

Tuesday, May 28.

FIRST DIVISION.

[Lord Ardwall, Ordinary.]

HAYMAN & SON v. M'LINTOCK
(M'NAIRN & COMPANY'S TRUSTEE)
AND OTHERS.

Right in Security—Sale—Bankruptcy—Ship—Bill of Lading—Store Warrants—Delivery Orders—Goods Placed in Store and not Set Aside or Marked—Rights of Holder of Bill of Lading, Store Warrants, or Delivery Order—Right of Purchaser—Sale of Goods Act 1893 (56 and 57 Vict. cap. 7), sec. 16.

A, a miller in America, sold flour to B & Co., a firm of merchants in Glasgow. Bills of lading for the flour were sent by A to his correspondents in Glasgow along with bills of exchange drawn upon B & Co., who on retiring the bills of exchange were handed the bills of lading. The flour on arrival in Glasgow was, on presentation of the bills of lading by B & Co., stored with H in B & Co.'s name, or, if bills of lading had not been presented, in name of the ship.

B & Co. having become bankrupt questions arose as to the right to the flour stored with H. Claims were lodged by (1) B & Co.'s trustee, who claimed all the flour stored as being the bankrupts' property; (2) by S & others, who claimed part of the flour in virtue of certain bills of lading, store warrants, and delivery orders held by them in security of advances; and (3) by M, W, & Co. to whom B & Co. had, prior to their sequestration, sold part of the flour stored. The bills of lading founded on had been endorsed to the claimants when the flour was still in the custody of the shippers, though at the date of B & Co.'s sequestration the flour had been so mixed up in H's store as to be no longer capable of identification.

Held (1) that the transfer of the bills of lading constituted a good security valid against the trustee; but (2) that the claim of the trustee was preferable to that of the holders of the store warrants and delivery orders, and also to that of the purchasers, seeing that at the date of B & Co.'s sequestration no specific property in the goods in question had passed to the claimants.

On 29th April 1905 Thomas Hayman & Son, carting contractors, Glasgow (*nominal raisers*), brought a multiplepounding against Thomson M'Lintock, C.A., trustee on the sequestrated estates of John M'Nairn & Company, produce importers, Glasgow (*real raiser*), and Moorhead Watson & Company, produce importers, Glasgow; J. & B. Stevenson, bakers, Glasgow; J. K. Stewart, flour merchant, Greenock; M'Connell & Reid, flour merchants, Glasgow; and William Gilchrist & Company, flour merchants, Glasgow. The *fund in medio* was 1174 bags of "Golden Flower" flour in the

stores of the pursuers, and the proceeds of the sale thereof.

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (ARDWALL), who on 22nd February 1906 pronounced this interlocutor—"Finds (*first*) that the claimant John Stevenson senior is entitled to be ranked and preferred to the goods *in medio* to the extent of 500 sacks of 'Golden Flower' flour; (*second*) that the claimants Messrs Moorhead, Watson, & Company are entitled to be ranked on the said goods to the extent of 250 sacks of the said flour; and (*third*) that the claimant Thomson M'Lintock, as trustee on the sequestrated estates of John M'Nairn & Company, is entitled to be ranked to the balance of 424 sacks of flour; and ranks and prefers the said claimants accordingly; and in respect that the flour has been realised and the proceeds deposited in bank, postpones granting decree for the pecuniary amounts representing the above-named quantities of flour till the real raiser's expenses have been taxed and paid . . ."

Opinion.—"This is an action brought for the purpose of determining who is entitled to a quantity of 1174 sacks of flour, of the brand known as 'Golden Flower,' that were stored in the warehouse of the pursuers and nominal raisers, Thomas Hayman & Son, at the date of the sequestration of Messrs John M'Nairn & Company.

"The real raiser is Thomson M'Lintock, trustee on John M'Nairn & Company's bankrupt estate. The date of the sequestration of Messrs M'Nairn & Company was 9th February 1905, and the trustee's act and warrant is dated 18th February 1905. I shall hereafter refer to Mr M'Lintock as the 'trustee,' and M'Nairn & Company as the 'bankrupts.'

"The trustee claims the whole of the flour in question, on the ground that it was the property of the bankrupts, having been bought and paid for by them, and that they were never validly divested of any part thereof.

"The claimant John Stevenson claims 500 sacks of the said flour in respect of bills of lading delivered to him on 5th January 1905 in return for an advance to the bankrupts.

"The claimants Messrs Moorhead, Watson, & Company, who had advanced large sums on loan to the bankrupts, and who are their creditors for a much larger amount than the value of any security they received, claim 720 sacks of the flour in respect of store warrant therefor, and other 500 sacks of flour in respect of another store warrant. Further, they claim 250 sacks of flour in respect of a bill of lading in respect of a loan on 3rd January 1905 from the bankrupts for 250 sacks of flour *ex* the 'Siberian,' one of the line of steamers owned by Messrs James and Alexander Allan. They accordingly claim the whole of the fund *in medio*.

"The claimants Messrs M'Connell & Reid claim 221 sacks of flour, being a balance of 250 purchased by them from the bankrupts before their sequestration; and the claimant James Kelling Stewart claims 100 sacks of flour, also as a purchaser from the bankrupts.

"I shall deal first with the claims of the claimants other than the trustee, as he is entitled to the sacks forming the fund *in medio* excepting those to which the other claimants can instruct a valid title as at the date of sequestration.

"The flour in question was stored in Thomas Hayman & Son's stores in the manner described in the plan and inventory, and it is admitted that the sacks were stored without any reference to what ships they came from, the dates when they were stored, or the contracts under which they had been bought. They must therefore be viewed as one undivided quantity of 1174 sacks of 'Golden Flower' flour. I may advert for a moment to the position of Hayman & Son relative to the bankrupts. It appears from the evidence of Thomas Hayman, who is manager of that firm (the sole partner being his mother), that their Commerce Street stores had for two years prior to M'Nairn & Company's sequestration been practically devoted to the goods of that firm alone, and, to put the matter broadly, Thomas Hayman seems to have done whatever he was told by John Stevenson junior, who was the sole partner of the bankrupts' firm.

"*John Stevenson senior's Claim.*

"I propose first to deal with the claim of John Stevenson senior. This claimant is an uncle of the bankrupt John Stevenson, and on 5th January 1905 he advanced to the bankrupts on loan the sum of £3000, and in return therefor there were delivered to him, *inter alia*, two bills of lading, marked 117 and 118 respectively. The consigner of the flour, according to the bills of lading, was Seymour Carter, and Seymour Carter was also entered in the bills of lading as the consignee, and before being delivered to the claimant they had been duly endorsed by the said Seymour Carter. The bankrupt's name does not appear upon the bills of lading except as the party to be advised of the arrival of the vessel. These bills of lading were each for 250 sacks of flour of 280 lbs. each of the brand 'Golden Flower,' and the vessel by which they were to be carried was the s.s. 'Sardinian,' which arrived in Glasgow on 30th December 1904. It seems to have been the practice of J. & A. Allan, who carried a great deal of flour that had been purchased by the bankrupts, on the arrival of a cargo in which the bankrupts were interested, to send flour, for which the bills of lading had not been taken up and presented for delivery of the cargo direct, to Hayman's stores, there to be stored in ship's name, and as appears from the excerpts from Hayman's books, this flour seems to have been stored in the ship's name in Hayman's stores on 14th January 1905. Accordingly, when the bill of lading was transferred to the claimant, the goods were not in Messrs Hayman's store at all, but in the actual custody of the shipping company. Goods stored in ship's name could not be removed from the store except by an order from the shipping company, which the shipping company issued after the bills of lading had been presented, and

all the shipping charges paid. In the present case the claimant on 9th February signed a mandate to the Commercial Bank, who held for him the shipping documents, authorising delivery of them to the firm of Bruce & Wilson, flour importers. Mr Wilson, a partner of that firm, obtained possession of the said bills of lading from the bank, and sent them the same day to Messrs J. & A. Allan, paid the freight and charges, and received from Messrs Allan a delivery order, addressed to Messrs Hayman, and ordering delivery of the goods to Bruce & Wilson. On the following day they presented the delivery order to Messrs Hayman & Son together with their own order for delivery, and delivery was refused, in consequence of Messrs Hayman having been notified that owing to the insolvent position of the bankrupts they were not to part with any flour in any way connected with them. It will thus be noticed that the bankrupts never had possession of this flour, and that the property of it was transferred to Mr Stevenson by the delivery to him of the endorsed bills of lading which he received on 5th January, being some nine days before the flour was delivered into Hayman's store. This parcel of flour accordingly truly belonged to the claimant at the time it was stored, and can no more be regarded as the property of the bankrupts by having been mixed up with flour belonging to them than if the same thing had been done with flour belonging to any stranger. It is, I think, clear, as a matter of law, that this mixing had not the effect of transferring these 500 sacks of flour to the bankrupts, but that the result was to give Stevenson or his assignees a right to get these 500 sacks of 'Golden Flower' flour delivered to them by Hayman & Son out of the total quantity of 'Golden Flower' flour in their store, preferably to the bankrupts or their assignees. The bankrupts could not give any higher right to any other party than they themselves had, and any rights they gave off to a part or the whole of the mixed lot of sacks of flour could not affect the right of Mr Stevenson to the 500 sacks which belonged to him, so long as 500 sacks of that brand of flour remained in the store. In this case the trustee can have no higher title than the bankrupt as regards that quantity of 500 sacks.

"I was referred on this question to the case *in re Hallett's Estate*, L.R., 13 Ch. D. 696, in which it was held that if money held by a person in a fiduciary character had been paid by him into his account at his bank the person for whom he held the money could follow it, and had a charge on the money in the banker's hands, and that in such a case the rule in *Clayton's case*, better known in Scotland as *Devayne's case*, did not apply. A similar case of money being put into a bankrupt's own bank account, and taken out of his sequestration, will be found in the Scotch cases of *Macadam v. Martin's Trustees*, 11 Macph. 33, and *Jopp v. Johnston's Trustees*, 6 F. 1028. The principle of these cases seems to

me to apply to the present, but in the circumstances there is no necessity for separate proceedings under the 104th section of the Bankruptcy Act.

"An argument against Mr Stevenson's claim was stated for the trustee, founded on the decision in the case of *Sewell v. Burdick*, L.R., 10 A.C. 74, and it was maintained that there was no passing of property in the 500 sacks of flour by delivery of the bill of lading, because the bill of lading was only handed over in security for the debt, and that it depended on the intention with which it was handed over whether there was a passing of the property or not. It seems sufficient to say that in the case just referred to the circumstances were very different from those here. In particular, the goods had arrived and been warehoused at the time of the endorsement of the bills of lading, and the endorsees were bankers who never took possession of or dealt with the goods, which by this time were warehoused in a port in Russia, they being resident in Manchester, and that case proceeded on the distinction in the English law of property between what was called a special property as pawnees and a general property. This distinction seems to depend on the peculiarities of the English law of pledge. But we are here dealing with the Scotch law of pledge, and the intention of the parties must be taken to have been that a valid security should be given, and that, accordingly, the absolute property in the sacks of flour in question should pass to Mr Stevenson, leaving only a reversionary right in the bankrupt.

"Another point that was made for the trustee against the rights of Mr Stevenson was, that the bill of lading was *de facto* taken up by the bankrupts, though that was done by money just obtained for the purpose from Stevenson, and that the bankrupt having paid the price the property of the goods contained in the bill of lading passed to him. I do not think any importance can be attached to this argument, because if the bankrupt did go personally and take up the bills of lading he did so merely as agent of Mr Stevenson and with his money (see *North-Western Bank, Limited v. Poynter, Son, & Macdonald*, 22 R., H.L. 1); and further, the goods were not put into the warehouse, as appears from Hayman's books, till 14th February 1905, and by that time the bills of lading were in the hands of the Commercial Bank as bankers and agents of Mr Stevenson, and had been so since the 5th of January 1905.

"I accordingly hold that the property in those goods had passed to Mr Stevenson before they were warehoused, and that they were not warehoused on behalf of the bankrupts at all, but by the Messrs Allan on behalf of the owner thereof, who was Mr Stevenson. But it would have been sufficient, in my view, for the decision of this matter, that they were warehoused by Messrs Allan in their own name, and had, before the sequestration of the bankrupts, been duly transferred to a third party.

"*Messrs Moorhead, Watson, & Company's Claim.*

"The next claim to be dealt with is that of Messrs Moorhead, Watson & Company. These claimants, as already stated, make a claim for 1220 sacks of flour, which is a larger quantity than the whole fund *in medio*. There is no doubt that they were creditors of the bankrupts to a very large extent, and were perfectly innocent third parties. With regard to the 250 sacks of 'Golden Flower' flour *ex s.s.* 'Siberian,' claimed in respect of a bill of lading handed to them by the bankrupts on 3rd January 1905, I regard the claimants as in a similar position to Mr Stevenson, whose claim I have just dealt with. The 'Siberian' arrived in Glasgow on 16th December 1904, and the 'Golden Flower' flour on board of her was delivered to the bankrupts, with the exception of the 250 sacks in question, which were stored with Messrs Hayman & Son in ship's name on 31st December 1904, conform to receipt by Messrs Hayman in favour of Messrs J. & A. Allan, the shipowners. They therefore were received into Messrs Hayman's store on behalf of Messrs Allan, and not on behalf of the bankrupts, and, as I have already held in the case of Mr Stevenson, Messrs Hayman had no right to mix this flour with flour belonging to the bankrupts, and their having done so as the bankrupts' agents and warehousemen could not affect the right of Messrs J. & A. Allan or their assignees, who were entitled to demand that quantity out of the gross bulk of 'Golden Flower' flour stored with Messrs Hayman.

"On 7th February 1905 Messrs J. & A. Allan handed to Messrs Moorhead, Watson, & Company delivery order for the 250 sacks of flour. This was presented the same day to Messrs Hayman, who, however, refused to honour it, as by this time they had received notification of the insolvency of Messrs M'Nairn, whom they understood to be mixed up in some way with the flour in question. I am of opinion that, so far as this part of their claim is concerned, Messrs Moorhead, Watson, & Company are entitled to have it given effect to on the same grounds on which I have given effect to Mr John Stevenson's claim.

"The same claimants, however, claim delivery of 720 sacks of the flour in question in respect of a store warrant, and 500 sacks under another store warrant. I am of opinion that this part of their claim must be rejected, under reservation of course of any right they may have against Thomas Hayman & Son, and of their right to make such claim as they may be advised in the sequestration. Those so-called store warrants run thus:—

235.

26 Robertson Street,
Glasgow, Dec. 5, 1904.

Thomas Hayman & Son,

Storekeepers.

STORE WARRANT.

We have received in our Commerce Street store Seven hundred and twenty sacks of flour, Golden, per 280 lbs. each, which are

deliverable only on production of this store warrant.

(Signed—over three Id. stps.)

THOS. HAYMAN & SON,
per JOHN HUNTER.

720 sks. flour, 280 lbs.

—and it is endorsed 'Moorhead, Watson & Co.'

"I cannot regard this document as of any avail in transferring the property of sacks belonging to the bankrupts and stored in Messrs Hayman's store. It specifies no particular sacks, and at best only conferred a right on the holder to claim delivery of the quantity of sacks therein mentioned from Thomas Hayman & Son out of any flour in their store, which, as they themselves explained, was a constantly fluctuating quantity, and upon which they gave delivery orders frequently in excess of the flour they had at the bankrupts' disposal. These documents possibly conferred a *jus ad rem*, but not a *jus in re*, either by way of security or in absolute property.

"Questions were raised and discussed as to the value of these store warrants, and although what I have said is sufficient for the disposal of this case, yet I may express my opinion upon these documents generally, and that is, that they are practically worthless for any other purpose except to permit of the holder going direct to the stores and getting delivery there and then of a specified number of sacks of flour. It will be noticed that no specific goods are mentioned in them, that they are addressed to no particular person, and that they contain no obligation to deliver to anyone. A similar document was held not to be a negotiable instrument of mercantile exchange in the case of *Dixon v. Bovill*, 3 Macq. 1, and wharfingers' certificates in very similar terms were held not to be documents of title in the case of *Gunn v. Bolckow, Vaughan, & Company*, L.R., 10 Ch. Ap. 491.

"It falls to be observed that these store warrants were issued to the bankrupts, who handed them over to Messrs Moorhead, Watson, & Company as securities; this is of importance in view of the argument for the claimants to the effect that the Factors (Scotland) Act 1890 (53 and 54 Vict. cap. 40), section 1, and the Factors Act 1889 (52 and 53 Vict. cap. 45), sections 3 and 9, apply to the present case; for it was decided in the case of *Inglis v. Robertson & Baxter*, 24 R. 759 and 25 R. (H.L.) 70, that these sections did not apply to the case of an owner of goods pledging documents of title, and in that case the goods were properly specified.

"The conditions under which constructive delivery takes place are clearly laid down by Lord President Inglis in the case of *Pochin & Company v. Robinow & Marjoribanks*, 7 Macph. pp. 628 and 629. He points out that to the completion of constructive delivery two things are necessary—that the custodian must hold an independent position, and be neither the owner nor in any way identified with the owner of the goods (*Anderson v. M'Call*, 4 Macph. 765), and that the goods themselves shall be specific in this sense, that they be capable of identifi-

cation either as one total undivided quantity stored in a particular place, or at least a specified quantity forming part of an identified whole. It is plain from the terms of these documents, and from the course of dealing as explained by the witness Thomas Hayman, that these requirements were not present in the case under consideration, for it seems that Thomas Hayman & Son issued these store warrants at the bankrupts' request irrespective altogether of the question whether they had enough flour to fulfil them within their stores at the time of issue, and that they intended to satisfy them out of any flour that might happen to come into their hands on account of the bankrupts.

"I am also of opinion that store warrants in the terms these are, are not capable of being regarded as negotiable instruments; among other objections to them as such it may be noted that they are not in favour of any named person, and accordingly it does not appear *ex facie* of the instruments who has the right to endorse them. It seems also clear that they must cease to have any value unless both the storekeeper and the person who hands them in security are strictly honest, and do not become bankrupt before the delivery takes place.

"On the whole matter I arrive at the conclusion that delivery of these store warrants to the claimants had not the effect of transferring the property of any of the sacks of flour deposited in Messrs Hayman's stores to Messrs Moorhead, Watson, & Company. Holding this view, it is unnecessary for me to go into the question as to whether the transactions under which these store warrants were handed over to the claimants are struck at by the Act 1696, cap. 25, or the Act 1696, cap. 5, but my impression is that they are not.

"*Messrs M'Connell & Reid's and Mr J. K. Stewart's Claims.*

"The only other claimants whose claims fall to be dealt with are M'Connell & Reid and James Kelling Stewart.

"As the claim for M'Connell & Reid is in the more favourable position of the two, I shall deal with it. These claimants were purchasers of 250 sacks 'Golden Flower' flour from the bankrupts on 11th January 1905. The price was paid and they received a delivery order from the bankrupts addressed to Messrs Hayman, who granted an acknowledgment in terms of the document printed in the record. Subsequently the claimants took delivery of 29 sacks of the said flour, leaving 221 which they now claim. The trustee objects to this claim on the ground that this was a contract for the sale of unascertained goods, and that, in terms of section 16 of the Sale of Goods Act 1893, no property in the goods was thereby transferred to the buyer unless the goods were ascertained. Now, it is clearly proved that these goods never were ascertained, that the claimants never asked Messrs Hayman to separate them from the other goods of a similar brand belonging to the bankrupts then in their store, and that it is not the custom in such stores to make

such separation unless the storekeeper is specially asked to do so, and is paid for his trouble. These being the facts I think it follows that no property in these goods passed to the buyers, but that the property remained in the bankrupts till the date of the sequestration.

"It was pleaded that the granting of a delivery order by the bankrupts in favour of the claimants created a bar against their trustee now claiming the goods. I am unable to give effect to this contention. I was referred to the case of *Knights v. Wiffen*, 1870, L.R., 5 Q.B. 660, but in that case the owner, who as unpaid vendor was refusing to deliver the goods to a sub-vendee, was held to be barred from continuing to refuse delivery by his special assent to the delivery order, for by giving such assent he induced the sub-vendee to rest satisfied in the belief that the property had passed, and so to alter his position by abstaining from demanding back the money which he had paid to the first vendee. I need hardly point out that this was a very different case from the present, and in my opinion the doctrine of bar is inapplicable here.

"The cases of *Stonard*, 1810, 2 Camp. 344, and *Gillett*, 2 C. & M. 530, which were relied on as entitling these claimants to prevail in the present case, were actions of trover brought against warehousemen upon documents issued by them, and it was held that by these documents they had become agents or holders of goods for the plaintiffs, and were bound to deliver the goods to them. These cases seem to have no application to the present case.

"I do not decide in this case what, if any, may be the rights of any of the claimants against Messrs Hayman & Son, either in respect of the transfer notes or other documents issued by them, or of any collusion with the bankrupts in issuing warrants or notes for goods which were non-existent.

"The claim of Mr Stewart is in no better position than that of M'Connell & Reid, and for the same reasons I hold that it cannot be given effect to, the goods sold being unascertained goods within the meaning of the Sale of Goods Act 1893. It was pleaded with much force and plausibility that the claims lodged in the present process disclose that the bankrupts sold or pledged the whole 'Golden Flower' flour which they had in Messrs Hayman's store prior to their bankruptcy, and that consequently neither they nor their trustee have now any just claim to any portion thereof in competition with any of the claimants, or with the claimants taken as a whole. This plea might have been useful so far as the bankrupts are concerned, but their trustee stands in a very different position, for under his act and warrant he is vested with the property of all goods belonging to the bankrupts, and therefore of all goods in Messrs Hayman's store, the property of which had not been validly transferred at the date of the sequestration. Therefore these goods, I think, must fall into the sequestration, leaving the claimants such rights as they may be able to make good there.

"In the present case it would certainly appear at first sight to be equitable that the whole fund *in medio* should be divided *pro rata* among the persons holding transfer notes, store warrants, or other acknowledgments from the warehousemen, but this could not be effected without doing violence to well-established rules of law regarding the passing of the property in moveables and the consequent transfer of the risk of loss from seller to purchaser.

"I accordingly hold that the trustee must be ranked and preferred to the whole of the fund *in medio* with the exception of 500 sacks which belong to John Stevenson, and 250 sacks which belong to Moorhead, Watson, & Company. As the flour has been all sold, I shall not issue an interlocutor till it has been arranged between these last-named claimants and the trustee what portion of the consigned fund falls to be paid to each of them.

"As I have sufficiently indicated the grounds on which I hold that the trustee is entitled to be preferred to the goods *in medio* with the exception of those the property of which passed by the bills of lading to other claimants, I need not do more than note the authorities which were quoted to me on behalf of the trustee's contention, in addition to the ones I have already noted in discussing the rights of the other claimants. These were—*M'Ewan v. Smith*, 9 D. 434, 6 Bell's Appeals 340; *Hastie v. Melrose*, 13 D. 880; *Distillers Company v. Russell*, 16 R. 479; 1 Bell's Comm. 198, and Lord M'Laren's note on the case of *Whitehouse v. Frost*, 12 East. 614; Benjamin on Sale, (5th ed.) 334; *Anderson & Crompton v. Walls & Company*, 9 Macph. 122.

"This last I consider a valuable authority, as it is a decision illustrating the effect of non-appropriation of goods sold, in a direction favourable to a purchaser. The purchaser in that case had a right to 750 gallons of sperm oil out of a large undivided quantity in store, deliverable to his order. The store was burned, with all the oil stored therein. At the time of the fire 713 gallons of the oil deliverable to the purchaser had not been delivered, and although all the oil in the store, which in one sense included the said 713 gallons, was burned, yet it was held that the purchaser having had no right to obtain delivery of any specific portion of the oil destroyed by the fire, no risk attached to him in respect of the 713 gallons, and that he was therefore entitled to delivery of the balance of the oil, just as if the fire had never taken place."

On 16th March 1906 his Lordship, in terms of the above interlocutor, decerned for payment.

M'Connell & Reid reclaimed, and argued—The reclaimers were entitled to delivery of the sacks of flour which they had bought and paid for. The storekeeper having come under an obligation, on the bankrupt's instructions, to deliver them to the claimant, was entitled to retain them against the bankrupt, and also against his trustee—Benjamin on Sale (5th ed.) 865; *Stonard v. Dunkin*, (1810) 2 Campbell 344; *Wood v.*

Tassell, (1844) 6 A. & E. 234; *Godts v. Rose*, (1855) 17 Scott's C. B. Rep. 229; *Knights v. Wiffen*, (1870) L.R., 5 Q.B. 660; *Henderson & Co. v. Williams*, [1895] 1 Q.B. 521. The reclaimers having no personal claim against the seller, had a claim for delivery against the storekeeper—*Brierly v. Mackintosh*, June 1, 1843, 5 D. 1100; *aff. Feb. 19, 1846*, 5 Bell's App. 1; *Whitehouse and Others v. Frost and Others*, (1810) 12 East 613; *Brodie's Stair*, app. p. 876; Bell's Prin. sec. 116. Alternatively and assuming that there was common property in the sacks of flour stored, the bankrupt had right to a *pro indiviso* share thereof—*Stair*, ii. 1, 37—which had been transferred to the reclaimers, in the only possible way, and the transfer duly completed by intimation. Assuming, however, that the bankrupt owned the sacks of flour stored, the passing or non-passing of the property was not conclusive, for goods might be in the hands of a buyer so as to be secured against the seller's bankruptcy even where the property in them had not passed to the buyer, *e.g.*, where the buyer of one article had several sent for selection. In such a case the trustee would not be permitted to keep both the price and the thing. The reclaimers had really possession of the sacks sold them, for Hayman was joint agent for both parties, and therefore delivery to him was equivalent to delivery to them. Moreover, Hayman had acknowledged that he held them for the reclaimers, who after that were entitled to look to him for delivery. Section 29 (3) of the Sale of Goods Act 1893 was not limited to the case of "ascertained" goods, and read positively was equivalent to this, that goods are delivered when a third party acknowledges to the buyer that he holds them for him.

Argued for the trustee—(1) *As against the reclaimers M^cConnell & Reid*—The property in the sacks claimed belonged to the trustee. The trustee had right to all the sacks in the store except in so far as they had been "ascertained" and set apart for their owners. The reclaimers never got any real right to the sacks claimed, for they were neither "ascertained" nor "specific"—Sale of Goods Act 1893, secs. 1 (4), 5 (1), 16, 18, 62. Neither the transfer note nor the delivery order was sufficient to transfer the property—*Black v. Incorporation of Bakers, Glasgow*, December 13, 1867, 6 Macph. 136, 5 S.L.R. 107; *Pochin & Company v. Robinow & Marjoribanks*, March 11, 1869, 7 Macph. 622, 6 S.L.R. 417; *Anderson & Crompton v. Walls & Company*, November 15, 1870, 9 Macph. 122, 8 S.L.R. 115. The case of *Whitehead v. Frost* cited by the reclaimers had been disapproved—*Benjamin on Sale*, 335-8; Bell's Com. 198. The plea of personal bar was ineffectual as against the trustee—*M^cEwan v. Smith*, January 14, 1847, 9 D. 434, *aff. March 20, 1849*, 6 Bell's App. 340; *Melrose v. Hastie*, March 7, 1851, 13 D. 880; *Distillers Company Limited v. Russell's Trustee*, February 9, 1889, 16 R. 479, 26 S.L.R. 348. It was not necessary to consider whether the storekeeper had a

right of retention, for he did not claim it, and had put the fund into Court. (2) *As against the holders of the Bills of Lading—(a) Stevenson's Claim*—The deposit of the bills of lading with Stevenson constituted a pledge of the goods leaving the property in the pledgor, *i.e.*, the bankrupt. Being merely a security transaction it passed the possession but not the property—*Sewell v. Burdick*, (1884) L.R., 13 Q.B.D. 159, *per Lord Bowen*, 170, L.R., 10 A.C. 74; *Carver's Carriage by Sea*, 4th ed., sec. 497. The possession so passed could be, and had been, lost by Stevenson. It was lost by Hayman mixing the sacks stored, for after that had taken place they were no longer specific. Stevenson therefore was merely an unsecured creditor. (b) *Moorhead, Watson, & Company's Claim*—Prior to the transfer of the bill of lading on 3rd January 1905 to these claimants the goods had been stored by the shipowners on the statement that bills of lading had been presented by the bankrupts. Even assuming that that statement was untrue, the shipowners were bound by it, and could not afterwards say that the property had not passed to the bankrupts. The transfer of the bills of lading on 3rd January to the claimants could not and did not transfer any right of property in the sacks in question, for after they had been mixed up in Hayman's store they were no longer specific, and the transfer of a bill of lading did not transfer the property in the goods unless the goods were specific and capable of being ascertained—*Grange & Company v. Taylor*, (1904) 9 Aspinal 559, 20 T.L.R. 386, 9 Com. Cas. 223. In *Barber v. Meyerstein*, (1870) L.R., 4 E. & I. App. 317, where it was held that the delivery of the bill of lading transferred the property even after the goods had been landed, the contract of carriage was not at an end. That distinguished that case from the present, for here the contract of carriage was ended.

Argued for the respondent, Stevenson—The Lord Ordinary was right. This claimant was the holder of a bill of lading for 500 sacks *ex s.s.* "Sardinian" and there were no other sacks on board. The sacks were stored in the ship's name, not in that of the bankrupt. The bankrupt never had the property in them, and never in fact presented bills of lading for them. In these circumstances the indorsement of the bills to the claimant carried the property to him—*Hamilton v. The Western Bank of Scotland*, December 13, 1856, 19 D. 152; *National Bank of Scotland Limited v. Union Bank of Scotland Limited*, December 18, 1885, 13 R. 380, 23 S.L.R. 242. The case of *Sewell v. Burdick* (*cit. supra*) was inapplicable, the sole question there being whether "special property" in the sense of the Bills of Lading Act 1855 had or had not passed. The transferee of a bill of lading had a right preferable even to that of the unpaid seller—Sale of Goods Act 1893, sec. 47.

Argued for respondents, Moorhead, Watson, & Company—These claimants adopted the argument for the claimant Stevenson. As to whether the effect of a bill of lading

was exhausted by the goods being landed, they referred to *Sanders Brothers v. Maclean & Company* (1883), L.R., 11 Q.B.D. 327. As to the effect of the indorsation of the bills, they referred to *Short v. Simpson*, 1866, L.R., 1 C.P. 248.

At advising—

LORD PRESIDENT—This is a multipounding, and the subjects *in medio* are certain bags of flour within the store of one Hayman, who is the pursuer and nominal raiser. He has no interest in the matter whatsoever, and the question arises upon a competition for these bags. Now the course of dealing out of which the question arose was this. There was a miller in America called Seymour Carter, and there was a firm of flour merchants in Glasgow of the name of John M'Nairn & Company, the sole partner of which firm was John Stevenson junior, and they had business relations with Seymour Carter. The course of business was this, that Carter used to ship bags of flour, and to take bills of lading in the name of himself (Carter) as consignee. He then sent over the bills of lading to his correspondents James Findlay & Company, in Glasgow, along with bills drawn upon M'Nairn & Company; and M'Nairn & Company, by going to James Findlay & Company and putting them in funds to retire the bills of exchange, were handed the bills of lading. Having got the bills of lading, they could go to the Allan Line, by which the flour was usually sent, and from them get a delivery order to put the flour into a store, Hayman's being the store in which they generally put it. Now, as it suited the ship to get rid of the flour, sometimes, if the bills of lading were not presented, the flour was stored in Hayman's store all the same. The storage order was in terms of a form addressed to the Allan Line, Master Porter Department, which recited that the bill of lading had been presented, and that form was used even when in point of fact the bill of lading was not presented, but in that case there was a *notandum* added stating that the flour was stored in the name of the ship. Then when the bill of lading was presented, a second delivery order was got from the Allan Line addressed to the store.

What happened on one occasion was this, that M'Nairn & Company being short of money went to a Mr Stevenson, who was an uncle of the sole partner of M'Nairn & Company, and asked him if he would give him an advance, and they proposed to give him in security some of the flour which was coming. Stevenson consented to give them an advance of a certain sum, and he gave them a cheque upon his bank, the Commercial Bank, for that amount. With the proceeds of that cheque M'Nairn & Company went to James Findlay & Company and got the bills of lading of a certain cargo of flour, and they then handed the bills of lading blank endorsed to the Commercial Bank to hold for Stevenson. The flour was then deposited in Hayman's store in ship's name. Stevenson did nothing after that, and while the flour was still in

Hayman's store M'Nairn & Company went bankrupt. Now the state of affairs when M'Nairn & Company went bankrupt was that Hayman had a good many bags of flour in his store, more a good deal than would satisfy the number of bags which were specified in the bills of lading that had been handed to Stevenson. Taking Stevenson's case, the competition arises between him, as in right of these bags in virtue of the bills of lading and the delivery order which he got from the shipping company afterwards, and the trustee.

I take Stevenson's case first because it seems to me to come logically first. Upon this state of the facts we had an excessively ingenious argument from Mr Murray, which was really founded I think entirely upon the case of *Sewell v. Burdick* in the House of Lords, where a shipowner sued the holder of a bill of lading for freight. Whether he was liable as upon the contract of freight depended on the terms of the Bills of Lading Act, and the terms of the Bills of Lading Act which deal with the point are that the person is to be liable if he has the property in the goods. Now *Sewell v. Burdick*, determined—it was an English case—that according to the law of England the question of whether the holder of a bill of lading in security was the holder of the property or was merely a pledgee was in each case a question of fact; but in this case they held that he was a pledgee, and that according to the law of England a pledgee in those circumstances had not *the* property in the goods in the sense of the Bills of Lading Act, but had only a property known to the law of England as a special property. Mr Murray, commenting on that case, suddenly, so to speak, assumed that the law of Scotland was the same as the law of England; for, he said, in this case the property of the goods was not in the pledgee or holder of the security, Stevenson, but was still in the bankrupt, and that accordingly, the property being in the bankrupt, the result obviously followed that Stevenson could only have a dividend and could not have the actual goods.

I am afraid that though that is ingenious, it is too ingenious, and the fallacy rests in suddenly turning an English term to use in Scottish law, and assuming that it is the same. There is no such thing in Scots law as the term special property, and there cannot be, according to the law of Scotland, a distinction between *the* property and a special property. But the form of security effectuated by what, in the law of England, is called a special property is perfectly well known in the law of Scotland. There is a very well-known leading authority upon the matter, namely, the case of *Hamilton v. Western Bank*. I take it to be clear beyond all doubt that when a person gives a document which transfers moveable property he can make a perfectly good security, and that, whatever the law of England may be, the law of Scotland was certainly this, that the condition of affairs in which a pledgee might lose his rights by losing possession applies only to the proper case

of corporeal moveables. It is very often a confusion of ideas or quibble of words to talk of losing possession where what is given to you is not the property itself but documents which transfer the property. You cannot lose possession of the moveables unless you lose the document; and the puzzle which Mr Murray attempted to create about the loss of the possession of the bags is really no puzzle at all, because Mr Stevenson had never lost possession of the bill of lading, and therefore upon *Hamilton v. Western Bank* he holds a perfectly good security.

Mr Murray's Senior, the Solicitor-General, really, remembering that this was a nautical case, jettisoned his junior's argument entirely, and he put the case upon perfectly separate grounds. He admitted that there was quite a good security in Mr Stevenson's hands, but then he said that the security was in the circumstances of no use to him, and for this reason—that these bags of flour were in no way distinguishable, you could not tell one bag from another, and no one could say to which particular 500 bags in the store Stevenson's bills of lading applied. Therefore, said the Solicitor-General, the property is now all immixed, and being immixed it is mine. That is really a sort of new form of alluvia in the person of the trustee which I have never heard of before, and the fallacy of it, I think, can be easily tested by supposing for a moment that Stevenson, instead of being a security holder, had been merely a third party. There is the bankruptcy, during which Hayman's store is filled with bags apparently belonging to the bankrupt and bags apparently belonging to this third person; and these bags are so immixed that no one can tell which bags belong to each. If the storekeeper is not in a position to fulfil his contract, that is to say, if he has not bags enough to satisfy his obligation to deliver bags to both the bankrupt and the third party, no doubt then a position of some difficulty may arise. But here there is no such difficulty. It is admitted that Hayman has bags enough to satisfy both the claims of the trustee and of Stevenson, and, in the circumstances I prefaced, what would have happened would be, that the bags all being the same, a number corresponding to the number held by the third party would be handed to him, and the rest handed to the trustee. I do not think that anyone could suppose that there was any difficulty in that situation. If that is the situation, what difference does it make if instead of being a third party Stevenson is a person who holds a security over the goods, provided that security has been well constituted. Therefore I think the argument of the Solicitor-General is not so ingenious as that of his junior and is equally unsound. Upon this matter the conclusion that the Lord Ordinary has come to is perfectly right; and that disposes of the matter so far as Mr Stevenson is concerned.

But there were other claimants, Moorhead, Watson, & Company, who are for all practical purposes in precisely the same

position as Stevenson except that the bills of lading were transferred after the cargo was put in the store. In the view I have taken that distinction makes no difference, and therefore Moorhead, Watson, & Company's case follows that of Stevenson, and that disposes of these two cases.

That leaves 424 bags in the hands of the trustee as representing the bankrupt, and upon these 424 bags arises a subsequent question with persons of the name of M'Connell & Reid and J. K. Stewart. The question arises out of this, that after the bankrupt had got the flour into the store he entered into a contract of sale of certain of these bags in favour of these parties. There is no question as to the contract of sale of the flour lying in the store, but before anything was done in the way of separating the bags there came the bankruptcy. The trustee in the bankruptcy appeals simply to the 16th section of the Sale of Goods Act, which specially provides that where there is a sale of unascertained goods the property shall not pass until the goods shall have been ascertained. Here nothing was done to ascertain the goods. These flour bags were not separately marked, and although doubtless if the buyer here had gone to the storekeeper and had got him to put aside the sacks, or mark them, or put them into another room, that would have passed the property, yet, as he did none of those things, the property, it seems to me, did not pass. It is not enough merely to get an acknowledgment in general terms that so many of those bags belonging to the bankrupt are held for him.

I think, therefore, that there again the Lord Ordinary has taken an entirely right view. It is a perfectly simple question arising solely on the terms of the Act. I am therefore for adhering to the judgment of the Lord Ordinary.

LORD M'LAREN—This is a somewhat involved case, and if I had had any doubt about the result I should have wished to take time to consider it and to unravel its details; but I am satisfied that the Lord Ordinary has decided the various points correctly and in accordance with settled law.

With regard to the sacks of flour which were represented by the bills of lading at the time of M'Nairn & Company's bankruptcy, various objections were raised to the right of Mr Stevenson as holder of these bills. In the first place it was said that the goods were landed, and that Stevenson, the transferee of a bill of lading, was in no better position as owner of the goods than the holder of a delivery order, which would not in all circumstances suffice to pass the property. It may be that at one time the effect of the transference of bills of lading was too rigorously limited to the case of goods which were on board a ship at sea. If Mr Stevenson had advanced the money upon the security of a bill of lading while the goods were actually at sea, although he might have taken the bill in security only, I think no one who was conversant with mercantile law would dispute that Mr

Stevenson had a good security upon his bill of lading to the extent of his advances. But I think the later law has settled that the question as to the effect of a bill of lading does not depend upon the arrival, or even the unloading of the ship, and that a bill of lading must be taken to be an effective document of title representing the goods until these have been actually delivered to the person in right of the bill.

There are some advantages, and there may also be disadvantages, in the rule as I have stated it, where the storage of the goods has extended over a considerable time; but since the case of *Barber v. Meyerstein* (and until that case has been further considered by higher authority) I think it must be taken as settled that although the goods are stored, the delivery of the bills of lading has effect in all respects, whether as a title of property, or whether as a security to the person to whom it has been endorsed or delivered, exactly as if the goods were on board the ship.

If that principle is once admitted, it again disposes of the next argument, which was founded upon the analogy of the delivery order. It is perfectly true that a delivery order is worthless as passing specific property until the goods have been ascertained, but that is exactly the distinction between the effect of a delivery order for goods on shore and a bill of lading. Bills of lading have been long in use, and as far back as we have any knowledge of their use they were held to be negotiable. Such bills, expressed to be for so many bags of flour or quarters of grain on board a particular ship, would pass by blank indorsation from hand to hand while the ship was at sea. How is it possible, consistently with such a state of the law, that the goods could be specifically ascertained, or that the various persons who took such bills of lading could examine and verify the goods while the ship was in mid-ocean? We know that bills of lading are granted for portions of cargo in bulk which cannot of course be ascertained; and when bills of lading are granted in these circumstances they must operate as a transfer of an unascertained quantity of goods on board the ship until delivery is made in terms of the obligation. Delivery had not been made here, and therefore Mr Stevenson's right to these undelivered goods was as effectual as if they were identified by marks and numbers.

The question as to Mr Stevenson's right to certain other bags of flour which had been delivered from the "Allan Line" and were held by the storekeeper was not pressed. But that question was argued on behalf of another competitor in this case, I think M'Connell. With regard to that point, I think it depends upon the law as laid down by the late Lord President M'Neill in *Hamilton v. Western Bank*, which has always been considered a leading case. The result of that decision is that where documents of title were taken in security of advances, the contract to be inferred was not strictly a contract of pledge, but the transference of a proprietary right under which the bank was held entitled to retain

the goods until the advances were repaid. Under the Roman law of pledge there must be actual perception of the subject of the pledge; but then I think the Lord President puts the nature of the banker's right in terms which identify it in all substantial qualities with the right of a holder of a security over heritable property constituted by *ex facie* absolute disposition. There the documents of title transferred to the bank constituted a title in the bank against all the world, except the person who pledged the goods and who was entitled to have them restored upon repayment of the advances. But in order that this right may be effectually constituted it is necessary that the goods should be specifically ascertained and identified; and I agree with the Lord Ordinary that as the sacks of flour were neither numbered nor marked, nor put into receptacles, nor ascertained in such a way as to distinguish them from other flour in the warehouse, no effectual right of security was constituted by the delivery order. I am of opinion, therefore, that on both points the Lord Ordinary's judgment should be adhered to.

LORD KINNEAR—I am of the same opinion as your Lordship on both points.

LORD PEARSON—I also am of the same opinion.

The Court adhered.

Counsel for Claimant M'Lintock (Real Raiser and Respondent)—Solicitor-General (Ure, K.C.)—C. D. Murray. Agents—Cairns, M'Intosh, & Morton, W.S.

Counsel for Claimants M'Connell & Reid (Reclaimers)—Cullen, K.C.—MacRobert. Agents—Cadell, Wilson, & Morton, W.S.

Counsel for Claimant Stevenson (Respondent)—Dean of Faculty (Campbell, K.C.)—R. S. Horne. Agents—Webster, Will, & Company, S.S.C.

Counsel for Claimants Moorhead, Watson, & Company (Respondents)—Hunter, K.C.—Scott Brown. Agents—Patrick & James, S.S.C.

Counsel for Claimant Stewart (Respondent)—Cullen, K.C.—MacRobert. Agents—Gardiner & Macfie, S.S.C.

Friday, May 31.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GILCHRISTS v. WHYTE.

Recompense—Heritable Loan—Expense of Preparing Bond Incurred by Proposed Lender through Belief that Borrower had Agreed to Clear Security Subjects of Obligations to the Superior—Action to Recover Expenses Dismissed.

The prospective lenders of money on the security of certain heritable subjects had stipulated that the owner thereof should free the security subjects