rected, the Commissioners, and not the parties to whom the water was given, were the proper defenders. The raising of this declarator was a natural enough proceeding; but the parties had a good enough title to apply to the Sheriff. If the parties suing proved that they really had been laid under the grievance of which they complained, it was difficult to say they had no title. Their grievance conferred a title. But the question was, Was the grievance proved? He could not hold that, because Murray said that there was an ample supply of water, that was conclusive against the pursuers. Their title would remain just as strong if there was plenty of water for all the public, if the Commissioners gave it to manufactories, and did not supply the domestic purposes of the inhabitants. On the face of the proof there seemed to have been a deficiency of water for domestic purposes before this complaint was presented. But it did not appear how this deficiency arose—whether from bad state of the pipes, or leakage, or what. But the Commissioners seemed to have done all in their power to remedy the evil. On the whole matter, he thought the pursuers had failed on the proof.

Lord Ardmillan agreed with all their Lordships in dismissing the action, on the ground that the case of the pursuers had failed on the proof, but agreed with Lord Deas on the question of title.

Agents for Pursuers—Henry & Shiress, S.S.C.

Agents for Defenders—J. B. Douglas & Smith, W.S.

Friday, December 13.

BLACK (D. & G.) *v.* GLASGOW INCORPORATION OF BAKERS AND ANOTHER.

Sale—Storekeeper—Delivery-order—Constructive Delivery—Retention—Lien—Stoppage in transitu. A sold to B the seconds, thirds, and bran which should be produced from 2000 bolls of A's wheat, then lying in a mill-store, B to provide bags, and the miller to deliver the produce. A gave B a delivery-order which was duly intimated to the miller, and who entered the transfer in his books. The wheat was ground in parcels from time to time, and part delivered to B on order. After it was all ground, but a large portion still remained in the miller's hands, B became bankrupt, having only paid part of the price. In a question between A, claiming retention of the produce in the miller's hands, and C, claiming on a sub-sale by B, *held*, on a view of the whole circumstances of the case, that the produce sold to B, and lying in the miller's hands, had been constructively delivered, and C's claim sustained. Observed that what here remained to be done to the subject sold was not sufficient to suspend constructive delivery. Observations on distinction between seller's right of retention in Scotland and seller's right of lien in England, and on stoppage *in transitu*.

In the beginning of September 1864, D. & G. Black, bakers, Glasgow, sold to the now deceased Alexander Bannatyne, grain merchant, Glasgow, 200 bags seconds flour, 100 bags thirds, and 400 bolls bran, the expected produce in seconds, thirds, and bran of 2000 bolls of wheat. The wheat was then lying in the store of the Clayslap Mill, Glasgow, which belongs to the Glasgow Incorporation of Bakers. Bannatyne obtained a delivery-order from the sellers in the following terms:—"Glasgow, 3d September 1864. Mr Jno. Thomson, Clayslap Mill, give Mr Alexander Bannatyne all the seconds, thirds, and bran from the 2000 bolls wheat we are just putting on the mill. (Signed) D. & G. Black." This order was intimated to Thomson, the head miller, about a fortnight after its date, and he thereupon made the necessary entry in his order-book. By this time part of the wheat had been brought from the store to the mill, and was being ground. The whole of the wheat was brought from time to time thereafter, but was not completely ground till November following. As it came off the mill it was weighed and put into bags belonging to the sellers, with the exception of 170 which belonged to Bannatyne, and were filled with bran, a note of the weight of each bag being sent to the sellers. Prior to 13th October 1864, Bannatyne had obtained delivery of a portion of the flour to himself, and part to his orders. On 13th October Bannatyne, who had stuff from other parties lying at the mill subject to his orders, transferred to Michael Rowan, baker and grain merchant, Glasgow, for onerous considerations, 145 bags seconds, 110 bags thirds, and 445 bags bran, quantities which corresponded with what remained of his purchase from D. & G. Black. On the same day Bannatyne wrote out a delivery-order, which was intimated by his clerk to Thomson, the miller, who thereupon wrote an acknowledgment to Rowan that he had transferred the flour and bran to his account, and would hold them to his orders. Bannatyne died insolvent on 18th December 1864, a large portion of the price (£176, 5s.) being then, and still, unpaid. The quantities of flour and bran last mentioned were still lying in the mill. On 14th January 1865 the law agents of D. & G. Black wrote to Thomson desiring him not to make any further delivery of the flour and bran. On the 16th January, however, a portion of the bran was delivered to a third party on the order of Rowan; and on the same day D. & G. Black presented a petition in the Sheriff-court of Glasgow praying to have the Incorporation of Bakers interdicted from delivering the remainder of the goods to Rowan, or any other person but the petitioners, until the balance of the price due by Bannatyne was paid. They alleged that by the terms of the contract of sale, and by the custom of the grain trade in Glasgow, they were bound to transfer the goods into the purchaser's own bags, and to deliver them at any place in Glasgow named by the purchaser, and pleaded that, the goods being still undelivered, the purchaser from them insolvent, and the price unpaid, they were entitled to stop delivery. Rowan alleged that when he purchased the goods they were in a deliverable state; weighed, set apart, and distinguished, and all ready for the purchaser's orders; nothing essential remained to be done by the seller or any one; and pleaded that, Bannatyne having got delivery of the goods by transfer order duly intimated, the pursuer could not insist in the action. A proof was taken in which the facts above stated were brought out; and it appeared that the practice in grinding and delivering grain at the Clayslap Mill and in Glasgow is as follows:—Members of the Incorporation of Bakers, to which the sellers belonged, are charged one shilling per boll for grinding the wheat and delivering the produce in Glasgow or the neighbourhood, the Incorporation having a contract with a carter to perform the cartages. For the same charge the Incorpora-

tion, if there be a sale, are bound before delivering to empty the flour and bran from the grister's (*i.e.*, the seller's) bags to those of the purchaser, which the latter is bound to provide. The Incorporation also, without additional charge, give the use of the mill as a store till the flour and bran are taken away, for which there is no fixed time. The accounts for "grinding and cartage" at the above rate were charged to and paid by the sellers. It also appeared that the flour and bran usually lie for a longer or shorter time in the seller's bags after being sold, and that whenever the purchaser sends his bags the miller turns over the stuff into them, and delivers them to the purchaser or his order at any place within the Incorporation carter's contract, and that without communicating with the seller. The bags, after being filled and weighed as the flour and bran came off the mill, were set aside, the seconds by themselves, and the thirds and bran among the general stock of the sellers. Thomson, the miller, stated that he had not made any entry of the transfer from Bannatyne's to Rowan's account, and had no books for the purpose, and that he had no authority from the Incorporation to grant the acknowledgment to Rowan, though he had occasionally granted similar documents to gristers of wheat, but that he would not have delivered the stuff to any one but Rowan or his order.

The Sheriff-substitute (H. G. Bell) on 12th March 1866 pronounced the following interlocutor:—"Finds—(1) in point of fact, that on the 3d September 1864 the pursuer sold to the now deceased Alexander Bannatyne all the seconds, thirds, and bran to be obtained from 2000 bolls wheat they were then putting on the mill, conform to delivery-order, No. 18-2, in Bannatyne's favour: Finds that the said wheat produced 200 bags seconds, 160 bags thirds, and 400 bolls bran, all of which, as made, were deposited in the stores connected with Clayslaps Mill, Partick, belonging to the defenders, the Incorporation of Bakers: Finds that the *cumulo* price payable by Bannatyne for the goods was £345, and of that sum £176, 5s. remains unpaid, Bannatyne having died insolvent on 18th December 1864: Finds that on 13th February 1864 Bannatyne, for onerous considerations, transferred to the defender Rowan 445 sacks bran, 145 sacks seconds, and 110 sacks thirds, being all the bran and so much of the seconds and thirds he had bought from the pursuers, conform to transfer-note, No. 18-1, addressed to John Thomson, miller at Clayslaps Mill; and on the same date Thomson gave Rowan the acknowledgment, No. 12, that he had transferred as requested, and held the goods to Rowan's order: Finds that the whole seconds, thirds, and bran sold by the pursuers to Bannatyne were not finally gristed till 26th November 1864, and as they came off the mill they were put by the miller into the pursuers' bags, with the exception of 170 bags bran, which were put direct into Bannatyne's bags: Finds that at the date of the institution of this action 170 bags of the bran remained in the pursuers' bags, and the remainder had either been transferred to Bannatyne's bags, or been delivered on Bannatyne's and Rowan's orders: Finds that at the same date 145 bags seconds and 110 bags thirds remained in the pursuers' bags, and the rest had been delivered as instructed by No. 26-5: Finds it proved that it was a part of the bargain at the time of the sale by the pursuers to Bannatyne that the purchaser was to provide his own bags, and that the seller was to get the stuff tusked or turned over into said bags, and thereafter delivered free at any place named by the buyer within certain limits: Finds (2) in point of law, that where goods are, at the date of sale, in the hands of a third party, such as a wharfinger, miller, or storekeeper, notice to the custodier, whether he makes an entry in his books or not, operates as a transfer of the property, provided nothing remains to be done by the seller to put the goods in a deliverable condition, but if anything remains to be done, then no complete constructive delivery or transfer has taken place, notwithstanding that a delivery-order has been given to the buyer, and a transfer-entry made in the custodier's books: Finds that in the present instance there was no complete transference to Bannatyne as long as the goods remained in the pursuers' bags, it being a condition of the sale that they should be tusked by the seller, and at his expense, into the purchaser's bags, to put them into a deliverable condition, and till that was done the pursuers retained their right to stop *in transitu*, as against Bannatyne, in the hands of the custodier: Finds that when the vendee's right is incomplete, a second or sub-vendee can be in no better situation than his vendor in a question with the original seller, and it was accordingly expressly laid down in the case of *Dixon*, June 7, 1833, 5 Barn. and Ald., p. 313, that 'it is a general principle of law that a man who has not the property and right of possession in goods cannot transfer them to a vendee, and therefore, if the original vendor chooses to retain or stop *in transitu*, a second vendee is in no better situation than the first:' Finds, farther, that whatever claim Rowan may have against the storekeeper in consequence of the terms of the acknowledgment, No. 12, held by him, the obtaining of such acknowledgment being, as regards the pursuers, *res inter alios*, they are in no way bound by it: Therefore, and in as far as relates to the seconds, thirds, and bran still lying to the extent above set forth in Clayslaps Mill in the pursuers' bags, repels the defences, and continues and makes perpetual the interim interdict formerly granted; but, in as far as regards the bran, which has actually been transferred to Bannatyne's bags, Finds that complete constructive delivery of said bran has taken place, and the property in it has passed, so as to bar the pursuers' right to stop *in transitu:* Finds, as regards the seconds and thirds actually set out from the mill, that they are not within the conclusion for interdict; Therefore, in as far as said bran, seconds, and thirds are concerned, sustains the defences, and, as regards the bran, recals the interim interdict: Finds, as regards expenses, that the pursuers have been to a large extent successful in their contention, whilst the defender Rowan refused to admit that they had any right to interdict at all: Therefore finds said defender liable in expenses subject to some modification; allows an account thereof to be given in, and remits the same to the auditor to tax and report: Finds, as regards the defenders, the Incorporation of Bakers, that they had no interest in the question between the pursuers and Rowan, and as there was no conclusion for expenses against them, there was no occasion for them entering appearance, Therefore, finds no expenses due to or by them, and decerns."

The Sheriff (Alison), on appeal, pronounced this interlocutor:—

"Having heard parties' procurators under their mutual appeals upon the interlocutor appealed against, and made avizandum, and considered the

record, proof adduced, and whole process, dismisses the appeal for the defenders, the Incorporation of Bakers, and adheres to the interlocutor appealed against in so far as they are concerned, for the reasons stated by the Sheriff-substitute, and upon the mutual appeals for the pursuers, and the defender Michael Rowan: Adheres to the interlocutor complained of in so far as the findings in point of fact are concerned; but finds, in point of law, that the original sale and transfer of the produce of the 2000 bolls of wheat by the pursuers to Bannatyne on the 3d of September 1864, and the subsale of a portion thereof by Bannatyne to the defender Michael Rowan by the delivery-order, 18-1, dated 13th October following, followed by the written acknowledgement of the same date, granted by the party Thomson, the keeper of the mill where the grain was stored, to the defender Rowan, No. 12, stating that he had transferred as requested, and held the goods to Rowan's order, was complete delivery, and that the mere circumstance of the grain not having been shifted from the pursuers' bags into bags of the defenders' own, was immaterial as in a question between the original vendors and vendees: Therefore, finds that the pursuers, the original sellers to Bannatyne, had no grounds in law for applying for an interdict against delivery to the defender Rowan of any portion of the grain so transferred to him: Sustains the defences for Rowan, and recals the interdict granted; and on the matter of expenses, in respect said defenders' pleas have in the end been entirely successful, Finds him entitled to expenses against the pursuers; Appoints an account thereof to be given in, and remits to the auditor to tax the same, and report, and decerns.

(Signed) "A. Alison."

"*Note.*—This case is of great, the Sheriff may say, without fear of exaggeration, of unexampled importance, for it involves the principles on which the sale of that extensive class of goods is to depend, which are sold and transferred without any actual delivery or change of possession following, or any farther implement of the transfer than an intimation of the sale to the warehouse-keeper of the store where the goods are stored, to be held for behoof of the purchaser, and at his risk. No one need be told how numerous are the transactions of this description in this great commercial city, and how frequent it is for great parcels of goods,—most frequently in commerce, such as iron, cotton, sugar, and grain,—to be sold upon a mere delivery-order, afterwards intimated to the storekeeper without any actual delivery or change in the possession of the goods taking place. It may safely be affirmed that, in the single article of iron, transfers of this sort, amounting to millions of pounds sterling, have taken place in Glasgow within the last six months. It is of the highest importance in a matter of such frequent and extensive mercantile usage, to have it distinctly understood what is requisite in law to complete the delivery, and make the vendor secure in selling, and the vendee in accepting the transfer and paying the price.

"It is a well known principle of Scotch law, taken from the Roman *traditionibus et usucapionibus, non nudis pactis dominia transferuntur*. But though this rule is abundantly distinct, and solves all cases in which moveables pass from hand to hand by sale, it does not explain the cases in which goods are transferred in the hands of a third party, and never quit his possession or go out of his hands at all till finally delivered to the last of, possibly, a long chain of vendees. In reference to such cases the law has long ago been settled, both in Scotland and England, on the footing that delivery, though made not to the vendee himself but to some third party for his behoof, is held to be complete, and the right of stoppage *in transitu* on the part of the vendor barred, if the warehouseman or storekeeper, in whose store the goods are lying at the time of the sale, receives instructions to hold them for the vendee's behoof, and enters them accordingly in the store books, as held for the exclusive behoof of the vendee, and entirely at his risk. In this way goods lying in a bonded warehouse or public mill are held to be effectually transferred from a vendor to a vendee, provided, at the date of sale, the goods are separate and distinguishable in the hands of the storekeeper from other goods of the same sort, and nothing remains to be done as between the vendor and vendee to complete the entire cession of the whole rights of the vendor over the goods to the vendee. Where goods are in the hands of a storekeeper, or, as in the present case, of a miller, this completed transfer is effected by the intimation of the sale to the custodier of the goods, and the entry of the purchaser's name in his books as the owner. All this took place in the present case, and, in addition, the custodier addressed a letter to Rowan, the purchaser, intimating the entry of his name in the mill-books, and stating that the goods were held for his behoof, and at his risk.

"So far both parties are agreed that this is the law in the general case upon which the practice of merchants in innumerable transactions is every day rested. But the pursuers contend, that in the present case something more was necessary to be done to complete the sale of the grain, which was lying in the mill for the purpose of being ground at the date of the sale by the pursuers, D. & G. Black, to the now deceased Alexander Bannatyne, on 3d September 1864, and the transfer by the latter to the defender Rowan on 13th October following, and the additional thing which they contend was necessary was a shifting of the grain or flour from the pursuers' bags into those of the purchaser from them. It is alleged that, by the custom of trade at Glasgow, such transference of grain or flour from the bags of the vendor into those of the vendee is necessary to complete the sale, and that where this shifting into the new bags has not taken place—which is the *species facti* in regard to part of the grain here—the sale is not complete, something requiring to be done to make the transfer equivalent to real and actual delivery, and that, meanwhile, the grain was liable to be reclaimed or stopped as *in transitu* by the original sellers, as still the owners. The Sheriff-substitute has given effect to this plea in regard to that part of the grain which was still in the original sellers' bags, although he holds the reverse, and that the delivery was complete in regard to those portions of the flour which had been transferred to the pursuers' bags. The Sheriff cannot see any solid ground for this distinction. He apprehends that it is not any local custom at Glasgow in regard to the shifting of bags, but the general principle of law applicable to real or constructive delivery which must regulate the matter, and that the transfer of the grain in question by Bannatyne to Rowan, and the intimation of the sale made to the miller, and the entry of that transfer in the mill books, followed by the written intimation of such entry having been made to the purchaser, completed the latter's right, and barred

all further right to stop the goods, as *in transitu*, at the instance of prior owners.

"When it is said that, on general principles of law in regard to delivery, it is to be held that the sale is not complete as long as one thing more requires to be done in regard to the goods, this means only that nothing more requires to be done as between the vendor and vendee. It is quite immaterial what requires to be done afterwards as between the vendee and the storekeeper, or any party to whom the goods may be afterwards transferred, in order to getting possession of them. The storekeepers, in the present case, are said to have a custom of charging new bags, along with their charges for grinding, against the purchaser, and to be bound to deliver the ground grain anywhere within the parliamentary limits of Glasgow for a charge of a shilling a bag. But all that is *res inter alios* as to the sale between the vendor and vendee. It was no part of their bargain that the grain should be put into new bags after being ground, nor is there any law which recognises the shifting of bags as the test of real and actual delivery. The test of that is to be found in the transfer of a delivery-order to a purchaser upon the storekeeper who holds the goods, and the entry of the transfer in the store-books. It is of no more consequence for the grain being put into new bags than whether those bags were white or grey. Be the bags new or old, white or grey, the flour they contain was, after intimation to the storekeeper of the transfer, and entry of it in the store-books, held by the storekeeper exclusively for behoof of the vendee, and as to him the delivery was final and complete, as much as the transfer of debt is by an intimated assignation, though the debt assigned has not been actually uplifted by the assignee. If any other rule were adopted, it would lead to incalculable confusion and litigation, and disturb mercantile transactions of the most important kind. The moment you depart from the principle that the test of real and completed delivery is not to be found in the fact that the goods have arrived at the end of their destination, or that they are put at the disposal of the purchaser, but that something ulterior requires to be done with the goods for behoof of the purchaser, and, under a local custom, or an agreement with the storekeeper, you are landed in an endless multitude of specialities depending upon local usage, or the whims of parties. In the present case, 'the something additional' is stated to be putting the flour in the miller's hands into different bags. In the case of a sale of iron lying in a yard, it might, with equal plausibility, be pleaded that the sale was incomplete, notwithstanding an intimated delivery-order, till the iron was put on the purchaser's carts. Sugar lying in a bonded warehouse might in this way be held to be undelivered, though it had passed through a hundred hands, till the last vendee shifted it into his own barrels. In short, there would be no end to the variety of local requisites that might be held to be requisite to complete the sale of an article in the possession of a third party. All these complications and all that confusion are avoided by a simple adherence to the general rule of law, that a sale is completed, and the right of stoppage *in transitu* by the seller barred, by the goods, if sold, *in transitu*, having arrived at their final place of destination as between vendor or vendee, or if sold, when in possession of another, by intimation of the sale to that other, that they are to be held for the purchaser's behoof, and an entry of the transfer made in the store-books."

The pursuers advocated.

YOUNG and SCOTT, for them, argued—That there was no complete delivery to Bannatyne in respect—(1) That the wheat was not ground at the time of the sale, the flour and bran, the subject of the sale, being only in *posse*, and the wheat lying at the store, and not in the mill. (2) That the delivery-order in favour of Bannatyne was not given on the custodier and storekeeper, but on the miller, who had no authority to receive the same. (3) That by the terms of the contract, and the custom of trade, the sellers were bound, through the Incorporation, as their paid agents or servants, to turn over the flour to the purchaser's bags, and to deliver within Glasgow or its neighbourhood, which had not been done. They also maintained that the defender Rowan had not identified the flour and bran which Bannatyne transferred to him as part of what Bannatyne had purchased from them (the pursuers), and could not, therefore, in a question with the unpaid sellers, claim the goods.

GIFFORD and J. C. LORIMER, for the respondents, argued — That there was complete delivery to Bannatyne in respect—(1) That the delivery-order was intimated to the miller, who was a third party, and the proper custodier of the flour when ground, and that delivery took place in virtue of the delivery-order, from time to time, as the grain came off the mill in the form of flour and bran. (2) That thereafter the millers (the Incorporation) held the flour and bran as the agents for the purchaser, whose orders, as to its transfer and delivery, they were bound to obey without communicating with the sellers. (3) That nothing remained to be done by the sellers to fix the price, the quantity, or the identity of the goods sold, or to put them into a deliverable condition. They also maintained that the miller was entitled to grant the acknowledgment to Rowan, and that, having done so, there was complete delivery, even though something had remained to be done.

The following authorities were referred to by the parties. 1 Bell's Com., pp. 185–6, and cases there cited; also *Hawes* v. *Watson*, 2 Ross L.C., p. 196.

At advising—

LORD PRESIDENT—This is an important case in mercantile law, and attended with some difficulty. But the difficulty arises from the peculiar and, as far as regards decided cases, the novel circumstances. The legal principles applicable to the case are in themselves clear and well settled. But their application to such circumstances as here occur may, and no doubt does, practically involve the establishment of a rule or precedent of extensive application. The personal contract of sale by the advocators to Bannatyne was verbal, but there is no dispute about its terms. The sellers had at its date 2000 bolls of wheat lying in the store of the Incorporation of Bakers, adjoining to and connected with the Incorporation Mill of Clayslap, deposited there with a view to its being ground and converted into flour. They sold to Bannatyne all the seconds, thirds, and bran which should be produced from these 2000 bolls of wheat, at the price of 18s. 6d. per bag for seconds, 7s. 6d. for thirds, and 5s. for bran. The sellers, being members of the Corporation of Bakers, were entitled to have their wheat ground at the Corporation's mill, and the produce carted and delivered at any place within the city of Glasgow, and certain of its suburbs, for the slump charge of 1s. per boll of the wheat. The sellers, therefore, undertook by the

contract of sale that the produce sold should be delivered at any place within these limits, free of charge to the buyer, by the Corporation's cart. At the time of making the contract, the sellers gave to the buyer an order addressed to the miller (a servant of the Incorporation, and a different person from the storekeeper, who is also a servant of the Incorporation), by which they order the miller to "give" to the buyer "all the seconds, thirds, and bran from 2000 bolls wheat we are just putting on the mill." The order is dated 3d September 1864; and it was intimated to the miller about a fortnight thereafter—*i.e.*, about the 17th September. On the 9th September 400 bolls of wheat were transferred from the custody of the storekeeper to that of the miller. All the best of the wheat was sent to the mill after the intimation of the order—viz., 400 bolls on 22d September; 420 bolls on 3d October; 420 bolls on 15th October; 418 bolls on 4th November; and 110 bolls on 19th November. It does not appear at what precise dates those several parcels of wheat were ground, and the first flour (which was not sold to Bannatyne) was separated from the seconds, thirds, and bran, the subject of the contract of sale. But it is established that the whole wheat had undergone these operations, and the whole produce sold to Bannatyne was in existence as a separate subject after the intimation of the sellers' order to the miller, and before the death and bankruptcy of the buyer, and the occurrence of the present dispute. During that interval, also, partial deliveries had been made by the miller of seconds and thirds to purchasers from Bannatyne, on the miller receiving delivery-orders from Bannatyne. Before the 13th October fifty-five sacks of seconds, thirty-five sacks of thirds, but no bran, had been so delivered by the miller, on the order of Bannatyne the buyer. On the 13th October Bannatyne addressed to the miller an order, desiring him to "transfer" to the respondent Rowan the whole of the seconds, thirds, and bran remaining in his hands, specifying the number of sacks; and on the same day the miller gave a letter to Rowan, stating that he had that day "transferred" to his account, by order of Bannatyne, the sacks specified in Bannatyne's order, "which," he adds, "I shall hold to your order." This letter was not granted by the miller in the ordinary course of his business; and he was not authorised by the Incorporation to grant such letters. Neither had he any book in which to enter such a transfer, nor did he enter this transfer in any book. It is the custom at Clayslap Mill, in such circumstances as occur here, to put the produce of the wheat as it comes from the mill into the sacks of the grister or seller in the first instance, and then for the miller to transfer it from these sacks, when making actual delivery, into the sacks of the buyer or his assignees, which he or they send for that purpose. In this manner the deliveries were made prior to the 13th October, and, in like manner, deliveries were made on Rowan's orders after 13th October. On the 18th December 1864 Bannatyne died insolvent, leaving the price of his purchase from the advocators unpaid to the extent of £176, 5s., out of £345, the gross price. On the 16th January, while a considerable portion of the goods still remained in the miller's hands, the advocators applied for interdict against any further delivery being made to the respondent Rowan or any other person till the balance of the price should be paid to them. The question for determination is whether the advocators were entitled to this interdict? The plea maintained for the petitioner in the inferior court is, that "the goods in question being still undelivered, the purchaser thereof from the petitioner insolvent, and the price unpaid, the petitioners are entitled to stop delivery thereof." This plea correctly enough represents the true legal principle applicable to the case if the petitioner be well founded in his application for interdict. There is only one unfortunate form of expression in the plea—"entitled to stop delivery thereof." And it may be that this form of expression, combined with other circumstances, has led the Sheriff-substitute and Sheriff to deal with the present as a case of stoppage *in transitu*. Again, the form of their judgments has perhaps led to the statement in this Court of seven additional pleas for the advocators, none of which has any application to the facts of the case. There could be no stoppage *in transitu* in this case, simply because the goods never were in a state of *transitus*. No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitus*, to which the equitable remedy of stoppage applies, is anything but an actual state of transit from the seller to the buyer. I am aware that there are loose expressions in some reports of cases in both countries, which have led to a good deal of misconception. But the equitable remedy of stoppage is applicable only to goods which are either in the hands of a carrier, or of some person—such as a wharfinger—who is doing something to render complete the contract of carriage. To put goods in a state of *transitus*, the seller must have parted with the possession of the goods, and put them into the hands of some person who is to carry, or procure them to be carried, and delivered to the buyer; and the buyer must be in the position of not having received the goods. Unless the seller has parted with the possession, his remedy is not stoppage *in transitu*, but, in Scotland, retention, and, in England, an exercise of the seller's right of lien. The advocators' averments and plea in the inferior court sufficiently refute the notion that they lay their case on the allegation of the goods being *in transitu*. Their sole contention (and I think most properly, having regard to the facts) is, that the seconds, thirds, and bran, so long as they remained in the hands of the miller, were in the possession of the sellers. The plea of the advocators is therefore a plea of retention and nothing else. I should think it almost unnecessary, at this time of day, to point out the important distinctions which exist between the laws of Scotland and England as regards the seller's rights in goods sold and not delivered. But the course of the argument suggested occasionally an identity between the seller's right of retention in Scotland and the seller's lien in England, which it is impossible to pass without notice. The seller of goods in Scotland (notwithstanding the personal contract of sale) remains the undivested owner of the goods whether the price be paid or not, provided the goods be not delivered; and the property of the goods cannot pass without delivery, actual or constructive. The necessary consequence is, that the seller can never be asked to part with the goods till the price is paid. Nay, he is entitled to retain them against the buyer and his assignees till every debt due and payable to him by the buyer is paid or satisfied. There are certain modifications of this rule by the Mercantile Amendment Act which, however, have no application to the circumstances of this case. The seller's right of retention thus being grounded on an undivested right of property,

cannot possibly be of the nature of a lien, for one can have a lien only over the property of another. In England, on the other hand, the property of the goods passes to the buyer by the personal contract of sale, and the seller's rights thereafter in relation to the undelivered subject of sale (whatever else they may be) cannot be the rights of an undivested owner. English jurists are not agreed as to the true foundation in principle of the seller's lien. I shall only say that, if it be not an equitable remedy like stoppage *in transitu*, it is certainly not the assertion of a legal right of ownership like the right of retention in Scotland. Nothing, therefore, can be more dangerous or more likely to mislead in argument than to deal with the right of retention of the Scotch law and the seller's lien of the English law as if they were identical, or even presented any available analogy. It is, on the contrary, necessary to keep the fundamental distinction constantly present to the mind in the discussion of every question like that before us. The whole of this doctrine has been so thoroughly established by a long series of cases during the last twenty years, and at last (as I had thought) so authoritatively explained by a judgment of the whole Court with reference to the provisions of the Mercantile Amendment Act in *Wyper* v. *Harvey*, that I confess it was with some surprise I found revived in the present discussion some of the fallacies which I supposed had been set at rest. The question then is, Whether, at the date when the application for interdict was presented, the seconds, thirds, and bran remaining in the hands of the miller were in the possession of the sellers, so as to entitle them to retain them till the price should be paid, or whether the property and legal possession of the goods had passed to the buyer by constructive delivery? The solution of this question is attended with difficulty, owing to the peculiar circumstances of the case. In the ordinary case, where goods in the hands of a storekeeper are sold by the owner, and a delivery-order is given by him to the buyer, the intimation of the delivery-order by the buyer to the storekeeper operates constructive delivery, and from that moment constitutes the storekeeper custodier or holder for the buyer, just as before he was custodier or holder for the seller. But this ordinary rule could not apply to the present case at the date when the delivery-order was intimated by the buyer to the miller—viz., on or about the 17th September—for at that date the subject of the sale (seconds, thirds, and bran) had no separate existence, and the wheat from which they were to be produced was still lying in the form of wheat, partly in the hands of the miller and partly in the hands of another servant of the Bakers' Incorporation, who kept the store or granary attached to the mill. But before the death and bankruptcy of the buyer the whole of the wheat had been ground, and the various products had been separated, viz., firsts, seconds, thirds, and bran. There can be no doubt the firsts were still the property of the sellers; but did not the other products, as they came into existence, become, under the operation of the intimated delivery-order, the property of the buyer? I am of opinion that they did. The Incorporation of Bakers were not, in the ordinary sense, storekeepers or custodiers of the goods sold. The 2000 bolls of wheat had been put into their hands, not for the purpose of safe custody, but for the purpose of undergoing an operation which is of the nature of *specificatio*. Before, however, that operation was commenced, the sale took place, and the delivery-order was intimated. And when the miller proceeded *speciem alteram facere*, he created two separate subjects of property, one of which—the firsts—belonged to the sellers; but the other—the seconds, thirds, and bran—belonged to the buyer. It is material to observe that the *specificatio* in this case is of that complete and immutable kind which, both by the Roman law and ours, is in certain circumstances a mode of transferring or acquiring property; for the products can never again take the form of the wheat from which they came. I do not say that this case depends upon, or is to be solved by, the doctrine of *specificatio* as a *modus acquirendi dominii*. But it was part of the contract of sale that what was the property of the seller should undergo a *specificatio* which effectually prevented the wheat, which was then his property, from remaining or ever again becoming his property in *forma specifica*. Under such a contract, I think it can hardly be disputed that, if the delivery-order had been intimated to the miller for the first time after the wheat had been ground, and when the subject of the sale was in actual existence and ready for delivery in the hands of the miller, constructive delivery would thereby have taken place, and the possession of the seller would have come to an end. And it seems to me that it can make no difference in principle that the buyer anticipated the actual production of the subject which he had bought by intimating his delivery-order before the grinding was begun. No doubt, he could not thereby acquire any right of property in, or possession of, the unground wheat; and, if he had become bankrupt, without paying the price, before the actual production of the subject of sale, the seller, as undivested owner of the wheat, might probably have retained the wheat and countermanded the grinding. But it seems to me most consistent with the principles of law applicable to this class of cases, to hold that the intimated delivery-order attached to the products sold as they came into existence under the miller's hands, and took effect, by operating constructive delivery of the subject sold, as soon as it was produced. I need hardly say that, in the view I take of the principles of law applicable to the case, there is no room for the distinction suggested by the Sheriff-substitute between that portion of the goods which was in the seller's bags and that which was in the buyer's. Such circumstances are material in questions of *periculum*, where the subject of sale is undelivered in the hands of the seller or his agents. And there may be other cases—such as the well-known case of *Gibson* v. *Forbes*—where the precise situation of the goods and their deliverable or undeliverable condition in the hands of their custodier for the time may affect the legal rights of seller and buyer, or of their creditors. But when the subject of sale is in the hands of an independent third party, and a delivery-order by the seller in favour of the buyer has been duly intimated to the custodier by the buyer, constructive delivery will take place, whatever may be the precise condition of the goods;—even though the quantity be unascertained, provided the mass be sold;—even though the price be unascertained, provided it be at a rate which afterwards can be certainly fixed by ascertainment of the quantity;—even though the goods be lying in such a state that some preliminary operation is necessary to put them in a state for delivery. Such circumstances can have no legitimate effect where the actual possession of the third party custodier is—by means of an intimated delivery-order—converted from a possession for the

seller into a possession for the buyer; for then the custodier is no more at liberty to re-deliver to the seller or his order, than, before the intimation of the delivery-order, he would have been at liberty to deliver to the buyer or his order. Constructive delivery converts the custodier of the goods from the servant or agent of the seller into the servant or agent of the buyer; and from that moment the custodier's possession of the goods is, in law, the possession of the buyer. Legal tradition has been made of the subject of the contract of sale; and there is an end of the real right of the seller, and of every other right of the seller, except a *jus actionis* for the price if it be unpaid. I am therefore of opinion that the Sheriff did right in refusing the petition of the advocators for interdict.

Lord Curriehill—This belongs to a class of cases in which there is some difficulty. It is a case where there is a concluded contract of sale, and the purchaser has become insolvent before paying the price, and a question has arisen, Whether the seller is in a position in which he can exercise the remedy known in the law of Scotland as retention? The difficulties which have been experienced for a considerable time in such cases arose from a confusion in the minds of the parties as to the principles of law applicable to such cases. One source of that confusion arose from not attending to the radical distinction between the laws of Scotland and England as to the transmission of the right of property, or *jus dominii* over the goods. According to the law of Scotland, that right of property does not pass without tradition or delivery; in the law of England the right of property passes by the contract of sale itself, without tradition. But that distinction was often left out of view in such discussions. Another source of confusion arose from not distinguishing the remedy which, if not peculiar to Scotland, is at least clearly a remedy known to Scotch law, the right of retention so long as the right of property remained with the seller, and he had the goods under his control. That right has been confused with the right of lien, which is competent in England to one person over the goods of another, and also with the other principle, which we have borrowed from England, of stoppage *in transitu*. This confusion has for a long time given rise to difficulties. But here there is another element, which is, so far as I recollect, new, and that is, that at the time of the contract of sale the subject of the contract was not in existence. The subject was the seconds, thirds, and bran, and these did not exist at that date; they were to be brought into existence by manufacture, and the manufacturer was after that to give the subject produced to the seller. In the present case we have had all the old difficulties and this new one too, and it requires careful discrimination to analyse the case and reduce it to proper principles. I have listened with the greatest attention to your Lordship's way of dealing with the question and statement of the principles, and knowing well your Lordship's views beforehand, I had given careful consideration to the question, and I think your Lordship has stated the principles to which I have alluded in the most lucid manner possible. Your Lordship's opinion being so lucid, and sound, and so exhaustive of the case, I have only to say that I entirely concur.

Lord Deas—I have very few observations to add. The question is, Whether there was constructive delivery of part or of the whole of the articles sold? There is no doubt of the intimation of the sale. At that time the price had been only partially paid, but all that remained to be done was (1) to transfer the produce into the purchaser's bags; and (2) to deliver the articles at the place of business of the purchaser. The seller had come under an obligation apparently to do these two things, or to be at the expense of having them done. The whole question on which the Sheriff-substitute and Sheriff differed was, whether, in respect that these two things were not done as regards a part of the articles, that prevented constructive delivery from taking place? The Sheriff-substitute held that, these two things not being done, did prevent constructive delivery. The Sheriff held they did not. I think it is material that there was nothing else remaining to be done. The price was paid, and the quantity was ascertained. The single observation I have to make is, that in these circumstances we don't require to consider what might have been the effect of anything remaining to be done in respect of ascertaining the price or quantity. Having said that, I have only to add that I concur with your Lordship. I think the Sheriff takes a right distinction when he says, that whatever be the effect of other things remaining to be done, if the things to be done are, such as here, entirely in favour of the purchaser, it is clear that they cannot affect constructive delivery. As to the two things undertaken by the seller, the most important in point of expense and trouble was delivery at the premises of the buyer. It is not possible to say that that not being done, can prevent constructive delivery from being complete; for if that had been done there would have been no room for constructive delivery. There would then have been actual delivery. The result of holding that would be, that under this bargain there could be no constructive delivery at all. The quantity was ascertained, and the mere transfer from one set of bags to another could not affect the question more than if the transfer had been from one loft to another, or if the produce had not been in bags at all, but required to be put into bags before being taken away. That cannot affect the question. The purchaser might arrange that there was to be no change of bags, but that the stuff was to be brought to him in the seller's bags, and the bags emptied and returned. I agree with the Sheriff that if things of that kind were to prevent constructive delivery, it would be a great inconvenience to trade, for it would give rise to endless questions whether some things of this sort, quite immaterial, remained to be done, so as to prevent constructive delivery, and would unsettle the whole principles of law. I am therefore of opinion that the Sheriff was right.

Lord Ardmillan—This claim has been presented to us, and I think quite rightly, as a claim of retention on the part of the pursuers Messrs Black. Some of the reasoning may be applicable to a case of stoppage *in transitu*, but the legal character of the pursuers' claim is that of retention. I do not think that the question is altered by the sub-sale by Bannatyne to Rowan. If the pursuer had a good right of retention against Bannatyne, it is good also against Rowan. The point for inquiry is, Whether the sale by the pursuers to Bannatyne was so completed by constructive delivery as to exclude the claim of retention on the part of the pursuers as unpaid sellers? I have come to the conclusion

that the pursuers have no claim of retention under the circumstances disclosed in the proof. The subject of sale was peculiar, and the peculiarity has been pressed on us by the counsel on both sides. The subject of sale was not 2000 bolls of wheat, nor any proportion of 2000 bolls of wheat, but "the seconds, thirds, and bran from the 2000 bolls of wheat we are just putting on the mill." There are two peculiarities to be observed in this sale. The first is, that the wheat is not sold, in whole or in part, as wheat; and the second is, there is no sale of all the product from the bolls of wheat, but only of the seconds, thirds, and bran, the sellers keeping the first flour. The article sold was within the body of the wheat, and had no existence at the date of the sale, but was to be produced by the process of grinding at the mill from the bolls of wheat stored on the mill premises, and removed to the mill for grinding. It was, however, the understood and ascertainable product of that particular lot of wheat, and there is no question as to quantity or price. I do not mean to say that I differ from your Lordships' views on the subject of specification; but I am not satisfied that the legal rules which you have explained as to specification do of themselves afford sufficient grounds for disposing of this case. It is, I think, necessary to consider the state of facts with reference to which the plea of retention is urged. I think the delivery-order took effect on the seconds, thirds, and bran as they arose in the process of manufacture; and that process was completed at the date of the death of Bannatyne. There was no written contract of sale. Bannatyne the purchaser is now dead, and it is from the evidence of David Black that we get the terms of the bargain. He states that the sale was of the seconds, thirds, and bran mentioned in the order; and he tells us that, apart from the price, which is not disputed, the terms were, that the purchaser was to provide sacks, and the seller to deliver at any place within a certain district, according to the custom of trade in Glasgow. I take this as the bargain. Now the question arises in regard to certain quantities of seconds, thirds, and bran made from the 2000 bolls according to agreement, not requiring any operation for ascertaining the subject, or the weight, measure, or price thereof, but not transferred to the purchaser's sacks, and not delivered at the purchaser's premises.

In regard to this last point, the non-delivery at the purchaser's premises, I have little difficulty. There is a delivery-order, duly intimated, and it cannot be doubted that an order for delivery of goods in the hands of the storekeeper, or, as in the present case, of a miller, operates as constructive delivery. In such a case the absence of actual delivery can be of no consequence; for, if actual delivery were necessary, there would be no case of constructive delivery. Accordingly, I have no doubt that the delivery order, with due notice to the custodier, is good constructive delivery, effectual to transfer the articles sold, unless something remained to be done by the seller which had the effect of suspending the delivery. That actual delivery had not been given at the purchaser's premises cannot have this effect. After the date of receiving the delivery-order, the custodier held the goods for the purchaser in respect of that order, which was constructive delivery, unless delivery was suspended. But was there anything here remaining to be done by the sellers in respect of which the effect of the delivery-order was suspended? I think not. By our law the seller is the owner of the goods sold and not delivered, and his claim for the price is a claim not of lien but of retention. Where the delivery is not actual, but constructive, the question arises—Was there anything to suspend the effect of the order which is equivalent to delivery? The law is thus stated by Mr Bell:—"But where anything remains to be done by the sellers in the way of ascertaining the price or quantity of the commodity sold, or, in order to put it in a deliverable state; the transfer is not completed by a delivery note given to the buyer, addressed to the keeper of the goods, with notice to the custodier; or even by a transfer in the custodier's books. Till the commodity is weighed, or till the other act, whatever it may be, shall be performed, which remains to be done in order to put the commodity in a deliverable state, the property is untransferred." I am not prepared to say that if anything whatever, however trifling, or however separable from the transaction of sale, remains to be done by the seller, that is to be sufficient to suspend the effect of a delivery-order. There is no authority for so broad a proposition. The thing remaining to be done by the seller must, I think, be something required for ascertaining the identity, the quantity, the weight, or measure of the subject of sale, or for making the subject ready for delivery in terms of the contract. If what remains to be done is not within the category of one or other of these operations, then I do not think that, even if it were to be done by the seller, it would in this case be suspensive of delivery.

But then I am not satisfied that what remained to be done here was to be done by the seller as part of the contract of sale, and still less that it was necessary to make the article sold ready for delivery. Black says that "the purchaser was to provide sacks." If, therefore, the purchaser had sent his sacks as soon as the stuff was ready to be put into the sacks, it would have been at once put into the purchaser's sacks, and that process would have been, not making the stuff ready for delivery, but the actual delivery thereof. That this is not done, but that the seller allows the purchaser the use of his sacks till the purchaser sends his own sacks, does not affect the essentials of the sale or of the delivery. It is a separate, collateral, and subordinate arrangement, not intended and not operating as a suspension of the transfer. It is in the purchaser's power to send sacks when he chooses, but his delay in doing so cannot suspend the effect of the delivery-order. It is true that this is a question of retention, not of *periculum*. But the decisions in the cases of *periculum* are not inappropriate when we are considering a plea of alleged suspension of constructive delivery.

The case of *Hansen* v. *Craig* (4th February 1859, 21 D., 432) is not directly in point, because it was a case involving a question not of delivery, but of risk. All the arguments and authorities urged by the advocators in this case were, however, there urged in order to support the plea that, in respect of what remained to be done in a sale of oil in a boiling-yard, the risk remained with the sellers. The Court found that the risk was with the purchasers. This case was very carefully considered, and the whole principles of constructive delivery in the civil law, in the law of England, and in our own law, were subjected to the most searching examination. I have seen no reason to change the opinion which I formed as Ordinary in that case. I am quite aware that the present case, where the

plea is retention in respect of no delivery, is not exactly the same as the case of *Hansen*, where the question was one of risk. But still, in judging of the effect of a delivery-order presented or intimated to a custodier, we must consider whether anything remained to be done by the seller, and, if so, whether what did remain to be done had the effect of suspending delivery. It is not said that in this case anything remained to be done by the seller for ascertainment of the subjects sold, or of the number, weight, measure, or price thereof. Anything of this kind might have had a suspensive operation. But that has not been maintained; and is at all events out of the case.

I think that the sale was here completed by the granting and due intimation of the delivery-order, and that any arrangement by the parties in regard to sacks was not so made as to be an intrinsic quality in the transaction of sale, and to be a condition suspensive of delivery. Accordingly, I concur with your Lordships in adhering to the judgment of the Sheriff; this opinion being formed irrespective of the question of specification, on which, however, I do not mean to indicate any difference of opinion.

Advocation refused, with expenses.
Agent for Advocators—John Ross, S.S.C.
Agent for Respondents—D. J. Macbrair, S.S.C.

Friday, December 13.

SECOND DIVISION.

MURRAY AND OTHERS *v.* MUIR.

Trust—Power of Trustees to enter into a Submission—Personal Bar. Held (1) that trustees, on whom a power to submit had not been conferred, had no power to enter into a submission in reference to a claim of £700 said to be due to the trust-estate under an alleged partnership; (2) that although the arbiter had decided in favour of the trustees, the opposite party was not bound to implement the award, an objection founded on the trustees' want of power having been taken before the arbiter had issued his award, but after he had issued notes of his proposed findings; and (3) that the opposite party was not barred from taking the objection.

This was an action for payment of a sum of money found due by an arbiter under a submission. The pursuers were the trustees of David Thomson, a contractor in Dundonald, and the defender is the sole surviving executrix-nominate of James Thomson, a coach-builder in Dundonald. David and James Thomson were brothers, and are both now dead. They were partners in business, as the pursuers alleged, from 1838 to 1854, when David died. In 1865 the pursuers raised an action of count and reckoning in regard to David's share of the profits of the business, and for payment of £700 as the balance due to him at his death. The defence was—(1) a denial of the partnership; and (2) no resting-owing. After defences were lodged, the parties agreed to refer the whole questions raised by the action to Dr William Alexander, of Dundonald. The arbiter accepted the reference, and shortly thereafter the defender admitted that there had been a partnership, but denied that any balance was due. On 11th September 1865, the arbiter issued notes of the findings proposed by him. He intimated his intention to find that £600 was due to the pursuers. Both parties lodged representations. On 5th December 1865, the parties met the arbiter for the purpose of being heard on the representations. At this meeting the defender's agent, for the first time, objected to farther proceedings, in respect that the pursuers had no power either at common law or under their trust-deed to enter into a reference. The agents of the parties were then heard, and signed a minute renouncing probation. On 9th May 1866 the arbiter issued his award, in which he found the defender liable to the pursuers in the sum of £623, 5s. 4½d., with interest from 27th June 1854, and also in expenses, which he modified to £27. This action was now raised for payment of these sums.

The defender pleaded:—"The defender is not bound to implement the said decree-arbitral in respect the said minute of reference, and the whole proceedings following thereon, including the decree-arbitral, are inept and invalid, inasmuch as the pursuers had no power by the deed under which they act to enter into the reference.

A proof was led before the Lord Ordinary, from which it appeared that the trust-deed under which the pursuers acted had been prepared in the office of the defender's agent, and that an extract of it had been produced in Court along with the summons in the action which was referred. The defender and her agent, however, deponed that when the reference was entered into they believed that the pursuers had power to refer.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor:—

"*Edinburgh, 15th February* 1867.—The Lord Ordinary having heard counsel on the evidence led before him, and on the whole cause, and made avizandum, and considered the said evidence, record, productions, and whole process: Finds, in point of fact, 1st, that after certain procedure in the action referred to in the third statement of facts for the defender, a proposal was communicated by William Alexander, M.D., to the defender, with the knowledge of the pursuers, that the action referred to in the third statement of facts should be made subject of reference, and that a minute of reference was thereafter entered into to the said Dr Alexander as arbiter; 2d, that no question was at first mooted in the reference, or otherwise, as to the power of the trustees to enter into the said reference, and that the defender entered into the same on the assumption of the power of the pursuers so to do; 3d, that thereafter, and more particularly on the occasion of a meeting on the subject-matter of the reference at Irvine, on the 5th December 1865, an objection was taken before the arbiter by the defender, or on her behalf, in terms of the minute No. 32 of process, to any farther procedure in the reference, on the special ground that the trustees (pursuers) held no power sufficient to authorise them to enter into the reference; 4th, that thereafter the arbiter, disregarding the said objection, proceeded to issue the award or decree-arbitral on which the present action is rested; 5th, that the trust-deed under which the pursuers act contains no clause purporting to confer power on the pursuers, as trustees, to enter into arbitration in relation to the property conveyed in trust; and finds, in point of law, that the subject-matter of the submission to the arbiter, Dr Alexander, under which the said decree-arbitral was pronounced, was