investigation of the facts, and resulted in the institution of this action some years before 1903. It is true that the respondents did not ask for more than one-third; but they had been informed by the Trust Company that this was all to which they were entitled, and the Trust Company cannot complain that the respondents accepted and acted on that statement. They did not discover the error till long afterwards. There is no evidence that they in any way misled the Trust Company; on the contrary, the Trust Company misled them. The third point raised on the appellants' behalf was that, even if there was a breach of trust, they should be relieved therefrom by virtue of section 3 of the Trusts Act 1901, which corresponds with section 3 of the English Act, 59 and 60 Vict. c. 35. That section is as follows:—"If it appears to the Supreme Court that a trustee is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve the trustee either wholly or partly from personal liability for the same." The Courts in the Colony have found that the appellants acted honestly and reasonably, and their Lordships are prepared to deal with the case upon that footing. Mr Terrell contended that these two things being established, the right to relief followed as a matter of course; but that is clearly not the construction of the Act. Unless both are proved the Court cannot help the trustees; but if both are made out, there is then a case for the Court to consider whether the trustee ought fairly to be excused for the breach looking at all the circumstances. It is a very material circumstance that the appellants are a limited joint stock company formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorises them to retain out of trust funds administered by them in addition to their costs. What they now ask the Court to do is to allow them to retain a sum of money to which the respondents' title is clear, in order thereby to relieve the Trust Company from a loss which they have incurred in the course of their business by reason of their having paid a like sum to wrong parties. The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee. And without saying that the remedial provisions of the section should never be applied to a trustee in the position of the appellants their Lordships think that it is a circumstance to be taken into account, and they do not find here any fair excuse for the breach of trust, or any reason why the respondents who have committed no fault, should lose their money to relieve the appellants who have done a wrong and have denied the respondents' title. And that is not quite all. If trustees do unfortunately lose part of a trust fund by a breach of trust, the least that can be expected of them is that they should use their best endeavours to recover the fund, or so much thereof as is practicable, for their *cestui que* trusts. In the present case there seems to be some ground for thinking that other proceedings were open to the Trust Company by which any loss to them might have been averted, at any rate to some extent; but it does not appear that the Trust Company have taken any such steps, or made any attempt whatever to replace the fund or relieve the respondents from loss; nor have they condescended to give the Court any explanation or reason why they have abstained from doing so. It may be that the solicitors would be willing or might be compelled to make good the loss if the Trust Company should find they cannot obtain relief elsewhere. The Courts in the Colony held that under these circumstances the appellants had not made out any case for relief under the Act; and their Lordships agree with them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs.

Their Lordships dismissed the appeal.

Counsel for the Appellants—H. Terrell, K.C.—Vaughan Hawkins. Agent—George M. Light, Solicitor.

Counsel for the Respondents—Warmington, K.C.—A. H. Jessel. Agents—Hicks, Arnold, & Mozley, Solicitors.

HOUSE OF LORDS.

Monday, July 3.

(Before the Lord Chancellor (Halsbury), Lords Davey and Robertson.)

CORPORATION OF SHEFFIELD *v.* BARCLAY AND OTHERS.

(On Appeal from the Court of Appeal in England.)

Company — Indemnity — Forged Transfer of Stock—Innocent Presentment for Registration—Implied Contract to Indemnify.

Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another, and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making

the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request.

A and B were the joint and registered owners of a certain corporation stock. A, in fraud of B, forged a transfer in favour of C & Co., a firm of bankers, who advanced him money on the security of the stock. C & Co. forwarded the transfer to the corporation with a request that the stock should be registered and a new certificate issued in C's name. This was done and C transferred the stock to D for value. C & Co. and D and the corporation, all of them, acted in good faith in ignorance of A's fraud, and without negligence. B, upon discovering the fraud, brought an action against the corporation and recovered from them the value of his interest in the stock.

Held, in an action by the corporation against C & Co., that the latter were bound to indemnify the former. Judgment of the Court of Appeal *reversed*.

This was an appeal from a judgment of the Court of Appeal (WILLIAMS, ROMER, and STIRLING, L.JJ.) reversing a judgment of LORD ALVERSTONE, C.J.

The facts of the case are sufficiently indicated in their Lordships' opinions.

At delivering judgment—

LORD CHANCELLOR (HALSBURY)—In this case two persons, Timbrell and Honnywill, were joint owners of corporation stock created under a local Act of Parliament. Timbrell, in fraud of Honnywill, forged a transfer of the stock and borrowed money on the security of the stock which the transfer was supposed to have transferred. A bank which lent the money sent the transfer to the proper officer of the corporation and demanded, as they were entitled to do if the transfer was a genuine one, that they should be registered as holders of the stock. The corporation acted upon their demand; they transferred the stock into the names of the bank, and the bank in ordinary course transferred it to holders for value. The corporation also in ordinary course issued certificates, and the holders of these certificates were able to establish their title against the corporation, who were estopped from denying that those whom they had registered were the stockholders entitled. Honnywill after the death of Timbrell discovered the forgery that had been committed and compelled the corporation to restore the stock, and the question in the cause is whether the corporation has any remedy against the bank who caused them to act upon a forged transfer, and so render themselves liable to the considerable loss which they have sustained. Now, apart from any decision upon the question (it being taken for granted that all the parties were honest), I should have thought that the bank were clearly liable. They have a private bargain with a customer. Upon his assurance they take a document from him as a security for a loan, which they assume to be genuine. I do not suggest that there was any negligence—perhaps business could not go on if people were suspecting forgery in every transaction—but their position was obviously very different from that of the corporation. The corporation is simply ministerial in registering a valid transfer and issuing fresh certificates. They cannot refuse to register, and though for their own sake they will not and ought not to register or to issue certificates to a person who is not really the holder of the stock, yet they have no machinery, and they cannot inquire into the transaction out of which the transfer arises. The bank, on the other hand, is at liberty to lend their money or not. They can make any amount of inquiries if they like. If they find that an intending borrower has a co-trustee, they ask him or the co-trustee himself whether the co-trustee is a party to the loan, and a simple question to the co-trustee would have prevented the fraud. They take the risk of the transaction and lend the money. The security given happens to be in a form that requires registration to make it available, and the bank "demand," as if genuine transfers are brought they are entitled to do, that the stock shall be registered in their name or that of their nominees, and they are also entitled to have fresh certificates issued to themselves or nominees. This was done, and the corporation by action on this "demand" have incurred a considerable loss. As I have said, I think that if it were *res integra* I should think that the bank were liable; but I do not think that it is *res integra*, but it is covered by authority. In *Dugdale* v. *Lovering* (32 L.T. Rep. 155, L. Rep. 10 C.P. 196) Mr Cave, arguing for the plaintiff, put the proposition thus—"It is a general principle of law when an act is done by one person at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done." This, though only the argument of counsel, was adopted and acted upon by the Court, and I believe that it accurately expresses the law. Qualifications have been constantly introduced into the discussion which I think have led to some confusion; they are not really qualifications of the principle here enunciated at all, but the expression of principles which would render the application of the principle in question erroneous. One is that there is no right of contribution between tortfeasors, and the other is to distinguish the right insisted upon from the ordinary remedy in damages against a person who has caused injury by intentional falsehood. Neither of these questions has any relation to what is here in debate. The principle insisted upon by Mr Cave in his argument

quoted above has been undoubtedly sanctioned as part of the law by several old decisions, and I think that the principle as enunciated is well established. With respect to the case of the sheriff quoted in the Court of Appeal (*Collins* v. *Evans*, 5 Q.B. 820) I think that it has been overlooked that the sheriff was executing a genuine writ, and the information he received was given to him to aid him in the execution of the office, which by law he was bound to execute, and the information (for it was no more) was given to him in good faith; but can anyone suppose that if anyone brought a forged writ and called upon the sheriff to execute it, such person would not be liable to indemnify the sheriff? I cannot think that there would be any doubt on that subject, but the genuineness or otherwise of the document to which the corporation were called upon to give effect made the whole difference, and I think that both upon principle and authority the corporation are entitled to recover, and I move your Lordships accordingly.

Lord Davey — The appellants are suing the respondents upon an implied contract to indemnify them against the liability which has been incurred by them in these circumstances. On the 11th April 1893 the respondents, Barclay & Company, Limited, forwarded to the appellants a transfer of Sheffield Corporation stock purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favour of the respondent Barclay, with a request to the appellants to register the name of the last named respondent, and forward new certificates in due course. The appellants acted upon this request, and granted a new certificate to the respondent Barclay, who afterwards transferred the stock for value to third parties. The names of Barclay's transferees were registered in due course, and it is admitted that they obtained a good title against the appellants. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but in fact Honnywill's signature had been forged by Timbrell. It was not, however, until 1899, after Timbrell's death, that Honnywill discovered the fraud, and he thereupon brought an action against the present appellants for rectification of the register and other relief, and recovered judgment against the appellants, under which they have incurred a large liability. On these facts the Lord Chief-Justice, who tried the action, has held that the appellants are entitled to be indemnified by the respondents against the liability which they have incurred, but his judgment has been reversed by the Court of Appeal. Before referring to the numerous authorities which have been cited, I will first state the grounds upon which I have come to the conclusion that the Lord Chief-Justice was right and that his judgment should be restored. Not much turns upon the particular provisions in the corporation's private Act of 1883 as to the transfer of their debenture stock or the keeping of the register or the issue of certificates of title. They for the most part follow the lines of the similar provisions in the Companies Clauses Act. I think that the appellants have a statutory duty to register all valid transfers, and on the demand of the transferee to issue to him a fresh certificate of title to the stock comprised therein. But of course it is a breach of their duty and a wrong to the existing holders of stock for the appellants to remove their names and register the stock in the name of the supposed transferee if the latter has in fact no title to require the appellants to do so. And it makes no difference that the appellants were not aware of the invalidity of the transfer or could not with reasonable diligence have discovered it. I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use), and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request. I think that this is the broad principle to be deduced from such cases as *Humphrys* v. *Pratt*, 5 Bli. N.S. 154; *Betts* v. *Gibbins*, 2 Ad. & E. 57; *Toplis* v. *Grane*, 5 Bing. N.C. 636, and the other cases which have been cited. In *Humphrys* v. *Pratt* the reasons for the judgment in this House are unfortunately not stated in the report, but in commenting on that case in *Collins* v. *Evans*, 5 Q.B. 820, Tindal, C.J., says:— "The declaration states that the judgment creditor pointed out the goods, and required the sheriff to take them. He made the sheriff his mandatory or agent for the purpose of taking the goods, and if the sheriff, acting innocently in obedience to that command, commits a trespass, there is no doubt but he, as any other individual in that position, whether sheriff or not, may recover over against his master or principal the damages he has been obliged to pay in consequence of obeying such directions." In *Toplis* v. *Grane* the same Judge, after referring to the evidence in the case, says— "We think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins*, that where an act has been done by the plaintiff under the express directions of the defendant which occasions an injury to third parties, yet, if such act is not apparently illegal in itself, but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences

thereof." In *Collins* v. *Evans*, on the other hand, the sheriff was entrusted with the execution of a writ of *ca. sa.* against one John Wright, and the defendant pointed out to him a person of the same name as the person liable, and the sheriff acted on the representation and incurred liability. It was held that the defendant was not liable to indemnify the sheriff, because he had merely made an innocent representation to the sheriff, but had not required the sheriff to act upon such representation, and had left him to his own discretion whether he would act upon it or not. It has been said that the principle of these decisions only applies to cases between principal and agent and employer and employee, and the language of Tindal, C.J., in his comment on *Humphrys* v. *Pratt*, gives some colour to that suggestion. I am not, however, of that opinion, and the contrary was decided in *Dugdale* v. *Lovering* (*ubi sup.*). It may be that the language of Tindal, C.J., was not so felicitous as it usually was; but his meaning is plain that the liability to indemnify the sheriff arose from his having acted in supposed execution of his duty at the request and by the direction of the creditor. In some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity, but in cases like the one now before your Lordships, when a person is requested to exercise a statutory duty for the benefit of the person making the request, I think that the contract ought to be implied. It matters not to the corporation whether A or B is the holder of stock, but to the purchaser who has paid his purchase-money, or the banker who has lent money on the security of the stock, it is of vital interest. The Court of Appeal distinguished the sheriff's cases on the ground that the request was to execute his duty in a particular manner. In the cases in question that was so. But I think that the argument *hæret in cortice*, and is neither logical nor maintainable. It is difficult to imagine a case where a person should innocently request the sheriff to execute a writ which though apparently regular is in fact fictitious or invalid. If such a case be possible, it would come within the exact words of Tindal, C.J., and I entertain no doubt that the person presenting the writ would be held liable to indemnify the sheriff. It does not seem to matter at what stage of the transaction the request to do an act which turns out to be outside the officer's duty is made. In the present case, as pointed out by Mr Bankes, the appellants ran no real risk until they issued the new certificate on the demand of the respondents. The judgment of the learned Judges in the Court of Appeal seems to be based mainly on three grounds —(1) the decision of Lindley, J., in *Anglo-American Telegraph Company* v. *Spurling* (5 Q. B. Div. 188); (2) that there was no consideration for the alleged contract of indemnity; (3) that the contract, if any, to be implied from the circumstances was a warranty of their title by the transferees and not a contract of indemnity. The cases of *Sim* v. *Anglo-American Telegraph Company* (*ubi sup.*) and *Anglo-American Telegraph Company* v. *Spurling* (*ubi sup.*) were an action and cross-action which arose out of a forged transfer of some of the company's stock, and were heard together. The first action was by the persons claiming under the forged transfer against the company for damages for wrongful removal of their names from the register on discovery of the fraud, and the cross-action was by the company against the persons who had brought in the forged transfer for registration for an indemnity. The learned Judge decided the first action in favour of the plaintiffs. He also decided the cross-action against the company. With regard to the transferor, he said—"Supposing that he knows nothing wrong about it, are the company entitled to say to him, 'We assume from the fact that you bring this transfer to us that it is a genuine document'? I apprehend that they are not entitled to say so to him. They are only entitled to say to him, 'We assume that you come honestly to us and that you do not know that anything is amiss with regard to the transaction.'" The learned Judge then stated his views as to the duties of the company as follows:—"It appears to me that a duty is thrown on the company to look to their own register, which involves, of course, the looking after transfers of stock or shares standing in the names of persons on the register, and that duty the company owe to those who come with transfers, and I do not see any corresponding or conflicting duty on the part of the person who brings the transfer, except, of course, that of bringing what he believes to be an honest document. I think that the true view is this, that there being no negligence on the score of want of care on either side, but there being a duty on the part of the company to keep the register correct and themselves to look after the transfers between innocent parties, the loss must fall on the company." There was an appeal in both cases and the decision in the first action was reversed, but counsel for the Telegraph Company did not proceed with the appeal in the cross-action, because if they succeeded in the first appeal the Telegraph Company had not suffered any damage. I am of opinion that the case of *Anglo-American Telegraph Company* v. *Spurling* was also wrongly decided by Lindley, J., and I respectfully dissent from both the propositions laid down by him and adopted by the Court of Appeal in the present case. I dissent from the proposition that a person who brings a transfer to the registering authority and requests him to register it makes no representation that it is a genuine document, and I am disposed to think (though it is not necessary to decide it in the present case) that he not only affirms that it is genuine but warrants that it is so. I think that this is the result of the decision in *Oliver* v. *Bank of England* (86 L.T. Rep. 248 (1902) 1 Ch. 610), affirmed in this House under the name of *Starkey* v. *Bank of England* (88 L.T. Rep. 244, (1903) A.C. 114). It may be argued with some

force that for this purpose no solid distinction can be made between the power of attorney through which the transfer of consols is effected and the deed of transfer in the present case. Each of these instruments, it may be said, is put forward as evidence of the authority with which the person making the application professes to be clothed to request the removal of the stockholder's name and the substitution of another name in his place. But however this may be, it is enough for decision of this appeal to say that the deed of transfer was put forward as a genuine document, and the appellants were invited to act upon it as such. I am also of opinion that the authority keeping a stock register has no duty of keeping the register correct, which they owe to those who come with transfers. Their only duty (if that be the proper expression) is one which they owe to the stockholders who are on the register. This point was decided by all the learned Judges who took part in the decision of the first case of *Sim* v. *Anglo-American Telegraph Company* (*ubi sup.*). I will content myself with quoting the language of Cotton, L.J.— "The duty of the company is not to accept a forged transfer, and no duty to make inquiries exists towards the person bringing the transfer. It is merely an obligation upon the company to take care that they do not get into difficulties in consequence of their accepting a forged transfer, and it may be said to be an obligation towards the stockholder not to take the stock out of his name unless he has executed a transfer; but it is only a duty in this sense, that unless the company act upon a genuine transfer they may be liable to the real stockholder." True it is that the appellants, following what is now the usual practice, gave notice of the transfer which had been brought in to the persons named as transferors, but they had no duty to do so, and it was done merely for their own protection. Experience in these cases shows, however, that it is a very poor protection. Stirling, L.J., held in this case that the mere performance of a duty imposed by law upon anyone holding a definite legal position does not constitute a consideration sufficient to support a promise to him by the person to whom the duty is owed. But, with great respect to that very careful Judge, he overlooked that this very point was involved in the decision in the case of *Oliver* v. *Bank of England*. Vaughan Williams, L.J., quoted and commented upon the passage from the judgment of Willes, J., in *Collins* v. *Evans* (*ubi sup.*) where he says—"The fact of entering into the transaction with the professed agent as such is good consideration for the promise." And it did not occur either to the learned counsel who argued the case with great pertinacity or to any of the learned Judges in the Court of Appeal or the noble Lords in this House to question that the acting by the Bank of England on the demand of the supposed attorney was not a good consideration for the promise by him to warrant the genuineness of the power which they held to be established. Lastly, it was said by Romer, L.J., that this is not an action on a warranty, and that a warranty and a contract of indemnity are distinct, one important difference being the period from which the statute of limitations would run. That, of course, is so, and the appellants admit that if they were suing on the warranty their action would be out of time. But I can see no legal reason why, in circumstances like those of the present case, it should not be held, if necessary, that the true contract to be implied from those circumstances is not only a warranty of the title but also an agreement to keep the person in the position of the appellants indemnified against any loss resulting to them from the transaction. And I think that justice requires that we should so hold. I agree with the Lord Chief-Justice that as between these two innocent parties the loss should be borne by the respondents, who caused the appellants to act upon an instrument which turned out to be invalid. I am therefore of opinion that the appeal should be allowed and the judgment of the Lord Chief-Justice restored with costs here and below.

LORD ROBERTSON concurred.

Judgment appealed from reversed.

Counsel for the Appellants—Danckwerts, K.C.—Eldon Bankes, K.C.—Waddy. Agents —R. F. & C. L. Smith, Solicitors.

Counsel for the Respondents—Haldane, K.C. —Radcliffe, K.C. Agents — Maples, Teesdale & Co., Solicitors.

HOUSE OF LORDS.

Monday, July 24.

(Before the Lord Chancellor (Halsbury), Lords Macnaghten, James of Hereford, and Lindley.)

MAYOR AND CORPORATION OF WESTMINSTER *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Local Government—Public Health—Sanitary Authority—Statutory Power—Ultra Vires—Bona Fides—Power to Make Subterranean Lavatory — Lavatory Constructed Incidentally Forming a Subway —Rules which should Govern Public Bodies in their Exercise of Statutory Powers.

An Act of Parliament conferred upon a sanitary authority power to construct lavatories under its streets, but conferred no power to make subways.

Held that in constructing an underground lavatory with access from both sides of a street, which constituted and was in fact used as a subway, the sanitary authority had not acted *ultra*