agree with his Lordship. I do not think the term "chartered bank" was ambiguous, or admitted of the construction contended for; and I think the evidence of Mr Ross, in which he admits he had come to have a doubt whether the City of Glasgow Bank could be called a chartered bank, is of importance on this point.

It remains merely to consider whether the knowledge and actings of the pursuer were such as to preclude her from insisting in this action. It must be borne in mind that she was not entitled to the fee of these funds. The fiars were her children in the event of her marrying and having children, and in the event of her dying without issue the funds pass to other relatives of the testator. I do not think therefore that she was in a position to consent to any act of the trustees, or to give them any extended powers. The provisions referred to by your Lordship make this clear. The purpose of these was to protect her, not merely against her creditors, but against her own acts and deeds; and their effect, I think, was to prevent her from giving validity to any acts not authorised by the deed, and to prevent the defenders from founding on any act or approval of hers as having that effect.

The Court adhered.

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