Friday, January 22.

FIRST DIVISION.

[Bill Chamber.

MACKENZIE & AITKEN *v.* ROBERTSON (RITCHIE & HARDIE'S TRUSTEE).

Bankruptcy—Agent and Principal—Stock Exchange—Stockbroker—Preference.

R. & H., stockbrokers in Edinburgh, were instructed by a client to buy for him certain shares. They then wrote to their correspondents, M. & A., stockbrokers in Glasgow, to procure the shares, which they did, and advised R. & H. that the shares had been bought "by your order, and on your account." The name of the purchaser was communicated to M. & A. for the purpose of being entered in the transfer. The transfer was completed, and sent by M. & A. to R. & H., who delivered it to the purchaser in exchange for his cheque for the price. R. & H. did not cash this cheque, but the same day R. & H. sent to M. & A. their own cheque for a sum which included the price of the shares. This cheque was dishonoured, and R. & H. immediately thereafter became bankrupt, and were sequestrated. *Held* that M. & A. had dealt with R. & H. as brokers for a a principal, and were not entitled to payment of, nor to be ranked preferably for, the amount of the purchaser's cheque.

On or about 19th March 1885, Ritchie & Hardie, stockbrokers, Edinburgh, sent an order to Mackenzie & Aitken, stockbrokers, Glasgow, to buy ninety shares of the Swan Land and Cattle Company (Limited). Eighty of these shares were for W. J. Dundas, who had requested Ritchie & Hardie to procure them for him.

On 19th March Ritchie & Hardie were advised by Mackenzie & Aitken as follows:—"We beg to advise having bought as undernoted, by your order, and on your account, subject to the rules and practice of the Glasgow Stock Exchange, for settlement 27th inst., 90 shares Swan Land and Cattle Coy., @ 6½, £585, 0s. 0d." On the same day Ritchie & Hardie sent to Mr Dundas a copy bought-note, bringing out the amount due for eighty of the above shares, including stamps, commission, &c., and after crediting the coming dividend, which the purchaser was entitled to receive, as £477, 12s. 6d. The transaction was for settlement on 27th March. In accordance with the usual practice, Mackenzie & Aitken were advised, a day or two before settling-day, that Mr Dundas was the purchaser. This was done in order that the purchaser's name might be entered in the transfer. Upon either the 27th or the 28th of March, the transfer, signed by the seller, was sent by Mackenzie & Aitken to Ritchie & Hardie, along with the usual form of letter sent by them on such occasions, of which the following is a copy:—"Herewith we beg to hand you certified transfer for , the receipt of which please acknowledge by signing and returning to us the enclosed form." Ritchie & Hardie acknowledged receipt as follows:—"Received from Messrs Mackenzie & Aitken (80) eighty shares of the Swan Land and Cattle Company."

On 28th March Mr Dundas gave Ritchie & Hardie his cheque for £477, 12s. 6d., and in exchange therefor got the transfer. On the same day Ritchie & Hardie sent their cheque for £500 to Mackenzie & Aitken.

On 28th March Ritchie & Hardie's cheques were dishonoured at their bank. The cheque granted by Mr Dundas had not been cashed by them, nor had they in any way mixed it with their own funds.

The firm of Ritchie & Hardie were thereafter sequestrated and J. A. Robertson, C.A., was appointed trustee.

Mackenzie & Aitken claimed a preferable ranking for the sum of £477, 12s. 6d. The trustee rejected their claim to a preference, but ranked them as ordinary creditors for £477, 12s. 6d.

This was an appeal to the Lord Ordinary on the Bills by Mackenzie & Aitken to have the trustee's deliverance set aside, and to obtain a preferable ranking in terms of their claim. The trustee lodged answers. Proof was led in which the facts above stated were brought out. The appellants founded upon the following rule of the Glasgow Stock Exchange—"(4) The legal rights and obligations of constituents between themselves, for completion of transactions made on their account by members, and the legal recourse of constituents against each other, between themselves, as well as the legal recourse of members respectively against the constituents of each other, for completion of transactions as aforesaid, are hereby strictly reserved."

The appellants pleaded—"(1) The said cheque for £477, 12s. 6d., and the sum therein contained, having been in the hands of the bankrupts at the date of their stoppage, in trust for, or as agents for, the appellants, the same formed no part of their estate at the date of their sequestration, and the appellants are now entitled to have the said sum paid over to them. (2) The said cheque having been given in exchange for the transfer obtained by the appellants for Mr Dundas, and the sum therein contained having been appropriated to payment of the shares thereby transferred, and having been at the time of the bankrupts' stoppage in their hands *in forma specifica*, and not mixed with their general funds, the appellants were and are entitled to obtain payment of the said sum."

The respondent, at the suggestion of the Lord Ordinary, lodged a minute stating that he consented to the question whether the appellants were entitled to the sum of £477, 12s. 6d. in dispute being disposed of as if it were under a petition under section 104 of the Bankruptcy (Scotland) Act 1856, presented by the appellants to the Lord Ordinary praying to have this sum taken out of the sequestration.

At the proof the appellants sought to establish that the bankrupts were merely acting as their agents and correspondents, and not principals, in the transaction.

The Lord Ordinary (TRAYNER) on 9th December 1885 found that the appellants were not entitled to payment of, or to be ranked preferably for, the sum of £477, 12s. 6d., sustained the trustee's deliverance, and dismissed the appeal.

"*Opinion.*—On or about 19th March 1885 the bankrupts, who were stockbrokers in Edinburgh, sent to the appellants (stockbrokers in Glasgow) an order to purchase the 'Swan' shares referred

to on record. Of same date the order was executed, and the appellants by contract-note intimated to the bankrupts that the shares had been bought 'by your order and on your account.' The price of the shares, along with the amount of the brokerage, was at once debited to the bankrupts in the appellants' books, and credited to the appellants in the books of the bankrupts. The settling-day for said transaction was 27th March, and on the day preceding the bankrupts forwarded to the appellants the name of the person for whom they had ordered the purchase, and in whose name the transfer was to be taken. The transfer was obtained in name of Mr Dundas, and forwarded to the bankrupts on the 27th.

"On receipt of the contract-note on 19th March the bankrupts sent a similar note to Mr Dundas, intimating that they had bought for him the 'Swan' shares, and giving him a note of the price, commission, &c., payable therefor.

"When the transfer reached the bankrupts on the 28th March, they delivered the same to Mr Dundas, and received from him his cheque for the amount payable. On same day they granted their own cheque for a sum in excess of the price of the shares transferred to Mr Dundas, but having chiefly reference to that transaction, the excess being in diminution of any balance at that time standing against them in the appellants' books. The bankrupts' cheque was dishonoured, and they knew on that day, not sooner, that they would require to suspend payment. Their affairs were put into the hands of the respondent at once, for behoof of their creditors, and he found the cheque granted by Mr Dundas among the bankrupts' papers, the bankrupts having properly determined not to cash the same or to meddle with their estate in any way so soon as they found that they were not in a condition to meet their obligations.

"The appellants contend that Mr Dundas's cheque should be given to them; or rather, that the amount for which it was granted is due and should be paid to them as the price of said shares, on the ground that the transfer was sent to the bankrupts for collection, and that it was in their hands merely as agents for the appellants. If this contention was well founded in fact, I think the appellants would be entitled to prevail in their demand. But I think they were wrong upon the fact. In the transaction in question, as in the whole course of dealing between the appellants and the bankrupts, it appears to me to be plain that the appellants looked to the bankrupts as principals. I do not find that in any case where an order was transmitted by the bankrupts to the appellants to purchase shares, that the appellants asked for the name of the person on whose behalf or for whom the shares were being purchased. The name of such purchaser was sent on 'name day' no doubt, but this was simply for the purpose of having that name put into the transfer instead of the bankrupts'; such name was not sent as a disclosure of the principal for whom the bankrupts were acting as agents or brokers. That the appellants treated the bankrupts as principals is fully borne out by the facts I have stated. It was to the bankrupts that the appellants sent the contract-note, to the effect that they had bought on the bankrupts' order and account; it was to the bankrupts that they debited the amount of price and brokerage; it was from the bankrupts that they received payment of the price and brokerage either in cash or in account. The transfer was sent to the bankrupts in completion of the transaction commenced on 19th March, not merely for collection, and it was to the bankrupts the appellants looked for payment of the amount due to them.

"In dealing with Mr Dundas the bankrupts acted again as principals. They had received his order for the shares, they had fulfilled his order, they delivered him the transfer, they received from him the price, Mr Dundas's cheque was in my opinion a payment to them of money he owed them on a transaction in which he knew none other than themselves as parties. That cheque appears to me to have become part of the bankrupts' assets from the moment they received it. They were debtors to the appellants in the amount of their accounts, but were not custodiers of any particular cheque or sum of money as agents for the appellants.

"It is not of any consequence to inquire what the appellants' rights would have been against Mr Dundas directly under the rules of the Glasgow Stock Exchange or at common law, if these rights had been asserted before the transfer was sent to the bankrupts, and before Mr Dundas had paid them the money. Whether Mr Dundas was principal in the transaction or not with the appellants is a question which it would not have then been necessary to decide. The appellants, with the transfer in their hands, would have been entitled to exercise a seller's lien, and hold the transfer till the consideration had been paid. But after Mr Dundas had paid the price and received the transfer, it is clear no further claim lay against him."

The appellants reclaimed, and argued — The appellants and respondents dealt with each other as agents, the true principals being, on the one side the buyer in Edinburgh, and on the other the seller in Glasgow. There was no general account between Mackenzie & Aitken and Ritchie & Hardie, as the respondents maintained, but each transaction was settled separately, which showed that Ritchie & Hardie were merely agents in getting the money. Besides, in this case there had been a payment *in forma specifica* by means of a cheque, which should have been handed over direct to the appellants—Bell's Comm. i. (5th ed.) 265; *Matthews* v. *Auld & Guild*, July 18, 1874, 1 R. 1224; *Semenza and Others* v. *Brinslay and Another*, 34 L.J., C.P. 161; *Macadam* v. *Martin's Trustee*, November 5, 1872, 11 Macph. 33.

The respondents argued—There were here two distinct contracts, and there was no contract between the buyer and the Glasgow broker. The rule of principal and factor could not apply here. The case of *Matthews* v. *Auld & Guild* was just the converse of the present. The bankrupts were in the position of principals throughout; they never held the money as agents for Mackenzie & Aitken, and were only under an obligation to account. Any claim that the appellants might have had against Dundas was now barred, because they had elected to proceed against the respondents—*Ferrier* v. *Dods*, February 23, 1865, 3 Macph. 561.

At advising —

LORD PRESIDENT—The appellants in this case are Mackenzie & Aitken, a firm of stockbrokers in Glasgow. They claimed a preference in the sequestration of Ritchie & Hardie, who are stockbrokers in Edinburgh, for the sum of £477, 12s. 6d. The trustee rejected their claim to a preference, but has ranked them for that amount as ordinary creditors.

The question is, whether the appellants have established, in the discussion which we have had, a right to a preference? The circumstances are very simple which have given rise to the claim. Mr Dundas was desirous of purchasing some shares in the Swan Land and Cattle Company (Limited), and instructed his brokers, who are the bankrupts, to buy eighty such shares for him. They seem not to have been able to procure these shares on the Edinburgh Stock Exchange, but having an order from another person for ten additional shares, they sent an order to the appellants in Glasgow to buy for them ninety shares in all. The appellants acted upon these instructions, and bought the shares from some party unknown to us. The whole was done apparently in one day, the 19th of March 1885. The first document of consequence is the announcement by Mackenzie & Aitken to the bankrupts that they had bought these eighty shares, and that is contained in a letter which is in these terms—"We beg to advise having bought as undernoted, by your order and on your account, subject to the rules and practice of the Glasgow Stock Exchange, for settlement 27th inst, 90 shares Swan Land and Cattle Company;" and then follows note of the price. This instruction was received by Ritchie & Hardie, and they communicated to Mr Dundas that they had been successful in buying for him the shares he wished. The settlement, it will be observed, was for the 27th of March, and of course it was the duty of the brokers in Edinburgh on the "name" day—that is to say, the day before settlement—to communicate to the brokers in Glasgow the name of their client who was the purchaser, in order that the transfer might be made out in Glasgow and signed by the seller, and then sent through for the signature of the purchaser. That was all duly done on the 27th or the 28th of March—it does not distinctly appear which; Mackenzie & Aitken sent the transfer signed by the seller to Ritchie & Hardie, and the bankrupts, in conformity with the desire of the appellants, acknowledged receipt in these terms—"Received from Messrs Mackenzie & Aitken (80) eighty shares of the Swan Land and Cattle Company." So the matter was settled as regards the completion of the contract of sale. On the same day Mr Dundas gave Ritchie & Hardie a cheque on his bankers for £477, 12s. 6d., and on that day also the bankrupts sent their cheque for £500 to Glasgow. That was not the precise sum received from Mr Dundas, but was a slump sum to be put to their credit in account with their correspondents.

The question turns on the true relation between the parties. There can be no doubt as to the relation between Mr Dundas and the bankrupts, for it was that of principal and broker and nothing else. If the bankrupts had bought the stock their client wanted upon the Edinburgh Stock Exchange, that would have been a perfectly ordinary description of transaction, in which the two brokers would have settled between themselves on settling-day, and the transfer would have been exchanged for money. But that not being the nature of the transaction, what was the relation between the Edinburgh and Glasgow brokers? It appears to me that it was that of principal and broker and nothing else. The bankrupts in Edinburgh ordered their correspondents in Glasgow to buy a certain number of shares, and the Glasgow firm did buy them, as stated in their letter of 19th March "by your order and on your account." I think it is impossible to get over those words, which express what the transaction was, without seeing that the relation was that of principal and broker only. When the Glasgow firm sent the transfer they put into the hands of the Edinburgh brokers a complete title to the shares—that is to say, the transfer only required to be accepted by the purchaser to complete the transfer. Now, they did so without getting payment of the price—that is to say, they gave credit to the bankrupts. They trusted them with the transfer without getting money for it, and if in these circumstances the brokers in Edinburgh became bankrupt without paying for the shares, the parties trusting them must just suffer for it. They have not got the money, and they cannot get it now, except in the shape of a dividend.

The appellants pleaded that since this was a cheque in the bankrupts' hands which had been granted by Mr Dundas, they had in some way acquired a right to that cheque. I have difficulty in understanding how that can be maintained. They knew nothing about the client of the Edinburgh firm, they had made no contract with him, and although his name was disclosed to the Glasgow brokers, that was not for the purpose of creating any relation between them, but to enable the Glasgow brokers to make out the transfer. The Glasgow firm had thereupon no possible claim against Mr Dundas for payment of the purchase price, and when he paid the Edinburgh broker he discharged the only possible obligation he ever undertook. That obligation was upon a contract of mandate between himself and the Edinburgh brokers, and was entirely discharged when he gave them the money. The Edinburgh brokers were no doubt indebted to their Glasgow correspondents, but only personally; they were under an obligation to pay, but not to transfer in specific form the document of debt which they had received. While matters were in this state the Edinburgh firm became bankrupt. I am of opinion that the appellants have no claim to a preference when the true relation between the parties has been ascertained, and I am therefore for affirming the judgment of the Lord Ordinary.

LORD MURE concurred.

LORD SHAND—I am of the same opinion. We were referred to certain rules of the Glasgow Stock Exchange which it was maintained support the view that the Edinburgh and Glasgow brokers were acting in some sense as agents for each other in order to enable them to have recourse against their respective constituents. But I do not think these rules apply as between a broker in Glasgow and a broker in another town. It must be observed that the transaction was com-

pleted in Edinburgh. It might have been that in consequence of being unable to get stock in Edinburgh the brokers might have been obliged to get in London the stock they wanted. The rules of the London Stock Exchange would not have applied to that transaction, and just in the same way I do not think that the rules of the Glasgow Stock Exchange can apply here.

I think that when the Edinburgh firm purchased these shares from the Glasgow firm the transaction was one between principals. Ritchie & Hardie employed the Glasgow firm to purchase the shares as principals, and Mackenzie & Aitken in the execution of that order were entitled to regard Ritchie & Hardie as principals. This view is, I think, corroborated by the course of dealing between the parties. We have not had produced in the case the letter by which the transfer was transmitted from Glasgow to Edinburgh, but a form of the letter in which this was done has been printed, the letter having reference to another transaction. That letter is just in the terms that an employee would use in addressing his employer. No doubt Mackenzie & Aitken might have acquired a preference by giving only a qualified title when they sent the transfer. If, for example, this had been added to the letter, "which stock is transmitted to you for the purpose of delivery to your client upon the condition that you send us his cheque by return of post," then I think the appellants' claim to a preference might have been sustained, but in the absence of any such condition I think it must fail.

LORD ADAM—I concur, and I think that our judgment practically gives effect to what was the ordinary course of dealing between the parties.

The Court affirmed the interlocutor of the Lord Ordinary.

Counsel for Appellants—Jameson—Goudy. Agent—F. J. Martin, W.S.

Counsel for Respondent—Comrie Thomson—Dickson. Agents—Dove & Lockhart, S.S.C.

Friday, January 22.

FIRST DIVISION.

[Court of Exchequer.

THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* THE SOLICITOR OF INLAND REVENUE.

Revenue—"Conveyance on Sale"—Sum Assessed as Compensation for Loss of Business—Stamp Act 1870 (33 *and* 34 *Vict. cap.* 97), *sec.* 70.

Under a proceeding to obtain compensation for premises taken by a railway company, there was assessed (1) a sum as the value of the land taken; (2) a sum as the value of the buildings and machinery thereon; (3) a sum as compensation for loss of business which the proprietors were there carrying on on the land. *Held* (*diss.* Lord Shand) that the compensation for loss of business was not part of the consideration paid by the company for the "conveyance on sale" of the property, and therefore fell to be excluded in estimating the *ad valorem* stamp-duty payable for the conveyance on sale.

This was a Case under the Stamp Act of 1870, for the Glasgow and South-Western Railway, in a question between them and the Commissioners of Inland Revenue. The Case stated the following facts:—In a proceeding under the Lands Clauses Consolidation (Scotland) Act 1845, before the Sheriff of Renfrewshire and a special jury, for the purpose of assessing the compensation payable by the railway company to the firm of Sommerville & Company, timber merchants, Caledonian Saw-Mills, Greenock, for the land or property and others taken by the company, the special jury found Sommerville & Company entitled to the sum of £28,586, 2s. 1d. as the value of the land about to be taken by the railway company under the powers contained in and for the purposes of their private Act. They further found Sommerville & Co. entitled to the sum of £14,572, 16s. 3d. for the value of the buildings, machinery, and plant upon the said land; and to the sum of £9499, 8s. 3d. as compensation for loss of business. These three sums amounted in all to £52,658, 6s. 7d.

The instrument under which this question arose, an abstract of which was set forth in the Case, was entitled a conveyance, and bore, that considering that by verdict of the jury they found Sommerville & Co. entitled to £28,586, 2s. 1d. as the value of the land taken, £14,572, 16s. 3d. as the value of the buildings, machinery, plant, and others upon the land, and the sum of £9499, 8s. 3d. as compensation for loss of business, "said three sums amounting in all to the sum of £52,658, 6s. 7d.; and seeing that the said Glasgow and South-Western Railway Company, incorporated by the Glasgow and South-Western Railway Consolidation Act 1855, have, pursuant to the Glasgow and South-Western Railway Act 1881, paid to the said Sommerville & Co. the said sums of £28,586, 2s. 1d. and £14,572, 16s. 3d. as the value of the foresaid land or property, and of the foresaid buildings, machinery, plant, and others, of which two sums they, the said Sommerville & Company, thereby acknowledged the receipt, and that the said railway company has also paid to them, the said Sommerville & Company, the said sum of £9499, 8s. 3d., conform to separate receipt and discharge granted by them therefor: Therefore the said Sommerville & Company, and individual partners, do hereby sell, alienate, dispone, and convey, assign, and make over from them, their heirs and successors, to the said railway company, their successors and assigns, forever, according to the true intent and meaning of the said Acts," the pieces of ground known as the Caledonian Saw Mills, and minerals therein, and whole buildings and heritable and moveable machinery therein.

The Railway Company, on 8th July 1885, presented to the Commissioners of Inland Revenue the deed of conveyance of the property in order to have the amount of stamp-duty due thereupon determined. The Commissioners were of opinion that the instrument was chargeable with *ad valorem* conveyance on sale duty; and that the amount or value of the consideration for the sale consisted of the total sum of £52,658, 6s. 7d. paid, being the aggregate of the three sums above mentioned. The Commissioners accordingly assessed the *ad val-*