

[HEARD 13th—JUDGMENT 20th March, 1849.]

Messrs. McEwan, Sons and Co., Merchants in Glasgow,  
*Appellants.*

Messrs. James and Archibald Smith, Merchants in Glasgow,  
*Respondents.*

*Sale—Stoppage in Transitu—Vendor and Purchaser.*—A delivery note “to the order” of the vendee is not such a document as will, by the endorsement of the vendee, transfer a right of property to the transferee and destroy the vendor’s lien for the price.

*Ibid.*—Where goods have been deposited in a warehouse by an agent in his own name for his principals, naming them, notice to the agent of a delivery note will not work a transference of possession of the goods to the parties giving the notice, so as to defeat the lien of the vendor for the price.

ON the 15th August, 1843, the Respondents sold to Bowie and Co., of Glasgow, forty-two hogsheads of sugar, to be paid for in cash. Afterwards the bargain, at the request of Bowie and Co., was so far altered, that Smith and Co. agreed to take Bowie and Co.’s bills at four months instead of cash. The sugars at the time of this sale, were lying in the bonded warehouse of Messrs. Little and Co., in Greenock, where they had been placed by Alexander, the agent of the Respondents, and the entry made in the warehouse-books was “James Alexander for J. and A. Smiths.”

At the time of the sale the Respondents handed Bowie and Co. a letter from them addressed to Alexander in these terms,

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“ Glasgow, 15th August, 1843,

“ Mr. James Alexander, Greenock,

“ Dear Sir,—You will please deliver to the order of Messrs.  
 “ James Bowie and Co., the undernoted forty-two hogsheads of  
 “ sugar, ex St. Mary, from Jamaica, in bond.

“ We are,

“ J. and A. SMITH and Co.

W

W H      12 hogsheads.

D          30      „

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42 hogsheads of sugar.”

On the 22nd of August, 1843, Bowie and Co. sold the sugars to the Appellants, the price to be payable by bill. The Appellants gave Bowie and Co. their bills for the price and received from them the letter from Smith and Co. to Alexander, of the 15th August, with an indorsement upon it in these terms, “ Deliver to the order of William McEwan, Sons, and Co., “ James Bowie and Co.”

On the 15th of September the Respondents wrote Alexander, desiring to have the sugars weighed. On the 16th, Alexander answered that Bowie and Co's. agent had got no order of delivery. On the 18th, the Respondents wrote Alexander that Bowie and Co. had “ promised to forward order of delivery,” and expressing a hope that the sugars had been weighed over. On the 19th Alexander had the sugars weighed, and that day forwarded the weights to the Respondents in a note bearing the following title:—“ Weights of forty-two hogsheads of sugar ex “ St. Mary, Jamaica, delivered Messrs. James Bowie and Co., “ per order of 15th August, 1843;” and along with this note Alexander also sent a note of the warehouse rent charged up to that date.

At the same time Alexander made an entry in his memo-

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randum book of weights and delivery in the same terms with those contained in the note of weights sent to the Respondents.

On the 25th of September the Appellants, through their agents at Greenock, sent to Alexander the letter of the Respondents of the 15th of August, with the endorsement upon it by Bowie and Co., and received from Alexander's clerk, he himself being absent at the time, a note which according to its appearance when produced in Court, was in these terms:—

“ Greenock, 25th September, 1843. *Delivered* to the order of  
“ Messrs. William McEwan, Sons, and Co., this date,

“ JAMES ALEXANDER per JOHN ADAMS,

W

W H      12 hogsheads

D        30        „

“ Sugar, ex St. Mary.”

But the word “*delivered*” seemed to have been originally “*deliver.*”

On the 25th of September Bowie and Co. stopped payment; and on the 26th their estates were sequestrated.

On the 26th Smith and Co, who had not as yet received from Bowie and Co. their bills for the price of the sale to them, wrote Alexander that they had heard of Bowie and Co.'s failure, and desired him to secure the forty-two hogsheads of sugar, “ if  
“ they are still in the warehouse.” When this letter arrived, Alexander's clerk was in the act of making an entry in his import-book, where purchasers' names were entered, in regard to these sugars, and had already marked off ten hogsheads as purchased by the Appellants. Alexander stopped any further entry, and on the same day applied for and obtained leave from the Custom House authorities to remove the sugars into another warehouse, and on the 27th they were removed from Little and Co's. warehouse to another warehouse in Greenock, where they were deposited to the order of the Respondents, and where they continued thenceforth.

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In these circumstances the Appellants presented a petition to the sheriff, praying him to ordain the Respondents to deliver up the sugars to them, and to interdict the Respondents from selling or otherwise dealing with them. The sheriff dismissed the petition, and the Appellants then carried the case by advocacy to the Court of Session.

The Lord Ordinary (Wood) on the 17th of December, 1844, remitted the cause simpliciter to the sheriff. The Appellants reclaimed, and the Court being equally divided, upon advising the record which had been prepared in the Sheriff Court, ordered cases to be prepared by the parties, and being still equally divided, after advising these papers, they directed them to be laid before the other Judges for their opinion. The consulted Judges by a majority of six to three, concurred in the interlocutor of the Lord Ordinary, (who was one of the six). In conformity with these opinions, the Court, which still continued to be equally divided, (on the 14th of January, 1847,) adhered to the interlocutor of the Lord Ordinary.

*Mr. Turner* and *Mr. Anderson* for the Appellants.—The first question which arises is upon the terms of the Factors' Act, 6 Geo. IV., cap. 94, sect. 12, by which it is enacted that any person "entrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner of the goods," &c., "so far as to give validity to any contract or agreement by such person, so entrusted and in possession as aforesaid, with any person for the sale or disposition of the said goods," &c., "upon the faith of such several documents or either of them, provided such person shall not have notice by such documents or either of them or otherwise, that such person so entrusted as aforesaid, is not the actual and *bonâ fide* owner or proprietor of such goods," &c.: And upon the 5 & 6 Vict., cap. 39, which in its first section enacts that any

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agent “ who shall be entrusted with the possession of goods or  
 “ of the document of title to goods, shall be deemed and taken  
 “ to be owner of such goods and documents, so far as to give  
 “ validity to any contract or agreement by way of pledge, lien,  
 “ or security *bonâ fide*, made by any person with such agent so  
 “ entrusted as aforesaid,” &c.; and in its fourth section “ that  
 “ any bill of lading, India warrant, dock warrant, warehouse-  
 “ keeper’s certificate, warrant or *order for the delivery of goods*,  
 “ or any other document used in the ordinary course of business,  
 “ as proof of the possession or control of goods, or *authorizing*,  
 “ or *purporting to authorize, either by indorsement or by delivery*,  
 “ the possessor of such document to *transfer or receive goods*  
 “ thereby represented, shall be deemed and taken to be a *docu-*  
 “ *ment of title* within the meaning of this Act; and any agent  
 “ entrusted as aforesaid, and possessed of any such document of  
 “ title, whether derived immediately from the owner of such  
 “ goods, or obtained by reason of such agent’s having been  
 “ entrusted with the possession of the goods, or of any other  
 “ document of title thereto, shall be deemed and taken to have  
 “ been entrusted with the possession of the goods represented  
 “ by such document of title as aforesaid; and all contracts  
 “ pledging or giving a lien upon such document of title as  
 “ aforesaid, shall be deemed and taken to be respectively  
 “ pledges of and liens upon the goods to which the same relates;  
 “ and such agent shall be deemed to be possessed of such goods  
 “ or documents, whether the same shall be in his actual custody,  
 “ or shall be held by any other person subject to his control, or  
 “ for him, or on his behalf.”

These statutes, therefore, convert possession under a colourable title into an absolute possession, and give third parties power to deal accordingly. When the Respondents gave Bowie and Co. the letter of the 15th of August, 1843, they put them “ in possession of an order for delivery,” which entitled third parties to consider them the true owners. No doubt there was

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a condition understood at the time that Bowie and Co. should, in exchange, give their bills for the price, but there is no pretence that the Appellants were aware of this condition; Bowie and Co., therefore, were the true owners of the goods so far as regards any sale made by them to third parties, and were as such entitled to give an indefeasible title. The indorsement of the order transferred this title to the Appellants, for the effect of the statute is to make orders for delivery as transferable in the market, as bills of lading had long previously been established to be.

II. But, assuming constructive ownership in Bowie and Co., under the statute, not to be established, the next question is whether constructive possession had not been obtained by the Appellants under the notice given by them to Alexander. The goods had been deposited by Alexander in Little and Co's. warehouse, and he was answerable to them for the rent as they were to him for the safe custody of the sugars. Without his authority Little and Co. could not have transferred the sugars into any other name. If it had not been intended that Alexander should have this control, why were the sugars entered in his name? The only object could have been that he, living upon the spot where they were deposited, would be able to exercise a more immediate, and, therefore, convenient control than the Respondents, residing at a distance, could have exercised.

Alexander, therefore, had the complete immediate control over the goods and, so far as any notice required from a vendee in order to make his purchase effectual was concerned, he stood in the place of the warehouse-keeper in the ordinary case, where there is no one interposed between him and the vendor.

Such being Alexander's position, the letter which the Respondents addressed to him on the 15th August, and put into the hands of Bowie and Co., was equivalent to an order of delivery, addressed to a warehouse-keeper. That letter gave

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Bowie and Co. a title of possession, and not being confined to them personally, but extended to their "order," it armed them with a title to deal with all the world, which third parties were entitled to rely upon. The indorsement of the letter to the Appellants effectually transferred to them the title which was thus in Bowie and Co., and the notice which was given to Alexander by the Appellants on the 25th of September, was as effectual to complete transference of the property, as if it had been given to Little and Co., who had the actual corporal possession, for the principle of all the cases in requiring notice to the warehouse-keeper is, that the notice shall be given to the party having the direct control of the goods, and is sufficiently answered where, as in the present case, it is given to an interposed person, who had as complete control as the warehouse-keeper.

No doubt the Respondents, as between them and Bowie and Co., had a lien upon the sugars for payment of the price, which they might have enforced by stopping the sugars *in transitu*, but that right could not be enforced to the prejudice of parties dealing *bonâ fide* with their vendee on the faith of an order by themselves to deliver to him or his order; a document which was negotiable in its nature, and such as parties dealing with the vendee were entitled to rely on as giving a title, and which had been duly intimated to Alexander, the custodier.—*Bell on Sale*, 124.—*Cross on Lien*, 382.—*Hawes v. Watson*, 2 *Bar. and Cres.* 540. Here Alexander, as the wharfinger in that case, acknowledged the right of the Appellants by the entry in his books of the delivery to them. A sub-vendee in the general case, is in no better condition than the original vendee, in questions with the original vendor, he merely stands in his place; accordingly, in *Dixon v. Yates*, 5 *B. and Ad.* 313, it was held, that as the price had not been paid by the vendee, and the vendor had not given an order for delivery, purchasers from the vendee were not entitled to demand the goods, because the

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sub-vendee claimed through the vendee, who could not have a title till the price was paid. This, however, may be changed by the act of the vendor himself, in authorising what has passed between the original vendee and the sub-vendee, *Pickering v. Busk*, 15 *East*. 38.

In *Tod v. Rattray*, 1st *February*, 1809, *F. C.* 132, it was held that intimation to Allan, the revenue officer was equivalent to intimation to the warehouse-keeper, that an order of delivery was a transferable document, and that a fund of credit had been given by parting with it; so here the Respondents, by giving the order to Bowie and Co., held them out to the world as the owners of the goods, with whom any one was at liberty to deal in that character. In *Hurry v. Mangles*, 1 *Camp.* 452, acceptance by the vendor of warehouse rent from the purchaser after the period for delivery of the goods, was treated as working a transfer of the property, and putting an end to the right to stop in transitu. In *Whitehouse v. Frost*, 12 *East*, 614, where the goods which had not been taken out of the bulk of which they formed a part at the time of sale, acceptance given by the vendor to a sub-vendee, of a transfer of the vendor's order for delivery, was held to deprive the vendor of power to retain the goods in his possession against the sub-vendee.

*Mr. Attorney General*, and *Mr. Blackburn*, for the Respondents.—The *first* point taken by the Appellants, cannot arise on the facts of this case, for the statutes, looking to their preamble as well as their purview, were intended to apply only to the case of agents or factors, but Bowie and Co. were neither agents nor factors, but themselves the true owners of the goods upon a defeasible title, which no construction of the statutes can convert into an indefeasible one. The same question was argued and disposed of in *Jenkins v. Usborne*, 7 *Man. & Gr.* 700.

II. The true question which alone can be raised is whether there was a constructive delivery of the sugars to the Appellants?



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—whether anything had been done by the vendors to part with possession, whereby they had lost their lien for the price. It is admitted that if Alexander was not custodier of the goods there is an end of the question, and it could not well be otherwise, for if he had not the actual possession, it was impossible for him to give constructive possession.

In questions of stoppage in transitu, what determines the transitus is an act of the custodier of the goods assenting to the contract between the vendor and vendee, and agreeing to keep the goods as the agent of the vendee. Until he does so, no constructive possession is delivered to the vendee. *Whitehead v. Anderson*, 9 *Mees & Wels.* 535. *Dodson v. Wentworth*, 4 *Man. & Gr.* 1080.

What then was the position of Alexander in this respect? The sugars were entered in his name as agent for the Respondents by their names, and the admission of the Appellants upon the record is that they “remained in the warehouse” in Messrs. Smith and Co.’s name, and of course subject to “the order, disposal, and control, by them or those acting for them.” How then could Alexander be the custodier? He had hired the warehouse of Little and Co., no doubt, but he was not even liable for the rent, having disclosed the Respondents as his principals in the hiring. *Ex parte Buckley*, 14 *Mees, & Wels.* 469. The Respondents, therefore, were the contractors with Little and Co. for the use of the warehouse, and were entitled to regulate that use, so far as regarded these sugars, until they had done something, to authorize Little and Co. to consider that their liability to them in respect of the sugars was at an end. If that be so, then intimation to Alexander could not be of any avail, for Alexander was in truth the Respondents. He was their agent and nothing more—intimation to him, therefore, was merely intimation to the Respondents themselves.

In *Hurry v. Mangles*, and *Whitehouse v. Frost*, the goods

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had continued after sale in the warehouse of the vendor, who was thus the warehouseman. In the first of these cases, the vendor had accepted rent from the vendee for the period subsequent to that at which delivery of the goods should have been taken, and in the other, the vendor had accepted notice of a sub-sale, and the question in both of the cases was whether the vendor was in truth the warehouseman, and whether what had been done by him was sufficient to determine his right to stop in transitu, so as to defeat a sub-sale. Neither of these cases therefore has any bearing upon the present. In *Harman v. Anderson*, and *Lucas v. Dorien*, the warehouse-keeper was a third party, and the only question in these cases, was whether notice having been given to the warehouse-keeper, what had been done by him was sufficient acceptance of the notice, and attornment to the party giving it. None of these cases give the slightest authority for saying that goods being in the possession of a third party as warehouseman, notice not to him, but to the agent of the vendor, is sufficient to prevent stoppage in transitu.

It does not make any difference in ascertaining what is necessary to be done in order to prevent stoppage in transitu that the question arises with a sub-vendee. A sale by a vendee before he has paid the price of his purchase, is made at the risk of the parties, for though sale gives a right of property it does not confer a right of possession also, nor give the vendee power to confer that right upon another party, unless in so far as the vendor has by his own act enabled him to do so; until the price is paid it is in the power of the vendor to stop delivery of possession, *Dixon v. Yates*, 5 *Bar & Ad.* 313. *Bloxam v. Sanders*, 4 *Bar & Cres.* 941.

But it is said that the terms of the letter of 15th of August formed an estoppel against the vendors stopping the goods in transitu. A bill of lading, for the convenience of trade, has a peculiar effect given to it. It is allowed to be transferable, and to give to the transferee a right of possession, but that

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quality has never been allowed to an order of delivery, *Farina, v. Holmes*, 16 *Mees, & Wels.* 119. And the circumstance that the terms of the order were conceived to the “order,” of the party does not alter the matter. The sub-vendee was not misled in this respect, for it did not amount to more than an order to Alexander to go with Bowie and Co. to Little and Co., and do what was necessary, and the Appellants must be held to have known that the document would avail nothing until thus intimated to Little and Co., and assented to by them.

LORD CHANCELLOR.—The facts on which the question in this case arises, are very short. Messrs. Smith and Company, the Respondents, having imported a certain quantity of sugars, they were placed in a warehouse at Greenock, of which the keepers were Messrs. James Little and Company, and they were entered in their books in these words, “James Alexander, for J. and A. Smith.” They remained in their custody until the time when the parties to whom Messrs. Smith and Company sold them, Messrs. Bowie and Company, had become insolvent. On the 26th of September, Messrs. Smith and Company wrote the following note to Mr. Alexander—“I have just heard of Bowie and Company’s failure. Take immediate steps to secure our forty-two hogsheads of sugar, ex St. Mary, lately sold them, if they are still in the warehouse.” Upon that, Mr. Alexander, who acted for Messrs. J. and A. Smith, caused the goods to be removed into another warehouse.

So far, these facts of course would show no matter of dispute at all, the vendors not having parted with the possession; the possession, in fact, remaining as it was at the time of the sale. Before the possession was parted with, or the custody altered, upon the failure of the vendees, they removed the goods to another warehouse.

But then a question is raised, not on behalf of Messrs.

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Bowie and Company, to whom the goods were originally sold, but on behalf of the present Appellants who bought from them. It appears that the sale to Messrs. Bowie and Company took place and was accompanied by a delivery-note in these words—“Mr. James Alexander. Dear Sir,—you will “ please deliver to the order of Messrs. James Bowie and Com-  
“ pany, the undernoted forty-two hogsheads of sugar, ex St.  
“ Mary, from Jamaica, in bond”; upon which it does not appear that anything was done by Messrs. Bowie and Co., but they as it is alleged, afterwards sold these sugars to the present Appellants. The Appellants, however, did nothing in order to obtain possession of the sugars or to transfer the custody into their own name, till the 25th of September. On that day they applied, not to Messrs. Little and Company, with whom the goods were in bond, but they went to the place of business of Mr. Alexander, and Mr. Alexander not being there, a clerk of his, John Adams, gave them the following memorandum: “Greenock, 25th of September, 1843. Deliver to the order of  
“ Messrs. William McEwen, Sons, and Company, of this date.” That document is not addressed to anybody; and it appears that the word “deliver” in it had been altered to the word “delivered.” Whatever may have been the object of that alteration, and it could not have been any good one, it entirely failed, because it was nonsense to state that the goods were delivered. Delivered they were not, and delivered they could not be, for they were not, in fact, in the hands of Mr. Alexander, but in the hands of Messrs. Little and Company, the warehousemen. This order to deliver the goods, reading it in that way, was, in fact, all that Alexander could have done if he had been there to write it instead of his clerk. Being the agent for the vendors, and the goods being in the warehouse of Messrs. Little and Company, he could only have acted under the authority which he derived from the original delivery-note of the vendors, and all he could have done under it would have been to give directions to the

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warehouseman to deliver the goods, and that is the purport and effect of the document which is signed by John Adams in the absence of Alexander.

So far, therefore, my Lords, it is very clear that at the 26th of September, the date upon which the vendors caused these sugars to be removed to another warehouse, nothing had been done to change the possession; Little and Company being the parties in possession, the custodiers of the goods, and the sugar remaining in their warehouse as it had done on the day of the sale. There cannot, therefore, be any doubt, under those circumstances, of the title of the vendors when they heard of the failure and bankruptcy or insolvency of the vendees, to revoke the sale which they had made to them, the price not having been paid, and to deal with the sugars as their own.

But then, this case, which is so clear as to the facts, is met by several points made on behalf of the sub-vendees. The first is, that though a delivery-note it is admitted does not pass the property as a bill of lading would have passed it, and although it has no effect in altering the title to the property, by being handed over and by being endorsed by one party to another, yet it is said the party giving the delivery-note is estopped from disputing it, and it is represented as a sort of fraud in him to give this note into the hands of the vendee and thereby enable him to impose upon some third party. But that is putting the same question in another form. If the party is to be estopped from disputing the title obtained under a delivery-note, that is giving to the delivery-note all the effect of a bill of lading. In fact, there is no such fraud. The effect of a delivery-note is perfectly well known in trade. It is perfectly well known that a title does not pass by a delivery-note, and it is perfectly well known that it does pass by a bill of lading. There is, therefore, no ground, as it appears to me, for that argument, which would, in fact, alter the nature of a delivery-note and convert it into a bill of lading.

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Then it is said that Mr. Alexander was the custodier of the goods, that he was the party in actual possession, and that the possession was altered by that note of the 25th of September. Now, up to the 25th of September, it is not pretended that any application was made either to Mr. Alexander or to Messrs. Little and Company. It is said that Mr. Alexander was the party in possession, and that the note operated as a transfer of the possession. In the first place, it is quite clear to my mind, that Alexander was not in possession of the goods at all. He was named in the books of Messrs. Little and Company only as the agent of the vendors, "Alexander, for Smith and Company." He was, therefore, merely standing in their place, and not in the place of the warehouseman. He was merely the intermediate agent through whom the vendors meant to exercise their rights and powers as the owners of these goods.

Then another point was raised for the Appellants. It was said that this note of the 25th of September had this sort of effect,—assuming that the delivery-note itself, given to the first vendee, had no operation in passing the property, yet if the second vendee comes to the original vendor and obtains a new order, the vendor then cannot afterwards say he has not been paid by the first vendee, and so defeat the title of the second vendee, which he had, in fact, sanctioned, by making that second note, and dealing with him as a party entitled to the custody of the goods. My Lords, it appears to me that that is perfectly answered by this observation, namely,—that with respect to the note of the 25th of September, supposing the clerk to have had the same authority as Mr. Alexander had, supposing Mr. Alexander himself had signed the note, Mr. Alexander had no authority whatever beyond that which the first note gave him. He had no authority to give a better title to the second vendee than the first delivery-note authorized him to give to the first vendee. And this note cannot be considered as a dealing between the vendors and the second

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vendee, because, in fact, there was no communication between them.

Therefore, being of opinion that the circumstances, as they stand, without going through the particular points made on behalf of the vendee, clearly leave the title in the vendors; and being also clearly of opinion that those subsequent transactions which are said to take this case out of the ordinary rule, and to give a title to the second vendee, have no operation for that purpose, I shall move your Lordships to affirm the interlocutors appealed from with costs.

LORD BROUGHAM.—My Lords, I have no doubt whatever in this case. I think a great deal of argument has been used in the Court below which is utterly untenable, and that a great deal of ingenuity has been thrown away in endeavouring to perplex the case with matters which do not really belong to it, and that when you come to look at it on its own merits, and according to the facts as they stand, it is very simple and very clear.

The case has been treated as if Alexander were the agent of Smith and Company, the original vendors, and having the same powers in reference to these goods to all intents and purposes as they themselves had. There is no such fact in the case. No authority whatever was given to Alexander, except that which was contained in the first note of the 15th of August, authorising him to deliver the goods to Bowie and Company, the first vendees. Alexander was not in custody of the goods, and he never possessed any authority to sell them, or deal with them in any way.

With respect to the second delivery-note, and the alteration of the word "deliver" to "delivered," I entirely agree with my noble and learned friend, that nothing can possibly turn upon that alteration, for it is absolute nonsense to read it as it is so altered, because it is a notorious fact that the goods were

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never delivered out of the custody of Little and Company in whose warehouse they were. As to the effect sought to be given to the delivery-note, as if it operated as a bill of lading, I also agree with my noble and learned friend, that no such effect is to be attributed to it.

I, therefore, my Lords, consider this to be a case free from all reasonable doubts, and that it is only confused by connecting with it circumstances which really should be kept apart, and by assuming matters to be in the case which, in truth, are not there. I am clearly of opinion, with all the respect I entertain for the minority of the learned Judges, that the conclusion which was come to by the Court was perfectly correct, and that the decision must be affirmed with costs.

LORD CAMPBELL.—My Lords, the simple question in this case is, whether Messrs. Smith and Company, the original vendors of these goods, retained their lien upon them or not. Several of the Judges in the Court below, have expatiated very largely upon the doctrine of stoppage *in transitu*. My Lords, that doctrine has no more bearing upon this case, than the doctrine of contingent remainders. One of the learned Judges says that the doctrine of stoppage *in transitu*, has been recently introduced, and ought not to be extended. My Lords, what is the doctrine of stoppage *in transitu*? It is this; that when a vendor of goods has to send them to a vendee at another place, and has parted with his goods into the hands of a captain of a vessel or a carrier, while they remain in the hands of the captain or carrier, and before they have been delivered to the purchaser, upon the insolvency of the vendee they may be stopped by the vendor. That is a most equitable doctrine. It has been introduced into our commercial law, and I by no means would circumscribe it. But, my Lords, that has nothing in the world to do with this case, which is a pure question of whether the lien, which a vendor originally had, remains, or has been lost.



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Surely it has nothing to do with that doctrine, that the vendor has a lien upon them for the price when they are sold for ready money, and, in fact, remain in his possession. That is as old as the doctrine of bargain and sale of personal property.

Well then, my Lords, in this case Smith and Company were in possession of the goods at the time they were sold, and it is not a case in which they were sold to be delivered, at a distance, to the vendee. The vendee is in Glasgow, and the mode of dealing with the goods has been by transferring them, simply by altering the name of the vendor into the name of the vendee.

The goods, therefore, being in the possession of the vendor at the time of the sale, they remained in the possession of the vendor, as it is admitted, for some time after the sale. There was no delivery to the vendee. The price has not been paid, nether has the money been handed over, nor a bill of exchange given for the amount. Then how has the lien been lost? It is first said by the delivery-order. But my noble and learned friend, to my mind, has most clearly and satisfactorily established that that could not be the case, for the delivery-order did not at all change the possession of the goods.

But then it is said that the delivery-order, with the subsequent sale, and the payment of the price of the goods by the second vendee, is to be tantamount to a delivery. But, my Lords, there is no case in which that has ever been done. We know that by the Law Merchant, if a bill of lading is given, and that bill of lading is endorsed for a valuable consideration, it takes away the right of the vendor; but there has been no such decision with regard to the effect of a delivery-note. It is not alleged that such is the usage of the merchants of Glasgow, and it would be the strangest dictum to say that such is the usage. There is no reason to suppose that the delivery-order has any effect at all, further than as giving authority upon the

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payment of the price to the person in whose possession the goods are to deliver them. As to the saying that it is an estoppel, which prevents the vendor from exercising his lien, that is merely a circuitous way of saying that it is tantamount to a bill of lading; but upon what ground can it be so? If it could have been proved that such was the custom, then it might have been likened to a bill of lading. If it could have been proved that the intermediate price had been paid, then it might have been said that this was a fraud, but we have no reason to believe that this delivery-order operated otherwise than merely as an authority to the warehouseman in whose custody the goods were, to transfer them to the name of the purchaser upon the price being paid.

Then the delivery-order, and the subsequent purchase and payment of the purchase-money, clearly it appears to me do not take away the lien of the original vendor. It is said that possession has actually been given. Now, if Alexander had been the custodier of the goods, there would have been a foundation for that argument. Alexander was the agent of Messrs. Smith and Company, the vendors; but for what was he their agent? He was their agent to land and sell the goods. He was a broker. He was not a warehouse-keeper. The goods were not in his possession. The goods were in the possession of the keeper of this warehouse, not of Alexander, and therefore the foundation upon which this argument of the possession being transferred, as if Alexander were the custodier, he appearing only to have been the broker, and not the warehouseman, is based, entirely falls.

My Lords, it is said that this case is one of great hardship. But we must take care that hard cases do not make bad law; but I do not see that it is a case of such extreme hardship. It appears to me that McEwan and Company were guilty of very considerable negligence. When they bought the goods, they knew that they had been the property of Smith and Company,

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and they ought to have inquired whether the purchase-money had been paid or not. It is quite clear that the delivery-order was no guarantee to them that the price had been paid, and they ought either to have inquired before they entered into the bargain, or at all events before they themselves parted with their own money, whether the price had been paid by Messrs. Bowie and Company, or they should immediately have seen that the transfer was made into their own names. They remain, however, entirely supine till the failure of Messrs. Bowie and Company.

This decision of your Lordships, if your Lordships shall adopt the suggestion of my noble and learned friend, will not embarrass commerce in the slightest degree. It will only throw upon a person who buys goods under the circumstances of McEwan and Company, the necessity of being more cautious in their dealings. Therefore I fully concur with my noble and learned friends.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

LE BLANC and COOK—RICHARDSON, CONNEL, and LOCH,  
Agents.