The power here directed to be given is a peculiar one and does not seem very well conceived. Probably, as was suggested in the course of the discussion, it was intended to relate to the real burdens on the lands which the settlement prescribed. The peculiarity attending the conception of the power does not however displace the inference to be derived for the present purpose from the language used by the testator in speaking as he does "of my wife and the institute and heirs-substitute foresaid under the said disposition *successively*." There is here a plain announcement of the testator's view that the "institute" to the fee is not to be the second party as she contends, but some other person who under the destination possesses after her. Mr Chree, for the second party, acknowledged that the language of this clause occasioned some difficulty in his argument. I think it presents a very real difficulty, to which I do not see a satisfactory answer. For I confess I am not impressed with the answer offered for the second party, to wit, that the testator must be regarded as having only scrupulously followed the conveyancing formula of *Frog* already adopted by him *ex hypothesi* in the destination, where *ex figura verborum* the heirs-male of the body of the second party are instituted. I cannot see that the arbitrary decision in *Frog* compels one to adopt this, as I think, strained construction of such a collateral expression of the testator's intention in his settlement which finds no analogue in the feudal disposition in *Frog's* case. Moreover, as I have already pointed out, the testator's use of the word "institute" is not confined to this part of his settlement, but freely occurs in the earlier part applicable to the destination of his landed estates to his own issue should he leave any, where *Frog* has no bearing, and where the word plainly means the person actualy first taking, or entitled actually first to take, the fee of the lands under the destination. And it would, I think, be unreasonable to suppose that he used the word in any different sense in the later part of the deed here under construction.

Taking together the several *indicia* of the testator's intention to be found in the context of the settlement as above adverted to, I am of opinion that these are sufficient to yield a reasonable presumption—or to carry to the mind a reasonable conviction—that the testator in destining the landed estates to the second party in liferent did not intend to confer on her a full fee therein but a liferent only coupled with a fiduciary fee.

A separate line of argument was presented for the third party to the effect that the rule of *Frog* has no application to conveyances or destinations flowing from one spouse to another, the authority chiefly relied on being the case of *MacKellar* v. *Marquis*—1840, 3 D. 172. While there are obvious considerations adverse to the application of the rule in the case of most matrimonial settlements or deeds whereby heritage is settled on the children of a marriage in fee, it does not seem clear that these have the same force in the case of a *mortis causa* grant such as the present conceived in favour of a surviving spouse in liferent and his or her issue born of a future marriage in fee. In the view I take, however, of the meaning of the settlement here under construction it is unnecessary to come to a decision on this general topic, and I prefer to reserve my opinion regarding it.

I am of opinion that the first question in the case should be answered in the negative and the second in the affirmative.

The Court answered the first question of law in the negative and the second question of law in the affirmative.

Counsel for the First Party—Monteith. Agents—John C. Brodie & Sons, W.S.

Counsel for the Second Party—Chree, K.C. —D. P. Fleming. Agents—John C. Brodie & Sons, W.S.

Counsel for Third Party—Dean of Faculty (Constable, K.C.)—Skelton. Agents—Alex. Morison & Company, W.S.

Saturday, June 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BANK OF SCOTLAND *v.* CRERAR.

Bank—Loan—Right in Security—"Secured Loan Account"—Transfer to Bank of (a) Specific Shares, and (b) Part of an Aggregate of Unspecified Shares—Right of Bank on Repayment of Loan to Tender Shares of Same Denomination in Lieu of Specific Shares Transferred — Acquiescence in System Followed by Bank—Bar.

A customer of a bank on various occasions bought through her stockbrokers ordinary shares in an industrial company, which she paid for with money advanced by the bank on a "secured loan account." Of the total shares thus purchased much the smaller proportion consisted of specific shares distinguished by numbers, of which the borrower executed a formal transfer in favour of the bank's nominees in security of the advance. The remainder consisted of various *quantities* of unspecified shares which were not distinguished by numbers, but which formed part of the total aggregate of ordinary shares of the company held by the bank, and vested in its nominees, on account of all its customers who had transferred shares of that particular denomination in security of advances. In an action of accounting at the instance of the borrower against the bank, in which the pursuer claimed that the bank must account to her for its intromissions with each specific share, and also with the "quantities" of unspecified shares transferred on her behalf, the evidence showed that the pursuer's loan account was opened on a delivery letter by her brokers transferring to her a certain *quantity* of shares, which she endorsed with a

request that the within-mentioned shares should be held by the bank on her account; that many similar delivery letters were subsequently endorsed by her; that by endorsing each of them she accepted a *quantity* of shares without specification, and used that quantity as security for her account; that when she asked for release and return of any of her shares she accepted shares bearing different numbers from those of the shares transferred; and that in the bank book which she asked the bank to make up for her from time to time, showing what shares of hers they had in hand, no record was kept of anything but quantities. *Held* that the pursuer must, in the circumstances stated, be held to have agreed to all the terms and conditions of the system followed by the bank, of which it was an implied term that the right to the individual security might be converted into a right to a corresponding amount of shares of the same denomination; and that she was therefore barred from insisting in her demand.

Opinions per the Lord President, Lord Skerrington, and Lord Cullen, that in the absence of express or implied agreement to the contrary it was the duty of a lender who had received specific shares in security of advances to retain and re-transfer the identical shares to the borrower upon repayment of the loan.

Miss Isabella Arrol Crerar, 21 Newlands Park, Glasgow, *pursuer*, presented a petition in the Sheriff Court at Glasgow against the Governor and Company of the Bank of Scotland, *defenders*, in which she craved the Court "to ordain the defenders to produce before the Court a full and particular account of their intromissions with 2775 or thereby ordinary shares of Messrs J. & P. Coats, Limited, transferred by the pursuer to the defenders in security of advances made by them to the pursuer; and to grant decree against the defenders for payment to the pursuer of such sum as may be found to be the true balance due to the pursuer by the defenders in respect of their said intromissions; . . . or in the event of the defenders failing to produce an account as aforesaid to grant a decree against them for payment to the pursuer of the sum of £25,000 sterling, which sum shall in that event be held to be the balance due by the defenders to the pursuer in respect of their said intromissions . . . "

The pursuer was in June 1907, and had since been, a customer at the Miller Street Glasgow branch of the defenders' company. On various dates subsequent to 1st June 1907 the pursuer obtained certain advances from the defenders through their said branch, and in security of these advances the pursuer transferred to the defenders or their nominees 2775 ordinary shares or thereby of J. & P. Coats, Limited, as hereinafter stated.

The pursuer averred—"(Cond. 7) The said shares were transferred by the pursuer to the defenders by way of pledge and in security of advances made by them to her, and it was the duty of the defenders to retain the same and re-transfer them to the pursuer on receiving repayment of said advances. At the outset of the pursuer's said transactions with the defenders, Mr Wilson, the agent in the defenders' said Miller Street branch, represented that any shares so transferred would be held and retained by the defenders as security against their advances to her; and on more than one occasion thereafter the said Mr Wilson, and Mr Beveridge, his successor as agent in the said branch, repeated this representation to the pursuer, and until recently (as after mentioned) the pursuer understood that the defenders were in possession of the said shares and were in a position to re-transfer them to her when the said advances were paid off. With reference to the defenders' averments in answer, admitted that 430 shares were transferred by the defenders on the pursuer's instructions. *Quoad ultra* the defenders' averments in answer so far as not coinciding herewith are denied. (*Ans.* 7) Admitted that said 2775 shares were transferred by the pursuer or others on her behalf to defenders' nominees in security of advances made by them to her. *Quoad ultra* denied. Explained and averred that the transfer of said 2775 shares was in itself warrant to defenders to sell them as and when they thought fit to effect repayment of said advances; that since the transfer of said 2775 shares to them defenders' nominees have throughout held that number of shares for pursuer in security as aforesaid, under deduction of 430 shares transferred on four occasions on pursuer's written instructions. . . . (Cond. 8) In or about the year 1916 the defenders called on the pursuer to make payment of the amount of their said advances. The pursuer called at the defenders' head office in Glasgow in connection with the matter and for the first time then learned that the defenders had sold the whole of said shares and were no longer in possession of any of them. The pursuer believes and avers that the whole of said shares (with the exception of 430 shares re-transferred to the pursuer or her nominees) were sold by the defenders when the same were standing at a high figure in the market, and large sums were received by the defenders in respect of the said sales. The said sales were made by the defenders without the knowledge or authority of the pursuer. (*Ans.* 8) Admitted that in or about the year 1916 defenders called on pursuer to make payment of the amount of their advances. *Quoad ultra* denied. Reference is made to answer 7 and to defenders statement of facts. (Cond. 9) The pursuer has called upon the defenders to account to her for their intromissions with the said shares and to make payment of all sums, including all profits, received by them in respect of the said sales, but the defenders have refused to do so. The pursuer is ready and willing on receiving an accounting to make payment of any sum which may be found to be due by her to the defenders in respect of their advances, but she believes and avers that on an accounting it will be

found that the amount due to her by the defenders greatly exceeds the amount of the pursuer's indebtedness to the defenders. . . (*Ans.* 9) Admitted that pursuer has called on defenders to account to her for their intromissions with said shares. *Quoad ultra* denied. Reference is made to answer 7 and to defenders' statement of facts."

The statement of facts lodged by the defenders set forth, *inter alia*, as follows:—"(Stat. 1) In carrying on their business as bankers numerous transfers of stocks and shares are constantly being granted by various customers and persons on their behalf in favour of the Bank's nominees, who are thereupon registered as members of the respective companies whose stocks and shares are so transferred in order that such stocks or shares may be held by the Bank in security of loans made and to be made, and similarly re-transfers are constantly being made by the Bank's nominees to such customers or others on their behalf. (Stat. 2) Quite a number of such transfers of a particular denomination of stocks or shares in favour of the Bank's nominees may be received about the same time, particularly in the case of such a security as the ordinary shares of Messrs J. & P. Coats, Limited, in which there is a very free market, and in dealing with all kinds of companies, many of whom will not recognise trusts in any way, it would be impracticable to earmark or get separate stock or share certificates for each separate holding transferred to said nominees. Consequently it is the regular and recognised practice and custom in the banking trade that the various certificates in name of said nominees relating to a particular denomination of stock or shares which are exactly identical in value, rights, privileges, and other respects, do not in any way represent the holdings transferred by different customers except in the aggregate; that shares are treated and regarded in exactly the same way as stock; that no note or record is kept, nor any attention paid to the specific numbers allocated by a company for its own administrative purposes to each individual share; that such numbers are never entered in the written acknowledgments given to customers in respect of shares transferred to the Bank's nominees; and that when the nominees of the Bank have to transfer stock or shares on the instructions of their clients, or when they have to realise stock or shares to pay off loans made to clients, they transfer or sell and transfer the appropriate amount of stock or number of shares, but they do not have any regard to whether the number of the stock certificate or the number of the share certificate or the numbers of the individual shares they are dealing with are the same as formed or comprised the particular customer's original holding. Further, it is the regular and recognised banking practice and custom that when a stockbroker or other customer of the Bank who owns a number of shares registered in the names of the Bank's nominees desires to transfer them or some of them on a sale or for some other reason to another stockbroker or customer of the Bank, who also desires them to be registered in the names of the Bank's nominees, this is accomplished by the stockbroker or other customer of the Bank who desires to transfer sending to the Bank a letter of delivery requesting them to hold the requisite number of shares to the order of the acquiring stockbroker or other customer, and the Bank thereupon if so requested by the acquiring stockbroker or other customer gives to him a letter of holding which states that the Bank holds the number of shares thus transferred to his order. Neither in the letter of delivery nor in the letter of holding is it the custom or practice to give the specific numbers of the shares dealt with. The letter of holding is frequently not asked for or given. . . . (Stat. 3) This banking custom and practice which facilitates business and does not result in hardship or loss to anyone is recognised and acted on daily. It was known to pursuer and to her agents after mentioned, and it has been accepted and acted on by pursuer herself and by her said agents as after mentioned. (Stat. 4) In accordance with said general banking practice and custom, when pursuer transferred to defenders' nominees in different lots and at different times in all 2775 ordinary shares of Messrs J. & P. Coats, Limited, they became a constituent part of a very large number of identical ordinary shares of J. & P. Coats, Limited, held by defenders' nominees for numerous customers. In all pursuer's stockbroking transactions with which defenders are conversant pursuer employed as her agents Messrs Knox & Service, stockbrokers, Glasgow, for whom, as in the case of various other stockbrokers, defenders from time to time held ordinary shares of J. & P. Coats, Limited, registered in the name of defenders' nominees. When pursuer acquired ordinary shares in said company through her said stockbrokers and desired them to be held by defenders in security of advances granted or about to be granted to her by defenders, this was accomplished either by pursuer's said stockbrokers granting a letter of delivery to defenders requesting them to hold the requisite number of said shares for pursuer instead of for said stockbroker or by ordinary transfers to the defenders' nominees, said transfers being granted either by pursuer herself or by the person or persons from whom she had purchased shares through said stockbrokers as her agents. Under the former method, that is, by letters of delivery, defenders came from and after 1st June 1907 to hold ordinary shares of said company for pursuer as follows:—In or about June 1907, 900 shares; in or about February 1908, 200 shares; in or about May 1910, 100 shares. In every case pursuer was fully conversant with and expressly approved of and homologated these transactions, and further, the specific numbers of said shares were not communicated by her or by said stockbrokers, her agent, to defenders, or referred to in any way. In the same manner defenders in or about April 1910 parted with 100 of said shares held for her on explicit instructions given by her in a

letter of delivery granted by her in favour of her said stockbrokers, in which letter the specific numbers of said shares were not communicated to defenders or referred to in any way. The shares dealt with in the four transactions last above mentioned formed part of the aggregate holding of ordinary shares of said company registered in the names of defenders' nominees. On the other hand defenders came to hold ordinary shares of said company for pursuer by ordinary transfers in favour of their nominees as stated below, which transfers specified in usual manner for the purpose of registration by the company the specific numbers of the shares transferred.—In or about June 1907, 425 shares; in or about July 1907, 400 shares; in or about May 1910, 200 shares; in or about September 1910, 100 shares; in or about February 1914, 300 shares; in or about June 1914, 150 shares. In view, however, of the custom, practice, and course of dealing above condescended on and hereinafter referred to, pursuer paid no heed and attached no importance to the specific numbers of said shares, for in or about April 1910, when pursuer by letters of delivery instructed defenders to deliver 100 of said shares held on her account to her agents Messrs Knox & Service, she did not specify or refer to any specific numbers, and pursuer's said agents accepted said 100 shares on her behalf out of the aggregate of said shares registered in the names of defenders' nominees, the specific numbers of the shares thus made over not being specified or stated on any occasion in connection with the transaction; further, in or about November and December 1913, when pursuer by letters of delivery instructed defenders to deliver 30 of said shares held on her account to her agents Messrs Knox & Service, she did not specify or refer to any specific numbers, and pursuer's said agents accepted transfers of 30 shares on her behalf out of the aggregate of said shares registered in the names of defenders' nominees, the specific numbers of the shares thus transferred not in any single instance being the same as the specific numbers which any of the shares transferred on her behalf to defenders bore; and further, on or about May 1915, when the pursuer was retrocessed in 300 of said shares, she accepted from defenders' nominees without comment or demur and duly executed a transfer of that number of shares out of the aggregate of said shares registered in the names of defenders' nominees, the specific numbers of the shares thus retransferred not in any single instance being the same as the specific numbers which any of the shares transferred on her behalf to defenders bore. Pursuer thus recognised, acted on, and acquiesced in said custom, practice, and course of dealing. (Stat. 5) Further, the pursuer had various loans from the defenders from August 1902 to January 1907, in security of which she transferred on the same basis various lots of shares of J. & P. Coats, Limited, to the defenders' nominees. These shares were acknowledged, dealt with, and retransferred to the pursuer or her nominees in accordance with said custom, practice, and course of dealing, irrespective of the specific numbers of said shares, in the same way as in the case of the subsequent group of transactions already referred to. . . . The series of transactions during said period from 1903 to 1907, involving 2160 ordinary shares of said company, was conducted throughout in accordance with the same custom, practice, and course of dealing as was followed in the case of the subsequent series of transactions from 1st June 1907 onwards, and was closed with pursuers' approval and acquiescence when she paid off the advances made by defenders to her and received from defenders the balance number of shares due to her, but not shares bearing the same specific numbers as any of the shares which she had made over to defenders in security of said advances. Throughout the whole course of dealing shares were dealt with without regard to any numbers. In numerous instances the numbers were never given, and when they were given the actings of pursuer and her agents indicated that she attached no importance thereto, and did not expect or claim that defenders should account to her for shares bearing the same specific numbers as they received from her. The claim now put forward by the pursuer was first made shortly before the date of the raising of the present action. (Stat. 6) When pursuer pays defenders the whole of her indebtedness, defenders' nominees will then re-transfer to her the 2345 shares held by them for her as above, and she has no right, title, or interest to demand that since the date or dates when she transferred to defenders' nominees 2345 shares of Messrs J. & P. Coats, Limited, to which the company had allocated specifie numbers, defenders through their nominees are bound to continue throughout to hold said shares bearing said specific numbers, and are further bound on repayment by her of her indebtedness to defenders to re-transfer to her 2345 shares bearing said specific numbers, and not identical shares to which the company has allocated other specific numbers."

The pursuer *pleaded*—"1. The defences are irrelevant. 2. The shares transferred by the pursuer to the defenders or their nominees having been so transferred only in security against advances made by the defenders to the pursuer, the pursuer is entitled to decree for accounting and payment in terms of the prayer. 3. The said shares having been deposited with the defenders by way of pledge or in security of said advances, and the defenders having intromitted with the same as condescended on, the defenders are bound to communicate to the pursuer all profits and benefits derived from their said intromissions, and decree of count, reckoning and payment should be pronounced as craved. 4. Failing an accounting, decree of payment should be pronounced in terms of the alternative prayer of the petition."

The defenders pleaded — "2. Pursuer is barred from pursuing the action by her own actings and by the course of dealing between her and the defenders as condescended on.

4. In respect that the defenders have throughout held and still hold the requisite number of ordinary shares of J. & P. Coats, Limited, available for re-transfer to the pursuer on discharge of her indebtedness, the defenders are entitled to absolvitor with expenses. 5. *Separatim*—In respect of the banking custom condescended on, which was known to, acted on, and acquiesced in by pursuer as condescended on, and in any event by which pursuer was bound as an implied condition of her dealings with defenders, the defenders were not bound to secure from the company and retain share certificates with the identical register numbers contained in the certificates and transfers delivered to them by or on behalf of the pursuer, or to account to pursuer for said identical shares, and the defenders should accordingly be assoilzied with expenses."

On 26th January 1920 the Sheriff-Substitute (FYFE), after a proof, pronounced this interlocutor—"Finds (1) that for a period of about 15 years, commencing in 1902, pursuer and defenders carried on a course of dealing under which defenders made advances to pursuer on the security of her interest as a shareholder in J. & P. Coats, Limited; (2) that the course of dealing was that against pursuer's advances shares were registered in the name of the Bank's nominees, the Bank having power to sell the same at their discretion if they thought the volume of security inadequate to cover the advances; (3) that the transactions were to a large extent conducted by Knox & Service, stockbrokers, Glasgow, who were pursuer's agents; (4) that sometimes shares were allocated as security for pursuer's loan account by delivery letters granted by Knox & Service or others, endorsed by pursuer, and sometimes shares were transferred by pursuer direct to the Bank's nominees; (5) that in the course of dealing shares were sometimes transferred back to the pursuer by the Bank; (6) that neither party paid any regard to the individual numbers which shares bore in the company's register; (7) that defenders were conducting similar transactions for many other customers of the Bank; (8) that throughout the whole course of dealing defenders have always held, registered in the company's share register in the names of the Bank's nominees, shares of J. & P. Coats, Limited, sufficient to enable them at any moment to reinvest any customer of the Bank in the share interest forming the security for advances; (9) that at any time during the course of dealing pursuer could have been so reinvested upon payment of her advances; (10) that she does not offer to pay up her advances in order to be reinvested in her shareholding interest; (11) that the course of dealing followed between pursuer and defenders was in accordance with the recognised custom and practice of Scottish banks, of which custom and practice pursuer and her agents were well aware, and which they both recognised and acquiesced in; (12) that throughout the whole course of dealing pursuer was periodically sent statements of the position of her loan account, which statements she accepted and approved; (13) that there is no dispute in regard to the amount due by pursuer on the loan account nor in regard to the number of shares of J. & P. Coats, Limited, still held by the Bank in security of the loan account; (14) that defenders have always been willing and are now willing to receive payment of the amount due on the loan account, and upon payment being made to transfer to pursuer or her nominees the shares they hold against that account: Repels pursuer's first plea and defenders' first plea: Sustains defenders' second, third, fourth, and fifth pleas: Dismisses the action."

The pursuer appealed to the Sheriff (MACKENZIE), who on 14th June 1920 pronounced this interlocutor—"Sustains the appeal: Recals the interlocutor of the Sheriff-Substitute dated 26th January 1920: Finds in fact (1) that between the years 1902 and 1914 the pursuer on various dates obtained loans from the defenders to enable her to purchase ordinary shares of J. & P. Coats, Limited, on the condition that she should transfer the shares purchased by her to the defenders' nominees in security of said loans; (2) that the pursuer employed Knox & Service, stockbrokers, Glasgow, to purchase the shares and deliver them to the defenders' nominees; (3) that the shares purchased by the pursuer were transferred to the defenders' nominees in the two following modes—(*a*) by ordinary transfer accompanied by a letter from Knox & Service stating that they enclosed a transfer of so many shares, and requesting the defenders to hold them on the pursuer's account, and (*b*) by delivery orders granted by Knox & Service and endorsed by the pursuer, which orders instructed the defenders to hold on the pursuer's account a specified number of the shares already held by their nominees on account of Knox & Service, but did not identify the shares allocated to the pursuer by their distinctive numbers; (4) that the shares transferred to the defenders' nominees were registered in their names; (5) that the defenders, following their usual practice in similar transactions, did not keep any record of the distinctive numbers of the shares transferred to their nominees on pursuer's account, but merely a record of the total number of the ordinary shares of J. & P. Coats, Limited, held by their nominees on her account, and treated these shares as interchangeable with other shares of the same denomination vested in their nominees; (6) that this practice of the defenders was well known to the pursuer's stockbrokers, Knox & Service, and was to their knowledge followed in the defenders' transactions with them, but that it is not proved that it was known to the pursuer; (7) that the loan account opened by the pursuer with the defenders in 1902 was settled in the early part of 1907, and ordinary shares of J. & P. Coats, Limited, to the number of those then held by the defenders' nominees on the pursuer's account were transferred to her or her nominees; (8) that between June 1907 and July 1914, 2775 ordinary shares were transferred to the defenders' nominees

on account of the pursuer in security of loans made to her by the defenders; (9) that the pursuer has failed to identify by their distinctive numbers 1400 of these shares, but has identified the remainder, which consists of the following parcels of shares of which the distinctive numbers are given, viz., 425 shares transferred on 25th June 1907, 400 transferred on 30th July 1907, 100 transferred on 28th September 1910, 300 transferred on 27th February 1914, and 150 transferred on 7th July 1914; (10) that the practice followed by the defenders in their dealings with the pursuer is the usual practice of other Scottish Banks in similar transactions; (11) that the defenders have failed to prove that the conduct of the pursuer, in the course of her transactions with them, was such as to amount to a representation that she knew of and acquiesced in their practice of treating shares vested in their nominees as interchangeable with others of the same denomination; (12) that on 13th February 1908, 100 of the shares held by the defenders on the pursuer's account were transferred to Knox & Service in terms of delivery order granted by the pursuer, and that 10 and 20 additional shares were similarly transferred on 11th November 1913 in terms of delivery orders granted by the pursuer; (13) that the distinctive numbers of the shares referred to in the preceding finding are not known; (14) that 300 shares were, on pursuer's instructions, retransferred to her by the defenders' nominees on 19th May 1915, and that the distinctive numbers of said shares are as stated; and (15) that the pursuer does not offer to retransfer to the defenders' nominees the shares referred to in findings 12 and 14: Finds in law (1) that the pursuer cannot call the defenders to account for the 1400 shares which she has failed to identify, and (2) that she is entitled to call the defenders to account for their intromissions with the 1375 identified shares referred to in the ninth finding in fact: To the extent indicated in the second finding in law, repels the defences, and ordains the defenders, within twenty-one days, to lodge an account of their intromissions with said 1375 shares."

Note.—[*After dealing with the question of the identification of the shares by the pursuer*]—"It was argued for the pursuer that where the defenders were instructed by delivery orders to hold a specified number of shares for the pursuer it was their duty to credit the pursuer with that number of shares identified by their distinctive numbers, and that if they failed to fulfil that duty the pursuer was entitled to call upon them to account for such shares as she might select. I explain later I have come to think that the duty of the defenders when they accepted the delivery orders was as stated, but I cannot accept the contention that their failure to perform this duty entitled the pursuer to make such a selection of particular shares as would be most profitable to her. If she cannot specify the shares for which she wishes the defenders to account her inability is due to her own fault as well as that of the defenders, for ordinary care for her own interests should have led her to ask for the numbers of the shares and to keep a note of them.

"I am accordingly of opinion that as regards 1400 of the 2775 shares mentioned in the petition the action fails, for I have already in a note to a previous interlocutor expressed the opinion that the pursuer could not call the defenders to account for shares of which she could not specify the distinctive numbers.

"The next question is, Whether the relations of the parties were governed by the general practice and custom of the defenders in similar transactions? and the first point for inquiry is whether the pursuer knew of this practice. The Sheriff-Substitute has found it proved that she did, and if I could agree in that finding I should have little difficulty in holding that she was barred from insisting in the present action, but I am unable to concur in the Sheriff-Substitute's finding. The pursuer herself denies knowledge of the practice, and neither the officials of the Bank nor her stockbrokers ever told her of it.

"I fail also to find any sufficient reason for holding that before dealing with the Bank she ought to have inquired as to its practice in similar transactions.

"What then was the defenders' obligation when shares were transferred to their nominees in security of the loans obtained by the pursuer? I have already expressed the opinion in a previous note that as a general rule when a borrower transfers shares in security to a lender the latter is accountable for the particular shares transferred. Exceptions may, of course, exist in the case of special agreements between the parties, and in the present case I think it necessary to discriminate between the transactions where shares were transferred by ordinary transfer and those in which the transfer was by delivery order. In the former case the course of the transaction was as follows:—The pursuer first applied to the defenders for a loan with a view to the purchase of shares, and having obtained the defenders' promise to advance the money necessary, she then instructed her brokers to purchase the shares for her and have them transferred to the defenders' nominees in security of the advance. The brokers then purchased the shares, took the transfers in name of the defenders' nominees, and enclosed them in a letter to the defenders. The following letter may be taken as a specimen of the covering letter:—'We enclose certified transfer for 100 ordinary shares J. & P. Coats, Ltd., which please hold to the order of Miss Crerar.' Construed according to its natural meaning, a letter in these terms was an instruction to the defenders to hold the particular shares specified in the enclosed transfer as security against the loan made to the pursuer, and the defenders in my opinion were not entitled without notice to the pursuer to accept the transfer and at the same time to disregard the instructions sent by the stockbrokers on the pursuer's behalf. Knowing that the stockbrokers were aware that it was the practice of the Bank to deal with security shares of the same denomination as interchangeable

they apparently assumed that the pursuer was also aware of and acquiesced in the practice, but they were not, in my opinion, entitled to act on that assumption. In transmitting the transfers the stockbrokers acted as the pursuer's agents and the defenders were I think bound to act on the instructions they received according to their natural meaning.

"The case of shares transferred by delivery order is different, for such orders did not distinguish the shares to which they referred by their numbers, and I am unable to read them as in terms imposing upon the defenders the duty of crediting the pursuer with particular shares indentified by distinctive numbers. Whether such an obligation was impliedly imposed on the defenders is a question which it is not essential for me to decide, as I have already held that the pursuer cannot call the defenders to account for the shares transferred by delivery orders as she has failed to identify them, but the opinion I have formed is that the defenders' duty was to credit the pursuer with particular identified shares.

"The only remaining question is whether the pursuer is barred from denying that she knew of, or assented to, the defenders' dealing with the shares which she transferred to their nominees according to their usual practice. It was argued that because the stockbrokers whom she employed to transact the transfers to the defenders knew of the practice of the Bank and recognised it in their own dealings with the Bank, the pursuer could not object to that practice as inapplicable to the defenders' dealings with her. I cannot agree. If a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts on the footing of such usages provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character—per Lord Chelmsford in *Robinson* v. *Mollett*, L.R., 7 H.L. at p. 836—but I do not think that in so far as Messrs Knox & Service were employed to make out the transfers of the shares purchased by them on the pursuer's instructions in favour of the defenders' nominees and to transmit them to the defenders, they were employed within the meaning of this rule to transact for the pursuer upon a market, and further, as I have already pointed out, the instructions which they sent to the defenders when forwarding the transfers were in terms inconsistent with the usage founded on by the defenders.

"In support of their plea of bar the defenders also founded on the facts that the pursuer never in the course of her dealings with them referred to the distinguishing numbers of the shares, that she did not ask that these numbers should be noted in her loan pass book, and that she endorsed delivery orders which made no mention of distinguishing numbers, but the answer she gives is, I think, sufficient, that she was unaware of the practice of the defenders and did not know that they were not holding particular identified shares for her. I cannot regard her conduct as amounting to representation that she consented to a practice of which she had never heard.

"Lastly, the defenders' counsel maintained that the pursuer being unable or unwilling to re-transfer to the defenders the 430 shares which they transferred to her nominees or herself in 1910, 1913, and 1915, was barred from insisting in the present action, and reference was made to *Langton* v. *Waite*, L.R., 4 Ch. App. 402. But I am unable to read that case as supporting the defenders' argument, as the ground of decision appears to have been that the plaintiff was precluded by the terms of his petition from asking decree in the circumstances. Further, it must be remembered that the pursuer having no record of the numbers of the shares could not know that the shares re-transferred by the defenders were not taken from these shares transferred to the Bank by delivery orders.

"For the reasons stated I am of opinion that the pursuer is entitled to an account of the defenders' intromissions with the specific and identified shares which she caused to be transferred to the defenders' nominees by ordinary transfer."

The defenders appealed, and argued — There was no duty on the defenders to retain the identical shares, provided the proper quantity of shares was held against the account. With regard to stock, this would necessarily be the rule, and there was no reason for treating shares differently. This was neither a case of pledge nor deposit —Bell's Comm., vol. i, 277-8, vol. ii, pp. 19 and 22; *Hamilton* v. *Western Bank*, 19 D. 152, Lord President M'Neill at 160, and Lord Curriehill at 163. There was no essential difference between shares of the same denomination—Buckley on the Companies Acts (9th ed.), p. 581; *International Transfer Company*, 1872, L.R., 7 Ch. App. 485. In any event the facts in this case proved that the pursuer had for years accepted and acted upon the defenders' mode of dealing; also the stockbrokers were her agents, and she was bound by their knowledge—*National Bank of Scotland* v. *Dickie*, 22 R. 740, Lord Ordinary Kyllachy at 747, Lord M'Laren at 752, 32 S.L.R. 562; *London Joint-Stock Bank* v. *Simmons*, [1892] A.C. 201, Lord Halsbury, L.C., at 211; *Fry* v. *Smellie*, [1912] 3 K.B. 282, Vaughan Williams, L.J., at 287, Farwell, L.J., at 294.

Argued for pursuer — The duty of the Bank was to retain the shares which were transferred by the pursuer in security and not to traffic with them. As regards those shares which were identified, the Bank could and must return the identical shares. As regards the other shares (transferred by delivery order) the Bank ought to have segregated a corresponding number of shares for the pursuer, and entered the individual numbers thereof in the Security Register. The stockbrokers had nothing to do with the arranging of loans between the pursuer and the defenders. At the most they were merely her agents for the purchase and sale of shares, and this fact did not necessarily fix the principal with the knowledge of the agent — *Robinson* v. *Mollett*, 1875, L.R., 7

H.L. 802; *Blackburn, Low, & Company* v. *Vigors*, 1887, 12 A.C. 531.

At advising—

LORD PRESIDENT—Among the services which the Bank offers to perform for its customers is that of providing financial accommodation on their system of "secured loan accounts." All securities held against these accounts are vested on *ex facie* absolute titles in nominees of the Bank. These nominees are selected from among the Bank's employees, and act under the Bank's instructions. They perform no function by themselves as distinct from the Bank except as depositaries of title. But in that capacity they come to be registered proprietors of large holdings of the better known Stock Exchange securities. The Bank keeps a securities register in which each customer who opens a secured loan account is credited with whatever *quantity* of shares or stock of any denomination belonging to him is held from time to time against his secured loan account. This record takes no account of anything but quantity and denomination. As among stocks or shares of the same denomination held by the nominees, no attempt is made to identify (or to preserve evidence for the identification of) any particular or specific holdings, *e.g.*, by the numbering of the shares or of the certificates, as being those transferred by, or held on behalf of, any particular customer. I understand that this mode of dealing with securities given to the Bank is not restricted to secured loan accounts, but no question arises with regard to it in this case except in relation to accounts of that particular class.

Suppose a customer wants to open one of these accounts. He may himself transfer to the Bank's nominees shares already registered in his own name, or he may arrange through his broker that the persons from whom he has purchased shares shall transfer these to the Bank's nominees. In both cases the shares transferred are specific shares, identified and distinguished by number, but while the customer is credited in the securities register with a corresponding *quantity* of shares of the same denomination, his specific (numbered) shares become immixed with and merged in the mass of similar shares held by the Bank through its nominees. Especially in the case of shares transferred by the persons from whom the customer has purchased them, all trace of identity may be thus destroyed, for the transactions recorded in the securities register are too many and complicated to allow of tracing the identity of every particular transfer with a corresponding credit entry in the register. When the customer repays his loan in whole or in part, and claims return or release of all or some of his shares, the requisite *quantity* of shares standing to his credit in the securities register is taken out of the mass and transferred to him, but the particular shares thus transferred are not (unless by accident) the particular shares (bearing the identical numbers) which he originally gave to the Bank in security. The chances are that those particular shares have already been carried away by other customers who also had secured loan accounts against shares of the same denomination, and whose demands for release or return of their shares have been met by means of those particular shares.

The system offers special convenience in connection with Stock Exchange business, and the way in which it is used by brokers *inter se*, and by brokers in relation to their clients, results in the almost complete obliteration of traceable distinction between particular customers' holdings as these are merged in the general mass. Stockbrokers usually have a secured loan account in their own names, for the accommodation of their clients, whose stocks and shares are employed as security therefor. This practice was under consideration in *National Bank of Scotland* v. *Dickie's Trustee*, 22 R. 740. The state of transactions as between one broker and another, and the inability or unwillingness of their clients to furnish the cash necessary to carry those transactions to their full conclusion, often make it convenient that a *quantity* of shares standing to the credit of broker A should be transferred to the credit of broker B in the Securities Register. This is done by means of a "delivery letter" addressed to the Bank. In such a case the mass of shares held by the Bank's nominees remains unchanged, while broker B gets the same financial facilities with respect to the quantity of shares mentioned in the "delivery letter" as broker A did, but it is quite impossible to say which particular shares in the mass have come to be held on account of broker B which were formerly held on account of broker A. In like manner, suppose that a broker's purchasing client wants to hold a purchase of shares for a more or less considerable time but is not in a position to furnish the cash to pay for them, then if the state of the broker's transactions, as these have passed through the Stock Exchange Clearing House, is such as to enable him to supply the shares purchased out of other (selling) clients' shares already on his hands (and employed as security for the Secured Loan Account in his own name), all he has to do is to address a "delivery letter" to the Bank instructing that a quantity of shares out of those standing to his credit in the Bank's Securities Register, sufficient to implement the purchase, are to be held on account of the purchasing client. The latter is thus put in a position to open a secured loan account of his own. Again, however, it is impossible to say which particular shares in the mass have come to be held on account of the purchasing client.

The working of the system is rapid and simple; it avoids the delay and expense of repeated transfers and registrations; and it is much less open to risk of mistake and confusion than would be the case if each transaction were carried out with reference to numbered and registered shares. The striking feature of the system is that once the shares are transferred to the Bank's nominees they are treated as being identi-

cal and undistinguishable from any other shares of the same denomination which have been similarly transferred. By its own nature the system is inconsistent with the retention, or even the existence, of any right of *specific* property, on the part of customers who avail themselves of it, in the shares which form the security for their loan accounts. This brings the relation between the Bank and such customers into marked contrast with that of ordinary borrower and lender in a secured loan. An ordinary lender has no right to do anything with the subject of the security held by him except what is necessary to effectuate the security, and subject to that qualification must hold and return it exactly as he got it. It will be observed, however, that, in the very numerous cases in which the customer's right to the shares which form the security for his account is acquired by "delivery letter," the system is not necessarily inconsistent with the principles applying to an ordinary secured loan. All the customer has, and all the Bank gets in security, in these cases is a right to a certain *quantity* of shares in the mass, and in that state of matters when release and return is demanded by the customer he has, even under the law applicable to an ordinary secured loan, no right to insist on being supplied with any particular numbered shares, for he gave no particular numbered shares to the Bank. He must therefore be content to accept any of those tendered to him out of the mass. Where, on the other hand, the customer has transferred or has arranged with his broker that the persons selling to him should transfer specific (numbered) shares, the system necessarily implies (and rests on) the condition that the customer surrenders his right to such specific or numbered shares in exchange for a right to a corresponding *quantity* of shares of the same denomination out of the general and fluctuating mass in the hands of the Bank's nominees.

The pursuer availed herself of the facilities afforded by the system described for many years in connection with Stock Exchange transactions of a more or less speculative character in the shares of J. & P. Coats. The shares which came to form security for her secured loan account did so in all the different ways above explained—largely by "delivery letter." But she now says she was ignorant of the nature of the system, that neither the Bank nor her brokers ever explained it to her, and that she thought her relations with the Bank were those of an ordinary borrower and lender in a secured loan. She therefore claims that the Bank must account to her for its intromissions with every specific share transferred to its nominees by her or by persons from whom she purchased them on her behalf. She also claims, on grounds which I do not appreciate, and which do not seem to consist with her view of the Bank's relations to her as ordinary lender in a secured loan, an accounting in respect of the *quantities* of shares dealt with by "delivery letter," on the footing that it was the duty of the Bank to set apart and earmark specific (numbered) shares against these letters. So far as the law of security goes this appears to me a hopeless claim. The Bank has all along held and now tenders to her the like *quantity* of shares as they got on her account. And even if the pursuer had set up, in averment and evidence, a case of contract by which the Bank undertook such a duty the result would not justify an accounting but would only sound in unsubstantial damages.

It is probably impossible to reduce the relations between a bank and a customer who avails himself of the complicated machinery of credit which a bank places at his disposal under any one chapter of legal rights and obligations. A bank is often said to be employed by its customers as their financial agent, and the characteristics of stability and integrity which are the indispensable conditions of their existence import, at some points in the field of agency covered by their functions, rights and powers which would be inadmissible at law in any ordinary agency. But I doubt whether, apart from proved custom of trade or agreement, the fact that a customer employs his bank to provide him with financial accommodation on security could be held to cover an authority to convert the customer's right to specific (numbered) shares, transferred as security for his account, into a right to a corresponding *quantity* of shares out of a mass of shares of the same denomination, held for account of all its customers who employ it in the like manner. The evidence in the case does not amount to proof of custom of trade.

An argument was presented for the Bank to the effect that the partnership interest vouched by a share is in fact and in law identical with and indistinguishable from the partnership interest vouched by any other share of the same denomination. But notwithstanding the substantial identity of such shares each individual numbered share represents a separate *jus crediti*, and if only for the purpose of tracing title the person to whom a specific share belongs has a right and interest in it as such distinct from the partnership interest which it vouches. However convenient and useful both to the bank and to its customers the system of secured loan account may be, it is not in the least necessary to effectuate the security which the Bank holds for its indemnification that the means of tracing the customer's title should be obliterated.

The true question is, Whether the knowledge brought home to the pursuer of the course of dealing which the system implies and follows is or is not enough to establish that she agreed to participate in and to be bound by it? It is not necessary that she should have fully comprehended the effects of that course of dealing, for it is a principle of evidence in relation to commercial contracts that they "cannot be arranged by what people think in their inmost minds," but according to what they say and do in their transactions together—(see *per* Lord Dunedin in *Muirhead* v. *Turnbull & Dickson*, 1905, 7 F. at p. 694). If it is proved that the pursuer's employment of the Bank

and her transaction on secured loan account were in themselves inconsistent with the existence on the part of the Bank of the duty which she says she thought they owed to her, viz., to hold specific shares against her account, she may be held to have agreed to all the terms and conditions of the system even though she did not grasp their legal effect.

In my opinion this is proved. The action relates to the latter half of a series of transactions which began in 1902, and throughout which the pursuer employed the same firm of stockbrokers. That firm had a secured loan account of their own and were thoroughly familiar with the Bank's system. The pursuer's secured loan account was originally opened on a "delivery letter" by these stockbrokers, which she endorsed, and many similar "delivery letters" were passed and endorsed by her throughout the whole series of transactions. The knowledge of her stockbrokers acting as her agents was her knowledge; and however little the pursuer may have appreciated the difference between a right to specific shares and a right to a corresponding *quantity* of shares she did in fact, by endorsing each of these "delivery letters," accept a *quantity* of shares (without specification), and did in fact use that *quantity* as security for her account. Again, when, on her instructions, her brokers arranged with the persons from whom the pursuer purchased shares to transfer them direct to the Bank's nominees in order to enable the pursuer to borrow the price from the Bank, the arrangement thus made on her behalf with the Bank was made, so far as the brokers as her agents were concerned, in conformity with the Bank's system of secured loan account; and the pursuer must be held (in a question with the Bank) to have authorised the consequences of her brokers' actings. What is even more impressive is that the pursuer herself repeatedly used the "delivery letter" method when she wished to make over some of her shares to her brokers or others, and in so doing was herself directly participant in dealings with her holding as consisting of non-specific shares merged in and immixed with the general mass. Further, when she asked for release and return of some of her shares she accepted without demur shares bearing numbers which did not correspond with any of the specific shares she had transferred. I do not think it would be reasonable in these circumstances to credit her with any contractual intention that those shares which she did transfer as specific numbered shares were to be treated by the bank in any other way than she knew, or rather ought to have realised, that her shares generally were being treated. One other significant point—not only did the pursuer keep no record herself of such specific shares as she transferred, but in the bank book which she asked the Bank to make up from time to time showing what shares of hers they had in hand, no record was kept of anything but quantities. In these circumstances I think it is proved that the pursuer did agree that her secured loan account, and the whole of the shares held by the Bank in security of it, should be dealt with by the Bank under the system explained in the earlier part of this opinion. It follows that the action should be dismissed.

LORD MACKENZIE—This action of accounting arises out of a series of transactions between the pursuer and the Bank on various dates between June 1907 and the raising of the action in 1918. These transactions related to speculative purchases by the pursuer, with money borrowed from the Bank, of shares in an industrial company—J. & P. Coats, Limited. The series in question in this case had been preceded by a previous series, which commenced in 1902 and closed in 1907. The transactions during these two periods were of the same character. The Bank advanced money, and the shares were registered in the names of their nominees. No segregation was made by the Bank of the pursuer's shares, which were massed with the other Coats shares held by them. The earlier dealings appear to have been profitable to the pursuer. In 1916 the Bank considered the margin held by them for their advances insufficient, and proposed to realise some of the shares. The pursuer challenged the method of dealing with the shares by the Bank, and demanded that if the Bank were not in a position to re-transfer to her the identical shares which had been made over to their nominees in connection with the pursuer's transactions, they were bound to credit her with the amount realised for these shares as at the date when they were sold. The answer of the Bank is twofold—(1) that they have throughout held, and now hold, for behoof of the pursuer as many ordinary shares in J. & P. Coats, Limited, as were made over to them in connection with the pursuer's transactions, and that one Coats ordinary share is as good as another; and (2) that the course of dealing between the pursuer and the Bank involved this, that to the knowledge of the pursuer, or of her stockbrokers for whom she is responsible, the practice of the Bank was not to pay attention to the serial numbers of the shares so conveyed to them in security, taking care that the total number held was never at any time less than the total number contributed by their customers.

In my opinion, although the undoubted fact that one ordinary Coats share is as good as another is of importance in considering what the nature of the arrangement between the pursuer and the Bank was, yet the real question in the case does not turn on the nature of the security subject, but on whether the pursuer must be held to have assented in her dealings with the Bank to one share being dealt with as equivalent to another.

It is impossible to dissociate the earlier from the later series of transactions. It is important to note that the prior dealings with the Bank open with one which is to my mind quite inconsistent with her present contention. On 5th May 1902 the pursuer's stockbrokers, Messrs Knox & Service, write

to the Bank—"Please hold to the order of Miss Isabelle Arrol Crerar, 52 Glassford Street, forty ordinary shares J. & P. Coats, Limited, held by you on our account." This order bears an endorsement signed by the pursuer—"Please hold within mentioned shares on my account with the Bank of Scotland, Miller Street." The evidence of the stockbroker leaves no room for doubt as to what the practice of the Bank is, and as to the broker's knowledge of the practice. In giving effect to such a delivery order as is contained in the letter above quoted, the Bank do not allocate specific shares, but only the number of shares indicated out of the total number held to the order of the stockbroker. The delivery order which the pursuer endorsed did not give her right to any defined shares. A number of the transactions in the earlier as in the later series were carried through by delivery orders. As regards all these transactions my view is that the pursuer cannot succeed. The Bank have throughout held the requisite number of shares and are prepared to account for them. The pursuer by her endorsation must be taken to have known what her agents knew—that all she got was a right to so many shares out of an aggregate number held by the Bank, not to shares bearing specific numbers. That this was the pursuer's understanding of the position of matters is shown by the facts (1) that she accepted re-transfers of shares which were admittedly of different numbers to those made over by her, (2) that she kept no record of any numbers, and (3) that her bank-book has a record of quantities only without any mention of serial numbers. Apart from the entries in this book the pursuer had no receipt from the Bank.

Other transactions took the shape of transfers to the Bank's nominees direct by the holders from whom the pursuer bought. In the case of these transfers, as in the case of the delivery orders, the pursuer never took up the shares, and never was registered in the books of J. & P. Coats, Limited, as the owner. The business was carried through with the Bank by Knox & Service according to the usual practice, with which they were well aware. If there was anything wrong, then that is a matter between the pursuer and her agents with which the Bank have no concern.

The question in regard to the shares registered in the name of the pursuer which she transferred direct to the Bank requires special attention. In the second series there were 425 transferred on 25th March 1907, and 150 transferred on 7th July 1914. The argument for the pursuer arises sharply in regard to these. It is said this is just the case, like pledge, of a specific subject given in security of a loan, and that the only questions to be considered are what was the contract and who made it. The legal results which it was maintained flow from this contract are that the Bank is bound (1) to redeliver the subject of the security when the loan is repaid, and (2) to account for any profits made when the security subject has been lawfully sold. The pursuer's argument is that what she gave the Bank in security were identifiable shares, not merely the right to demand shares. The Bank's reply is that they advanced money to her on condition she accepted a right to a proportionate number of the whole Coats' ordinary shares that they held in security. It is not in my opinion necessary to decide or to express an opinion upon what the rights of parties would have been had these transfers of 425 and 150 shares been isolated transactions. It may be that if these transactions had stood alone, and there was no notice given by the Bank of the way they would be dealt with, or knowledge on the part of the pursuer of the course of dealing, then she might have been able to vindicate her right and trace her title to the specific shares transferred. The transfers of these two parcels were, however, just part of the dealings of the pursuer with the Bank, which must be taken as a whole. The whole purpose was that her purchases should be financed by the Bank. The transfer of 425 shares on 25th June 1907 was, as Miss Crerar says in her evidence, the first step in the new transactions. She at the same time instructed Knox & Service to purchase for her another 900 shares, which they were to deliver to the Bank and obtain payment for from the Bank. The way in which this was carried out is vouched by the two letters of 27th June 1907. On that date Knox & Service granted a delivery order to the Bank in these terms—"Please hold to the order of your Miller Street branch Nine hundred shares (900) J. & P. Coats, ordinary, held by you on our account, and oblige." On the same date Miss Crerar wrote in these terms to the Bank—"Please pay Messrs Knox & Service for 900 J. & P. Coates deferred ordinary shares at the rate of £7, 10s." It appears that the amount advanced against the security of the 900 shares was £5885. The balance of the price of £6750 (900 shares at £7, 10s.) was advanced against the security of the 425 shares. The transfers of the two parcels of shares, 425 and 900, were part of the same transaction. If what has been said about the Bank's position in relation to shares made over by delivery order be correct, the pursuer cannot, in my opinion, successfully contend that the Bank were not entitled to ask J. & P. Coats, Limited, to grant them a slump certificate for these two lots of 425 and 900 shares they held in security for the advance, If this was their right the pursuer cannot maintain that the position of the Bank *quoad* the 425 shares was just that of a trustee bound to retain the identical shares and not entitled to commute the security subject. The evidence shows that it was an implied term of the contract that the right to an individual security might be converted into a proportionate share of a *pro indiviso* right. The corresponding duty on the Bank was always to hold the requisite number of shares and to reinstate each customer in the number of shares held for him on the loan being repaid. As regards the transfer of 150 shares on 7th July 1914 there is no letter produced, but the excerpt from the deed of transfer exhibited by the registrar of J. & P. Coats, Limited,

shows that the transfer has this certificate on its back signed by Miss Crerar and the Bank's nominees—"We hereby certify that the within transfer is made for a nominal consideration by way of security for a loan dated the 17th day of June 1914." These shares therefore were made over by the pursuer to the Bank on the same footing as the others.

The result of my opinion is that the Bank made the advances on the footing that she had assented to the course of dealing above described, and that she is barred from insisting in her present claim. This entitles the defenders to have their second plea-in-law sustained,

In this view of the case the terms of the letter No. 10/35 taken by the Bank from Miss Crerar on 27th March 1914 for the special purpose of making her shares available for a joint account do not touch the point. Nor is it necessary to refer to the position of the 430 shares transferred to her except to say that even if she were right in asking an account of the defenders' intromissions with 2775 ordinary shares in Coats, credit would have to be given for the 430 shares she has already got.

LORD SKERRINGTON—When the shares of a joint stock company have been fully paid up, a share of any particular denomination is, in the ordinary case, of the same pecuniary value as any other share of that denomination in the same company. It does not, however, follow that a borrower who transfers such shares to a lender in security of cash advances has no interest to insist and no right to expect that the identical shares so transferred shall be retained and held for his behoof, and shall be restored to him upon his repaying all that he owes to his creditor. In the absence of some express or implied agreement to the contrary, or of conduct on the part of the borrower amounting to personal bar, the lender's duty, in my judgment, is to retain and hold on account of the borrower the identical shares which he received unless and until he requires to realise them for payment of his debt. If the lender performs this duty and afterwards falls into pecuniary difficulties, the borrower would be in a position to assert his beneficial and proprietary interest in these shares in a question either with a trustee in bankruptcy of the lender or with other borrowers on the security of similar shares. Moreover, though the point is hardly a practical one, a borrower would be entitled to say that he preferred to receive back his own shares, the title to which he knew to be good, rather than other shares the title to which might turn out to depend upon a forged transfer.

In considering whether in any particular case there is sufficient evidence to negative the existence of a duty on a lender to preserve the identical shares transferred by a borrower, it is not irrelevant to observe that a prudent man of business who borrowed money from his banker might reasonably and naturally agree to terms which he would not concede to an ordinary lender. Vast sums are lent to banks without any security except the personal credit of the borrower, and the public would be equally ready to lend shares on similar terms if trafficking in shares fell within the business of a banker. *A fortiori* a borrowing customer would at once dispense with his banker's keeping a record of the denoting numbers of the shares transferred by him in security of an overdraft if it was explained to him that the keeping of such a record would interfere with the rapid, economical, and efficient dispatch of business, and that this was the opinion not only of bankers but also of stockbrokers, the section of the public which most frequently and regularly borrows money from banks upon the security of shares belonging to the borrower or to his clients. It is also worth noting that when a customer borrows money from a bank on the security of shares he is required to execute a transfer in favour of two or more persons who are complete strangers to him. According to the form of the title these individuals are constituted the absolute proprietors of the shares, though in reality they are mere trustees for behoof of the bank and the customer according to their respective rights and interests. Though the customer knows that these persons are in the bank's employment, and that the Bank is responsible for the manner in which they execute the trust which he reposes in them, he can hardly fail to be aware that his contract of loan is one *sui generis* and one which he would refuse to enter into with an ordinary lender. The interposition of these nominees between the Bank and its customers has various and obvious advantages from the Bank's point of view, but it is also advantages for the customer, firstly, because it clearly distinguishes securities which really belong to customers from securities held by the Bank in its corporate name as an investment of its own funds, and secondly, because it makes it necessary for the Bank in a competition as to the beneficial right to shares vested in its nominees to prove the existence and extent of its interest in the same way as is incumbent upon any other claimant. I mention this because the pursuer's counsel appeared to assume that if a bank went into liquidation shares held by its nominees must *prima facie* be regarded as ordinary assets divisible among its general creditors. While I doubt the soundness of this assumption, it is not germane to the present action to express any opinion as to the legal position of the borrowing customers of a bank which followed the practice described in the statement of facts for the defenders and subsequently went into liquidation. The pursuer does not assert that she has any beneficial interest in the ordinary shares of J. & P. Coats now held by the defenders' nominees. Her complaint is directed against the manner in which the defenders' nominees (for whom the defenders are admittedly responsible) dealt with shares which, as she alleges, they formerly held on her account. Her case is that the defenders and their nominees were under a duty to keep a record of the denoting number of every share which they at any time held

on her account, and to retain every such share until she authorised them to part with it. The defenders' reply is that the existence of any such duty is inconsistent with the manner in which the pursuer transacted her business with them both personally and through her authorised agents. If this defence is established as a matter of fact, it is immaterial whether the pursuer appreciated all the legal implications and consequences of her actings.

During the first series of loan transactions between the pursuer and the defenders, which began on 5th August 1902 and closed on 16th January 1907, the pursuer on various occasions bought through her stockbrokers, Messrs Knox & Service, a total of 1680 ordinary shares of J. & P. Coats. She paid for these shares with money advanced for that purpose by the defenders in meeting the cheques which she drew on her loan account. Of these 1680 shares only 300 consisted of specific shares which were distinguished by their denoting numbers, and which the pursuer caused to be transferred into the names of the Bank's nominees. The remaining 1380 consisted of various quantities of unspecified shares which were not distinguished by denoting numbers but which formed an undivided and unascertained part of the total ordinary shares of J. & P. Coats held by the defenders' nominees on account of all the Bank's customers who had transferred shares of that particular denomination in security of advances. The pursuer's witness J. M. Ross, the sole surviving partner of the firm of Knox & Service, deponed that while his firm always bought shares on the Exchange as instructed by the pursuer, the purchase of each of the parcels to which I am now referring was completed by a letter from the selling broker directing the defenders to hold to the order of Knox & Service a named quantity of ordinary shares of J. & P. Coats, which the letter stated that the defenders held "on account of" the selling broker, and by a similar letter in favour of the pursuer signed by Knox & Service and addressed to the defenders. Each "delivery letter" in favour of the pursuer was endorsed by her with a request that the "within-mentioned" shares should be held by the defenders on her account. The denoting numbers of the shares were never mentioned in any delivery letter. It is a proved fact in the case that the defenders and their nominees did not hold any specific ordinary shares of J. & P. Coats on account of Knox & Service, and that they were under no obligation to set aside and hold any such shares on account of that firm. It follows, in my judgment, that the right acquired by the pursuer under each delivery letter in her favour was of precisely the same character as that which belonged to her authors Knox & Service, viz., a right to demand that a named quantity of the total ordinary shares of J. & P. Coats held on account of the defenders' customers should be held on her account instead of on account of Knox & Service. It was not a right to demand that any specific shares in that company should be retained or set aside for her behoof and ultimately transferred to her. There is no inconsistency between this view and the opinion which I also hold, viz., that the defenders would have been personally barred from claiming to retain the shares purchased by the pursuer in security for Knox & Service's indebtedness to the defenders, unless they had intimated that such was their intention upon receipt of the delivery letter in favour of the pursuer. In short, the pursuer is entitled to the same rights in a question with the defenders as if they had given her a "letter of holding," as described in article 2 of their statement of facts.

If I am right in thinking that the pursuer authorised the defenders to hold 1380 ordinary shares of J. & P. Coats in security of her indebtedness without either requesting or obliging them to appropriate specific shares to her account, it would be difficult to reach the conclusion that she intended them to hold separately and specifically for her behoof the remaining 300 shares the title to which (as it so happened) was completed in favour of the defenders' nominees by an ordinary transfer, especially seeing that from time to time the pursuer issued delivery letters in general terms which the defenders were at liberty to implement out of any shares, specific or not specific, which their nominees held on her account. The same reasoning applies to 480 ordinary shares in the same company of which the pursuer was the registered owner, and which she transferred to the defenders' nominees in various lots, obviously for the purpose of providing additional security in order to protect the defenders against a fall in the market price of the shares purchased and paid for by cheques on her loan account.

The present action relates to a second series of precisely similar transactions beginning on 25th June 1907 and ending on 19th May 1915, in pursuance of which the defenders' nominees came to hold 2775 ordinary shares of J. & P. Coats in security of advances made by the defenders to the pursuer. During this period also the greater part of the shares which Knox & Service bought on the pursuer's instructions was transferred by delivery letters in her favour, and not by ordinary transfers in favour of the defenders' nominees. Though the excess of delivery letters, as compared with transfers of specific shares in favour of the defenders' nominees, is not so striking during this second period as during the first period, the transactions between the parties were of substantially the same nature from first to last. I have therefore come to the conclusion that the pursuer's ingenious attempt to throw upon her bankers the loss consequent upon her unfortunate speculations on the Stock Exchange has been unsuccessful, and that the Sheriff's interlocutor of 14th June 1920 ought to be recalled.

LORD CULLEN—The more extreme proposition advanced by the Bank in this case may be stated thus. If A, who owns specific shares in a concern standing on a particular title makes them over to the Bank by way of security of an advance, and if X, Y, and

Z, who also own specific shares of the same class in the same concern, each makes over his shares in security of an advance to him, whether with or without the knowledge of A, the Bank is not bound to hold the shares made over by A exclusively as security for the advance to him in the same way as a private individual lending to A would fall to do, but is entitled to hold and treat the shares made over by A, X, Y, and Z as a common security fund, any part of which is available to obtain repayment, so far as need be, of any of the advances to A, X, Y, and Z, subject only to the condition that the Bank must always have in hand enough shares to go round and that there will thus be always available for the purposes of A's account the same number of shares as he made over in security although these may not be the same shares. Thus the shares made over by A may be sold in order that the proceeds may be applied towards repayment of the advances to X, Y, or Z. And similarly the proceeds on sale of the shares made over by X, Y, or Z may be applied in repayment of the advance to A. And if A repays his advance and asks back his security, he may be tendered, not the shares he originally made over but an equivalent number made over by X, Y, or Z.

This mode of dealing with A's security shares is not in any way necessitated by the nature of A's contract of loan on security with the Bank. Nor is it of any advantage to A in better furthering the purposes for which he made over his shares as security. It represents only a convenience to the Bank —considerable no doubt—in handling the volume of their business of the kind in question. There is no impracticability, although there would be much less convenience, in the Bank holding the shares made over by A exclusively for his account, and A's interests would be efficiently served thereby.

Under the said mode of dealing, while A begins by being the owner of certain specified shares standing on a particular title and intends to continue to be the beneficial owner of them after he has caused the legal title thereto to be vested in the Bank by way of security, the Bank *ex hypothesi* without his consent or knowledge arrogate the power to convert his right of ownership in his shares into something quite different in quality. He ceases to have any shares which under burden of his debt he can claim specifically as his own property, and in lieu thereof he comes to have a species of *jus crediti* in relation to the general mass or pool of the shares in common with a number of other persons with whom he has made no contract and of whose existence and dealings with the Bank he may have no knowledge whatever.

Prima facie there would probably be little difficulty in the Bank obtaining from persons in the position of the pursuer a written consent to the course of dealing which they find so convenient. But in the absence of consent I am unable to see any legal justification for such course of dealing whereby the borrower's right of ownership in his particular shares is converted into a different species of right as above mentioned. In the absence of such consent I think the Bank is bound to deal with shares made over by a borrower in security of his advance in the same way as any ordinary individual lender on such security would be bound to do—that is to say, to hold the shares exclusively against the advance to him which they have been made over to secure, and if the advance be repaid to hand back the identical shares which were made over.

But *esto* the view above expressed is sound, the Bank here contends, alternatively, that under the circumstances of this case they were not bound to segregate the pursuer's shares but were justified in dealing with them as they did. I concur with your Lordships in the view that this contention should be sustained. I think, to begin with, that the whole course of dealing between the parties although there was a break in its continuity must be viewed together in order to see how the pursuer intended and agreed that her shares should be treated. And in the case of the shares which she acquired under what have been called delivery orders granted by Knox & Service it appears to me that what she obtained and was content to have was an assignment by that firm of their right to a certain quantity of non-segregated shares in the general "pool," and that the Bank was therefore justified in not segregating such shares specifically for her behoof and in holding them in the same way as they had previously done for Knox & Service, the cedents. And in the next place I think that the pursuer's undiscriminating mode of dealing with her shares generally, whether acquired on delivery orders or made over to the Bank by specific numbers, shows that she intended and agreed that the Bank should deal with all her shares in the same way and should not be obliged to hold segregated the latter class any more than the former. As regards the effect of the evidence on this latter point I adopt what has been already fully said by your Lordships, to which I do not think I can usefully add anything.

I concur in the judgment which your Lordships propose.

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

Counsel for Appellants—Macmillan, K.C. —Watson, K.C. —Black. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent—Moncrieff, K.C. —R. C. Henderson—King Murray. Agents —Robert White & Company, S.S.C.