

from all of the learned Judges who have taken part in the decision in the Court of Session, to be one of considerable difficulty. If by natural causes or by the actings of third parties the ship had been in April 1896 restored to the appellants without cost to them, though in a disabled condition, but requiring only repairs of less cost than the value of the ship when repaired, the authorities seem to show that they would not be entitled to prevail in a claim against the underwriters as for a total loss, and in some cases of capture and recapture the result has been the same.

These cases have, no doubt, as the respondent's counsel urged, a certain analogy to the present. But it appears to me that there is a material distinction in fact between them and the present case, inasmuch as here (1) the operations were undertaken and large outlay made by the underwriters, who were themselves the obligants under the contract of insurance, in order by changing the real state of matters as these had occurred to get rid of the obligation which they had incurred, and which might have been enforced by action brought as for a total loss, and (2) unlike the cases of recapture, in which the vessel is restored in a fit state to take the sea, and in which different considerations may arise from those which determine liability incurred from the ordinary perils of the sea, in this case the vessel is tendered still in a disabled condition, requiring large expenditure to make her seaworthy. There is undoubtedly a broad difference between such a case and those to which it is said to be analogous, and in agreement with the views of your Lordships I am not prepared to carry the analogy so far as to apply it in circumstances so different from those of the cases referred to. I cannot think it was the intention of the parties, or that it is according to the true construction of the contract of insurance, that after a total constructive loss has unquestionably occurred it should be in the power of the underwriter, if he can only succeed in inducing the shipowner to delay raising action for the requisite time, by outlays however large and operations however extensive, to reduce a total to a partial loss, and so, if he has become bound to indemnify for a total loss only, to leave the shipowner without indemnity to make large expenditure in repairing the ship to fit her for the sea. The cases decided have never gone this length, and I do not think when this question is now for the first time raised that the contract of insurance should be so construed as to enable astute underwriters in this way, as my noble and learned friend on the woolsack has already said, to turn a total into a partial loss.

On these grounds I am also of opinion that the judgment complained of should be reversed with costs, and the case remitted to the Court of Session that a proof of the facts may be allowed.

Ordered that the cause be remitted back to the Second Division to give final judgment after the disputed facts have been

ascertained, either by proof or by mutual admission; the appellants to have the expenses in the Court of Session after the date of closing the record, and the costs of this appeal.

Counsel for the Appellants—Robson, Q.C.—Salvesen—Hon. M. Macnaghten. Agents—Learoyd, James, & Miller, for James Russell, S.S.C.

Counsel for the Respondents—Joseph Walton, Q.C.—Aitken. Agents—W. A. Crump & Son, for Webster, Will, & Ritchie, S.S.C.

Monday, July 11.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, Macnaghten, and Morris).

INGLIS v. ROBERTSON AND BAXTER.

(*Ante*, March 18, 1897, 34 S.L.R. 577, and 24 R. 758.)

*Foreign—Arrestment—Competition as to Real Right in Moveables—Lex rei sitæ.*

*Held (aff. the judgment of the Whole Court) that the right of a Scotch creditor, completed by arrestment of goods in Scotland belonging to a foreign debtor, cannot be defeated by a transaction between the debtor and another foreigner which would be, according to the law of their domicile, but is not, according to the law of Scotland, sufficient to create a real right in the goods.*

*Right in Security—Pledge of Document of Title—Factors Act 1889 (52 and 53 Vict. c. 45)—Factors (Scotland) Act 1890 (53 and 54 Vict. c. 40), sec. 51.*

The Factors Act 1889 (extended to Scotland by the Factors (Scotland) Act 1890) provides by section 3 (a section falling within the group of sections headed "Dispositions by Mercantile Agents"), that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods;" and by section 9 (a section falling under the heading "Dispositions by Buyers and Sellers of Goods"), that "where a person having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person . . . of the goods or documents of title under any sale, pledge, or other disposition thereof to any person receiving the same in good faith and without any 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."

A buyer of goods, after they had been transferred into his name by the warehouse-keeper in whose custody

they were at the time of the sale, obtained from the warehouse-keeper warrants which bore that the goods were held to the order of the buyer as owner or his assignees by endorsement. The buyer subsequently endorsed the warrant to a third party in implement of a contract assigning the goods in security. The original seller thereafter arrested the goods in the hands of the warehouse-keeper.

*Held*, in a competition between the original seller and the endorsee of the documents of title, that the latter could not found on either of the above sections, in respect that the pledge of the documents of title had not been made either (1) by a mercantile agent, or (2) by a person obtaining possession of the documents of title "with consent of the seller."

*Observed* that the statutory headings in the Factors Act are not mere marginal notes, but the sections or the groups to which they belong must be read in connection with them and interpreted by the light of them.

This case is reported *ante ut supra*.

The claimant Inglis appealed.

At delivering judgment—

**LORD CHANCELLOR**—In this case the question to be determined is, whether a certain parcel of whisky—or rather the sum of £1000, 10s. 6d. representing its value—belongs to the respondents in this appeal, and it cannot be doubted that unless the Factors (Scotland) Act 1890 (53 and 54 Vict. c. 40) (extending the English Factors Act 1889 (52 and 53 Vict. c. 45) to Scotland) is in the way of the respondents, who arrested the whisky in the hands of the Clyde Bonding Company, the creditors (that is to say, the respondents, who have so arrested the whisky) are entitled to the sum in question.

The section in respect of which the question arises is the third section, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." It can hardly be denied that if that section is applicable to this case, the pledging of the document of title would be for all purposes as valid to constitute an actual right in the goods themselves as if the goods themselves had been physically handed over to the pledgee. But the only point in this case seems to me to depend upon whether that section is applicable to the facts in this case, and that in turn depends upon whether the person pledging comes within that part of the statute which the Legislature has separated from the other parts of the statute as applicable "to dispositions by mercantile agents."

The Act, which is a Consolidation Act, and also an amending Act, is separated into parts. Section 1 is "preliminary," and the definition of a mercantile agent is—"A mercantile agent shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods."

From the 2nd section to the 7th inclusive the Legislature has enacted what shall be the law in respect of "Dispositions by Mercantile Agents." From the 8th to the 10th, "Dispositions by Sellers and Buyers of Goods" are dealt with, and the 11th to the 17th are described as "Supplementary."

I cannot doubt that each of the sections included in this separate portion of the statute must be read as only applicable to the cases of persons indicated by that separate part of the statute, and if so, it seems to me that the case is free from doubt, since under the circumstances of this case there was no disposition by a mercantile agent.

This seems to me to dispose of the case, though indeed it was suggested that under the 9th section (which comes within the part of the statute applicable to sellers and buyers of goods) it might be contended here that these goods were obtained with the consent of the seller, and under the conditions prescribed by that section. But it appears to me the facts raise no such question.

I have referred to the English Act exclusively in what I have said, simply because the Act has been extended in its operation to Scotland subject to certain provisions not relevant to any question raised in this case. If the general law of Scotland be different from that of England in respect of pledges, though I do not say it is, that Act certainly did not purport, nor did it in fact alter in any other respect than that specially enacted, the law of Scotland as it stood at the passing of the Act.

I am therefore of opinion that this appeal should be dismissed with costs, and I move your Lordships accordingly.

**LORD WATSON**—Walter C. Goldsmith, a wine merchant in London, purchased, in December 1893, from the respondents Robertson & Baxter, who are wine and spirit merchants in Glasgow, a quantity equal to 600 hogsheads of blended Scotch whisky, deliverable during the year 1894. The whisky was stored in a bonded warehouse at Glasgow. From the productions made by the appellant in this process it appears that Goldsmith, after his purchase, had the whisky transferred to his name in the books of the Clyde Bonding Company, and obtained from them delivery-orders in these or similar terms—"Warrant for ten hogsheads whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon."

In December 1894 Goldsmith obtained a loan of £3000 from the appellant, an English merchant, to whom he delivered a letter purporting to hypothecate 180 hogsheads and 101 quarter-casks of Scotch whisky, as per schedule annexed, in security for the loan, with interest at £7 per cent. per annum, and containing a power of sale. The whisky thus hypothecated was part of the quantity which had been purchased from the respondents by Goldsmith, and was still lying in his name in the bonded warehouse at Glasgow. Along with the letter Goldsmith endorsed and handed to

the appellant the warrants which he held for delivery of the whisky. The appellant did not intimate the right and interest which he had thus acquired in the whisky to the keepers of the bonded warehouse.

Goldsmith having failed to make payment to the respondents Robertson & Baxter of the sum of £1000, 10s. 6d., being the balance of price then remaining due to them, they on the 11th February 1895 arrested the whisky in the hands of the Clyde Bonding Company, in order to found jurisdiction against their debtor, and then raised an action against him before the Court of Session, upon the dependence of which they again arrested the whisky, on the 18th February 1895.

Under an arrangement made between the respondents and Alfred Cotton Harper, chartered accountant in London, as trustee administering the estate and affairs of Walter C. Goldsmith, the whisky was sold in April 1895, upon consignment of the sum of £1000 in the British Linen Company's Bank, Edinburgh, as a *surrogatum* for the goods sold, subject to the arrestments and claims of all parties who had an interest in the whisky. The present action of multiple-poining was thereafter brought by the holders of the consigned fund, and two competing claims were lodged, which have been keenly contested and have led to this appeal. The respondents claim the fund *in medio*, not as having a right of retention or other interest as unpaid sellers of the goods, but as personal creditors of Goldsmith, in whose name as owner the goods were at the dates of their arrestments held in Scotland by the actual custodiers, the Clyde Bonding Company; the appellant, on the other hand, claims an interest in the fund *in medio* preferable to that of the respondents, upon the ground that prior to the date of their arrestments he had become pledgee and endorsee of the delivery-orders which constituted the documents of title to the goods within the meaning of the Factors Act 1889. He maintains that the legal effect of such a pledge, both according to the law of England and according to the law of Scotland as altered by the provisions of the Factors (Scotland) Act 1890, was to vest the property of the goods in him.

I do not find it necessary to consider, for the purposes of this appeal, whether or in what circumstances, according to the law of England, a valid pledge of documents of title to goods stored in a bonded warehouse, will enable the pledgee to defeat the right of a creditor of the person who in the warehouse books is entered as the owner of the goods. The present question does not arise between two Englishmen, nor does it arise in relation to mercantile transactions which can reasonably be characterised as English. The *situs* of the goods was in Scotland. The Scotch creditors who claim the proceeds did not make any English contract, and in order to attach them they made use of the execution which the law of Scotland permits, for converting their personal claim against the owner into a real charge upon the goods themselves. It

would, in my opinion, be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scotch creditor, when so perfected, can be defeated by a transaction between his debtor and the citizen of a foreign country, which would be according to the law of that country, but is not, according to the law of Scotland, sufficient to create a real right in the goods.

I can see no reason to doubt that, by Scotch law as well as English, the endorsement and handing over of delivery-orders in security of a loan, along with a letter professing to hypothecate the goods themselves, is sufficient in law, and according to mercantile practice, to constitute a pledge of the documents of title, whatever may be the value and effect of the right so constituted. In my opinion the right so created, whether in England or in Scotland, will give the pledgee a right to retain the *ipsa corpora* of the documents of title until his advance is repaid. The crucial question in this case is, whether the right goes further and vests in the pledgee of the documents, not a *jus ad rem* merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodian for Goldsmith as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scotch law, the effect of vesting the property of the whisky, or in other words a *jus in re*, in the pledgee.

I have been surprised by the suggestion, which appears to have found favour with one of the learned Judges in the Court below, that the recent decision of this House in *North Western Bank v. Poynter, Son, & Macdonalds*, Ap. Ca. 1895, p. 56, is an authority for holding that this appeal ought to be decided according to English law. The circumstances of that case appear to me to stand in marked contrast to the facts of this appeal. There a Liverpool firm owned and held the bills of lading of a cargo destined to the port of Glasgow. The firm obtained an advance from a Liverpool bank, to whom they, as a security, duly endorsed the bill of lading, which carried the property of the goods, according to Scotch as well as English law. The bank sent the bill of lading, without endorsing it, to the pledgors in Liverpool, in order that they might act as the agents of the bank in selling the cargo and receiving and accounting for the price. Upon that footing the pledgors sold the cargo, and a Scotch creditor, to whom they owed a personal debt, arrested the price in the hands of the purchaser in Scotland, and claimed a preferable right to it, upon the ground that by the law of Scotland the pledgees had lost their right of property in the cargo, which had reverted to the pledgor, in consequence of their having returned the bill

of lading to him for a temporary and special purpose. I thought at the time, and I remain of opinion, that the relative rights of the pledgor and the pledgee depended upon the law of England, the country in which the pledge of the bill of lading was made, and in which the circumstances which were said to have destroyed the right of the pledgees occurred. I am not prepared to hold that whenever the cargo of a ship is destined to a port in one country all the dealings of the owner of the cargo with the bill of lading, which represents and carries the property of the goods, must in every other country be governed by the law of the *locus* where the ship is to unload.

It was not disputed by the appellant's counsel, and it is hardly necessary to repeat, that by the common law of Scotland the endorsement and hypothecation of delivery-orders, although it may give the pledgee a right to retain the documents, does not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery-orders to the custodian by whom they were granted, and obtaining delivery of the goods from him, or by making such intimation of his right to the custodian as will make it the legal duty of the latter to hold the goods for him. His right, which, in so far as it relates to the goods is in the nature of a *jus ad rem*, will be defeated if before he has either obtained delivery or given such intimation the goods are validly attached in the hands of the custodian by a creditor of the person for whom the custodian holds them.

It was argued, however, that the common law of Scotland has been materially altered by the provisions of the Factors Act 1889, their effect being that a pledge of the documents of title is by itself sufficient to carry a real right to the goods, and that the pledgee of the documents, from the moment when his right is completed by endorsement and delivery, is in the same position as if he had been pledgee of the goods and had obtained possession of them. The Statute is an English Act, which consolidates and repeals the previous Factors Acts, from 4 Geo. IV. cap. 83, to 41 Vict. cap. 39. But by the Factors (Scotland) Act 1890 the whole provisions of the English statute of 1889 are extended to Scotland, and must therefore be construed as if they had originally been made applicable to that country.

Two clauses of the Act of 1889 were founded on by the appellant. The first of these is section 3, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." So far as it applies the language of that clause is unambiguous. It provides that to that extent a pledge of the documents of title shall, although in point of fact it is not so, be nevertheless regarded in law as equivalent to a pledge of the goods. If the enactment had been embodied in a statute which contemplated an alteration of the general law with regard to contracts of pledge in Scotland, I should have had little

difficulty in holding that its effect would have been to make a pledge of the documents of title in all cases equivalent to a completed pledge of the goods themselves. But I am unable to come to the conclusion that the clause was meant to be or is of general application. It is one of a group of clauses which are collected under the statutory heading "Dispositions by Mercantile Agents"; and an examination of the context of these clauses shows, conclusively in my opinion, that the enactments of section 3 were merely intended to define the full effect of a pledge of the documents of title made by a mercantile agent under and by virtue of one or other of the sub-sections of the preceding clause (section 2). Accordingly, section 3 has, in my apprehension, no application to the case of a pledge of documents of title by one who was in the position of Goldsmith, or by any other person who is not a mercantile agent within the meaning of the Act of 1889.

The other clause founded upon by the appellant was section 9, one of a group of clauses which occur under the statutory heading "Dispositions by Sellers or Buyers of Goods." The main, if not the sole, object of these clauses appears to be this—to protect the purchaser or pledgee of documents of title deriving right from one who is lawfully in possession of them against a claim of retention for unpaid price, or a right of stoppage *in transitu*, by the original seller, in cases where the purchaser or pledgee has had no notice of such claim or right. Goldsmith, from whom the appellant derived his right as pledgee to the documents of title representing the whisky in question, was not a pledgor within the meaning of section 9, who must be a person who has obtained the documents of title either from his seller or with consent of his seller, Goldsmith did not obtain the documents of title which he pledged to the appellant from the respondents, who were his sellers, or with their consent. He got the documents in his own right, and in his own name, as owner of the whisky directly from the warehousemen, after the goods had been transferred to his name in the warehouse books.

I am therefore of opinion that the interlocutor appealed from ought to be affirmed, with costs.

**LORD HERSHELL**—The fund in question in this multiplepounding consists of the sum of £1000, representing a certain parcel of whisky belonging to Walter Goldsmith. On the 11th February 1895 the respondents, who were creditors of Goldsmith, arrested this whisky in the hands of the Clyde Bonding Company to found jurisdiction against Goldsmith, and afterwards raised an action against him upon the dependence of which they arrested the whisky on the 18th of February 1895. In this action they obtained a decree for the sum of £1000, 10s. 6d.

The appellant on the 18th December 1894 advanced to Goldsmith the sum of £3000 on the security of the same whisky and of certain wines not now in question.

On the 17th December 1894 Goldsmith had obtained from the Clyde Bonding Company warrants for the whisky in these terms, *mutatis mutandis*: "Warrant for ten hogsheads whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon." These warrants he endorsed to the respondent as security for the advance.

No notice was given to the Clyde Bonding Company by the respondent of the endorsement to him. The question is whether in these circumstances his claim is superior to that of the arresting creditors.

It was admitted on behalf of the appellant that, apart from the provisions of the Factors Act 1889, which were extended to Scotland by an Act of the year 1890, the claim of the respondents as arresting creditors must prevail. The question turns then on the construction of certain provisions of the Act of 1889. The section mainly relied on is the third, which is in these terms—"A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

I think that in the present case there was a pledge of documents of title to goods. They were endorsed and handed to the appellant as security for an advance, and he was clearly entitled to hold them until the advance had been repaid. This appears to me to have constituted a pledge of the documents, and I fail to see how it was any the less a pledge because the agreement of the 18th of December was at the same time executed by Goldsmith. But it is not necessary in the view I take to express an opinion upon the point so much discussed in the judgments in the Court of Session, whether the effect of the enactment is to put the pledgee of the documents of title in the same position as if he had received possession of the goods to which the documents relate. I think the enactment has no application to the present case, inasmuch as the pledge was not a disposition by a mercantile agent, and in my opinion it is to such dispositions only that the section applies. It is true that it is general in its terms, but it is one of a group of sections headed, "Dispositions by Mercantile Agents." The Act is divided into parts. The first, headed "Preliminary," consists of a definition clause. The last part, headed "Supplemental," contains provisions as to the mode of transfer "for the purposes of this Act," and certain savings. The other two parts are headed respectively "Dispositions by Mercantile Agents" and "Dispositions by Buyers and Sellers of Goods." These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them. It appears to me that the Legislature has clearly indicated the intention that the provisions of section 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents.

The only other section relied on by the appellant is the 9th. I think this section

also is inapplicable to the case before your Lordships. I am not satisfied, as at present advised, that the section applies in any case where no right to the goods or the documents of title remains in the seller who has parted with possession of them. But I do not decide this point. The possession of the documents of title which were pledged was obtained from the warehouse-keeper by the appellant by virtue of his ownership of the goods. They had already been transferred into his name by the warehouse-keeper, and were held for him before the warrants were delivered. I think in these circumstances it cannot properly be said that he obtained possession of them "with the consent of the seller."

For these reasons I think the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN—I agree.

LORD MORRIS—I am of the same opinion.

Appeal dismissed with costs.

Counsel for the Appellants—Pyke, Q.C.—E. Martin—Wooten. Agents—Irvine & Borrowman.

Counsel for the Respondents—Upjohn, Q.C.—R. T. Younger—T. T. Robertson. Agents—F. W. Reynolds, for Morton, Smart, & Macdonald, W.S.

Monday, July 11.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

GLASGOW CORPORATION v.  
GLASGOW TRAMWAY AND OMNIBUS  
COMPANY, LIMITED.

(Ante, March 4th 1897, 34 S.L.R. 460, and 24 R. 628.)

*Lease—Lease of Tramway—Conditions of Lease—Tenant's Right of Relief from Landlord in respect of Owner's Rates and Taxes.*

By lease entered into in 1871, the Corporation of Glasgow let to the Glasgow Tramway and Omnibus Company, Limited, the sole right to use, for the sole purpose of the Glasgow Street Tramways Act 1870, carriages with flange wheels on the whole of the tramways authorised to be formed by that Act, for 23 years from 1st July 1871. The terms of this lease were (amongst others) that the Corporation should make the tramway out of moneys to be raised or borrowed by them, and that the company should pay half yearly to the Corporation the amount actually paid or payable on the money borrowed by them and expended on the tramways and on certain other expenses which were to be regarded as expenditures on capital account. The company undertook the whole cost of maintenance and repair during the