about a sum of £24, this vessel has been kept lying for months at Greenock during a period in which she might have made I do not know how many voyages back and forward to Barcelona, leaving a question of this kind to be determined in the meantime.

The Court adhered to the judgment, with findings in terms of the Sheriff's judgment.

Counsel for Pursuer (Appellant)—Trayner—Pearson. Agents—Dove & Lockhart, S.S.C.

Counsel for Respondent (Defender)—Guthrie Smith—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, March 16.

SECOND DIVISION.

[Lord Craighill, Ordinary.

FLEMING *v.* SMITH & COMPANY.

Sale — Retention — Sub-Sale — Seller's Right to Retain for Payment of the Price — Where Sale on Credit effect of Silence of Seller when Sub-Sale intimated to him, as indicating Acquiescence in Sub-Sale.

Goods having been sold on credit to be delivered on demand, the buyer immediately, without having taken delivery, resold them to a party, who at once requested the seller to hold to his order. The seller made an entry in his books of the transfer, but returned no answer to this request. During the currency of the credit the first buyer became bankrupt and could not pay for the goods. *Held, per* Lords Young and Craighill—that the silence of the seller imported acquiescence in the sub-sale, and that he had thereby barred himself from retaining the goods; *per* Lord Justice-Clerk—that in a sale on credit, if the buyer assigns his right to demand delivery to a third party, who intimates that assignation to the seller, the assignation thereby made and intimated gives the assignee an absolute right to demand delivery.

On 9th and 10th February 1880 Macnaughtan & Co., sugar merchants in Edinburgh, bought from A. C. Smith & Co., sugar merchants in Greenock, 171 bags and 11 casks of sugar, being parts of larger lots held on their account by sugar refiners in Greenock from whom they had purchased them. In payment of the price Macnaughtan & Co. accepted a bill dated 14th February 1880, and payable one month after date. On 11th February Macnaughtan & Co. sold to James Fleming, merchant, Leith, the sugar mentioned, and in payment Fleming granted bills, which were afterwards duly met by him. Macnaughtan & Co. having thus sold the sugars to Fleming, granted him a delivery-order on Smith & Co., dated 17th February, requesting them to deliver the sugar to Fleming. This order Fleming enclosed on the following day to Smith & Co. in the following letter:—"Enclosed you have a delivery-order for 171 bags sugar and 11 casks, which please hold to my order." On receipt of this letter Smith & Co. made in their stock-book this entry after the entry of the 171 bags 11 casks—"Transferred by F. J. M. & Co. to James Fleming, Leith, 17/2/80;" but they did not acknowledge receipt of the letter by any communication to Fleming. Early in March Macnaughtan & Co. became insolvent, and intimated their insolvency to their creditors by circular dated 13th March. Among others Smith & Co. received a copy of the circular. In consequence of their failure Macnaughtan & Co. could not meet their bill for the sugar when it fell due on 17th March. Thereafter Fleming having required delivery of the sugars, Smith & Co. refused delivery, in a letter in which they wrote as follows:—"We hold no sugar belonging to you. The sugars you refer to were sold to Messrs Macnaughtan & Co., but they have not been paid, and the transaction is cancelled by their failure."

Fleming then raised this action, concluding for delivery of the sugar, with £100 as damages for delay in delivery, or otherwise for £700 damages for non-delivery.

Smith & Co. defended the action, and pleaded —"(2) The defenders were entitled to retain the sugar in question at the time when delivery was demanded, in respect it had not been paid for and the purchasers had become insolvent."

The Lord Ordinary (CRAIGHILL), after a proof, by interlocutor containing findings of fact to the effect above narrated, found as matter of law—"that the defenders by their silence during the period between the receipt of the pursuer's letter of 18th February 1880, and accompanying delivery-order by F. J. Macnaughtan & Co. in favour of the pursuer, must be taken to have consented that the sugars in question were to be held by them to the order of the pursuer as required; and that after F. J. Macnaughtan & Co.'s insolvency they were not entitled, and are not now entitled, to refuse delivery of said sugars to the pursuer: And before further answer, appoints the cause to be enrolled that these findings may be applied."

He added this note—"If the matter in question were to be determined according to the law of England, it was hardly disputed on the part of the defenders that the pursuer would be entitled to judgment. Even, however, had this view been resisted, the Lord Ordinary thinks that the authorities cited by the pursuer (*Hawes* v. *Watson*, 2 Barnewall and Cresswell, 540; Houston on Stoppage *in transitu*, 78–79; Benjamin on Sale, 2d ed., 640; *Pearson* v. *Dawson*, 27 L.J., Q.B. new series, 36 old series; *Wodeley* v. *Coventry*, 32 L.J. Excheq. 185 new series, 41 old series; *Knights* v. *Wiffen*, L.R., 5 Q.B. 660) would have been conclusive of the controversy. But the law of Scotland, and not the law of England, must govern the decision as to the rights and liabilities of the parties in the present action.

"The defenders' contention is that they remain undivested of the property in the sugars, and that they are not bound to give delivery to the pursuer while the price for which these had been sold by them to F. J. Macnaughtan & Co. continues unpaid. But for the effect due to their silence subsequent to the receipt of the delivery-order and pursuer's letter of 18th February this claim probably could not be resisted; and the point on which the case truly turns is, whether such silence is, in the circumstances shown in

the proof, to be regarded as acquiescence. Had the defenders written, in answer to the pursuer's letter, that in terms of his request the sugars would be held for the pursuer, the Lord Ordinary thinks it plain they could not have resiled from the consequences of this undertaking. Is the result different when in place of returning an answer they keep the delivery-order and letter of request and remain silent? That they might have refused to hold except upon the condition that any rights they had or might have in the sugars should be preserved may be true. But when they say nothing in answer to a request which obviously was made upon the assumption that what was asked would be granted, they must, the Lord Ordinary thinks, be held to have acquiesced in or consented to what was required. To hold otherwise would be hard upon, not to say unfair to, the pursuer as in a question with the defenders. They could not at the time have refused delivery to the pursuer had immediate delivery of the sugars been asked, because they had taken a bill for the price which was still current; and F. J. Macnaughtan & Co., the acceptors, were still solvent, as they continued to be for some time afterwards. The pursuer, by the course followed by the defenders, was put off his guard, and led to refrain from insisting for what at the time could not, and indeed would not, have been refused. To sustain the plea now put forward by the defenders would be in effect to sustain their right to a benefit which they never could have obtained if they had answered the pursuer's letter, and thus warned the pursuer that other measures than the request to hold the sugars for him must be adopted for their protection against contingent or possible claims upon the sugars at the instance of the defenders.

"The question of expenses, for the sake of conveniency, has been reserved; but it may be understood that when the findings in the foregoing interlocutor shall be applied expenses will be awarded to the pursuer."

The defenders reclaimed, and argued—There was a right in the seller to retain for payment of the price, and the sending of an answer assenting to the transfer, which the Lord Ordinary assumed would be fatal to the claim of retention, would not have altered their position. The proviso contained in section 2 of the Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. c. 60) was exactly in point. That section enacted that a seller should have no general right of retention against a second purchaser, but the proviso was to the effect that "nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid"—*Wyper* v. *Harvey*, Feb. 27, 1861, 23 D. 606; *Black* v. *Incorporation of Bakers*, Dec. 13, 1867, 6 Macph. 136. In this case the goods were sold on credit, and the price being unpaid, delivery could be withheld against the purchaser, and the pursuer, the purchaser's assignee. The mere entry in defenders' books did not amount to an obligation to deliver without payment, nor in any way make his position better than that of an assignee. It was in no way equivalent to delivery, actual or constructive—Bell's Prin. sec. 116, and case of *Dryden*, rep. in vol. i., p. 243, of 7th ed. Bell's Comm. (editor's note); *New* v. *Swain*, 1 Danson & Lloyd, 193; *Griffiths* v. *Perry*, 28 L.J. Q.B. 204; and 1 Ellis and Ellis, 680. The cases quoted by the Lord Ordinary proceeded on estoppel. Now, the Mercantile Law Amendment Act, *supra*, meets any objection on the ground of bar—*Hoveld* v. *Hughes*, 14 East. 308; *Dixon* v. *Yates*, 5 Barn. & Adolph. 313, quoted in Benjamin on Sale, 634. Two things are necessary that a person be barred from such a plea as the defenders' plea of retention—(1) that the person whose actings are said to constitute a bar must have done them on knowledge that they would be relied upon by the other; (2) that the other did so rely upon them—*Cairncross* v. *Lorimer*, 3 Macqueen, 827. Here there was no such acting by the defenders as these tacks require.

Argued for pursuer—The defenders were barred from pleading this ordinary right of a seller to retain for payment of the price. A plea of bar is just applicable to a case where he against whom it is pleadable would have had some right (whether of lien of property, or of any other kind) but for the conduct by which he is held to be barred. By accepting the order sent by the pursuer the defenders undertook to give delivery, and they could not now say they were not bound to give it—*Serruys & Co.* v. *Watt*, Feb. 12, 1817, F.C., and cases cited by the Lord Ordinary.

At advising—

Lord Young—This case raises an important question of mercantile law. The facts lie in small compass. Smith & Co. sold a quantity of sugar to Macnaughtan & Co., and sold it on credit, in the usual sense of the word—that is to say, on the terms that the sugar should be delivered immediately or on demand, and that the credit be one month, a bill being given by the buyer Macnaughtan at one month's currency. That is truly, and in the ordinary sense of the words, a sale on credit. Within the month Macnaughtan & Co., the buyers, having granted their bill for the price, sold the sugars to the pursuer Fleming. Fleming intimated the sale to Smith & Co., the sellers, who did not acknowledge the intimation by answering the communication of Fleming, but they assented to it and acted on it by entering the sub-sale in their stock-book of the date mentioned in the communication, thus—"Transferred by F. J. M. & Co. to James Fleming, Leith. 17/2/80." Within the month Macnaughtan & Co. became bankrupt, and were unable to pay the contents of their bill, and thereupon Smith & Co. refused to give delivery of the sugar to Fleming, on the ground that they were entitled to hold it in respect that the purchaser had become bankrupt and the price was unpaid. Fleming on his part says that the sub-sale having been acknowledged, the seller must be held to hold the sugar on his account, and cannot now be heard to plead the bankruptcy of the original purchaser against their demand for delivery. The Lord Ordinary has decided in conformity with this contention, and I am humbly of opinion that his judgment should be adhered to. We have no information on the record as to the exact position of the sugar, but in answer to inquiries made during the debate we were told that it is still in the warehouse of the refiners from whom Smith & Co. bought it, but on what contract it remains there we do not know. If in the refi-

ners' possession on the contract of sale, and to be delivered to Smith & Co. on demand, then, according to the principle of our law which requires delivery in order to pass the property, it has never become the property of Smith & Co. at all. If, again, as is more probable, it is in the refiners' hands on a contract under which warehouse rent is paid to them by Smith & Co. for its deposit—that is, in their hands, though they were sellers on another contract than that of sale, they receiving warehouse-duty for it—why, that would be esteemed sufficient delivery to pass the property. I think that as the case is presented to us we must take it as if the sugar is in the possession of Smith & Co. by being at their order in the refiners' stock-book, they paying warehouse rent. Now, there is no doubt that by our law the undivested seller, unless he bargains otherwise, is entitled to retain for the price. If he sells on credit, he is, of course, bound to deliver according to the contract to the buyer, having waived his right to payment of the price before delivery. But if during the currency of the credit, whether a bill has been granted for the price or not, the buyer became bankrupt, the sellers' right to withhold delivery until he is paid revives if the goods be still undelivered, notwithstanding the sale upon credit. That is substantially the law of England also, though there the seller's right to withhold is attributed to seller's lien, whereas with us it is attributed to his undivested right of property. The result is the same in both cases. It is the law of England, and I think the law of Scotland also, that if a seller has received intimation of a sub-sale, and has assented thereto, that deprives him of all right to retain as against the original purchaser. In this case it is almost conceded that if Smith & Co., the original sellers, had acknowledged receipt of the pursuer's letter, and undertaken, in terms of the requisition contained therein, to hold the sugars to his order, they could not have afterwards on Macnaughtan's bankruptcy refused delivery to Fleming on his order and demand. That acknowledgment was not made, and no reason was given for it. But, as I have stated, it was received, and was assented to and acted upon, for a transfer by sub-sale thereby intimated was entered in the sellers' stock-book. We have the entry made of the date of the delivery-order in the print before us. When Fleming & Co received no answer—no repudiation of the transfer—by Macnaughtan & Co., which he was entitled to expect if assent was not given, it is, I think, reasonable to deal with them on the footing of that having been done which in point of fact was done, though the fact that it had been done was not communicated to Fleming, namely, that a notice had been received and assented to, and the transfer entered in the books accordingly. There is no doubt that if Fleming had applied for the sugars within the following month—for nearly a month elapsed before Macnaughtan's bankruptcy—delivery could not have been withheld. But when he applied after the month had expired, he was applying to the party who within the month undertook, as I assume from their actings Smith & Co. did undertake, to hold to his order. That is exactly according to the authority quoted from the law of England, to sound principle, and I think for the convenience of commerce. Macnaughtan was entitled to demand immediate delivery. He transferred his right, as he was entitled to do, to Fleming & Co., and Fleming & Co. communicated the fact to Smith & Co., who had no answer to the demand, with a request to hold to their order. My opinion is, that although Smith & Co. did not communicate receipt of the letter, yet they must be dealt with on the footing of assent, which is exactly in accordance with the fact of the order to hold for Fleming having been entered in their stock-book.

Lord Craighill—I adopt all that has been said by my brother Lord Young, and I adhere to the findings of fact and law which are contained in the interlocutor under review. As I regard the matter, what has been said by Lord Young is simply an enlargement of the views of the law applicable to the case which I entertained when I pronounced the interlocutor reclaimed against.

Lord Justice-Clerk—This case raises a question of some interest, and one attended, as I have found it, with considerable difficulty. The sugars in question were the property of the defenders, and were at the date of the sale alleged stored on their account with sugar refiners in Greenock. They were sold on the 9th and 10th of February 1880 to Macnaughtan & Co. on credit, and a bill at one month's date was granted for the price by the the purchasers. The pursuers on the 11th of February purchased these sugars from Macnaughtan & Co.—also on credit—and obtained from them a delivery-order on the defenders. This was intimated to the defenders on the 18th of February, who noted the transfer in their books, and it is not disputed that although no answer was returned to the intimation the defenders held the goods for delivery to the subvendee instead of the original purchaser.

Before the bill presented for the price to the defender was paid, Macnaughtan & Co. stopped payment, on the 13th of March—the sugars still remaining in the possession of the defenders. The sub-vendee has brought this action for delivery to him of the goods. The question is, whether he is bound to deliver the goods without receiving payment of the price?

The condition of this question is that the property of the goods remained with the original seller, who was under an obligation to the purchasers to deliver them in terms of his contract. The purchaser was simply a creditor for delivery, and had this been a ready-money transaction could never have demanded delivery without payment of the price; nor could he by assigning the obligation place his assignee in any better position than himself. That could only have been accomplished either by a new contract with the original seller or by some act on his part equivalent to delivery.

In the present case I am of opinion that nothing took place between the sub-vendee and the defender which either amounted to delivery or to a new contract. The first is not maintained, nor, indeed, could it be so; but it is contended, and the Lord Ordinary has in substance held, that the conduct of the defenders in not replying to the pursuer's intimation while he noted the transference in his books amounted to an obligation to deliver absolutely to the purchaser, or at least

misled him, with the result of inducing him not to demand delivery.

Had the sale been one for ready-money, I do not think that the defender did anything but what he was entitled and bound to do consistently with all his rights reserved by the original contract and resulting from his continued possession. The want of an acknowledgment of the intimation was immaterial, and the assignation being intimated, he was bound to hold for and deliver to the assignee on the same terms as he had held for and was bound to deliver to the cedent.

This, however, was a sale on credit, one consequence of which was that the seller was bound to deliver the goods sold when demanded within the period of credit although the price remained unpaid. There is not much authority in our law on this subject, and no light, in my opinion, can be obtained on it from English cases. By the law of England, if the property of the thing sold has not passed to the vendee, a sub-vendee has no higher right than the original purchaser. Such cases occur where the goods sold require identification or separation or the like. From this it would follow, that as with us the property only passes on delivery, an assignee cannot acquire a higher right. But in regard to an ordinary sale the English analogy necessarily fails; because when the contract of sale is completed the property of the subject of the sale passes to the vendee, and the whole fabric of case law which has been built up on this head rests entirely on this foundation. The right of the seller is not a right of property, but merely a lien over the property of another, which is held to be waived or to revive under varying circumstances, but always on the assumption that the property has passed to the vendee or his assignee or sub-vendee. Mr Benjamin in his book on Sale has these remarks—"When the goods have not yet left the actual possession of the vendor, he has at common law at least a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose that after a bargain in which the lien has been unequivocally waived, the buyer for his convenience or any other motive has left the goods in the custody of the vendor until the credit has expired, and has then made default in payment or has become insolvent before the credit has expired, what are the vendor's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*—a right that might perhaps be termed a stoppage *ante transitum?* The true nature and extent of the vendor's rights in this intermediate state of things have not yet perhaps been in all cases precisely defined, but they have been considered by the Courts under such a variety of circumstances that in practice there is now but little difficulty in advising on cases as they arise." But the rules thus established—and some of them are technical enough—proceed on the initial assumption that the unpaid vendor's right is one of lien, and the vendee's right one of property, and the result is reached generally by inquiring whether the seller is or is not stopped or personally barred from using his lien.

We have no materials in our different and as I think simpler system in which these rules can be specifically applied. The rights of the parties are exactly the converse. The seller remains proprietor. The purchaser is only creditor for delivery. There is no lien of any kind vested in any of the parties, and these principles of waiver, lien, and personal bar seem entirely inapplicable and inextricable.

This interlocutor was pronounced—

"Adhere to the interlocutor reclaimed against: Find the defenders liable to the pursuer in damages; of consent assess the same at £569, 13s. 7d., and decern against the defenders for payment to the pursuer of that sum, with interest thereon from the 19th day of March 1880 till paid: Find the pursuer entitled to expenses in the whole cause," &c.

Counsel for Pursuer—Guthrie Smith—Young. Agents—Macgregors & Ross, S.S.C.

Counsel for Defenders—D. F. Kinnear, Q.C.—Mackay. Agent—Adam Shiell, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

AINSLIE *v.* MURRAY AND ANOTHER.

Foreign—Contracts—Locus solutionis.

The parties to an action in the Scotch Courts agreed as a compromise of the action that certain property in Rangoon belonging to the first party should be sold and the proceeds handed to the agent of the second parties in satisfaction *pro tanto* of a sum of £4250, and that any deficiency should be paid by the first party. The property was sold and the price paid in rupees. In an action for payment of a deficiency the defenders pleaded that the amount of the deficiency must be calculated on the footing of the value of the rupee in Rangoon. *Held* that the pursuer was entitled to payment at the full equivalent of the sum in English currency, and that the sum realised in rupees must be estimated according to the current rate of exchange.

Opinions per Lord President and Lord Mure that Scotland was the *locus solutionis* of the contract.

Opinions contra per Lord Deas and Lord Shand.

The pursuer of this action was John Dodds Ainslie, who at one time carried on business at