other topics are merely incidental. The question is, whether we shall interdict the completion of the purchase by the Town Council of Mr Milne's half of Torry Farm?

The main ground on which we are asked to interfere lies in an alleged disqualification on the part of Mr William Leslie, one of the Town Council, to take part in the proceedings of the Council relative to the purchase. It is said that Mr Leslie is a creditor over the other *pro indiviso* half of Torry Farm, originally belonging to Sir Alexander Anderson; and that his interest as such creditor is to obtain as high a price as possible for that other half. He is, therefore, it is said, materially concerned in the sale of Mr Milne's half, which cannot but affect the disposal of the other half of the estate. In consequence of this interest, it is maintained that he was excluded from voting on the proposal to buy Mr Milne's half; and without his vote it is said there was no valid Act of Council.

I am of opinion that this reason for granting the interest is insufficient. I am not prepared to hold the alleged interest in Mr Leslie, as creditor over the other half of the property, to be an interest of that direct and immediate character which excluded him from voting in this matter. But I am clearly of opinion that, even if this objection invalidated the vote of the meeting at which Mr Leslie was present, it was quite competent to the Town Council to confirm the sale by an after resolution free from this objection; and I think the Council did so.

The only other ground of suspension which I have felt myself called on to consider is, that the proposed purchase is so grossly inexpedient and improper as to call on the Court to interdict it. I have no doubt of the competency of the Court not merely to control such acts of a Town Council as are *ultra vires* in respect of intrinsic illegality, but also such as are so manifestly inexpedient and improper as to go beyond the bounds of fair administration. The case, however, must be a very clear and strong one to warrant the interposition of the Court. With the discretion of the Town Council, when acting within the bounds of administration, the Court is not entitled to interfere.

I cannot say that the proposed purchase produces in my mind a vivid impression of prudence and sagacity. This purchase of land on the other side of the Dee was only part of a scheme depending for its completion, first, on the acquisition of the other half of the ground; and, secondly, on obtaining Parliamentary authority for building a bridge across the Dee, by means of funds diverted from another Bridge Trust. The other half of the ground has, it is said, been offered to Mr Francis Edmond for himself, or for behoof of the creditors of Sir Alexander Anderson; and is, for the time at least, gone out of the power of the corporation. The proposed Act of Parliament, to obtain which naturally formed the first step in the proceedings, is still in the clouds. If all this is so, nothing seems to be gained by carrying through the purchase, except to make the Town of Aberdeen partners with Mr Francis Edmond in a property on the other side of the Dee. The Town Council's own committee reports that, in the first instance, there will be an annual loss on the transaction, "which loss," it is added with some *naiveté*, "would, of course, be extinguished by an increasing rental of the estate." I suspect that, if I had been in the Town Council, my vote would have been with the minority. But the proverbial acuteness of the locality is perhaps too great for any more southern apprehension. Nothing, at all events, is before us except the purchase of this half of Torry Farm, as to the futurities of which I do not feel myself so competent to decide as men on the spot. The purchase is of ground in the neighbourhood of the town, and so not unnaturally falls within the scope of the magistrates' operations. We must hold the price to be a fair one; as on a contingent sale to Mr Edmond, contingent, that is to say, on the Town Council not carrying through the transaction, the same price is given. Although, in the first instance, the money to pay for the purchase is to be borrowed from the town's bankers, it is plain that there are abundant funds on other investments to pay for the purchase. In this condition of things I do not feel warranted, on any ideas of my own, in interfering with the administration of the council, for which they, and not I, are responsible.

I am of opinion that the case, as it stands, affords sufficient materials for a decision to this effect: and that no facts necessary for a judgment require to be investigated. In the whole circumstances, I think the note of suspension and interdict should be refused.

The note of suspension and interdict was therefore unanimously refused by the Court.

Agents for Complainers—W. & J. J. Saunders, S.S.C.

Agent for Respondents—T. J. Gordon, W.S.

Tuesday, December 20.

MILNE (HALL'S TRUSTEE) *v.* BOOKER & CO.

Sale—Bankrupt—Rejection—Stoppage in transitu. *Notice.* A merchant purchased a cargo of timber at sea, to be paid for according to measurement; after the arrival of the vessel, but before the cargo was fully discharged and measured, he found that he was insolvent; he did not stop the unloading, but, after it was completed, and the timber for the most part lying on the quay, he wrote to the sellers informing of his circumstances, and they immediately presented a petition to the Sheriff for interdict against his taking possession of the timber,—*Held* that this letter was a rejection of the timber, and the steps taken by the sellers rescinded the contract. *Observed* that there would be great difficulty in bringing the case under the head of stoppage *in transitu*, as there was no notice to a custodier.

This was an appeal from the Sheriff-court of Aberdeenshire. The circumstances were as follows:—On 17th November 1869, Messrs Booker & Co., merchants, Liverpool, sold to Messrs Hall & Co., Aberdeen, the cargo of timber on board the Sir Colin Campbell, which had arrived the day before from Demerara, and they directed the vessel to proceed to Aberdeen. The price was £5, 15s. per load, to be measured and delivered at Aberdeen. The Sir Colin arrived there on 26th Nov., and the unloading was begun next day, and on 7th December the measurement began to be made, and both unloading and measurement were completed on 16th December. The measurement was, according to custom, done at the sellers' expense, and by a licensed measurer. In the unloading and laying out of the timber on the quay for measure-

ment, the horses and men of Messrs Hall & Co., were employed, but that was reckoned part of the expense of measurement, and was to be borne by the sellers; and Messrs Hall & Co. had no right to remove any part of the cargo before the measurement was completed.

Prior to the arrival of the cargo it had been disposed of to other parties, with the exception of one-sixth, because the quantity was too large for Messrs Hall & Co., but Mr Hall, the sole partner, had no suspicion then that he was insolvent. The remaining one-sixth was sold on the 7th December to one of the parties before referred to, because Mr Hall had become satisfied that he could not pay for it himself.

Between 6th and 24th November, Mr Hall was taking stock in order to settle with the representatives of a deceased brother. The balance-sheet was shown to the City of Glasgow Bank, whose Aberdeen agent, on 25th November, refused to allow him to draw further on the bank; and on 28th the directors in Glasgow adhered to the refusal. Thereafter Mr Hall succeeded in getting a loan of £2000, and carrying on business for a time. But on 11th December, he called a meeting of the principal crditors, at which he produced a state of his affairs. The meeting was adjourned till the 22d, to see if an arrangement could be made, and to have a report from an accountant. On the 22d, Mr Murray, C.A., produced another state of affairs prepared in the interval, and after considering an offer of composition of 7s. per pound by Mr Hall, it was resolved to apply for sequestration, and sequestration was awarded on 24th. Up till 22d December, Mr Hall expected to be able to settle with his creditors and to carry on his business. After the sale of the last portion of the timber on 7th Dec., Mr Hall did not wish to interfere with any part of the cargo. But after the meeting on 11th December, Mr Milne (one of the largest creditors, and now trustee) was afraid that Messrs Hall, Rus- & Co., (who had originally bought one-sixth, and had also bought the remaining one-sixth), would try to set these purchases off against a debt due by Mr Hall to them, and he urged Mr Hall to take delivery of the timber himself. Messrs Hall, Russell, & Co., when examined, repudiated any such intention. After refusing to act on Mr Milne's suggestion, Mr Hall at last agreed, as the Harbour Commissioners were pressing for its removal, to take the timber to a neighbouring piece of vacant ground rented by him, considering at the same time that he was doing so for the benefit of the parties to whom the timber truly belonged. This was on Saturday 18th December, and on that day fifty logs or thereby were so removed by Messrs Alexander Hall & Company's servants. On 20th December Mr Hall stopped the further removal, because he thought he was not doing right in putting it on his own ground, and he did not further interfere. On the same day he wrote to Messrs Booker & Co., informing them of his embarrassments and of the meeting to be held on 22d. On 21st December, Booker & Co. replied:—"Under the circumstances we presume that you have not touched the timber. We are sending a party to Aberdeen (Mr James Dunn) to protect our interest." The price of the timber, about £1200, was not paid. On the 22d December (the day of the adjourned meeting of creditors), Mr Dunn arrived in Aberdeen, and in the name of Messrs Booker & Co., presented a petition to the Sheriff, setting forth that the cargo, consisting of 169 pieces, had been completely landed, and that 115 pieces were then on Aberdeen Quay, and that the price was unpaid; and craving "interdict against A. Hall & Co. taking delivery of or interfering with the cargo so far as not already delivered;" and craving authority "to take possession of the timber and place it in safe custody." Interim interdict was granted on the same day.

The parties entered into an arrangement for the custody of the timber during the dependence of this action for deciding the rights of parties. The sellers maintained the timber removed by Mr Hall had only been taken by him for safe keeping, and not as his own property; and they claimed the timber left on the quay as having been stopped *in transitu* by the interdict. Messrs Hall & Co.'s trustee maintained that the whole timber had been constructively delivered when the measurement was completed on the 16th December; and, at any rate, that the partial delivery on the 18th December was equivalent to completed constructive delivery.

After proof being led, of which the most material facts have been detailed, the Sheriff-Substitute (COMRIE THOMSON) found that the respondents (A. Hall & Co.) did not intend, by receiving the fifty logs on their ground, to take possession for themselves, but only *as custodiers* for those to whom they belonged; that when delivery of the remainder was stopped (22d December) the respondents were insolvent, and knew it; that in law the taking possession of the portion in these circumstances did not amount to constructive possession of the whole; and that the *transitus* of the timber, which was the subject of the petition, had not been completed, and had been duly stopped by the petitioners.

The Sheriff (JAMESON) adhered.

Mr Milne, the trustee in Messrs Alexander Hall & Co.'s sequestration, appealed to the Court of Session.

The SOLICITOR-GENERAL and MONRO, for him, contended that it was impossible for stoppage *in transitu* to take place in the circumstances, the *transitus* being over. The proper place for delivery in this case was at the ship side, and even were it not so, Mr Hall, by taking delivery of the fifty logs constructively took delivery of the whole. Moreover, supposing that the goods were *in transitu*, no notice of stoppage was given to any one who had the custody of the goods, and that there was no such right known in law as that of the seller interdicting a buyer from taking delivery. Farther, the question of rejection did not arise under this petition, the only question being whether the petitioners were entitled to interdict the buyer from taking delivery. The following cases were quoted in support of the argument:—*Slubey* v. *Heyward*, 6th May 1795, 2 Henry Blackstone, 504; *Tanner* v. *Scovell*, 18th April 1845, 14 M. and W., 28; Smith's Leading Cases, I., 756; Bell's Com., I., 248; *Stoppel* v. *M'Laren*, 20th Feb. 1849, and 15 Nov. 1850, 11 D. 676, and 13 D. 61.

SHAND and ASHER, for the respondents, argued that physical custody of goods did not necessarily constitute completed delivery. Mr Hall had no intention of taking delivery, and certainly could not do so until the measurement had been completed. *Transitus* is not at an end if possession be taken for behoof of a seller. The buyer's intention to take goods for himself alone stops *transitus*. Moreover, in the circumstances of this case, Mr Hall knowing that he was going to become bankrupt, and that it was not honest accordingly to take the goods, was

entitled to reject them, and that his taking them into his custody with that purpose did not deprive him of his right of rejection. The following authorities were relied on—*Stein* v. *Hutchison*, 16 Nov. 1810, F. C.; *Hanson* v. *Meyer*, 3 July, 1805, 6 East, 614; *Wallace* v. *Breeds*, 21 May, 1811, 13 East, 522; *Collins* v. *Marquis' Creditors*, 23 Nov., 1804, F. C.; *Bolton* v. *Lancashire and Yorkshire Railway Company*, 19 January, 1866; I Com. Pl., 431; *James* v. *Griffin*, 2 M. and W., 623; *Atkin* v. *Barwick*, 1 Strange, 165; Houston on Stoppage *in Transitu;* Bell's Com, I., 255 (M'L. Ed.).

At advising—

The LORD PRESIDENT—My Lords, the question raised in this case is one of difficulty and importance, and depends upon the construction which the Court may put upon the occurences which took place between the arrival at Aberdeen of the vessel "Sir Colin Campbell," on 26th November 1869, and the sequestration of the firm of Messrs A. Hall & Co., on 24th December 1869. On 17th November 1869 Messrs Alexander Hall & Co., or rather Mr William Hall—because he was the sole partner of that company, his brother having died shortly before—purchased the cargo of timber on board the "Sir Colin Campbell," which was then on her way from Demerara, from the petitioners, Messrs Booker & Co., merchants, Liverpool. On the day after the bill of lading was endorsed to Hall & Co., and the vessel herself arrived at Aberdeen on the 26th. Previous to her arrival, Mr Hall had sold off considerable portions of the cargo to other parties in Aberdeen, one-third to Messrs Duthie, Sons, & Co., another third to Messrs Humphrey & Co., and a sixth to Messrs Hall, Russell, & Co. So that he had retained, so to speak, only one-sixth of the cargo. At this time he considered himself perfectly solvent, and such is his own statement. Upon its arrival at Aberdeen the vessel commenced to discharge its cargo, but this was not completed till about the 17th of December. The logs as they were landed were laid upon the quay for measurement, in order to discover the exact amount of the cargo, and in this operation Mr Hall's men and horses were employed. In the meantime, Mr Hall had become embarrassed, and, having to arrange with his brother's representatives, was engaged in taking stock. Greatly to his own surprise, he found that his affairs were in a very bad condition. One of the things he did immediately upon finding himself in difficulties was to get rid of the sixth of the cargo still in his hands by selling it to Hall, Russell, & Co., upon the 7th December. Now, the arrangements with these different firms were nothing else in law than sub-sales. In consequence of Mr Hall's embarrassments, he endeavoured to get advances from the City of Glasgow Bank to enable him to carry on, but he was not successful. Failing in that, he called a meeting of some of his principal creditors on 11th December. This meeting was only attended by five of the principal creditors, and to them he submitted a state which showed that he was in a condition of insolvency. But both he and his principal creditors thought that he could still manage to go on, and they therefore ordered an accountant to prepare a new state. Meanwhile Mr Hall obtained an advance of £2000, with which he was enabled to carry on business for sume time. Upon 22d December there was another meeting of his creditors, and it then became apparent for the first time that he could not carry on any longer, and accordingly he applied for sequestration. In the course of the evidence, it is distinctly stated that it was not till this meeting that either Mr Hall or his creditors became perfectly satisfied that he could no longer carry on. In the meantime, the cargo had been completely discharged by 15th December, and the measurement concluded by the 17th. Mr Hall seems to have wished to be perfectly honest in the matter; he had no intention of giving a preference to Messrs Booker & Co., the petitioners, or to any of his creditors. He was desirous in the circumstances to do what was fair to all concerned. Mr Hall's evidence shows graphically the state of his mind. When Mr Milne, the appellant, who afterwards became trustee in the sequestration, wished all the timber to be put on his ground, he refused, and proposed to put it on neutral ground. He afterwards proposed to put it on some ground on the links which he rented; but he explained that, in proposing so to take it, he did not consider that he was taking it for his own benefit, but for the other purchasers to whom he had sold it. No doubt he was wrong in the view he took of the position of these purchasers in considering them co-purchasers with himself, whereas, in point of law, they were only subvendees. Mr Hall was under the impression that he could substitute these solvent purchasers in his place with Messrs Booker & Co. What was the effect of that mistake, in point of law, is the question here for consideration. His evidence on the subject is as follows:—"The cargo was more than I wanted, and I asked some of my neighbours to join in purchase. . . . . I employed meter to measure the cargo. I did so on behalf of pursuers who fell to pay him. The mark put on timber was the first letter of the ship's name and a number. No private mark was put on it. The cargo had to be spread out before being measured. I employed my horses and men to do that. That is part of the expense of measuring, and was to be charged by me against the pursuers. I had no right to remove any of cargo before measuring was completed. . . . . The harbour police insisted on the timber being removed. On Saturday (18th December) my men began to remove timber. They took about fifty logs. On Monday (20th December) I stopped them, because I thought I was not doing right in putting it on my own ground. I had been reflecting about it. I did nothing more about it." Now, this seems to me to be, in some respects, the turning point of the case. Mr Hall was under a mistake when he thought that he could put the purchasers into exactly the same position in which he stood to Messrs Booker & Co., and accordingly, when pressed by the harbour police, he proceeded to remove the timber to his own ground, but for their behoof. On reflection, however, he doubted the propriety of what he was doing, and, knowing the position of his affairs, he came to the conclusion that the proper thing for him to do was to leave the cargo where it was. In this he was right, for it was the duty of an honest trader so to leave it alone. From this time he refused to allow a single log more to be removed. The logs were lying on ground belonging to the Commissioners of the Harbour of Aberdeen, who had a claim over them for the harbour dues. Now, on 20th December Mr Hall wrote to the pursuers, informing them of the expense of the measurement, and adding, "We are much pained to inform you that, from severe losses we have sustained, we have been under the necessity of asking a few of our largest creditors to meet us on Wednesday first to lay the

state of our affairs before them, and we hope then to be able to arrange matters satisfactory." Now, that intimation was addressed to Messrs Booker & Co. as sellers of the cargo, and was meant to be acted on by them, and it was so acted on, for, upon the day of its arrival at Liverpool, they wrote as follows:—"We regret to learn that you have been under the necessity of calling a few of your largest creditors to meet you. Under the circumstances, we presume that you have not touched the timber *per* 'Sir Colin Campbell.' We are sending a party to Aberdeen (Mr James Dunn) to protect our interest." That was just the natural response to the intimation, and Mr James Dunn arrived in time to present the application now before us on the very next day—namely, on the 22d of December. Now, the question is, whether the timber was so taken into the stock of the bankrupt Hall as to constitute a part of his general estate for behoof of his creditors, or whether it was rejected, and in consequence of the rejection the petitioners took advantage of it to rescind the contract. If there was no rejection of the cargo, and no rescinding of the contract, the legal effect is, that the goods belonged to the sequestrated estate. I am of opinion that the circumstances amount to rejection on the part of the buyer, and rescinding on the part of the seller. It is not necessary that there should be a particular form for rejection—intimation to the seller is enough. The resolution to which Mr Hall had come on Monday, 20th December, putting all the other circumstances apart, though they are of importance as showing his *animus*, amounts, in my opinion, to rejection. He was urged by Mr Milne (one of his largest creditors, and subsequently the trustee in his sequestration) to take possession of the timber, and he positively refused to do so. Afterwards, while the goods still lay on the quay, the sellers come and propose to take possession of the goods; that is a distinct rescinding of the contract on their part. Such questions as this do not often arise, because the bankruptcy of a buyer does not frequently occur at such a juncture as to make it possible for him to reject goods. After sequestration had been issued it is different, and it is a doubtful matter whether the creditors of a buyer in such a position could take any advantage from goods delivered when the sequestration was in force. When a buyer, however, is conscious of his insolvency, but is not yet sequestrated, he surely can reject goods for which he knows he cannot pay. Whether it be or be not the case that a buyer conscious of insolvency is committing a fraud in taking delivery, I do not pronounce an opinion, but that he has a right to refuse to take delivery I think there can be no doubt, and that right was here exercised by Mr Hall. The circumstances make a difficulty here in showing an act of rejection, but there is a case where the Court held rejection had taken place under more remarkable circumstances. That was the case of *Drake* v. *M'Millan*, 8th July 1807, Hume 691, where a purchaser on the verge of bankruptcy had indorsed the bill of lading of the goods in order that they might be discharged at the port of delivery, but stated that he made the indorsation merely in trust for behoof of either his creditors or the seller, whichever might be found to have the right to the cargo. I think that case even stronger than the present as construing as an act of rejection an act which was ambiguous. In the present case we have a more unequivocal act of rejection in the circumstances, which I have adverted to.

If this had been a case in which Messrs Booker & Co. had relied solely upon a plea of stoppage *in transitu*, I should have had some difficulty in coming to an opinion in their favour, but that question does not arise.

Some doubt was expressed as to whether the remedy here made use of was a competent one. I am of opinion that it was competent. No doubt there would need to be some farther steps taken after the prayer of this petition was granted as it only prays for interdict and custody, but the agreement between the parties does away with the necessity for that. I am therefore for coming to the same conclusion as the Sheriff and Sheriff-Substitute, though upon different grounds.

LORD DEAS—I am of opinion with your Lordship that Messrs Hall & Co. were entitled, and in fairness and honesty were bound, to reject these goods. And I am farther of opinion that they did reject them. Mr Hall's attempt to take possession does not affect that; the views he had all along were that the goods should not go into the hands of his creditors so as to injure the sellers' position. I agree that it is not here necessary to decide that if he had taken those goods benefit to his creditors might have resulted; on that subject I have an opinion, but it is not called for here. Nor is it necessary to decide whether these goods were in a position in which they could be stopped *in transitu*. Generally there is a custodier of goods, and it may be that the circumstances of this case were such that if stoppage *in transitu* had been resorted to it might have been successfully effected. The clear ground for decision, however, is the rejection of the goods and a rescinding of the contract. Rejection of the goods is not inconsistent with their being *in transitu*. The rejection is the act of the purchaser, and I do not see why he may not intimate that rejection even before he could have taken delivery. Goods can quite well be in a position both for rejection and stoppage *in transitu*.

I see no difficulty in granting the prayer of the petition, and I therefore concur with your Lordship that the appeal should be dismissed.

LORD ARDMILLAN—There are here three questions, but it is only necessary for us to decide one of them. The first question is, whether the *transitus* of these goods had terminated at the date of the application? the second is, whether the mode made use of—viz., interdicting the purchaser from taking delivery without notice to the custodier of the goods—was sufficient to constitute stoppage *in transitu*? and the third, whether the purchaser rejected the goods? I hardly think it right to pass the first two questions without remark, though the third is undoubtedly the best ground on which to decide. If the process of unloading the cargo, and its subsequent laying out for measurement, had been conducted by any one acting for the vendors only, I should have had no hesitation in saying that the *transitus* was still going on. Mr Hall, however, employed his own men and horses in so doing. The Sheriffs have both held that in so doing he acted as agent for the sellers. In that view I concur, and so am of opinion that the *transitus* had not terminated. As regards the second question, I am inclined to think that interdict without notice to the custodier is not a proper

mode of stoppage *in transitu*. Notice to stop can only be given by the vendor to the carrier or custodier of the goods before they have passed into the hands of the purchaser, and must be given at such a time and under such circumstances that the custodier may be able to prevent delivery. There was no such notice here, and I am therefore of opinion that there was no stoppage. On the third point, I concur with your Lordships that Mr Hall was entitled to reject these goods, and did so. It was his duty in his position to reject them, and that has been already stated by Lord President Blair in his opinion in the case of *Stein* v. *Hutchison*, which was referred to in the course of the debate. It is not necessary to go the whole length of that opinion, but there can be no doubt about the part of it that it was his duty. In a question between a vendor and a purchaser, when a purchaser has rejected, I have the greatest satisfaction in holding that the law does not interfere to prevent the honest trader from doing justice.

Lord Kinloch—This case presents some peculiar features, different, as I think, from those exhibited in any reported case involving the points now raised.

The cargo of timber in question, which consisted of 170 logs or thereby, was sold by Messrs Booker to Mr Alexander Hall, of Aberdeen (the sole constituent of Alexander Hall & Co.), in November 1869. It was sold, as the contract bears, at £5, 15s. per load, Queen calliper measure, "for cost, freight, and insurance," the sellers thus taking on themselves the burden of freight and insurance.

The vessel by which the sellers sent this timber arrived in Aberdeen on 26th November 1869. Next day the vessel commenced unloading. But the unloading was only to the effect of placing the timber on the quay, where it was left by those carrying it from the ship, the shipmaster apparently taking no further concern with it. It lay there for the purpose of measurement, the mode of measurement being twofold, one by string for the purpose of ascertaining the freight, the other by calliper for the purpose of fixing the amount of price due to the seller.

The measurement began on the 7th, and was completed on the 16th December. The timber continued thereafter to lie as before on the quay.

In the meanwhile, the position of the buyer, Mr Hall, had undergone a serious change. So far back as 24th November, which was two days before the arrival of the vessel, he had made a balance of his books, on showing which to the City of Glasgow Bank they had refused further to honour his drafts. An application made thereafter to the directors of the bank at Glasgow received an unfavourable answer. On 11th December Mr Hall held a meeting with some of his principal creditors, and laid before them a state of his affairs, which showed him to be insolvent. A remit was made to an accountant, who returned a report to an adjourned meeting of creditors held on the 22d December. It was resolved at this meeting to apply for sequestration, and sequestration shortly after issued.

On the 20th December, two days previous to this meeting, Mr Hall wrote to Messrs Booker, the sellers of the timber, stating that he had called a meeting of creditors for the 22d, "to lay the state of our affairs before them, and we hope to be able to arrange matters satisfactorily." Messrs Booker wrote back on the 21st, expressing their regret for the intelligence, and saying, "under the circumstances we presume you have not touched the timber *per* 'Sir Colin Campbell.'" They also intimated that their bookkeeper, Mr James Dunn, would go to Aberdeen to protect their interests. On the 22d, the same day that the meeting of creditors was held at which it was resolved to apply for sequestration, a petition was presented to the Sheriff at the instance of Messrs Booker, to which they called Messrs Hall, the buyers, as parties, praying his Lordship "to grant warrant for interdict against the said Alexander Hall & Co. taking delivery of or interfering with the said cargo, so far as not already delivered, and to authorise the petitioners to take possession of the same and place the same in safe custody." Mr Milne, the trustee in the sequestration of Hall & Co., was afterwards sisted as defender in this process; and ultimately the Sheriff pronounced judgment in favour of the petitioners. This judgment is now under our review.

The case was mainly argued to us on the part of the petitioners as a case of stoppage *in transitu*, properly carried through. Were it necessary to pronounce on this point, I think some nice and difficult questions would arise for consideration. I am not prepared to say that stoppage *in transitu* could not, or did not, take place. But I consider it unnecessary to form any decided opinion on this point, the judgment of the Sheriff being, as I think, capable of being supported on other grounds.

I consider it to be fully proved by the evidence that prior to the 22d December, when sequestration was resolved on, Mr Hall had, with one exception (to be immediately adverted to), not taken delivery of any part of the timber in question. On Saturday the 18th December he had been induced by Mr James Milne, one of his largest creditors, and now trustee in his sequestration, to remove about 50 logs to certain vacant ground rented by him. But on Monday he repented of having done so, and no further interfered with the timber. No question as to these 50 logs is now before us. As to all the remaining timber, matters, I think, remained in a position in which Mr Hall was clearly entitled to reject the timber; and such rejection is a reasonable construction to be put on his conduct. The idea of Mr Hall from the first, and consistently followed out all downwards, was not to take the timber to himself, but to make an arrangement by which certain other parties were to be substituted as purchasers, who were to take the timber, and to settle for the price directly with Messrs Booker, the sellers. Even before the arrival of the vessel he had induced two houses — John Duthie, Sons, & Co., and John Humphrey & Co.—to take each one-third, and another house—Hall, Russell, & Co.—to take one-sixth, leaving only one-sixth to himself; and this one-sixth he prevailed on Hall, Russell, & Co. also to take on the 7th December. The scheme was an impracticable one, and could only have been realised by Mr Hall doing the very thing he intended to avoid, viz., becoming proprietor of the timber; for he could not make it over to another till first he had acquired it himself. But the very formation of the scheme shows that he did not intend to take the timber himself; and, except perhaps as to the 50 logs (as to which themselves he says that he meant to keep them for the other parties), he consistently followed out this purpose by carefully abstaining from taking possession of the timber. On the 22d December, when the meeting of creditors took place and resolved on seques-

tration, Mr Hall appears to me to have continued in the same mind not to receive the timber. I think that this is fairly to be held rejection of the goods by the buyer, and that on this ground Messrs Booker were entitled, on the 22d December, to take possession of the timber, and to obtain judicial aid and authority to enable them to do so.

The difficulty in the way of adopting this view mainly lies in the fact that Mr Hall did not accompany his rejection by intimation to the sellers, which is a usual element in the case of rejection. But although intimation to the seller must at one period or another be made, I do not think it essential that it should be made before the rejection can be held complete. The authorities, I think, point the other way. I cannot doubt of the competency of the purchaser putting the goods into neutral custody, and thereby in law rejecting them; and in such a case his bankruptcy, before intimation reached the seller, would not, I think, invalidate the rejection. It has been found that the buyer could even take the goods into his own premises *custodiæ causa*, and yet his rejection be valid. The seller may often be at such a distance that to require intimation reaching him before the rejection was complete might be altogether to frustrate this wholesome rule of law. After all, intimation to the seller is mainly important as affording evidence of rejection which is clear and unambiguous. In the present case, I think the other evidence sufficiently establishes the rejection.

But the difficulty may be overcome on another ground, which is to my mind satisfactory and conclusive. I entirely subscribe to the doctrine—which has high authority in our law to support it—that after a buyer has become insolvent and resolved to stop payment, he is not only entitled to reject goods purchased and not yet delivered, but it is his bounden duty to do so. It seems to me the doctrine at once of reason and equity that, after an insolvent trader has resolved *cedere foro*, no act whatever should be done by him altering the state of matters then existing, and having the effect of changing an incomplete into a complete, a personal into a real right. In consistency with this view, I am of opinion that on the 22d December, when sequestration was resolved on, Mr Hall was not only entitled to reject the timber; he was bound to reject it, and could not legally take possession of it. If this opinion be a sound one, all difficulty in the case is removed. Messrs Booker were entitled to enforce this obligation by application to the Sheriff for interdict, and warrant for custody; and the Sheriff's judgment to that effect remains unimpeachable.

Appeal dismissed.

Agents for Appellants—Morton, Whitehead, & Greig, W.S.

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

Thursday, December 15.

SECOND DIVISION.

CAIRNS *v.* COCKBURN'S EXECUTORS.

Warrandice—Eviction—Intermediate Profits. Certain subjects were sold by a bondholder in virtue of a power contained in a bond and disposition in security, and a disposition containing a clause of warrandice was granted by the bondholdor to the purchaser, who possessed the subjects for a number of years. The sale was afterwards reduced by the heir-at-law of the granter of the bond. *Held* that, under an arrangement as to defending the action at the instance of the heir-at-law, the purchaser was entitled to repayment of the price he had paid for the subject, after accounting for the surplus rents during his possession.

Opinion that warrandice in sales of land implies an obligation to restore the price on eviction, and all loss over and above.

This was an action at the instance of John Fuller Cairns against Charles Howden, as acting executor of the late Mrs Cockburn, concluding for repayment of £800, being the price of certain subjects in Eyemouth.

The following narrative is taken from the opinion of the Lord Justice-Clerk :—

Mrs Cockburn, the defenders' predecessor, held a bond for £300 over this property, dated in 1831, of which Nisbet was the proprietor. Purves held a disposition to the same property, dated posterior to Mrs Cockburn's bond, *ex facie* absolute in its terms, but in reality a security for a debt of £160. He was infeft in 1841. In 1845 Mrs Cockburn sold the property under her bond by public roup, and Cairns, the pursuer, bought it for £800, and received the disposition which contains the clause of warrandice founded on, and an assignation *inter alia* to the bond held by Mrs Cockburn. And he afterwards acquired right to Purves' absolute disposition. Cairns possessed the property from 1845; but in 1859 the heir-at-law of Nisbet, the proprietor of the subjects and debtor in the bond, brought a reduction of the sale to Cairns, on the ground that the notices given previously to the sale were insufficient, and ultimately, in 1864, the sale was reduced on this ground. By this time the whole price had been applied in paying debts due by Nisbet, including that of Mrs Cockburn. Then came the question, On what terms the heir-at-law was entitled to resume possession of these subjects? And it appears very clearly from the correspondence that it was agreed between Cockburn, the seller, and Cairns, the purchaser, that the latter should contest this question with the heir-at-law for their mutual interest, leaving their claims *inter se* to be afterwards adjusted. In the course of the subsequent litigation with the heir at law a question arose as to the amount for which Cairns was entitled to credit, after debiting himself with the whole of the surplus rents, and taking credit for the price, with interest, which had gone to pay the debts of Nisbet, the owner. Counter statements were given in by the parties, and the Court ultimately found that the sum, on payment of which the heir-at-law was entitled to possession, was £803, with interest from the 1st of June 1867. In this way, as in a question with the heir-at-law, Cairns has entirely accounted for the surplus rents during his possession; and is still entitled to receive from him, as a condition of his ceding possession, £803.

The Lord Ordinary (MURE) repelled all the defenders' pleas, except the 9th, which was—"In any view, and even assuming eviction to have taken place, and the defender to be bound to repeat, he is liable only for the value of the subjects as at the date of eviction, and that is greatly less than the sum claimed in this action."