represent his indebtedness to Wright & Greig as a mere matter of account.

What we have to decide is whether the verdict of the jury upon the issue submitted to them was against the weight of the evidence, and that question depends on whether this was an impartial and accurate report, or a calumnious report not justified by the fact that it was an impartial report of what took place before the Registrar. I hold it to be settled that a defamatory statement contained in a report, or what professes to be a report, of proceedings in a court of justice is not protected by privilege unless it be impartial and fairly accurate, and the question whether it is impartial and accurate is in my opinion a question for the jury. I think there was evidence for the consideration of the jury on that question, and I concur with your Lordship in thinking the conclusion the jury arrived at was supported by the evidence.

As to the *onus probandi* in the question of accuracy and impartiality, it must be observed that no misdirection on that subject is alleged. The pursuer appears to have accepted the burden of proving that the report was partial and inaccurate, especially in omitting matters which would have made an appreciable difference in his favour, and would have counteracted the objectionable statements which were fully set forth. My opinion is that the pursuer was right in undertaking this burden. He has satisfied the jury on the subject, and I cannot say that the verdict of the jury is against the evidence. It seems to me that the omissions pointed out were very material. The answer made to the bankrupt's statement is not given, nor is the bankrupt's admission as to the account, although that admission was said to have been sufficient of itself to contradict the defamatory statements complained of.

With regard to the amount of damages, although it is larger than I should have awarded as sufficient, I consider that the amount of damages, especially damages for slander affecting the credit of a person engaged in commerce, is peculiarly within the province of the jury, and I should have thought it doubtful whether the amount is so excessive as to justify the interference of the Court. But as your Lordships think it is excessive, I agree that the verdict can only stand if the pursuers agree to a reduction as suggested.

Subject to the question about the amount of damages, I think this rule ought to be discharged.

The pursuers having agreed that the damages should be reduced to £250, the Court discharged the rule and applied the verdict.

Counsel for the Pursuers—Graham Murray—Ure. Agents—Smith & Ritchie, S.S.C.

Counsel for the *Glasgow Herald*—Asher, Q.C.—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, March 12.

FIRST DIVISION.

PIRIE *v.* THE CALEDONIAN RAILWAY COMPANY.

Process—Jury Trial—Citation of English Witnesses—Affidavit—Witnesses Out of Jurisdiction Act 1854 (17 *and* 18 *Vict. cap.* 34), *sec.* 1.

The Witnesses Out of Jurisdiction Act 1854, section. 1, provides that "If in any action . . . depending . . . in the Court of Session . . . it shall appear to the Court . . . that it is proper to compel the personal attendance at any trial, of any witness who may not be within the jurisdiction of the Court in which such action is pending, it shall be lawful for such Court . . . if in . . . their discretion it shall so seem fit, to order that a . . . warrant of citation shall issue in special form commanding such witness to attend such trial wherever he shall be within the United Kingdom." . . .

A party applying under this statute, presented a note to the Court, which consisted of a signed statement by the agent, that the witnesses designed would not attend without special citation, and concluded with a prayer for warrant to cite, signed by counsel.

Held that this was a proper form of application, and that an affidavit was unnecessary.

Counsel for Petitioner—Wallace. Agent—A. Morison, S.S.C.

Friday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

CROSKERY AND OTHERS *v.* HENDRIE AND ANOTHER (BOYD GILMOUR'S TRUSTEES).

Trust—Loan—Powers and Duties of Trustees—Ultra Vires—Delict—Reparation.

In an action by beneficiaries under a trust against one of the trustees for alleged losses to the trust estate, arising from loans thereof by the trustees to certain of their own number—*held* that as the action was founded on delict, the trustees were all liable *in solidum* and conjunctly and severally, and a plea of "all parties not called" *repelled.*

Western Bank v. *Douglas*, 22 D. 447, and *Perston* v. *Perston's Trustees*, 1 Macph. 245, *followed.*

Mrs Mary Gilmour or Croskery and Mrs Jeanie Logan Sinclair, two of the beneficiaries under their father's trust, sued John Hendrie junior and others, the trustees, for an account of the trust estate, and for payment of their shares, and John Hendrie junior, as an individual and as factor for

the trust, for repayment to them or to the trustees of certain sums which the pursuers alleged had been lost to the estate by the default of the trustees.

The late Mr Boyd Gilmour, coalmaster, Galston, died upon 26th May 1869, leaving a trust-settlement in which he nominated certain trustees. They all accepted office, but two of their number died, one in 1873, and James Hendrie, writer, Galston, in 1880, and in 1883 Allan Gilmour, the testator's nephew, and John Gilmour, his brother, became bankrupt and resigned.

In October 1880 John Hendrie junior, bank agent, Galston, brother of the late James Hendrie, and Joseph Gilmour, coalmaster, Hurlford, brother of the said Allan Gilmour, were assumed trustees and accepted office. Hendrie was also appointed factor and law-agent on the trust-estate in succession to his brother. In 1884 Joseph Gilmour resigned office, and Mr Daniel Gilmour, coalmaster, Crookedholm, was assumed as trustee, and continued to act along with Mr Hendrie down to the date of the present action.

The pursuers averred that the trust purposes had now been exhausted, and they claimed as their shares of the estate £1000 and £200 respectively, apart from the sums alleged to have been lost. They further averred that in 1880 the defender lent to Allan Gilmour, one of their own number, £3000 of the trust fund at 4½ per cent., taking therefore an assignation in security, dated 3rd September 1880, over some ground in Ayrshire which did not exceed £1000 in value, and the borrower's interest in the lease of a certain coal-field. Again in March 1882 the defenders lent Allan Gilmour a further sum of £2500 of the said trust funds, in security for which additional bonds and assignations were granted over the same subjects. These advances were *ultra vires* of the said trustees; the security was insufficient; and through the negligence of the defenders the whole of these advances were lost to the trust-estate.

"The trustees also, in November 1876, illegally lent to Boyd Gilmour junior, one of the truster's sons (to whom they had already at that date advanced some thousands of pounds, and beyond his share of the estate) the sum of £100, taking as a security three small houses (two of them built of brick) in Montgomerie Street, Kilmarnock. . . Since the assumption of the defender John Hendrie junior as trustee a sum of £219 has been advanced by him and his co-trustee or co-trustees beyond Boyd Gilmour's prospective share of the estate, in violation or gross neglect of his duty to the other beneficiaries, as aforesaid. . . In connection with a loan of £4000 made by the trustees to the Gauchalland Coal Company, and which was repaid by instalments, the said John Hendrie junior, as factor to the trust, has negligently failed to get from the debtors as for interest on various instalments of principal in arrear between Whitsunday 1887 and January 1888, the sum of £35 or thereby."

The pursuers pleaded—"(1) The pursuers being beneficiaries under the said trust-settlement, and their shares or interest being now due and payable, are entitled to count, reckoning, and payment as concluded for. (2) The defender John Hendrie, and the said James Hendrie, having *ultra vires* and illegally made or continued the advance of £3000 of the trust-funds, and taken over the Montgomerie Street property as condescended on, to the loss of the pursuers, the latter are entitled to decree of payment against them or their estates, or to have the said sums replaced as concluded for. (3) The defender John Hendrie having *ultra vires* and illegally made and continued the advance of £2500 and of £219 condescended on, and having failed through negligence to recover the £35 condescended on, the pursuers are entitled to decree for payment or replacement against him. (4) The sums condescended on having been respectively lost to, or unwarrantably charged against, the trust-estate through the default of the defender Hendrie, and the late James Hendrie, the pursuers as beneficiaries are entitled to decree of payment or replacement as concluded for."

The defender pleaded—"(1) The action is incompetent as laid. (2) All parties interested are not called, and the present action should be dismissed or sisted until the said Allan Gilmour, John Gilmour, Joseph Gilmour, and Daniel Gilmour shall be made parties thereto, and to the operative conclusions of the summons, so far as applicable to each. (3) The defender John Hendrie is not liable *in solidum*, in respect he was only one of several trustees by whom the alleged *ultra vires* and illegal or negligent actings were done."

On 23rd November 1889 the Lord Ordinary (KINNEAR) repelled the defenders' first three pleas-in-law.

"*Note.*—The conclusions for accounting are properly directed against the acting trustees, and if there were no other conclusions I do not understand it to be maintained that the trustees who have resigned must also have been called as defenders. But it is said that in so far as the action is brought to enforce personal liability for breach of trust it ought not to be allowed to proceed against one alone of the delinquent trustees while there are others equally responsible who have not been made parties as defenders. The action in this branch is brought to enforce an obligation of reparation arising *ex delicto*, and if the case is well founded the trustees who were parties to the breach of trust are not *correi debendi* but joint delinquents. But when an action is founded on delict or joint delinquency the pursuers are entitled to proceed against any one or more of the wrongdoers—*Western Bank* v. *Douglas*, 22 D. 447.

"The third plea-in-law appears to be intended to specify the ground on which the first two pleas are to be supported, namely, that one of several trustees is not liable *in solidum* for 'illegal or negligent actings' in which all are implicated. This plea therefore falls to be disposed of at the present stage. Notwithstanding its being repelled, it will still be open to the defender

to maintain upon other grounds that he is not liable in respect of the matters complained of, either separately or jointly with others."

On 12th December 1889 the Lord Ordinary allowed the parties a proof of their averments.

The defenders reclaimed against both these interlocutors, and argued — That where, as in the present case, a body of trustees was charged with having acted *ultra vires*, such actings being *quasi ex delicto*, it was not sufficient to call as defenders one of their number, but all must be called, because the rule as to joint delinquents did not apply. The true character of the defenders here was not that of joint delinquents but *correi debendi*. The case cited by the Lord Ordinary did not apply, being one of joint delinquency. An analogy to the present action was to be found in cases arising out of collisions between ships and between coaches, on which see *Binny* v. *Machray*, July 18, 1848, 10 D. 1508; *Gibson* v. *Smith*, March 10, 1849, 11 D. 1024; *Muir* v. *Collett*, June 17, 1862, 24 D. 1119. The defenders were entitled to have their co-trustees called as defenders, and the action should be sisted until this was done—*Richmond* v. *Graham*, February 8, 1847, 9 D. 633; *Ross* v. *Baird*, July 18, 1848, 10 D. 1493; *Pearson* v. *Houston's Trustees*, January 20, 1868, 6 Macph. 286.

Argued for the respondents—The liability of the defenders was not joint, but *pro rata*, and the rule in such cases was, that where the parties were primarily liable by stipulation or *ex lege*, then they were liable *singuli in solidum*. This was settled by the case of *Richmond, supra*. The obligation here did not arise *ex contractu*, but what the defenders were guilty of was a *quasi*-delict—Ersk. iii. 1, 13. The defenders were guilty of more than breach of trust, for the lending of trust funds to one of their own number was absolutely illegal—*Perston* v. *Perston's Trustees*, January 9, 1863, 1 Macph. 245.

At advising—

LORD PRESIDENT—This is an action of count and reckoning brought by certain beneficiaries against a body of trustees. So far as the conclusions for count and reckoning are concerned, I understand that no question is raised, but there are also conclusions with a view to making some of the trustees personally liable for the loss of a portion of the trust funds which has arisen through their making loans to certain of their own number. Upon this matter the Lord Ordinary has pronounced two interlocutors, one upon 23rd November 1889, and another on 12th December 1889, both of which are brought under review, The pursuers have not called all the trustees who took part in the proceedings complained of, and in consequence of this the defenders have pleaded—"(1) The action is incompetent as laid. (2) All parties interested are not called, and the present action should be dismissed or sisted until the said Allan Gilmour, John Gilmour, Joseph Gilmour, and Daniel Gilmour shall be made parties thereto, and to the operative conclusions of the summons, so far as applicable to each. (3) The defender John Hendrie is not liable *in solidum*, in respect he was only one of several trustees by whom the alleged *ultra vires* and illegal or negligent actings were done"—and these three pleas the Lord Ordinary has repelled by his interlocutor of 23rd November, and in so doing I think that his Lordship acted rightly.

The lending of trust money by trustees to one of their own number is unquestionably an illegal proceeding. It is much more than a mere breach of trust in the ordinary sense, because such a breach of trust covers and includes small acts of negligence which may infer very little blame on the part of those concerned in them. But to lend trust money to one of their own number is an absolutely illegal proceeding.

It is perhaps a little strange that there is no express decision upon this point until the year 1863, but the question was decided in that year in the case of *Perston's Trustees*, reported in 1 Macph. 245. The principle upon which the judgment proceeded was founded so deeply both in the law of Scotland and in the civil law that the Judges thought the result was inevitable, and it has been followed in subsequent cases. It is therefore fixed in our law that it is absolutely illegal for trustees to lend trust funds to any of their own number. No circumstances will justify such a proceeding, as it is quite *ultra vires* of any body of trustees so to act.

That being so, the question comes to be, whether the parties who are guilty of such a proceeding are not jointly and severally liable and *in solidum* as having committed an act of the nature of a delict? I am of opinion very clearly that they are. It is not a question of breach of contract at all. It is not a question as to whether there is a violation of any particular article of a contract, or of any particular provision in the trust-settlement, nor is it a question of circumstances whether the security offered is sufficient. It stands upon the common law principle that such a loan is absolutely illegal, and that anyone acting contrary to it is committing a delict, or, as it is sometimes called, a *quasi*-delict, not indeed involving the doer in criminal responsibility, but only in serious civil liabilities.

A trust is a contract made up of the two nominate contracts of deposit and mandate. The trust funds are deposited for safe custody, and the trustees receive a mandate for their administration.

The contract is entered into between the truster and his representatives on the one hand, and the trustees on the other; and to act as the trustees did in the present case was not to commit a breach of that contract but was to violate a fundamental principle of fiduciary law.

The whole question of the liability of trustees *ex delicto* and of the necessity of calling all parties to answer for the delict was considered in the case cited by the Lord Ordinary—*Western Bank* v. *Douglas*, 22 D. 447. It is needless to go back upon that case, all the authorities are collected

there, beginning with the Institutional writers and going down to the date of the case.

Applying then the rules there laid down, I cannot but agree with the Lord Ordinary, that it is not necessary in a case like this to call all the wrongdoers. Each of them is liable *ex delicto* or *ex quasi delicto*, and there is no necessity for calling all or any particular number or more than one if the pursuer chooses to select one.

I am therefore for adhering to the interlocutor of the Lord Ordinary of 23rd November and 12th December.

LORD SHAND—I am also of opinion that the Lord Ordinary has done rightly in repelling the plea of all parties not called. The pursuers are beneficiaries under a trust-deed, and the defenders are the assumed and acting trustees. The existence of the relation of beneficiary and trustee creates certain duties and obligations on the part of the trustees. Whether these rest upon contract or not is of little consequence for the present purpose. It is enough that the trustees come under an obligation to observe certain well-known rules in regard to the administration of trust-estates to fulfil obligations arising out of their acceptance of the offices they hold. In the present case, there has been violation of duties, in their lending a portion of the trust-estate to one of their own number and otherwise. I do not think it is necessary to distinguish this from many other breaches of trust administration which occur as the making any unauthorised investment. The same result follows as in the case of their lending to one of their own number. In each case there is a violation of the duty which they owe to the beneficiaries. For the consequences, the trustees so acting are all liable *in solidum* and conjunctly and severally, and in bringing his action against them the beneficiary is not bound to call more than one of them. As I think that the case of the *Western Bank* v. *Douglas* settles the point, I am for adhering to the Lord Ordinary's interlocutor.

If I thought that by so holding we were prejudicing the question whether, where one of the trustees has been found liable for a breach of trust duty, and there has been no fraud, he could claim a contribution from those who have not been called, but who were also parties to the acts of negligence or violation of duty which created the liability to the beneficiaries, it might have been different. But where a pursuer has reasons for selecting one defender rather than another having several persons jointly and severally liable, there can be no prejudice suffered as among the trustees themselves in the subsequent question whether those who have not been called but who were, it may be, equally to blame must bear a share of the loss to the estate.

LORD ADAM—I may just observe that the claim made here by the pursuers is not only for the replacing of money lent by the trustees to one of their own number, but also for the recovery of funds loaned to a beneficiary on insufficient security. I do not think there is any good ground for making any distinction between the different parties of the claim. I consider the case to be ruled by the *Western Bank* v. *Douglas*.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers — Kennedy. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders — Salvesen. Agents—Bruce & Kerr, W.S.

Tuesday, March 11.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CLYDESDALE BANK *v.* ANDERSON (MARTIN, TURNER, & COMPANY'S TRUSTEE).

Sequestration—Del Credere Agents—Preference—Agreement with Particular Creditor—Dividend from Concurrent Foreign Liquidation.

A copartnery of mercantile commission agents trading in Glasgow with foreign branches at Manila and other places failed. Shortly before the date at which they suspended payment certain Glasgow merchants had consigned to them for sale abroad a quantity of goods. Against these goods the copartnery had made advances in the shape of acceptances, which the consignors had discounted with a bank. An agreement was come to between the consignors, the bank, and an accountant representing the bankrupts and certain creditors, that the bank, on condition of the bankrupts transferring to the consignors the unsold goods and the proceeds of goods sold but not remitted for, would not claim on the bills except to the effect of recovering the remittances already in the bankrupts' hands or in transit. The copartnery having been sequestrated, the unsold goods and remittances in course of transit to the bankrupts at the date of suspension were transferred to the consignors, and handed by them to the bank, but the proceeds of goods sold which were mixed with the general funds of the bankrupts either at home or abroad were not handed over. The consignors, however, were ranked upon the estate of the bankrupts in Manila, where a separate liquidation was carried on, for the amount of goods sold there, the proceeds of which had not been remitted home before suspension, and obtained a dividend, which they handed to the bank. The bank having claimed in the sequestration, their