Thursday, June 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NATIONAL BANK OF SCOTLAND *v.* M'WATT AND OTHERS.

Right in Security—Pledge—Bank—Lien for General Balance—Principal and Agent—Stockbroker—Stocks belonging to Client Pledged by Broker—Specific Appropriation—Bankruptcy.

A stockbroker obtained three loans from a bank, upon the security in each case of particular stocks or shares belonging to his clients, which he pledged with the bank. In two cases the loans were obtained by the broker for his clients, in the third case on his own account. In all cases the loans were made to the broker in his own name, no other name appeared in the bank books, and the bank dealt throughout with him alone, but it was the belief of the bank officials that he was acting for clients. The title of the bank to the securities was constituted in certain cases by registered transfer of the stocks; in others, where the securities were shares or bonds payable to bearer, by delivery. While the loans were still unpaid the broker was sequestrated. In addition to the amount of the loans he was then indebted to the bank in a considerable overdraft on his current account.

In a competition between the bank and the broker's clients to whom the stocks and shares belonged, *held* (*aff.* judgment of Lord Kyllachy) that the bank was only entitled to retain the securities for payment of the specific loans for which they had been impledged, and was not entitled to hold them for payment of the overdraft on the broker's current account, in respect that they had not been deposited as a general security for current advances.

Opinion by Lord Kyllachy that banker's lien cannot apply to securities constituted by registered title where the banker has obtained a title of property.

On 27th October 1893 the estates of Henry D. Dickie, stockbroker, Edinburgh, were sequestrated, Mr Molleson, C.A., being appointed trustee in the sequestration.

At this date Dickie was indebted to the National Bank of Scotland in respect of loans of £5200, £2000, and £4000 made to him by that bank. He was further indebted to the same bank in the sum of £1323, 8s. 1d., being the overdraft on his current account. The loans of £5200 and £2000 had been granted originally in 1890, and the loan for £4000 in 1893. In every case the loan had been granted for a short fixed period, but by repeated renewals they had been respectively extended to various dates in October 1893.

In security of these loans Dickie had pledged with the bank the following stocks, shares, and bonds:—(1) In security of the £5200 loan, £20,000 Caledonian Railway Deferred Converted Ordinary Stock; (2) in security of the £2000 loan, £7450 North British Railway Stock; and (3) in security of the £4000 loan certain American shares and bonds payable to bearer. The title of the bank was constituted in the first two cases by registered transfer, and in the third case by delivery.

In obtaining the loan of £5200 Dickie had acted on behalf of a client, Dr M'Watt, who had instructed him to purchase £20,000 Caledonian Railway Deferred Converted Ordinary Stock, and to borrow on the security of the stock as much of the price as he could obtain from the bank. Acting on these instructions Dickie had purchased the stock, and borrowed £7200 (afterwards reduced to £5200 by payments made by Dr M'Watt through Dickie) upon its security. The remainder of the price had been paid to Dickie by Dr M'Watt.

In obtaining the loan of £2000, Dickie had also acted for a client, John Thyne, who had instructed him to purchase the North British Railway Stock, and borrow £2000 from the bank upon its security. The stock was purchased and pledged, and the loan obtained by Dickie in pursuance of these instructions, and the balance of the price was paid by Thyne.

The case of the £4000 loan was different. That sum had been borrowed by Dickie on his own account, and the American shares and bonds deposited in security of the advance belonged to two of his clients, Daniel Bernard and Miss Christie. Dickie had no authority to pledge the securities with the bank.

Shortly after Dickie's bankruptcy the bank realised the securities in their hands. The Caledonian Railway Stock realised £6474, 18s. 1d., the North British Railway Stock £2622, 8s. 1d., and the American shares and bonds, £4967, 8s. 9d., the total sum realised being £14,064, 12s. 1d. This amount the bank placed against Dickie's indebtedness to them, including the overdraft on his current account. M'Watt, Thyne, Bernard, and Miss Christie having objected that the bank were not entitled to place the proceeds of the stocks, shares, and bonds, which respectively belonged to them, against the overdraft on Dickie's current account, the bank raised an action of multiplepoinding to have the rights of parties determined. The fund *in medio* amounted to the sum of £2827, 3s. 7d., which consisted of the surplus remaining out of the proceeds of the stocks realised by the bank after deduction of the whole of Dickie's indebtedness to the bank therefrom, and of the amount applied by the bank to the payment of the overdraft on Dickie's current account.

The following claims were lodged—(1) The National Bank claimed to be ranked for the amount of the overdraft on Dickie's current account; (2) Dr M'Watt claimed to be ranked for the surplus remaining out of the proceeds of the Caledonian Railway Stock, after satisfaction of the £5200 loan for

which that stock had been pledged; (3) Thyne claimed for the surplus of the proceeds of the North British Railway Stock remaining after satisfaction of the £2000 loan; and (4) Bernard and (5) Miss Christie for the surplus of the proceeds of the American shares and bonds, after payment of the £4000 loan; (6) the trustee of Dickie's sequestrated estate claimed the balance of the fund *in medio* remaining after the overdraft due to the bank had been paid.

The bank averred that they had transacted with Dickie alone, and had had no knowledge that any third party had any interest in any part of the advances granted to Dickie, or in any of the securities pledged by him.

They pleaded—"In respect that the claimants were entitled to retain the said securities or the proceeds thereof, and to apply the same in satisfaction of all debts due to them by Mr Dickie, they should be ranked and preferred in terms of their claim."

A proof was allowed.

The cashier and manager of the National Bank gave evidence to the effect that it was the custom for brokers to apply to the bank for loans on the security of stocks and shares; that the bank in such cases, while presuming the broker was acting for clients or customers, had no actual knowledge of this, and dealt with him throughout as the principal, and did not regard the client as their debtor; that they assumed the broker had full power to impledge the securities, and that their transactions with Mr Dickie had been on the above basis.

It further appeared from the evidence of the cashier and the correspondence that, at least before the last extension of the loan over the stocks of M'Watt and Thyne, the bank were incidentally informed that Dickie had clients behind him, for whose behoof these loans were being obtained.

It was shown from the entries in the books of the bank that in each loan transaction an advance of a definite amount was authorised against the particular stocks, and that the advances were entered as items of credit in Dickie's general account, and that he was only allowed to operate upon the account by drafts to the extent of the sums which *ex facie* of the account stood at his credit. In each case the money lent was drawn out by Dickie by cheque, passed on the special loan account, and was paid into his current account. On each loan account Dickie alone operated. No other name appeared in the bank's books.

The evidence also showed that the overdraft on Dickie's account-current was not granted on the credit of the securities impledged, but on his representation that the money would be immediately replaced, and that it appeared as an overdraft without security on the face of the current account.

On 22nd November 1894 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor—"Finds that the claimants the National Bank of Scotland did not obtain or possess a security over the stocks, shares, and bonds in question, which covered the balance due on H. D. Dickie's current account at the date of his stoppage: Finds therefore that the said claimants have no right to participate in the fund *in medio*, which consists of the surplus arising upon the sale of the said stocks, shares, and bonds after satisfying the special advances in security for which the said stocks, shares, and bonds were held: Finds also that the trustee on the said H. D. Dickie's estate has no claim on the fund *in medio*, and that the same falls to be apportioned amongst the other claimants in the proportions in which the said stocks, shares, and bonds belong to the said claimants respectively: Reserves in the meantime the question of expenses; appoints the case to be enrolled for further procedure, and grants leave to reclaim.

"*Opinion.*—This is a multiplepoinding which arises out of the bankruptcy of Mr H. D. Dickie, formerly stockbroker in Edinburgh. The raisers are the National Bank of Scotland, who claim to have made advances to Dickie on the security of certain shares, stocks, and bonds, of which the bank stood possessed at the date of the bankruptcy, and which have since been realised in ordinary course. The fund *in medio* consists of the surplus arising upon the realisation after paying certain advances made by the bank, as to which there is no dispute, viz., certain advances made specifically against the stocks, shares, and bonds in question, and entered in the bank's books as specifically so secured. The amount of this surplus is £2827, 3s. 7d., and the real question in the case is, whether the bank are entitled to apply the same to the extent of £1323, 8s. 1d. in payment of advances made to Dickie, not expressly against particular securities, but by way of overdraft upon cheques passed on his current account a few days before his stoppage. With respect to the balance of the fund, amounting to £1503, 15s. 6d., there is, so far as appears, no real dispute. The bank admit that it must be paid to and among the other claimants, who are (1) the trustee in Dickie's sequestration; and (2) certain clients of Dickie's, to whom, as it now appears, the stocks, shares, and bonds truly belonged. And so far as I followed the argument it did not occur to me that there was much difficulty in this part of the case. The trustee's claim although excellently maintained did not appear to have much substance, and the distribution of the fund among the other claimants after satisfying the bank's claim was not matter of controversy.

"The true point for decision therefore being as to the bank's preference for the £1323, 8s. 1d. advanced by way of overdraft upon current account, the case of the bank rests upon, or at least involves two propositions—(1) That whatever the limits of his authority in a question with his various clients, Dickie had apparently authority to deal as he pleased with the stocks, shares, and bonds in question, and in particular, had apparent authority to impledge them, either separately or in the lump, for any sums which he desired to borrow; (2) that, that being his position, Dickie did in fact impledge the said stocks,

shares, and bonds for the overdraft in question—that is to say, obtained, or must be held to have obtained, that overdraft on the faith and security of the margins existing on his several loan accounts. And this last proposition involves or presents itself under two alternatives—(1) That the supposed impledgment arose upon a contract, expressed or implied, covering the overdraft as well as the special advances; (2) that the impledgment arose *ex lege* by virtue of what is known as the banker's general lien, or by virtue of the right of retention common to all persons holding a title of property as against persons claiming under a personal contract for retrocession.

"It was to the first of those propositions, and the different points which it involved, that the proof and the debate which followed were mainly directed. The fact chiefly at issue was the extent of the bank's knowledge with respect to the ownership of the several securities and with respect to the interests of their several owners in the loans for which they were specially impledged. The law again chiefly canvassed was that applied and explained in two well-known cases in the House of Lords, viz., *Sheffield* v. *London Joint-Stock Bank*, L.R., 13 App. Cas. 333; and *London Joint-Stock Bank* v. *Simmons*, L.R., 1892, App. Cas. 201.

"I may say at once that on this part of the case my judgment, if a judgment were necessary, would be in favour of the bank, and I may summarise in a word or two the view which, on that matter, I am disposed to take.

"There were in all, it appears, three sets of stocks and three loans—(1) £20,000 Caledonian stock belonging to the claimant Dr M'Watt, against which Dickie had borrowed in his own name, but on behalf of M'Watt, £5200; (2) £7450 North British stock belonging to the claimant Thyne, against which Dickie had borrowed in his own name, but on behalf of Thyne, £2000; and (3) certain American shares and bonds payable to bearer, belonging mostly to the claimant Bernard (but to a small extent, it is said, to the claimant Miss Christie), against which Dickie had borrowed in his own name and on his own account the sum of £4000. All these securities were impledged for specific loans of fixed amount and having a fixed currency, and to all of them the bank had obtained a sufficient security title, viz., in the first two cases a title of property *ex facie* absolute, constituted by registered transfer, and in the third case a title (either of property or possession, as the case may be,) constituted by delivery. In each case the money lent was drawn out by Dickie by cheque, passed on the special loan account, and was paid into his current account. On each loan account Dickie alone operated, and the bank throughout dealt with him alone. The loans were negotiated in his own name, and no other name appeared in the bank's books. In short, as between Dickie and the bank, he contracted and was contracted with as a principal.

"These are the admitted facts, and *prima facie* they beyond doubt imply that Dickie had at least apparent authority to deal with the securities in question as he pleased. In other words it seems clear that, apart from notice of some limitation of Dickie's title to deal with the securities, the bank were in safety to contract with him with respect to the same, and to do so on the footing that they were in his absolute disposition. That follows in the case of Mr Bernard's bonds and shares, because the same were negotiable securities, and because it is the rule of law with respect to such instruments that any person in possession of them may confer a good title to them upon any *bona fide* purchaser or pledgee. And it follows equally in the case of Dr M'Watt's and Mr Thyne's stocks, to which the bank had a title by registered transfer, because it is an equally fixed rule of law that where the true owner of property has so acted as to arm another person with an ostensible title to that property, or otherwise with ostensible authority to deal with it as his own, he is thereby barred from disputing any title derived from that person by a *bona fide* transferee for value.

"The case, therefore, of the competing claimants rests on this branch of it, entirely on the suggestion that the bank had notice or knowledge of some limitation of Dickie's title or Dickie's authority, and that suggestion rests mainly on the admission, candidly made by the bank's manager, that in dealing with Dickie as with other stockbrokers, the bank presumed that he was acting for clients, and that the loans were being obtained on behalf of clients, and that the stocks either belonged to clients, or that the clients had an interest in them greater or less. I think that must be taken as the result of the manager's evidence; and I think it must also be taken as the evidence of the bank's cashier, and as the result of the correspondence, that at least before the last renewal of the loans over the stocks of M'Watt and Thyne, the bank were informed incidentally, but yet distinctly, that Dickie had clients behind him for whose behoof these loans were being obtained. There was an attempt to prove specific mention of Mr Thyne's name as principal in the £2000 loan. But so far as that fact may be important I do not consider it proved.

"Now, I am quite unable to hold that—assuming knowledge on the part of the bank that the loans in question were being got on behalf of clients, or that the stocks which were being impledged wholly or partially, belonged to clients—such knowledge imposed any duty on the bank to doubt or to distrust the apparent limits of Dickie's authority. It is said that knowing so much the officials were put on their inquiry; by which I suppose is meant that they were bound with respect to each sum drawn out against each security to require from Dickie evidence that his clients knew and approved of the transaction. But anything of that kind would be plainly inconsistent with the whole course of banking business, and indeed when reduced to a

proposition was hardly maintained. It was not, for example, contended that, with regard to the *first* loan, there was any duty to inquire; and—apart from notice of something wrong—it is difficult to see how a distinction can in this matter be drawn between the first, second, and third loans. Nor does it appear to me to be possible to distinguish between loans taken against particular securities, and loans taken against the whole securities in the lump; or between loans taking the shape of special advances and loans taking the shape of overdraft allowed on current account. These distinctions may possibly be in some views material, but none of them involve or suggest, so far as I can see, any note of fraud. It may be true—I must so take it—that in dealing with stockbrokers in such transactions, bankers always, or as a rule, assume that the stockbroker is acting on behalf of clients—that is to say, is not speculating on his own account. But the banker does not know, and cannot know, the pecuniary relations between the stockbroker and his clients—how far he is in advance to or for them—how far he may be financing them by the help, it may be, of securities of his own—how far, although the securities are entirely theirs, he has claims or responsibilities in connection with them, which have procured for him a free hand in dealing with them. In short, the business of a stockbroker is a quite different business from that, for example, which was in question in the case of the *Earl of Sheffield*; and this was fully acknowledged and emphasised in the subsequent judgment of the House of Lords in the case of *The London Joint Stock Bank* v. *Simmons*.

"If, therefore, the bank and Dickie did in fact contract that the overdraft in dispute should be made and granted as a further advance against the whole securities which the bank held—in other words, if Dickie did *in fact* impledge these securities for the overdraft which he obtained, I should, as I have already said, been prepared to sustain the bank's claim. But the next point is, Did Dickie do so? Was there any contract of impledgment, express or implied, between the bank and Dickie with respect to this overdraft, as there certainly had been with respect to each of the advances making up the previous loans? It is here that it seems to me the difficulty of the bank's case lies.

"Now, there certainly was no express impledgment. Dickie did not go or write to the bank and say, 'I propose to overdraw my current account, and I hope you will allow me to do so as against the unexhausted margins on my several special loans.' Neither did the bank when they cashed the cheques which produced the overdraft, or when, after cashing them, they drew Dickie's attention to the fact, make any reference to the matter of security. The letters which passed come simply to this, that Dickie, having without previous notice on the Saturday before his failure overdrawn his account, was on the same day reminded of the fact, and replied that he was aware of the overdraft and would attend to the matter on Monday.

"But then if there was no express impledgment, can such impledgment be held implied? This raises a question, in the first place, with respect to the law of pledge—a question bearing specially on Mr Bernard's securities, which being negotiable were, I assume, capable of being pledged in the proper sense. Is it the law of Scotland that when goods or documents of title are pledged for specific loans, the pledge is held by implication to cover any subsequent advances made by the pledgee to the pledgor.

"Now, I apprehend this question must be answered in the negative, and I do not know that I need do more than refer to the well-known case of *Hamilton* v. *Western Bank*, 19 D. 152, where this question was fully discussed and the whole authorities reviewed, particularly in the exhaustive judgment of Lord Handyside in the Outer House.

"But if there is no room under the contract of pledge to imply an agreement that subjects pledged for a special debt shall stand pledged for all future advances, is there room for implying such an agreement where, as in the case of Dr M'Watt's and Mr Thyne's stocks, the security is constituted by registered transfer—that is to say, by transfer not merely of the possession, but of the property—a transfer equivalent in effect to an absolute disposition of heritage qualified by an unrecorded back bond? I know no authority for making in this matter any distinction between a security by way of pledge and a security constituted by absolute transfer of disposition. The same reasoning seems to apply to both. Assuming that the immediate object was to secure a particular debt, the form of the security can scarcely affect the implications to be deduced with respect to future debts or future advances. No doubt, as I shall presently notice, the holder of an absolute title may have in result a universal security which will in general be all he wants. But that is not a security which results from contract express or implied, but results simply by force of law, and from the necessity of the situation, and may not, as we shall see presently, at all operate to secure further advances to the original debtor.

"The bank, however, in the recent debate did not put their case so much upon contract, express or implied, as upon lien or retention operating *ex lege*. And, in the first place, they appealed to the doctrine of what is known as 'banker's general lien,' a lien undoubtedly recognised in our law (Bell's Com. ii. 113; *Robertson* v. *Royal Bank*, 18 R. 12), and the application of which in the law of England is illustrated by such cases as *Jones* v. *Peppercorne*, 28 L.J., Ch. 158; *Brandao* v. *Barnett*, 12 C. & F. 787, and similar cases.

"Now, I must observe at the outset that this banker's lien can at the best apply only to the securities belonging to Mr Bernard. It is a lien which applies only to what are called paper securities—that is to say, speaking generally, to negotiable secu-

rities. It has never been applied to securities constituted by registered title. And indeed where, as in the latter case, the banker obtains a title of property, there cannot be a lien, for a lien is only possible over the property of another. It is a legal pledge, and pledge implies a title of possession as distinguished from a title of property.

"But with regard even to securities like those of Mr Bernard the suggested lien can only apply in the absence of special appropriation—that is to say, it cannot apply where securities have been pledged for a special purpose, and that purpose was inconsistent with the existence of a general lien. Now, I should be disposed to hold that it was enough to exclude this condition that the securities were here pledged in security of a particular debt. That, I observe, was the opinion of the late Lord President (Inglis) in the case of *Robertson*, 18 R. 12, already referred to. But however that may be, there can, I think, be no doubt that a pledge for a particular debt excludes the general lien, where, as in the present case, the bank had notice and knew that the securities belonged to someone else than the pledgor, and were being pledged by the latter for special loans effected by him as a stockbroker for behoof, if not on behalf, of clients.

"The ultimate question therefore comes to be, whether, putting aside contract, and also banker's general lien, and taking the bank's case as rested simply on their *ex facie* absolute title of property, they have in virtue of that title of property a right of retention which will serve their purpose. Now, it is undoubtedly the law that where property has been transferred in security under an *ex facie* absolute title, the creditor holding that absolute title is subject only to a personal obligation to retrocess, and being so is not bound to perform that personal obligation except upon performance by the reverser of all personal obligations however arising prestable by the reverser to him. That is undoubtedly a principle well established and often applied, and it is a principle which would I do not doubt have in this case secured the bank if the stocks in question had been Dickie's own. Perhaps also it might have done so if the bank had believed the stocks to be Dickie's own. But the difficulty is this. The question here is not, as in *Hamilton* v. *Western Bank*, between the bank and the trustee for Dickie's creditors, but between the bank and the—as it now appears—true owners of the stocks. If the stocks had been Dickie's own, there would have been no difficulty. He would have been the debtor in the overdraft, and at the same time (as being the true reverser) creditor in the bank's obligation to retrocess; and as between these counter obligations there would of course have been a set-off operating at least in bankruptcy. But was Dickie, as the facts stand, the reverser? Was he the creditor in the bank's obligation to retrocess? Was it not the true owners of the stocks to whom the bank, on their special advances being paid, were bound to reconvey? It must be noted, as I have already said, that the universal security which, in cases like that of *Hamilton*, results to a creditor who has obtained in security of a specific debt an absolute transfer or absolute disposition, does not result from any implied contract to the effect that the subject of the security shall stand impledged for all debts due or to become due by the debtor in the specific debt. The only contract expressed—and there is no reason to imply any other—is, that the subject of the security shall be impledged for the specific debt. The universal security which may arise does so not *ex contractu*, but from the rule of law that mutual obligations may, at least in bankruptcy, be set off the one against the other. And hence the question always is—Who has the right to demand the retrocession? Now, the person who has that right is, and must be, the true owner of the subject of the security. Against that owner the bank may of course hold for all advances which they have made on the security of the subjects with his apparent authority. But these advances being repaid, the right of the true owner revives, and the universal security only operates to the effect of enforcing payment of all *his* debts if there any be. The present case is in this respect really the same as if M'Watt and Thyne had themselves made the transfers in question expressly in security of certain specified sums borrowed from the bank by Dickie. And if that had been the shape which the transaction took (and in point of fact it did so with regard to certain of Mr Thyne's stocks), I do not at this moment see what the bank would have had to say.

"No doubt it might, as I have already indicated, have made all the difference had it appeared that the bank believed that the stocks were Dickie's own, and had been misled into that belief by the action of Messrs M'Watt and Thyne. In that case it might be argued that in allowing the overdraft without stipulating for security, they relied, and were entitled to rely, on the universal security which the holder of an absolute title to stocks necessarily has against their owner. But then comes the question—Did they believe that the stocks were Dickie's? Is it not rather the result of the evidence that they knew, or at least presumed the contrary? As already said I think that question must be answered in the affirmative. I do not say that the bank knew the names of Dickie's clients, or how far particular stocks belonged to particular clients, or how far the client's ownership of the stocks was exclusive of all interest on the part of Dickie. But they at least knew that the stocks were not exclusively Dickie's—that he was not raising the special loans on his account or pledging stocks which were his own on his clients' account. That, I think, at the lowest, is the result of the evidence of the bank's officials, and I do not, I confess, see how in these circumstances the bank can, as against the true owners, set up a general right of retention for Dickie's debts.

"On the whole matter, therefore, I come

to the conclusion that for the reasons above stated the bank's case fails—not, it will be observed, on the point as to the extent of Dickie's authority, but on the point as to the extent of its exercise. I quite accept the proposition that the bank were entitled to take it that Dickie had full authority to deal with the whole securities, so that if he gave a title for value to any of them, that title was a good one. But they have failed, in my opinion, to show that Dickie did give or profess to give a title constituting a universal security in the bank's favour for all his debts.

"I have only to add what perhaps I should have mentioned earlier, that I have not overlooked the argument that Messrs M'Watt and Thyne did not, for the most part, possess any title of property to their respective stocks, but were owners of these stocks only in this sense, that they had a *jus ad rem* to the specific stocks as having been purchased and taken up on their behalf by Dickie, who had arranged with the sellers that the latter should transfer direct to the bank. It is quite true that, except as regards two parcels of Mr Thyne's stocks, this was the shape which the transaction took. But I have not been able to see the materiality of that circumstance. The stocks certainly never belonged to Dickie, nor were they ever transferred to or registered in his name; and whether or not the claimants referred to were ever vested with the legal title, they had at least a sufficient title to have claimed the stocks as against Dickie or Dickie's creditors, and they have now, in my opinion, a sufficient title to claim them from the bank." . . .

The claimants, the National Bank, reclaimed, and argued — The bank were entitled to use the securities in full satisfaction of Dickie's debts — 1. As regarded Bernard's claim, there had been nothing in the course of the bank's transactions with Dickie to indicate that he had a client behind him. In order therefore to establish his claim Bernard would have to prove that Dickie had no right to pledge the securities for any amount however small, and that the bank had no right to make any advances on them. These being negotiable securities fell directly under the rule laid down in the case of *London Joint-Stock Bank* v. *Simmons*, L.R., 1892, App. Cas. 201. That case showed that, unless there was some sign of fraud indicating that the broker was exceeding his authority, the bank was not put upon its inquiry on that point, but was entitled to assume that the broker had the right to deal with the securities exactly as though they were his own. The same principles were laid down in the case of *Baker* v. *Nottingham Banking Company*, 1891, 60 L.J., Q.B. 592. The case of *Sheffield* v. *London Joint-Stock Bank*, 1888, L.R., 13 App. Cas. 333, was a very special one, and was easily distinguishable from the present, as the bank there had exact knowledge as to the limits of the money-lender's authority, while here it was entitled to consider Dickie's as unlimited. The respondents assumed that the question of good or bad faith on the part of the bank was settled by the consideration whether or no they knew that Dickie had clients behind him, but there was no need—as was proved by the cases quoted—for the bank to inquire who were the true owners of the stock, if, as was the case, they were entitled to assume that he had a free hand to deal with them. Accordingly, the principle of *Cook* v. *Eshelby*, quoted by the respondents, did not apply, and the bank were entitled to use the securities as though they belonged to Dickie. That being so, the only question to consider was, whether on that assumption they were barred from using them against Dickie's whole indebtedness by their specific appropriation to particular advances. They were not so appropriated; the mere agreement to make a particular advance was not enough to exclude the securities from being used against Dickie's general account. The case of *Jones* v. *Peppercorne*, 1858, 28 L.J. Ch. 158, was almost identical with the present case, and showed that a special contract was only exclusive of a general lien when quite inconsistent with it. There was no such inconsistency here. The same principles were laid down in *Robertson's Trustees* v. *Royal Bank of Scotland*, October 24, 1890, 18 R. 12, and *Mure* v. *Royal Bank of Scotland*, June 23, 1893, 20 R. 887; Bell's Prin., sec. 1451. Again, in the case of *in re European Bank*, 1872, L.R., 8 Ch. App. 41, the whole securities held by the bank were held to apply to each of the separate accounts of their customer, while in *Greenwood Teale* v. *Brown & Company*, 1894, Times L.R., vol. xi. p. 56, it was held in the case of a customer having three accounts that the bank had a lien in respect of all three. 2. With regard to the cases of M'Watt and Thyne, there was no evidence that the bank ever knew who Dickie's clients were, and the only indication that he was acting for clients was given after the loan had been made. In the case of *Bentinck* v. *London Joint-Stock Bank*, L.R., 1893, 2 Ch. 120, there was just as much ground for suspicion on the part of the bank as to the power of the agent as there was here, but yet the doctrine of *Simmons'* case was applied in a question as to a general balance. The reasoning in the latter case while primarily applicable to Bernard's claim also applied to these claims. The bank had obtained by a registered transfer an absolutely universal security, and therefore the principle of specific appropriation could not apply—*Nelson* v. *Gordon*, June 26, 1874, 1 R. 1093. They had obtained a good title to the securities against all the world—why therefore were they not entitled to use it against any advance made to Dickie?

Argued for the claimant Bernard--The securities had been pledged for definite specific advances, and the bank had no right to retain them for advances on Dickie's general account. If the bank had any reason to suspect the broker of having

only a limited title they were bound to make inquiries; they had such reason here — *Sheffield* v. *London Joint-Stock Bank, supra; Farrar* v. *North British Railway Company*, July 6, 1850, 11 D. 1190; *Attwood* v. *Kinnear*, July 11, 1832, 10 S. 817. In the cases of *Simmons* and *Bentinck* the bank had no ground of suspicion, and they were therefore distinguishable from the present case, and emphasised the distinction to be drawn between the authority which the bank was justified in assuming Dickie had for pledging the securities for a specific loan, and that which it was not justified in assuming he had in regard to his general account. As regarded the general lien of the bank, it was excluded because inconsistent with the facts known or believed by the bank to exist — *Robertson's Trustees* v. *Royal Bank*, 18 R. 16, and accordingly the cases quoted for the bank actually excluded such cases as the present. There were *dicta* to the same effect in *Garnett* v. *M'Ewan*, November 8, 1872, L.R., 8 Ex. 10.

Argued for the claimants M'Watt and Thyne — Dickie had no authority to pledge the stocks except in security for the specific loans, and as matter of fact he only pledged them for these loans, and not for his general account, and the bank actually knew that he was acting for clients; in Thyne's case they even knew who the client was. Each renewal of the loan was a new transaction. This was even a stronger case than that of *Sheffield*, where there was only a suspicion on the part of the bank. This was a case of an agent with an undisclosed principal, and the bank must show that they were induced to believe by the conduct of the principal that the agent was the real owner of the securities—*Cook* v. *Eshelby*, 1887, L.R., 12 App. Cas. 271, at 278. But the evidence was clearly against holding that there was any such belief on the part of the bank. No loss arose to the bank on any of the loan amounts, but only on Dickie's current account, and they knew that the overdraft was allowed to him as an individual, and had nothing to do with his clients. They had therefore no right to use his client's stock against it —*Loche* v. *Prescott*, 1863, 32 Beav. 269. The banker's lien did not attach documents given in pledge for a specific advance. There was here such a specific appropriation, and therefore the general lien was excluded as inconsistent therewith — *Farrar and Booth* v. *North British Banking Company*, July 6, 1850, 12 D. 1190.

At advising—

LORD M'LAREN—The questions in this case arise out of the bankruptcy of Mr H. D. Dickie, who carried on business as a stockbroker in Edinburgh, and who in accordance with the general practice of his profession pledged the securities of his clients or customers with the National Bank for the purpose of obtaining money to pay for the purchase of the stocks. It is hardly necessary to point out that the course of dealing here referred to does not depend on any supposed usage of trade. A stockbroker, as broker, has no right to pledge the securities of his clients. If the client provides him with the money required for the purchase of a quantity of stock, his duty would be to take the transfers in the name of the client, and to deliver the stocks purchased at the settling-day But in two of the cases here considered the clients wished to borrow as much of the price as they could obtain on the security of the stocks, and only to advance the balance. In the third case, although the purchaser did not wish to borrow, and was not a borrower, but a lender on the security of stocks, he allowed the title of the stocks to be passed to the broker. In such cases it is convenient that the loan should be got through the broker, because he has a standing agreement with his bankers for borrowing on the security of stocks, the titles to which are taken in his own name, and as he knows the value of the stocks he can more easily arrange with his bankers for an advance proportionate to the value of the stocks than the client could do by contracting directly. As the bank contracts with the broker, it is of course necessary that the transfers to the stocks should be taken in the name of the broker, in order that he may be put into the position of making a valid assignment in security to the bank. In the present case it is admitted that the transfers to the stocks were taken in the name of the broker with the consent of the clients for the purpose of enabling him to negotiate as a principal on behalf of his clients. The immediate effect of this arrangement would be that the broker would be entitled to a retrocession or transfer of each parcel of stock from the bank, on repayment of any advances made against it, and he would then hold the stock as trustee in the first place for repayment of his advances, and in the second place, for the benefit of the client on whose account the purchase had been made.

While the broker is solvent there can be no doubt that the legal relations arising out of the system of purchases and advances on security would be such as I have stated. But in the actual case Mr Dickie became bankrupt while indebted to the National Bank in respect of an overdraft or balance due on his account-current, and the National Bank claims the right to retain the stocks against this general balance—in other words, to apply the proceeds of the sales of the stocks, not only in repayment of the specific advances made against them, but also in repayment of the overdraft. The owners of the stock claim to be entitled to the surplus proceeds after repayment to the bank of the specific advances.

The facts are admitted to be correctly set forth in the Lord Ordinary's opinion. The subjects in dispute in the action of multiplepoinding include three sets of stocks and three loans—(1) £20,000 Caledonian Railway stock, purchased by Dickie on account of the claimant Dr M'Watt, against which Dickie had borrowed in his own name, but on behalf of M'Watt, the sum of £5200; (2)

£7450 North British Railway stock purchased on account of the claimant Thyne, against which Dickie had borrowed in his own name, but on behalf of Thyne, the sum of £2000; and (3) certain American shares and bonds payable to bearer, belonging partly to the claimant Bernard, and partly to the claimant Miss Christie, against which Dickie had borrowed in his own name (and without authority) the sum of £4000.

It may be convenient, first, to consider the case of the Caledonian and North British stocks, which raise identical legal questions, and then to consider whether there is any distinction in principle between these cases and the case arising out of the loans obtained by transfer of the American stocks and bonds payable to bearer, as to which the facts are in some respects different.

It is pointed out in the Lord Ordinary's judgment, in accordance with settled rules of law, that if the securities, *i.e.*, the North British and Caledonian Stocks, had been the absolute property of Dickie, and had been made over to the National Bank by *ex facie* absolute transfers, the bank would have been entitled to treat the stocks as security for subsequent advances as well as for the advances made at the time of the transfer. This result depends on the principle that in the case supposed the debtor puts the creditor into possession of his estate on an unqualified title. Then the only right which he retains against his creditor is a right to an adjustment of accounts in which the creditor may set against the property any advance which he has made at and subsequent to its acquisition. But where the creditor's title is qualified in its inception, either because the transfer bears to be in security of a specific advance, or because it is so limited by a separate writing executed at the time, then the security is incapable of extension, and a second transfer must be executed if it is desired to make the subject available as a security for further advances. It is proper to notice (although the distinction does not bear upon the present case) that in the case of an *ex facie* absolute conveyance of heritable property followed by infeftment, an unrecorded back-bond or declaration does not have the effect of limiting the security to the immediate advance. It is only upon the recording of the back-bond that the security becomes incapable of extension. But this distinction does not arise in the case of transfers of moveable rights, and it is of no consequence whether the limitation of the creditor's title is contained in the transfer itself or in a collateral contract.

Now, in the present case I think it is established that the title of the National Bank to the Caledonian and North British stocks was in its inception limited, but that it is a question how far that limitation was known to the bank, and if it was not made known whether the bank was bound by it.

Dr M'Watt states in his evidence that when he purchased the Caledonian stock he arranged with Dickie (in November 1890) to get an advance from the National Bank to the extent of £7200, and that he supplied Dickie with funds to pay the balance of the price. The accounts show that this sum was in fact advanced on a transfer of the stock. Dr M'Watt further states that he afterwards supplied Dickie with funds to reduce the amount of the advance, and again in December 1892 he found it necessary to increase the advance from the bank by £1000, and that was done. He adds—"Dickie had no authority from me to pledge these Caledonian stocks for any other advances than those referred to." The evidence of Thyne as to the loan obtained on his account is to the same effect. He authorised Dickie to negotiate a loan with the National Bank for a definite sum —£2000—on the security of his North British stock. This loan was in fact obtained at the time, and Dickie never had authority to pledge the stock for any other loan.

On the second point, it is admitted by the bank's manager that in dealing with Dickie as with other stockbrokers, the bank presumed that he was acting for clients, and that the loans were being obtained for clients. Now, I agree with the Lord Ordinary that such knowledge on the part of the bank of the general fact that Dickie was acting on behalf of clients did not amount to a limitation of Dickie's authority as to the amount of the advances to be obtained. Dickie was the agent of M'Watt and Thyne to obtain advances for them on the security of their holdings in railway stocks, and therefore if Dickie had borrowed a larger sum than he was empowered to borrow, I do not doubt that the owners of the stock would have been bound by his acts to the extent of the sums advanced by the bank on express contracts of loan. I will even go further, and say that, if at any future time Dickie had asked for and obtained further advances on these stocks, his constituents would have been bound by his acts although they had not authorised the extension of the security, because, by allowing the stocks to be taken in the agent's name, they are held in a question with third parties to have given him authority to dispose of the stock either absolutely or under reversion. But it appears to me that the utmost effect which can be given to such implied authority is that the principal shall be bound by all the voluntary contracts made by his agent, whether in accordance with his instructions or contrary to his instructions, but that subject to its right in security the bank will hold the stock in trust for the true owner.

But the claim of the bank cannot be brought within the rule of the responsibility of the principal for the contracts of the agent. What the bank is claiming is that independently of contract the property of M'Watt and Thyne should be applied in satisfaction of Dickie's liability to the bank. This claim appears to me to come into collision with a well-settled principle that creditors in general only take such interest in the possessions of the debtor as he himself had, or, as it is some-

times expressed, creditors take the debtor's estate *tantum et tale* as it exists in his person.

For example, if Dickie had become bankrupt with these stocks standing in his name, the trustee for his creditors would have no claim to them. On proof that M'Watt and Thyne were the true owners the stocks would be struck out of the sequestration. The same result would follow if any individual creditor of Dickie had attempted to attach the stocks by diligence. It appears to me that the claim of the bank to apply the surplus proceeds in extinction of their unsecured balance is precisely of this description. As regards the surplus proceeds, the bank can only hold the stock for its true owners, and it has no more right to withhold payment on the plea of retention against Dickie's liability than it would have to attach the surplus by diligence as estate of Dickie.

It was suggested in the argument for the bank that according to the actual contract on which the stocks were transferred to the bank, the bank took over the stocks at their full value in security of Dickie's general account. But in my opinion the attempt to establish such a contract has completely failed. It is only necessary to look at the form of the loan account to displace the argument. If the contract had been that all the stocks were to be massed together and treated as a general security, then Dickie's account with the bank would have taken the form of a credit account. But we see from the correspondence between Dickie and the bank, and from the books of the bank, that on each occasion an advance of a definite amount was authorised against the particular stocks. The advances were entered as items of credit in Dickie's general account, just as if he had paid in the specific sums to the credit of his account. And he was only allowed to operate upon the account by drafts to the extent of the sums which *ex facie* of the account stood at his credit. If the bank had consistently adhered to this system, the present question could not have arisen. Unfortunately, on one occasion Dickie was allowed to overdraw his account, and soon after became a defaulter. But this overdraft was not allowed on the credit of the stocks in question. It was allowed on the representation of Dickie that the money would be immediately replaced, and it appears as an overdraft without security on the face of the current account. I think it is clear that the stocks were only treated as securities for the specific sums advanced against them, and put to Dickie's credit in the account-current. Accordingly the bank can have no claim to the surplus proceeds, unless they can found a claim on the principle of retention. But for the reasons stated, I conceive that this ground also fails; because the right of retention only covers assets of the debtor, and does not extend to the property of other people standing in the debtor's name.

If the views which I have expressed are well-founded, there is no real distinction between the cases that have been considered, and the case of the American securities which are payable to bearer. The difference is only in the mode of passing the title to the stocks, which in the one case is by a registered transfer, and in the other by delivery of the scrip. In either case full effect is given to the actual contract made by the agent as for a loan in security. But, subject to the rights which the bank has acquired by contract, the property of the stocks and bonds is untransferred, and on repayment of the specific loans the stocks ought to be restored to their true owners. In the case of the securities payable to bearer which belonged to Bernard, Dickie had no authority to pledge them. This is a distinction not favourable to the claim of the bank, but it was admitted by Bernard's counsel that as the stocks were standing in Dickie's name, the contracts which Dickie made with the bank (pledging the securities for advances) are binding on Bernard, and he only claimed the surplus remaining after repayment of the specific advances; so that the case is really identical in principle with the cases of M'Watt and Thyne.

There is a separate question relating to the American securities, as to whether the surplus belongs to Bernard exclusively, or is divisible between him and the claimant Miss Christie. This question depends on whether it can be established that the American bonds and stocks remaining were acquired for Bernard alone, or partly for him and partly for Miss Christie. The Lord Ordinary has not made any finding on this subject, but has indicated an opinion that the securities in question are divisible. In the course of the argument on the reclaiming-note, it was pointed out that according to Dickie's books these securities belonged to Bernard, and did not correspond in date or amount with the purchases which Dickie was empowered to make on behalf of Miss Christie. Miss Christie's counsel stated that they had no proof to contradict the books. When the case goes back to the Lord Ordinary, the surplus from the American securities will accordingly be treated as Bernard's estate.

I have not thought it necessary to refer specially to the two cases in the House of Lords which are cited by the Lord Ordinary and were brought under our notice by counsel, because I think that the claim of the National Bank is not at all supported by the decisions or the observations of the learned Judges who took part in these decisions. These cases, I conceive, are authorities on the question of the limits to the agent's power to pledge, which may arise out of the nature of the employment of the agent, and the knowledge which the pledgee has or must be credited with on the subject of the agent's powers. But the claim to retain for advances which were not made under a contract of security is not supported by the English decisions, and, as far as I am able to apply the principles laid down in the decisions, I venture to think that if this case had arisen in England it would have been decided in the same way as the Lord Ordinary has decided it. I think

that the judgment is sound in all its findings, and that the reclaiming-note ought to be refused.

LORD KINNEAR—I agree with the Lord Ordinary and with Lord M'Laren.

It is not disputed that Mr Dickie had authority from his clients to pledge the shares and stocks in question for moneys borrowed from the bank in his own name, and it follows that the bank is entitled to hold these securities for payment of their loans of £5200, £2000, and £4000 respectively, for which they were in fact impledged. But I can see no ground on which the bank should be entitled to retain them for the overdraft on Dickie's current account for which they were not impledged. The contention that they were deposited with the bank as a general security for current advances is inconsistent with the evidence of the bank officials. These gentlemen make it perfectly clear that on each occasion when securities were deposited Dickie or his clerk on his behalf applied for a specific loan upon specific securities, which he undertook to pledge for the particular advance required, that the bank was asked whether the security was adequate to cover the loan; that the loans were granted for fixed periods, and that when a loan was renewed each renewal was considered by the directors on that footing, and treated as a new transaction. I agree with Lord M'Laren that the manner in which the transactions are stated in the books of the bank is consistent with this evidence. The officials of the bank may have believed that they were entitled to retain the securities deposited by Dickie, not only for the specific loans for which they were pledged, but also against his general indebtedness. But it is proved by their evidence that this belief was not rested upon any contract or representation made by Dickie himself. It may be assumed that if the stocks and shares in question had belonged to Dickie they might have been retained for payment of a general balance. But the property of a principal cannot in general be retained for the separate debt of his agent, and therefore the right of the bank, which I think cannot be disputed, to deal with Dickie as having authority to pledge the securities in question for the amounts for which he did in fact pledge them, will not enable them to retain them against the true owners for the personal obligations of Dickie himself for which he did not undertake to pledge them. The argument for the bank was that they were entitled to deal with Dickie, not only as an agent having authority to pledge his client's securities, but as being himself the owner of the stocks and shares. This might have been a perfectly good plea if the bank had believed that in these transactions Dickie was a principal and not an agent, but on any other hypothesis it is untenable. It is true that, where an agent has contracted in his own name for an undisclosed principal, the debts of the agent may in certain circumstances be set off against the claims of the principal. But not if the person dealing with the agent knew that he was not or might not be the principal. The rule has been recently considered in the House of Lords in *Cook* v. *Eshelby*. The Lord Chancellor says—"The ground on which all these cases have been decided is that the agent has been permitted by the principal to hold himself out as the principal, and that the person dealing with the agent has believed that he was the principal, and has acted in that belief." Lord Watson says—"In order to sustain the defence it is not enough to show that the agent sold in his own name. It must be shown that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account, and not for an undisclosed principal, and it must also be shown that the agent was enabled to appear as the real contracting party by the conduct or by the authority, express or implied, of the principal." Now, it is proved by the very clear and candid evidence of the bank officials that they did not believe that Dickie was pledging his own securities on his own account. They did not inquire whether he was acting for a client or who his client was, but they took for granted that he was acting for a client. The manager says—"In all cases we assume that they, *i.e.*, brokers, are acting for clients." And the evidence of the cashier is to the same effect. It follows that a broker's application for a loan on the security of certain stocks is no evidence to the bank that the stocks are his own. It may import a representation that he has authority to pledge them for the amount he proposes to borrow, and to that extent to give a good security-title to the lender. But it cannot be inferred that they are his own property, or that he has power to give the bank a title to retain them for other advances than those for which he actually undertakes to pledge them, and the bank should not in fact draw any such inference. It appears to me to follow that when the true owner seeks to recover his property the bank cannot allege against him that the broker pledged it as his own. They are entitled to plead against the principal the contract which his broker may have made with respect to the shares. The owner therefore cannot redeem his property except on payment of the advances for which it was pledged. But on the other hand the bank cannot retain it for the separate debts of the agent.

On these grounds I am of opinion that the judgment of the Lord Ordinary is right.

LORD ADAM and the LORD PRESIDENT concurred.

The Court adhered.

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Wednesday, June 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GLASGOW DISTRICT SUBWAY COMPANY *v.* CRABBIE AND OTHERS (ROBERTSON'S TRUSTEES.)

Railway—Compensation for Lands Injuriously Affected—Act of Parliament—Special and General Act—Construction—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 6—*Glasgow District Subway Act* 1890 (53 *and* 54 *Vict. cap.* 162), *sec.* 73.

By section 73 of the Glasgow District Subway Act 1890, it was provided that, if by reason of the construction of the subway any structural damage should be caused to buildings "fronting or abutting on the streets in or under which" the subway was constructed, or if by reason of such construction any damage should be done to the effects in any such buildings, the company should make compensation to the owners, lessees, or occupiers, and that such compensation should be recoverable from time to time as the injuries might be discovered. The Act also incorporated certain sections of the Railway Clauses Consolidation Act 1845, "except where expressly varied by or inconsistent with this Act," and, *inter alia*, the sections dealing with the construction of the railway. The first of these sections (sec. 6 of the general Act) provides that full compensation shall be made to the owners and occupiers of lands injuriously affected by the construction of the railway.

Held (*aff.* judgment of Lord Stormonth Darling) that there was no inconsistency between this section and section 73 of the special Act, and that the proprietors of buildings, injuriously affected by the construction of the subway, but not fronting or abutting on streets under which it was being constructed, had a claim against the railway company under the 6th section of the general Act.

John Miller Crabbie and others, trustees under the marriage-contract of Mr and Mrs James Robertson, and as such proprietors of heritable subjects in Abercorn Street and Burnside Street, Glasgow, lodged a claim for compensation with the Glasgow District Subway Company, for damage done to the said subjects through the operations of the company in constructing their subway under New City Road, Glasgow. The heritable subjects in question did not front or abut on the New City Road, and were not built upon land by the side of the subway. The trustees nominated an arbiter to fix the amount of compensation in terms of the "Railway Clauses (Scotland) Act 1845," and "The Lands Clauses Consolidation (Scotland) Act 1845." The company under protest also appointed an arbiter, but thereafter brought a note of suspension and interdict to prevent the arbitration being proceeded with.

The complainers pleaded, *inter alia*,—"(3) The respondents' said property not having a frontage to or abutting on the streets or roads in or under which the subway is constructed, and not being built upon land by the side of the subway, the said notice of claim is incompetent, and the complainers are entitled to decree as craved."

The respondents pleaded—"(2) The respondents' property having been damaged and injuriously affected within the sense and meaning of the complainer's special Act, and of the Acts of Parliament incorporated therewith, the arbitration proceedings complained of are competent and valid, and the suspension and interdict craved ought to be refused with expenses."

The Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), by section 6, enacts that ". . . the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the Special Act, or any Act incorporated therewith, vested in the company." . . .

The Glasgow District Subway Act 1890 (53 and 54 Vict. cap. clxii.), section 3, enacts that "The following clauses and provisions of the Railway Clauses Consolidation (Scotland) Act 1845, are, except where expressly varied by or inconsistent with this Act, incorporated with and form part of this Act, that is to say, the clauses with respect to the following matters (namely)—. . . the construction of the railway" (which include section 6).

Section 73 enacts that "If by reason of the construction of the subway, any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which the subway is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land by the