alleged, supposing they had been stated in a mode that would have connected the pursuer with them, are wholly denied by him. But with respect to the question of relevancy that is not material.

It was further argued for the appellants, that no such sum as £23,000 was in fact due to the pursuer from the Pitcon estate.

The fifth statement of the appellants in answer to the case of the pursuer was to the effect, that a sum of £11,500, being one half of the £23,000, had been discharged by Alexander Alison before the time when the notes for £23,000 were given by the Blair Iron Co.; and the statement represents that the sum of £11,500 so paid was paid by Alexander Alison out of the funds of the company. This is wholly denied by the pursuer. But treating it to be true, as we must in considering its relevancy as a defence, it raises no question between the pursuer and the company. The question whether the whole £23,000 remained due to the pursuer, was a question not between him and the company, but between him and Alexander Alison, junior, and James Alison, the owners of the estate.

The only remaining ground of defence relied on by the appellants was, that they had counter claims against the pursuer more than sufficient to countervail his demand, as well in respect of the £1120 note as also of the £1500 bill. But this is certainly not so stated as to afford any valid defence. The transactions relied on are various acceptances said to have been given by Alexander Alison, junior, to the pursuer, and to have been retired and discharged by him as acceptor out of the funds of the company, and also various bills drawn by Alexander Alison, junior, in name of the Blair Iron Co., on, and accepted by, the pursuer. These latter bills certainly constitute no ground of demand against the pursuer, for though he is represented as having been the acceptor, not, indeed, in his own name, but in the name of the Forth Co., of which he was the manager, there is no suggestion that any part of the money raised on these bills ever came to his hands. And with respect to the bills accepted by Alexander Alison, junior, and said to have been paid by him out of the funds of the Blair Iron Co., no demand can arise in favour of the company against the pursuer on these bills, without ascertaining the state of the account between Alexander Alison, junior, and the pursuer, and also the state of the account between Alexander Alison, junior, and the Blair Iron Co. It may be, that on the result of these accounts the pursuer may become liable to the company, but that can only be on the ground of his having been party to a fraudulent misapplication of the funds of the company. An illiquid demand of this nature, to be established as the result of complicated cross accounts, and by proving a knowledge of the fraudulent misapplication of partnership funds, cannot be set off against a plain ascertained sum due on a bill of exchange. There is no direct debt from the pursuer to the company. Their demand on him (if any) is only to be made out by shewing that he is indebted to Alexander Alison, junior, their manager, for money which had been obtained by him, with the knowledge of the pursuer, fraudulently from his employers.

The Court of Session, on a consideration of all the facts of this case, came to the conclusion that there was no relevant defence to the action; and I see no reason to doubt the propriety of their judgment. I therefore move your Lordships that the appeal be dismissed, with costs.

My Lords, I have to state that I have communicated what I have just read to LORD BROUGHAM, and he authorizes me to say that he fully concurs in the view I have now taken. There was an objection made by Mr. Rolt, which was, that the Blair Iron Co. are not implicated in the whole of this business; but they have joined as co-appellants, and it is impossible to distinguish the one from the other.

Interlocutors affirmed, with costs.

Appellants' Agents, W. and J. Cook, W.S.—*Respondent's Agent*, A. J. Dickson.

AUGUST 14, 1855.

JOHN BOYLE GRAY, *Appellant*, v. WILLIAM GRAHAM and Others, Trustees of the deceased Henry Wardrop, and Miss JANET CUNNINGHAM, PATRICK GRAHAM, and WILLIAM FRASER, W.S., *Respondents.*

Law Agent—Hypothec—Retention—Solicitor's Lien—Bona Fides—Personal Exception.

Held (affirming judgment), 1. *That a law agent's right to retain his client's title deeds, does not extend to the expense of judicial proceedings instituted by him, after the termination of his agency, for the purpose of recovering payment of his accounts.*

2. *That such accounts were subject to taxation in a question with competing heritable creditors, though they had been constituted by decrees in absence.*

HELD (reversing judgment), 3. *That the law agent was not prevented, by a compromise of his right of retention over the titles of one estate belonging to his client, from throwing an undue proportion of his accounts upon other properties of his client, of which the titles were also in his possession, though these were charged with heritable securities in favour of creditors to whom the compromise had not been intimated; and that he was not bound to apportion rateably upon them the burden of his right.*

HELD (affirming judgment), 4. *That a law agent, acting both for borrower and lender, is bound to disclose to the latter the fact, that the titles were subject to a right of retention on his part; and that, on failure to do so, he was barred from pleading that right against the creditor.*[1]

This was a ranking and sale of the property of the late Charles Cunningham, who died in February 1840.

The pursuer had acted as Cunningham's law-agent, and had possession of the titles of several of his heritable estates. Various accounts were incurred to him by Cunningham in that capacity, amounting in all to £609 12*s.* 7*d.*, and terminating in December 1834.

On 17th April following, the pursuer having ceased to be Cunningham's law agent, commenced proceedings for payment of his accounts. A farther debt of £155 14*s.* 3*d.* of expenses was thereby incurred. Having obtained decree in absence in the sheriff court, he raised diligence, and led an adjudication against his debtor's lands. In the adjudication, the pursuer obtained decree in absence, and ultimately rendered his right real by infeftment.

Besides the lands included in the present ranking, the summons of adjudication was directed against the estate of Stonelaw, also belonging to the debtor, and over which the Bank of Scotland held a security for £15,000. Appearance was entered by the bank in the adjudication; and an arrangement was entered into between the bank and the pursuer, by which they paid him £425 to account of his debt and interest, upon his consenting to relieve the estate of Stonelaw from any claim. He accordingly executed, in their favour, an assignation of his debt, and right of lien upon his debtor's titles, to the extent of £425. It was alleged that the debtor, Cunningham, was a consenting party to this arrangement. The estate of Stonelaw was not included in the decree of adjudication, and was ultimately sold by the bank.

The claimants, Wardrop's Trustees and Janet Cunningham, were heritable creditors on the other portions of the debtor's estate which were included in the present ranking, and of which the title deeds were also in the pursuer's possession. The transaction with the bank was not communicated to them.

It was alleged, that if the burden of the pursuer's right had been apportioned over the estates of the debtor rateably, according to their value, a much larger sum than £425 would have fallen to be charged upon Stonelaw.

The claimant Janet Cunningham was the sister of the debtor. He had proposed to borrow £700 from her upon heritable security, and employed the pursuer to draw up the necessary deeds. The claimant had acquiesced in the employment, and had not instructed any separate agent. She was not informed by the pursuer of the right of retention claimed by him over the title deeds of the borrower.

Cunningham died bankrupt, and the present process of ranking and sale was instituted against his representatives.

Four questions arose upon the state of interests prepared by the common agent:—1*st.* Whether the pursuer's right extended to the sum of £155 14*s.* 3*d.* of expenses incurred in the recovery of his accounts after his connection with the deceased as his law agent had come to a close. 2*d.* Whether the accounts were liable to taxation at the instance of the claimants, notwithstanding all the proceedings which had been taken upon them. 3*d.* Whether the claimants were entitled to object to a greater portion of the pursuer's accounts being charged upon the lands included in the ranking, than what effeired to the value of these estates as compared with the estate of Stonelaw. 4*th.* Whether the right of retention was pleadable against Miss Cunningham,—that right not having been intimated to her, though the pursuer acted for her, as well as for her brother, in completing the loan of £700.

The Court answered the first and fourth questions in the negative, the second and third questions in the affirmative.

The pursuer appealed, arguing that the interlocutors of the Court of Session should be reversed —1. Because the appellant was entitled to maintain his right of lien or hypothec to the effect of securing not merely the amount of his business accounts, but also of all expenses fairly and reasonably incurred in making these accounts effectual against the debtor or his estate. 2. Because the claim of the appellant, in respect of his business accounts, ought to have been held fixed by the decree taken by him against Mr. Cunningham, his debtor; which, after Mr. Cnnningham's acquiescence and ratification, and the transactions and proceedings which followed, could not, posterior to Mr. Cunningham's death, and at such a distance of time, be competently

[1] See previous report 13 D. 963; 23 Sc. Jur. 450. S. C. 2 Macq. Ap. 435: 27 Sc. Jur. 621.

or justly opened up, to the effect of now submitting the accounts to taxation, and readjusting the charge of interest. 3. Because the appellant was not bound to give deduction from his claim of any further sum than that of £425 actually received from the Bank of Scotland, by means of the fair and beneficial transaction carried through with the bank; and there were no sufficient grounds on which the appellant could legally or justly be compelled to give credit for a sum equal to the value of the lands of Stonelaw, as compared with the value of the subjects under sale. 4. Because no sufficient grounds existed on which the appellant could be held barred from maintaining his hypothec against the respondent Miss Cunningham, in respect of an alleged non-communication to her of the existence of the hypothec at the time when she took her heritable bond from Mr. Cunningham. 5. Because, as regards the other respondents, Wardrop's Trustees, judgment was prematurely pronounced *before* it was determined whether they possessed a valid security on which to compete with the appellant.

Miss Cunningham supported the judgment of the Court of Session on the following grounds:—1. The appellant having acted as the agent of Miss Cunningham, as well as her brother, in preparing the bond and disposition in security, and sasines, and having failed to inform her that he had any hypothec or lien over the title deeds for accounts then due or to become due, no claim of preference on account of alleged hypothec can be successfully maintained by him in competition with her; and he is barred, in the circumstances, from claiming such preference. 2. Even supposing the appellant were to be ranked, in virtue of his hypothec, preferably and *primo loco* in a question with Wardrop's Trustees, the respondent Miss Cunningham is entitled to draw back from him such a sum as would have fallen to her as the second bond holder, on the assumption that no preference could be claimed under the hypothec.

Wardrop's Trustees maintained, that—1. The judgment of the Court below, which finds that, in a question with the respondents, who are heritable creditors over the subjects said to be affected by the appellant's hypothec, no preference can be claimed in virtue of that hypothec for any portion of the accounts incurred subsequent to the 17th April 1835, is well founded. 2. The interlocutors were well founded, in so far as they find that the law accounts of the appellant are still liable to taxation, as in a question with the heritable creditors, and that the preference of the appellant can only extend to the amount of these accounts as they shall ultimately be taxed. 3. The interlocutors rightly hold, that the appellant was bound so to use his hypothec as to throw a rateable proportion of his account on the lands of Stonelaw, the titles of which stood hypothecated to him as well as the titles of the lands over which the respondents hold heritable securities; and that no larger portion of that account could be laid upon the lands burdened with the securities of the respondents, than the proportion corresponding with the value of these lands as compared with the lands of Stonelaw.—Bell's Com. ii. 524; *Edie* v. *Robertson*, M. 3403; *Clark* v. *Morrison*, 16 S. 133.

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellant.—1. As to the £155 odds, though there is no direct authority either way, yet it is, on principle, clear, that the hypothec extends not only to the business account, but to the expenses of recovering judgment upon it. The principle is the same in England, and is recognized in *Lambert* v. *Buckmaster*, 2 B. & Cr. 616. 2. The account is not now subject to taxation. The amount was fixed and liquidated by the decree of the Sheriff, and though that decree went in absence, yet the defender had been personally cited. The whole conduct of the client throughout amounted to acquiescence, and he himself would have been now precluded from obtaining taxation.—*Macdonell* v. *Mackenzie*, 2 S. 185, and 7 S. 798; *Clyne* v. *Swanson*, 8 S. 391; *Macara* v. *Gilfillan*, 9 S. 684; *Fraser* v. *Stuart*, 13 S. 78; *Neilson* v. *Morrison*, 14 S. 974; *Colville* v. *Jamieson*, 1 D. 526. A decree in absence following on personal citation binds the defender's heir after the death of the defender.—*Blair* v. *Common Agent* in estate of *Kinloch*, M. 12,196. And the same principle applies to the decrees of inferior Courts.—*Sutherland* v. *Lockhart*, M. 12,200. If, then, the client and his heir would both have been precluded from obtaining taxation, so would his creditors, for they only stand in his place; and to allow them a privilege would introduce anomalies to which there would be no end. 3. There is no absolute and unqualified rule, that in the case of a catholic and secondary creditor the catholic creditor must always take payment proportionally out of the two estates.—Ersk. ii. 12, 66; *Edie* v. *Robertson*, M. 3403. Where it is against his interest, he is clearly not bound to do so. The Court below went on the assumption, that the hypothec over title deeds was exactly the same as the right of a creditor by heritable bond; but the cases differ in many points, for the hypothec is a mere passive right, while the bond is an active right; besides, the value of the security by bond depends on the value of the estate, whereas the value of the hypothec depends merely on the likelihood of some person interested in the estate requiring the title deeds, and as a condition of obtaining them, paying the debt for which the hypothec stands. The transaction with the Bank of Scotland was in the nature of a compromise of a disputed right of hypothec. They denied that the appellant had any hypothec over Stonelaw, but to avoid delay they entered into the arrangement, whereby they paid the appellant a certain sum to get rid of his interference. This agreement the appellant was entitled to enter into.—*Hogg* v. *Gardner*, M. 2894. The case of *Clark* v. *Morrison*, 16 S. 133, on which the

respondents rely, is not a sound decision, but even assuming it to be so, it differed from the present case in several important points. First, the common debtor there was insolvent. Secondly, the title deeds there were not delivered up by the law agent to any one set of the creditors, but were given to the trustee under the trust deed, for the general behoof of all. Thirdly, the distribution of the hypothec was made, not by the law agent but by the trustee. And, fourthly, the trustee sought entirely to relieve one of the creditors from any share of the burden, and thus increased the burden of the other creditors. 4. Miss Cunningham was not the client of the appellant at the time she obtained her bond, and the allegations on the record do not warrant any inference that she was. It was therefore no duty of the appellant to advise her of the hypothec he claimed.

Rolt Q.C., and *R. Palmer* Q.C., for the respondents.—1. The expenses of the action were not covered by the hypothec, for the hypothec is a mere passive right, and can have no active right as its incident. The action was an entirely distinct and independent proceeding, and being raised, not on behalf of his client, but against him, his estate cannot be affected thereby, at least as against the heritable creditors. 2. The right of taxation still exists, for whatever personal bar may have been set up against Mr. Cunningham, his heritable creditors, over whom the agent seeks to be preferred, cannot be prevented from having the account taxed. 3. The hypothec should have been so used as to obtain a rateable proportion of the debt from Stonelaw. The appellant is barred by personal exception from setting up his hypothec against the trustees, for he prepared their security, or at least was aware of it, and he was bound to give them notice of the hypothec he claimed.—*Campbell* v. *Goldie*, 2 S. 16. Besides, at the date of the transaction, Cunningham was known by the appellant to be in a state of insolvency. It is denied that the arrangement with the bank was in the nature of a compromise, for they never seriously disputed the fact that the appellant had a hypothec over Stonelaw. The case of *Edie* v. *Robertson* is no authority against us, while *Clark* v. *Morrison*, 16 S. 133, is precisely in point, and in our favour. 4. Miss Cunningham as well as her brother employed the appellant as her agent, and therefore, as agent of both buyer and seller, he was bound to inform her of the hypothec he claimed over the property.—*Wilson*, 15 S. 1211; *Allan*, 4 D. 1356; *Paterson*, 8 D. 1005.

Solicitor-General replied.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case the appellant was the law agent of Charles Cunningham. That is the situation he held for a period commencing on the 23d November 1826, and his bills of costs from that time down to the 23d December 1834 amounted, according to his demand, to £609 12*s.* 7*d.* In order to recover payment of that sum, as to which there had been a great deal of negotiation and correspondence between him and his employer, he raised a summons before the Sheriff. Upon that occasion Mr. Cunningham was personally served, but he did not appear; and on the 1st July 1835 the Sheriff pronounced decree against Mr. Cunningham for the whole demand, and interest. On the 3d June 1836 the appellant raised a summons of adjudication on this decree, seeking to affect Mr. Cunningham's estates of Stonelaw, Kinninghouse, and some property of Mr. Cunningham's in Regent Street, Glasgow.

Mr. Cunningham was the fee simple proprietor of the property in Regent Street and Kinninghouse, which he had purchased before the appellant had become his law agent. The sum which he had paid for the Regent Street property was £2140, and that for Kinninghouse £1350. In January 1830 Mr. Cunningham had purchased the property at Stonelaw for £18,500, subject to an heritable bond, dated in 1824, in favour of the Bank of Scotland, for £15,000, and subject also to some other real burdens. The title deeds of Stonelaw were in the hands of the bank when Mr. Cunningham purchased the estate in 1830, having been assigned to them by their heritable bond, but upon the completion of that purchase by Mr. Cunningham they were delivered up to him.

The appellant, as the law agent of Mr. Cunningham, had in his hands the title deeds of all the three estates.

The Bank of Scotland being desirous of getting the Stonelaw estate sold, in order that they might obtain the money secured to them by their bond, applied to the appellant for the deeds, alleging that as against them he had no lien, or right of retention, as they call it in Scotland. A great deal of correspondence took place upon this subject in the years 1832-3-4; and eventually, in December 1836, after the appellant had raised his summons of adjudication, and before he had obtained a decree upon it, an agreement was come to between the bank and the appellant that they should pay him £425 towards the discharge of the demand which he had on his employer Mr. Cunningham, of £609 odd, and then that he should abandon his claim of lien or retention on Stonelaw, which might then be sold to satisfy the claim of the bank.

This agreement was carried into effect with the approbation of Mr. Cunningham. The bank having paid £425 to the appellant, his demand was thereby reduced to a sum of about £380, including interest.

On the 14th February 1837 the appellant obtained a decree on his summons of adjudication,

whereby the Lord Ordinary assoilzied from the summons, so far as related to Stonelaw, and adjudged the other lands, *i. e.* Kinninghouse and Regent Street, to the appellant, in satisfaction of the balance of £380, and he was thereupon duly infeft in those lands. Mr. Cunningham approved of all those proceedings. He died early in 1840. Afterwards the appellant raised a process of ranking and sale, in which he claimed to be ranked *primo loco* for the £380 and interest, and also for a further sum of £155 for subsequent expenses, consisting chiefly, I might almost say entirely, of the expenses incurred by him in the proceedings relative to his claim against Mr. Cunningham.

This claim was opposed by the respondents on the following grounds:—The respondents Graham and Calder, who are the surviving trustees of Henry Wardrop, rely on an heritable bond for £2500 over the two properties of Kinninghouse and Regent Street, granted in 1828 by Mr. Cunningham to Wardrop, being the first securities affecting those estates, and they opposed the appellant's claim, contending that, as to the balance of £380—*first*, the bills of costs ought to be taxed; *secondly*, the interest ought to be calculated on a principle different from that adopted by the Sheriff; *thirdly*, if the appellant is entitled to any lien, by way of hypothec, against the respondents, it can only be for such a portion of his demand as the value of the two estates of Kinninghouse and Regent Street bears to that of Stonelaw. And as to the £155, they contended that a law agent has no lien for costs incurred against his employer for enforcing a demand against him. Those were the grounds on which the respondents Graham and Calder resisted the priority of the claim set up by Mr. Gray.

Miss Cunningham, the other respondent, objected to any claim against her by the appellant on the ground of a personal exception: she claimed, in virtue of an heritable bond granted to her by Mr. Cunningham in 1830, in the procuring and preparing of which bond she alleged that the appellant acted as her agent, and also as agent of Mr. Cunningham the granter. And she alleged that during the negotiations for, and preparation of this bond, the appellant never set up or alluded to any claim of hypothec, but, on the contrary, represented the estates as subject to no burdens except the prior bond to Wardrop.

On all these points the decision of the Lord Ordinary, and then of the Court of Session, was adverse to the appellant. It was decided—*first*, that the right of the appellant's hypothec or retention did not extend to the £155; *secondly*, that notwithstanding the decree by the Sheriff, and the subsequent decree of adjudication, the appellant's bills were still liable to taxation; *thirdly*, that the appellant could only claim a lien upon the estates in question—Kinninghouse and Regent Street—for such proportion of his demand as would effeir thereto after attributing a rateable proportion of the claim to the estate of Stonelaw; and, *fourthly*, that as against Miss Cunningham he could not set up any right of hypothec at all. The appellant has brought these adverse interlocutors by way of appeal before your Lordships' House.

As to the *first* point which was decided, viz., as to the £155, the Lord Ordinary decided, and his decision was adopted by the Court of Session in these terms:—"Finds that the objection to John Boyle Gray's claim of hypothec on the titles of the subjects under sale, in so far as founded on the accounts, amounting to £155 14*s.* 3*d.*, said to be due to him by the late Charles Cunningham, incurred subsequent to the 17th April 1835, before which date the relation of agent and client between those parties had been dissolved, cannot be maintained in competition with the claims and interests of the respondents Wardrop's Trustees, and Miss Janet Cunningham, heritable creditors over the said subjects, so as to enable the objector to draw preferably from the price thereof any sum in payment of the said accounts, to the prejudice of the security rights held by the said respondents."

I confess that on this point of the case I had very considerable doubts, because, according to the law, certainly, of this country, (though there is very little authority upon this subject,) if a solicitor has a lien upon his client's deeds for costs incurred by him, and the client, upon application, refuses to pay those costs, and the solicitor is consequently driven to bring an action, undoubtedly, by the law of England, though there is no direct authority upon the subject, except a case very shortly reported—*Lambert* v. *Buckmaster*, 2 B. & C. 616—all principle goes to this: that the law of lien must extend as well to the costs of enforcing the bill of costs, as to costs incurred by the client himself. But the Court of Session held, that as to this £155, incurred in the process of adjudication, that principle does not apply; and though I had some doubt about it, upon full consideration I think the Court of Session is right, and for this reason: the right of retention is primarily a right against the client, and the client only, the owner of the estate. But by the law, as administered in Scotland—which certainly gives rise, as text writers have suggested, to very great anomalies—it is a right which prevails against the holder of the heritable security also. Now this is a very anomalous state of the law, because it enables the debtor to prejudice the right of his creditors; and then the question is—how are those rights affected by the law agent obtaining adjudication? When the law agent who had this demand, first having constituted his debt, proceeded to the process of adjudication, there is no doubt that, by virtue of that adjudication, and what subsequently follows upon it—viz., the infeftment and other proceedings—he becomes a real creditor upon the lands; but he becomes a real creditor upon the

lands not in virtue of his lien, but in virtue of the proceedings which he has instituted. And what the Court of Session has decided is this: that the costs which he incurred in making himself a creditor with a real security, though they may constitute a very good ground of lien or retention against the client who employs him, cannot prejudice the rights of heritable creditors who had claims upon the estate prior to his lien. The Court of Session held that there was no authority to warrant any such extension of the law; that the law itself is subject to very considerable anomalies, and there being no precedent for it, they thought it ought not to be extended; and in that view of the case I entirely concur. That, therefore, disposes of the first question, as to the £155.

The *second* question was as to whether or not these bills were still liable to taxation. The argument was, that there must be an end to the time when a solicitor's bills are liable to taxation; that here the debt was constituted a liquid debt in the year 1835; and that from repeated acts, the particulars of which it is not necessary for me to enumerate, from that time onwards to the time of his death, it may be taken to be quite clear that Mr. Cunningham had repeatedly recognized this as being a valid claim; and it is said that it cannot now be questioned, but it must be taken to be good, and that it is not liable to taxation. The Court of Session, however, thought otherwise, and, I think, quite correctly, because this, as in the former case, is not substantially a question between the client and the law agent, but between the heritable creditors of the estate of the client and the law agent. Mr. Cunningham did all that he possibly could do to confirm the amount due from him to his law agent; to ratify the finding of the Sheriff as to the amount; in short, everything he could to confirm that as a debt due from him; but his acts cannot prejudice the rights of those who had claims prior to any claims that his acts could affect. The Court of Session held, and, I think, quite rightly held, that in a process of ranking and sale of this nature, which is substantially a question between the other creditors holding a prior heritable security and the law agent, the circumstance that the client has chosen to dispense with taxation does not at all prejudice those who may insist upon it, even after the lapse of a considerable time.

Then the *third* question was one of this nature. I have already stated to your Lordships that Mr. Cunningham, the client, had three estates—Stonelaw, subject to large demands, nearly exhausting the whole value, the estate being sold for £18,500, and the charge upon it being £15,000; and he had two other estates, which are the subject of adjudication. And the point which has been decided by the Lord Ordinary first, and approved of by the Court of Session, is this—that the law agent could not part with his lien upon the one estate, so as to leave the lien affecting the others; that, having a lien upon the Stonelaw, and Kinninghouse, and Regent Street, he had no right to part with his lien upon Stonelaw, so as to leave it wholly to affect the two other estates.

Now, with very great deference, I must say, after having considered the case very fully, I cannot do otherwise than concur with the appellant. I think that the Court of Session have fallen into a mistake as to what is called the doctrine of catholic securities, which, though assuming a different name, is a doctrine as perfectly familiar in this country as it is in Scotland. It is very reasonable that where a creditor has a claim upon two funds, he should take his payment rateably out of these funds; or if he takes it, as he certainly may, only out of one of them, then that he should assign to the persons who are prejudiced by that a portion of the securities, so as to set the matter right. That is the doctrine of the law of Scotland as well as of the law of England. But how does that apply to the case of a law agent insisting upon the lien—that is to say, the right that he has to retain his client's deeds? That is something totally different. And the Judges in the Court below in deciding this case, admitted that no such doctrine had ever been propounded or acted upon until the case of *Clark* v. *Morrison*. And they all, in giving their judgment, expressly said that it was exceedingly difficult to apply the doctrine to such a case as this; and though they did arrive at this conclusion, they arrived at it evidently with very great doubt. And the Judges in the present case, I think, acted solely, so far as authority went, upon that decision of *Clark* v. *Morrison*.

Now I do not feel myself, for the reason I have stated, called upon to state to your Lordships as my decided opinion, that that case of *Clark* v. *Morrison* was wrong. But I have no objection to say, that I think it requires very great consideration before it can be held to be right, because what does it amount to? It amounts to this, that a client having several estates, a solicitor can never safely allow him to sell any without ascertaining, when he is selling it, what is the proportionate value of that estate to the others, and saying to him—"You must discharge a portion of your debt to me now, in order that those who hereafter may question my right to the other estates may have nothing to complain of." That seems to me a doctrine so exceedingly inconvenient, that unless it be concluded by the most positive authority, I should be very unwilling to recommend your Lordships to act upon it. But I think that this case is distinguishable from the case of *Clark* v. *Morrison* upon two grounds, and therefore, even supposing the case of *Clark* v. *Morrison* to be rightly decided, still it would not govern the case now waiting your Lordships' decision. The distinctions are these:—In *Clark* v. *Morrison* the whole estate was actually under

diligence. The whole estate was conveyed to a trustee, a gentleman of the name of Grieve, who was to sell the whole, and to apportion the proceeds among the creditors rateably. One of the estates was subject to heavy burdens, and Mr. Grieve agreed, with the assent of all parties, that the second creditor upon the estate should take the property to himself, subject to the prior burden, and, in consideration of that, should release all his claim upon the personal estate—that is to say, that he should become purchaser of the estate, upon which he held a second security, taking the money due to him as the purchase money. Then, when Mr. Grieve proceeded to sell the other estates, undoubtedly the Court held that the solicitor, the law agent, had lost his lien upon the other estates to the extent of the proportion which the estate which had been taken by the other creditor bore to those which then remained to be sold. It was a very strong decision, but it was a decision applicable to the case only of estates that were actually under adjudication, and under process of ranking and sale.

Now in this case the ultimate completion of the sale of Stonelaw by the bank, and the sale of Kinninghouse, did not take place until after the appellant had raised his summons of adjudication; yet it took place, and was substantially entirely completed before there was any decree of adjudication. It had been commenced long before there was any dispute about the payment of the bills at all. Therefore it is the simple case of a client solvent, at least apparently solvent, (it was suggested that he was really insolvent for many years, but *non constat* that he was,) selling one of the estates of which he was the owner, and the solicitor parting with the deeds upon the completion of that sale. That makes a most material distinction between this case and the case of *Clark* v. *Morrison*.

But there is another distinction, which puts this case altogether upon a footing different from that of *Clark* v. *Morrison*, which is this: When the Bank of Scotland proceeded to get this estate of Stonelaw sold, in order to pay themselves out of the proceeds the heritable debt due to them of £15,000, they disputed the right of Mr. Gray to hold these deeds against them at all. For when they took the security they took it with an assignation of all the rights and deeds, and they had the rights and deeds in their actual custody and possession. That was prior to the purchase of the property by Mr. Cunningham, and when Mr. Cunningham purchased, the vendors borrowed the deeds from the bank, and gave a receipt, saying that they had borrowed them, and that they promised to return them on demand. Now Mr. Gray contended that he was not a party to that, and that, consequently, when the deeds came into the hands of his client Mr. Cunningham, the purchaser, he was entitled to hold them against the bank. The bank said that he was cognizant of it, and a great deal of discussion took place, which was protracted through several years, as to whether Mr. Gray had any lien at all upon these deeds, or whether they had not been fraudulently or surreptitiously obtained from the bank, so as to get from them deeds which they were entitled to hold, and which they parted with only for a limited purpose. Before the matter was completed, however, the bank said that they were not willing to protract the litigation any further, and that they would give the sum of £425 towards the discharge of the lien, which altogether amounted to £609. With that offer Mr. Gray was perfectly ready to close, and the £425 was actually paid.

Now, to say that where a solicitor has a lien for £600 in respect of his costs, upon all the deeds of his client, upon the client proceeding to sell one of his estates, the solicitor must not part with the deeds without being paid in the exact proportion of the value of the estate sold to the other estates, would be carrying the doctrine to a length which, unquestionably, the case of *Clark* v. *Morrison* does not justify.

In my opinion, therefore, the Lord Ordinary first, and the Inner House afterwards, came to an erroneous decision in respect to the third finding. I think that there was nothing in what passed between Mr. Gray and the bank upon the sale of the Stonelaw estate, which prevented him from asserting to the full extent his security, whatever that security might be, remaining after giving credit for the £425, the proceeds of the other estate.

That brings me to the *fourth* point, which, I think, lies in a very narrow compass indeed—that is, the claim of Miss Cunningham. Now Miss Cunningham disputes the claim of the appellant to any lien against her upon a ground which I think the Court of Session was perfectly right in sustaining in point of law, if the facts had warranted the application of it. What the Court decided was this: that where there is a borrower and a lender, and the solicitor for the borrower acts as solicitor for both parties, he, preparing the security for the lender at the expense, as will ordinarily be the case, of the borrower, if he has any demand upon the title deeds which belong to the lender, and affect his security, is bound to disclose that fact to him, because otherwise he is deceiving his own client by leading the lender, who is as much his client as the borrower, to suppose that he is giving him the security of the estate free from any lien on his part, whereas, in truth, he afterwards sets up a right of retention against him. The Court of Session held that nothing was more dangerous than to allow transactions of this sort; and that where the same law agent acts for parties who have conflicting interests, the law must always be taken most strongly against him. And consequently they held in this case that there was a personal exception against the appellant setting up this lien against Miss Cunningham.

As regards the law there laid down, I entirely concur in the judgment of the Lord Ordinary, and of the Inner House afterwards. But upon looking attentively to the case, I cannot discover the least trace that Mr. Gray acted in any respect whatever as the law agent of Miss Cunningham. The proceedings here are in the nature of what we should call in this country a demurrer. There is no evidence gone into except some letters which I shall allude to presently. Miss Cunningham says that Mr. Gray acted as her agent. He denies that. He states that he never saw Miss Cunningham in his life. Miss Cunningham says that he acted as her agent, communicating with her through a nephew, a son of Mr. Cunningham's. That is entirely denied. The transaction looks to me very much more like that which the appellant represents it, than that which Miss Cunningham's advisers represent it. Because this was no loan of money. Miss Cunningham was the creditor of her brother upon a bill or a note, or some transaction of that sort, (I suppose some family arrangement,) and Mr. Cunningham had, whether at her instance or not is immaterial, agreed that he would give her a real security for the amount he owed—£500 due to herself, and £200 to some person for whom she was trustee, making in all £700.

The *printed case* now before your Lordships does not disclose the fact, but we have had handed to us the print as it was before the Court of Session in Scotland, and by that print it appears that a correspondence took place, in which Mr. Cunningham always treated this as a transaction in which he and he alone was concerned. I say he alone, because there is no allusion to anybody else. The bill of costs was brought in to him. He complained of delay and neglect on the part of the agent, Mr. Gray, who managed this business. Mr. Gray takes offence at that, and writes to say that Mr. Cunningham is charging him very unfairly; that he had done exactly what Mr. Cunningham had told him to do. And he points out how he had strictly complied with his commands.

That being so, the facts on which the law applied by the Court of Session rested, entirely fails in this case. There is no evidence that Mr. Gray ever undertook to act as agent for Miss Cunningham, and consequently the application of the law is not warranted by the facts of this case.

The result therefore is, that I shall move your Lordships, as to the two first findings, to dismiss the appeal, and declare that the appellant's right of retention of the title deeds of Kinninghouse and Regent Street, Glasgow, was not affected by reason of his having parted with all right in the title deeds of Stonelaw in consideration of a sum of £455; and declare further, that the appellant was not barred by any personal exception from insisting on his right of retention against Miss Cunningham's claim on her bond for £700; and with this declaration remit the case to the Court of Session.

Mr. Anderson.—May I ask how your Lordships dispose of the costs below—the costs in the Court of Session? The Inner House gave the costs against Mr. Gray. I apprehend that order will be reversed with the other finding; but I apprehend that he ought to have his costs. He has succeeded in the main points.

LORD CHANCELLOR.—He has succeeded upon two of his points, and upon two he has failed.

Mr. Anderson.—He has succeeded entirely against Miss Cunningham.

LORD CHANCELLOR.—He has succeeded entirely against Miss Cunningham, and as against her he must have his costs below. With regard to the others he can have no costs, because he has succeeded only in part.

Cause remitted with a declaration.

Appellant's Agents, Wotherspoon and Mack, W.S.—*Respondents' Agents* (for Wardrop's Trustees), Patrick Graham, W.S.; (for Miss Cunningham) William Fraser, W.S.

JUNE 9, 1856.

SIR ROBERT MENZIES, BART., *Appellant, v.* Major-General JOHN MACDONALD, *Respondent.*

Common Property—Loch—Part and Pertinent—Right of Riparian Owner in Loch—*A and B, two proprietors* ex adverso *of the shores of Loch Rannoch, had, by decree of the Court of Session, been found to have a joint right or common property in the loch. Thereafter A sold part of his lands adjacent to the loch to C, the title being taken in the same terms as in his own Crown charter, where lakes were merely mentioned as amongst other pertinents.*

HELD (affirming judgment), *in a declarator at B's instance, that C had also a right of common property in Loch Rannoch.*