

Tuesday, November 28.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

BROWNE & COMPANY v. AINSLIE & COMPANY.

Sale—Sub-Sale—Intimation—Arrestment by Original Seller in Security—Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60), sec. 3.

The Mercantile Law Amendment Act 1856 provides, sec. 3—“Any seller of goods may attach the same while in his own hands or possession by arrestment or pointing at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller.”

In January 1891 a merchant in Leith sold 20 hogsheads of whisky to a merchant in London, who paid the price and allowed the whisky to lie in the Leith merchant's bonded warehouse, and in the custody of his warehouse-keeper. A sub-sale of this whisky was made by the London merchant, and on 21st January 1891 he informed the Leith merchant of the sub-sale in a letter, which, however, did not disclose the name of the sub-purchaser. His name was given verbally on 10th February following at an interview between the Leith merchant and the London merchant. In March 1892 the Leith merchant arrested part of the whisky in his warehouse in security of a balance due to him on a general account by the original buyers.

In an action by the sub-purchaser against the Leith merchant to compel delivery of the whisky, or alternatively to recover its value—*held (diss. Lord Rutherford Clark)* that a sale of the whisky to a subsequent purchaser had been intimated to the Leith merchant prior to the execution of his arrestments, and that therefore he was not entitled to withhold delivery from the sub-purchaser.

In the end of 1890 or beginning of 1891 Davis, Strange, & Barker, wine merchants, London, who were desirous of selling Scotch whisky in London, entered into communications with James Ainslie & Company, wine merchants, Leith, for a supply of whisky. In order to push their business to the greatest advantage, Davis, Strange, & Barker resolved to represent to their customers that they were a Scotch house with an office in London, and accordingly they arranged with Ainslie & Company that the name of the latter should not appear at all in connection with the sales of whisky. Ainslie & Company acquiesced in and lent themselves to this proposal. In a letter dated 17th December 1890 they wrote—“I shall do my very best for you as regards price, quality, and terms. Casks can be marked with your firm's name and address, and bottlings with your

label. My firm's name will not appear in any way, such as we at present do for some of our customers who are large dealers in England.”

This was acted upon in the transactions narrated between Davis, Strange, & Barker and the defenders, and the delivery-order forms bore the address of Davis, Strange, & Barker's London office, but in addition there was printed on it in white letters, “Delivery-Order. Davis, Strange, & Barker, Leith, N.B.,” and it was addressed to “Mr John Anderson, warehouse-keeper, No. 23 Bond, Wet Docks, Leith, N.B.” Anderson was a servant and bonded warehouse-keeper of Ainslie & Company. A label also was prepared, with the assent of the defenders, on which Davis, Strange, & Barker's address is given as “Leith, N.B., and London offices 4 King William Street, London.” A circular was prepared by them, and despatched to their customers by Ainslie & Company from Leith. After completing these arrangements, and having purchased the 20 hogsheads of special Scotch whisky from Ainslie & Company, Davis, Strange, & Barker wrote them as follows on 21st January—“Samples came to hand to-day; many thanks. We have been very successful to-day in opening one of the largest accounts in the whisky trade in London with one of our richest publicans, the owner of several houses, who has hitherto never bought your whisky under any brand. We have sold him this lot of whisky. . . . Can you send us separate warrants for each hhd., or have we to sign delivery-orders ourselves, and if we have to give them, on whom do we have to make them on? Of course such a man as this wants a tangible document.” The purchaser was Freeman Thomas. Next day Ainslie & Company replied—“We will mark off the 20 hhds. in our books in your name, and hold them to your order, and we will stamp the casks with your name, and you can issue a delivery-order to your customer made out upon John Anderson, warehouse keeper, No. 23 Bond, Wet Docks, Leith.” On the 27th January Ainslie & Company enclosed to Davis, Strange, & Barker an invoice and delivery-order for the 20 hhds, and said—“If you desire separate warrants for each hogshead you can either issue them yourselves upon Mr Anderson, or we will send you them, just as you may wish.” And on 29th Davis, Strange, & Barker replied that they would draw their own delivery-orders on Mr Anderson. On 9th February 1891 Davis, Strange, & Barker asked whether they are to deposit Ainslie & Company's delivery-order for 20 hogsheads on Anderson, as they had issued twenty separate delivery-orders for the 20 hogsheads, of which they enclose a form. On 10th February 1891 the defenders reply—“You should lodge the delivery-order which you have with the warehouse-keeper.” On 25th March 1891 Ainslie & Company wrote—“Regarding delivery-orders, it is unnecessary for us to issue same. All that is required is for you to issue your own delivery orders made out on our bonded warehouse-

keeper Mr J. Anderson." Davis, Strange, & Barker on 13th April 1891 wrote to Anderson—"Leith, 13th April, 1891.—Dear Sir—We beg to enclose you Messrs James Ainslie & Company's delivery-order on you for twenty hogsheads Scotch whisky, 1/62 to 20/81 Highland Dirk special. We have now issued our own delivery-orders on you for these and other whiskies bonded in your warehouse in our name by Messrs Ainslie & Company; also d.-order for one qr. cask." Their delivery-orders were in terms similar to the following:—

"No. 1.

"4 King William Street,
Strand, London, W.C.

[Id. Stamp.] "To Mr John Anderson, Warehouse-keeper, No. 23 Bond, Wet Docks, Leith, N.B.

"Deliver to W. Freeman Thomas, Esq., or order, one hhd. Scotch whisky, special, 1/62, 53½ gal. 0/40. February 5th 1891.

"DAVIS, STRANGE, & BARKER.

"(Endorsed)—W. F. THOMAS.

"(Watermarked)—Delivery-order.

"DAVIS, STRANGE, & BARKER, Leith, N.B.,"

On the 18th February Mr Ainslie had an interview in London with Mr Barker and Mr Davis, who swore that at that meeting Mr Ainslie was informed that Davis, Strange, & Barker had sold the 20 hhd. to Mr Freeman Thomas, of the Griffin Tavern. Mr Ainslie denied this. Thereafter during 1891 several deliveries of the whisky took place on delivery-orders issued by Davis, Strange, & Barker in favour of Freeman Thomas, and in December 1891 the latter sold 8 hogsheads, still remaining in Anderson's store, to Browne & Company, licensed victuallers, London, and Mr Ainslie was verbally informed of this sale at a meeting with Davis, Strange, & Barker in January 1892. Two of these hogsheads were delivered to Browne & Company in February 1892. On the 9th March 1892 Ainslie & Company, having become suspicious of the financial stability of Davis, Strange, & Barker, arrested in their own hands the remaining 6 hogsheads in security of a balance of £806, 1s. 6d. due by Davis, Strange, & Barker on a general account. The execution of arrestment of this date was produced.

Browne & Company and H. J. Towell, a partner of the firm, and Robert Lindsay, F. Browne's trustee, raised this action against Ainslie & Company and Anderson for delivery of the balance of 6 hogsheads, or for payment of £150 damages, the alleged value of the whisky.

They averred—" (Cond. 3) In the beginning of 1891 Messrs Davis, Strange, & Barker . . . purchased a number of hogsheads of special Scotch whisky from the defenders James Ainslie & Company. The said whisky was allowed to remain in Messrs Ainslie's bonded warehouse, and was entered in the name of Messrs Davis, Strange, & Barker, and in the books of the warehouse-owner, who thereafter held it for them. (Cond. 4) In February 1891 Messrs Davis, Strange, & Barker sold to W. Freeman Thomas, the then proprietor of the said Griffin Tavern, *inter alia*, 8 hogs-

heads of the said special Scotch whisky lying in the said bonded warehouse at Leith. The said 8 hogsheads had been paid for by Messrs Davis, Strange, & Barker to the defenders James Ainslie & Company. The whisky was also sold subject to payment by the purchaser of the storage and warehouse rent for the period during which the whisky had been lying in bond. Mr Thomas duly paid Messrs Davis, Strange, & Barker the price of the whisky, and he received from them on the 5th of February 1891 eight delivery-orders addressed to the said defender John Anderson, warehouse-keeper, No. 23 Bond Wet Docks, Leith, N.B. Six of the said delivery-orders are produced herewith, and they bear that Anderson had to deliver to Mr Thomas or order—

1.	One hhd. Scotch Whisky, Special,	60	gals	0/10,	7/68
2.	do.	do.	66½	do.	0/40, 8/69
3.	do.	do.	63	do.	0/40, 9/70
4.	do.	do.	65½	do.	0/40, 10/71
5.	do.	do.	64	do.	0/40, 11/72
6.	do.	do.	63½	do.	0/40, 12/73

The value of the said hogsheads of whisky is not less than £150 sterling. The defenders were well aware of the said sub-sale, and at the date of the said purchase due intimation was given to the defenders that the said whisky had been sold, and then belonged to Mr Thomas, and that delivery-orders therefor had been handed to him. (Cond. 5) In December 1891 Mr Thomas sold the Griffin Tavern to the pursuers Henry James Towell and Frederick Browne, and they subsequently purchased from Mr Thomas and paid for the said 8 hogsheads of whisky, and he at the same time endorsed and handed over to them the said eight delivery-orders. Intimation of the said sale was duly made to the custodiers of the whisky, who thereafter held for the before-mentioned pursuers."

The defenders did not admit the sub-sales founded on by the pursuers, and denied that they had received intimation of them.

In Ans. 5 the defenders averred—. . . "It is specially denied that there was any intimation of a sale by Thomas to the pursuers of 8 hogsheads here referred to, or indeed that the pursuers had any interest in any portion of the whisky until the receipt of their letter in April 1892. Previous to said intimation the defenders had arrested the said hogsheads in their own hands in terms of the Mercantile Law Amendment (Scotland) Act 1856 on the dependence of an action at their instance against Davis, Strange, & Barker for the sum of £806, 1s. 6d. due by them to the defenders. Said arrestment being prior to the intimation of the delivery-orders in question, the defenders are entitled to retain the said goods in satisfaction *pro tanto* of their claim against the said Davis, Strange, & Barker."

The pursuers pleaded—" (1) That having bought and paid for the whisky, and having had said delivery-orders endorsed to them, and having duly intimated their sub-sale, or at all events the sub-sale to Freeman Thomas, prior to the date of the arrestments, they were entitled to obtain delivery. (2) The defenders being well aware of the sub-sales were not entitled to arrest,

(3) The arrestment was inept under the provisions of the Factors Act (52 and 53 Vict. cap. 45)."

The defenders pleaded—"That the alleged sub-sale of the goods in question to Mr Freeman Thomas or to the pursuers, not having been intimated to the defenders prior to the date of the arrestments, they should be assolvizied."

The Mercantile Law Amendment Act 1856 (19 and 20 Vict. cap. 60) provides, section 2—"Where a purchaser of goods, who has not obtained delivery thereof, shall after the passing of this Act sell the same, the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled in any question with a subsequent purchaser or others in his right to retain the said goods for any separate debt or obligation alleged to be due to such seller by the original purchaser. (3) Any seller of goods may attach the same while in his own hands or possession by arrestment or poinding at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party."

On 30th March 1893 the Lord Ordinary (WELLWOOD), after a proof which elicited the facts above stated, "repelled the defences and granted decree, ordaining the defenders to deliver up to the pursuers the six hogsheads of special Scotch whisky within twenty-one days, reserving to the pursuers, in the event of the defenders failing so to deliver said hogsheads, to move for decree in terms of the petitory conclusions.

"*Opinion.*— . . . The defenders thus enabled Davis, Strange, & Barker to represent themselves to customers as owners of the whisky. The result was, that any customer dealing with Davis, Strange, & Barker, and receiving delivery-orders on John Anderson in the terms which I have mentioned, were led to suppose, and were entitled to suppose, that Davis, Strange, & Barker had the full right of property in the whisky, and that John Anderson, named in the delivery-orders, simply held for them either as their servant or as an independent warehouseman. They had no reason to suppose that behind Davis, Strange, & Barker were the defenders claiming the right as sellers, who had not delivered the whisky sold, to retain and arrest in their own hands for a general balance due by Davis, Strange, & Barker. I am therefore of opinion that on this ground alone the defenders are barred in a question with a purchaser from Davis, Strange, & Barker from founding on an arrestment used by them in their own

hands. I do not mean to imply that the arrangement which they made with Davis, Strange, & Barker was fraudulent, although the defender Mr Ainslie admits that he never had to do with such a transaction before. But by allowing Davis, Strange, & Barker to hold themselves out as owners of the whisky, and as coming in place of the defenders themselves, the defenders are barred on equitable grounds, which are recognised both here and in England, from setting up any such right, the rule being that one who enables another to induce third parties to deal with him on the faith of false or erroneous representations as to his rights and position with regard to property or goods, is held to the truth of such representations.

"The Scotch cases of *Pochin v. Robinow*, 7 Macph. 622, and *Vickers v. Hertz*, 9 Macph. (H. of L.) 65, and L.R., 2. H. of L. Cases, 115, may be referred to as showing the tendency of Scotch law in such cases, and there are many English decisions illustrative of the doctrine of estoppel which proceed upon the same principle. The present seems to me to be a stronger case for the application of the principle than the case of *Vickers v. Hertz*, because while in the latter case Mr Vickers, by handing to his agents Campbell Brothers a delivery-order with his own name appearing on it as endorser, enabled them, contrary to his intention, to commit a fraud by endorsing the warrant to Hertz instead of selling on his (Vickers') account, the defenders here allowed, and indeed advised, Davis, Strange, & Barker to issue delivery-orders in their own name—the defenders' name not appearing on the documents at all, and Davis, Strange, & Barker being falsely described as merchants in Leith—for the very purpose of the latter holding themselves out as the real owners of the whisky, and securing purchasers on that footing.

"In this view of the case it is perhaps not necessary for the pursuers to invoke the assistance of the Factors Act 1889 (52 and 53 Vict. c. 45), which was extended to Scotland by an Act passed in 1890, being 53 and 54 Vict. c. 40. The material parts of the Act of 1889 are the following:—Section 1, sub-division 2, provides that 'A person shall be deemed to be in possession of goods, or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him on his behalf.' By section 1, sub-section 4, it is provided—'The expression 'document of title' shall include . . . and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.' By section 2, sub-section 1, it is provided—'Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other

disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.' Section 9, so far as material, is as follows—'Where a person having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or documents of title to the goods, the delivery or transfer by that person . . . of the goods or documents of title under any sale, . . . to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.' And by section 10 it is provided—'Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.'

"The application of those provisions to the present case is this—The defenders gave Davis, Strange, & Barker possession of the documents of title to the whisky by sending them the delivery-warrant for 20 hogsheads, and allowing them to issue delivery-orders on Anderson in their own name. In terms of the Factors Act the transfer of the documents of title by Davis, Strange, & Barker to Freeman Thomas had precisely the same effect as if Davis, Strange, & Barker were mercantile agents for the defenders, and in possession of the goods or documents of title with their consent.

"If these views are sound, it is not necessary to decide whether the sub-sale by Davis, Strange, & Barker to Freeman Thomas was intimated to the defenders so as to exclude their arrestment of the goods in their own hands. On the one hand, there was no intimation of the sub-sale by the sub-purchaser direct to Anderson on the defenders before the date of the arrestment. But on the other hand—(1) the defenders in January 1891 were informed that the 20 hogsheads had been sold by Davis, Strange, & Barker to one purchaser; (2) they subsequently learned that Freeman Thomas was the purchaser; and further (3) they received and acknowledged delivery-orders in his favour, and endorsed by him for part of his purchase; and (4) subsequently they were apprised of the sale by Thomas to Browne and Towell.

"It is an arguable question whether these facts may not be held as equipollents for regular intimation by the sub-purchaser,

keeping in view that the question arises not between competing sub-purchasers from Davis, Strange, & Barker, but between one sub-purchaser and the defenders themselves. Here there was more than mere private knowledge of the sub-sale, as the defenders by acting on the delivery-orders in favour of Thomas and Browne and Towell in a way recognised the sub-sale.

"I do not, however, find it necessary to decide this point. I prefer to rest my judgment on the grounds formerly stated."

The defenders reclaimed, and argued—It was immaterial that they had allowed Davis, Strange, & Barker to represent themselves as Leith merchants. That could not act as a bar to the defenders arresting in terms of section 3 of the Mercantile Law Amendment Act if otherwise they were in a position to do so. In any case, personal bar was not pleaded. Here, however, the defenders' arrestment satisfied all the requirements of that section. They were in possession of the whisky, which was in their store, and under the custody of their own servant, the defender Anderson. Though the delivery-orders were transferred, that was not equivalent to delivery, because the goods still remained "in their hands." The issue of the delivery-orders by Davis, Strange, & Barker had nothing to do with the sub-sale to Thomas, as they were issued after that sub-sale. The defenders' arrestment therefore could only be defeated if prior to 9th March 1892 intimation of the sale of the whisky had been given. The only suggestion of intimation was the letter of 21st January 1891. That was not sufficient, and any information given afterwards did not help it. The intimation required by the statute must be intimation that the holder of the goods is now to hold for the sub-purchaser. It must be so meant by the giver, and so understood by the receiver. This was so, both on a sound construction of the Mercantile Law Amendment Act and on an analogy from the intimation required to complete an assignation. Intimation must be such as would bar the holders from delivering to the original purchaser. It must be such also as would bar creditors of the original purchasers from doing diligence on the goods, and would exclude another sub-purchaser coming forward and demanding delivery on another delivery-order. Mere knowledge never could effect this. In the case of an assignation, knowledge on the part of the debtor did not prevent him paying to the cedent—*Wyper v. Harveys*, February 27, 1861, 23 D. 606. Here, it could not be said that the sub-sale was so intimated as to make the sub-purchaser Mr Freeman Thomas the creditor under the contract of sale.

The respondents argued—The defenders were by their actings barred from pleading the arrestment as against the pursuers. In any case, the arrestment was inept. Davis, Strange, & Barker's connection with the whisky ceased with the transference of the documents of title—Factors Act 1889 (52

and 53 Viet. cap. 45), sec. 1, sub-sec. 2 and 4, and sec. 9—and therefore the goods could not at common law be arrested by any creditor of theirs. The Mercantile Law Amendment Act neither gave nor could confer on the pursuers any such right. Even if the arrestment (of date 9th March 1892) is valid, it cannot avail the defenders as against the pursuers, because intimation of the sub-sale to Freeman Thomas was made by the letter from Davis, Strange, & Barker of January 21st 1891, and this was confirmed by the verbal intimation at the interview of the 18th February 1891. The defenders also by the end of 1891 were verbally informed of the sub-sale to the pursuers. No form of intimation is prescribed by the Mercantile Law Amendment Act. Intimation may be either written or oral, and it is sufficient if the original seller is definitely certiorated of the sub-sale.

At advising—

LORD JUSTICE-CLERK—The facts of this case are somewhat peculiar. Towards the end of 1890 a firm of the name of Davis, Strange, & Barker, who were then wine merchants in London, purchased from the defenders Messrs James Ainslie & Company 20 hogsheads of whisky for the purpose of selling to customers in London if they could find such. With a view, presumably, to the better prospect of effecting sales they desired to pose as a Scotch firm carrying on business in Leith, and they accordingly entered into arrangements with the defenders, whereby the defenders agreed to mark the whisky casks with Davis, Strange, & Barker's name and address, and to label any quantity bottled with the same name. They also received from that firm a quantity of their circulars to customers, and posted them for them in Leith, so as to keep up the fiction that they carried on business there. These circulars were posted on 19th January 1891, and on 21st January Davis, Strange, & Barker wrote to the defenders stating that they had sold to a customer "this lot of whisky." To this the defenders replied by return, expressing satisfaction that Davis, Strange, & Barker had secured such a good order, and stating that they would mark off the 20 hogsheads in their books in Davis, Strange, & Company's name, and stamp them with their name, thus plainly intimating that the "lot of whisky" referred to in their correspondents' letter consisted of the whole 20 hogsheads bought from them. The letter further stated, in answer to a query, that their correspondent could issue delivery-orders "to your customer" upon one John Anderson, warehouse-keeper in Leith. It was afterwards arranged that the defenders' delivery-order in favour of Davis, Strange, & Barker should be lodged with Anderson, and that that firm should issue their own delivery-orders for the hogsheads as these might be required. These delivery-orders bore to be issued by Davis, Strange, & Barker as a Leith house, and were addressed to John Anderson, warehouse-keeper. Labels were also prepared

and issued with the knowledge of the defenders, in which Davis, Strange, & Barker were entered as Leith merchants, and designated as "sole proprietors of the Highland Dirk blend whisky."

Within a few days of these arrangements being completed, Mr Ainslie went to London and saw certain members of the firm of Davis, Strange, & Barker. As to what passed between them there is a sharp conflict of evidence. The witnesses for the pursuers depone that at their interviews Mr Ainslie was distinctly informed that Mr Freeman Thomas was the customer who had purchased the whisky, and Mr Ainslie was told who he was, and where he carried on business. Mr Ainslie, on the other hand, denies altogether that anything of the kind took place. My view upon the proof is that the evidence for the pursuers must be accepted on this branch of the case.

After this time and during 1891 several deliveries of the whisky took place, the whisky being given out by Anderson on delivery-orders issued by Davis, Strange, & Barker in favour of Freeman Thomas. In July 1891 8 hogsheads of the whisky were tendered back to the defenders by a delivery-order of Davis, Strange, & Barker on Anderson, Mr Freeman Thomas having not wished to carry out his purchase as regarded them, but no question turns upon these.

It is quite certain that the defenders knew long before the end of 1891 who the purchaser from Davis, Strange, & Barker was, for in September of that year he is spoken of by the defenders by name as being the purchaser.

In December 1891 Freeman Thomas sold 6 hogsheads still remaining in Anderson's store to Davis, Strange, & Barker's order to Browne & Company, now represented by the present pursuers, and the pursuers allege that Mr Ainslie was informed of this sale very shortly after it took place, but Mr Ainslie positively denies this. It may not be of consequence in the case which is right on this matter, but I am satisfied that he was told.

The financial position of Davis, Strange, & Barker having become very doubtful, the defenders arrested the 6 hogsheads as being in their own hands in security of a general balance due to them, and it is the validity of this arrestment which has to be decided in the present action.

The right of the defenders so to arrest arises under the provisions of the 3rd section of the Mercantile Law Amendment Act of 1856, and turns upon the question whether the goods purchased from them being still in their "own hands or possession" at the time of arrestment, the exception to the right to arrest applies, viz., that "the sale of such goods to a subsequent purchaser shall have been intimated to such seller." The statute does not specify any way or form in which intimation must be made, nor does it state by whom intimation must be made to be effectual. It does not require it to be written or prescribe any particulars. "Intimated" is the only

word used, and it depends on what may be included in that word, whether the pursuers or defenders are to prevail. The pursuers maintain that it is proved that Davis, Strange, & Barker intimated the sale by them to Freeman Thomas, and that that intimation having been made before the date of the arrestment by the defenders, the right of the defenders to arrest under the statute thereby came to an end. The defenders maintain that as matter of fact there was no intimation, and that even if there were held to be an intimation, such intimation being only by Davis, Strange, & Barker, could not set up the exception contained in the statute, so as to render the arrestment at a subsequent date inoperative. I have already said that in point of fact I am satisfied intimation was given by Davis, Strange, & Barker, but the other question is one which I cannot help feeling to be of considerable nicety and difficulty. But giving it the best consideration I can, I have come to the conclusion that the intimation of the sub-sale by the original purchaser, the defender, constitutes intimation under the statute. Given a *bona fide* sub-sale, on which the original seller would have been bound to give delivery on intimation if there had been no arrestment, I am unable to see ground for holding that such intimation cannot be given by the sub-vendor, so as to fulfil the statutory requirement by whom in the natural course of things the intimation would be made. In this case the original seller had the conditions of his contract fulfilled by payment of the price by the vendee, and that vendee, on his becoming sub-vendor, intimated the sub-sale to the original vendor. In doing so I think that the statutory requirement was fulfilled so as to exclude the original vendor from using arrestment for a general balance against the vendee, and thus preventing the sub-vendor from obtaining fulfilment of his contract.

This being a sufficient ground of judgment, I do not enter into a consideration of the clauses of the Factors Act referred to by the Lord Ordinary, the application of which to the facts of this case seems to me to be more than doubtful.

LORD YOUNG—I agree with what your Lordship has said as to the facts of the case. I think the facts of a case of this kind must be familiar, of daily occurrence, with respect to whisky and other commodities bought and sold. The only question is as to the effect and validity of the arrestment by the defender, and so far as that is concerned I think the case is peculiar, for probably an arrestment in similar circumstances was never before the Court before. The question is, as I say, as to the effect and validity of that arrestment to deprive the pursuer in this action of his right as a purchaser of the goods which he undoubtedly bought and paid for. We have here three sales—quite enough to deal with—although there might have been forty, and I have no doubt many cases occur greatly exceeding three of whisky

and other such commodities being sold over and over again before reaching the consumer. There are three parties—Browne & Company, of the Griffin Tavern, bought from Thomas, who bought from Davis, Strange, & Company, who bought from the defenders Ainslie & Company. I should state my view of the case more easily by taking only two of the sales, that is, the sale by Ainslie to Davis, Strange, & Company, and the sale by Davis, Strange, & Company either to Thomas or to Browne & Company. I think it is quite plain, as a matter of fact, that the whisky which Davis, Strange, & Company bought from Ainslie either was at the time of the purchase or was in consequence of the purchase deposited in a bonded warehouse. The casks containing it were stamped and branded with the name of Davis & Company. The bonded warehouse was kept by a man named Anderson, who was designed as the keeper of the warehouse. There is a statement of fact, which is one of no importance, but it is made a question of fact, and there is evidence about it, as to whether Davis was informed that Ainslie, the defender, was lessee of the building or bonded warehouse, and the employer of the keeper of the bonded warehouse. It would be a strange thing, in my opinion, and altogether inadmissible, for the right of a purchaser to depend in any way as to an inquiry of who was the lessee of a building used and occupied as a bonded warehouse, but upon the evidence, if any one should think it a question of material importance, I may say that I am of opinion that Davis & Company had no reason to know or suspect that Ainslie was the lessee of the building so used and occupied. I believe Davis' testimony to the effect that he had no such opinion, but it is undoubtedly the fact—although in my judgment a totally immaterial fact—that he was lessee of the building and the employer of Anderson, the keeper of the bonded warehouse. The spirits which were sold were deposited in that bonded warehouse in casks stamped with Davis & Company's name, addressed and set aside for them, and it was the intention of Ainslie to put Davis in the position of the owner of the whisky deposited in the bonded warehouse, and that possession given to him is what I think, at the common law, as well as under the statute, may be called a document of title. I look at the Act as to the statement of what a document of title is for a purchaser under the Act, and the main purpose of it was to protect purchasers having such a document of title—to protect them against their rights as purchasers being disappointed by the interposition of other parties. The definition of a document of title for the purposes of the Act is, in my opinion, a good definition of such a title at the common law. I read it—“The expression (document of title) shall include any bill of lading, dock-warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or

control of goods, or authorising or purporting to authorise, either by the endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." In this particular case it was a contract between Davis & Company and Ainslie & Company that Davis & Company should be put in the position of owners of twenty hogsheads of whisky deposited in this bonded warehouse, and should be put in possession of such a document of title as is described in the clause of the statute I have read—should be put in possession of a document of title authorising by endorsement or delivery the transfer of the goods. It appears from the correspondence that it was a question with Davis originally whether they should have from Ainslie separate warrants for each of the twenty hogsheads—that is, a separate document of title—a warrant for delivery for each of the twenty hogsheads, or a general order for delivery of the whole, which would enable them to issue their own documents of title to the purchaser of them, and they bring that under Ainslie's notice in a letter of 21st January, in which they intimate that they have sold the whisky which they had bought from Ainslie. In that letter Davis & Company say—"Can you send us separate warrants for each hogshead, and have we to sign delivery-orders ourselves, and if we have to give them, on whom do we have to make them on? Of course such a man as this wants a tangible document." The expression is significant; a tangible document such as is described, and the effect of that is as expressed in the statute I have read. The answer they got to that is dated 22nd January. In that letter Ainslie & Company say—"We will mark off twenty hogsheads in our books in your name, and hold them to your order, and we will stamp the casks with your name, and you can issue delivery-orders to your customers." That is the course which was followed out. Then in another letter dated 27th January—"We have now much pleasure in sending invoice for 20 hogsheads. If you desire separate warrants for each hogshead, you can either issue them yourself upon Mr Anderson, or we will send you them just as you may wish." Davis & Company did send their own delivery-orders, so as to show they were whisky dealers in Leith although having a separate establishment in London. Now, this delivery-order, which they had and they desired to lodge with the warehouse-keeper, was in these terms—"Please deliver same to John Anderson, warehouse-keeper, 23 Customs Bond, Wet Docks, Leith." There is a representation here, if it should have any bearing on the argument, that Anderson was their servant, and that Davis had no reason to suppose this was the bonded warehouse of Anderson, or that this warehouse was other than a department in Ainslie's premises. This is an order on John Anderson alone. Now, I think that may be taken as a form of order upon the warehouse-keeper by anyone, whether the lessee of the premises used

and occupied as a warehouse or not, to deliver goods in their name, and I think it clear in point of law that such an order could not be cancelled or revoked or qualified without the consent or concurrence of the party who by contract had procured them. But I refer to all that in order to show clearly that the intention of Ainslie & Company was to do what they were quite entitled to do, to put Davis & Company in the position of being owners of the whisky contained in the casks in their name and stored in their name in the bonded warehouse, and that the document of title was to enable them to transfer these goods to any person they pleased, and to put them in the position of dealing with their customers on that footing. It was intended they should have something tangible which would represent them as having a document of title with the right of transfer to any purchaser from themselves, and if that was not the position which Davis & Company understood they occupied, their transaction with respect to this whisky would have been dishonest. But it was the position they occupied in my clear judgment, and certainly the position Ainslie & Company intended they should occupy, and that they should be enabled to represent to other people they did occupy. While occupying that position, Davis & Company sold the whisky. Suppose the other alternative to that had been adopted—the other one being that Davis & Company should be authorised to issue their own order—that is to say, their own documents of title for each of the 20 hogsheads—and that Ainslie had given them separate orders for each of the casks? Would it have been different if there had been sent twenty different hogsheads? I do not think there is anything that would make me impute anything so discreditable to Ainslie & Company, and it is not my opinion that it would make any difference whether Davis & Company was authorised by Ainslie & Company, from whom they received the general delivery-order, or from Anderson, to issue the delivery-orders themselves in their own name, and in the very form which Ainslie & Company on its being sent to them approved of, or whether they had a separate order for each cask from Ainslie. Supposing Davis & Company had separate delivery-orders from Ainslie for each cask, then the proposition is that by arrestment under the Mercantile Law Amendment Act Ainslie & Company could defeat the effect of these delivery-orders which they themselves had granted or authorised to be granted. It is of no importance whether they granted the orders themselves or authorised Davis & Company to issue them. That they did authorise Ainslie to issue them to the purchaser from them is certain according to their own letters. What is the position? The pursuers purchased this whisky from Davis & Company, who had Ainslie's authority certainly to sell it, and who gave documents of title in the shape of warrants of delivery for the purchase from them, and the pursuers had that warrant of delivery.

Well, what is the position of Ainslie? That Davis, the seller, is a debtor of mine, and I will arrest goods which Davis, the seller, sold to you, as I intended he should, for a debt he owes to me. Now, under the common law, irrespective of the Mercantile Law Amendment Act altogether, I do not think any creditor of Davis & Company could have arrested this whisky which had been sold to the present pursuer, who paid for it and received the documents of title. I say that under the common law, irrespective of the Mercantile Law Amendment Act altogether, I am satisfied that if Davis & Company had become bankrupt this whisky would not have been passed to the trustee in bankruptcy, and I am satisfied that it was not open to the diligence of any of Davis & Company's creditors for the debt owing by them. Their connection with the whisky had ceased and determined, and in the very way that the seller to them considered it should by selling it to other purchasers and giving them the documents of title. Davis & Company had no connection with the whisky after that, and how therefore could it be liable to the diligence of a debt of theirs to others? Now, that is at common law. But if there is anything clear in the Mercantile Law Amendment Act at all as to this matter, it is that the right of a *bona fide* purchaser should not be defeated by any diligence of creditors of the seller. It is as a creditor of the seller to the present pursuers—that is, a creditor of Davis & Company—that Ainslie says he has arrested these goods. But the goods are not Davis & Company's, and they are protected by the very statute to which he refers against any diligence at the instance of the creditor of the seller, a trustee in bankruptcy, or otherwise. Let me read the words—"From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same." If the arrestment by Ainslie was good, the arrestment by any other creditor of Davis & Company would have been good, or if Davis & Company had gone bankrupt, as they did, the receiver as they call him in England, or the trustee as we call him in Scotland, representing the whole body of the creditors, would be entitled to attach these goods—indeed they would be attached by process of law. But that is a thing expressly excluded by the Act. The clause is not very happily expressed. The great evil, as it was found under the common law, was that if the goods sold, although paid for, were allowed to remain in the custody or possession of the seller they would pass to his trustee in bankruptcy, or might be attached by any of the creditors of the seller by separate diligence. If the

goods were not so in the possession of the debtor they could not be attached even at the common law, because at the common law if a bankrupt had been proprietor of goods which were deposited in a bonded warehouse, and had granted a delivery-order to the purchaser who had paid money for them, they were not in the custody and possession of the bankrupt at the common law before the statute. That only refers to goods in the custody or possession of the seller. Now, the words in the statute, "in the custody or possession of the seller," are superfluous and possibly a little misleading unless you attend to the whole object and intention of the provision. It could not mean that they shall be liable to be attached by the creditors of the seller if they are not in his custody or possession, but they shall not be liable to be so attached if they are in his custody or possession. That is simply nonsense. The true meaning is, that if they have not been delivered to the purchaser they shall not be attachable by creditors of the seller, although they might be in his custody or possession. To say they were attachable if they were out of his custody or possession and in the possession of a third party is absolute nonsense. That is as distinct a provision as you can have to protect a *bona fide* purchaser for value against the subject of the purchase being attached for the debt of the seller to them. But then it is said the arrestment here was under clause 3 of the statute. That clause, I venture to say with great respect to any who think otherwise, is not very felicitously expressed. The meaning of it is, however, I think not doubtful. It reads—"Any seller of goods may attach the same while in his own hands or possession by arrestment or pouncing at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or pouncing shall have the same operation and effect in a competition or otherwise as an arrestment or pouncing by a third party." That is giving the seller no right to arrest when a third party has no right to arrest for a debt due by the same person. That is clearly the view of the Legislature, and the whole object and intention of the enactment. The Act says, You are the possessor of goods which a man who may be the debtor of yourself is entitled to demand delivery of. Your right of retention is abolished, but these goods may be attached in your hands by any third party who is a creditor of the buyer from you by arrestment or pouncing, and it is very hard that on account of a technicality that a man cannot arrest goods in his own possession, you should be placed at a disadvantage, and therefore we put you in the same position to protect yourselves as that occupied by any third party. But I have pointed out that no creditor of Davis & Company could have attached these goods—no third party could have attached these goods by arrestment or pouncing for a debt of Davis & Company to the prejudice of the purchaser from Davis & Company. That would have

been a violation not only of the common law, but of the expressed provision of the statute. Therefore this arrestment is, in my opinion, altogether out of place. It might have been that there was no sale by Davis & Company. In that case the arrestment or poinding would have been as good by Ainslie & Company in their own hands as by any creditor of Davis & Company. But being sold by Davis & Company, as clearly and distinctly shown by the document of title, the goods are not arrestable by any creditor of Davis & Company, and would not pass to any trustee of Davis & Company in bankruptcy. I think it is only carrying out the views and intentions of the parties, and the legal effect of what they did, to hold that these goods are the property of Browne & Company, and that they, and they alone, are the creditors for delivery, and that they as creditors only can attach these goods. If being creditors, any creditors of theirs might have attached the goods. But then we have infelicity of expression here. "Arrestment must be before a sub-sale shall be intimated." Of course arrestment after a sub-sale has been intimated would be bad according to my view, because my view goes further. It is utterly bad after a sub-sale has taken place for the right of a buyer in a sub-sale to be affected by any debt of the seller to him, or of any creditor of the seller to him. It would be ridiculous to read the statute strictly and literally to mean that if the seller has got intimation of a sale by the buyer, he should not be in the same position as a third party to arrest or poind in his own hand—if he had not got intimation, he should; but if he had, other parties who were creditors of Davis & Company might arrest in their hands, and the original sellers could not. If there should be any arrestment after a sub-sale to the detriment of the sub-seller, that would be to operate to the prejudice of the purchaser by the diligence of the creditor of the seller. On these grounds, which are really independent of every question except the validity of the arrestment by Ainslie or any other creditor of Ainslie to disappoint the right of a creditor of Davis & Company, I am of opinion that the judgment of the Lord Ordinary is right. But I agree with your Lordship that not only was it Ainslie's intention that Davis & Company should be in a position to sell to third parties, to give them a document of title, and to give them control of the goods without being exposed to any risk of their attachment by a third party, but I think he certainly knew of the sale to Thomas. In law I agree that he was informed of the seller, and that was sufficient intimation of the sub-sale. I do not, however, care to put my judgment upon that; I rather prefer to put it upon the invalidity of any arrestment of a debt of Davis & Company by a creditor of Davis & Company to the disappointment of a *bona fide* purchaser for value from Davis & Company.

LORD RUTHERFURD CLARK—This action is directed against Ainslie & Company and

John Anderson. But as Anderson is the servant of Ainslie & Company, I shall call Ainslie & Company the defenders.

The whisky to which it relates was sold by the defenders to Davis, Strange, & Barker. It was duly paid for. In February 1891 it was sold by Davis, Strange, & Barker to W. F. Thomas. In December of the same year Thomas sold eight casks to the pursuers, who now demand delivery of six. They have already obtained delivery of two.

The defenders were creditors of Davis, Strange, & Barker on another account. On 9th March 1892 they arrested the whisky in security of the debt due to them, as being "in their own hands or possession," in virtue of the power given to that effect in the Mercantile Law Amendment Act. The question is, whether this arrestment is effectual against the pursuers?

I am of opinion that the whisky remained in the possession of the defenders. It was in their own private store, of which John Anderson is the storekeeper. Anderson is the servant of the defenders, and is paid by a weekly wage. It is true that a delivery-order was issued by the defenders against Anderson in favour of Davis, Strange, & Barker, who on 13th April 1891 forwarded it to Anderson. But as the store belonged to the defenders, and as Anderson was their servant, such an order was not equivalent to delivery. The goods still remained in the possession of the sellers. It is not even said that any transfer was made in the books of the store. In point of fact there was no transfer-book. Anderson merely kept a small memorandum-book for his own guidance. He says—"I never effect any transfers of stock in my book; anything of that kind is always done in the office"—that is to say, in the office of the defenders. It follows, I think, that the arrestment cannot be objected to on the ground that the goods were not in the hands or possession of the seller.

But no arrestment is legal unless it be used prior to the date "when the sale of such goods to a subsequent purchaser shall have been intimated to such seller." It is maintained by the pursuers that the sale to Thomas and to themselves was intimated to the defenders before the arrestment was used. An important question was raised on the meaning of the statute, and I think it right to determine it before I examine the facts on which the intimation is said to depend.

By the common law no one can arrest goods in his own hands. His only remedy is by retention. The Mercantile Law Amendment Act took from the seller the right to retain undelivered goods except for the price, but it gave him a right to arrest them. In other words, it permitted him to attach them for any debt due to him by the purchaser. The right to arrest necessarily presupposes that the purchaser has right to the goods. Otherwise the arrestment would be ineffectual. But the purchaser is not the owner, inasmuch as there has been no delivery. The right which sustains the arrestment must con-

sist in his title to obtain delivery, or, in other words, he must at the time when it is used be creditor in the contract of sale.

Accordingly, the statute provides that the arrestment must be used prior to the intimation of a sub-sale—that is to say, before a sub-purchaser is made the creditor for delivery. This is effected by intimation, for by the 2nd section it is provided that the seller on intimation of the sub-sale shall be bound to deliver to the sub-purchaser. So long as the original purchaser is creditor for delivery there seems to be no reason why the seller should not have the power to arrest. He is entitled to arrest in respect of the existence of that right, and in the absence of any declaration or indication to the contrary, I think that the right to arrest must remain so long as the right on which it is founded continues to exist.

Accordingly, I read the words "intimated" and "intimation" as they occur in the statute in their ordinary legal sense as applied to moveable rights. Intimation is the process by which the right of the cedent is completed in the person of the assignee. A sub-vendee is the assignee of the original purchaser, and his right is completed by intimation to the seller. Until that be done, there is no contract relation between him and the seller, and the latter is under no obligation to deliver to him. Indeed, if he did, he would be acting in breach of his contract with the original purchaser. I hold therefore that the arrestment was effectual unless it be shown that before it was used there had been such intimation of the sub-sale as to constitute the pursuers creditors for the delivery of the goods.

The question, then, comes to be, whether the sub-sale was so intimated as to make the sub-purchaser the creditor under the contract of sale, or, in other words, so as to complete the assignation of that contract to the sub-purchaser. I feel some difficulty in answering it, from the great imperfection of the pursuers' record. They do not state the time or manner of intimation. They say nothing more than that "intimation of the said sale was duly made to the custodiers of the whisky, who thereafter held for the before-mentioned pursuers." This averment refers to the sale to the pursuers by Thomas. There is no averment that the sale to Thomas was intimated to the defenders unless it be meant that there is an implied intimation of that sale by the intimation of the sale by Thomas to the pursuers.

On turning to the evidence, I do not find that the pursuers rely on any written intimation of a definite date other than the letter of 1st April 1892, which was subsequent to the arrestment. They attempt to prove that the defenders were cognisant of the sale to Thomas and of the sale by Thomas to them. I do not doubt that the defenders knew that Davis, Strange, & Barker had sold the whisky. Mr Ainslie admits it, and I think it probable that they came to know that Thomas was the buyer. It is not said that anything was done by Thomas or by the pursuers to intimate the sub-sales. In-

deed, it was only on the pursuers' demand to clear the first two hogsheds in January 1892 that they came to know that Davis, Strange, & Barker had anything to do with the whisky. "We did not then know"—so says Mr Towell—"that Ainslie & Company had possession of the whisky. I had never heard of Ainslie up to that time." The pursuers were referred to Davis, Strange, & Barker by Thomas. They applied to that firm, who directed the defenders to invoice and send the two casks to them. This was done, and the casks were delivered to the pursuers by Davis, Strange, & Barker.

In all this I can see nothing which amounts to intimation of the sub-sales. The evidence of the pursuers comes to no more than that the defenders knew that there had been a sub-sale. Knowledge is not the word of the statute, and I think it clear that the knowledge of the seller is not equivalent to intimation. The reason is, that as intimation is the act by which the sub-purchaser becomes the creditor of the original seller, the intimation must be his act. It denotes his acceptance of a position which is not created by the sub-purchase, that he accepts the benefits as well as the liabilities of the original contract of sale. I do not mean to say that it must be in writing or be done by himself individually. But it must be done by himself or with his authority. Nothing less will signify that he has made a contract with the original seller. It is said that there could be no liability because the whisky was paid for. I do not think that this statement would be relevant even if it were true. But it is not true. For the creditors under the original contract were necessarily liable for the warehouse rents.

As I read the evidence, neither Thomas nor the pursuers ever made any intimation to the defenders, either directly or indirectly. They never attempted to establish, and never did establish, any contract relation between themselves and the defenders. They simply did nothing. They were contented to remain creditors under the contract which they themselves had made.

I hold therefore that the arrestment of the defenders is good and effectual.

If I am right in the opinion I have expressed, the defence is good in law, and must be sustained unless the defenders are barred from pleading it. The Lord Ordinary has not decided whether the arrestment was effectual or not. But assuming it to be effectual, he is of opinion that the defenders cannot found on it. His view is that the defenders, at the desire of Davis, Strange, & Barker, so acted as to enable them to show a clear title to the whisky as owners, and that customers by reason of their conduct were entitled to believe that Davis, Strange, & Barker had in truth such a title.

The pursuers state no such case, and I do not think that I can refuse to sustain a legal defence in respect of an equity which is not stated on record. They allege no misconduct on the part of the defenders, nor any conspiracy or concert between

them and Davis, Strange, & Barker. They ask judgment in respect of their own legal rights. They do not say that the defenders have been deprived of theirs. As the pleadings stand, I cannot affirm the judgment of the Lord Ordinary.

But if we are to consider a plea of this kind, in support of which no facts have been stated on record, I think that nothing has been proved by which the defenders are barred from founding on their legal rights. There is a great conflict of evidence, and it is not easy to decide where the truth lies. Mr Davis swears that he was never told that Anderson was the mere servant of the defenders. Mr Ainslie's evidence is to the contrary. But after all I see nothing more than that. Mr Davis told Mr Ainslie that his firm was desirous of "posing as Leith merchants," and states that at his request the defenders gave facilities to this end by agreeing that their name should not appear in the transactions with the customers of Davis, Strange, & Barker. If Mr Davis thought that Anderson was a public bonded warehouseman, I cannot see what pertinence these statements have. They are more important when we see from the evidence of Mr Ainslie, that in the knowledge that Anderson was the servant of the defenders, Davis asked that delivery-orders should be issued in favour of his firm against Anderson, on whom Davis, Strange, & Barker might issue their own delivery-orders. But even in that case I can see no unfair dealing on the part of the defenders. They might have acted as they did on their own motive without sacrificing any of their legal rights. They were entitled to issue a delivery-order against the keeper of their own store. If they acted within their own powers, it seems to be immaterial that they followed a particular course at the request of Davis, Strange, & Barker.

But the matters with which I have been dealing are necessarily unimportant unless the pursuers were deceived. Mr Towell is the only witness who can speak to this fact. He does not say that the pursuers were deceived. He says no more than that they did not know that the defenders had possession of the whisky. The pursuers bought from Thomas in December 1891, and paid at the time. They did not even know of Davis, Strange, & Barker until they desired to clear two hogshheads in January 1892. Consequently they completed their purchase without the knowledge of what had been done by the defenders and Davis, Strange, & Barker. In these circumstances I cannot see how the pursuers were misled or deceived, and if they were not there is no foundation for the plea that the defenders are barred from founding on their legal rights.

The pursuers also founded on the 9th and 10th sections of the Factors Act of 1889. Here, again, their record is very imperfect. There is no attempt to explain the grounds on which they appeal to the Act. But it is obvious that they can take no benefit from it unless they show that it deprived the defenders of their right to arrest.

The ninth section deals with a person who has bought goods, and who has obtained with consent of the seller possession of the goods or documents of title, and it declares that the transference by such person of the goods or documents of title shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. We have to consider how that section can affect the defenders.

The goods here spoken of are the goods of the seller, and if the Act affects the defenders they must be taken to be the sellers. The enactment is that the buyer who has obtained possession of the goods shall be entitled to transfer them to the same effect as if he had been a mercantile agent in possession of the goods. The possession of the documents of title gives the same powers and rights as the possession of the goods, or, in other words, the possession of the documents of title is equivalent to the possession of the goods. But this is only possible if the documents of title are the documents under which the seller held the goods. For no transfer order granted by the seller can of itself divest him of the possession. The pursuers have no such documents of title, and the defenders remain in possession of the goods.

Again, the tenth section provides that when a document of title has been transferred to a buyer of the goods contained in the document of title, the transfer shall defeat the vendor's lien or right of stoppage *in transitu* in the same way as the transfer of a bill of lading defeats the stoppage *in transitu*. But we are not concerned with any such rights. The defenders are not claiming any lien, nor are they asserting any right to stop *in transitu*. They are claiming the benefit of an arrestment which they have a statutory right to use so long as the goods are in their own possession.

The Act in the ninth section deals merely with the right to transfer, and in the tenth with vendor's lien and stoppage *in transitu*. It does not alter the law relating to delivery. It leaves to the former law to determine whether the goods remain in the hands of the seller, or whether there has been a change of possession, and in my opinion it leaves unrepealed the statute which enables a seller to arrest the goods so long as they are in his possession.

LORD TRAYNER—The facts of this case have been so fully stated in the opinion of the Lord Ordinary as to render any recapitulation of them unnecessary. The question of law to be determined is, whether the pursuers are entitled to delivery of the six hogshheads of whisky in question, or whether the defenders are entitled to retain them in respect of the arrestment they have used in their own hands.

The Lord Ordinary has held that the defenders in the circumstances he narrates are barred from pleading their arrestment in answer to the pursuer's demand. I offer

no opinion upon this ground of judgment, as I am disposed to decide this case on a consideration of the effect of the 3rd section of the Mercantile Law Amendment Act 1856. That section provides—"Any seller of goods may attach the same while in his own hands or possession, by arrestment or pointing, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or pointing shall have the same operation and effect in a competition or otherwise as an arrestment or pointing by a third party." There are here three conditions which must be fulfilled in order to make the arrestment effectual, viz.—(1) The arrestment must be used by the original seller of the goods; (2) the goods must be in his hands or possession; and (3) the arrestment must be prior in date to an intimation made to the seller of the sale of the goods to a subsequent purchaser. The first of these conditions is admittedly fulfilled; the defenders were the original sellers of the goods in question. The second condition is, in my opinion, also fulfilled. There may be room in this case for a question whether the goods sold by the defenders were or were not delivered to their buyers Davis, Strange, & Barker, so as to pass the property in the goods to them. But such a question does not need to be determined. For the section of the statute does not limit the arrestment by the seller to goods in his "possession," which might be read as meaning in his possession as undivested proprietor, but, on the contrary, by express words provides that arrestment may be used of goods "in his own hands," which I read as meaning goods in the custody or keeping of the seller, no matter what the title may be to which the custody may be attributed, provided of course it be a lawful title. The words "in hands" and "possession" are in my opinion used in contrast, and not as synonymous. Now here, whether the goods were or were not delivered in the technical sense to the original buyer, they were at the date of the arrestment in the store or warehouse of the defenders and under their control. In a word, they were in the custody—"in the hands"—of the seller. The only question then remaining is, whether the defenders used the arrestment upon which they found at a date prior to intimation of a subsequent sale. This is a question of fact, but before considering the fact or the proof offered in support of it, it is necessary to see what are the essentials of the intimation which, if made, excludes the seller's right to arrest; what must be the form and character of the intimation, and by whom must it be made. On this subject I observe that the statute does not prescribe any form of intimation—it does not provide that it shall be in writing—there is no solemnity prescribed with regard to its form, contents, or mode of delivery. It provides merely that an intimation shall be given to the seller which conveys to him the knowledge that a sub-sale has taken place. Any intimation therefore, verbal or

written, which possesses the seller with the knowledge of the fact of the subsequent sale appears to me to fulfil the requirement of the statute. It does not appear to me to be essential that the seller shall be informed who is the buyer under the subsequent sale. In that he has no interest. If the conditions of the original contract of sale have been fulfilled, it is of no concern to him to whom the goods are ultimately delivered, whether he be the first or the sixth sub-vendee, provided only that the person ultimately claiming the goods can show such a title to them as warrants the original seller in giving delivery. If the conditions of the original contract have not been fulfilled, the original seller can hold the goods against the world until such fulfilment is made. As the subsequent sale (if there is one) does not affect the rights of the original seller, it is of no importance to him to know the name of the person to whom that subsequent sale has been made. Does it make any difference whether the intimation is made by the buyer under the original sale, and seller under the subsequent contract, or the sub-vendee? I think not; either may make it. If there is any difference I should prefer to hold that the intimation should be made by the original buyer and sub-vendor rather than the sub-vendee. The original seller knows nothing, or may know nothing, of the sub-vendee, with whom he stands in no contract relation, and he might very well answer any intimation from the sub-vendee by saying, I will take no notice of your intimation or any claim under it until you produce your delivery-order or other notice from the man who bought from me, and to whom I am bound by contract to deliver the goods. But a notice from the original purchaser to the effect that he had sold the goods to another is a different matter, and a notice to which the original seller (saving his rights under the original contract) would be bound to give effect, and would be safe in giving effect.

Now, then, how stand the facts as regards intimation of a sub-sale. The original sale of 20 hogsheads of whisky (of which the six now in question form a part) was made early in January 1891. On the 21st of that month Davis, Strange, & Barker wrote to the defenders that they had that day opened an account with one of the richest publicans in London, and added—"We have sold him this lot of whisky," and it is plain (I do not think it is disputed) that this letter refers to the 20 hogsheads bought from the defenders. Their reply, on the following day, clearly shows that the defenders so understood it. This intimation did not name the purchaser, but that, as I have said, was not, in my opinion, at all necessary. But the name of the purchaser was very soon supplied, for a delivery-order for a hogshead of this particular lot of whisky (identified by marks and numbers), dated 5th February 1891, in favour of Mr Freeman Thomas, was forwarded to the defenders by Davis, Strange, & Barker. I think it does not appear on the proof on what date precisely this delivery-order reached the

defenders, but there is no proof and no suggestion that it was not sent to and received by the defenders on or about its own date. The documentary evidence therefore comes to this, that written intimation was given to the defenders by their buyers of a sub-sale of the 20 hogsheads to one purchaser in January 1891, and that in the following month a delivery-order was presented for part of the whisky, which disclosed the purchaser to be a Mr Thomas. The parole evidence is to the same effect. Mr Davis and Mr Barker both depone to having informed Mr Ainslie, the defender, at an interview in London on 18th February 1891, that they had sold the 20 hogsheads to Mr Thomas, and "that the delivery-orders had been handed" to him. No doubt Mr Ainslie denies this. He does not deny knowledge of a sub-sale, but he says that at the interview with Davis and Barker he neither asked nor was told the name of the purchaser. But I prefer to believe that Mr Ainslie has forgotten what took place at that interview, rather than to believe that Davis and Barker are swearing to statements which (if not true) they must have invented and known to be false. I think therefore the evidence in the case shows that prior to 18th February the defenders had written intimation of the sub-sale to Mr Thomas, and that on 18th February the intimation was verbally repeated. The arrestment founded on by the defenders was used by them on 9th March 1892, a date somewhat carelessly omitted from the defenders' record, but which I find from the execution of arrestment produced. It follows that the defenders' arrestment is ineffectual in competition with the pursuers (who stand in the place and use the rights of Mr Thomas), not having been used prior to the date when the sale of the goods in question to a subsequent purchaser had been duly intimated. I am therefore of opinion that the result reached by the Lord Ordinary is right, and ought to be affirmed.

The Court affirmed the Lord Ordinary's interlocutor.

Counsel for the Reclaimers—W. Campbell—Aitken. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Respondents—W. C. Smith—Burnet—M'Watt. Agents—Gordon, Petrie, & Shand, S.S.C.

Thursday, December 7.

SECOND DIVISION.
 PENCAITLAND KIRK-SESSION v.
 WOOD.

Poor—Parish—Heritors and Kirk-Session
 —Poor Law Amendment Act 1845 (8 and
 9 Vict. cap. 83), sec. 52.

By various personal bonds dated between 1729 and 1752 A B acknowledged to have borrowed from the kirk treasurer of a parish sums amounting to

£553, 6s. 8d., and bound himself, and his heirs, executors, and successors, to repay "to the present minister and kirk-session of the said parish, or their successors in office, in name and for the use and behoof of the poor of said parish." The heirs of A B having in 1886 paid the sums contained in these bonds, and a question having arisen between the kirk-session and the parochial board of the parish as to whether the right to administer this fund was now vested in the parochial board for behoof of the legal poor, or in the kirk-session for behoof of a wider class of poor—held (following the cases of *Kinglassie*, June 14, 1867, 5 R. 869, and *Aberdour*, November 24, 1869, 8 R. 176) that the history of the fund must be considered in order to explain the terms of the deeds, and that the history of the fund showed that it had been possessed by the heritors and kirk-session jointly for behoof of the legal poor, and that it had therefore passed to the parochial board under section 52 of the Poor Law Act of 1845.

By section 52 of the Poor Law Amendment Act 1845 (8 and 9 Vict. cap. 83) it is enacted—"That where any property whatsoever, whether heritable or moveable, or any revenues, shall at the time of the passing of this Act belong to or be vested in the heritors and kirk-session of any parish, or the magistrates, or magistrates and town council, of any burgh, or commissioners, trustees, or other persons on behalf of the said heritors and kirk-session, or magistrates, or magistrates and town council, under any Act of Parliament, or under any law or usage, or in virtue of gift, grant, bequest, or otherwise, for the use or benefit of the poor of such parish or burgh, it shall, from and after a time to be fixed by the Board of Supervision, be lawful for the parochial board of each such parish, or of the combination in which such parish or burgh may be respectively, to receive and administer such property and revenues, and the right thereto shall be vested in such parochial board; and the said heritors and kirk-session, magistrates, town council, commissioners, trustees, or other persons are hereby authorised and required either to continue to hold all such property and revenues for the behoof of such parochial board, or to make, grant, subscribe, and deliver such dispositions, assignments, and conveyances of all such property and revenues as may be necessary to enable such parochial board to administer the same for the behoof of the poor of such parish or combination."

During last century, at various dates between 1729 and 1752, Alexander Hamilton of Pencaitland granted six personal bonds in favour of the minister and kirk-session of the parish of Pencaitland for sums borrowed by him from the then kirk treasurer of the poor's money of the parish, amounting in all to £553, 6s. 8d. These bonds all remained in force until 1886, when the sums therein, principal and interest, were paid by the heirs of Alexander