as in the present case, the owner, being himself in actual possession of the equipage, simply hands over the reins or the wheel he does not by so doing give up the possession of the equipage or his right of control of the way in which it is to be driven. Collins when he took the wheel came under the control of the defendant. It was in the interest of the defendant that Collins should drive, in order that he might make a trial of the car. If Collins drove in the ordinary way the defendant in his own interest would not interfere with the driving; but there is nothing to show or to suggest that the defendant had given up the right to control the way in which the car was to be driven if an occasion arose on which in his opinion it became necessary to exercise that control, or if for any other reason he desired to exercise it. If Collins had been going too quickly and Samson had told him to go slow, and Collins persisted in going too quickly, Samson would have had the right to say to him—'If you wish to continue to drive my car you must drive it as I direct, and if you will not do so you must cease to drive it.' In such circumstances Collins would have had to obey orders or cease driving. It does not follow that because in any particular case it has not been found necessary to exercise a paramount authority that such authority did not exist."

In the opinion of their Lordships this amounts to a finding of fact that the appellant had not abandoned the control which they think, *prima facie*, belonged to him. The mere fact that he had asked or permitted young Collins while he sat beside him to drive the car is in their Lordships' view not enough to establish *per se* that he had abandoned control of his car. And if the control of the car was not abandoned, then it is a matter of indifference whether Collins while driving the car be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case which makes him responsible for the negligence which caused the injury. It appears to their Lordships that there is abundant evidence to sustain the conclusion to which the learned Judge has come on this question of fact—the retention of control by the appellant. They not only see no reason for disturbing it, but think that it is the right conclusion, one at which they themselves would have arrived. Their Lordships cannot, with all respect to the learned Chief-Justice, concur in the view of the evidence expressed in the following passage of his judgment in the Court of Appeal—"There was therefore nothing requiring the appellant to interfere with or intervene in the driving or control of the car. Nor do I see that it can be said that this was a driving on the business of the appellant as in the case of *Wheatley* v. *Patrick* (2 M. & W. 650). It was done for the purpose of testing the car, and while the car was being tested the accident occurred. It appears to me that to hold that Collins was acting as a servant or an agent or under the control of the appellant would be going beyond what has been decided in any of the cases referred to or which may be referred to, or to what is laid down in the various treatises on torts or negligence. The facts that he was to have a trial of driving up a hill, that the car was surrendered to his control for that purpose, and that his mother was in the car as well as the appellant, appear to me to differentiate this case from those relied on. Nor does it seem to me that, assuming that Mrs Collins and her son's evidence is true about the suggestions made as to driving by the appellant, it shows that the driving was under the appellant's control."

They think that in this passage the very fact in controversy is assumed to be true, namely, that the car was surrendered to the control of Collins for the purpose of the trial. There was to be a trial of the car as a hill climber, no doubt, but if the evidence of Mrs Collins and her son be true there was no stipulation whatever, express or implied, that Collins should drive during the trial, or should have the control of the car while he drove it. On the contrary, they state that the suggestion that he should drive it came from the appellant during the progress of the run.

Their Lordships are therefore of opinion that the judgment appealed from was right and should be affirmed and the appeal dismissed. And they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Appeal dismissed.

Counsel for the Appellant—E. G. Jellicoe. Agents—Metcalfe & Sharpe, Solicitors.

Counsel for the Respondent—Atkin, K.C. —T. T. Paine. Agents—Paines, Blyth, & Huxtable, Solicitors.

HOUSE OF LORDS.

Friday, July 26, 1912.

(Before Lords Macnaghten, Atkinson, Shaw, and Robson.)

DEELEY *v.* LLOYDS BANK, LIMITED.

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

Right in Security—Second Mortgage Intimated to First Mortgagee—Indefinite Payments—Appropriation.

Where a bank holding a first mortgage over property in security for advances on a current account receives intimation of a second mortgage over the property, the priority of the bank as first mortgagee only extends to advances made before the date of the intimation, and all payments to the account after that date must be applied by the bank in reduction of the balance due to it at that date.

For application to the law of Scotland see *Union Bank of Scotland* v.

National Bank of Scotland (1886, 14 R. (H.L.) 1, 24 S.L.R. 227, 12 A.C. 53) and Lord Lindley, M.R., in *West* v. *Williams* (1899, 1 Ch. 132) as quoted by Lord Shaw *infra*.

This case was an appeal from a judgment of the Court of Appeal (FLETCHER MOULTON and BUCKLEY, L.JJ., COZENS-HARDY, M.R., *diss.*) affirming a judgment of EVE, J.

The *facts* appear from their Lordships' considered judgment, which was delivered as follows—

LORD ATKINSON—The facts in this case are in the main not in dispute; it is upon the proper inference to be drawn from them that the controversy arises.

One John Glaze, the owner of ironworks at Brierley Hill, Dudley, called the "Brockmoor Works," which were valued at a high figure, and of which, apparently, he entertained high hopes, executed three mortgages of them. The first was dated the 25th August 1891, for £2500; the second the 21st September 1893, for £2500; the third the 19th October 1895, for £3500. The first of these mortgages was on the 22nd March 1899 assigned to the respondents, and this litigation is not concerned with it. Glaze was a customer of the local branch of the respondent bank, of which one George Wilkinson was the manager. From Glaze's passbook it appears that on the 31st December 1892 there was a debit balance against him of £687, 6s. 10d., and on the 30th June 1893 a similar balance against him of £920, 8s. 3d.

To secure this current account, to the amount of £2500, Glaze made to the bank the second mortgage, which I shall refer to as the "bank mortgage." It contained a covenant by Glaze that the mortgagor would pay on demand, or, if no demand should be made in his lifetime, that his representatives would pay on his death, to the respondents the balance then owing by him on his current account with them for cheques, notes, or bills drawn, accepted, or endorsed by him, or for advances made to him, or for his accommodation or benefit, or otherwise howsoever, with interest, with half-yearly rests, commission, and customary charges. I concur with the Master of the Rolls in thinking that this was an ordinary bank mortgage to secure a current account. From first to last Glaze's account with the bank was kept as an ordinary current account, balances being struck half-yearly on the 30th June and the 31st December in each year. The passbook duly posted up from time to time was sent to Glaze, who returned it without objecting to the form which the account took.

Owing to some mistake which was not explained, and one which, if the business of the bank had been conducted with ordinary care, would appear to be inexplicable, this mortgage was for some time taken by the bank to be a security for the whole of Glaze's overdraft, then amounting to between £3000 and £4000, and not for the amount plainly stated in it in so many words—namely, £2500. The debit balance against Glaze on the 30th June 1895 amounted to £3872, 1s. 8d.

The third mortgage, though dated the 19th October 1895, was not in fact executed till the 2nd December following.

It was a mortgage from Glaze to Mrs Deeley, his sister, for £3500, and included, in addition to the Brockmoor Works, all the book debts due to Glaze, amounting nominally to between £2000 and £3000. Frank Deeley, the husband of Mrs Deeley, who was Glaze's solicitor, gave on that day notice to the local branch of the bank of the execution of this mortgage. I am utterly unable to understand the insinuations which have been made against this man because of his having given this notice. It would rather appear to me that it was his duty, not only to himself and his wife, but also to the bank, to give the notice if the mortgage was a genuine and honest transaction. He knew that Glaze owed a large sum to the bank, and to conceal from them under these circumstances the fact that their debtor was encumbering or disposing of his property would, I think, have been anything but straightforward or worthy conduct.

A debit balance stood against Glaze in the bank's books on the 31st December 1895 amounting to £3449. It is, however, plain on the figures that if the debit items entered in the accounts after the 2nd December 1895, the date of the receipt of the notice, be disallowed on the principle of *Hopkinson* v. *Rolt* (9 H.L.C. 514), and the payments alone taken into account, then, as against Mrs Deeley, Glaze's debt to the bank was discharged on the 6th January 1896, and at least as far as the figures go her mortgage would, as was contended, have *prima facie* acquired priority over the mortgage to the bank.

The bank must have been fully aware of the effect on their security of the receipt of notice of the existence of a security of a later date than their own, and the manager Wilkinson must have known fully what his duty was with respect to it, for he produced in the witness-box a copy of the bank's rules for branch managers, of which the 14th was as follows—"Whenever notice is received of a second mortgage, or second charge on any security on which the bank holds a prior charge, the account must be at once ruled off and a second account opened for subsequent transactions." This rule, he said, was acted upon in his branch.

Glaze's account was not so ruled off. No new account was opened. On the contrary, to use Wilkinson's own words, "it was kept as a continuous current account" from the date of the mortgage to the bank downwards, and the reason why it was so kept was obvious. Mr Wilkinson, whose memory was said to be defective, forgot all about the notice. No entry of the receipt of it was ever made in any of the books of the bank; no record was kept of it. At the trial Wilkinson stoutly denied that he had ever received it, and relied upon the fact that he had kept the account as a con-

tinuous account, and not as directed by his rules, as corroboration of his statement, circumstantial proof that he had never received the notice at all. If he had been right in his impression, the appropriation of the earlier payments to discharge the earlier debts, on the principle laid down in *Clayton's* case (1816, 1 Mer. 572, 3 Ross, L.C., 654), could not prejudice in any way the interest or defeat the rights of the bank, their security being, as it was, a continuing security; and the fair inference to be drawn from Wilkinson having kept Glaze's account as he did keep it, is that, owing to his having forgotten all about the notice he intended thus to appropriate the payments made by or on behalf of Glaze.

In addition, Glaze, in August 1896, began to make specific appropriations of his lodgments with the bank. This continued down to the 13th January 1898. The appropriations in that period amounted to 134 or 136. On the 21st January 1897, and on the 12th and the 13th January 1898, Wilkinson wrote to Glaze three letters containing the following passages respectively. On the 21st January 1897—"Your memorandum is altogether unsatisfactory. Let me again remind you that the bill for £67, 4s. has to be withdrawn. The excess in the account, and the last half-year's charges have to be paid at once, and I have to inform you that we cannot take special provisions for cheques, especially while your former promises are unfulfilled." Then he wrote on the 12th January 1898—"Your account being conducted in such an irregular manner causes great confusion in our books, and I give you notice that I cannot in future accept any special provision for your transactions. The account must be conducted on ordinary lines in future. The charges for the past year must be paid to the bank." The passage from the next letter was—"Although I wrote to you yesterday as to special provision for cheques, you send a similar transaction to-day. I cannot accept the money as special provision, and if you send further instructions of the same kind it will be returned to you."

These three letters, he said, were his protests against the making of special provisions; and he further stated that by the words "the account must be conducted on the ordinary lines," he meant the paying in of sums so that they could be put to the general account; and further, that up to the time when Glaze began making special provision he had paid the money in to the general credit of the account, crediting the payments in their order of date, as he always did, in current accounts.

There could be no more direct refusal than this to permit the debtor to appropriate his payments as he wished to do, and no more emphatic assertion than this of the creditor's intention to appropriate them as he, the creditor, wished. The mode in and by which the creditor in this case carried out his intention was by appropriating them in a way which has been held to disclose, *prima facie* at all events, an intention to apply the earlier payments to discharge the earlier debits. No record was kept in any of the books of the bank of these special appropriations by Glaze. The current account was kept as if no such special appropriations had ever been made. Counsel for the respondents made the strangest use of these negligent omissions on the part of Wilkinson. He contended that it established that the mode in which the account was kept before the special appropriations commenced, as well as after they had ended, could not be taken as any indication whatever of an intention on Wilkinson's part to deal with the payments during either of those periods on the principle laid down in *Clayton's* case. I am quite unable to follow this line of reasoning. If it were sound it would lead to this strange result, that it would only be necessary for a creditor to omit all notice of a debtor's special appropriations in a current account to rebut the inference which is *prima facie* to be drawn from the fact of keeping accounts at a date anterior to the appropriation as current accounts.

In *Clayton's* case Sir William Grant, M.R., is reported to have spoken thus—"If appropriation be required, here is appropriation in the only way which the nature of the thing admits. Here are payments so placed in opposition to debits that on the ordinary principles on which accounts are settled this debt is extinguished. If the usual course of dealing was for any reason to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers 'Leave this balance altogether out of the running account between us,'—or—'Always enter your payments as made on the credit of your latest receipts, so that the oldest balance may be the last paid.' Instead of this he receives the account drawn out as one unbroken running account. He makes no objection to it, and the report states that the return of the customer after the receipt of his banking account is regarded as an admission of its being correct. Both debtor and creditor must therefore be considered as having concurred in the application." *Bodenham* v. *Purchas* (1818, 2 B. & Ald. 39, 3 Ross L.C. 661), and *Simson* v. *Ingham* (1823, 2 B. & C. 65, 3 Ross' L.C. 689) are to the same effect.

In *Royal Bank of Scotland* v. *Christie* (1840, 2 Robin. 118, 8 Cl. & F. 214, 3 Ross L.C. 668), the two surviving partners of a firm of three continued after the death of the third to deal with their banker in the same way as theretofore, no arrangement having been made for keeping separate in the accounts the balance due to the bank at the death of this partner. At a certain date the payments made after the death of the partner balanced the debt due from the firm at the time of his decease. It was held that the separate estate of the deceased partner was discharged by this payment. Lord Lyndhurst, L.C., is reported to have expressed himself thus—"Such payments"—*i.e.*, payments subsequent to

the partner's death—"having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them consisting of the old and new transactions, and constituting therefore a continuing account, and from which appropriation it was not competent for the bank to remove such payments at a subsequent time when the consequences were seen, as was decided in *Bodenham* v. *Purchas*." In *Sherry's* case (1883, 25 Ch. Div. 692) Lord Selborne, L.C., thus stated the rule in *Clayton's* case—"The principle of *Clayton's* case, and of the other cases which deal with the same subject, is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the persons paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account. It is, of course, absolutely necessary for the application of those authorities that there should be one unbroken account and entries made in that account by the person having a right to appropriate the payment to that account." It is no doubt quite true that the rule laid down in *Clayton's* case is not a rule of law to be applied in every case, but rather a presumption of fact, and that its application may be rebutted in any case by evidence going to show that it was not the intention of the parties that it should be applied. This was much insisted upon by the respondents, and the decisions in *Henniker* v. *Wigg* (1843, 4 Q. B. 792), *City Discount Company* v. *M'Lean* (1874, L.R., 9 C.P. 692), and *The Mecca* ([1897] A.C. 286) were relied upon in order to show that according to the principles laid down in them Wilkinson could not be taken to have intended that the rule in *Clayton's* case should apply to Glaze's current account.

The facts of each of these cases were very special. In the first a bond, not on its face a continuing security, was given by the several obligors to a bank as security for the debt of one of them. The statements and acts of the parties showed clearly that the bond was intended to be a continuing security. To have applied the rule in *Clayton's* case would, under the circumstances of the peculiar case, have defeated the common object of the parties.

In the second case, though long debtor and creditor accounts were furnished by the creditor to the debtor, including amongst their items the original guaranteed advance, a balance being struck from time to time, yet on the face of these accounts it was shown that the credit items consisted to a large extent of trade bills, and to a very considerable extent of the amounts, less discount and commission, of accommodation bills discounted by the bank for the debtor, many of them being current when the balance was struck, while the debit items included such of the bills as were dishonoured. Several of the bills were renewed at maturity, when the same system of debiting and crediting was adopted. The actual indebtedness of the customer always exceeded in amount the advance made by the bank on the security.

Bramwell, B., is reported to have said—"They contemplated an advance of £5000, and that the debt might continue for two years unpaid and unsatisfied, and they obviously contemplated subsequent dealings quite independent of and unconnected with the advance of £5000. . . . With respect to the accommodation bills, it is clear that they were nothing more than advances and renewals of the advances. With respect to the trade bills discounted after the advances, they were discounted on the terms that Southgate (*i.e.* the customer) should have the proceeds, and not that the proceeds should be applied in liquidation of the £5000." In the last case no account current at all was kept between the parties. Lords Halsbury and Herschell seemed to think that this fact was by itself sufficient to show that *Clayton's* case did not apply, and Lord Macnaghten found in the facts of the case, and the correspondence which took place between the parties, clear evidence that the creditors who received the money payments never intended to give up their right to appropriate them as they pleased. But at the end of Lord Macnaghten's judgment there is another passage, which runs thus—"Where the election is with the creditor it is always his intention, expressed or implied or presumed, and not any rigid rule of law, which governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates an intention one way or the other and is communicated to the debtor, provided that there are no circumstances pointing in an opposite direction." The only matter of importance relied upon by the respondents as pointing in the opposite direction in the present case is, as I understood the argument, this—"It is said that it never could be supposed that Wilkinson intended to postpone the bank's security to Deeley's, thereby lessening the security of the bank. But the acquisition of priority for the latter security rests on the receipt of the notice by the bank. Wilkinson had forgotten all about the notice. He never thought about the acquisition of priority by Deeley's mortgage, and it seems to me impossible for any human being to intend to bring about or to retard a result which was never present to his mind at all. All that he knew or remembered was that the mortgage of the bank stood second upon the list. Moreover, the application of the rule in *Clayton's* case would, in his state of ignorance of the real facts, have appeared to him quite harmless. There was therefore no reason why he should not intend and desire that the rule should apply.

It has also been urged that it cannot be supposed that the Deeleys could ever have intended to do anything to shake John Glaze's credit with the bank or cause

the bank to think that their security for his overdraft was diminished in value. The answer to that is that Deeley was ignorant of the law touching these matters. Deeley could not have intended to gain priority for his wife's mortgage by any system of appropriating payment, because neither he nor she ever knew that priority could be so secured. I think, however, that this in itself does not prevent them from taking advantage of the benefit which the operation of the law, of which they were ignorant, may have secured for them. There is, therefore, in my opinion nothing to rebut the presumption that the creditor, in this case the branch bank, by keeping Glaze's account in the way in which they did keep it, intended to apply the earlier payments to discharge the earlier debits in the manner indicated in *Clayton's* case, and accordingly that it must be taken as established that this was done.

It follows that the bank having in fact had notice of Mrs Deeley's mortgage cannot *prima facie*, as against her, insist that the payments made after the date of that notice, the 2nd December 1895, should not be applied in the first place, so far as needed, to discharge the debit items anterior to that date—See *Hopkinson* v. *Rolt* (9 H.L.C. 514); *London and County Bank* v. *Ratcliffe* (1881, 6 A.C. 722); *Union Bank of Scotland* v. *National Bank of Scotland* (1886, 14 R. (H.L.) 1, 24 S.L.R. 227, 12 A.C. 53); *Bradford Banking Company* v. *Briggs* (12 A.C. 29).

The practical result of the application to the facts of this case of the principles established by these two lines of authority must, as has been demonstrated on the figures, be taken to be that Mrs Deeley's mortgage in fact gained priority on the 6th January 1896. The respondents contend, however, that the conduct of the Deeleys (I make for the present no distinction between the husband and the wife), was such that it is inequitable on their part to rely upon this priority; that the truth on this matter must be shut out from the consideration of the House. On behalf of the respondents it was expressly admitted that neither Deeley nor his wife ever made any representation, false or true, which would make it inequitable for them to rely upon this point. They distinguish between words and conduct in this respect, and contend that it is by the latter, not by the former, that they are prevented from insisting on the truth. The burden of proving the affirmative of this proposition rests upon the respondents. They must discharge it by adducing trustworthy evidence, not by insinuations.

What, then, has been the conduct of the Deeleys, which, it is contended, stands in the way of their assertion of the right which they have acquired? First, as to the mortgage itself; their story is in effect this, that Glaze was largely indebted upon many heads to Deeley, that Deeley was largely indebted to his wife, and that it was arranged between the three that Glaze should execute this mortgage to his sister in discharge, in whole or in part whichever it be, or to secure in whole or in part, his debt due to her husband. It appears to me that there is nothing inherently improbable, or legally or morally wrong, in such a transaction.

Eve, J., deals with the matter at length in his judgment. He says—"I have had an opportunity of seeing the witnesses; without accepting the whole of their testimony in detail, I am satisfied in the main of this, that this transaction which took place in 1895 was a transaction which was *bona fide* to this extent—and perhaps it is sufficient to say to this extent—that Mr Deeley intended by it so far as possible to secure to Mrs Deeley all the moneys for which he believed that he was indebted to her; and I do not believe that the bank have discharged the obligation which lies upon them of proving the allegation which they have made, that the whole thing was colourable, and that in fact the money was Mr Deeley's, the mortgage was Mr Deeley's, and that Mrs Deeley was merely put forward as a nominee, and as a cloak for the transaction which was entered into."

That finding has not, in the argument before your Lordships, been either accepted frankly or challenged boldly. It has been accepted most grudgingly and with many insinuations. Judging from the evidence, as the Court of Appeal were obliged to judge of it, namely, from the printed report, I find nothing whatever to lead me to reject this finding of Eve, J. Mr and Mrs Deeley do not appear to me to have been untrustworthy witnesses who endeavoured to conceal anything which they thought might tell against them; on the contrary, they appear to me to have given their evidence on the whole with frankness. She stated distinctly that this mortgage was her own, that she kept control of it, only giving it to her husband when he needed it to use in the strange manner which I am about to mention. He gave evidence to the same effect.

The use of the mortgage to which I refer (Eve, J., comments on it) was this—A very few weeks after its execution Deeley, with the concurrence of his wife, deposited it in the local branch of the bank as a security for a temporary advance to John Glaze, and on four separate occasions repeated the operation. Mr Wilkinson cannot be the sole official of the bank, but none of the other officials were produced to contradict Deeley on this point. It is inconceivable that the nature of the document was not known to some of them, and it certainly appears to me that these transactions not only show, if indeed that were needed, how slovenly and negligent was the bank's mode of doing its business, and how reckless was the defence, persisted in to the last, that they knew nothing of Deeley's mortgage, but refute completely the charge that Deeley, while he was pressing the bank to give the utmost possible accommodation to Glaze was concealing from it Glaze's true financial position.

Deeley owed no duty to the bank, who was not his client, to know the law. Even if his conduct amounted to a representation of what the law was, it would not, I think, however erroneous, prejudice the case of himself or his wife, if he honestly said what he thought—see *Eaglesfield* v. *Marquis of Londonderry* (1875, 4 Ch. Div. 693.)

But it is not alleged that anything which he said or did amounted to a representation of the state of the law. The conduct which, as I understand, is alleged to preclude the Deeleys from relying upon the postponement of the bank's mortgage to their own in this connection is this—they were anxious, it is said, that Glaze should get all possible accommodation from the bank. They must have known that the accommodation actually given to him would not have been given if the mortgage to the bank had lost its priority. Accordingly they dealt with the bank on behalf of Glaze on the assumption that the bank's mortgage retained its priority, and having so dealt they are estopped from asserting that the bank's mortgage has lost its priority.

When this contention is analysed it merely comes to this, that there was a common mistake as to the true state of the facts. I concur with Cozens-Hardy, M.R., in thinking that this course of dealing, having taken place as it did and under the circumstances in which it did, cannot estop the Deeleys from relying on the acquisition of priority by their mortgage.

The only other substantial matter, in my view, pressed against the Deeleys is this—Thomas Glaze, the brother of John Glaze, had given to the bank a bond for £2000 as security for his brother's indebtedness. Mrs Deeley had given a counter-security to Thomas Glaze for the sum of £1000.

The sum received by the bank on the sale of the property was sufficient to satisfy mortgages one and two, but left nothing to meet Deeley's mortgage as it originally ranked. If this bond was in fact merely a security collateral to the bank's mortgage, then of course when that mortgage was satisfied by the proceeds of the sale the bond was satisfied, as was also the counter security given by Mrs Deeley. This bond was not produced, though it was shown to have been sent to the head office of the bank. It was not cleared up whether on its face it did not show that it was merely a collateral security. Deeley was cross-examined on this point as to an interview which he had with Nicholls in June 1899. His evidence was as follows:—"(Q) Just listen again. Did you tell Nicholls that Thomas Glaze's guarantee was only intended to be collateral to the second mortgage?—(A) Yes, I did. (Q) And that, as the bank had got sufficient money by the sale to pay the first and second mortgages, the guarantee must cease?—(A) I believe I did say so. If he says so I will not deny it." Later on he says—"You are asking me about Thomas Glaze. I am referring to an attempt to make Thomas Glaze pay. I went to the bank and showed my books and correspondence, and I proved to the bank that the £2000 guarantee was collateral to the second mortgage? (Q) No one suggests that it was not. You do not listen to me. The form of Thomas Glaze's guarantee was this, was it not, that Thomas Glaze guaranteed the indebtedness of his brother John to the bank to the extent of £2000?—(A) Yes. (Q) But the fact is that they did not ultimately pursue that remedy which they may have had against Thomas Glaze after having sold this property and paid off?—(A) No, they dropped the contention."

The matter was not cleared up further. Nicholls, Wilkinson's successor, was not asked anything about these negotiations. No evidence was given by him as to whether he had found out whether what Deeley told him was true or false. It is not suggested that Deeley was guilty of any false representation. If it was true in fact that Thomas Glaze's guarantee was only a collateral security, it was his duty to Glaze to say so. The truth is that the release of Thomas Glaze from liability had its true foundation in the belief that the bank's mortgage was paid off out of the proceeds of the sale. That was the belief of both Nicholls and Deeley, but Deeley had done nothing to cause Nicholls to form that belief. He had given the notice which if properly attended to would have made it impossible for any official of the bank who attended to the rules of the bank to have formed such a belief. There is no evidence that Deeley knew that Wilkinson had forgotten all about the notice or that Nicholls was not aware of the receipt of it. I do not think, therefore, that the fact that Nicholls and Deeley dealt on the assumption that the mortgage of the bank was thus satisfied can estop Deeley and his wife from insisting now that their own mortgage has acquired priority or make it inequitable for them to do so.

This being my view, I think it unnecessary to deal with the question of the nature and limits of Deeley's agency for his wife.

I concur with the Master of the Rolls. I think that his judgment was right, and I am of opinion that this appeal should be allowed, with costs here and below.

LORD SHAW—Mr John Glaze was the owner of the Brockmoor Steel and Iron Works in the county of Stafford, and of certain messuages or dwelling-houses there. He carried on a steel and iron business, and was in the position of requiring advances of capital. He was a customer of Lloyds' Bank Limited, the respondents in this appeal. He executed three mortgages over his property. The first of these need not be referred to. The second was dated the 21st September 1893. By it it was stipulated that "the mortgagor hereby covenants with the company that he, the mortgagor, will on demand, or if no demand is made in his lifetime, then his heirs, executors, or administrators will on his death, pay to the company the balance then owing from the mortgagor on his

account-current with the company for cheques, notes, or bills drawn, accepted, or endorsed by him, or for advances made to him or for his accommodation or benefit." The indenture contained other clauses usual in similar circumstances, and it was "provided always that the amount to be secured by these presents shall not exceed the sum of £2500." It is an ordinary bank mortgage to secure a current account to the extent of £2500.

About two years thereafter, on the 2nd December 1895, Mr Glaze granted a further mortgage over the same property in favour of the appellant. Notice thereof was duly given on behalf of the appellant to the bank. The proceedings in this case have been protracted, and much of the delay and elaboration has been due to a denial by the bank that this notice was received. In the witness-box their agent maintained that it was not, and, indeed, explained his conduct with regard to his method of keeping the account, and of treating subsequent payments, by the circumstance that he had not been apprised of the second mortgage. This defence has been held to be unfounded in fact, and it was not maintained at your Lordships' Bar. I incline to the view that the bank agent was of opinion—an opinion entirely justified by the value of the Brockmoor property while there was a going business therein—that the subsequent mortgage was a matter of no moment, looking to the enormous margin of security which still remained for the bank. In these circumstances I think it not unlikely that he took no special account at the time of the notice of the subsequent mortgage, and has forgotten all about it ever since.

Mr Glaze's circumstances, however, became more and more embarrassed. The bank, after the usual procedure, realised the property by private sale at a price just sufficient to cover the amount of its security together with a prior mortgage which the bank had acquired. In these circumstances the bank maintain that no surplus is available for payment of anything to the appellant. The appellant, however, maintains that payments were made at times and of sufficient amount to extinguish the bank's security, and that, consequently, her mortgage ranks as prior in date to that of the bank, and the debt due thereon should be satisfied accordingly. It is agreed that if this be so the bank mortgage would be effective for any balance due from the property after satisfaction of the appellant's mortgage.

The position of the accounts may be stated in a word. The important date is the 2nd December 1895, being the date of the appellant's mortgage. According to the bank passbooks of Mr John Glaze there was at that date a debit balance of £3379 on his current account. This to the extent of £2500 was secured by the bank mortgage. When, however, notice was given of the execution in the appellant's favour by Mr Glaze of the second mortgage, on the 2nd December 1895, that notice was ignored. Mr Glaze's account with the bank was continued as before. No fresh account was opened, nor fresh security asked. Not even the course referred to in argument of drawing a line across the bank account to distinguish fresh from former payments or advances was taken. Mr John Glaze continued to pay in money to his credit, and within three weeks, namely, by the 21st December 1895, these payments more than extinguished the total amount of the £2500 secured by the bank mortgage. In about another fortnight, namely, by the 7th January 1896, further payments were made by Mr Glaze to the credit of his account which more than extinguished the entire balance due from him, secured and unsecured, to the bank on the 2nd December previous. The case is very similar indeed to that which was expressed many years ago in the compendious phraseology of Lord Chelmsford, which was quoted in the opinion of Lord Campbell, L.C., in *Hopkinson* v. *Rolt* (9 H.L.C. 514). "A prior mortgage for present and future advances; a subsequent mortgage of the same description; each mortgagee has notice of the other's deeds; advances are made by the prior mortgagee after the date of the subsequent mortgage and with full knowledge of it; is the prior mortgagee entitled to priority for these advances over the antecedent advances made by the subsequent mortgagee?"

There are dicta of the learned Judges in this case, and in particular of Fletcher Moulton, L.J., which make it appear almost necessary to recapitulate the general rules applicable to this subject. These general rules do not appear to have been left unsettled, but in the view which I take of the judgment of Fletcher Moulton, L.J., and with the high respect which I have for that learned Judge, it appears to me that these rules would be subjected to considerable change if his judgment were affirmed by your Lordships' House. Upon the topic of the rights arising between a bank which has obtained a first mortgage over the property of a customer, and a second mortgagee who has obtained a second mortgage over the same property, and has given notice thereof to the bank as first mortgagee, it may be necessary to state the law of the transaction from its commencement. I think that the rules, simply stated, are these:—

1. In the case of a grant of a mortgage to a bank by a customer in security of advances made and to be made, there, of course, still remains in the customer an estate capable of being disposed of by sale or affected by subsequent mortgage, and if a second mortgage is granted, and notice given to the first mortgagee, it is contrary to good faith upon the part of the bank as first mortgagee to make in its own favour encroachments upon that remanent estate which would in effect enlarge the scope of the first mortgage, and make it stand as cover for fresh advances. I have been anxious to place this proposition in the forefront of the case, because it appears to me to be well founded in principle, to be amply warranted by authority, and to dispose of not a few of the arguments in

reference to the equities as between the bank and its customers which have been freely used in this case.

On the matter of authority, I am of opinion that the judgment of Lord Lindley, M.R. in *West* v. *Williams* ([1899] 1 Ch. 132) is of the highest value. That learned Judge says, summing up what was in his opinion the effect of *Hopkinson* v. *Rolt, ubi sup.*, *Bradford Banking Company* v. *Briggs* (1886 12 A.C. 29), and *Union Bank of Scotland* v. *National Bank of Scotland, ubi sup.* "These three cases show very clearly that the principle which underlies the rule established in *Hopkinson* v. *Rolt* is simply this, that an owner of property dealing honestly with it cannot confer on another a greater interest in that property than he himself has. The rule rests on no technicality of English law. It is based on the plainest good sense, and it is as much the law of Scotland as the law of England. When a man mortgages his property he is still free to deal with his equity of redemption in it, or, in other words, with the property itself subject to the mortgage. If he creates a second mortgage he cannot afterwards honestly suppress it, and create another mortgage subject only to the first, nor can anyone who knows of the second mortgage obtain from the mortgagor a greater right to override it than the mortgagor himself has."

2. It is also contrary to good faith upon the part of the mortgagor himself who has granted two successive mortgages to do anything which would facilitate the enlargement of the scope of the first mortgage to the detriment of the second, or would minimise the value of that remanent estate which as mortgagor he had assigned by the second mortgage subject to the first. This rule stands in the same position as the former in principle. It is covered also by the authority of Lord Lindley which I have just referred to, and in the *Union Bank* case Lord Halsbury, L.C., made it particularly clear. He said—"The question is whether Mrs M'Arthur (the mortgagor) having bargained away and made an assignation of her reversionary right to the knowledge of the National Bank, could then obtain further advances upon the security of an interest which she had for valuable consideration already assigned to a third person. It seems to me that such a proceeding is contrary to good faith, and the decision of your Lordships' House in *Hopkinson* v. *Rolt* establishes the principle and establishes it upon the broadest grounds of natural justice." Language to the same effect, and put in principle upon the same basis, is used by Chitty, L.J., in *West* v. *Williams*.

3. This being the basis upon which the doctrine under discussion rests, the third general rule springs therefrom, and is applicable in the case of a bank holding a first mortgage in security of advances made and to be made on current account as follows—After notice to the bank of a second mortgage by the customer, the debit is struck at the date of notice, and in the ordinary case, that is to say, where an account is merely continued without alteration or where no specific appropriation of fresh payments is made, such payments are credited to the earliest items on the debit side of the account, and continue so to be credited until the balance secured under the first mortgage is extinguished. The judgment of Eve, J., in this case, although in my view it is erroneous in holding that the general rule was by the conduct of the parties departed from, appears to me to state the general rule, and also the effect of the authorities in which it has been canvassed, clearly and luminously, and I respectfully adopt that part of the learned Judge's judgment. After referring to *Sherry's* case (1884, 25 Ch. Div. 692, at 702) he says—"In giving judgment the Lord Chancellor (Lord Selborne) says this —'The principle of *Clayton's* case and of the other cases which deal with the same subject is this, that where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to the account, and the effect of that is that the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account.'"—I understand that to mean this—According to the law of England, the person paying the money has the primary right to say to what account it shall be appropriated, the creditor, if the debtor makes no appropriation, has the right to appropriate, and if neither of them exercises the right, then one can look on the matter as a matter of account, and see how the creditor has dealt with the payment in order to ascertain how he did in fact appropriate it, and if there is nothing more than this that there is a current account kept by the creditor or a particular account kept by the creditor, and he carries the money to that particular account, then the Court concludes that the appropriation has been made, and having been made it is made once for all, and it does not lie in the mouth of the creditor afterwards to seek to vary that appropriation." This is substantially the view taken by the Master of the Rolls in his clear opinion in this case, and I respectfully concur in that opinion.

There are two passages, however, in the judgment of Fletcher Moulton, L.J., which appear to me to deserve grave consideration. In his view the law applicable to the ordinary case of a mortgage to a banker to secure a current account is this—"When the bank receives notice of a second mortgage by the customer to a third person, it does not in my opinion affect the nature of the security; it remains a security for the balance of the account from moment to moment, but it puts a limit to the amount of that security. It cannot be increased beyond the balance at the date of the notice, but it may be diminished. If the debit balance is at any moment brought lower than this by the subsequent payments in and out, the secured amount is correspondingly reduced, and once reduced

cannot again be raised." In a subsequent passage the same learned Judge says—"In the simple case, therefore, of a secured account with subsequent payments in and payments out, I am of opinion that the presumed intention should be to apply the payments in to the unsecured items in order of date in priority to the secured items."

I am of opinion that these passages which express a principle for, and perhaps against which much could be said upon general grounds, are not and have not for many years been any part of the law of England or of Scotland. They appear to me to be in direct contradiction to authority from *Clayton's* case downwards to the judgments of Eve, J., and Cozens-Hardy, M.R., in the present case. Lord Blackburn, commenting upon the series of decisions, and in particular on *Hopkinson* v. *Rolt*, puts the matter thus — "A mortgage to secure future advances not exceeding a certain amount, though perfectly good as against the mortgagor, gave the mortgagee no equity to postpone advances made by a second mortgagee with notice to the first to advances made by the first mortgagee after notice of the second mortgage"—(*London and County Banking Company* v. *Ratcliffe*, 1881, 6 A.C. 722, at p. 738).

In short, I do not see my way to holding that the passages to which I have referred can stand alongside of the high authorities in the other direction.

Of course, upon the extinction of the first mortgage by the credit payments, the later mortgage, its predecessor being thus satisfied, attains priority, and subject to priority of the second mortgage the mortgagor still remains answerable as debtor, and his property or any remanent value thereof not covered by the mortgage remains the security to the bank. . . . .

LORD MACNAGHTEN — I agree with the judgment of the Master of the Rolls, and with the judgments which have just been delivered by my noble and learned friends.

LORD ROBSON, who was present during the argument, was prevented by ill-health from taking part in the judgment.

Order appealed from reversed with costs here and below. Judgment entered for the plaintiff.

Counsel for the Appellant—P. O. Lawrence, K.C.—Buckmaster, K.C.—Sheldon. Agents—Field, Emery, Roscoe, & Medley, for Frank Deeley, Dudley, Solicitor.

Counsel for the Respondents—Astbury, K.C.—Stamp. Agent—P. W. Chandler, for Hooper & Fairbairn, Dudley, Solicitors.

PRIVY COUNCIL.

Wednesday, July 31, 1912.

(*Present*—The Right Hons. the Lord Chancellor (Viscount Haldane), Lords Macnaghten and Atkinson, and Sir Charles Fitzpatrick.)

BARNARD - ARGUE - ROTH - STEARNS OIL COMPANY AND OTHERS *v.* FARQUHARSON.

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.)

Mines and Minerals—Reservation—Natural Gas—Sale of Land—Construction of Reservation Clause.

A conveyance of land contained a clause reserving "all mines and quarries of metals and minerals and all springs of oil in or under the said land, whether already discovered or not, with liberty . . . to search for, work, win, and carry away the same."

Held that a natural gas which at the date of the deed had no commercial value was not included in the reservation.

This case was an appeal from a judgment of the Court of Appeal affirming a judgment of the CHANCELLOR of Ontario.

The question at issue and the circumstances of the case are detailed in their Lordships' judgment, which was delivered as follows:—

LORD ATKINSON—This is an appeal from a judgment of the Court of Appeal for Ontario, dated the 20th November 1911, affirming the judgment of the Chancellor of Ontario and dismissing the appeal of the appellants.

The Canada Company, the principal appellant, the other appellants being merely its licensees, was incorporated by a charter of King George IV, dated the 19th August 1826, granted in exercise of the powers vested in His Majesty by a statute of the Imperial Parliament passed in the sixth year of his reign, entitled "An Act to enable His Majesty to grant to a company to be incorporated by charter to be called the Canada Company certain lands in the Province of Upper Canada, and to invest the company with certain powers and privileges and for other purposes." By patent issued by the Province of Canada dated the 12th October 1841 the Crown granted to this company a large tract of land in what now has become the Province of Ontario, comprising, amongst others, lot No. 6 in the eighth concession of the township of Tilbury East in the county of Kent, saving and reserving to the Crown all gold and silver that might be found on the lands granted. By deed dated the 22nd January 1867 this company granted to one Charles Farquharson the fee-simple in the southern half of the lot No. 6, comprising 100 acres more or less.

This deed contained an excepting clause, which ran as follows:—"Excepting and