station at which every train should stop. There might have been an obligation which they could not summarily bring to a close, but it would have been a temporary obligation in the ordinary sense of the term, and not an obligation which could have been made lasting against the company.

I think it equally clear, after all the discussion we have had about it, that the word "temporary" must be read in connection with the word "said" which we find in the second part of the clause; and it must be taken as if it had expressly said "the company shall erect and maintain a goods and passenger station temporarily in the sense hereinafter explained." Accordingly, going to the proviso, we see what is the meaning to be attached to the term. It is that there is an existing obligation to keep up the station, with the proviso that that obligation may ultimately turn out not to be permanent, for the clause is practically so expressed, "providing always that if after five years the traffic done at the station shall "not be sufficient to remunerate the company for the maintenance of it, the obligation to maintain the station shall be no longer binding upon the company." The result of that simply is, that the obligation which the company have undertaken in the earlier part of the clause may be determined in one event only—otherwise that obligation as originally expressed remains permanent in its character. My Lords, if the obligation remains permanent, it is the obligation as a whole in the terms in which it was originally expressed, If it turns out that the station is unremunerative, and the arbiter named gives a finding to that effect, the obligation as a whole flies off. But that obligation as a whole, as contained in the first part of that clause, appears to me either to remain permanently as an obligation as a whole, or the company are relieved of it as a whole. But the case is in the position that no such event occurred. The station has not been found to be remunerative, and therefore the obligation as originally contracted remains.

Now, what is that obligation? My Lords, it seems to me that there are four qualities or incidents of it. I do not care which expression is used, but when I use the expression I mean it to cover essential points with reference to which the company undertook the obligation. One of those refers to the place where the station is to be. It is to be at the point named or in some other position convenient to the parties on the estate of Lundin—the estate now possessed by the appellant. In the second place, it is to be a station for passenger traffic. In the third place, it is to be a station for goods traffic. In the fourth place, it is to be a station at which all the ordinary trains shall stop. My Lords, as I have said, I think the obligation applicable to all these points or incidents remains as a whole; and I think the company are no more entitled to get rid of the obligation to stop all their ordinary trains there than they would be entitled to say, "this shall not be a passenger station" or "this shall not be a goods station."

Upon these grounds, my Lords, I concur with your Lordships, and I entirely agree in the views which have been already expressed by your Lordships who have preceded me.

The House reversed the decision of the Court of Session, and allowed the appeal with costs, holding that all ordinary trains must stop at the station in question.

Counsel for Appellant—Graham Murray, Q.C.—C. N. Johnston. Agents—Grahames, Currey, & Spens, for Macpherson & Mackay, W.S., and Wilkie, Youden, & Bruce, Leven.

Counsel for Respondents—Lord Advocate (Balfour, Q.C.)—Solicitor-General for Scotland (Asher, Q.C.) Agents—Loch & Co., or James Watson, S.S.C.

Monday, June 26.

(Before the Lord Chancellor (Herschell), and Lords Watson, Morris, and Shand.)

THOMSON AND OTHERS *v.* CLYDESDALE BANK.

(*Ante*, vol. xxviii. p. 610, and 18 R. 751.)

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 (*aff.* judgment of the Second Division) 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.

This case is reported *ante*, vol. xxviii. p. 610, and 18 R. 751.

J. R. Thomson and others appealed.

At delivering judgment—

LORD CHANCELLOR (HERSCHELL) — My Lords, the appellants in this case are the trustees of the late Thomas Dunlop. They held fifty shares in the Commercial Bank of Scotland, which they resolved to sell with a view to another investment. They accordingly in February 1890 instructed Mr D. B. Thomson, a stockbroker in Edinburgh, to sell the shares and to deposit the

proceeds in certain colonial banks in the names of the appellants. The shares were sold by Mr Thomson, and the sum realised was paid in by him to his account with the respondent bank. The transaction was carried out in the ordinary way by Mr Thomson, the dealing being between him and another member of the Stock Exchange who knew him only in the transaction, and accordingly gave in payment for the shares a cheque payable to Mr Thomson or order. This cheque was paid in by Mr Thomson to the Clydesdale Bank. At the time when the cheque was paid in, Mr Thomson's account with the Clydesdale Bank was overdrawn to an amount exceeding the amount so paid. Some few days afterwards Mr Thomson absconded, and application was then, or shortly afterwards, made by the appellants for the payment to them by the Clydesdale Bank of the sum of money which they had so received from Mr Thomson. After the date of the receipt of that cheque some small amounts were drawn upon his account by Mr Thomson, but the amount so drawn was greatly less than the sum paid to his account in the manner which I have described to your Lordships. The question is, whether under these circumstances the appellants are entitled to follow, as it is called, this sum of money and to require its payment to them by the Clydesdale Bank, or whether the Clydesdale Bank are entitled to retain it in discharge *pro tanto* of the debt which was due from Mr Thomson.

It cannot, I think, be questioned that under ordinary circumstances a person, be he banker or other, who takes money from his debtor in discharge of a debt is not bound to inquire into the manner in which the person so paying the debt acquired the money with which he pays it. However, that money may have been acquired by the person making the payment, the person taking that payment is entitled to retain it in discharge of the debt which is due to him. But it is said that in the present case the bankers took with notice that the sum which they received was a sum of money not belonging to their debtor personally, but which he held or had received for other persons, and that having had this knowledge or notice, they are not entitled to retain it in discharge of Mr Thomson's debt. My Lords, I cannot assent to the proposition that even if a person receiving money knows that such money has been received by the person paying it to him on account of other persons, that of itself is sufficient to prevent payment being a good payment and properly discharging the debt due to the person who receives the money. No doubt if the person receiving the money has reason to believe that the payment is being made in fraud of a third person, and that the person making the payment is handing over in discharge of his debt money which he has no right to hand over, then the person taking such payment would not be entitled to retain the money, upon the ordinary principles which I need not dwell upon. But in the present case there appears to me to be an absolute absence of any evidence of that kind. Reliance is entirely placed on behalf of the appellants, upon the answers given by the manager of the bank, which were in these terms—"I made no inquiry as to whether the money paid in to Mr Thomson's account was in his hands as broker or otherwise. I believed that it was in his hands as broker acting for clients. (Q) And that, I suppose, would be your belief generally when he made payments into his account of a large amount?—(A) Yes. (Q) Did you know whether or not Mr Thomson was engaged in a speculative account of his own?—(A) I had not the least knowledge. (Q) For anything you knew the cheques may have been paid in for dealings in which he was principal?—(A) We believed that the cheques were just paid in in the ordinary course of business. (Q) As money belonging to him or at his disposal?—(A) Yes."

Now, that is the whole of the evidence upon which reliance is placed; and it seems to me that, so far from proving the case sought to be set up on behalf of the appellants, it really proves the contrary.

The only point to which I have not alluded, and upon which stress was laid, is this—That in the bank books Mr Thomson is described as a stockbroker; therefore it was said his account would be understood to be one relating to matters in which he was acting for principals, and that this, coupled with the answers to which I have alluded, is sufficient to establish the appellants' case. My Lords, if a stockbroker who was receiving money in respect of transactions for his clients could never properly pay it to his account in discharge of liabilities incurred, there might be something in the case of the appellants; but obviously that is not so. A stockbroker may make advances to his clients in anticipation of sums which he will receive for them. In that case it is perfectly legitimate, he having obtained for that purpose an advance from his bankers, that when he receives the money for his clients he should pay it to his bankers for the purpose of reinstating the account he has overdrawn. Therefore it is clear that there may well be cases in which a stockbroker having overdrawn his account may properly pay money which he has received for his clients into that account. It is obvious that the case of the appellants wholly fails unless they bring home to the respondents much more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that if, because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in, it would be wholly impossible that business could be carried on, and I know of no principle or authority

which establishes such a proposition. I confess, therefore, with all respect for the learned Judge who took a different view in the Court below, that it seems to me to be a very clear case.

For these reasons I move your Lordships that the appeal be dismissed with costs.

LORD WATSON—My Lords, I am of the same opinion with the Lord Chancellor, and for the same reasons.

When a broker or other agent entrusted with the possession and apparent ownership of money, pays it away in the ordinary course of his business for onerous consideration, I regard it as settled law that a transaction which is fraudulent as between the agent and his employer will bind the latter, unless he can shew that the recipient of the money did not transact in good faith with his agent.

In this case a broker employed by the appellants to sell stock and invest the proceeds, sold and received payment of the price by a cheque of the purchasing broker payable to himself. He then passed the cheque to the credit of his current account with the respondent bank, which at the time was largely overdrawn. The course thus followed was a usual one, and in strict accordance with the practice of the Edinburgh Stock Exchange. The payment to the bank was onerous in so far as concerned the respondents, because, whenever made, it operated in law as a discharge by them *pro tanto* of the broker's liability for the debit balance on his account; and several drafts were made by him and honoured before his dishonesty became known.

The broker knew that he was insolvent, and that he was using his customers' money to pay his own debt to the bank without any reasonable expectation of his being able to replace it. That was an undoubted fraud upon the appellants; but, in my opinion, the brokers fraud is of no relevancy in this case unless it is coupled with bad faith on the part of the respondents. The onus of proving that they acted in *mala fide* rests with the appellants. It is not enough for them to prove that the respondents acted negligently; in order to succeed they must establish that the respondents knew, not only that the money represented by the cheque did not belong to the broker, but that he had no authority from the true owner to pay it into his bank account.

The appellants have in my opinion failed to prove either of these cardinal facts. I do not think it necessary to examine the evidence, and shall content myself with a reference to the note of the Lord Ordinary, which deals with the facts of the case and the law applicable to them to my entire satisfaction.

LORD MORRIS—My Lords, I concur.

LORD SHAND—I am of the same opinion. It seems to be clear that the broker employed by the appellants acted not only in violation of his duty and obligation as their agent, but also fraudulently. He had special instructions from the appellants to invest the price to be received for the bank shares sold, but in place of doing so, he paid the amount received to the respondents in the reduction of the balance then due by him to them on his account. Such a payment might have been made in the hope, and with the intention of afterwards drawing the amount for the purpose of investing it as directed. The broker's conduct and the pecuniary circumstances in which he was placed, lead, however, to the inference that he had no such hope or intention, but seem to support the conclusion that he fraudulently applied the money to the payment of his own debt in order to gain time to make arrangements for absconding, as he did a few days afterwards.

But the breach of obligation or fraud of the broker alone cannot entitle the appellants to recover from the respondents the amount of the payment made to them. The appellants entrusted the broker with the money to be employed as they had directed. It is proved, and it is indeed well known, that a broker, according to the ordinary practice, receives as payment of the price of shares sold the cheque of the buying broker, and in the first instance places the amount to the credit of his own bank account. Thereafter he gives a cheque on his own bank account to his employers for the amount received, less his charges; or he gives his cheques to others if, as in this case, he has directions to make reinvestments. In this way the broker has the possession of the money, and the power of disposal which possession gives, and it is in accordance with the usual practice that the money should be mixed with and form part of his general funds. He has thus the opportunity, and may take advantage of this, to misapply and to appropriate to his own use the money entrusted to him by a customer; and the principal's only remedy lies against his agent whom he has so trusted.

Where questions arise with third parties into whose hands the money can be traced, as in this instance, liability against them for recovery of the sum misapplied arises only where it can be shown directly, or as the reasonable inference from facts proved, that these parties were cognisant that the money was being wrongfully used, in violation of the agent's duty and obligation.

Accordingly it was not maintained in the argument in the present case that if the agent had employed the money in question, or a large part of it, in the payment of debts due by him to the different tradesmen with whom he might have dealt, in ignorance on their part of any violation of his obligation to employ the funds otherwise, the appellants would have had any claim excepting against the agent himself. Indeed, although a different view was at first maintained, it seemed to be conceded before the close of the argument that the same principle must apply to the ordinary case of bankers with whom stockbrokers deal, and with whom they keep their bank accounts; and the argument for the appellants was rested entirely

on the special circumstances said to exist in this case.

However this may be, I am of opinion that the same principle which applies to third parties generally is equally applicable to the case of dealings between stockbrokers and their bankers, and that the only circumstances in which money misapplied by a broker in payment to the banker of a debt due to him can be recovered from the banker by the principal to whom the money belonged, is where it can be shown directly, or by inference from the facts proved, that the banker or his representative in the transaction knew that the money was being misapplied. It has been shown in the present case, and indeed is notorious, that a stockbroker is often in advance for his customers, and that on settlement days and at other times he may require temporary advances, which will in due course be repaid shortly afterwards, when the broker receives payment of the prices of stocks sold and delivered by him. Accordingly the knowledge of the banker that money paid in by which a broker reduces or extinguishes an overdraft on his account consists of the prices received for customers' stocks delivered, or of the price of stock belonging to a particular customer, is nothing more than knowledge of what is constantly occurring in the ordinary course of business. The broker may or may not owe the price to his principal. In the general case he does, but in others he may have already advanced the amount; or his principal and he may have had other stock transactions which leave a balance in the broker's favour; or the arrangement between the parties may be that the broker is to retain the fund for an interval of more or less time for the purpose of reinvestment or otherwise. It would be impossible that such business could be carried on if it were held to be obligatory on a banker, in order to save himself from the consequences of a possible breach of duty or obligation, or of the fraud of an agent to his principal, that the banker should examine into the particulars of the various transactions resulting in the payments by brokers or agents to the credit of their accounts on each occasion on which such payments are made; and that the only rule that can be applied in practice, and which, as I think, rests on sound principle, is that liability for repayment of funds which can be traced or followed into the banker's hands, and which have been applied in payment of the agent's debt, shall arise only where it can be shown that there was knowledge on the banker's part not merely that the fund was received from the broker's principal, but knowledge also that the payment was a misapplication of the fund, made in violation of the agent's duty and obligation.

With regard to the specialties which are founded on in this case, as distinguishing it from the general case, it appears to me, after full consideration of the argument of the appellants, that the case fails. The only specialty, I think, that was latterly founded on was that the overdrawn account was said to have got into what is called a "chronic condition"—that is to say, that for a considerable length of time the balance had been steadily against the broker. I do not know that, however much that might be so, it would make any difference in the result of the case; but on looking over the broker's account, which we have before us for fifteen months from the 2nd of January 1889, I find that, consisting as it does of about twelve pages of closely-printed matter, there is a constant and fluctuating balance throughout almost the whole period. At one time the balance was a good deal against the broker, at other times it was somewhat in his favour; but so recently as the 15th of March, the transaction in question having occurred on the 19th of March, I find that the total amount to the broker's debit was the sum of £1285. I can see nothing suspicious in the state of the broker's account, and nothing to indicate to the bankers that funds to be now paid in to wipe out the balance, in whole or in part, was being obtained by any violation of duty or fraud; and I agree with the Lord Chancellor in thinking that there is no evidence whatever here of facts which put the bankers on inquiry, or which can be founded on as showing that they must have believed or known that this was a misapplication of funds.

A number of authorities were referred to in the case. The only one which has not been dealt with in the Court below, I think, is the case of *The London Joint-Stock Bank* v. *Simmons*, 1892, A. C. 201. That case related to negotiable securities, while the present relates to money entrusted to the broker. The decision and dicta of your Lordships in that case are both strongly adverse to the appellants' claim. As to the other authorities, and as to the facts of the case, I agree with my noble and learned friend opposite (Lord Watson) in thinking that they are most satisfactorily dealt with in the short and able judgment of Lord Kyllachy.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

Counsel for the Appellants—The Lord Advocate (Balfour, Q.C.) — Finlay, Q.C. Agents—Gadsden & Treherne, for Mackenzie & Black, W.S.

Counsel for the Respondents—Sir Horace Davey, Q.C. — Ure. Agents — Murray, Hutchins, Stirling, & Murray, for Morton, Smart, & Macdonald, W.S.