

defenders were quite in a position to prove and can now establish. The counsel for the defenders has urged, as far as I could follow him, as the only ground on which he could maintain this claim for deduction, that this contract was a contract "free on board," and that unless the deduction was allowed him we would be drawing no distinction between the contract "free on board" and contract "free alongside." Now, I have been for a good many years very familiar with both these contracts, and I never heard until to-day that it was a distinction between these contracts that in the one case a shipper was bound to pay the expense of shipment, and in the other case that he was not. The distinction between the two contracts is not far to seek, and it may be an important distinction. The point of delivery under the two contracts is different, and the consequent risks and the necessary insurance to cover these risks may be very different—the duty of insurance or the risk in the one case lying upon one party, and in the other upon the other party; but as regards the question which is to be at the expense of putting the cargo on board, there is not any difference which I have ever heard between the one contract and the other. In either contract—putting the goods alongside or free on board—the universal practice is that the ship undertakes the duty and the expense of putting the cargo from the quay or alongside into the hold of the vessel. I never heard yet of a captain or a crew who would tolerate outsiders stowing their cargo. Of course putting coal and slag on board, which is tipped into the hold from a waggon, requires no particular stowage, but in dealing here with the general question, which affects not only stowage of cargo like coals or slag, but cargo that would require to be very carefully placed into the hold, that is undoubtedly on the ship and crew or those who take their place, and it is not only their duty but their right to see that nobody else but themselves interfere with the stowage of the cargo. But I repeat that up to this date I never heard it suggested that either under a contract "free on board" or "free alongside" the duty and consequent expense of putting the cargo from alongside into the hold of the vessel was a duty upon any other than the ship itself, and I am not astonished that there is no authority to be stated on that subject, because, so far as I know, the idea is absolutely universal that nobody is liable for the expense of shipping cargo on board a ship anymore than for the expense of discharging the cargo at the port of discharge. That is a duty incumbent on the ship and on the ship alone. Now, in this case the defenders having in a way ultroneously made payment—for I assume they can prove it,—come upon the seller to have it refunded. The answer is twofold—first, "You did not pay that at all as the buyer of the goods"; and in the second place, "You did pay it, if you paid it at all, as part of your own obligation." These things I think are abundantly made clear by the

evidence before us. I say again that I assume they actually paid the £75 to the proper parties and to the persons who did the work. But under what conditions? If they had meant to claim it as an obligation of the shipper—if they had regarded it as the duty of the shipper to make payment of this £75, their position undoubtedly was to say—"We are not to pay the £75 for loading this cargo, for our contract entitles us to this cargo free on board. If anybody is responsible, then, for the loading of the cargo, it is the man who contracted with me, and I must ask payment from him." He would have had this answer to make no doubt—"Oh! It is the ship's duty; it is not mine." But in this case we need not even consider whether there is a claim against the ship at the instance of the seller of the goods, because the buyer of the goods in this case is the charterer of the vessel, and he undertakes by the charter-party which is produced to pay all charges whatsoever connected with the use of the vessel for the two months that it was to be in his possession under the charter except certain items which are put on the owners, those items which are put on the owners not covering the expenses in question, and the charges which the charterer is bound to pay covering the very item which we are now considering. I have no doubt on the whole matter, first, in agreeing with the Lord Ordinary that it was right to refuse the proof that was asked, but I think, in the second place, it is quite certain on the case, as argued to us, that the respondent has no claim whatever for this deduction against the seller of the goods, and that the pursuer is entitled to his full price free from this deduction.

The Court adhered.

Counsel for the Pursuers—Dundas—Aitken. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders—H. Johnston—Watt. Agents—Clark & Macdonald, S.S.C.

Saturday, June 15.

FIRST DIVISION.

[Lord Low, Ordinary.

COWDENBEATH COAL COMPANY,
LIMITED *v.* CLYDESDALE BANK,
LIMITED.

Bankruptcy—Illegal Preference—Act 1696, cap. 5.

A firm of merchants, within sixty days of bankruptcy, obtained an advance from a bank upon the undertaking that they would send the bank as security the bill of lading of a cargo which they were shipping abroad. Upon the following day the bill of lading was endorsed and sent to the bank.

Held (aff. judgment of Lord Low) that

the security conferred upon the bank had been granted in consideration of a present advance, and was therefore not struck at by the Act 1896, cap. 5.

Shipping Law—Bill of Lading—Bill of Lading Signed Blank as to Quantity of Goods Shipped.

While a cargo was being loaded the master of the ship granted a bill of lading in name of the shippers blank as to the quantity of goods shipped. When the loading was completed the shippers duly filled in the amount of goods shipped, and endorsed the bill of lading to a bank in security of an advance which they had obtained.

In a question as to the validity of this security, held (aff. judgment of Lord Low) that the bill of lading was an effectual document, although signed in the condition described.

Observed by Lord Kinnear that, although a bill so signed might not have been good evidence against the shipowner, if any question had arisen as to the quantity of cargo shipped, still when its accuracy was not disputed, it did not affect its validity, either as a shipping document between shipper and shipowner, or as a negotiable instrument, that the shipmaster had trusted the shipper to enter a correct statement of the cargo, and in that confidence had signed and delivered the document in the condition described.

Sale—Delivery—Stoppage in transitu.

The pursuers agreed to sell a quantity of coal to Dymock, Smith, & Company, under a contract which provided that the point of delivery should be f.o.b. at Burntisland, and that the coal was for exportation by Dymock, Smith, & Company, and not for sale to any other person in Great Britain. The coal was duly delivered at Burntisland, and was loaded on board a vessel chartered by Dymock, Smith, & Company to convey it to a merchant abroad, to whom they had re-sold it. The bill of lading was taken in name of Dymock, Smith, & Company. Shortly after the loading was completed the pursuers served an interdict upon the master of the ship with the view of stopping the coals in his hands.

Opinion by Lord Kinnear and Lord McLaren (contrary to opinion by Lord Low) that, when the goods were shipped, the sale as between the pursuers and Dymock, Smith, & Company had been completed by delivery, and therefore that it was no longer within the pursuers' power to stop the goods as being *in transitu*.

Upon 5th October 1893 Messrs Dymock, Smith, & Company, coal exporters, Glasgow, telegraphed to the Cowdenbeath Company, Limited—"Would you kindly wire us on receipt hereof your lowest price for 10/1200 tons Cowdenbeath coal, f.o.b. Burntisland, shipment latter half of this month." On 6th October the Cowdenbeath Company wrote in reply—"Confirming our telegram

in reply to yours of yesterday, we hereby offer to supply you with one thousand to twelve hundred tons of steam coal to be shipped latter half of this month, the shipments to be as may be mutually arranged. . . . You will provide sailing vessels or steamers at Burntisland. . . . The point of delivery shall be alongside the ship in the port above mentioned, where our responsibility for weight and quality shall terminate. The price to be per ton, including shore and machinery dues, ten shillings and sixpence, at Burntisland. . . . The quantity of coal herein named is for *bona fide* exportation by the purchaser, and not for sale to other export merchants, or any other person in Great Britain, unless specially permitted by us in writing.' Messrs Dymock, Smith, & Company wrote in reply—"The price seems a very stiff one, but we are making offer to our friends abroad accordingly, and will advise you by Monday." Communications between the parties followed, in the course of which Dymock, Smith, & Company asked that the offer should be kept open for a day or two in order that they might have an answer from their friends abroad as to whether they would accept the price or not. To this the Cowdenbeath Company agreed. On 11th October Dymock, Smith, & Company wrote—"Referring to telegrams exchanged with you, we confirm having bought from you cargo of about 1400 tons Cowdenbeath coal at 10s. 6d. per ton f.o.b. Burntisland, for shipment per s.s. 'Whitehead,' which steamer is expected ready to load at Burntisland on Monday first, and we shall feel obliged by your giving the necessary instructions for loading accordingly."

The "Whitehead" belonged to the Ulster Steam Shipping Company, but had been chartered by Messrs Dymock, Smith, & Company to take the coal to Copenhagen.

In accordance with their contract the Cowdenbeath Company forwarded the coal to Burntisland, and after some delay the loading of the vessel was completed at half-past three on the afternoon of 25th October 1893.

Dymock, Smith, & Company were customers of the Bo'ness branch of the Clydesdale Bank, Limited, and were in the habit of getting advances from that bank upon the security of the bills of lading of cargoes which they were shipping abroad, the usual course of business being that along with the bill of lading they sent the bank a bill drawn upon the foreign buyer of the goods, and that the bank upon receiving the acceptance of the foreign buyer forwarded the bill of lading. On 23rd of October 1893 Messrs Dymock, Smith, & Company wrote to the bank as follows—"We will send you to-night or to-morrow, documents per 'Whitehead' s.s., with draft at three months, payable London, on Messrs Schach, Steenberg, & Company, Copenhagen, for about £670 stg., for forwarding as usual." Later on the same day they wrote—"Enclosed we beg to hand you insurance policy per s.s. 'Whitehead,' along with bill at three months on Messrs Schach, Steenberg, & Company, for £672, 4s. 11d., payable London, and we will

send you B.L. for this cargo to-morrow night. These documents to be delivered up against S. S. & Co.'s acceptance of our draft." At this time Dymock, Smith, & Company were in embarrassed circumstances, and had no funds at their credit with the bank. A few days previously they had been warned that they would not be allowed to overdraw their account without giving the bank security, and these letters were written with the view of obtaining an advance.

In consequence of the undertaking contained in the said letters, cheques of Messrs Dymock, Smith, & Company to the amount of £727 were honoured by the bank on the 24th October. Upon the same day, Messrs Dymock, Smith, & Company being anxious to telegraph to their consignee that the cargo was loaded, and that they had the bills of lading, their agent at Burntisland induced the master of the "Whitehead," while the loading was still incomplete, to sign a bill of lading, blank as to the quantity of coal shipped, in name of Dymock, Smith, & Company as shippers, and to deliver it to them. Upon the following day, October 25th, after the loading had been completed, Dymock, Smith, & Company filled in the amount of coals shipped, and at 4 p.m. they transmitted the bill of lading to the bank duly indorsed in its favour, and it was received by the bank about 5 o'clock. At 7 p.m. on the same day the Cowdenbeath Coal Company served an interdict upon the master of the "Whitehead," interdicting him from delivering to Dymock, Smith, & Company, the cargo of coals then on board said vessel. This step was taken by the Cowdenbeath Coal Company in consequence of Dymock, Smith, & Company having failed to meet a bill granted by them to the said Coal Company.

In order to enable the vessel to proceed on her voyage, it was subsequently arranged between the bank and the Cowdenbeath Company that she should proceed to Copenhagen, leaving the ultimate rights of parties to the price payable by Schach, Steenberg, & Company, viz., £657, to be settled by action in Court. On 10th November 1893 Messrs Dymock, Smith, & Company were made notour bankrupt.

In May 1884 the Cowdenbeath Coal Company, Limited, brought an action against the Clydesdale Bank to recover payment of the said sum of £657.

They pleaded—"(1) The pursuers having effectually stopped the said goods *in transitu*, are entitled to recover the value thereof. (2) The alleged indorsation of the bill of lading, and delivery of the same to the defenders were invalid and ineffectual, both at common law and under the statute 1696, c. 5, and the pursuers are entitled to decree as concluded for."

The defenders pleaded, *inter alia*—"(3) The delivery of the goods on board the 'Whitehead' was delivery to John S. Dymock, Smith, & Company, and excluded the remedy of stoppage *in transitu*. (4) The pursuers have no right or title to set aside the transference of the goods to the

defenders by the indorsation of the bill of lading either at common law or under the Statute 1696, cap. 5. (5) The defenders being the onerous holders of the bills of lading, were entitled to the custody and control of the goods in question, and to apply the proceeds to account of the advances made by them to John S. Dymock, Smith, & Company on the security thereof."

A proof was allowed, the result of which sufficiently appears from the above narrative and the opinions of the Judges.

Upon 15th November 1894 the Lord Ordinary (Low) sustained the 4th and 5th pleas-in-law for the defenders, and assoilzied them from the conclusions of the summons.

"*Opinion.*—The first question in this case is whether the cargo of coals which was sold by the pursuers to Messrs Dymock, Smith, & Company, and put on board ship by the former at Burntisland, was subsequently effectually stopped *in transitu* by them.

"After the coal had been shipped on board the 'Whitehead,' but while she was still lying in the harbour of Burntisland, the pursuers, having heard that the affairs of the vendees, Messrs Dymock, Smith, & Company, were embarrassed, obtained an interdict in the Sheriff Court against the master, prohibiting him from delivering the coal to Dymock, Smith, & Company or their order.

"The pursuers maintain that although the coal was loaded it was still *in transitu*, while the defenders contend that the *transitus*, in a question between the pursuers and Dymock, Smith, & Company, came to an end when the coal was put on board ship, and a bill of lading, made out in Dymock, Smith, & Company's name, was delivered to them.

"There is no doubt as to the general rule of law, namely, that goods are *in transitu* so long as they are in the hands of a carrier as such, even although he is appointed by the purchaser—*Berndston v. Strang*, L.R., 3 Ch. 588; *ex parte Rosevear China Clay Company*, L.R., 11 Ch. Div. 560; *Lyons v. Hoffnung*, L.R., 16 App. Cas. 391. But there is an exception to that rule which may be stated thus:—When the goods have arrived at the destination disclosed in the contract between the vendor and vendee, or to which the vendee has instructed the vendor to send them, the transit will be at an end so far as the vendor is concerned when the goods reach that destination, even although the ultimate destination of the goods necessitates a further transit—*ex parte Miles*, L.R., 15 Q.B.D. 39, and *Bethell v. Clark*, L.R., 20 Q.B.D. 615.

"The question is, whether this case falls under the rule or the exception, and in order to answer that question it is necessary, in the first place, to see what was the contract between the parties. The terms of the contract are set forth in the pursuers' letter to Dymock, Smith, & Company of 6th October 1893, and Messrs Dymock's letter to the pursuers of 11th October 1893.

"In the former letter the pursuers, after referring to telegrams which had passed

between them and Messrs Dymock, proceed thus (I quote only the important part of the letter)—‘We offer to supply you with one thousand to twelve hundred tons of steam coal to be shipped latter half of this month. . . . You will provide sailing vessels or steamers at Burntisland. . . . the point of delivery shall be alongside the ship in the port above mentioned where our responsibility for weight and quality shall terminate. . . . The quantity of coal herein named is for *bona fide* exportation by the purchaser, and not for sale to other export merchants, or any other person in Great Britain.’

‘The letter of Messrs Dymock of 11th October is in these terms—“Referring to telegrams exchanged with you, we confirm having bought from you cargo of about 1400 tons Cowdenbeath coal at 10s. 6d. per ton f. o. b. Burntisland for shipment per s.s. ‘Whitehead,’ which steamer is expected ready to load at Burntisland on Monday first, and we shall feel obliged by your giving the necessary instructions for loading accordingly.

“The ‘Whitehead,’ which belonged to the Ulster Steam Shipping Company, had been chartered by Messrs Dymock to take the coal to Copenhagen.

“While the coal was in course of being loaded, the master signed bills of lading, blank as to the quantity of coal, in name of Messrs Dymock as shippers, and delivered them to Messrs Dymock.

“These are, I think, all the material circumstances requiring to be kept in view in determining whether or not the coal was *in transitu* when it was stopped.

“I am of opinion that the rule of law which I have already stated applies to this case, and that the coal was *in transitu* when it was stopped.

“The contract between the pursuers and Messrs Dymock makes it clear that the loading of the coal at Burntisland was with the view to a further transit, because Messrs Dymock were taken bound to send it abroad. When therefore the pursuers put the coal into the ship, they delivered it to the master, not as the agent of Messrs Dymock to hold for them, but as a carrier who was to carry it to its ultimate destination.

“The defenders laid great stress upon the fact that the ultimate destination was not disclosed in the contract between the vendors and vendee. I do not think that that makes any difference, it being part of the contract that the coals, after being put on board by the vendor, were to be taken abroad. The case of the *Rosevear China Clay Company, L.R.*, 11 Chan. Div. 560, is a direct authority upon the point, because the very argument now urged by the defenders was there rejected. Apart from authority, I should have come to the same conclusion, because I cannot see any difference in principle between a contract that the vendors are to put goods on board ship for the purpose of being conveyed to a certain definite place, and a contract that the vendee shall be bound, when the vendor has put the goods on board ship, to send

them out of the country. In both cases the contract makes it clear that the goods are put on board ship merely in course of their transit to their destination.

“The defenders also argued that the fact that the bill of lading was in name of Messrs Dymock as shippers was sufficient to put an end to the *transitus* in a question with the pursuers. I know of no authority for that proposition. The Messrs Dymock were the shippers in relation to their consignees in Copenhagen, and they were the parties who had chartered the ship. It therefore appears to me that they were entitled to have the bills of lading made out in their name, and I do not see how that affects the cardinal fact that the contract between vendor and vendee made it clear that the coals came into the master’s possession as a carrier who was to take them to their destination abroad.

“The defenders also relied upon the Scotch case of *Morton v. Abercromby*, 20 D. 302, which no doubt at first sight appears to be in their favour. When the case is examined, however, it seems to me to differ in essential particulars from the present case, and not to be inconsistent with the rule of law which I have held to be applicable here.

“The facts as stated in the interlocutor of the First Division are as follows—‘First, that Dickson & Company, merchants in Glasgow, having on or about 1st February 1854 engaged a certain amount of tonnage-room in the ship “Caledonia,” then loading at Glasgow for Melbourne, did on or about the 7th of said month purchase from the respondents, Alexander Abercromby & Company, merchants in Glasgow, the goods in question on credit, and did direct that the goods should be packed in a manner suitable for the Australian market; second, that on or about the 23rd of said month the goods were by direction of Dickson & Company, conveyed by the sellers to the wharf and put on board the said ship “Caledonia,” and an acknowledgment or receipt was obtained from the mate for the goods, as having been put on board by order, on account and at risk of Dickson & Company, which acknowledgment or receipt was by the sellers delivered to Dickson & Company, the purchasers, in order that they might procure the bills of lading in their own names as shippers, and that accordingly the bills of lading were granted by the master of the “Caledonia” to Dickson & Company in their own names as shippers of the goods.’ Upon these findings in fact the following finding in law was pronounced:—‘Find in point of law that there was no room for the exercise by the sellers of the right of stoppage *in transitu*, the delivery to the purchasers having been completed, and the purchasers having themselves been the shippers of the goods for Melbourne, and as such having obtained the bills of lading in their own names and disposed thereof.’

“Now it seems to me that the basis of that judgment was that the Court held that the circumstances amounted to actual delivery of the goods by the sellers to the

purchasers, and no one disputes that, if goods are actually delivered to the purchaser or to his agent to hold for him, there is an end of the transit as between seller and purchaser, although the goods may immediately commence another transit to their ultimate destination. That it was the fact of delivery to the purchaser that the Court proceeded upon is shown by the opinion of the Lord President, where he says (p. 368), 'I am not aware of any case in which stoppage *in transitu* has been recognised in such a state of matters, holding that delivery was made to Dickson & Company, that Dickson & Company were themselves the shippers of the goods, and that Abercromby & Company were not consigning them to any party as consignees of Dickson & Company. They' (I take the Lord President to be referring to Dickson & Company) 'were disposing of them as their own goods at the time, and having possession of them.'

'I am confirmed in the above view of the grounds of the judgment in *Morton v. Abercromby* by a reference to the note of the Sheriff (Alison) in the session papers. The First Division affirmed the Sheriff's interlocutor, and apparently were satisfied with the grounds upon which he based his judgment. Now, I find that the Sheriff cited two cases (first) *Bohtlingk v. Inglis*, 3 East, p. 381, and (second) *M'Taggart v. Kymer*, 7 Term Reports, 442. The former case, which the learned Sheriff accepted as an authority, was one giving effect to the general rule of law that goods in the hands of a shipmaster employed as a carrier are *in transitu*. The case of *M'Taggart v. Kymer* is not reported under the reference given by the Sheriff, although it is there referred to as an authority in the report of the case of *Hodgson v. Toy*. It is, however, reported under the name of *Fowler v. Kymer & M'Taggart* in 1 East, p. 522, and is also commented upon in the judgment in *Bohtlingk*. In *Fowler's* case the purchaser had chartered a ship for three years, and the master and crew were in his pay. The ship was thus the purchaser's ship, and delivery on board the ship was actual delivery to him. It was therefore held that in a question with the seller, the *transitus* was over when the goods were put on board the ship.

'The Sheriff's opinion was that *Morton v. Abercromby* was ruled by *Fowler v. Kymer & M'Taggart*, and not by *Bohtlingk v. Inglis*, he holding as the First Division did, that there had been actual delivery to Dickson & Company.

'Such being the opinion which I have formed upon the question of stoppage *in transitu*, it is necessary to consider the further question which is raised, viz.,—whether the pursuers' right to stop *in transitu* was not defeated by the indorsation and delivery of the bill of lading to the defenders for onerous causes prior to the stoppage.

'It is proved that the defenders received the bill of lading from Dymock & Company on the afternoon of the 25th October, prior to the stoppage of the goods by the pur-

suers, and that the defenders had allowed Messrs Dymock to overdraw their account on the 24th October. It is also proved that Messrs Dymock were at the time hopelessly insolvent.

'The pursuers' case is that if the defenders received the bill of lading as a security at all, they received it as a security for advances already made, and that therefore Messrs Dymock being insolvent the transaction was bad under the Act 1696, c. 5.

'As to what actually occurred, I think that there can be no doubt, because Mr Dymock and Mr Swan (the defenders' agent at Bo'ness), between whom the transaction was carried out, appeared to me to be witnesses whose reliability could not be impeached.

'It appears that Messrs Dymock kept their bank account (the only one which they had) at the branch of the defenders' bank at Bo'ness. During the year 1893 the account had been generally overdrawn. At first overdrafts seem to have been allowed without security, but latterly security was required. In particular, upon the 20th October, and again on the 21st, Mr Swan wrote to Mr Dymock intimating distinctly that no further overdraft would be allowed without security.

'The security which Mr Dymock was in the habit of giving to the bank was bills of exchange and bills of lading. When Mr Dymock purchased coal for exportation he was in the habit of sending the bill of lading along with a bill of exchange for the acceptance of his consignee abroad to the bank. The bank then obtained the acceptance of the consignee in exchange for the bill of lading. When the bill of lading or the acceptance, as the case might be, was in the hands of the bank, it was regarded as security against which Messrs Dymock might draw upon their account.

'On the 21st and 22nd of October the bank account was overdrawn to the extent of some £816, but the bank held a bill of exchange for £600, and the bill of lading of a cargo of timber valued per invoice at £222. The account was therefore overdrawn to practically the full value of the security held by the bank, and it is certain that further overdrafts (at least to an amount beyond the small margin of security) would not have been allowed unless additional security was given.

'On 23rd October Messrs Dymock wrote to Mr Swan—'We will send you to-night or to-morrow documents per "Whitehead" s/s with draft at 3 mos., payable London on Messrs Schach, Steenberg & Company, Copenhagen, for about £670 stg., for forwarding as usual.'

'On the same day Messrs Dymock again wrote—'Enclosed we beg to hand you insurance policy per s/s "Whitehead," along with bill at 3 months on Messrs Schach, Steenberg & Company, for £672, 4s. 11d., payable London, and we will send you B/L for this cargo to-morrow night. These documents to be delivered up against S.S. & Company's acceptance of our draft.'

'On the 24th Mr Dymock again wrote—

‘The bill of lading per “Whitehead” came in just as I was leaving to catch my train to-night. I am going from home in the morning, but I left instructions for B/L to be sent you by forenoon post.’

“On the 25th October Messrs Dymock wrote as follows—‘As we have not been able to get B/L per “Whitehead” completed in time for post, we will send you this per 4 p.m. train. We have been trying to get the weights per telephone this morning, but there seems to be great delay in getting Burntisland, and we have not succeeded.’

“The bill of lading was accordingly sent by the 4 o’clock train. Messrs Dymock telegraphed to Mr Swan that it was despatched, and the latter sent a clerk to meet the train and get delivery of the parcel.

“It appears from a letter sent along with the bill of lading, that owing to delay in getting the weights of the cargo, Messrs Dymock had resolved to send the bill, as they had received it, blank as regards tonnage, to the bank, and that a note of the tonnage, which they had filled into the bill, had been received just before sending it off.

“Both Mr Dymock and Mr Swan say distinctly that the overdraft which was allowed on the 24th October would not have been asked or given except on the security of the bill of lading of the ‘Whitehead,’ which Messrs Dymock had promised on the 23rd to send to the bank.

“Now, apart from a question in regard to the bill having been signed blank as to the weight, which I shall afterwards consider, I do not understand it to be disputed that, if Messrs Dymock when writing to the defenders on the 23rd October had asked to be allowed a further overdraft against the security of the bill of lading, and had undertaken to forward the bill whenever it was completed, the transaction could not have been challenged.

“But the pursuers found upon the terms of Messrs Dymock’s letter of the 23rd October, in which they say that the bill is to be sent ‘for forwarding as usual. The pursuers contend that as that was an express direction as to the purpose of sending the bill of lading, it excluded the idea that it was being sent to secure an overdraft to be made on the following day, and shows that the defenders did not grant the overdraft upon the security of the bill, but that, having subsequently obtained possession of the bill, they are now trying to retain it as a security notwithstanding the insolvency of their debtor.

“Now, it seems to me that the terms of the letter are not inconsistent with the evidence of Mr Dymock and Mr Swan. In the first place, the course of dealing between Messrs Dymock and the bank must be kept in view. The bank were in the habit of treating a bill of lading sent to them to be forwarded to a consignee in exchange for an acceptance, as security upon which an overdraft would be allowed. Therefore for the Messrs Dymock to write that they were sending a bill of lading to

be forwarded, was equivalent to saying that they were sending that which, according to the course of dealing, would be recognised as a security for advances. Then the account was on the 23rd overdrawn to the full amount, or nearly so, for which the bank held security, and the Messrs Dymock had been warned twice in the few days immediately preceding that no further overdrafts would be allowed unless they were secured. Therefore Messrs Dymock, when they passed cheques upon the bank on the 24th, must have done so upon the understanding that the bill of lading which they had promised to send was regarded by the bank as security.

“Again, on the 23rd Messrs Dymock did send the bill of exchange and the policy of insurance. It is true that these documents were of no use as a security, or indeed for any purpose, without the bill of lading, but for that very reason I think that the fact that they were sent was of importance. If the only reason for which the bill of lading was to be sent was that it might be forwarded, there was no reason for sending the relative bill of exchange and policy before the bill of lading was ready. If, however, the intention was to give the bank a security against which an overdraft would be allowed, the sending of the other documents was an earnest or guarantee that the bill of lading would be forwarded whenever it was completed. Further, the fact that Messrs Dymock wrote to Mr Swan on the subject twice on the 23rd, once on the 24th, and twice on the 25th, points in the same direction. If the bill of lading was to be sent to the bank only for the purpose of forwarding, then it did not concern the bank when it was forwarded, or whether it was forwarded at all. That was a matter in which, *ex hypothesi*, Messrs Dymock alone were interested. Therefore all these letters to Mr Swan seem to me to show that Messrs Dymock regarded the delivery of the bill of lading to the bank as a matter in which the latter were directly interested. I am therefore of opinion that the correspondence is not inconsistent with the evidence of Dymock and Swan, but points in the same direction.

“The question, therefore, comes to be whether the fact that the bill of lading did not actually come into possession of the bank until after the advances were made is sufficient for the pursuers. The law on the subject is settled by the cases of *Moncrieff v. Union Bank*, 14 D. 200; *Stiven v. Scott*, 9 Macph. 923, and *Gourlay v. Mackie*, 14 R. 403. These cases establish that when money is advanced on the faith of a specific security to be immediately granted, the Act of 1896 will not apply, although the security is not completed until after an interval of time.

“If I am right in the view which I have taken of the evidence, I think that the conditions of the rule were fulfilled in the transaction in question. This was not a case of a promise to give security at a subsequent time, or if required. The promise to send the bill of lading was immediate

and unconditional, and it was in fact sent the moment it was completed. I am therefore of opinion that the right of the bank to the bill of lading cannot be challenged on the ground that it was granted in security of a prior debt.

“The pursuers further argued, if I rightly understood them, that the bank had no security, because a bill of lading blank in the quantity shipped was an incomplete and ineffectual document and not truly a bill of lading at all, and that Messrs Dymock were not entitled at their own hand afterwards to fill in the quantity.

“Now, I am not prepared to say that in such circumstances as occurred here a bill of lading signed and delivered by the master, but blank as to tonnage, is an ineffectual document. The Messrs Dymock had chartered the whole ship to take a cargo of coals to Copenhagen. The bill of lading, as signed by the master, ran thus:—‘Shipped in good order and condition, by John S. Dymock, Smith, & Co., in and upon the good steamship called the “Whitehead,” whereof Brennan is the master for this present voyage, lying in port of Burntisland, and bound for Copenhagen, viz.:’ (here follows a blank space for the tonnage) ‘of best Cowdenbeath coal.’ I am inclined to think that the holder of that bill of lading would have had a title to demand delivery of the cargo of coals, although, of course, he would not have the *prima facie* evidence of the amount of coal shipped, which would have been afforded if the tonnage clause had been filled up.

“But, however that may be, the Messrs Dymock completed the bill by filling up the blank space when they received information as to the amount actually shipped, and the bill of lading so completed constituted, in my opinion, a perfectly good title to the cargo in the hands of an onerous holder.

“I understand that there is no dispute that the amount advanced by the defenders was greater than the sum for which the cargo has been sold, and that therefore, if the view which I have taken of the case is sound, the defenders are entitled to absolver.”

The pursuers reclaimed, and argued—(1) They were entitled to stop and had stopped *in transitu*. The transit was not at an end until the cargo reached Copenhagen. The Lord Ordinary was with them on this point. He had rightly interpreted the series of previous decisions to which he had referred in his opinion. See also 1 Bell’s Comm. (7th ed.) p. 219; Bell’s Principles, sec. 1308; Scrutton on Charter-Parties (3rd ed.) p. 133. *Schotsmans v. Lancashire and Yorkshire Railway Company*, 1867, L.R. 2 Ch. Appeals 332. (2) The Lord Ordinary was wrong in holding that the right of stopping *in transitu* had been defeated by the indorsation to the bank of the bill of lading. The bill of lading was not a good security at all. The master had signed it while blank, and before the cargo was all on board—*per* Lord Shand in *Grieve, Son, & Company v. König & Company*, January 23, 1880, 7

R. 525; *Sewell v. Burdick*, 1884, L.R., 10 Ap. Cases 74. It was also invalid under the Act 1696, c. 5, because everything took place within 60 days of Dymock, Smith, & Company’s bankruptcy. The bill of lading was given as a security for prior advances made the day before. The Lord Ordinary had sustained a hypothetical case which was not the same as the present. There was nothing to show—and the *onus* lay on the bank—that there was anything exceptional about the transaction. It was in the ordinary course of business. The bill of lading was sent as usual for collection. The pursuers therefore were entitled to cut down this attempted but illegal preference.

Argued for the defenders—The pursuers required to show not only that the stoppage took place before the *transitus* was at an end, but also that the bank were not onerous indorsees of a valid bill of lading before the right to stop was exercised. If they failed to establish both these points they could not get decree. (1) The Lord Ordinary was clearly right in holding that the bill of lading was not sent merely for collection or as a general security, but as security for an advance made the day before on the faith that the bill of lading would be immediately sent. A blank bill of lading could not settle the amount of the cargo, but it could form a good security over the cargo—see Mr Justice Willes in *Gattorno v. Adams*, 1862, 12 C.B., New Series, p. 567. Here the master trusted the shippers to insert the proper figure, and there was no suggestion that the quantity had not been correctly filled in. (2) But the Lord Ordinary was wrong in holding that the *transitus* was not at an end. His Lordship’s views could not be sustained without reversing *Morton v. Abercromby*, January 7, 1858, 20 D. 362, which was identical with the present case and not distinguishable as his Lordship thought. There were here two distinct and separate transits—the one from Cowdenbeath to Burntisland Quay, the other from Dymock, Smith, & Company at Burntisland to Schach, Steenberg, & Company at Copenhagen. The first transit was over at 3.30 p.m. on 25th October; the attempted stoppage did not take place until 7 p.m. on that day. The knowledge of the seller that the goods were going abroad had nothing to do with what was the real question, namely, what in the contract was the *transitus*? That was always a question of fact. The *transitus* here was to end at Burntisland. The sellers made it a condition of the price being low that the coals should not be re-sold in this country, but the buyers might have stored them for months; in that case could it have been said the *transitus* was still going on? The buyers made their own arrangements as to shipment abroad without reference to the Cowdenbeath Coal Company—see 1 Bell’s Comm. (7th ed.), pp. 232-234. In the following cases stoppage *in transitu* had been disallowed on the ground that the *transitus* was at an end—*Dixon v. Baldwin*, 1804, 5 East. 175; *Meletopolo v.*

Ranking, 1842, 6 Jurist 1095; *Valpy v. Gibson*, 1847, 4 C.B. 837, see *Wilde, C.-J.* pp. 862-865; *Morton v. Abercromby (supra)*; *Kendal v. Marshall, Stevens, & Company*, 1883, L.R., 11 Q.B.D. 356, in which *ex parte Rosevear China Clay Company (infra)* was distinguished; *ex parte Miles*, 1885, L.R., 15 Q.B.D. 39. In the following the stoppage had been allowed—*Berndtson v. Strang*, 1868, L.R., 3 Chan. Ap. 588; *ex parte Rosevear China Clay Company*, 1879, L.R., 11 Ch. Div. 560; *Bethell v. Clark*, 1888, L.R., 20 Q.B.D. 615; *Lyons v. Hoffnung*, 1890, L.R., 15 Ap. Cases 291. The present case fell under the first list of authorities, whereas the Lord Ordinary thought it was solved by the second.

At advising—

LORD KINNEAR—The question in this case is, whether the pursuers, as unpaid vendors, have effectually exercised a right to stop *in transitu*. The defence is rested on two separate grounds—(1st) that the transit was at an end before the pursuers attempted to stop the goods, and (2nd) that even if the goods were still *in transitu*, the defenders, the Clydesdale Bank, had acquired right as onerous endorsees of the bill of lading before the vendors exercised their right to stop.

On the first point the defenders do not dispute that the goods were in the hands of a carrier when the pursuers attempted to stop them. But they say that the goods were not in the carrier's hands in the course of a transit to the purchaser caused either by the terms of the contract of purchase and sale, or by directions given to the vendor by the purchaser, but in course of a new transit directed by the purchaser himself after the original transit had come to an end.

The contract is contained in a series of letters and telegrams between the pursuers and Messrs Dymock, Smith, & Company, the most material of which are those dated 5th and 6th October and 10th and 11th October 1893. The transaction begins by a letter from Dymock, Smith, & Company, the merchants in Glasgow, to the pursuers, the Cowdenbeath Coal Company, asking them to wire on receipt hereof your lowest price for ten or twelve hundred tons Cowdenbeath Coal f.o.b. Burntisland—shipment latter half of this month. Then the pursuers answer on the 6th, in the first place by a certain telegram, and then by a confirmatory letter, in which they say that they are prepared to offer 1200 tons of steam coal on certain terms set out at length in the letter, but among these the material are that the buyers are to provide sailing vessels or steamers at Burntisland; that "the point of delivery should be alongside the ship at Burntisland, where the responsibility of the sellers for weight and quality should terminate," and that the coal should be exported by the purchaser and not sold to other export merchants or other persons in Great Britain. To this Dymock, Smith, & Company answer that the price seems a stiff one, but they say "We are making offer to our friends abroad

accordingly, and will advise you by Monday." Then two or three letters pass between the parties, in the course of which Dymock, Smith, & Company ask that the offer should be kept open in order that they might have a reply from their friends abroad as to whether the other people abroad would accept the price or not, and the final result is that Dymock, Smith, & Company's correspondents abroad agree to the terms, and on the 11th October Dymock, Smith, & Company write to the pursuers—"We confirm having bought from you cargo of about 1400 tons Cowdenbeath Coal at 10s. 6d. per ton f.o.b. Burntisland, for shipment per s.s. 'Whitehead,' which steamer is expected ready to load at Burntisland on Monday first, and we shall feel obliged by your giving the necessary instructions for loading accordingly."

Now, the proposal, therefore, of the pursuers is to deliver the coal alongside the ship in the port of Burntisland. The variation upon these terms contained in the letter of the purchaser that the coal is to be delivered f.o.b. makes no difference as to the contract between buyer and seller, except that it imports that all charges are to be paid by the sellers and the goods to be at their risk until they are actually on board the vessel. The correspondence shows that at this stage, therefore, there were two separate and distinct contracts, the first for the sale and delivery of the goods at Burntisland to Dymock, Smith, & Company, the second for the sale by Dymock, Smith, & Company, and the transmission of the goods from them to Schach, Steenberg, & Company at Copenhagen, and the pursuers had no concern whatever with the second of these contracts. They had notice that it had been completed, and that their purchaser was to ship the goods for some foreign port in order to carry it into effect. But they had nothing to do with the destination determined by that contract, and they did not even know for what port or to what person the goods were to be consigned. The destination to which they were to despatch the goods was to Dymock, Smith, & Company or their order at Burntisland. Any further destination as between Dymock, Smith, & Company and their purchaser was unknown at this stage of the business to the pursuers.

The goods were sent to Burntisland in pursuance of pursuers' contract, and were put on board the "Whitehead," the ship chartered for that purpose by Dymock, Smith, & Company. The loading, after some delay, was completed at 3:30 on the 25th of October, and the interdict by which it is said that the pursuers have stopped the goods *in transitu* was served upon the master at sometime after seven on the same evening. But in the meantime Dymock, Smith, & Company had taken a bill of lading in their own name as shippers, and had endorsed and delivered it for value to the Clydesdale Bank. It is said that this instrument was vitiated by an irregularity in the mode of its completion. The loading had been delayed, and Dymock, Smith, & Company were pressing for delivery of the

bill of lading, being anxious to telegraph to their purchaser that the cargo had been loaded and that the contract was fulfilled for shipment on the 24th. For this reason the master was induced by the agent who acted for them at Burntisland, who happened to be the pursuers' clerk but was not in this matter acting for them, to sign the bill of lading before the cargo had been completely loaded, leaving a vacant space for a statement of the tonnage of the coal, and to deliver it in that condition. When the loading had been completed the blank was filled up by Mr Dymock before transferring the bill to the bank. I agree with the Lord Ordinary that this circumstance is immaterial, since it is not disputed that the blank was filled up correctly after the cargo had been loaded, and that although a bill so signed in blank might not have been good evidence against the shipowner if any question had arisen as to the quantity of cargo actually shipped, still, when its accuracy is not disputed, it does not affect its validity, either as a shipping document between shipper and shipowner or as a negotiable instrument, that the shipmaster trusted the shipper to enter in a vacant space a correct statement of the cargo, and in that confidence signed and delivered the document in the condition described.

But assuming the validity of the bill of lading, it is maintained that the endorsement and delivery of the bill to the defenders was ineffectual to defeat the right to stop *in transitu*. This is maintained on two grounds—first, that the bill of lading was not deposited with the defenders as a security for an advance, but was put into their hands as agents for transmission to the consignee, and secondly, that if it were given as a security at all, it was a security for a prior debt, and so struck at by the Act of 1696. The evidence on this part of the case has been very carefully examined by the Lord Ordinary, and I entirely agree with his Lordship's view of the facts, and with his opinion on the law. Without repeating what he has said in detail, I think it proved that the bank allowed Messrs Dymock, Smith, & Company to overdraw their account on the security of the cargo of the "Whitehead;" that a policy of insurance and a draft for the acceptance of Schach, Steenberg, & Company were sent to the bank on the 23rd with a promise to send the bill of lading the following night; that on the 24th of October, in reliance on that promise, the bank honoured cheques drawn by Dymock, Smith, & Company, and that in performance of that undertaking, the bill of lading was endorsed and forwarded as soon as completed, and reached the hands of the bank on the evening of the 25th. There can be no question therefore that the endorsement, if it were meant as a security at all, was not a security for a prior debt, but for moneys presently advanced, and I think it is equally clear that the bill of lading was not put into the hands of the bank as agents merely for the purpose of transmission to Copenhagen, but was deposited

with them as a security to be held by them for their advance which they could not be required to part with except for money or for Schach, Steenberg, & Company's acceptance, which they took as an equivalent for money. It is not disputed that the endorsement of the bill of lading for value to a *bona fide* transferee defeats the vendor's right to stop.

I agree with the Lord Ordinary that this is a sufficient ground of judgment, and it is therefore unnecessary to decide whether the goods could have been effectually stopped *in transitu* if there had been no endorsement of the bill of lading. But as at present advised, I am unable to assent to the Lord Ordinary's opinion on that question. The general rule is that goods may be stopped in the hands of a carrier between vendor and purchaser. The doctrine is thus explained by Lord Cranworth, then Baron Rolfe, in *Gibson v. Carruthers* (8 M. & W. 321, 2 Ross' L. C. 48)—"Where a vendor of goods has put them into the hands of a carrier in order to their being by him forwarded and delivered to the vendee, then if the vendee before actual delivery to him becomes insolvent, the vendor has a right to resume the possession with which he had previously parted. I consider it to be of the very essence of the doctrine that during the *transitus* the goods should be in the custody of some third person intermediate between the seller who has parted with, and the buyer who has not yet acquired actual possession." Again, in *Kendal v. Marshall* (L.R. 11 Q.B.D. 356), Lord Justice Cotton says—"The transit from the seller to the buyer is the only one to be considered in determining whether the seller can exercise his right of stoppage. For this purpose it is immaterial that the buyer, when the transit from the seller to him is at an end, starts them on to a fresh destination. This is a fresh transit not from the seller to the buyer, but by or from the buyer." Now, in the present case the only transit from the seller to the buyer was the transit to Burntisland. That was the only destination contemplated by the first contract or known to the seller. It is true that the seller was to deliver the goods free on board the "Whitehead." But the captain or master of the "Whitehead" was not an intermediate person between the seller and the buyer, but a carrier from the buyer to a new purchaser under a new contract, with which the original seller had no concern. The pursuers could not have shipped the goods for transit to the new purchaser without farther instructions from Dymock, Smith, & Company. I do not think it was contemplated by the contract that they should receive such instructions, or that, as vendors, they ever received such instructions in fact. Their clerk at Burntisland, Mr Forbes, came to know that the goods were consigned to Copenhagen. But that was not in course of performance of the contract of sale, but because the pursuers acted as shipping agents for the "Whitehead." In that capacity Mr Forbes was furnished by Dymock & Company with a form

of a bill of lading, and instructed by them to obtain the master's signature and return the bill when signed. But in this matter he says that he was acting as agent for Dymock and not for the Cowdenbeath Company. I cannot agree with the Lord Ordinary that it is immaterial that the bill of lading was taken by Dymock, Smith, & Company in their own name as shippers, and could not in conformity with the contract have been taken in name of the pursuers. If the contract were ambiguous, that would be evidence to show that the goods had come into the possession and were under the control of the purchasers; and as it is in exact conformity with the contract, it is evidence that as between the pursuers and their purchaser the destination of the goods was the ship "Whitehead" at Burntisland, and not the purchaser in a foreign port to whom they were to be carried by the "Whitehead." Apart altogether from the argument which arises from the new contract with Schach, Steenberg, & Company, the case of *Morton v. Abercromby* (20 D. 362) seems to be directly in point. The Lord Ordinary seems to think that in that case the Court proceeded on the authority of *Fowler v. Kymer* (1 East. 522), where delivery on board ship was held to be actual delivery into the hands of the purchaser, because the latter had chartered the ship for three years, and the master and crew were in his pay, so that delivery on board was not delivery to a carrier, but into the actual possession of the buyer himself as completely as if the goods had been put into his warehouse. But I find nothing to support this theory in the judgment or in the opinion of the Lord President. On the contrary, I think it clear that the purchasers were not the owners or hirers of the ship, but had contracted with the owners as carriers to carry their goods to Melbourne. The grounds of judgment are clearly set forth in the interlocutor. The Court found in fact that the goods were, by direction of Dickson & Company, the purchasers, conveyed by the sellers to the wharf and put on board the ship "Caledonia," and an acknowledgment or receipt was obtained for the goods as having been put on board by order on account, and at risk, of Dickson & Company, which receipt was by the sellers delivered to Dickson & Company, the purchasers, in order that they might procure the bills of lading in their own names as shippers, and that accordingly the bills of lading were granted by the master of the "Caledonia" to Dickson & Company in their own names as the shippers of the goods, and that Dickson & Company had endorsed the bills of lading to Morton & Company. On these facts they found in law "that there was no room for the exercise by the sellers of the right of stoppage *in transitu*, the delivery to the purchasers having been completed, and the purchasers having themselves been the shippers of the goods for Melbourne, and as such having obtained the bills of lading in their own name and disposed thereof." And it appears from the opinion of the Lord

President that the material point in his judgment was, that the buyers and not the sellers were "the shippers of the goods." He says they purchased the goods for the purpose of sending them to a foreign market, "but they themselves arranged all about that, and took the bill of lading in their own name as shippers, and the arrangement they made was for the purpose of transmitting the goods from themselves in Glasgow to a foreign port. . . . The goods were not *in transitu* from the sellers to the buyers. The transaction between the sellers and buyers was complete, and if the goods were *in transitu* at all they were *in transitu* from Dickson & Company to certain parties at Melbourne." Therefore the ground of judgment appears to me to stand perfectly clear of any such misapprehension, as that which the Lord Ordinary thinks may have accounted for it, as to the right of the purchasers in the ship on which the goods were loaded.

I do not think this decision is at all in conflict with the *Rosevear China Clay Company* (L.R., 11 Ch. Div. 560) to which the Lord Ordinary refers. In that case no bill of lading had been signed. The buyer had purchased china clay which was to be delivered by the vendor at a specified port. It was argued that the transaction was at an end when the goods were delivered on board, because the ultimate destination had not been communicated to the purchaser. But Lord Justice Brett, now Lord Esher, says—"It seems to me that it can make no difference whether the destination of the goods is communicated at the time of the contract for sale, or whether the destination is to be named after the contract but before the shipment. There the purchaser entered into an agreement with the owner of the ship that the ship should take the clay to Glasgow, and the vendors were bound to put the clay on board the ship to be carried to Glasgow." The same learned Judge in the later case of *ex parte Miles* defines what is meant by the destination of the goods. "It can only be said that goods are sent to their destination when they are sent to the purchaser, or to the person to whom he directs them to be sent—to a particular person at a particular place. That is the meaning of destination in a business sense." Therefore the judgment in the case of the *Rosevear China Clay Company* means that, as matter of fact, the Court held that the goods were destined to the purchaser at Glasgow, and were put by the vendor into the hands of a carrier to be conveyed to the purchaser at Glasgow. It appears to me, therefore, that there is no conflict between the two decisions which the Lord Ordinary seems to think conflict. The learned Judge whom I have already quoted says that all those cases run very fine, and that it is often difficult to say upon which side of the line a particular case ought to be placed. However that may be, it appears to me that the case of *Morton v. Abercromby* is an authority which we are bound to follow in this Court. It is unnecessary to decide that

absolutely. If the present case depended upon the decision of that question, I think we ought to follow *Morton v. Abercromby*. But apart from that consideration I agree with the Lord Ordinary that it is a perfectly sufficient ground of judgment that before the right to stop was exercised the bill of lading had been endorsed for value to a *bona fide* transferee.

LORD M'LAREN—I concur entirely in the opinion which has been delivered by Lord Kinnear, and I have really very little to add.

As regards the first point in the case, and which suffices for its disposal, I think there can be no doubt whatever that the bill of lading in this case had been lawfully transferred for an onerous cause before the right to stop *in transitu* was asserted. It makes no difference, in my judgment, in regard to the onerosity of the transaction, that instead of an immediate advance being made by the bank simultaneously with the arrival of the bill of lading, that advance had been made on the previous day in reliance on a promise that the bill would be sent in course of post. In mercantile transactions a contract is understood to be for present payment, provided the payment is sent in course of post, without any excusable delay, to the person who is entitled to receive it.

Supposing our decision had been otherwise on the first point, then the question would have arisen whether the goods at the time when they reached the vessel at Burntisland were within the *transitus* from buyer to seller; and on this subject also I concur in Lord Kinnear's opinion. There is, as was pointed out in the argument, an apparent conflict, not so much in the decisions as in the expressions which have been used by eminent judges in defining the right of the seller to stop his goods *in transitu*. But from the analysis of the decisions which has been given it appears that there is no real conflict; and when Lord Cranworth and Lord Justice Cotton said that the *transitus* must be in the course of the carriage of the goods from the seller to the purchaser they meant exactly the same thing as Lord Esher meant when he expressed the thing more fully, that the goods must be on their way from the seller to the purchaser, or to *his order, i.e.*, to some person to whom he has directed them to be sent. Now, with that addition, which I think is clearly implied and must have been in the minds of the learned judges in the earlier cases, the whole of the decisions seem to be reconcilable and to stand perfectly consistent with the decision in *Morton v. Abercromby*. There is one case which was cited to us where the seller was directed to send the goods to a definite port, but the name of the eventual destinee was not communicated to him, and the goods were held to be *in transitu* until they reached Australia, although no name was known to the seller except the name of the party with whom he contracted. That decision appears to me to be quite consistent with the general doctrine, because if a purchaser in London directed his goods to be sent to Australia, and did

not communicate the name of his sub-vendee, then it follows that until the goods arrive in Australia they are on their way to the original purchaser himself; and it is for him or his agent, on the arrival of the goods, to come forward and claim them and say to whom they are to be delivered. In the present case I apprehend that the contract was for delivery of the goods at Burntisland. It was not perhaps very material whether the ship was named, but the ship was named and the port of delivery was disclosed; and there, so far as the Cowdenbeath Coal Company was concerned, the journey was to be at an end. They no doubt sold for exportation, but that was not to be exportation by them, but on a contract made by their vendee. Therefore it appears to me that there can be no place for the application of the right of stoppage *in transitu* after the goods were put on board the ship at Burntisland, because when put on board the goods were competently delivered and the *transitus* was at an end.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court pronounced the following interlocutor:—

“The Lords having considered the reclaiming-note for the pursuers against Lord Low's interlocutor, dated 15th November 1894, and whole cause, and heard counsel for the parties, Recal said interlocutor: Of new sustain the 4th and 5th pleas-in-law for the defenders, and assolzie them from the conclusions of the summons, and decern: Find the pursuers liable in expenses,” &c.

Counsel for the Pursuers—Dickson—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—Ure—King. Agents—Ronald & Ritchie, S.S.C.

Friday, June 21.

SECOND DIVISION.

HAYWARD'S EXECUTORS v. YOUNG.

Succession—Vesting—Direction to Divide among Children of Cousin “Lawfully Begotten, or who shall be Lawfully Begotten” — Whether Child Born after Testator's Death Entitled to Participate.

A testator directed his executors to divide the residue of his funds “among the children lawfully begotten, or who shall be lawfully begotten, of my cousins,” T, A, and J, share and share alike, on each of them attaining the age of twenty-one years.

Held that the residue vested *a morte testatoris* in equal shares in the children of T, A, and J born at that date, and that no child born after the testator's death was entitled to participate.