

it was presented. The funds to meet it were there, and the cheque was drawn by the person in whose name they were lodged, and countersigned by the executrix, to whom they belonged. Was there anything to justify the refusal? It is not said that William Ireland's estate was sequestrated, for that had not then been done, and was not done till the month of March subsequent. There was then nothing to interfere with the management of the executrix or to prevent her agent drawing funds for her. It is said, however, that he had executed a trust-deed for behoof of his creditors. But the bank has nothing to do with that. They are not entitled to assume that when a man becomes insolvent he is going to commit fraud, and while funds are in a bank the banker cannot set up a title in anyone else so as to refuse the owner's cheque or himself to account as depository for the funds.

**LORD DEAS**—I am entirely of the same opinion. The point of time at which the question is to be taken is the date of presentation of the cheque, and I think it was then the duty of the bank to pay it.

**LORD MURE**—I am of the same opinion.

**LORD SHAND**—I am of the same opinion. If there had been an averment to the effect that the bank were aware that the depositor who asked back the money he had deposited was about to commit a breach of trust, then there might have been something said for their right to retain the funds. But all that is said is that he had executed a trust-deed, and the bank are bound to fulfil their contract of deposit.

Their Lordships dismissed the appeal.

Counsel for the Appellants and Defenders—Kinnear—H. J. Moncreiff. Agents—Carmont, Wedderburn, & Watson, W.S.

Counsel for Respondents and Pursuers—Rhind. Agent—Robert Menzies, S.S.C.

Tuesday, December 7.

## FIRST DIVISION.

(Lord Curriehill, Ordinary.)

**MILLER v. THE GIRVAN AND PORTPATRICK JUNCTION RAILWAY COMPANY AND HALDANE (THEIR JUDICIAL FACTOR), AND THE COMMERCIAL BANK OF SCOTLAND.**

*Arrestment—Railway Bond—Railway Clauses Act 1845 (8 Vict. c. 77).*

A bond granted by a railway company to a bank, accepted and registered in the books of the company, in security of future advances to be made by the bank, does not constitute a debt due by the bank to the company, so as to entitle a creditor of the company to use arrestments in the hands of the bank, and obtain decree of forthcoming for the amount of the sum contained in the bond.

The pursuer of this action was an ordinary share-

holder of the Girvan and Portpatrick Junction Railway Coy., and a creditor of the company for, *inter alia*, the sum of £3000, together with the sum of £594, 8s. of expenses, and £1, 3s. for dues of extract, contained in a decree obtained by him in the Court of Session against the said company, dated the 16th October and 8th November 1879, and on 3d April 1880 he used arrestments by virtue of the warrant in the decree in the hands of the Commercial Bank of Scotland. On or about 17th December 1878 the railway company issued and granted to and in favour of the said bank a bond or mortgage for £3000, which was accepted by the bank and registered in the books of the railway company as due on 11th November 1881. It was this mortgage that the pursuer claimed to have attached by his arrestments, and he brought the present action to have the sum contained in it made forthcoming to him in satisfaction of his decree, and alternatively, in case it should be found that no sum was due by the bank to the railway company, and that he was consequently not entitled to have any sum made forthcoming to him in virtue of his arrestments, to have it found and declared that the said mortgage was illegal, and *ultra vires* of the granters thereof, and ineffectual as a charge upon the railway company or its assets, and the bank ordained to deliver it up to the railway company to be cancelled or otherwise validly discharged. The pursuer further averred that no consideration was paid or granted for the said mortgage, and the bank were still bound to pay its par value to the railway company, or if no sum were due under it, then its issue was *ultra vires* of the officials of the company, and it was ineffectual to constitute any indebtedness or security in favour of the bank. The defenders averred that the mortgage was granted in security of an overdraft to the railway company, who were now indebted to them in upwards of £2000. They denied that the arrestment used by the pursuer had attached anything, and pleaded—(1) The arrestment in question having attached nothing, the action is incompetent, and should be dismissed.

The Lord Ordinary (CURRIEHILL) allowed the parties a proof of their respective averments, adding this note to his interlocutor:—"This is an action of a somewhat peculiar character. The pursuer is a shareholder of the Girvan and Portpatrick Railway Company, and he is also a creditor of the company in virtue of a decree of this Court, dated 16th October and 8th November 1879, for payment of £3000, with £594, 8s. of expenses. Upon that decree the pursuer, as creditor of the company, arrested in the hands of the Commercial Bank the sum of £3000 alleged to be due by the bank to the railway company. The fund so said to be arrested is the amount of a debenture bond or mortgage for £3000 granted by the railway company to, and now held by, the bank, and it is not said that the bank is otherwise indebted to the railway company.

"*Prima facie*, the bank is not debtor, but creditor in the mortgage, and in that view nothing was attachable or attached by the arrestments. But the pursuer alleges, in the first place, that no consideration was given by the bank for the mortgage, and that if the mortgage is to be regarded as valid, the bank is still bound to advance the amount to the railway company, or, in other words, is debtor to the railway company in the

nominal amount of the mortgage, and that the debt has been validly arrested. The bank admits that at the date of the mortgage the railway company had a small balance at their credit in the books of the bank, that the mortgage was granted in security of future overdrafts to be allowed by the bank, and that subsequent to the date of the mortgage overdrafts were allowed to the extent of £2095, still unpaid, and that no further advance has been made by the bank. To the extent, therefore, of about £900 the bank has admittedly not advanced the sum contained in the mortgage.

“In the next place, the pursuer maintains, alternatively, that the mortgage is wholly inept, and that it should be cancelled. It is maintained, both for the bank and for the railway company, that the pursuer had no title, either as a creditor or as a shareholder of the company, to inquire into the circumstances connected with the mortgage. The pursuer, however, maintains that in both capacities he is entitled to such an investigation, and that in the event of its being held that the bank is not indebted to the railway company he is entitled to have the mortgage declared to be *ultra vires* of the railway company, and illegal as a security for a future debt, and on other grounds; and he has conclusions to that effect, being reductive conclusions under another name.

“It is, to say the least of it, doubtful whether as a shareholder he is entitled to insist upon any of the conclusions of this action. He is certainly not entitled to sue the conclusions of forthcoming in any character but that of creditor of the company. But it is unnecessary to consider that question of title, because I think that as a creditor he is entitled at all events to be allowed a proof of his averments, and to expiscate all the facts connected with the granting and subsistence of the mortgage. He cannot get payment of the debt contained in his decree, because the railway company say that they have no funds, and that they have exhausted their borrowing powers.

“Now, it appears to me (1) that the pursuer as a creditor of the company has an undoubted interest and title to show that the mortgage is altogether illegal and ought to be cancelled, in which case the railway company's borrowing powers may still be exercised to the extent of £3000; (2) that as the mortgage was admittedly not granted in consideration of a present payment of £3000, and as the full amount has admittedly not been advanced, he has both interest and title to ascertain the whole circumstances under which it was granted. Thus it may turn out that the bank at the date of the mortgage became absolutely bound to pay £3000 to the company, in which case the amount, in so far as not already advanced, would appear to be a debt or obligation by the bank arrestable by the creditors of the company—see Bell's Com. ii. 219, and cases there cited,—or it may turn out that the obligation of the bank was of a more limited character, or that there was no obligation at all; and in either of these cases the question would arise, whether or how far the mortgage was a security for a future debt, and so ineffectual? All these are matters as to which I think investigation should be allowed; but as some of the alleged facts may admit of proof only by the writ or oath of the bank, all such questions which may arise are reserved to be dealt with at the proof.”

The defenders reclaimed, and argued—(1) The

arrestments have attached nothing; a mortgage as a *nomen debiti* cannot be thus attached any more than a bill—Bell's Com. ii., pp. 67 and 69, 5th ed., pp. 70 and 73; *Haddow v. Campbell*, 1796, M. 763; *Dick v. Goodall*, Nov. 1, 1815, F. C.; Ersk. ii. 67; *Johnston v. Commercial Bank*, March 11, 1858, 20 D. 790. The pursuer has no title to sue the other conclusions than that of forthcoming, and he could not benefit by having the *corpus* of the mortgage transferred to him, for assignation is necessary to complete his title. (2) The mortgage is within powers of company—Lindley, i. 619; *Campbell's Case*, Dec. 14, 1876, 4 Ch. Div. 470; *Regent's Canal Company*, April 11, 1876, 3 Ch. Div. 43.

The pursuer replied—(1) Mere acceptance and registration of a railway mortgage implies liability on the part of the acceptor; every such mortgage is declared to have the force and effect of a duly completed assignation by 8 Vict. c. 77, sec. 40, &c., and the pursuer has therefore arrested a debt due by the bank to the railway company. (2) The bond is *ultra vires* of company, being not to raise capital but secure a cash-credit, while its Act 1877 only allows it to issue mortgages for money instantly advanced—8 Vict. c. 77, secs. 46, 47, 48, &c.; 24 and 25 Vict. c. 108, sec. 114; Lindley, i. 271; *Inns of Court Hotel Company*, 6 Eq. 2; *Dempster*, cited Bell's Com. ii. 235, 5th ed.; *Mowat*, 1848, 12 Jur. 407.

At advising—

LORD PRESIDENT—In this action we understand that the conclusion of forthcoming is the only one still insisted upon, but to dispose of it we require to consider the other conclusion now departed from in order to decide the question whether the arrestment upon which it proceeds is effectual. The averments of the pursuer are not numerous, and they are also very general, but still they are distinct enough. They are, in the first place, that on 17th December 1878 the Girvan and Portpatrick Junction Railway Company granted to the Commercial Bank, the arrestees, a bond or mortgage bearing to be in consideration of the sum of £3000, and that the said bond or mortgage was thereafter duly registered in the books of the railway company. He then avers that no consideration was or has since been paid by the bank for the said bond or mortgage, and that on the assumption that it was legally issued the bank were, and still are, bound to pay to the railway company the par value thereof with interest. At that time when the mortgage was issued the railway company were not indebted to the bank. And he then says, with reference to the alleged overdraft, that it was not applied to meet current working expenses, and he calls on the company to specify the particular mode in which it was applied. As I read it, this means that at the time the mortgage was granted no money was presently paid by the bank, but that thereafter advances were so made on security of the mortgage. He then further avers that the bank is liable to the railway company in the sum contained in the bond with interest. This last statement is an inference in law, and on its correctness the pursuer's whole case depends. He says the bank are now owing the railway company £3000, and that though some sums may have been paid, yet the bond having been granted and registered without consideration, the express con-

sideration contained in it is a debt of the company. Now I am clearly of opinion that no such debt is due. The first question is, Whether the transaction is a legitimate one? But we may deal alternatively, with the view that it is either a transaction *ultra vires* of the directors of the railway company, or else altogether illegal. If legitimate, it was the granting of a security by the company for advances to be made by the bank. I do not wish to countenance the view that such a use of a mortgage or bond is illegal. But assuming it to be legal, what relation but that of debtor and creditor is thereby constituted? the debtor being the railway company for the sums so advanced if this was a legitimate transaction, and if the advances are less than the sum contained in the mortgage, it is quite clear that the bank is not a debtor for the amount of the balance. A security for advances does not compel the bank to advance to the full amount of the security. The bank is not thus paying a debt, but making a loan, whose extent depends upon various circumstances, for many considerations must be taken into consideration by the directors of the company in determining the amount of the margin.

But if the transaction is altogether illegal, the directors of the company, on that view, have no power to impignorate the mortgage or bond for advances made or to be made to them. It is therefore good for nothing as regards the advances, and the only remedy is to have the mortgage cancelled or delivered up to the railway company. The arresting creditor cannot be put in a better position, or entitled to demand more than his debtor could from the arrestee. And so, whether the mortgage is to be held good or bad, no money is due by the arrestee to the principal debtor, and I am therefore of opinion that there is no foundation for the conclusion of furthering.

LORD MURE.—I agree with your Lordship in the conclusion arrived at, and have little to add. I give no opinion that the bond was beyond the powers of the railway company and the question therefore simply is, Whether the arresting creditor can attach for advances not yet made? I do not see that he can be in a more favourable position than if he had arrested on an ordinary cash-credit bond. The bank here were not bound in all circumstances to pay over the balance, and there is therefore here no indebtedness on their part to the railway company, and the arrestment has consequently failed to attach anything.

LORD SHAND.—I am of the same opinion. The material averments are merely that the railway company on 17th December 1878 delivered the mortgage to the bank, which they accepted, and which was duly registered in their name, and for which no consideration was given. It is said that if these averments are proved, the legal result is that the bank became indebted to the railway company in the sum contained in the bond of £3000, and are now bound for the same. I cannot assent to that view. It depends entirely upon the footing upon which the mortgage was delivered and taken whether such an obligation exists or not. No arrangement is averred here beyond the bare statement that the deed was delivered, and no money was given for it, and the legal result

appears to me to be, not that the bank became debtors for the sum in the bond, but that having got the deed for which no consideration was given they are bound to give it up. That is the position of the railway company on that assumption, and on the footing that the sole obligation of the bank is to return the document, it can hardly be maintained that the arrestment has attached anything. The other alternative it is equally difficult to admit. Taking it that there was an arrangement that the bank should make advances to the amount of the bond, the creditor must allege it, and the Court would then inquire into its substance, as was done in the case of the *Regent's Canal Company* in 1876, cited to us in the course of the debate. If the mortgage constitutes a security at all, we have no reason to doubt it would be good for the amount of the advance, and the creditor's right would be to hold it till repayment, and then return it. But it is said we must here infer an obligation to advance to the amount of the security. There seems to me great difficulty in holding that such obligations could be attached by a creditor, for many circumstances might intervene to greatly change the relationship between the parties. None, for example, would be more effectual than having the funds to be advanced arrested, so as to prevent his using them. But I think the creditor here cannot proceed on the footing that there was such an arrangement with such a meagre record, and I therefore agree in holding the present arrestment ineffectual.

The Court sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuer and Respondent—Kinnear—Pearson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders and Reclaimers—Asher—J. P. B. Robertson. Agents for the Railway Company—Henry & Scott, S.S.C. Agents for the Bank—Melville & Lindesay, W.S.

Wednesday, December 8.

## SECOND DIVISION.

SPECIAL CASE—BAIRD'S TRUSTEES.

*Succession—Heritable and Moveable—Implied Conversion.*

*Held* that, according to a sound construction of a trust-disposition and settlement, in which the trustor directed his trustees "to pay and convey the residue" of his means and estate equally among his four children, their issue to come in their place if they should predecease the trustor, and conferred on his trustees power to sell his heritage, conversion had taken place, and the rights of parties claiming under the trust-disposition must be determined by the rules of moveable succession.

Robert Watson of Burnstyle, near Glasgow, died on 21st October 1878, survived by his four children—Robert Watson, George Watson, Agnes Watson or Lambie, and Jane Watson or Baird. Mr Watson left a trust-disposition and settlement