entirely with the Lord Ordinary when he declines to distinguish between the defenders and Pickering & Company. The defenders seem to regard it that they have done their duty when they have hired their waggons from a firm of such reputation as Messrs Pickering & Company, and when they have satisfied themselves that inspection is made by the employees, not only of Messrs Pickering & Company but of the Caledonian Railway Company, upon the care and skill of whose inspectors they plead that they are entitled to rely, and did rely, and having so relied to be clear of further responsibility. To this I cannot subscribe. If they rely upon the inspectors of either or both companies, they are responsible for the failure in care and skill of these inspectors. And here there has been failure in care at any rate if not in skill, for, as I have already pointed out, it is impossible to conceive that such an amount of readjustment of the parts of the brake of this waggon would have been required had the defect not been one of long standing and apparent.

I am aware that the majority of the Court in the case of *Heaven* v. *Pender* did not take the more comprehensive view of the learned Master of the Rolls, but decided the case on the principle which has received the technical name of invitation and trap. If all cases of this kind, in order that there should be liability found, require to be brought under the category of invitation and trap, it appears to me that there must be a stretching out of all recognition of the term invitation, just as in England there has been a stretching out of all recognition of the term fraud in an analogous class of cases. (See *Levy* v. *Langridge*, 4 M. & W. 337). I respectfully think, therefore, that it is safer to face the general question, as the Master of the Rolls did in *Heaven* v. *Pender*, and find a general principle applicable to such cases. The view which I venture to take is, I think, supported by the case of *Elliot* v. *Hall* (L.R., 15 Q.B.D. 315), and is not inconsistent with the decision of the House of Lords in *Caledonian Railway Company* v. *Warwick* (25 R. (H.L.) 1), when the particular circumstances of that case are properly regarded. There the Caledonian Railway Company had performed their contract by bringing their waggon to the Dumfries Station of the Glasgow and South-Western Railway Company, where it might have been, and, strictly speaking, under their contract should have been discharged. But the Glasgow and South-Western Railway Company, under an arrangement to which the Caledonian were no parties, hauled a quarter of a mile down a private siding to discharge at certain works. All that could be said was that the Caledonian Company knew of and took no exception to this use of their waggons. But the operation of haulage on this siding was not connected with the carrying out of their contract of freight, and was no part of their business. It was held, therefore, that they were under no duty to those engaged in the haulage of their waggons over the siding to see to the condition of these waggons. This is as if, after the defenders' waggons had been brought alongside at Grangemouth, some use had been made of them by the stevedores or by the ship for their own convenience, of which the defenders were aware and to which they did not object. But it was not in course of such use that the accident happened, but when the waggon having been alongside and been discharged was on its way back to the defenders' colliery, and therefore was within their contract with the Railway Company and being transmitted on their business.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

Counsel for Pursuers (Respondents)—M'Clure, K.C.—J. R. Christie. Agents—Macpherson & Mackay, S.S.C.

Counsel for Defenders (Reclaimers)—Hunter, K.C.—R. S. Horne. Agents—Drummond & Reid, W.S.

Thursday, July 15.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* THOMAS WHITE & PARK.

Right in Security — Agent and Client — Hypothec — Lien over Title-deeds — Possession Obtained while Acting for Client other than Owner — Plea as against Heritable Creditor of Owner.

A firm of law agents arranged for their client a postponed bond over his property. The bond contained an assignation of writs, but as the title-deeds were in the possession of the prior bondholders they were not given up. Subsequently the prior bonds were assigned to other clients of the law agents, and the title-deeds came into their possession at this time. Still later the prior bonds were assigned to the law agents themselves. The postponed bondholders having called for the production of the title-deeds to enable them to sell and realise their security, the lawyers pleaded a lien.

Held that the title-deeds had come into the law agents' possession as acting for others than the owner, namely, the assignees of the prior bonds, and that the law agents consequently had no lien to plead.

On 30th June 1908 the National Bank of Scotland, Limited, brought an action against Thomas White & Park, W.S., Edinburgh, and the partners thereof. In it they craved declarator that the defenders were not entitled as against the pursuers, holders of a bond and disposition in security for £8000 over the subjects

therein mentioned granted in their favour by James Donaldson, timber merchant, Leith, dated 6th and recorded 7th August 1901, to claim or exercise any right of lien or hypothec over the title-deeds, searches, and others of or relating to the said subjects, and that the defenders should be ordained "to make the said titles, searches, and others available to the pursuers free of any claim for lien or hypothec, to the effect of enabling the pursuers to take all necessary steps to realise the said subjects contained in the said bond and disposition in security, and for that purpose to make the said titles, searches, and others forthcoming to the pursuers and to all offerers or intending offerers or inquirers for the said subjects in the usual way, and to deliver the said titles, searches, and others to the purchasers of the said subjects on receiving payment of all sums due under three bonds and dispositions in security for £1250 sterling, £1250 sterling, and £700 sterling respectively, held by the defenders, and ranking in priority to the foresaid bond and disposition in security for £8000 sterling in favour of the pursuers."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (SKERRINGTON), who on 24th November 1908 dismissed the action.

Opinion. — "The pursuers, who are bankers, hold a bond and disposition in security for £8000, granted by a Mr Donaldson in their favour in August 1901. The bond was granted by Mr Donaldson in part security for an overdraft allowed to him by the pursuers for the purpose of enabling him to buy a property and business in Leith. The defenders are law agents and conveyancers, and they acted for Mr Donaldson in negotiating the loan and granting the bond. There were prior bonds affecting the property to the extent of £3200, and accordingly on 30th July 1901 the defenders wrote to the pursuers' law agents explaining that the titles would have to be returned to the solicitors of the prior bondholders. Though the pursuers allege that it is their practice to require delivery of the titles to security subjects, they agreed in the present case to dispense with such delivery. The bond and disposition in security in their favour contains a clause in the following terms—'I assign the writs conform to inventory annexed and signed as relative hereto, which' with certain exceptions stated to be unimportant, 'are in the possession of prior bondholders, and so cannot be delivered up, but I assign to the said bank and the foresaids thereof all right competent to me to call for exhibition of the whole of the said writs, and also of the prior and other writs.'

"The bond for £8000 was granted in the month of August 1901, and at Martinmas in the same year the prior bondholders granted assignations of their bonds in favour of clients of the defenders, and the titles accordingly came into the possession of the defenders. In 1906 Mr Donaldson became bankrupt, and thereafter the defenders, in order to save trouble to their clients, paid them the £3200 and took assignations of the bonds in their own favour.

"The leading conclusion of the present action is to have it declared that the defenders are not entitled as against the pursuers to claim or exercise any right of lien or hypothec over the title-deeds of the said property. This form of conclusion suggests what is the fact, viz., that the titles are in the possession of the defenders. It further suggests that the pursuers admit that the defenders are entitled to retain these titles as against their own client Mr Donaldson, but contend that the defenders are in some way barred from asserting their lien as against the pursuers. In short, the conclusion is one which would be appropriate in the familiar class of cases where a law agent has acted both for the borrower and for the lender. In such cases, although the law agent's lien remains good, he is held to be personally barred from asserting it against the lender unless he has given due notice to the latter of his claim to retain the titles. Accordingly I asked the pursuers' counsel whether he disputed that the defenders were lawfully in possession of the titles and had a good right of retention in a question with their own client. The answer was in the negative.

"The defenders never acted as law agents for the pursuers, and the pleadings and oral argument left it somewhat uncertain upon what ground the pursuers contended that the defenders were barred from asserting their lien. In the end the pursuers' case resolved into this, that the defenders, being cognisant of the bond in favour of the pursuers, were not entitled to acquire a lien over the titles to their prejudice. No authority was quoted in support of this contention, and I am of opinion that it is not good law.

"The next conclusion of the summons is, I think, ancillary to the preceding one; but it is open to the further objection that it raises in an incidental way an entirely different question with regard to the rights of persons purchasing the property from the pursuers and tendering payment of the amount of the prior bonds. The pursuers do not themselves tender payment of the prior bonds. Accordingly I think it unnecessary to express any opinion upon the question whether the pursuers or purchasers from them could compel the defenders to grant an assignation of these bonds, or upon the further question as to the effect of such an assignation if it were granted.

"I accordingly dismiss the action with expenses."

The pursuers reclaimed, and argued—A second bondholder was entitled to sell the subjects comprised in his bond—Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. c. 101), secs. 122-3; *Adair's Trustees* v. *Rankin*, July 20, 1895, 22 R. 975 at p. 981, 32 S.L.R. 637 at p. 640. The respondents' lien, while good against their own client, did not attach to the prejudice of the reclaimers, seeing they (the respondents) had acquired the titles in the know-

ledge of the existence of the reclaimers' bond — *Drummond* v. *Muirhead and Guthrie Smith*, February 13, 1900, 2 F. 585, 37 S.L.R. 433; *Tawse* v. *Rigg*, March 8, 1904, 6 F. 544, 41 S.L.R. 391, Lord M'Laren's opinion. The fact that the respondents were aware of its existence distinguished this case from that of *Hamilton of Provenhall's Creditors* (1781), M. 6253, relied on by the respondents, for in that case the agent whose right was preferred had throughout possession of his client's titles. The respondents had not acquired the titles from the borrower himself, but indirectly through prior lenders, and the lien only attached and could only be pleaded where the agent had got the titles direct from the borrower himself and while acting as his agent—Bell's Com. 7th ed., vol. ii, pp. 107-9; *Renny and Webster* v. *Myles and Murray*, February 8, 1847, 9 D. 619. The rule in England was to the same effect, viz., that a law agent was not entitled to intervene between first and second bondholders so as to acquire a right for himself —*Ex parte Fuller*, L.R., 16 C.D. 617; *Pelly* v. *Wathen* (1851), 1 De G. M. & G. 16.

Argued for respondents—The Lord Ordinary was right. The fact that titles had been acquired in knowledge of the existence of a prior bond had been pleaded and repelled in the cases of *Campbell & Clason* v. *Goldie*, November 15, 1822, 2 S. 14 (16), and *Clark* v. *Morrison*, November 29, 1837, 16 S. 133. The question was settled by authority in the respondents' favour—Bell's Com. (*cit. supra*), and cases there cited.

At advising—

LORD KINNEAR—This is an action at the instance of the National Bank of Scotland against certain law agents and conveyancers to have it found that these defenders are not "entitled, as against the pursuers, to claim or exercise any right of lien or hypothec over the title-deeds, searches, and others" relating to a certain piece of ground.

The National Bank lent money to the proprietor of this ground, and obtained a bond and disposition in security containing an assignation of writs. They say that in the ordinary course of their business when they lend money upon securities of that kind they require the titles to be delivered to them, so that they may be in a position to operate their security if necessity arises, but in this case they were not able to do so because the subjects were already affected by prior securities in favour of other creditors, and these creditors held the title-deeds. Accordingly the National Bank got their security in the ordinary terms, but they did not get the titles into their possession. They now desire to exercise their undoubted right of sale in order to realise their security, and the only obstacle to their doing so is that the defenders say that, as agents for the borrower, they hold the titles, and that their lien as in a question with him is good against his heritable creditors also.

But the position of the defenders and the extent of their right depend upon certain other considerations. I have said that there were certain prior creditors in whose hands the titles were. The statement is that these prior creditors were paid off by a new lender who was also a client of the defenders, and that the bonds and the titles were accordingly put into the hands of the defenders as agents of the new lenders. Now the defenders say that in this rearrangement of the loan they acted as law agents for Mr Donaldson, the debtor. That is not a statement of fact, it is an inference of law; and the facts, as to which the statements of the pursuers on the one hand and the defenders on the other hand coincide, do not support, in my opinion, that inference of law. The first bondholders held the titles as ancillary to their real right. A new client of the defenders—not the debtor at all—paid the sums due to the first bondholders and got an assignation of the bonds from them. The documentary evidence of that transaction and of the right so transferred from the first creditors to the assignees was put into the hands of the defenders; but it follows of necessity from the nature of the transaction that it was put into their hands for the benefit of the person who had advanced the money and obtained the security. They must have held, therefore, as agents for their new client, that is to say, the new lender.

Now the question is whether in these circumstances the defenders have any right of lien in respect of their position as law agents of the original debtor, and I am of opinion that they have none. An agent's lien has been the subject of a great many decisions, and the general rule of law upon the question may, I think, be taken as well settled. It is stated by Lord Fullerton in *Renny & Webster* v. *Myles & Murray*, 9 D. 619, where his Lordship points out this lien is "an exception from the general principles of law; for unquestionably in the general case and for an ordinary debt title-deeds are not apt subjects of pledge as against heritable creditors, or against the trustee in a sequestration, who is vested with the whole of the bankrupt's heritable estate. The true view is, that the title-deeds, in so far as they are matter of value at all, are accessories to the heritable right and must be made accessible to those vested with that right." That is the general principle, but it is undoubtedly fixed by the repeated decisions that the lien of the agent is available in his favour not only against his own client but against his client's heritable creditors. That is to be taken as fixed, but the possession upon which the claim in a question with heritable creditors must rest is the same as in the case of all other liens. The lien is merely a right to retain property which has been put into the hands of a person employed to do certain professional or tradesmanlike work upon the property, and which enables him to retain the subjects so put into his hands either for a special or a general balance as the case may be. In the case of law agents it is clearly enough settled that it is for a general balance; but the condition upon which

their right arises is that the titles have been put into their hands by their client or employer for the purpose of the business which they are to do for him. The principle, I think, was very clearly brought out in the case to which I have already referred —*Renny & Webster* v. *Myles & Murray*— because there was a good deal of discussion on the subject both in the course of the argument and in the course of the judgment, and Lord Mackenzie winds up the matter by saying that in that particular case it would be necessary to put in the interlocutor as the reasons of judgment that the titles were not received in the course of employment; and the interlocutor accordingly bears—"The said titles did not come into their hands in the course of their employment as agents." The case, so far as it depends on its circumstances, does not directly apply, because the titles came into the agents' possession after the employment was at an end. But the principle is expounded by the Judges, and their explanation is that the right of retention arises only with reference to the things that are put into the hands of a person employed in the exercise of his professional employment on behalf of a particular employer. Lord Jeffrey refers also to other cases of the same kind, and says that this lien depends on the same ground as a factor's or bleacher's lien. It is clear that, to make the security good, in the first place the owner whose property is supposed to be subjected to it must be in a position to give a good title of possession, and, in the second place, he must give possession to the person he has employed in the course of that employment, to enable the employee to rely on the security of the things so put into his hands. In the present case I think it is clear that the client was not in a position to give that lien or to make any pledge of the titles. They were not in his possession. He was their owner, no doubt, but subject to the right of a creditor to whom he had not only assigned them but in whose possession they had been actually put. Therefore if the question had arisen as to whether he could pledge them, they were not in his possession to pledge, and for that reason his agents acquired no right to hold them as if they had been pledged by him. They held them as agents for a different client altogether.

That was the position of matters when the titles were put into the hands of the defenders by the assignees of the first lenders, but since then the defenders have themselves acquired this bond and hold it in their own right, and therefore the titles are in their possession now as bondholders, not as agents for the debtor. But nothing in this action can affect their right, whatever it may be, as prior bondholders, and the conclusion for declarator leaves every question between defender and pursuer except that of lien untouched. The operative decree that is sought is that the defenders should be ordained "to make the said titles, searches, and others available to the pursuers free of any claim for lien or hypothec, to the effect of enabling the pursuers to take all necessary steps to realise the said subjects contained in the said bond and disposition in security." There follows a conclusion somewhat more fully expressed, as to which the Lord Ordinary has expressed considerable doubt—a conclusion in which the Court is asked to anticipate the results of procedure which has not taken place, and to define beforehand a right which the pursuers and their purchasers, if they succeed in effecting a sale, will have. The Lord Ordinary thinks that is not a very regular proceeding, because it asks us to anticipate a sale and pronounce a hypothetical decision on its result. I am disposed to think that that is not a desirable conclusion, and therefore that we should give the pursuers all they are entitled to if we give them a decree of declarator and the operative decree down to the sentence ending "to realise the said subjects contained in the said bond and disposition in security." All they ask is that the titles should be made available to them so that they may realise the subjects, and if there is no lien I think that is their right. I should be disposed to stop there if your Lordships agree with me.

LORD PEARSON—I agree with your Lordship in all that you have said.

LORD JOHNSTON—I agree on the short ground that the titles came into the hands of the defenders as assignees of the prior bondholders, and not as the agents of the borrower. The defenders cannot be allowed to use their position as heritable creditors to their own advantage as law agents and to the prejudice of postponed creditors.

The dilemma which the Lord Ordinary suggests is not a complete or conclusive one. It may be admitted that the defenders were lawfully in possession of the titles, for they were assigned to them as prior creditors. It may also be admitted that the defenders, as such prior creditors in possession of the titles, had a good right of retention in a question with the borrower. But it by no means follows that because the borrower happens to be their client they have more than a special right of retention for the purpose of the contract of loan. And it certainly does not follow that they have such right of retention against postponed creditors, to whom the titles have been assigned, subject only to the prior assignation in favour of the defenders as prior bondholders.

The LORD PRESIDENT and LORD M'LAREN were absent.

The Court pronounced this interlocutor—

"Recall said interlocutor: Find and declare in terms of the declaratory conclusion of the summons: Ordain the defenders to make the titles, searches, and others referred to in said declaratory conclusion available to the pursuers free from any claim for lien or hypothec, to the effect of enabling the pursuers to take all necessary steps to realise the subjects mentioned in said

conclusion and contained in the bond and disposition in security therein libelled: *Quoad ultra* dismiss the conclusions of the summons, and decern," &c.

Counsel for Pursuers (Reclaimers) — Hunter, K.C. — R. S. Horne. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Respondents)— Sandeman. Agents — Thomas White & Park, W.S.

Thursday, July 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

JOHN C. M'KELLAR, LIMITED *v.* YOUNG.

Sale—Sale of Heritage—Bounding Title—Measurement—Plan.

A property was described in a disposition by reference to a plan, and as containing 383 square yards or thereby, "bounded on the north by D. Road, along which it extends 34 feet 6 inches or thereby; on the north-east by the central line of D. Street, to measure 40 feet in breadth, along which it extends 56 feet 6 inches or thereby; on the south-east-by-south by ground belonging to R, along which it extends 72 feet 3 inches or thereby; and on the west by a steading of ground belonging to M, along which it extends 78 feet 6 inches or thereby."

Held that the disposition could not be regarded as a purely bounding disposition.

Opinion (*per* Lord Low) that the southern boundary was not of the kind which absolutely fixed the limits of the subject since there was in fact nothing on the ground to suggest a boundary there.

Contract — Sale — Sale of Heritage — Disposition — Damages — Articles of Roup — Absolute Warrandice — Reference to Articles after Disposition Completed — Bar.

The articles of roup at a public sale of a heritable property, which was therein described as being of the extent of 383 square yards, provided, *inter alia*, as follows:—"(*Seventh*) The subjects are exposed *tantum et tale* as vested in the exposers, and without reference . . . to the measurements or description thereof . . . as specified in the titles or as appearing from advertisements or otherwise. (*Eighth*) Offerers shall be held to have satisfied themselves with respect to the extent, condition, and description of the subjects. . . . (*Ninth*) The purchaser shall not be entitled, on the ground of any objection to the extent, condition, and description of the subjects . . . or to the exposer's title thereto, or on any other pretext whatever, to withhold the price or any part thereof." The property having been sold to a purchaser under the articles and relative minute of preference, he obtained from the sellers a disposition wherein the same description was given of the property as in the articles of roup. The disposition contained a clause of absolute warrandice. When a building lining was applied for, it appeared that the subjects described in the disposition included an area of 25 square yards which the sellers were not *in titulo* to convey, and that accordingly the purchaser had got 25 yards less than was therein specified. He thereupon brought an action of damages for breach of warrandice against the sellers, in respect that he had not obtained possession of the full area of ground.

Held that it was incompetent to refer to the articles of roup, and, doing so, that the pursuer's claim was barred—*per* Lord Low, on the ground that as the purchaser did not aver that he could not have discovered the discrepancy sooner, and was holding to his purchase, he must be bound by the conditions of the purchase; *per* Lord Ardwall, on the ground that the question between the parties was really, not as to the subject of the sale, but as to the terms of the contract of sale, and these terms were embodied in the articles and minute of preference and not in the disposition.

Wood v. *Magistrates of Edinburgh*, June 22, 1886, 13 R. 1006, 23 S.L.R. 723, *followed.*

On 10th September 1908 John Craig Young, pawnbroker, 11 Merkland Street, Partick, Glasgow, brought an action against John C. M'Kellar, Limited, 45 West Nile Street, Glasgow, in which he claimed £630 damages for breach of the warrandice in a disposition of heritable property granted to him by the defenders.

The pursuer pleaded—"The pursuer having suffered loss and damage through the defenders' breach of warrandice condescended on, is entitled to decree as concluded for."

The defenders, *inter alia*, pleaded—"(1) The averments of the pursuer being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed with expenses. (3) There having been no breach of the obligation of warrandice referred to, the defenders should be assoilzied, with expenses. (4) In respect that the pursuer bound himself by the articles of roup to take the subjects *tantum et tale* as vested in the defenders, and to be satisfied with the title, extent, and description of the said subjects, he is barred from insisting in the present action."

The subjects conveyed were thus *described* in the disposition—"Therefore we do hereby . . . sell and dispone to and in favour of the said John Craig Young and his heirs and assignees whomsoever, heritably and irredeemably, all and whole that steading of ground lying within the parish