burdens applies to this case alone. It seems to me that on that construction of the schedule a general direction is dealt with as exceptional. I see no warrant for it. The section is universal. It applies to all general dispositions, and the schedule is given as the form under which all such dispositions without exception may be feudalised subject to the burdens therein contained. I do not think that the words of the schedule are satisfied by referring them to a particular class of notarial instruments. In my opinion they cannot be satisfied without referring them to every notarial instrument which can be expede under the 19th section. Lord Shand seems to proceed on the ground that the grantee was under no obligation to create the legacy a real burden, and that in consequence it had not been made effectual. I should hesitate to adopt this view of the position of the disponee. But it is not necessary to consider it. In this case, as well as in the case of *Williamson*, the grantee accepted the estate on the conditions in which it was conveyed to him. He made up his title in such a form as he thought would be effectual to make the burden real. The question is, whether the form was sufficient for that purpose, and that question cannot in my opinion depend on the rights or obligations of the grantee, but on the legal effect of the title which he has actually made up.

Apart from the decision in the case of *Williamson* v. *Begg*, I should have no difficulty in deciding in favour of the defender. But considering the weight of authority against me I can feel but little confidence in the opinion which I have expressed. I cannot however bring myself to think that I am wrong, and I have thought it right to express my opinion at some length, in case the question should ever come to be reconsidered.

LORD TRAYNER—I agree with the Lord Ordinary. I think the question here raised is not an open question, but has been decided by the case of *Williamson* v. *Begg* to which the Lord Ordinary refers. For my own part, I see no reason to doubt the soundness of that decision. On the contrary, I concur in the decision and agree with the views expressed by the Lord President and Lord Shand.

LORD YOUNG was absent at the hearing.

The Court adhered.

Counsel for the Pursuer and Respondent —Strachan—Wilson. Agents—Welsh & Forbes, S.S.C.

Counsel for the Defender and Appellant —Greenlees. Agent—A. Laurie Kennaway, W.S.

Thursday, March 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THOMSON AND OTHERS (DUNLOP'S TRUSTEES) *v.* THE CLYDESDALE BANK, LIMITED.

Banker—Stockbroker—Overdrawn Account —Payment by Stockbroker into his Own Account of Proceeds of Sale of Shares belonging to Clients.

A stockbroker sold bank shares for certain clients for £2900, and received from the buying broker, in accordance with the usage of the Stock Exchange, a cheque for that amount in his favour. This cheque he lodged with his bankers, £2000 being put to his own account, which was at that time overdrawn to the extent of £6200, and a draft upon the bank's branch in London, where he had an account being given him for £900. He shortly thereafter absconded.

Held that everything having been done in the ordinary course of business, the broker's clients had no claim against the bank for repayment of the sums contained in the cheque, which had properly been applied to reduce the broker's indebtedness—*diss.* Lord Young, who was of opinion that in the circumstances the bank had good grounds for suspecting that the money represented by the cheque belonged to some client of their customer, and accordingly were not entitled to use it for the purpose of reducing his personal indebtedness to them.

James Robert Thomson, manager of Parr's Bank, Chester, Mowbray Douglas, C.A., Edinburgh, and John Ross, W.S., Edinburgh, trustees of the late Thomas Dunlop of Carndonach, Donegal, Ireland, upon 28th February 1890 instructed David Bryce Thomson, stockbroker, Edinburgh, to sell 50 shares of the Commercial Bank of Scotland, Limited, belonging to the trust-estate under their management. Upon 7th March Thomson sold said shares to Mr H. W. Hislop, stockbroker, Edinburgh, for £2906, 5s. On 19th March, in return for a duly prepared transfer, he received Mr Hislop's cheque in his favour for £2921, 10s. 6d. (being the price of the shares, together with the stamp-duty and the fee payable to the Commercial Bank in respect of said transfer), and on the same day he received instructions from the said trustees to reinvest the proceeds of the Commercial Bank shares in deposits with certain Colonial banks. On receipt of said cheque he paid it into his own account with the Clydesdale Bank, George Street, Edinburgh, which was at that time overdrawn to the extent of £6270, but against which the bank held two guarantees from his father amounting together to £4100. Of the sum of £2921, 10s. 6d., £2000 was placed to Thomson's credit, while he received a draft on London for £900, and the remainder in cash.

Upon 24th March Thomson absconded, and upon the 25th he was declared a defaulter on the Stock Exchange.

Thereafter the said trustees brought an action against the Clydesdale Bank for repayment of the sum of £2900 (the price of the bank shares sold, less Thomson's commission), as being part of the trust-estate belonging to them as trustees.

They pleaded—"(1) The sums sued for being trust funds belonging to the pursuers, and having been paid to the defenders without the pursuers' knowledge or authority, and being still in the hands of the defenders, the defenders are bound to deliver the same to the pursuers. (2) The said funds having been handed to Mr Thomson for a specific purpose, he was merely custodier thereof, and could transmit no right of property in said funds to the defenders, who are therefore bound to restore same to the pursuers as concluded for."

The defenders pleaded, *inter alia*—"(2) The cheque in question having been paid into bank in the ordinary course of business, and the defenders having no knowledge whatever of the purpose for which the same came into Mr Thomson's hands, decree of absolvitor should be pronounced, with expenses."

A proof was allowed, which brought out the above facts, and the further facts given in Lord Young's opinion (*infra*), and from which it appeared that the ordinary course of business on the Stock Exchange was for the selling brother to receive the buying broker's cheque in his favour, and to pay his clients by his own cheque.

Upon 3rd July 1890 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The material facts of this case appear to be these. The pursuers (a body of trustees) instructed a stockbroker to sell for them certain Commercial Bank shares, and to reinvest the proceeds in deposits in certain Colonial banks. The shares were duly sold, and the stockbroker received the price, and paid it into his account-current with the defenders, the Clydesdale Bank. That account was at the time overdrawn, and the sum paid in did not wipe out the overdraft. Some days afterwards, and before further operations on the account, except to a small amount, the stockbroker absconded, and was found to be insolvent. It was also found that he had made no investment on behalf of the pursuers. In fact, he had informed them that there was a difficulty about the transfer of the Commercial Bank shares, and that in consequence he had been unable to obtain the price. In these circumstances the pursuers demand from the defenders the price of the shares paid in, as above mentioned, to the stockbroker's account, and they have brought the present action to enforce such payment, maintaining alternatively that they are entitled (1) to the whole sum paid in, less the broker's charges, which, it is admitted, he fell to deduct in settling with his client; or (2) to such part of the sum paid in as was not drawn out by the stockbroker previous to his absconding.

"These are, I think, the only facts which are really material. But I may notice, lest in other views of the case other facts may be thought important, (1) that the price of the shares was received by the stockbroker in the form of a cheque by the buying broker, which cheque included the price of the shares plus stamp duty and charges; (2) that in the ordinary course of business the cheque in question fell to be paid into the selling broker's account, as it in fact was, he giving his own cheque to his clients for the amount, less charges and commission; (3) that the bank had no knowledge of the source of the cheque in question beyond this, that they believed that the cheque had come into the stockbroker's hands in the ordinary course of his business as a stockbroker; (4) that, in particular, although they had been informed sometime previously that the broker's overdraft was in part due to a transaction in Commercial Bank shares which he had sold out for clients, and the proceeds of which he had re-invested before receiving the price, they did not know that these were the pursuers' shares, and did not identify the cheque in question as having to do with that transaction.

"In these circumstances the legal question is, whether the pursuers have a good claim against the bank? After considering as carefully as I could the pursuers' argument, and the various authorities on which they found, I have come to be of opinion in the negative.

"The broad view of the matter, as it presents itself to my mind, is this—that the case at best for the pursuers is just the ordinary case of a person paying his just debt with money fraudulently obtained or dishonestly appropriated, but received by the creditor in ignorance of the fraud or of the dishonesty. I know no authority for holding that in such a case the creditor is bound to restore. It may be doubted whether a cash payment can be recovered from a just creditor in any circumstances short of actual complicity on the part of the creditor, with the fraud to which the payment owes its source; but at least knowledge, actual or constructive, on the part of the creditor seems essential; and such knowledge on the part of the bank is here, I think, excluded by the proof. It is true they knew, or may be held to have known, that the money was probably the price of stock sold for a client; but the right of the broker to pay such money into his own bank account depended not merely on the source of the money, or on the state of his (the broker's) bank account, but also upon the state of accounts between him and his client, and perhaps also upon the prospects which he *bona fide* had of meeting his obligations to his clients from other funds. And into those matters I do not hold that the bank was bound to inquire, or that it would be consistent with

the ordinary course of business that a banker should do so.

"The pursuers founded on three classes of cases, all of which, however, are in my opinion distinguishable.

"1. (1) *Sheffield* v. *London Joint Stock Bank*, 13 App. Cas. 333; (2) *Cooke* v. *Eshelby*, 12 App. Cas. 271. These cases, as I read them, only establish or rather recognise that where a person deposits securities or sells goods to which he has in the knowledge of his creditor or buyer a limited or merely representative title, he cannot confer on his creditor or buyer a higher title than he himself holds. They also, no doubt, recognise that knowledge may in certain circumstances be inferred from the nature of the business which the parties do, and the course of dealing between them; but they were not cases relating to cash payments; nor do they lay down any principle which, so far as I can see, can apply to the relations between a stockbroker and his bankers.

"2. *Ex parte Cook*, 4 Ch. Div. 123, Knatchbull, 13 Ch. Div. 696. These cases again merely establish this, that where, *e.g.*, a stockbroker has sold stock for a client, and the proceeds are still extant or traceable in the broker's possession, the client has a preference in bankruptcy as against the broker's general creditors. This doctrine has, I think, obviously no application to the present case.

"3. *Wardlaw* v. *Mackenzie*, 21 D. 940, and other cases which apply the maxim *nemo debet locupletari aliend jacturd*. These again are cases which do not at all apply to cash payments in the ordinary course of business. In particular, the case of *Wardlaw* related to a cautionary obligation obtained by a curator for the benefit of his ward, by means of fraud, without consideration, and challenged while matters were still entire. I do not consider that the principle there applied applies here, (1) because the defenders are not in any sense taking advantage of the fraud of their agent, or of anybody acting as their agent; and (2) because it cannot be said here that matters were entire when the bank was apprised of the fraud. It may be that the sums drawn out by the defaulting stockbroker after the payment in question were inconsiderable, but nearly a week elapsed before the pursuers' demand, and in the meantime the broker had left the country.

"Altogether, I have not been able to come to any other conclusion than that, however hard the pursuers' case may be—and it is a very hard case undoubtedly—the defenders are not legally liable to restore the money. I shall therefore assoilzie them with expenses."

The pursuers reclaimed, and argued—The bank should have inquired to whom the money belonged. In any case, if they could show that it was their money that went into the bank's coffers they were entitled to follow it and to recover it. The money was paid into the bank, not as a debt, but to the credit of Thomson's account, and was still there. The bank were not entitled gratuitously to benefit by Thomson's fraud. They gave no value at the time or subsequently. The case was distinguishable from that of *Mackenzie* v. *Robertson*, *infra*, because here Thomson stood towards them in a fiduciary character. He had been instructed how to reinvest the money. He was their agent, not their debtor—*Wardlaw* v. *Mackenzie*, June 10, 1859, 21 D. 940; *Eyre* v. *Burmester and Others*, April 1862, 10 H. of L. Cases, 90; *Macadam* v. *Martin's Trustees*, November 5, 1872, 11 Macph. 33; *Gibbs* v. *British Linen Company*, June 23, 1875, 4 R. 630; *Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626; *Cooke* v. *Eshelby*, March 15, 1887, 12 App. Cas. 271; *Earl of Sheffield* v. *London Joint-Stock Bank*, March 12, 1888, 13 App. Cas. 333. Thomson here was in the position of Mozley there. *Ex parte Cook*, November 16, 1876, 4 Ch. Div. 123; *Knatchbull* v. *Hallett*, February 11, 1880, 13 Ch. Div. 696, Jessel, M.R.; Bell's Comm. (7th ed.) i. 283. The Bills of Exchange Act 1882 did not apply. No value was given for the cheque at the time or subsequently.

Argued for the respondents—The Lord Ordinary's opinion was correct. Everything here was quite regular so far as the bank was concerned. If the pursuers had distrusted Thomson they might have stipulated that they should be paid direct by the buying broker's cheque, but they were satisfied with the ordinary course according to which their broker would eventually pay by his own cheque. The case of *Mackenzie & Aitken* v. *Robertson*, January 22, 1886, 13 R. 494, was entirely in point. The bank was an onerous holder without notice—Bills of Exchange Act 1882, secs. 27 and 73. They not only had given valuable consideration in the past, but they gave value from the time of receiving the cheque by ceasing to charge interest.

At advising—

LORD JUSTICE-CLERK—The pursuers here are a body of trustees who gave instructions to a Mr Thomson, who was a stockbroker in Edinburgh, to sell for them certain stock which they held in one of the Scotch banks—I think the Commercial Bank—and to reinvest the money on deposits in certain colonial banks; and they put him in the position of selling, and he accordingly sold to another broker those Commercial Bank shares. He received the price in the form of a cheque from the other broker, which cheque included the price and what other charges the other broker was bound to pay, and he paid the money into his bank account. It appears that he for days did not invest the money in these colonial deposits, but represented to his clients that there was some difficulty about the settlement of the Commercial Bank shares, and led them to understand that he had not received the proceeds. He was at that time very deep in debt, and ultimately he absconded. Before he had absconded—it is not a matter of much consequence but it is one of the facts of the case, that of the £2900 odds he had received, £900 was transmitted by his direction to an account which

he had with the agency of his own bank in London, he having an overdraft there. It appears that he had opened his account with the Clydesdale Bank sometime before, and had got some security through his father towards advances which the bank might make on his account, and that security was afterwards added to by considerably valuable securities. But in point of fact when he absconded his account was still overdrawn, and the bank now maintain that they are entitled to retain as having been paid to them in payment *pro tanto* of their overdraft the sum which he paid in upon that occasion.

Now, the Lord Ordinary has found that the bank are entitled to maintain that position; and after giving the matter the best consideration I can, I have come to the same conclusion. There is no doubt whatever that the business as it was done was perfectly in the ordinary course of business of a stockbroker. He is entrusted by his clients with shares for sale; he is entrusted by them with the custody of the money after effecting the sale; and he is entrusted by them with the duty of making a special purchase of investments for them. Having sold the shares and got the money, he pays the money into his bank account, and I think that the bank are entitled to hold that money. All his banking transactions were in ordinary course; there is no suggestion that there was any collusive or fraudulent arrangement between him and the bank. It is frankly admitted by the manager of the bank that he believed this and other large sums which were passing through Mr Thomson's account to be sums which were clients' money; but as regards the transactions themselves the bank had no cognisance of them and had nothing whatever to do with them. It comes to be a pure question whether or not this client of the bank—this customer of the bank having his account overdrawn and paying in a sum—of course it was paid in by cheques into his bank account—whether this is just equivalent to a payment in cash which other parties having a claim against their debtor and able to make charges against him of improper conduct are entitled to follow up and insist that it shall be paid to them. As I have said, I have come to the conclusion that the Lord Ordinary is right in the decision at which he has arrived, and I so entirely concur in the reasons which he has given for his decision that I adopt them, and do not think it necessary to add anything else.

My judgment therefore would be in favour of the bank, and of adhering to the Lord Ordinary's interlocutor.

Lord Rutherfurd Clark—I am of the same opinion. I think the money that was paid to the bank was a payment in extinction *pro tanto* of the debt then due to the bank, and that that payment cannot be gone back upon. It seems to me that was a perfectly good payment to the bank, and I do not need to enlarge upon the case, for that is the ground of my opinion. I quite assent to the views of the Lord Ordinary.

Lord Trayner—I, like your Lordships, agree with the Lord Ordinary, and upon the grounds which his Lordship has stated. I entirely concur in what he has said, and think it unnecessary to add anything.

Lord Young—The pursuers are trustees under the will of the deceased Thomas Dunlop, and as such vested with the testamentary estate. Part of it consisted of shares of the Commercial Bank, which they in 1890 sold through Mr Thomson, a stockbroker, who on 19th March 1890 received the price from the buyer, and at once paid the amount (£2900) to the defenders to be put to his credit with them. The pursuers now claim this money as their property. It is at the foundation of this claim that the pursuers shall trace the price of their undoubted property (the Commercial Bank shares) into the hands of the defenders, so as to identify it with the money which they received on 19th March. This they do by proving that the payment was made by transferring to them the cheque for the price which Thomson had got from the buyer only a few minutes before. It is now, I think, well settled that in order to the application of the rules of law and equity regarding the following and recovery of trust property money may be traced and identified so that the receiver shall be answerable according to these rules although the particular money may have disappeared.

I am of opinion, therefore, that the defenders must be answerable to the pursuers for the trust money thus traced into their hands, and must pay the amount unless they have shown that it was well transferred to them by Thomson, the broker—that is, in such manner as to become their own—or that they have some legal ground for withholding it from the pursuers. Whether they have done so or not is, I think, the only question in the case.

It appears that Thomson had an account-current with the defenders, which at the time of the payment in question was overdrawn, and showed a large balance due to the defenders, and their case accordingly is, that they are and from the first were entitled to impute the payment in reduction of this balance. I assent to the proposition that when a customer pays money to his banker to be put to the credit of his account, the banker is *prima facie* entitled to assume that it was the customer's own money, and that he defrauded no one by paying his debts with it. I also agree that a payment to the credit of an account *prima facie* operates reduction or extinction of any balance then due upon it, and is thus in a sense payment of debt. But these propositions are too general and abstract to be of much practical utility in a particular case, the facts of which in detail are before the Court to be dealt with. I think it is proper, and indeed essential, to inquire into and consider the character of the particular account, the position of the customer as the bank knew it, and also

the banker's knowledge — even general knowledge—of the sources from which the money paid in came, and for the brief safe custody of which the account was opened and existed. Take for example the account of a rent and debt collector. The banker titles the account as that of "A B, rent and debt collector," and knows, or believes on sufficient grounds, the true sources of the money paid in. I could not in such a case assent to the applicability of the general abstract propositions which I have expressed. Again, to instance a case much resembling that before us, take a stockbroker's account—so entitled in the banker's books—and the purpose of which is, to the banker's knowledge, the temporary safe custody of the money of the broker's employers. Suppose that the banker lends this broker customer—say £6000 on his bond or bill or I O U, or (worst of all) on his cheque, when he had nothing at his credit. Suppose further, that in this state of matters the broker pays in £2900, which in fact is not his own money but an employer's, as the banker well knows, or on sufficient grounds believes. In such circumstances it is at least not clear that the banker could successfully support his claim to appropriate the money by the general legal propositions which I am now referring to. These are applicable (and probably sufficient for the decision) in every case of an account of such character that it is reasonable to impute to the banker the belief that the money paid in is the customer's own, so that he may, without breach of trust, pay his debts with it. It would be unreasonable to subject a banker's claims upon money paid by a customer to his credit in account to the result of an inquiry as to the source from which it came. Take the case of a man of business who pays to the credit of his own account with his banker the money of a client entrusted to him for investment. The man of business acts with grave impropriety, and the client may lose his money, but the banker will not be allowed to suffer unless the *bona fides* which is *prima facie* imputable to him is displaced by positive evidence. Whether he would be permitted to gain at the expense necessarily of the defrauded client is, I think, not clear. If he knew the truth when the payment was made, he would certainly not be permitted to retain the money and apply it in payment of his customer's debt. If he did not at the moment, but received notice of the truth immediately thereafter, and before anything had occurred in consequence of the payment whereby he would or might be prejudiced if it were withdrawn, I am not sure that the case would be substantially different.

I now proceed to consider more closely, first, the character of the account and dealings between the defenders and the broker Thomson, and second, the defenders' knowledge with respect to facts their knowledge, or excusable ignorance of which I have sufficiently indicated as being material, in my opinion, to the decision of the case. These topics, though in some respects separable, run into each other, the first having certainly a very distinct bearing on the second. I therefore premise what I have to say on both by observing that by the knowledge of the defenders, who are a joint-stock company—I mean the knowledge of the officers in their branch office in George Street, Edinburgh, where the business we are inquiring about was conducted, and particularly the knowledge of their agent and chief officer there —the account was on the face of it a stockbroker's account with his banker. In the title of it in the defenders' books Thomson is designed as "stockbroker, 26 George Street;" and their agent in their George Street branch says, as a witness, that he knew him as the son of "the agent in our High Street branch in Edinburgh," and that his office was "quite near our bank."

1. The account was opened on 2d January 1889, apparently at the request of the broker's father, "the agent in our High Street branch," who became security for it to the amount of £600, according to his letter of 14th January 1889, the terms of which show pretty well the character of the account. He (the father) appears also to have used his personal influence with Mr Henderson, who was at the time joint agent along with Mr Greenhill for the defenders in their George Street office, to help his son at a pinch "at settlement time,"—that is, of course, to lend him money—which was natural and excusable on his part. This appears from Mr Greenhill's letter of 29th March 1890, which I refer to only as showing the character of the account, and as some explanation, although no justification, of the very large loan that was in fact given, and as I think most improvidently and irregularly given.

The account opened with a credit entry of £100, and was continued to the close without any security except that of the unfortunate father referred to in Mr Greenhill's letter of 29th March 1890. On 14th February 1890 it is balanced with the sum of £833, 10s. at the broker's credit. At the close of the following day (15th February) the balance to his debit is £1193, 1s. 7d. It thereafter goes on with balances due to the defenders, fluctuating from over £1000 to over £5000, till 18th March when the balance is £4870, 15s. 1d. due to the defenders, the broker not having had a shilling at his credit since 14th February. On the following day (19th March) the broker's cheque for £1400 was presented, and it is not surprising that the teller should have hesitated to pay it, and asked instructions from his superior Mr Nicholson, and that he before authorising payment should have seen fit to communicate with Mr Thomson, who accordingly, as Mr Nicholson says in his evidence, "came over" on the same day, and stated "that he would be paying in in the afternoon." What he had in view was manifestly the price of the pursuer's stock which he expected to receive, as he in fact did, that afternoon from the buyer. From the order of the entries on 19th March it would seem that this cheque for £1400 was not honoured till the balance on the account was reduced

by the payment immediately in question, which Thomson made after bank hours. But the teller (Riddell) explains that the cheque was honoured first—so that at the close of bank hours on 19th March Thomson was the defenders' debtor to the amount of £6200—for money which was simply lent to him within about a month, during which there was not a shilling at the credit of his account. They had, indeed, Mr Thomson senior's guarantee to the extent of £4100, and have, as they say, since got his cheques for that amount, but as his account is (independent of these cheques) overdrawn to the amount of £5300, as stated in the defenders' minute of 31st January, it is unlikely that these cheques have yielded any money.

There must, I should think, be some explanation of this very remarkable state of matters as the result of what ought to have been very familiar and common-place banking business. What is it? Had the defenders' agents in Edinburgh authority to act as they did—that is, to advance money to Thomson to the amount of £6200? If not, they are plainly liable for any loss on this account so occasioned. Mr Greenhill in his letter to the manager in Glasgow of 29th March, already referred to, alleges no authority, and refers, as explanatory of the advances, only to Mr Thomson senior's guarantee and his verbal request to Mr Henderson, "to help David at settlement time when required." Do the defenders accept this as a justification of their agents' conduct? If the agents are truly responsible for the loss, the defenders may of course beneficently relieve them of it if they please. But such beneficence must be at their own cost.

2. With respect to the knowledge of the defenders—that is, of their agents, who acted for them in this business—it is proved, I think, to the exclusion of any reasonable doubt, that they knew perfectly well that the money paid in by Thomson was not his, but his employers'. *Res ipsa loquitur.* From January to December 1889 he paid in sums to the amount of £147,465. None of these payments were allowed to remain undrawn for more than a couple of days, very few of them for more than one, and some were drawn out the same day. But sums of £7000, £8000, £9000, and even up to £11,000 stood at his credit for a night or even two. I suppose over a Sunday or holiday. The defenders' agents who did business with him were the personal friends of himself and his father, who had requested them "to help David at a settlement time when required," and a suggestion that they honestly believed that this money was his own which he might, without breach of trust, pay his debts with, would be extravagant. No such suggestion is made. Mr Greenhill says—"I made no inquiry as to whether the money paid into Mr Thomson's account was in his hand as broker or otherwise. I believed that it was in his hands as broker acting for clients." Knowledge of the individual clients whose money was paid in is not necessary to knowledge of the character of the account and the sums paid into it. All that the pursuers need, in my opinion, show is that the purpose of the account and the use made of it was the reception of clients' money for safe custody till it was paid over to the owners within a very brief period, and that the defenders were not deceived or misled, but quite knew the fact.

I have been assuming that the money paid to the defenders by Thomson on 19th March was, when he made the payment, the property of the pursuers, and that, if he meant it as a payment of debt due by him to the defenders, he committed a breach of trust. This is certainly my opinion, founded on what I think was the legal relation in which the pursuers and Thomson stood to each other, viz., that of principal and agent, and I should have thought it superfluous to say a word in support of this view had it not been seriously disputed by the defenders on the authority of the case of *Mackenzie* v. *Robertson*, 13 R. 494. I think it clear that a broker is the agent of his employer, and that his relation to his employer is consequently fiduciary. Nor is this proposition affected by the fact that by a rule of the Stock Exchange, quite in accordance with law and legal principle, a purchasing and selling broker are *inter se*, or with respect to each other, principals—that is, stand in the relation of buyer and seller. It is not inconsistant with this rule, or with any of its consequences, that each of the brokers who are *inter se* principals should, with respect to his employer, be an agent. In the case of *Mackenzie* v. *Robertson* the dispute was between a selling broker and the general creditors of another broker, to whom he had sold (a purchasing broker)—the employer of neither of them having any interest in it; and the decision proceeded on the character of the relation of the two brokers *inter se*, which the Court held to be that of principals—buyer and seller. A similar question would have arisen here had Hislop, the broker who bought from Thomson, become bankrupt without paying Thomson, and had Thomson in competition with Hislop's general creditors been claiming a preference over a cheque or money which Hislop had received from his employer. As it is, the case of *Mackenzie* v. *Robertson* is in my opinion inapplicable.

The property which Thomson was employed by the pursuers to sell for them consisted of bank shares, and when he received from them the transfer to be delivered to the buyer in return for the price he was entrusted with the property itself, and the price when he received it was his employers' money in his hands, which he was bound to deal with accordingly by handing it over to his employers, or disposing of it according to instructions. If he appropriated it to his own use, keeping it and absconding with it, or paying his own debt with it, he was not a mere defaulting debtor, but a criminal guilty of the very serious crime of breach of trust and embezzlement. We have not here to consider any question of criminal law, but I notice in passing that we have no such technicality as I believe prevails to

some extent at least, in England that in order to the crime of embezzlement the delinquent must stand in the relation of a clerk or servant to the person defrauded. The cases in our criminal Court to the contrary are numerous and familiar. It appears from the evidence that Mr Ross, the pursuers' man of business, having occasion to go from home on the 19th of March, instructed Thomson to deposit the money in certain banks (having agencies in Edinburgh) in the pursuers' name, which he says he would have done himself had he remained in town. Instead of doing so, Thomson paid the money to the defenders. He was on this 19th March, as the event proved, at the end of his resources, indebted to the defenders in £6200, resolved to abscond, but without money enough to take him out of the country. In these circumstances the resolution which he took as shown by his conduct is remarkable, and may throw some light on the relation between him and the defenders' officers in Edinburgh, from whom or by whose means he had received this large sum of £6200 within a month. He resolved to defraud the pursuers of their money then in his hands. This is plain from his false and fraudulent letters spoken to by Mr Ross. These letters were obviously meant to delay inquiries after him till he had time to be off. They could have no other meaning or object. Further, he resolved to pay his debt to the defenders with the pursuers' money, and so benefit them to the exact extent that he defrauded the pursuers, *minus* £55 to carry him out of the country. What is the explanation of this conduct, for there must be one. It is hard to believe that he spontaneously and willingly wrote deceptive letters and committed a heinous crime only from a kindly disposition towards this joint-stock company, the Clydesdale Bank, or an ill-feeling towards the testamentary trustees of the deceased Thomas Dunlop or the family of whose interests they had charge. But whatever the motive, the fact is certain that Thomson did deliberately resolve to rob these testamentary trustees of £2900 in order to relieve, to that extent, the defenders or their agents of the loss consequent on advances which had been made to him between 14th February and 19th March, and which I think the defenders will now acknowledge ought not to have been made. I should indeed have been the reverse of surprised had the defenders disdained to take benefit by this very gross fraud, the fact and purpose of which they cannot fail to see. But they have judged otherwise, and we have therefore to decide whether or not they have the legal right which they urge.

The view of the matter on which the defenders rely as true in fact and sound in law is stated by the Lord Ordinary, who adopts it, thus—"The broad view of the matter as it presents itself to my mind is this, that the case at best for the pursuers is just the ordinary case of a person paying his just debt with money fraudulently obtained or dishonestly appropriated, but received by the creditor in ignorance of the fraud or of the dishonesty. I know no authority for holding that in such a case the creditor is bound to restore. It may be doubted whether a cash payment can be recovered from a just creditor in any circumstances short of actual complicity on the part of the creditor with the fraud to which the payment owes its source, but at least knowledge, actual or constructive, on the part of the creditor seems essential, and such knowledge on the part of the bank is here, I think, excluded by the proof. It is true they knew, or may be held to have known, that the money was probably the price of stock sold for a client, but the right of the broker to pay such money into his own bank account depended not merely on the source of the money, or on the state of his (the broker's) bank account, but also upon the state of accounts between him and his client, and perhaps also upon the prospects which he *bona fide* had of meeting his obligations to his clients from other funds. And into those matters I do not hold that the bank was bound to inquire, or that it would be consistent with the ordinary course of business that a banker should do so."

This broad view of the matter assumes that there is no distinction, with respect to the right and duty of the banker, between a stockbroker's account opened and used for the purpose, and substantially only for the purpose, of enabling him to pay into bank the money of his clients to be kept safe till he can pass it over to them, and any other account between a banker and a customer. My opinion is adverse to this assumption. I think the distinction may be material to the duty and consequently to the right of the banker. The subject is of general importance and very material in the case before us. In order to explain my opinion upon it I must take leave to offer some remarks on the familiar enough expression "overdrawn account," and on another cognate to it, and used by the Lord Ordinary, "to wipe out an overdraft," not that the meaning of either expression is doubtful, but that it is important to see and appreciate clearly what is the reality and legal character of the things signified by them. Now, I venture to say that an account with nothing in it, either at the credit or debit, is no account at all. Accordingly, every account is opened with a sum put to the customer's credit, whether consisting of money paid in by him or of money which he has arranged with the banker to place to his credit, with or without security, so that he may draw on it, and which last is in its legal character a loan from the banker. Money at the credit of an account, whether originally the property of the customer, or borrowed by him from the banker or a third party, is drawn upon by cheques which are legal instruments for that purpose and no other. When the money at the credit of the account is all drawn out, there is plainly nothing to draw on or for a cheque to operate on, and if the customer desires to continue to draw he must have more money placed to his credit, whether his

own, or borrowed from the banker, or a third party as before. This is the regular business course with respect to every account, and in business or trade banks is always strictly followed, so that when the money at the credit is all drawn out no cheque is honoured till money is paid in, or till by arrangement with the banker such sum as may be required is placed to the credit. In family banks (such as Coutts') the same strictness is not always observed, and in business banks in Scotland (not in England) it is sometimes neglected. When the regular course is followed, an account cannot be overdrawn although the customer may very well be his banker's debtor for money placed to his credit by arrangement, and which his cheques show that he has in fact received from the lender. An account is overdrawn when a banker honours the cheque of a man who once had an account with money at his credit, but who has ceased to have such account—for a longer or shorter period—I know of no rule for limiting the period. Such conduct by a banker is safe or not according as the confidence in the drawer of the cheque, which he necessarily acts on, is misplaced or not. If not misplaced, and the drawer of the cheque subsequently pays in as much as he had thus through the banker's confidence in him personally been permitted to draw in anticipation, the overdraft is wiped out. But this is not regular banking. It may be practically safe and the irregularity insignificant when the account is such that no others besides the banker and the customer have any legitimate interest in it or in the manner in which it is kept, or the amount of loans or advances by the former to the latter. A stockbroker's account with his banker is I think clearly not of that character. The defenders not only admitted, but contended that when a selling broker receives a cheque for the price of a client's property which he has sold, it is in the ordinary course of business that he shall pay it into his own bank account, giving his own cheque to his client for the amount, less charges and commission, and the Lord Ordinary in his judgment refers to this "ordinary course of business" as indisputable and well known. I assume that such is the ordinary course of business, and that it is known all round—that is, to bankers as well as to stockbrokers and their clients. It seems to follow that the accounts of stockbrokers with their bankers ought to be kept and operated on with a due regard to this ordinary course of business respecting them and the interests therein thence legitimately arising. Nor does there seem to be any reason why the duty in this respect, if there be any, should be confined to the stockbrokers and not be extended to their bankers. The ordinary course of business, thus appealed to by the defenders themselves, necessarily and of itself announces to the clients of stockbrokers the bankers with whom they have accounts into which their (the clients') money is paid, and out of which they get it on the broker's cheques; and the bankers are parties to the announcement. Now, I would ask this plain question, are there any bankers who would venture to notify to all concerned—that is, to the public who employ stockbrokers — that while they allowed accounts to be kept with them into which in the ordinary course of business stockbrokers paid their clients' money, they held it to be consistent with their duty to permit overdrafts to any amount they pleased, and that on the footing that they should be wiped out with clients' money? So long as this ordinary course of business prevails, no stockbroker can conceal from his clients who are the bankers with whom he keeps his account, and I much doubt whether any broker could afford to continue his account with bankers who were known or even suspected to be capable of acting on such a view of their duty; he would be so likely if he did to experience the effect of—well, the effect of "exclusive dealing." He would cease to be employed. The only alternative view—and it is simple and obvious enough—is that a stockbroker's account ought to be kept with strict regularity, and so that it shall never be overdrawn even for an hour. The banker may of course accommodate a stockbroker to any amount and on any terms he pleases, but he ought in my opinion to do it if so minded by putting to his credit in account the sum he is willing to accommodate him with, the broker becoming his debtor therefor as for so much money lent to him on the terms agreed to. This course is attended with no hardship or inconvenience to either the broker or the banker, and any other exposes innocent clients, to whom not even the least negligence or inattention can be imputed, to the risk of being scandalously defrauded.

I have pointed out that between 14th February and 19th March the defenders allowed Thomson to overdraw on his Edinburgh account to the amount of £6200, his own drafts to that amount standing as a debt against him unwiped out when the pursuers' money was paid in. In London his account was within the same period (or about the same period) allowed to be overdrawn to the amount of £672, 18s. 6d., which was the sum at the debit on 18th March. Adding this to £6200, it appears that this needy broker was allowed by the defenders within a month to overdraw £6872 on the account into which he was invited, and expected in the ordinary course of business to pay the money of his clients. I am of opinion that having regard to the character of the account, and as in a question with the pursuers, it was a violation of duty on the part of the defenders to allow these overdrafts. As in a question with Thomson himself, who got the money, I have no occasion to consider the matter, but suggest no doubt of his liability.

But the defenders are entitled to have their case and claim considered as if they had done what I think they ought if they were willing to accommodate Thomson to the amount of £6872, so as to enable him to continue his drafts on these two otherwise

exhausted accounts, viz., as if they had put £6200 to the credit of his account in Edinburgh, and £672 to the credit of his account in London. In this view the case is not one of overdrawn account and the wiping out of overdrafts, but a simple case of loan by the defenders to Thomson—not the less so because the lent money was put to the credit of the borrower's account to be drawn out as it suited him.

I have already expressed my belief, and the grounds of it, that Thomson intended to benefit the defenders with the pursuers' money, which he intended should never reach the pursuers at all, and this may be represented as intention by him to pay to that extent his debt to the defenders. Did the defenders receive the money in the knowledge of this intention on his part and with a corresponding intention on their own? If they did—and I regret to feel obliged to say that there are in my opinion very serious grounds for believing that they did—it is, I think, impossible to regard the proceeding as one "in the ordinary course of business." If they did not, but, in ignorance of Thomson's fraudulent intent, received the payment from him "in the ordinary course of business," according to which, to use the Lord Ordinary's language, "the cheque in question fell to be paid into the selling broker's account, as in fact it was, he giving his own cheque to his clients for the amount, less charges and commission," then they did not in fact receive it as or towards payment of their own debt for money lent to the broker.

There are no doubt cases in which a creditor who has in good faith received payment from his debtor of a just debt will not be ordered to restore the money on proof that it was not the debtor's own, and that he committed a breach of trust in paying it away. But it is the primary condition of every such case that the money was *bona fide* received in payment of the debt, and this condition fails here. If it were otherwise, we should have to determine whether the equities on both sides here are equal, taking account of all the facts to which I have referred at great, I fear too great length, and I have to express my own opinion that they are not. I think, indeed, that there is no equity on the defenders' side.

The case then comes to this, that the defenders having lent Thomson £6872 on such security as they were content to accept, subsequently received from him a sum of £2900, and in the ordinary course of business put it to his credit in his broker's account, which, for the reasons I have explained, I must decline to regard as an overdrawn account. The money is identified as the price of the pursuers' property, and paid into this account "in the ordinary course of business" in its passage from Thomson to the pursuers. Thomson then became bankrupt, and absconded, and the question is, ought the defenders to be allowed to impound this money in payment of his debt to them? In support of their contention that they ought, they say that when they lent Thomson £6872 on insufficient security they had in view that, should misfortune overtake him, there would certainly or probably be some of his clients' money within their reach through the medium of this account into which clients' money was paid in the ordinary course of business, which they might seize in payment. What does this amount to? I think to this, that the defenders regarded and meant to use this account as a snare which might trap for their use and benefit the money of innocent people. If this view be admissible it is a grave misfortune to the defenders, which no doubt they deplore, that there was only £2900 in the trap when the collapse came. Had there been £7000 they would have seized it all, arguing that it was (again to use the language of the Lord Ordinary) "just the ordinary case of a person paying his just debts with money fraudulently obtained." And what, I venture to ask, would have been the result in the view I am now considering had this just debt been well secured to the defenders by the bond of solvent cautioners or by a heritable bond? Thomson was the debtor in it, and if the case is to be dealt with on the footing that he paid it the cautioners would apparently be relieved, and any security held for it set free. Would the case be different if the defenders held Thomson's bond with sufficient (or insufficient) security for the amount of his debt to them? I can conceive no reason for thinking so. Nor can I see any ground for thinking the nature or origin of the debt material. It might have been on a bill or bond of caution for the debt of another customer of the defenders. The question of their right to retain the pursuers' money in payment would have been precisely the same. They got it from Thomson, who was their debtor in a just debt, with which the pursuers could not possibly have less concern than they have with the loan or advance to him of £6872.

The money was paid in after bank hours on the 19th March. Suppose that Thomson had at the same time handed his cheque to his clients for the amount, less charges and commission, and that they had presented it to the defenders on the opening of the bank next morning. Could they have refused to honour it "in the ordinary course of business," on the ground that they had received the money honestly and in good faith in payment of their own debt? Or is their claim to keep the money to be rested on Thomson's failure to give his cheque to his clients, and his success is artfully delaying their application therefor till he was safe out of the country? If the first alternative is maintainable, the facts on which the second is based are quite immaterial. If, again, the first alternative is ill-founded, the second cannot possibly be maintainable. It seems to me, at least, that there are no grounds for holding that the pursuers have lost their claim, which they once had, by undue delay in asserting it.

I am of opinion that the defenders have instructed no good ground in respect of Thomson's prior debt for withholding from the pursuers the £2900 which they received on 19th March.

With regard to their claim to retain the money in respect and to the extent of subsequent advances to Thomson, I do not feel myself in a condition usefully to say much. Your Lordships, agreeing with the Lord Ordinary, are of opinion that the defenders are entitled to prevail in respect of the prior debt, which greatly more than exhausts the money in question, and so have not adverted to the subsequent advances. The Lord Ordinary refers to them as inconsiderable, and only, I think, with reference to the topic of the time that elapsed, and of matters not being entire, when the defenders were apprised of Thomson's fraud. We really had no argument on the subject, and as the case is necessarily, according to the opinion of your Lordships, to be decided irrespective of it, it would really be useless for me to enter upon it. It is, of course, speaking quite generally, indisputable that advances made in good faith in respect of money received in good faith may be made good out of that money.

The Court adhered.

Counsel for the Pursuers and Reclaimers—Sol.-Gen. Pearson, Q.C.—Dickson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Respondents—Vary Campbell—Ure. Agents—Morton, Smart, & Macdonald, W.S.

VALUATION APPEAL COURT.

Tuesday, February 17.

(Before Lord Wellwood and Lord Kyllachy).

ABERDEEN CEMETERY COMPANY, LIMITED *v.* ASSESSOR OF ABERDEEN.

Valuation Roll—Cemetery—Yearly Value. *Held* that one-half of the nett profits of a cemetery company is a reasonable sum to take as representing the annual value of the land belonging to the company, and used as a cemetery.

At a Valuation Court for the burgh of Aberdeen held on the 12th day of September 1890, to dispose of appeals against the valuations by the Assessor of the burgh for the year from Whitsunday 1890 to Whitsunday 1891, an appeal was made by the Aberdeen Cemetery Company, Limited, against the following entry in the valuation roll:—

Description & Situation of Subjects.	Proprietor.	Tenant and Occupier.	Yearly Rent or Value.
Cemetery, Allenvale,	Aberdeen Cemetery Company, per George G. Whyte, C.A., 130½ Union Street,	Proprietor,	£297
Lodge,	Do.	James Williams, Superintendent,	£13, 10s.

The appellants objected to the entry of £297 in the valuation roll, and contended that the valuation should be reduced to the sum of £171 as a reasonable rent for the subjects in question.

The Assessor arrived at the value entered in the roll by ascertaining the nett profits of the year, and entering one-half thereof as the rent which a hypothetical tenant would be likely to pay. The value so ascertained was allocated between the cemetery and the lodge.

The Magistrates sustained the valuation.

The company appealed, and cited *The Craigton Cemetery Company, Limited* v. *Assessor of Lower Ward of Lanark*, February 2, 1889, 16 R. 802.

At advising—

LORD WELLWOOD—I am not prepared to say that half the nett profit is not a reasonable rent to take as representing the annual value. No doubt cemeteries are not usually let, but it does seem to me that half the nett profit is a sum at which I should expect a tenant to be well content to take the cemetery. I therefore think the Magistrates are right.

LORD KYLLACHY concurred.

The Court were of opinion that the determination of the Magistrates was right.

Counsel for the Appellant—J. Dove Wilson. Agent—T. R. Gillies, Aberdeen.

Tuesday, March 10.

(Before Lord Wellwood and Lord Kyllachy.)

THE BANK OF SCOTLAND *v.* ASSESSOR OF EDINBURGH.

Valuation Roll—Cumulo or Separate Valuation — Bank Buildings with Official Houses in Same Building.

The premises of a bank including the banking office and the houses of two officials were entered in the valuation roll as a *unum quid* at one *cumulo* valuation. Under the provisions of a local Act authorising an assessment a distinction was made between the assessment of houses and of offices. The bank appealed against the valuation, and maintained that it was necessary for the purposes of this local Act that the *cumulo* valuation should be distributed among the houses and office. The houses formed part of the bank buildings. One of them had internal communication with the office, the other had not. *Held* that the latter house ought to be separately valued, the former being valued along with the office as a *unum quid*.

At an Appeal Court of the Magistrates of the Burgh of Edinburgh held within the Council Chamber of Edinburgh on the 10th day of September 1890 for the purpose of hearing and disposing of appeals against