[HIGH COURT OF AUSTRALIA.]

TOBIN . . . . . APPELLANT;
PLAINTIFF,

AND

BROADBENT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept*, 17, 18, 19.

SYDNEY, *Dec.* 2.

Latham C.J., Starke, Dixon and McTiernan JJ.

Principal and Agent—Stockbroker as agent—Power of attorney—Construction—Share certificates—Pledge by stockbroker in fraud of principal—Authority—Actual—Ostensible—Estoppel—Stock Exchange—Practice among stockbrokers—Evidence—Judicial notice.

In 1927 the plaintiff executed a power of attorney in favour of H., a stockbroker, giving H. very wide powers in relation to his property. In 1929 the plaintiff left Australia and thereafter H. was allowed to assume complete control over the plaintiff's share investments; buying and selling shares, paying calls, taking up options and advancing money for such purposes, all without reference to the plaintiff. In 1943 in fraud of the plaintiff H. pledged certain share certificates the property of, and registered in the name of the plaintiff, with the defendant, another stockbroker, as part of the security for an advance made by the defendant to H. At this time the plaintiff was not in any way indebted to H. The defendant made the advance to H. as a principal and did not intend to enter into contractual relations with the plaintiff. It was not disputed that the defendant dealt with H. bona fide. The share certificates were endorsed with transfers in blank signed by H. as attorney for the plaintiff and bore a further endorsement to the effect that the power of attorney had been produced to the companies in which the shares were held. The defendant did not inspect the power of attorney and made no inquiry into H.'s authority to pledge the shares. In 1945 a sequestration order was made against H. In an action by the plaintiff claiming the return of the shares pledged by H. with the defendant;

Held that the plaintiff was entitled to judgment on the grounds:—

(1) that the share certificates were not negotiable instruments;

(2) that the power of attorney conferred no actual authority on H. to borrow on his own account by pledging shares which were the property of the plaintiff;

(3) that H. was not the ostensible owner of, nor had he any ostensible authority so to deal with, the plaintiff's share certificates;

(4) that the plaintiff had not acted so as to mislead the defendant into the belief that H. had authority to pledge the shares for a personal loan;

(5) that there was no evidence that it was within the recognized scope of a stockbroker's business in Australia to raise money in the stockbroker's own name by pledging his client's interests in securities in the stockbroker's hands.

Decision of the Supreme Court of South Australia (*Ligertwood* J.): *Tobin* v. *Broadbent*, (1946) S.A.S.R. 191, reversed.

APPEALS from the Supreme Court of South Australia.

By writ of summons dated 1st October 1945 John Richard Tobin commenced an action in the Supreme Court of South Australia against Allan Edgar Broadbent, a stock and share broker of Adelaide, claiming the return of scrip certificates for 400 ordinary shares in Colton Palmer & Preston Ltd. or the value of them and for damages for their detention and a declaration that the said scrip certificates were the property of the plaintiff free from any charge or pledge in favour of the defendant or alternatively for damages for their conversion. By writ of summons issued on the same day Adelaide Teesdale Tobin, the wife of the said John Richard Tobin, claimed similarly against the same defendant in respect of 1,000 ordinary shares in Harris Scarfe Ltd. Both actions were heard together. The defendant in each case set up a claim to retain the scrip certificates as security for a loan of £1,500 which he had made to one Harry Warburton Hodgetts, also a stock and share broker of Adelaide, on the deposit by Hodgetts of the said scrip certificates and other securities belonging to other persons.

The actions were tried by *Ligertwood* J. who stated the facts as follows (1):—

"The plaintiff Joseph Richard Tobin was formerly a medical practitioner at Gawler. He invested his savings in shares in public companies. Included in his investments were 1,000 ordinary shares in Harris Scarfe Limited and 400 ordinary shares in Colton Palmer & Preston Limited. Both companies were listed on the Adelaide Stock Exchange. The Harris Scarfe shares were acquired in parcels from 30th August 1921 to 28th April 1925 and were put into the name of Mrs. Tobin. Throughout the correspondence and the accounts they were treated as belonging beneficially to Dr. Tobin. The Colton Palmer shares were acquired in one lot about 17th May 1927. They were in Dr. Tobin's name. The scrip certificates for the shares in the

(1) (1946) S.A.S.R., at pp. 193-196.

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two companies as originally issued to Mrs. Tobin and Dr. Tobin are the subject matter of these proceedings.

On 4th April 1927 Dr. and Mrs. Tobin each executed a wide power of attorney in favour of Hodgetts. The documents were in identical words. They remained in force until they were cancelled on 18th July 1945.

The immediate occasion for giving the powers of attorney does not appear, but in December 1929, Dr. and Mrs. Tobin left South Australia for England where they have resided ever since. From the time they left, Hodgetts assumed and exercised complete control of Dr. Tobin's share investments. He bought and sold shares without reference to his principal. He paid calls and took up options. He speculated in gold shares. The correspondence shows that Dr. Tobin left everything to Hodgetts to deal in shares on his behalf as he thought fit.

At the time of his departure for England Dr. Tobin had an overdraft of £1,721 with the Union Bank. It was secured by the deposit of 1,500 shares in Carlton Breweries Limited and seventy-one shares in News Limited. The overdraft interest rate was $7\frac{1}{2}$ per cent per annum. In August 1930 the bank asked that the overdraft be reduced. Without consulting Dr. Tobin, Hodgetts paid it off himself and proceeded to carry Dr. Tobin's account at $6\frac{1}{2}$ per cent interest. The amount he paid the bank was £1,630. In addition he gave Dr. Tobin the right to draw against him from his agents in London, of which Dr. Tobin availed himself from time to time. Hodgetts also bought new shares on Dr. Tobin's behalf often without consulting him. By April 1932 Dr. Tobin's indebtedness to Hodgetts had risen to £2,393 10s. against which Hodgetts held shares which were then valued at £6,238 15s. An amount of £2,393 was a considerable sum to have advanced to one customer and the probabilities are that Hodgetts on his part had used some of Dr. Tobin's scrip along with the securities of other customers to raise money for his business either from his own bank or from brokers or other persons who had money to lend. The only evidence of such a practice is a letter of 27th June 1932 from Hodgetts to Dr. Tobin in which he writes :—'With reference to your inquiry re overdraft. The overdraft at time of writing with interest is £2,391 19s. 8d. subject to interest debit on the 28th February next for six months ending that period. If you want £100 or thereabouts at any time please let me know and I will see that you get it. You will quite understand that financing is more difficult than ever before and we have to have more securities to get any large amount. With securities as they are today, the position is that we are holding

approximately £4,500 against this amount, all of which is not financed through the Bank.'

It appears from the correspondence that Hodgetts actually signed blank transfers of the Harris Scarfe shares at least as early as 1934. I infer this from an account dated 11th January 1934, in which, when Dr. Tobin's indebtedness was £2,834 12s. 8d., the Harris Scarfe shares were listed under the word 'Holding', which clearly meant that they were being held as security against the account. This meaning was indeed explained to Dr. Tobin in a letter dated 26th March 1934 written by Hodgetts' clerk in relation to this very account. Dr. Tobin had inquired why certain shares, which he knew he owned, were not included in the account under the word 'Holding'. Hodgetts' clerk replied, 'Your statement shows you holding only 34 T. J. Richards Ordy. as this is the only certificate that is 'negotiable.' The Preference Shares are not signed so do not appear in your Statement as they are only held for safekeeping.' Hodgetts would no doubt have had a lien over the unsigned scrip and could have signed such scrip at any time as attorney as a step towards perfecting his security.

The Colton Palmer shares appear under the word 'Holding' for the first time in an account of 11th October 1938. They were not included in the account of 31st August 1938 and I infer that the scrip was signed between those two dates.

On 26th September 1938, the blank transfer of the Colton Palmer shares, which was indorsed on the scrip certificate was produced to the company together with Dr. Tobin's power of attorney and a note was made on the transfer, 'Power of Attorney exhibited.' Also the blank transfers of the Harris Scarfe shares, which were by separate instrument, were produced to Harris Scarfe Limited together with Mrs. Tobin's power of attorney and were marked 'Power of Attorney noted.' The date when this was done could not be ascertained, but the parties agreed that it was probably about 27th August 1937. The effect of the notation by the companies on the transfers was that the scrip accompanied by the transfers would be treated as 'good delivery' in transactions on the Stock Exchange and between brokers.

Hodgetts was very successful in his handling of Dr. Tobin's investments. The shares which he in his discretion had decided to retain, as well as those which in his discretion he had purchased, all appreciated in value. His sales were generally made at the top of the market. A few quick transactions in speculative gold shares yielded profits. By 4th November 1936 by means of sales and by the collection of some life assurance moneys, Hodgetts had cleared

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the indebtedness to himself and Dr. Tobin had a credit of £530 16s. 5d. But in October 1938 Tobin drew £2,000 which again put him in Hodgetts' debt to the extent of £1,791 16s. 10d.

From then on Hodgetts steadily sold Dr. Tobin's shares at good prices. The overdraft was extinguished. Hodgetts continued to sell, but instead of remitting the purchase moneys to Dr. Tobin in London, he retained them in his own business and allowed Dr. Tobin interest thereon at five per cent per annum. Dr. Tobin's credit balance continually increased and by 31st August 1943 it amounted to £3,229 8s. 11d.

On 30th July 1943 Hodgetts went to the defendant Broadbent and borrowed from him £1,500, depositing as security for the loan, scrip certificates for the following shares:—1,000 Harris Scarfe (ords.) in the name of A. T. Tobin; 400 Colton Palmer & Preston Ltd. (ords.) in the name of J. R. Tobin; 500 Sands & McDougall Ltd. in the name of Mr. Guy Fisher; 200 Guinea Airways (pref.) in the name of Mrs. J. M. Hughes; 100 Lake View & Stars in the name of J. B. Haddy (a clerk employed in Hodgetts' office); 37 Guinea Airways (ords.) in the name of J. R. Tinlin; 100 Broken Hill Souths in the name of E. W. Hodgetts (a son of Hodgetts employed in his office); 100 Adelaide Steamships in the name of E. M. Richardson.

All the scrip certificates were indorsed with or accompanied by blank transfers. The blank transfers of the plaintiffs' shares were signed by Hodgetts as attorney and bore upon them the notation that the powers of attorney had been produced to the companies concerned.

The plaintiffs knew nothing of the loan or of the deposit.

The defendant made the loan to Hodgetts as a principal and did not intend to enter into contractual relations with the plaintiffs. He did not inspect the powers of attorney and made no inquiry into Hodgetts' authority to pledge the plaintiffs' scrip certificates. He had no knowledge of the position between Hodgetts and the plaintiff nor of the events which I have related.

On 31st May 1945 a sequestration order was made against Hodgetts. At that date Hodgetts still owed the defendant £1,500 and the defendant had possession of the plaintiffs' scrip certificates. Hodgetts also owed the plaintiffs a large sum of money. His bankrupt estate showed a very large deficiency.

The pledge of the plaintiffs' scrip certificates was clearly made by Hodgetts for the purposes of his own business and in fraud of the plaintiffs."

The powers of attorney, so far as material to this report, were as follows :—

KNOW ALL MEN BY THESE PRESENTS that I Joseph Richard Tobin hereby appoint Henry Warburton Hodgetts my attorney for the purpose hereinafter mentioned that is to say To Act in such manner as my attorney may think fit in relation to my affairs generally and the conduct and management thereof and particularly in relation to (1) my freehold and leasehold lands tenements and hereditaments (2) my investments securities moneys bank balances income and personal property of every description (3) my contracts loans mortgages and business affairs of every description (4) any legal or arbitration proceedings to which I am or may be at any time hereafter become a party AND I DIRECT that my attorney may exercise the fullest powers in relation to real and personal property and my affairs and the conduct and management thereof including power in my name and on my behalf to execute sign and do all deeds instruments cheques acts and things in relation thereto as effectually as I myself could execute sign and do the same AND without prejudice to the generality of the foregoing powers (which I hereby declare are to be given the fullest and widest interpretation) and for the purpose merely of affording protection to the persons or corporate body dealing with my attorney or of complying with the rules and requirements of the court or other authority having jurisdiction in the premises I hereby expressly authorise my attorney in my name and on my behalf to do and execute all or any of the acts deeds and things specified in the Schedule hereto AND I ratify and confirm and promise at all times to allow ratify and confirm all and whatsoever my attorney shall lawfully do or cause to be done by virtue of these presents including anything which shall be done between the revocation of these presents by my death or in any other manner and notice of such revocation reaching my attorney and I hereby declare that as against me and persons claiming under me everything which my attorney shall do or cause to be done in pursuance of these presents after such revocation as aforesaid shall be valid and effectually in favour of any person claiming the benefit thereof who before the doing thereof shall not have had express notice of such revocation.

THE SCHEDULE ABOVE REFERRED TO

4. To sell either by public auction or private contract or exchange any part of my freehold or leasehold lands or tenements personal property or chattels or other effects for such consideration and subject to such covenants as my attorney may think fit and to give

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receipts for all or any part of the purchase or other consideration money.

8. To sell all or any stocks shares debentures inscribed stock bonds obligations and other securities or investments of a like nature and to give good receipts and discharges for all purchase money payable in respect of such sales and to execute all deeds and other instruments necessary or proper for transferring such stocks shares debentures inscribed stock bonds obligations and other securities or investments respectively to the purchaser or purchasers thereof and to exercise all rights and privileges and perform all duties which now or hereafter belong to me and devolve upon me as holder of such stock shares debentures inscribed stock bonds obligations and other securities or investments or as otherwise interested in any company or corporation.

9. To deposit at my bank or at such other bank or banks as my attorney shall select any moneys which may come to the hands of my attorney and to withdraw any moneys now standing or hereafter to be standing on deposit in my name at any bank whether solely or jointly with another or others and to invest the same in such stocks shares funds or securities as my attorney may think proper.

Ligertwood J. gave judgment for the defendant. The plaintiffs appealed to the High Court.

Phillips K.C. (with him *Pickering*), for the appellants. No question of apparent authority arises. Broadbent had notice of the powers of attorney but did not inspect them. He is therefore bound by the real authority of Hodgetts. The only possible defence is estoppel. Broadbent can establish this only if he were misled by the principals' representations, and the principals made no representations. The judgment of the Supreme Court is apparently founded on a real authority arising from the powers of attorney plus the practice of sharebrokers. But the trial judge found that Hodgetts' actual authority to pledge arose only if the Tobins were indebted to him. As they were not so indebted, there was no real authority. Authority cannot be found in a course of dealing, nor has any general practice of sharebrokers been established. [He referred to *Greenwood* v. *Martin's Bank Ltd.* (1); *Newbon* v. *City Mutual Life Assurance Society Ltd* (2); *Thompson* v. *Palmer* (3).]

Ward K.C. (with him *Litchfield*), for the respondent. The powers of attorney are in the widest possible language. There is power to

(1) (1933) A.C. 51, at p. 57.
(2) (1935) 52 C.L.R. 723.
(3) (1933) 49 C.L.R. 507.

pledge, and the pledgee is not concerned with the application of the money handed over (*Montaignac* v. *Shitta* (1)). The Tobins trusted Hodgetts completely whether they were in credit or in debit with him, they left everything to him, and the course of dealing shows that Hodgetts' authority had no limits. This state of affairs was allowed to continue long after Broadbent had come into the matter. [He referred to *Bank of Bengal* v. *Fagan* (2) ; *Hambro* v. *Burnand* (3).]

If a principal authorizes his agent to borrow and the agent borrows in fraud of the principal, the latter is bound, even if the lender does not know of the authority to borrow (*Brocklesby* v. *Temperance Building Society* (4)). That case and the following authorities show that estoppel operates against the Tobins : *Rimmer* v. *Webster* (5) ; *Fry* v. *Smellie* (6) ; *Fuller* v. *Glyn, Mills, Currie & Co.* (7) ; *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* (8) ; *Colonial Bank* v. *Cady* (9).

Phillips K.C., in reply. The powers of attorney related only to the Tobins' affairs, and this was not a dealing on their behalf. Broadbent was a broker and would know that Hodgetts' dealings as a broker could be only to the extent of his interest in the shares. It was therefore Broadbent's duty to inquire whether the Tobins were indebted to Hodgetts (*Attwood* v. *Munnings* (10)). Hodgetts was not the ostensible owner ; it was clear that he was acting only as agent throughout.

Cur. adv. vult.

Dec. 2.

The following written judgments were delivered :—

LATHAM C.J. These are appeals from judgments of the Supreme Court of South Australia (*Ligertwood* J.) in two actions brought respectively by Dr. J. R. Tobin and his wife against A. E. Broadbent claiming the return of certain share certificates or, alternatively, damages for their conversion. Judgment was given for the defendant in each case. Dr. Tobin in all the transactions in question acted on behalf of his wife as well as of himself and the evidence is the same as to both plaintiffs in all relevant respects.

(1) (1890) 15 A.C. 357.
(2) (1849) 5 Moo P.C. 27 [18 E.R. 804].
(3) (1904) 2 K.B. 10.
(4) (1895) A.C. 173.
(5) (1902) 2 Ch. 163, at pp. 171-2.
(6) (1912) 3 K.B. 282, at pp. 287-8, 294, 299.
(7) (1914) 2 K.B. 168, at pp. 174,177.
(8) (1938) A.C. 287, at pp. 301-303.
(9) (1890) 15 App. Cas. 267, at pp. 278, 285, 286.
(10) (1827) 7 B. & C. 278 [108 E.R. 727].

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Dr. and Mrs. Tobin went to England in 1929. In 1927 they had given powers of attorney in identical terms to one H. W. Hodgetts, a sharebroker, which conferred upon him powers of dealing with securities and investments. Hodgetts sold and bought shares for them, advanced money for this purpose, and allowed Dr. Tobin to draw moneys on his agents in London. During the greater part of the relevant period Dr. and Mrs. Tobin were overdrawn, but in 1943 and thereafter had a credit of over £3,000 to their account with Hodgetts. In July 1943 Hodgetts, without the knowledge of Dr. or Mrs. Tobin, pledged certain shares belonging to them, together with other shares (as to the ownership of which there is no evidence), with the respondent Broadbent, another stockbroker. The shares were pledged as security for a loan of £1,500 made to Hodgetts. It is not disputed that the respondent dealt with Hodgetts bona fide. Hodgetts did not profess to act as agent for Dr. or Mrs. Tobin in this transaction. Hodgetts applied the £1,500 to his own purposes. There is no evidence as to whether he used the money in his business or spent it otherwise. In 1945 Hodgetts became bankrupt and there was a large deficiency in his accounts. Dr. and Mrs. Tobin became aware of the transaction with Broadbent only after the bankruptcy. They claimed the shares from Broadbent and upon his refusal to deliver up the scrip, instituted these actions.

The learned judge found for the defendant, basing his judgment upon the terms of the power of attorney, construed in the light of a custom or practice which, he held, existed among brokers. According to this practice, a broker who had possession of securities belonging to a customer had authority to pledge them for the purposes of the broker's own business.

The general law with respect to personal property is that upon a transfer or pledge no one can give a better title than he himself has (*Picker* v. *London & County Banking Co. Ltd.* (1); *Cundy* v. *Lindsay* (2); *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* (3)). There are exceptions to this rule in the case of negotiable instruments (including securities which by established mercantile usage are transferable by delivery like money (*Goodwin* v. *Robarts* (4)), sales in market overt, under the *Factors Act* and under the *Sale of Goods Act*: see *Williams* on *Personal Property*, 18th ed. (1926), pp. 666 et seq. The present case does not fall within any of these exceptions.

Hodgetts did not profess to act on the plaintiffs' behalf in pledging the shares. It is not suggested that any relation of borrower and

(1) (1887) 18 Q.B.D. 515.
(2) (1878) 3 App. Cas. 459.
(3) (1938) A.C. 287, at p. 297.
(4) (1876) 1 App. Cas. 476.

lender was established or was intended to be established between the plaintiffs and the respondent Broadbent. The question to be determined is whether Hodgetts had actual authority to pledge the scrip in question, or, if he did not have such authority, whether the plaintiffs are estopped from denying that he had that authority: see *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 17, par. 43.

In my opinion no case can be made for the respondent upon the basis of estoppel. The plaintiff never had any relations with Broadbent and made no representation of any kind to him: therefore Broadbent did not act on any such representation, nor by reason of so acting did he suffer any detriment.

But there may be an estoppel arising from what has been called assisted representation. It is accordingly argued that the plaintiffs put Hodgetts in the position of being able to represent to Broadbent that he (Hodgetts) had authority to pledge the scrip. Certain admissions were made for the purpose of the action, and it was agreed between the parties that Broadbent, when he lent the money upon the security of the shares, "assumed that the broker (Hodgetts) required the money for the purpose of financing the owners for the time being of the said shares." This admission is not an unequivocal statement that Broadbent assumed that Hodgetts had authority to use the scrip for this purpose. But, whatever the assumption was, it was not induced by any act of the plaintiffs unless, indeed, it could be said that the fact that they had allowed Hodgetts to have possession of the scrip was an act which entitled third parties to assume that Hodgetts had authority from the owners to pledge the scrip, whoever the owners might be. The fact that a servant or other person is entrusted with the possession of goods does not involve a representation to any person that he is entitled to pledge or sell them (*Hoare* v. *Parker* (1) is an old authority to that effect and *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* (2) a modern authority; and see *Halsbury's Laws of England*, 2nd ed., vol. 25, p. 11).

But the defendant relied upon the further fact that the scrip which Hodgetts deposited as security for the loan of £1,500 bore signed endorsed transfers which were in blank, i.e., with no name of a transferee. The scrip was for shares in ten companies and was in the names of various persons. The scrip which was in the name of Dr. Tobin represented 400 ordinary shares in Colton Palmer & Preston Ltd. and that which was in the name of Mrs. Tobin represented 1,000 ordinary shares in Harris Scarfe Ltd. The transfers were signed by Hodgetts as attorney for Dr. Tobin in one

(1) (1788) 2 T.R. 376 [100 E.R. 202]. (2) (1938) A.C. 287, at p. 303.

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case, and for Mrs. Tobin in the other case. It was agreed in the admissions of facts made by the parties for the purpose of the actions that where a transfer of shares is signed by the registered owner as his transferor and correctly witnessed, or by a person authorized by him in that behalf, and the body of the transfer is completed with the relevant details pertaining to the transfer and the transfer is attached to the relevant share certificates, delivery thereof is accepted as good delivery on the Stock Exchange of Adelaide. It was also admitted that it was a regular stock exchange practice to accept as good delivery, without requiring production of the power of attorney, a transfer of shares signed by an attorney for the registered owner, duly witnessed and attached to the relevant share certificate, if the transfer was endorsed with a notation that the power of attorney had been exhibited at the office of the company at which the shares were owned, if the notation was made by an officer of the company with an official certification to that effect by the company. In the case of the shares belonging to Dr. Tobin and his wife which Hodgetts deposited, Hodgetts had signed the transfers as attorney for the shareholders and the words " power of attorney noted," certified by the company, had been written upon the transfers.

It is contended for the defendant that the possession by Hodgetts of scrip certificates with transfers so executed and certified amounted to a representation by the owners of the shares that Hodgetts was entitled to deal with the shares by pledging them, with the result that a third party who dealt in good faith and for value with Hodgetts acquired rights against the owners. The scrip certificates with such transfers might have passed through several hands, with several changes of ownership, before they were deposited with the defendant. Neither the shareholder whose name appeared on the face of the certificate nor, in the case of subsequent transfers, any subsequent owner, can, in my opinion, be regarded as making any representation to persons with whom someone in possession of the scrip elects to deal. Such persons, in all but the exceptional cases already mentioned, take the risk of the person in possession of personal property having authority to enter into the dealing. A contrary view would place all owners of personal property at the mercy of their servants or bailees. There is no reason for declining to apply the general rule to shares and share certificates. Share certificates do not become negotiable instruments when they are endorsed with transfers executed in blank.

In my opinion, therefore, the possession of the share certificates gave no apparent authority to Hodgetts. The circumstance that

Hodgetts had signed the plaintiffs' names by virtue of a power of attorney showed only that Hodgetts represented himself as having authority to sign for them. This circumstance, as already stated, was quite consistent with the shares having been sold to a person, or in succession to several persons, who did not choose to become registered as shareholders. Accordingly, in my opinion, no question arises of apparent authority as distinct from real authority. If this be so, the rule that a person cannot limit an apparent or public authority by private instructions (*Hambro* v. *Burnand* (1)) is not relevant in this case. The only question which has to be determined is a question as to the authority which the plaintiffs actually gave to Hodgetts, and not any question as to the extent of any "apparent authority" arising by estoppel.

If then the plaintiffs are not estopped by reason of any of the matters mentioned from denying Hodgetts' authority to pledge their shares, the question is—what authority did the plaintiffs actually give to Hodgetts to deal with the shares? The power of attorney contains certain express authority which the learned judge construed in the light of the facts that Hodgetts was a broker, and that there was a practice which his Honour held to exist as between broker and broker and between brokers and customers according to which a broker had authority to pledge any securities of his customer which were in his possession not only for a loan made to the customer but also for a loan made to the broker personally. It was further argued that the course of dealing between the plaintiffs and Hodgetts showed that the plaintiffs knew that Hodgetts was financing them on their shares, and that their failure to challenge this procedure involved an agreement to its continuance.

By the power of attorney the plaintiffs appointed Hodgetts as their attorney:—"for the purpose hereinafter mentioned that is to say To Act in such manner as my attorney may think fit in relation to my affairs generally and the conduct and management thereof and particularly in relation to (1) my freehold and leasehold lands tenements and hereditaments (2) my investments securities moneys bank balances income and personal property of every description (3) my contracts loans mortgages and business affairs of every description (4) any legal or arbitration proceedings to which I am or may be at any time hereafter become a party AND I DIRECT that my attorney may exercise the fullest powers in relation to real and personal property and my affairs and the conduct and management thereof including power in my name and on my behalf

(1) (1904) 2 K.B. 10.

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to execute sign and do all deeds instruments cheques acts and things in relation thereto as effectually as I myself could execute sign and do the same AND without prejudice to the generality of the foregoing powers (which I hereby declare are to be given the fullest and widest interpretation) and for the purpose merely of affording protection to the persons or corporate body dealing with my attorney or of complying with the rules and requirements of the court or other authority having jurisdiction in the premises I hereby expressly authorise my attorney in my name and on my behalf to do and execute all or any of the acts deeds and things specified in the Schedule hereto."

The schedule included, *inter alia*, powers :—" 4. To sell either by public auction or private contract or exchange any part of my . . . personal property or chattels or other effects for such consideration and subject to such covenants as my attorney may think fit . . . " " 8. To sell all or any stocks shares debentures inscribed stock bonds obligations and other securities or investments of a like nature. . . . " " 9. To deposit at my bank . . . any moneys which may come to the hands of my attorney and to withdraw any moneys now standing or hereafter to be standing on deposit in my name at any bank whether solely or jointly with another or others and to invest the same in such stocks shares funds or securities as my attorney may think proper."

It will be seen that under these powers Hodgetts could sell the plaintiffs' shares and could buy other shares at his discretion with any money of the plaintiffs which came to his hands. The power of attorney contains no express power to pledge any of the plaintiffs' property, but it does provide that the attorney may exercise the fullest powers in relation to the plaintiffs' real and personal property and their affairs. His Honour called particular attention to the words in the power of attorney, " without prejudice to the generality of the foregoing powers (which I hereby declare are to be given the fullest and widest interpretation)." His Honour held that under the wide general words used in the power of attorney Hodgetts had express authority to pledge the plaintiffs' scrip certificates if he thought fit. These provisions in the power of attorney excluded, in his Honour's opinion, the application of such decisions as *Bryant, Powis & Bryant Ltd.* v. *La Banque du Peuple* (1) and *Jacobs* v. *Morris* (2) where it was held that general words in a power of attorney did not give authority to pledge.

It is a long established rule that general words in a power of attorney are to be strictly construed : *Attwood* v. *Munnings* (3) ;

(1) (1893) A.C. 170.
(2) (1902) 1 Ch. 816.
(3) (1827) 7 B. & C. 278 [108 E.R. 727].

Bryant v. *La Banque du Peuple* (1). There is no doubt that under the power of attorney Hodgetts had authority to sell any shares belonging to Dr. or Mrs. Tobin (cl. 8). But a pledge is essentially different from a sale. The distinction has been emphasized in many cases, but perhaps nowhere more strongly than in *City Bank* v. *Barrow* (2) where Lord *Selborne* said :—" It is manifest that when a man is dealing with other people's goods, the difference between an authority to sell, and an authority to mortgage or pledge, is one which may go to the root of all the motives and purposes of the transaction. The object of a person who has goods to sell is to turn them into money, but when those goods are deposited by way of security for money borrowed it is a transaction of a totally different character. If the owner of the goods does not get the money, his object and purpose are simply defeated ; and if on the other hand, he does get the money, a different object and different purpose are substituted for the first, namely that of borrowing money and contracting the relation of debtor with a creditor, while retaining a redeemable title to the goods, instead of exchanging the title to the goods for a title, unaccompanied by any indebtedness, to their full equivalent in money."

The power of attorney in this case contains an express power to sell, and no express power to pledge. The power of pledging is such a different power from that of selling that, in my opinion, in view of the strict rules applied to the construction of powers of attorney, it should not be held that the general words in the power of attorney conferred a power to pledge for Hodgetts' own purposes. I agree that the emphatic phrase " fullest and widest interpretation," expressly applied as it is to the " generality " of the antecedent provisions, is an important feature which distinguishes this power of attorney from others which have been the subject of judicial interpretation. Some effect could be given to these provisions by interpreting the general power to deal with the plaintiffs' property and affairs as including even a power to pledge their property in dealing with their affairs. So construed the power of attorney would entitle Hodgetts to pledge the plaintiffs' shares for moneys owed by them and for the purpose of obtaining money for investment on their behalf. But in my opinion it is not a reasonable interpretation of the power of attorney to regard it as intended to authorize Hodgetts to raise money for his own purposes on the security of the plaintiffs' shares. I am therefore of opinion that the source of the authority of Hodgetts to pledge the plaintiffs'

(1) (1893) A.C. 170. (2) (1880) 5 A.C. 664, at p. 670.

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shares must be found, if at all, elsewhere than in the power of attorney.

His Honour held that there was such a source of authority in a practice among stockbrokers, which bound stockbrokers and people who dealt with them, according to which a stockbroker could pledge for the purposes of his own business any securities with the possession of which a customer had entrusted him. There was no evidence that such a practice existed, but his Honour held that the existence of such a practice had been recognized in *London Joint Stock Bank* v. *Simmons* (1) and *Fuller* v. *Glyn, Mills, Currie & Co.* (2). His Honour referred (3) to the statement of Lord *Halsbury* concerning " the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities." Lord *Halsbury* added : " the deposit of securities as 'cover' in a broker's business is as well-known a course of dealing as anything can possibly be " (4). I do not read these passages or the other passage quoted from Lord *Macnaghten* (which really only deals with the practice of lodging a number of securities together in respect of a single loan) as stating that stockbrokers, by reason of the mere fact that they are entrusted with the possession or the custody of securities, have authority to pledge them for their own benefit. Where a broker has authority to pledge (as is often the case) he exercises that authority when he deposits securities as cover, and Lord *Halsbury* says no more than that it is a common practice for him so to do. But Lord *Halsbury* does not say that the mere fact that a stockbroker is in possession of scrip certificates enables him to deal in any way that he thinks proper with those scrip certificates in order to raise money for his own purposes so as to bind by such dealing the person who has deposited the certificates with him.

In *Fuller* v. *Glyn, Mills, Currie & Co.* (5) however, *Pickford* J. did hold that if a person placed in the hands of a stockbroker share certificates endorsed with a signed transfer form he was estopped from setting up his title as against persons with whom the sharebroker had pledged the certificates if the pledgee took them bona fide. This is, I think, the only actual decision that there is an estoppel in such a case. In *Colonial Bank* v. *Cady* (6) there is a statement to the effect that if a shareholder had executed a transfer of the shares and left them in the hands of his brokers he would have been estopped from asserting his title as against a person

(1) (1892) A.C. 201.
(2) (1914) 2 K.B. 168.
(3) (1946) S.A.S.R., at p. 199.
(4) (1892) A.C., at p. 211.
(5) (1914) 2 K.B. 168.
(6) (1890) 15 App. Cas. 267.

to whom they had disposed of them and who received them in good faith and for value. This statement was not necessary for the occasion of the case and was very plainly *obiter dictum*. In *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* (1) there is a reference to *Fuller* v. *Glyn, Mills, Currie & Co.* (2) and to a statement by Lord *Watson* in *London Joint Stock Bank* v. *Simmons* (3) that "brokers, in the ordinary course of business, are employed to sell, to buy, and to raise money upon as well as to keep in custody the securities of their customers," and that accordingly other persons were entitled to assume, in the absence of anything to indicate the contrary, that a broker had "full authority to deal with them." I should have thought that it was plain enough that the only justifiable assumption would be that the broker had authority either to sell or to buy or to raise money or to keep in safe custody. I cannot see how it can be said that because a broker may have been employed to do any one or more of four things that therefore other persons are "entitled to assume" that the broker has full authority to deal with the shares as he chooses. There can be no inference as to the actual extent of the broker's authority in a particular case. He may have no authority whatever. He may have acquired the certificates dishonestly, but upon any view there can be no reason for assuming that because he may have any one of several kinds of authority therefore he in fact has one of those particular kinds of authority.

It may be observed that the reference to *Fuller* v. *Glyn, Mills, Currie & Co.* (2) and to the *London Joint Stock Bank* v. *Simmons* (4) made in the *Mercantile Bank of India Case* (5) contains the significant statement: "It is not necessary to discuss such cases further, or express any opinion about them" (6). In my opinion the decision in *Fuller* v. *Glyn, Mills, Currie & Co.* (2) is not satisfactorily supported by authority. The adoption of the principle there stated would place share certificates with endorsed transfers in the same position as negotiable instruments if, but only if, the person in possession was a stockbroker, with the result that any person dealing in good faith and for value with the broker would acquire a title as against the true owner. No such rule has been laid down unequivocally and unambiguously except in the single case mentioned, and in my opinion to adopt such a rule would be to introduce a principle at variance with the basic rules of English law with respect to the transfer of title to personal property. In my opinion the fact

(1) (1938) A.C. 287, at pp. 302-303.
(2) (1914) 2 K.B. 168.
(3) (1892) A.C. 201, at p. 213.
(4) (1892) A.C. 201.
(5) (1938) A.C. 287.
(6) (1938) A.C., at p. 303.

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that Hodgetts was in possession of a number of share certificates in the names of various persons which had transfers in blank endorsed on them did not amount to a representation by any person that Hodgetts had authority to pledge the shares to which the certificates related or, indeed, that he had any authority to deal with the shares in any way.

But, finally, it is contended for the respondent that the course of dealing between the plaintiffs and Hodgetts was such that in fact the plaintiffs gave authority to Hodgetts to use their shares for the purpose of financing Hodgetts' own business. The only evidence which is relied upon to support this conclusion is a statement in a letter dated 27th January 1932 written to Dr. Tobin at a time when the plaintiffs' overdraft with Hodgetts was £2,391. In this letter the following statements appear :—" You will quite understand that financing is more difficult than ever before and we have to have more securities to get any large amount. With the securities as they are today the position is that we are holding approximately £4,500 against this amount, all of which is not financed through the Bank." There followed a statement of the securities which Hodgetts was holding : " It is quite convenient for us to go on financing for you. . . . With an improvement in values financing will be better but with values as above it is difficult to arrange finance on some of the shares and we have to put out more to get large amounts, but it is better than selling at the low prices and I believe that you will greatly benefit in the long run."

This letter only intimates to Dr. Tobin that in order to finance him Hodgetts is holding some of his shares as securities, and that he has pledged some in some other quarter, not all with the bank. But there is no indication that I can discover that Hodgetts in this letter or by any other means informed Dr. Tobin that he was (if indeed it were then the case) using the plaintiffs' shares for the purposes of his own business as distinct from the purpose of financing the plaintiffs.

I am therefore of opinion that neither the power of attorney, nor any practice of brokers, nor the course of dealing between he plaintiffs and Hodgetts conferred any authority upon Hodgetts to pledge the plaintiffs' shares, and that there was no estoppel which prevented them from relying upon the actual limits of the authority given.

Accordingly, in my opinion, the appeal should be allowed and there should be judgment for the plaintiffs for a return of the scrip.

STARKE J. These two actions were tried together in the Supreme Court of South Australia and judgments were entered for the defendant and from these judgments appeals have been brought to this Court.

The appellants are husband and wife. The husband was the registered holder of 400 shares in Colton Palmer and Preston Ltd. and his wife the registered holder of 1,000 ordinary shares in Harris Scarfe Ltd. though they belonged beneficially to her husband. In 1927 they gave powers of attorney to Hodgetts, a stock-broker, and a member of the Adelaide Stock Exchange, to act in such manner as their attorney should think fit in relation to their affairs generally and the conduct and management thereof. And in 1929 they left Australia for England where they have resided ever since.

Their attorney exercised complete control over their investments, bought and sold shares, took up options, speculated in gold shares and so forth. But he got into financial difficulties and proceeded to use his clients' securities fraudulently and for his own purposes. About July 1943 he obtained a loan of £1,500 from the respondent who was also a stock and share broker and a member of the Adelaide Stock Exchange. Hodgetts used the moneys for the purposes of his own business and not for any purpose of his principals. He deposited, en bloc, with the respondent, as security for the loan, various securities, some negotiable and some not negotiable, and some apparently belonging to himself and others to various clients including the shares of the appellants. The certificates for the shares of the appellants had transfers in blank endorsed on the back thereof and signed respectively, " J. R. Tobin by his attorney H. W. Hodgetts Transferor " and " A. T. Tobin by her attorney H. W. Hodgetts Transferor." On the transfer by the appellant, J. R. Tobin, the following endorsement also appeared : " Power of Attorney exhibited 26/9/38 Colton Palmer and Preston Ltd. per P. S. Hume " and on the transfer by the appellant, A. T. Tobin, the following endorsement also appeared : " Power of Attorney noted Harris Scarfe Limited L. Harris, Secretary." This deposit by Hodgetts of the appellants' shares with the respondent was in fraud of his principals, the appellants, but the respondent did not know that the loan was not for or on account of the owners of the shares and other securities deposited. He did not inspect either power of attorney given by the appellants or make any inquiry as to Hodgetts' authority to pledge their shares. He assumed that Hodgetts required the money for the purpose of financing the owners for the time being of the shares. And it was the practice amongst members of the Stock Exchange at Adelaide to accept as good delivery

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(without requiring production of a power of attorney) a transfer of shares signed by an attorney for the registered owner, duly witnessed and attached to the relevant share certificate, provided that such transfer was endorsed with a notation that the power of attorney had been exhibited at the office of the company in which the shares were owned and that such notation was by an officer of that company with the company's official certification to that effect. It was a condition of listing shares on the Stock Exchange of Adelaide that a company should endorse transfers on production of the necessary documents: "Power of Attorney Exhibited." According to this requirement, the companies made the endorsements on the transfers relating to the powers of attorney already mentioned.

The appellants' share certificates with the transfers in blank endorsed on the back were not negotiable securities.

It was not denied that if the appellants had themselves executed the transfers in blank and left them in the hands of their broker, Hodgetts, then they would have been estopped from denying the title of any one who took them from the broker in good faith and for value: see *Colonial Bank* v. *Cady and Williams* (1); *Fuller* v. *Glyn, Mills, Currie & Co.* (2); *London Joint Stock Bank* v. *Simmons* (3); and cf. *Abigail* v. *Lapin* (4). But it was contended that the signature by the broker as attorney for the appellants operated as a notice that the agent had a limited authority to sign and that the appellants were only bound by such signature if the attorney, in so signing, was acting within the actual limits of his authority (cf. *Attwood* v. *Munnings* (5); *Reckitt* v. *Barnett, Pembroke & Slater Ltd.* (6); *Midland Bank* v. *Reckitt* (7)). These cases are illustrations, no doubt, of the provision enacted in s. 25 of the *Bills of Exchange Act* 1882 (45 & 46 Vict. c. 61) relating to signatures by procuration of cheques and bills. But the provision of the Act is declaratory of the common law and is, in my opinion, as applicable to other documents as to cheques and bills. "The general rule of the law," said Lord *Herschell* in *London Joint Stock Bank* v. *Simmons* (8) "is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the

(1) (1890) 15 App. Cas. 267, at pp. 280, 286.
(2) (1914) 2 K.B. 168.
(3) (1892) A.C. 201.
(4) (1934) 51 C.L.R. 58; (1934) A.C. 491.
(5) (1827) 7 B. & C. 278 [108 E. R. 727].
(6) (1929) A.C. 176.
(7) (1933) A.C. 1.
(8) (1892) A.C. 201, at p. 215.

person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner."

The actual authority conferred upon Hodgetts is contained in the powers of attorney already mentioned, and in most comprehensive terms. They authorize the attorney to act in such manner as he thinks fit in relation to their affairs generally and the conduct and management thereof and in particular in relation to their investments, securities, moneys, bank balances, income and personal property of every description. And they authorize the attorney to exercise the fullest powers in relation to their real and personal property and their affairs and the conduct and management thereof including power to execute, sign, and do all deeds, instruments, cheques, acts and things in relation thereto as effectually as they could execute, sign and do the same and without prejudice to the generality of the foregoing powers which are to be given the fullest and widest interpretation and for the purpose of affording protection to persons or bodies corporate dealing with their attorney they expressly authorize their attorney in their name on their behalf to do and execute all or any of the acts, deeds and things specified in the schedule which includes the power to sell either by public auction or private contract or exchange any part of their freehold or leasehold lands or tenements personal property or chattels or other effects for such consideration and subject to such covenants as their attorney should think fit and to give receipts for all or any part of the purchase money or other consideration money and to sell all or any stock, shares, debentures, inscribed stock, bonds, obligations and other securities of a like nature and to give good receipts and discharges for all purchase money payable in respect of such sales and to execute all deeds and other instruments necessary and proper for transferring such stocks and other securities respectively to the purchaser and to exercise all rights and privileges and perform all duties which now or thereafter belonged to them as the holders of such stock and other securities and to deposit at their bank or such other bank as their attorney selected any moneys which came to the hands of their attorney and to withdraw any moneys standing to their credit at any bank whether solely or jointly with another or others and to invest the same in such stock, shares and other securities as their attorney should think proper.

Comprehensive as are these terms the only actual authority given to Hodgetts is to act for and on behalf of his principals; nowhere is any authority given to him to use the appellants' shares and

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investments for his own private purposes. And the ratification clause in the powers of attorney to confirm all and whatsoever their attorney shall lawfully do or cause to be done adds nothing to Hodgetts' authority (cf. *Midland Bank* v. *Reckitt* (1)).

In my opinion the powers of attorney are so comprehensive in their terms that they authorize a pledge of the appellants' shares and securities by the attorney in the conduct and management of their affairs for and on their behalf. But they do not authorize the attorney to pledge their shares and securities for the purposes of his own business affairs.

Now the respondent had notice on the face of the transfers in blank of the actual authority of the attorney. But he never asked for nor saw the terms of the powers of attorney, and he made a loan to the attorney personally and as a principal for the purposes of his business. He assumed that the attorney required the money for the purpose of financing the owners for the time being of the shares. There is nothing in the powers of attorney to warrant that assumption. It was said however, that the appellants had given authority to their broker to pledge their shares in the conduct and management of their affairs and that acting ostensibly within the limits of that authority he had done so, though he had abused the actual authority given to him for his own private purposes (*Brocklesby* v. *Temperance Building Society* (2) ; *France* v. *Clark* (3) ; *Rimmer* v. *Webster* (4) ; *Fry* v. *Smellie* (5)). But the respondent had notice of the actual authority of the broker. The case is one of actual and not ostensible authority (cf. *Midland Bank* v. *Reckitt* (6)). And yet with knowledge of that authority he advanced money to the broker personally for the purposes of his business on the security of shares in the name of the appellants. Consequently it is not shown that the appellants so acted as to mislead the respondent into the belief that the attorney had authority to pledge the appellants' shares and securities with him for a personal loan to the attorney.

The respondent relies further upon the statement on the face of the transfers of the shares that the respective powers of attorney had been exhibited or noted by the companies issuing the shares. At best the notification amounts to a statement that the transferor has produced to the company and that the company had sighted what prima facie was a power of attorney authorizing the attorney to transfer the shares of the transferors. But the notification is

(1) (1933) A.C. 1, at p. 18.
(2) (1895) A.C. 173.
(3) (1884) 26 Ch. D. 257.
(4) (1902) 2 Ch. 163.
(5) (1912) 3 K.B. 282.
(6) (1933) A.C. 1, at p. 17.

not a warranty of the attorney's authority either on the part of the company or of the party producing the transfer to the respondent: cf. *Balkis Consolidated Co. Ltd.* v. *Tomkinson* (1); *Longman* v. *Bath Electric Tramways, Ltd.* (2); *Buckley* on *The Companies Acts* 11th ed. (1930), p. 151. And the respondent had notice of the actual authority of the attorney. Again the appellants did nothing to mislead the respondent.

Finally the respondent relied upon the practice of the Stock Exchange. It must be observed that the practice is not stated as a custom and it would be difficult, I think, to support the practice as a reasonable custom. The case of the *London Joint Stock Bank* v. *Simmons* (3) was referred to but that was the case of a negotiable security. "It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority" (per Lord *Herschell*, *London Joint Stock Bank* v. *Simmons* (4)).

Here the shares were not negotiable securities and the respondent had notice of the actual authority of the attorney and assumed without any inquiry that he was acting within his authority although he was pledging the appellants' shares for an advance to him personally. The respondent took the risk and must bear the loss.

The appeal should be allowed and the appellants should have judgment for the return of their shares or damages for their conversion.

Dixon J. These are two appeals in actions brought respectively by husband and wife and heard together by *Ligertwood* J. The learned judge has pieced together from the not very satisfactory materials placed before him a detailed account of the facts which I accept for the purpose of deciding this appeal. It is set out in the report of the case (5) and I shall not repeat it. It is necessary to add only two observations by way of caution or reservation. The first is that for some of the circumstances his Honour was forced to rely on deductions from the statements of account and from a few casual references occurring in the correspondence. The inferences from these sources cannot but be occasionally a little speculative. The second observation is that the reference (6) to

(1) (1893) A.C. 396.
(2) (1905) 1 Ch. 646.
(3) (1892) A.C. 201.
(4) (1892) A.C., at p. 217.
(5) (1946) S.A.S.R. 191, at pp. 192-196.
(6) (1946) S.A.S.R., at p. 194.

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the practice of stockbrokers is not based on evidence—for none was given with reference to the use of scrip as a security—but it represents his Honour's view, derived possibly from the cases in England to which afterwards he refers. The correctness of the learned judge's view on this question is a matter to be decided upon the appeal.

There can be no doubt that, subject to whatever rights Hodgetts created in the defendant by depositing the plaintiffs' scrip with the defendant as security for the loan to Hodgetts himself, the plaintiffs are respectively entitled to the 400 ordinary shares in Colton Palmer and Preston Ltd. and to the 1,000 ordinary shares in Harris Scarfe Ltd. and to possession of the scrip for such shares. There is equally no doubt that the scrip was so deposited by Hodgetts in fraud of the plaintiffs and without their knowledge or consent.

The defendant's title to retain the scrip as part of his security for the loan to Hodgetts must, therefore, depend either upon the existence in Hodgetts of some authority within the scope of which the transaction fell or upon the state of facts being such that the plaintiffs are precluded or disabled from setting up their title to the shares and to the possession of the scrip so as to defeat the defendant's security.

There are four possible positions that must be examined in order to decide the appeal. It is possible :—(1) that Hodgetts exercised an actual authority ; (2) that, with the consent or by the imprudence of the plaintiffs, Hodgetts became the ostensible owner of the shares and the defendant took the security from him on the assumption that he was entitled as a matter of property to deal with them as his own ; (3) that Hodgetts, though acting as agent, was in a situation in which his ostensible authority was wide enough to include the transaction and the defendant took the security relying in good faith upon his ostensible authority ; (4) that some other combination of facts in the case provides ground for precluding the plaintiffs from asserting their title to the shares and scrip.

I shall consider these four positions in order.

(1) *Actual authority.* This depends in the first instance upon the two powers of attorney, both in the same form, executed by the respective plaintiffs on 4th April 1927, which remained in force. The general words of the powers of attorney are very wide, quite wide enough to authorize the deposit of scrip by way of security and, of course, wide enough to authorize the signature of a transfer on behalf of the constituents.

But the cardinal fact of the transaction which it is sought to bring within the power is that the loan was made to Hodgetts, the donee of the power, and not to either of the Tobins, the principals. Hodgetts was the borrower, the loan was for himself, he did not contract it as an agent but he gave the lender his principals' property as security. The question is, therefore, whether the power of attorney extended to authorizing Hodgetts to give a security over his constituents' shares for his own debt, not simply whether it authorized him to give a security. You cannot sever the giving of the security from the indebtedness secured. A transaction of security is unintelligible without an identification of the obligation secured. This is not the case of an agent misapplying moneys borrowed in his principal's name on the security of his assets pursuant to an authority covering the borrowing of money on the principal's behalf. If a transaction is ostensibly on the principal's behalf and is of a description that falls within the authority, it is nothing to the point that the agent's purpose was to act for his own benefit and to defraud the principal, that is, unless the opposite party to the transaction had notice.

But here the transaction was the attorney's own, both in form and substance, and the only incident of it concerning the constituents was when the latter's property was drawn in as a support for the loan. Prima facie, a power, however widely its general words may be expressed, should not be construed as authorizing the attorney to deal with the property of his principal for the attorney's own benefit. Something more specific and quite unambiguous is needed to justify such an interpretation. "The primary object of a power of attorney is to enable the attorney to act in the management of his principal's affairs. An attorney cannot, in the absence of a clear power so to do, make presents to himself or to others of his principal's property." Per *Russell* J., *Reckitt* v. *Barnett Pembroke and Slater Ltd.* (1) a judgment approved in the House of Lords (2). In my opinion, the words of the powers of attorney do not in themselves suffice to confer authority upon Hodgetts to secure a borrowing of his own by a deposit of the plaintiffs' scrip. Such a transaction is in itself beyond the limits of the power. But *Ligertwood* J. considered that the power should be construed in the light of the practice of brokers, which as I understand it, his Honour regarded as sanctioning a redeposit by a broker with his bank of his client's securities held by him as cover for his client's indebtedness to him, if the redeposit with the bank is to secure an overdraft employed

(1) (1928) 2 K.B. 244, at p. 268.

(2) (1929) A.C. 176, at p. 183 and p. 195.

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in the broker's business. I take it that the redeposit contemplated by his Honour is not by way of sub-mortgage operating only up to the interest of the broker, but is one securing the bank up to the full interest of the broker's client.

I shall not discuss at this place the question whether we are entitled to assume that such a practice or usage exists in Australia. The chief importance of the existence of such a practice appears to me to be that it would or might afford a foundation for an ostensible agency in Hodgetts as broker, so that the plaintiffs would be precluded from asserting their title against the defendant. It is more convenient to deal with the matter under that head.

It is enough to say at this point that the powers of attorney are documents the application of which is much wider than in transactions between Hodgetts as broker and his banker and, even if, contrary to the opinion I shall express, we were warranted in assuming that such a practice existed in Australia, it ought not to lead us to enlarge so drastically the operation of the instruments, more particularly as the practice, not the instruments, would *ex hypothesi* be the natural source of the broker's title to deal with his client's scrip in securing his overdraft.

I am, therefore, of opinion that no actual authority to create a security over the plaintiffs' scrip for his loan from the defendant was conferred on Hodgetts by the powers of attorney.

It was claimed, however, that the correspondence between the male plaintiff and Hodgetts, including the statements of account, disclosed enough to authorize the inference that the former, on behalf of himself and his wife, tacitly consented to the use by Hodgetts of their scrip as security for advances to the latter. The question is a matter of evidence and I think that it is unnecessary to say more than that I am unable to spell out of the materials relied upon any tacit authorization of Hodgetts to deposit the plaintiffs' securities by way of mortgage or pledge to secure over the interests of the plaintiffs therein advances to Hodgetts. I think that it has not been shewn that an actual authority subsisted in Hodgetts to mortgage or pledge the shares in question to the defendant as security for the loan to Hodgetts.

(2) *Ostensible ownership.* In my opinion no case of ostensible ownership can be made out. Hodgetts was a broker ; the security lodged comprised shares in a variety of names ; the defendant does not allege that he believed that Hodgetts was entitled (except perhaps as mortgagee, pledgee or lienee) to any interest in the shares ; his whole case is that he dealt with Hodgetts as a broker whose authority extended to raising money on his clients' securities :

see par. 10 of the agreed statement of facts and pars. 12 and 13 of the defences.

(3) *Ostensible agency.* The defendant in his pleading made the following allegation as an answer to the actions:—"It was in accordance with custom and/or the ordinary course of business for a broker to pledge or deposit by way of security, for a loan made to the broker, share certificates together with transfers thereof signed in blank, by or on behalf of the person who appeared to be the owner of the certificates; and the defendant acted in accordance with such custom and in accordance with the ordinary course of business in lending money to the broker, against and in accepting the said certificates and transfers as a pledge or deposit." I understand this to mean that, according to the established course of a sharebroker's business, he not only sells in his own name, or without disclosing his principal, the stock and shares of his client and completes the sale by delivery of the scrip intrusted to him, but he also mortgages or pledges scrip intrusted to him for loans raised in his own name. I presume that it was hoped to shew under this allegation that it is the custom in Adelaide for a sharebroker to hold his clients' securities, consisting in the case of shares of the scrip and a blank signed transfer, as cover for his clients' indebtedness to him and to lodge securities so held by him with the broker's own bankers, or with other persons making advances to him, as mortgages or pledges to the full value of the stock or shares independently of the broker's interest therein, that is his title to retain them against his client. If that had been shown, a foundation would have been made for an ostensible authority in the broker, Hodgetts, which nothing but notice in the defendant would displace. Speaking of the supposed course of business, practice or usage, though rather in connection with the interpretation of the powers of attorney, *Ligertwood* J. said:—"By the practice of brokers he" (Hodgetts) "would still be acting in the conduct and management of the plaintiffs' affairs, if he redeposited the certificates for the purpose of obtaining money for his own business, because that is one of the means by which brokers are able to finance their customers. On the authorities I am entitled to take judicial notice of this practice. It was recognized by several of the Law Lords in *London Joint Stock Bank* v. *Simmons* (1) and by *Pickford* J. in *Fuller* v. *Glyn, Mills, Currie & Co.* (2). Indeed it was largely the recognition of the practice which enabled the House of Lords in *Simmons' Case* (1) to distinguish their previous decision of *Sheffield* v. *London Joint Stock Bank* (3). Lord *Halsbury* referred to 'the

(1) (1892) A.C. 201.
(2) (1914) 2 K.B. 168.
(3) (1888) 13 App. Cas. 333.

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course of business which brokers habitually pursue towards their own clients and for their own clients, when dealing with bankers with whom they deposit securities' and he said, 'the deposit of securities as "cover" in a broker's business is as well-known a course of dealing as anything can possibly be' (1). And Lord *Macnaghten* said, 'The only objection alleged is that securities of different customers of the stockbrokers were pledged for one entire advance. . . . But even so, if the bank had no reason to suppose that the stockbrokers were not at liberty to pledge each and all of the securities for their full value, I cannot see in what the supposed want of good faith consists. As was pointed out in *Foster* v. *Pearson* (2) such a practice—and the practice prevails in the case of stockbrokers as much as in the case of bill-brokers—has advantages for the customers as a body, though it may occasionally operate hardly on an individual (3).' The advantage is that by pledging his customer's securities for his own business debt, the sharebroker may be able to give his customer a loan on more favourable terms than the customer could obtain by pledging his own securities (see per Lord *Field* (4))" (5).

The difficulty about all this is that it depends upon judicial notice of a supposed practice in Australia of which we know nothing. We have no evidence and no source of information about the practice prevailing in Adelaide or elsewhere in Australia. Many practices obtaining upon or in connection with the London Stock Exchange do not obtain in Australia. Ordinary experience tells us that there is a strong tendency on the part of stockbrokers to treat stock and shares, not as specific property, but upon the footing of a contractual liability only to deliver or account for in due time so much stock or so many shares of the named description. It is also evident that all classes of agents who make advances to their clients and handle their securities have the strongest reason for desiring to repledge the securities en bloc to support advances to themselves, whether on bank overdraft or otherwise.

It must be kept in mind that in a continuation of a bargain, contango transactions, in the London Stock Market the broker takes the shares as his own and may deal with them as he chooses. So large an amount of the business was done in this way that in *Bentinck* v. *London Joint Stock Bank* (6) it was held to give ample ground for an assumption by banks that shares and stock held by brokers were within their absolute power. See, further, *Bongio-*

(1) (1892) A.C., at p. 211.
(2) (1835) 1 C. M. & R. 849 [149 E.R. 1324].
(3) (1892) A.C., at p. 225.
(4) (1892) A.C., at p. 228.
(5) (1946) S.A.S.R., at p. 199.
(6) (1893) 2 Ch. 120, at p. 141.

vanni v. *Société Général* (1) and *Sachs* v. *Spielmann* (2) and *Halsbury's Laws of England*, 2nd ed., vol. 31, *Stock Exchange*, p. 588, par. 811 and p. 600, pars. 841 and 842 and notes (*a*) and (*b*).

There is, of course, in point of law, a great difference between, on the one hand, sub-mortgaging and repledging to the extent of the mortgagee's or pledgee's interest, a thing every mortgagee or pledgee has the right to do, and, on the other hand, attempting to give security over the full interest in the chattel or chose in action so as to overreach the client's right as mortgagor or pledgor to redeem.

The question which of these two things has been effectually done by a stockbroker can only arise in the event of his insolvency, and a doubt may be allowable as to whether, even on the London Stock Exchange, a usage has arisen which settles this question.

If the securities deposited with a bank are negotiable instruments and the banker is not put upon notice, the banker will, doubtless, take the full interest. The practice of stockbrokers is, of course, relevant to the bona fides of the bank and that is why it was discussed in *London Joint Stock Bank* v. *Simmons* (3). Cf. *Halsbury, Laws of England*, 2nd. ed., vol. 31, *Stock Exchange*, p. 602, par. 848.

In the case of securities which are not negotiable but are in a condition in which they are transferable by delivery and serve as indicia of title, the course of business of stockbrokers in London is, perhaps, such as to make a broker an ostensible agent of his client to pledge his securities with a bank. For it is said that brokers in the ordinary course of business are employed to sell and to buy and to raise money upon as well as to keep in custody the securities of their clients and consequently the banker is entitled to assume, in the absence of indications to the contrary, that the broker has full authority to deal with the securities : *Halsbury, Laws of England*, 2nd ed., vol. 31, *Stock Exchange*, p. 584, par. 803. On this footing the fact that the client signs a blank transfer and hands the scrip and the transfer to the broker puts him in the same position as a merchant who entrusts the documents of title to his goods to a factor or mercantile agent. This is the explanation of *Fry* v. *Smellie* (4) where *Vaughan Williams* L.J. says :—" An owner who gives indicia " of title " to an agent and authorizes him to deal with such indicia either for the purpose of raising money or sale, owes a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority." I take this to mean that the employment of an agent, who has ostensible authority to deal with transferable securities in

(1) (1886) 54 L.T. 320.
(2) (1889) 5 T.L.R. 487.
(3) (1892) A.C. 201.
(4) (1912) 3 K.B. 282, at p. 289.

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his possession, precludes a principal, who places such securities in his hands, from denying his authority to deal with them in the ordinary course of his business. It is a curious thing that in *Re Burge, Woodall & Co.*; *Ex parte Skyrme* (1) *Phillimore* J., after hearing full evidence of the actual relation of a stockbroker to one of his clients, arrived at the conclusion that the broker could repledge the client's securities to the bank only to the extent of the indebtedness of the client to the broker. It does not appear that the matter was dealt with by proof of a general usage of the business. On the whole, there appears to be much support for the view that it is not because the course of a stockbroker's business includes the mortgaging or pledging of his client's interest in securities in his hands to support advances to him that a bank has been considered entitled to hold the securities as against the client. It is either because the securities have been negotiable instruments or because they have been indicia of title transferable by delivery placed in the broker's hands with authority to repledge or mortgage, though for a limited amount or interest.

Now the scrip in the present case is not negotiable. It is true that it is in a form by which title can, in effect, be transferred by delivery. But the vital distinction is that the scrip assumed that form only by the use by Hodgetts of his authority under his power of attorney. On the face of the scrip their condition as indicia of title transferable by delivery depended entirely on the authority of Hodgetts as attorney under power and not upon any measure taken by his client. His possession of these documents, therefore, justified no assumption that his client had authorized him to deal with them. That depended on his actual authority as attorney under power. Moreover, at the time of the loan from the defendant the plaintiffs were not indebted to Hodgetts and the latter had no authority of any sort to pledge or mortgage the scrip even for a limited interest or amount or for a special purpose. The scrip was in his hands only for safe custody and to enable him to sell if he saw fit or was so instructed.

In principle the case can hardly be distinguished from an agent having possession of goods. If it is in the ordinary course of such an agent's business to sell in his own name goods entrusted to him by clients, then a sale of the goods in his possession will bind his principal whether actually authorized or not. But an unauthorized pledge or mortgage by him will not bind his principal, unless to pledge or mortgage goods of his clients in his possession is also within the ordinary course of his business.

(1) (1912) 1 K.B. 393.

We have no ground for holding that it is within the recognized scope of a sharebroker's business in Australia to raise money in his own name by mortgaging or pledging his clients' interests in securities in his hands. There is no evidence whatever that it is so. I cannot think that it is a matter of judicial notice. But, if it were, no materials have been brought to our attention upon which we could proceed in informing our minds.

I am, therefore, of opinion that no case of ostensible agency has been made out.

(4) Broad general grounds of estoppel are sometimes invoked such, for instance, as the rule of policy so often repeated, to the effect that, where one of two innocent parties may suffer, the loss should fall on him by whose indiscretion it has been occasioned. Upon this approach to such questions I have expressed my opinion in *Thompson* v. *Palmer* (1) and I shall not repeat myself here. See, further, *Newbon* v. *City Mutual Life Assurance Society Ltd.* (2) and *Grundt* v. *Great Boulder Pty. Gold Mines Ltd.* (3).

In the end an assumption on the one side must be induced or assisted and on the other side the conduct of the party to be precluded must be such that he ought not to be permitted to depart from that assumption. Here there are, so far as I can see, only two assumptions which would avail the defendant, namely, either that Hodgetts was entitled in point of property to give the security over the scrip, or that he had the owners' authority to do so.

Is it possible by adding further facts or combining all the circumstances of the case to place upon the plaintiffs the responsibility of having contributed to or assisted towards the adoption by the defendant of any such assumption? He never assumed that the plaintiff was owner. As to the assumption that Hodgetts had authority, I cannot see that any further facts appearing in the case add any strength to the grounds already discussed on which reliance may be placed for the defendant.

In my opinion the appeals should be allowed with costs and the plaintiffs should have judgment in the actions with costs for the return of the respective parcels of scrip.

McTiernan J. I have read the reasons for judgment of the Chief Justice and my brother *Dixon*. I agree substantially with their reasons and it does not seem to me to be necessary to add anything to their very full discussion of the questions raised. There

(1) (1933) 49 C.L.R. 507, at pp. 545-547.
(2) (1935) 52 C.L.R. 723, at pp. 734-735.
(3) (1937) 59 C.L.R. 641, at pp. 674-677.

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should be judgment in each case for the delivery of the scrip to the plaintiffs or payment of its value.

I agree that the appeals should be allowed with costs.

Appeal in each case allowed with costs. Judgment of Supreme Court set aside. In lieu thereof judgment that the defendant do deliver up to the plaintiff the share certificates in the statements of claim herein mentioned or recover against the defendant the value of the said shares. Action remitted to the Supreme Court to be dealt with in accordance with law. Defendant to pay costs of action in Supreme Court.

Solicitors for the appellant, *Pickering, Cornish & Lempriere Abbott.*

Solicitors for the respondent, *Ward, Mollison, Litchfield & Ward.*

C. C. B.