the practice in mills it would be a very strong thing to say that the defenders were in fault in employing the girl in the way they did. They cannot be condemned if they do what has been done as matter of daily practice, and has not led to injury.

But further, there was nothing in the employment of this girl as a full-timer, who should only have been employed as a half-timer, to lead to the danger of any accident happening, because there was no danger unless she undid the shutters of the machine. The only case that occurs to one's mind where danger might result from the employment of a young person in work to which an older person is usually put, is in that class of cases where the danger arises from such a source as occurred in the case of *Gibb* v. *Crombie*, July 6, 1875, 2 R. 886. In that case two lads under the age of eighteen were employed by the manager of the mill at night work, when the Act said that only persons over eighteen should be employed in such work; one of them was injured, and he recovered damages from the millowners, because they had not used sufficient diligence to ascertain the lad's age before they employed him at night work. In that case, however, the lads were engaged to do an illegal work which the Act of Parliament forbade, and it is plain that it is more dangerous to employ a young person at night work than an older person, because the risk of exhaustion or liability to succumb to fatigue is greater. But here there is no question of exhaustion or fatigue. The girl took off the guards of the machine, an act which was in no way connected with her work, and thus made a danger by her own deliberate act. She was found inside the machine, a place where she had no call to be in doing her work. Upon the whole matter I do not think there is any evidence to support the verdict of the jury, and I would propose that the rule should be made absolute for a new trial.

LORD YOUNG—I am of the same opinion. The question, which was one of pure fact for the jury, and which I left to the jury, was whether upon the evidence which had been led it was blameworthy on the part of the defenders to have employed this girl in the carding-room at all. That evidence consisted of the girl's age, and the account laid before the jury of the dangers which existed in the carding-room. There was no law whatever in the subject, and it was a question for the jury whether it was blameworthy of the defenders to employ a girl of this age in such a place. There was evidence of the opinion of experts on such matters led on both sides as to its being dangerous or safe. One witness for the pursuer said it was a dangerous practice, but there was what I must call an overwhelming body of evidence on the other side that it was quite a safe practice, and that it was commonly practiced in mills to the extent not merely of hundreds but thousands of girls every day.

The jury in the exercise of their discretion found that it was a dangerous practice and involved actionable fault on the part of the employers. What we have to consider is, whether there was reasonable evidence to support that view. I think there was not, and I admit the verdict surprised me.

There may have been—I rather think there was—a violation of the Factory Acts in employing this girl as a whole timer and paying her accordingly, and in her not getting the periodical holiday on Saturday, and there would be liability to a penalty under the Acts for the violation, but that would not support the present case unless there was something to connect it with the accident. There is no evidence in support of that view, and there was no rational ground for suggesting that they were connected, unless it was that, if the girl had not been employed as a full timer, she would not have been there at all. There was no evidence that she would have been taken on as a half timer, but that was no evidence really to justify the verdict. The question really put to the jury was whether, taking her as a half timer, there was any *culpa* in putting a girl of that age to work on that Saturday or at all. If there was, then undoubtedly that conduced to the accident, which must then be attributed to that *culpa*. I agree that we are left without any statement in the evidence at all to support that view.

LORD RUTHERFURD CLARK — I think there is no evidence to support the verdict.

LORD TRAYNER—I agree.

The Court made the rule absolute and granted a new trial.

Counsel for the Pursuer—Guy—Sandeman. Agent—Charles T. Cox, W.S.

Counsel for the Defenders—H. Johnston—Constable. Agent—Andrew H. Hogg, S.S.C.

HOUSE OF LORDS.

Friday, November 16, 1894.

(Before the Lord Chancellor (Herschell) and Lords Watson and Macnaghten.)

NORTH-WESTERN BANK, LIMITED *v.* JOHN POYNTER, SON, & MACDONALDS.

(*Ante*, February 2, 1894, p. 401, and 21 R. 573.)

Right in Security—Pledge—Re-delivery of Pledge to Pledger as Agent for Pledgee—Ship—Bill of Lading.

On 1st April 1892, Page & Company, merchants in Liverpool, obtained an advance of £5000 from a bank in Liverpool upon the security by way of pledge of a cargo of phosphate rock, then afloat, and handed the bill of lading to the bank. It was agreed that the bank should have immediate and absolute power of sale

over the cargo, and under this power the bank authorised Page & Company to enter into contracts for sale of the phosphate rock on their behalf. £3826 of the loan was paid off.

On 12th April the bank, in consideration of Page & Company undertaking to sell the cargo on their behalf, returned the bill of lading to Page & Company "as trustees," requesting them to obtain delivery of the merchandise, and sell it on account of the bank, and pay the proceeds towards retirement of the advance.

Some months previously Page & Company had sold a similar quantity of phosphate rock through their agents, Poynter, Son, & Macdonalds, to Cross & Sons, merchants in Glasgow, and when they received the bill of lading they forwarded it to Poynter, Son, & Macdonalds, to hand to Cross & Sons in implement of their contract with them. This was done, and Cross & Sons took delivery of the cargo, and in part payment of the price sent a cheque for £1900 to Page & Company, who paid it to the bank to the credit, not of the advance of £5000, but of another advance which they had received from the bank, the bankers not being aware at the time that this cheque was part of the price of the cargo of phosphate. Thereafter, Poynter, Son, & Macdonalds, who were creditors of Page & Company for £2011, arrested the balance of the price (£1039, 7s. 6d.) in the hands of Cross & Sons. The bank also claimed this balance, and Cross & Sons raised an action of multiplepoinding to have these competing claims determined.

Held (*rev.* the decision of the Second Division) (1) that the bank had not lost their real security over the merchandise by returning the bill of lading to Page & Company, but that Page & Company sold as their agents and on their behalf; (2) that the bank were not bound to attribute the cheque for £1900 to account of the advance of £5000; (3) that in this action Poynter, Son, & Macdonalds were not entitled to claim the amount of their commission and charges in connection with the sale; and therefore (4) that the bank must be preferred to the whole fund *in medio*.

Tod & Son v. *Merchant Banking Company of London*, June 21, 1883, 10 R. 1009, *distinguished*.

Foreign — Conflict of Laws—Transaction between Englishmen—Question to which of two Englishmen Moveable Fund situated in Scotland Belonged.

Opinions by Lord Chancellor and Lord Watson that the rights arising out of a transaction between a merchant in England and a bank in England fell properly to be determined by the law of England.

Observed by Lord Watson that where a moveable fund situated in Scotland admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *prima facie* one of English law.

On 1st April 1892 Charles Page & Son, merchants in Liverpool, applied to the North-Western Bank there for an advance of £5000 "upon security by way of pledge, of 3455 tons of phosphate rock," then on board the "Cyprus" and the "Storra Lee." The bank agreed to make the advance, and the bills of lading, blank indorsed, were handed to them. This case related only to the cargo of the "Cyprus," the sale of the cargo of the "Storra Lee" having been completed, and the proceeds (£3826) paid to the bank, to the credit of the foresaid loan of £5000.

Upon 4th April the bank wrote to Charles Page & Company as follows—"We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the under-mentioned merchandise which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us, from time to time, the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time, at our request, to give us full authority to receive all sums due, or to become due, from any person or persons, in respect of any sales of the merchandise so made by you on our behalf." . . . Particulars of merchandise—"1629 phosphate rock, 'Cyprus,' B/L held by us. 1826 phosphate rock, 'Storra Lee,' B/L delivered to you."

Upon the same date Page & Company replied, acknowledging that the above letter correctly set forth the conditions upon which the advance had been made, and undertaking to carry out the bank's directions.

Upon 12th April accordingly, the bank sent the bill of lading of the "Cyprus," without further indorsation, to Page & Company with the following letter—"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified we transfer to you, as trustees for us, the bill of lading, &c., for 1629 tons phosphate rock per "Cyprus," marked which we now hold as security for payment of the advance specified at foot (*i.e.*, of £5000), and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading, and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us

immediately on receipt thereof in order to be applied towards retirement of such advance. You are at any time at our request to give us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf," &c.

On the same date Page & Company acknowledged receipt of the bill of lading, and undertook to carry out the directions of the bank, and also sent the following sale-note to the bank:—"We have sold for you 1629 tons phosphate rock *ex* "Cyprus" in your name, and held by you by way of pledge for phosphate advance No. 7 for £5000, and for which bill of lading has been handed to us for the purpose of enabling us to complete the sale which we have contracted for on our behalf with Messrs A. Cross & Sons, Glasgow, and in consideration thereof we hereby undertake to pay to you the proceeds of said sale; payment expected about 5th May, immediately and specifically as received."

Upon 12th April Page & Company also wrote to Poynter, Sons, & Macdonalds, their agents in Glasgow:—"We beg to enclose you bill of lading for the cargo of phosphate per "Cyprus," also certificates of insurance, which please hand to Cross on arrival of the vessel."

It appeared that in the previous year Page & Company had sold to Alexander Cross & Sons, merchants in Glasgow, about 1600 tons of phosphate rock under sale-notes dated 23rd September and 19th November 1891, and in implement of these contracts they forwarded the bill of lading of the "Cyprus" to Cross & Sons through Poynter, Sons, & Macdonalds. In part payment of the price of the cargo of the "Cyprus" Cross & Sons sent a cheque for £1900 to Page & Company, who paid it into the North-Western Bank on 20th April, not upon account of the £5000 advance, but of another advance which they had received from the bank. It was said that the bank were not aware at the time that this money was part of the proceeds of the "Cyprus" cargo. The balance due by Cross & Sons for the remainder of the cargo of the "Cyprus" amounted to £1039, 7s. 5d. On 3rd May, before this balance was paid, Poynter, Son, & Macdonalds, who were creditors of Page & Company, on the dependence of an action against them for £2011 (in which decree in absence was afterwards pronounced), arrested in the hands of Cross & Sons all sums in their hands belonging to Page & Company. Up to this time Cross & Sons, and Poynter, Son, & Macdonalds, had been ignorant of the transactions between Page & Company and the bank, but upon the same day the North-Western Bank intimated to Cross & Sons that the cargo of the "Cyprus" was their property, and had been sold by Page & Company on their behalf, and requested payment of the balance due. In view of these competing claims Cross & Sons raised an action of multiplepoinding in the Sheriff Court at Glasgow, the fund *in medio* being the foresaid sum of £1039 due by the real raisers for the balance of the "Cyprus" cargo.

The bank and Poynter, Son, & Macdonalds both claimed the whole fund. Poynter, Son, & Macdonalds also claimed at all events the amount of their commission and charges on the sale (£164 odds), which they averred Page & Company could have deducted from the proceeds before handing them to the bank.

Upon 18th April 1893 the Sheriff-Substitute (GUTHRIE) preferred Poynter, Son, & Macdonalds to the whole fund *in medio*.

The North-Western Bank appealed, and on 20th February 1894 the Second Division —*diss.* Lord Young, and *absente* Lord Rutherfurd Clark—pronounced the following interlocutor—[*After findings in fact*] "Find in law that at the date of said arrestment the said sum of £1039, 7s. 5d. was a debt due by Alexander Cross & Sons to the said Charles Page & Company, and was therefore liable to the diligence of the lawful creditors of the latter, and that the claimants, the North-Western Bank, Limited, by re-delivery of said bill of lading on said 12th April 1892, lost their right of preference as pledgees of said cargo, and had no preferable right of property therein entitling them to payment of said sum as in competition with the arresting creditors, the said John Poynter, Son, & Macdonalds: Therefore dismiss the appeal, and affirm the interlocutor appealed against."

The North-Western Bank appealed.

At delivering judgment—

LORD CHANCELLOR — This action was tried in the Sheriff Court of Lanarkshire, and an interlocutor was pronounced in favour of the present respondents in that Court. This interlocutor was affirmed in the Court of Session by the Lord Justice-Clerk and Lord Trayner, Lord Young dissenting. The proceedings arose out of the arrestment by the present respondents of a debt due or alleged to be due from Alexander Cross & Company to the firm of Charles Page & Company. The respondents were undoubtedly creditors of Page & Company, and if that debt, which certainly was due by Cross & Company, was a debt due to Page & Company and was the property of Page & Company, then clearly the arrest was good, and there would be no ground for this appeal. The appellants, however, contend that the debt which Cross & Company owed was the price of a cargo sold to them, that the cargo was sold to them by Page & Company as the agents of the appellants, the North-Western Bank, and that therefore the debt was really the property of the North-Western Bank, and consequently could not be arrested by a creditor of Page & Company. I do not understand it to be disputed that, if in fact the goods sold were the property of the North-Western Bank, then, although the sale may have been made by Page & Company to Cross & Company, yet being made by Page & Company on behalf of the bank as owners, it could not be attached by a creditor of Page & Company, and certainly there is no

decision or indication of any opinion to the contrary in the Court below.

The transaction between Page & Company and the North-Western Bank upon which the appellants rely took place in the month of April 1892, the arrest being on the 3rd of May 1892. Certain goods for which Page & Company held a bill of lading were on their way to this country, and they desired upon this bill of lading to obtain an advance. On the 4th of April 1892 a letter was written by the manager of the bank (which was admitted by a subsequent letter of Page & Company to detail correctly the conditions on which the advance was made), in which the terms on which the bank were willing to make the advance were stated. The letter was as follows—"Dear Sirs,—We now beg to put in writing the conditions on which we advance to you the sum of £5000, say five thousand pounds, repayable by you on or before 1st June, on the security of the under-mentioned merchandise, which you pledge to us and warehouse in our name. It is distinctly agreed that we are to have immediate and absolute power of sale, and under that power we authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay to us from time to time the proceeds of all such sales immediately and specifically as received by you, to be applied towards payment of the said advance, interest, commission, and all charges. You are at any time at our request to give to us full authority to receive all sums due or to become due from any person or persons in respect of any sales of the merchandise so made by you on our behalf. You are to insure the merchandise against all fire risks." At the end of the letter there is a statement of the particulars of the merchandise —1629 tons of phosphate rock by the ship "Cyprus," and 1826 tons of phosphate rock by the ship "Storra Lee." On the occasion when that letter was written and the arrangement entered into, the bill of lading for the phosphate rock per the "Cyprus" was handed, indorsed in blank, by Messrs Page & Company to the bank.

On the 12th of April the bank handed the bill of lading to Messrs Page & Company, with a letter in these terms—"In consideration of your undertaking to deal with the merchandise in the manner hereinafter specified, we transfer to you as trustees for us the bill of lading, &c., for 1629 tons phosphate rock, per 'Cyprus,' marked , which we now hold as security for payment of the advance specified at foot, and we request you to obtain delivery on our account of the merchandise referred to in such bill of lading and warehouse the same in our name, you paying the freight and expenses of discharge. We further authorise and empower you to enter into contracts for the sale of the merchandise on our behalf in the ordinary course of business, and we expressly direct you to pay the proceeds of all such sales from time to time to us immediately on receipt thereof." That letter was received and acknowledged, and an undertaking was signed by Page & Company to carry out the directions given in the letter.

The transaction between the parties which gives rise to the controversy was thereupon complete. The bill of lading so received by Page & Company was afterwards delivered by them, in implement of a contract of sale, to Cross & Company, and it is with respect to the price of the goods comprised in the bill of lading that the debt of Messrs Cross arises.

Now, I cannot help saying at the outset that, in my opinion, it is abundantly clear that the rights of Messrs Page & Company and the bank respectively must be determined, if the strictly legal course is to be followed, by the law of England. A transaction between a merchant in England and a bank in England, and the rights which arise out of that transaction, cannot, as it seems to me, fall to be determined by anything but the law of England; just in the same way as, if this had been a transaction between a banker and a merchant in Glasgow, and a question had arisen in an English proceeding as to the rights that arose out of that transaction, it would have fallen to be determined according to the law of Scotland. But in the present case it appears that, there being a suggestion in the pleadings that the matter was one to be determined by the law of England, when the case came on for trial before the Sheriff those who maintained that proposition were not desirous of leading evidence to show what the law of England was. They were content to rest their case upon the law of Scotland, and have it decided as if the law of Scotland were applicable; or perhaps one may put it otherwise and say, as if there were no difference between the law of England and the law of Scotland. That being so, I enter into no controversy whether it would have been open in the present case to this House to consider what the law of England was, and to determine the case according to that law. I am content to base my decision upon the conclusion at which I have arrived as to the law of Scotland.

Of course, when I say that the rights arising out of this transaction between these parties would fall to be determined by the law of England, I do not for a moment intend to dispute that, where such a transaction has been entered into, there may be proceedings or transactions in Scotland which would render a recourse to the law of Scotland necessary to ascertain the rights which had arisen in respect of transactions relating to the contract, though it had its basis and origin in England. Those are considerations quite beside the present case; because it seems to me that in the present case there is really nothing which needs to be determined for the purpose of arriving at a conclusion in this action, except what was the real nature of the transaction at Liverpool between Messrs Page & Company and the North-Western Bank.

It appears that in the month of September of the previous year Messrs Page & Company had entered into an agreement to sell to Messrs Cross & Company several hundred tons of phosphate which were to be shipped between certain dates. It was not a sale of any specific goods; it was merely a contract to sell goods of a particular quality and quantity to be shipped at a particular time. When the bill of lading was handed to Messrs Page & Company on the 12th of April 1892 Messrs Page & Company transmitted that bill of lading to Messrs Cross & Company in implement of their contract with them. Upon their thus receiving the bill of lading in implement of the contract, that which down to that time had been only an agreement to sell became a sale, and Messrs Cross became liable for the price of the goods so sold. Now, was that or was it not a sale of the bank's goods? Was it a sale for or on behalf of the bank, or was it a sale of Page's goods in respect of which the bank could not claim to be principals? My Lords, the only ground upon which the Courts below have decided that it was a sale, not of the bank's goods, but of Page's goods, is this, that in order that a pledge may be effectual possession must continue in the pledgee—that parting with the possession is parting with his security and with any property which the pledge gives, and that even if the possession of the pledge may be parted with to a stranger, so that the possession of the stranger should be still the possession of the pledgee, possession cannot be so parted with to the pledgor himself, and that if the pledgor receive back possession of the goods pledged, however clear it may be that he was to receive them only as the agent of the pledgee to do something with them on the pledgee's behalf, that they were delivered for that purpose and received for that purpose, the law of Scotland inexorably requires that it shall be held that the pledge is at an end, and that the entire property has reverted to the pledgor because he has regained possession of the goods which he had pledged. My Lords, I need hardly say that if the law of England were applied no such point would be arguable for a moment. There can be no doubt the pledgee might hand back to the pledgor as his agent for the purpose of sale, as was done in this case, the goods he had pledged, without in the slightest degree diminishing the full force and effect of his security. But it is said that the law of Scotland is different; and the point upon which this case must turn cannot be more distinctly put than it was put in the judgment of Lord Trayner. He says—"That a pledgee may part with the pledge temporarily for a necessary purpose, or for safe custody without the loss of this right, may be admitted, provided he has not so parted with it to the owner. If he parts with it to a third party, the temporary possession of the latter is possession for the pledgee; he has no right in or to the subject except that which the pledgee gave him, and which the pledgee may at any time take away. But if the pledgee parts with the pledge to the owner the result is that the owner resumes possession of his own property freed from the security burden; the owner acquires no new right; but the pledgee's right, as a real right, flies off, leaving him only his personal right against his debtor. This distinction between the delivery of the subject of pledge to a third party and to the owner is recognised in the passage in Bell's Commentaries which I have already cited."

Now, the question is whether that can be maintained as a proposition of the law of Scotland. Certainly there are cases where some rule of law defeats the object and intention of the parties—where there is a technical rule which prevents effect being given to their intention. The question is whether such a rule applicable to the present case has been shewn to be established as part of the law of Scotland or not. I turn to the authorities upon which it is rested, because I confess that, with all respect, as a matter of principle, I am unable to see why any such rule should exist. It does not seem to me to be a reasonable rule. If the rule exists, it is one which runs counter to every-day commercial practice and, I am satisfied, to every-day commercial understanding of business transactions. Nevertheless, it may be that it is an established rule.

Now, the only authorities cited are three. The first is in Erskine's Institutes, 3, 1, 33, where it is said—"In a pledge of moveables the creditor who quits the possession of the subject loses the real right he had upon it." Well as a general proposition that may be perfectly true. It is to be observed that in the present case this is really something more than a pledge. In the paragraph from which I have quoted those words it is pointed out that a pledge gives only the right of detention of the goods, and gives no right to sell. Where as in the present case, the delivery of goods is accompanied by a grant of an absolute right of sale to the pledgee, he is certainly something more than an ordinary pledgee; he has a right which a mere pledge does not convey. But the general proposition that the parting with possession puts an end to the pledge is one with which I suppose no one would quarrel; but it does not touch the question with which your Lordships have to deal—namely, whether a delivery of possession for a particular purpose on the part of the pledgee to the pledgor is a parting with possession any more than a delivery under the same circumstances and for the same purpose to a third person.

The next authority referred to is in Bell's Commentaries on the Law of Scotland. He there alludes to the real right of a creditor being completed by delivery and continued by possession, which I suppose no one would doubt; and then occurs this discussion—"By the Roman law it was lawful for the creditor, after the constitution of pledge by delivery, to restore the subject to the possession of the debtor on

the footing of location, or any other legitimate contract. Paulus lays down this doctrine very explicitly. But Voet very justly observes, in criticising this law, that to permit such practices were to endanger the safety of other creditors, and to sanction a fraud upon the rule which requires possession to complete a real right to moveables; and that no true analogy can hold between the law of Rome, where hypothecs without possession were admitted, and the laws of modern commercial nations, in which the rule is established that possession presumes property." Then he continues thus—"It is true that in the course of many contracts there is a necessity for separating property and possession, and that the mere circumstance of goods being in the hands of another on a temporary contract will not deprive the real proprietor of his right in favour of the creditors of the temporary possessor." Now, that is stated generally; there is no exception made in the case of the person in whose hands the pledged goods are placed being himself the pledgor. Then he proceeds: "And there seems to be no doubt that the right of a pledgee will also be sufficiently strong to support this temporary dereliction of possession in the course of necessary operations on it; the manufacturer or other holder being custodier for the pledgee without injury to the real security. But the doctrine delivered by Voet is sound, where the possession is given up without necessity to the owner of the goods." That is, confined to a case of possession being given up without necessity to the owner of the goods, and does not, and, as it seems to me, never was intended to cover the case where possession is given to the person who happens to be the pledgor, just for the same legitimate purpose and in the same business manner as it might be given to any third person filling the same commercial capacity—that is to say, if it is given to a broker for sale or to a warehouseman to warehouse, or in other cases which might be put. There is nothing in that passage to warrant the conclusion that where the parties intended that to be, and it really was, the nature of the transaction, nevertheless their intention shall be held to be ineffectual because against their will the pledge or security is thereby destroyed. My Lords, where it is a pledge, as here, with a power of sale, I cannot think that anything I have yet read warrants the assertion that the delivery to the pledgor, who is a broker, for the purposes of sale would destroy all the rights of the pledgee.

Now, beyond those general statements, which do not seem to me necessarily to cover or to touch this case, there is only one authority cited, and that is the case of *Tod & Son* v. *Merchant Banking Company*, 10 Court Sess. Cas., 4th Series, R. 1009. Of course that case would be open to review in your Lordships' House; but I confess, with all deference to the learned Judges in the Court below who took that view, I am unable to see that it governs the present case, or that it necessarily leads to the conclusion which the respondents seek to induce your Lordships to arrive at in the present case. The whole judgment here is based upon the proposition that delivery by the pledgee to the pledgor puts an end to the pledge. In the case of *Tod & Son* v. *Merchant Banking Company*, the bank, who were the pledgees, never did deliver the goods at any time to any person to hold for them as their agent. The only deliveries which they ever made in that case were deliveries to a purchaser who received the goods, not for the bank, but to hold from the moment of receipt as owner under the purchase. I confess I am at a loss to see how a case which deals with facts such as I have described, can be held to be an authority for the proposition that the delivery of goods by a pledgee to a pledgor as his agent puts an end to the pledge. In that case the bank were pledgees without any power to sell at all—they were mere pledgees. Messrs Bryant & Ridley, who had pledged the goods, came to the bank, and obtained from the bank a promise that if they sold the goods, and would obtain from the purchaser an obligation to pay the price to the bank, the bank would then deliver the goods to him. In the first instance, before the bank ever parted with the goods they did obtain a direct undertaking from the purchaser of a portion of these pledged goods to pay the price to them, and then they gave the order for the delivery of them to the purchaser. In the second case, which was the transaction giving rise to the litigation in *Tod & Son* v. *Merchant Banking Company*, the bank were content to make delivery of the goods without having got a direct undertaking on the part of the purchaser, but having obtained a promise by the pledgor that he would get such an undertaking. Having got that promise from the pledgor, they then made delivery of the goods. Now, in that case it was impossible to say, or at all events it was very difficult (it is not necessary to go further) to say that the pledgor in making those sales made them on behalf of the bank. He did not purport to do so; he made those sales on his own account in the course of his own business. All that the bank did was to tell him that if he should make such sales, and if he would get or give a certain undertaking, then they would be prepared to make delivery of the goods, and take in place of the goods, which were their security, an undertaking from his purchaser or the undertaking which he promised to get from his purchaser. In that case the question which arises here did not arise, and could not arise, because the whole point here turns upon this—that Messrs Page & Company in making this sale to Messrs Cross & Company were selling the goods of the North Western Bank by their directions and as their agents. Therefore I am quite unable to see that the case of *Tod & Son* v. *Merchant Banking Company* is an authority for the proposition upon which the decision of this case has proceeded.

Now, it was argued at the bar that this could not be said to be a sale by the bank of the bank's goods to Cross & Company, because Page's contract with Cross was of prior date to the bank's interest in the goods. But, my Lords, I apprehend that if an owner of goods (for this purpose the case is precisely the same as if the bank had been absolute owners) places his goods for sale in the hands of an agent, and if the agent, for the purpose of implementing an open contract which he has, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal and liable to be sued by his principal, as if the agent had no contract before the goods were delivered, and had afterwards made the only contract that was ever made. I do not think that could be doubted for a moment to be the English law; and I have heard no argument to suggest to me any substantial ground for holding that the law of Scotland is different in that respect.

It seems to me, therefore, upon the whole that the right of the bank to these goods was continuous, that it was still effectual at the time of the delivery to Messrs Cross & Company, that it was effectual at the time when this arrest of the price was made, and that a creditor of Page could not in Scotland any more than in England insist that that was a debt due from Cross to Page which he had a right to arrest as being a creditor of Page.

My Lords, it was said that in the present case there was at the time when the arrest was made no debt due from Page to the North Western Bank—that their loan had been completely discharged, and that therefore, even supposing the principles I have been putting before your Lordships be well founded, they are inapplicable to the present case, inasmuch as the bank had ceased to have any right to the pledge at all. There is no finding in the interlocutor of the Sheriff of the facts which are the foundation of the argument; and I confess to more than a doubt whether it is possible in this appeal for your Lordships to deal with those facts and to found any judgment upon them. The utmost that could be asked would be a remit to find further facts. But, my Lords, I may say that the argument of the learned counsel for the respondents has not satisfied me that there is any substantial ground for that contention. It rests upon this. There was, as I have already mentioned, besides the "Cyprus" cargo, another cargo which had been pledged for this same advance. The sum of £3826, the proceeds of that cargo, had been paid into the bank. Messrs Page & Company had received £1900, part of the price of this "Cyprus" cargo. It was only the balance which was arrested. Instead of paying that £1900 into the bank upon the account of this advance, when they paid it in upon the 20th of April they paid it in respect of another advance. Of course, if that transaction stood it left a sum more than the amount now arrested still due upon the advance of the 4th of April. It is argued on the part of the respondents that the bank are bound as between them and Page, or at all events as between them and the arrestor, to attribute this payment to the advance of the 4th of April, and that so attributing it nothing remained due. My Lords, I am unable to follow that argument. The whole of this transaction took place before there was any arrest, at a time when the question was a question only between Page and the bank. Nobody else had anything to do with it. It was perfectly open to Page and the bank to have arranged that that £1900, though a part of the proceeds of the "Cyprus" cargo, should go in discharge of another debt due to the bank, and that the residue of the pledged goods should be the only security for the amount remaining due upon the debt of the 4th of April. If they had entered into such an arrangement no person afterwards arresting or purporting to arrest this debt could have made any complaint of it. But it is said that they did not make the arrangement, because at the time they did not know that this £1900 was a part of the proceeds of the "Cyprus" cargo—they did not know that Page was allotting a part of the price of the "Cyprus" cargo to another advance. My Lords, surely if the bank could have come to such an agreement as I have suggested with Page on the 20th of April, they cannot be less able when they know the facts (which they did not then) to adopt the arrangement which Page so made by attributing the payment to the other advance. There is really no substance in the point at all, and I will not dwell upon it further.

The only remaining point relates to a sum of £164, which it is said was a debt due to Page & Company in connection with this particular cargo—a claim for commission and otherwise in relation to the sale of this cargo. It is said that they at all events would have a right to claim that part of the price due from Cross & Company, inasmuch as Page & Company would have been justified in retaining that sum before they paid over the proceeds, which would then have been the net proceeds, to the bank. My Lords, no such point appears to have been urged in the Courts below, and there are no facts found in relation to it. But I will treat the evidence as establishing the fact that this sum was properly chargeable by Page & Company in respect of what they had done in relation to this cargo. I do not think that can establish the respondents' case as regards this arrest. What they did was to arrest a debt of £1000 odd due from Cross to Page. They cannot split up that and say, "Assuming the bulk of the debt to be due to the bank from Cross, yet a portion of it was" (according to the contention I have just put before your Lordships) "not due to the bank, and we are entitled to say that so much may be arrested." My Lords, I apprehend that if the bank could have sued Cross & Company at all they could have sued Cross &

Company for this entire sum, and that to the bank's action Cross & Company would have had no answer as to any part of it, and having thus arrested a debt which, as I have said, the bank could have recovered from Cross as being the price of their property, whatever liabilities there might have been on their part to pay charges in respect of it to other people, it seems to me that the respondents' case must fail. Of course I express no opinion whether they can recover this sum from the bank. If it has not been paid to Page, or satisfied in any way, it is perfectly possible that they may be able to do so. That is a question with which your Lordships have not now to deal. It seems to me that, even assuming that this sum of money was due in respect of this cargo to Page & Company, it does not support the arrest which the respondents have made, the validity of which arrest is the only question now in issue before your Lordships.

For these reasons I move that the interlocutors of the Sheriff and of the Court of Session appealed from be reversed, and the cause be remitted to the Court of Session to rank and prefer the appellants to the whole fund *in medio*, and to find the respondents liable to the appellants in their expenses of process in both Courts below. The appellants, of course, will have their costs of this appeal.

LORD WATSON—My Lords, this appears to me to be a remarkably plain case. Concurring as I do in what has been said by the Lord Chancellor, I shall only make these very general observations. When a moveable fund situated in Scotland admittedly belongs to one or other of two domiciled Englishmen, the question to which of them it belongs is *prima facie* one of English law and ought to be so treated by the courts of Scotland. In this case the respective rights of Page & Company and the appellant bank depend on transactions which took place between them in England. I see no reason to doubt that had there been any conflict between the laws of Scotland and England upon the questions arising in this case it would have been proper for your Lordships to consider and apply the law of England. But, according to my apprehension, there is no difference whatever between the laws of the two countries applicable to the decision of this case.

Upon the point of law which was mainly discussed in the Courts below, and which is disposed of by the last finding in the interlocutor appealed from, I have no hesitation in differing from the majority of the Second Division and concurring in the clear and satisfactory judgment of Lord Young. The argument submitted for the respondents upon that point is in my opinion not borne out by the *dicta* of institutional writers to which they referred, and the case of *Tod & Son* v. *Merchant Banking Company*, 10 Court Sess. Cas. 4th Series, R. 1009, upon which they also relied, if it has any bearing upon this case, is an authority the other way.

I was somewhat impressed at the time by the argument of Sir Richard Webster in regard to the respondents' alternative claim for £164, 19s. 2d. But, assuming that the appellants may be liable to satisfy the claim, that circumstance can give the respondents no nexus upon the fund *in medio*, and they could not obtain any preference by an arrestment directed against Page & Company. In these circumstances I think the respondents must enforce their demand in a new action, and that this suit ought not to be prolonged by a remit to have it tried as a riding claim.

LORD MACNAGHTEN—My Lords, I concur.

Their Lordships ordered and adjudged that the interlocutors appealed from be reversed, and remitted the case back to the Second Division of the Court of Session in Scotland, with directions to rank and prefer the appellants, the North Western Bank Limited, to the whole fund *in medio*.

Counsel for the Appellants—Finlay, Q.C. — L. Sanderson — H. Aitken. Agents—Wynne, Holme, & Wynne, for Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents — Sir R. Webster, Q.C. — D. C. Leck. Agents — Lowless & Company, for Campbell Faill, S.S.C.

COURT OF SESSION.

Friday, February 1.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACKIRDY'S TRUSTEES *v.* WEBSTER'S TRUSTEES.

Right in Security—Personal Obligation in Bond and Disposition in Security — Debtor's Right to Re-Assignation of Subjects on Payment—Restriction of Security by Bondholder—Discharge of Debtor.

The debtor in a bond and disposition in security sold the security-subjects under burden of the bond. The purchaser obtained the consent of the bondholders to part of the security-subjects being feued, and the real security being restricted to the feu-duties payable in respect thereof. The consent of the original debtor was not asked.

In an action by the bondholders against the original debtor, for payment of the principal sum and arrears of interest due under the bond, *held* (*aff.* judgment of Lord Wellwood) that as a condition of receiving payment the bondholder was bound to assign the bond in its entirety, and that, as he had disabled himself from reconveying the security subjects intact by consenting to the restriction of the burden, the debtor was freed from his obligation.