rised by the Statute of 1853 and subsequent Acts, the defender should be ordained to execute a deed as your Lordship proposes, and that the terms of this deed in the meantime should be adjusted by a man of business.

It is right to notice that when the point as to the mode of working out the different stages of the case with the materials for so doing was argued before the Lord Ordinary when the case was before him, the conclusions of the summons did not describe the proper course to be adopted, but there has been an amendment made on the conclusions to the effect that the defender should be decerned and ordained to execute a disposition of the estate, and thereafter to take and follow out proceedings to have the sale and disposition approved of, and I think that alternative conclusion enables the Court to deal practically with the case as your Lordship proposes.

LORD ADAM—In my opinion if this had not been an entailed estate and missives in the terms of the offer and acceptance had been exchanged, in that case there would have been a completed contract of sale, and that would be all that was required. But this was an entailed estate, and therefore such a contract of sale could not be carried out without the use of statutory words, the "approval" or, as it is sometimes called, the "sanction" of the Court, because an application must be presented to the Court to obtain approval in respect of the interests of the heirs of entail and creditors upon the estate. Therefore we find that the concluding words of the offer here are—"In the event of your acceptance the sale is made subject to the ratification of the Court." As I read that, it means this—subject to the sanction or approval of the Court. I think that is the only sensible meaning that can be given to the word ratification there. Well, then, if that be so, so far as I am aware or know, there is only one way in which the approval or sanction or ratification of the Court can be obtained, and that is by a proceeding under the 5th section of the Act of 1853, because that gives authority to the heir of entail to execute and produce, either during or before he presents an application, a disposition of the estate. Now, it is quite true, as Lord Shand pointed out, that if the entail legislation had stopped with the Act of 1853 this sale could not have been carried out, and the sanction or approval or ratification of the Court could not have been obtained, because at that date the consent of the heir or heirs of entail was requisite and there would have been a bar, just as there is a bar to any other proceedings under the Act of 1882 here, because the consent in this case clearly would not have been given. But then have come the subsequent Entail Statutes, which I think it would be a waste of time, after your Lordship's exposition of them, to go over again; but the result of them is just this—that under the Act of 1882 there is a means by which the consent of the heir of entail, which was necessary under the Act of 1853, may be dispensed with by ascertaining the money value of his expectancy or interest in the entailed estate. That is entirely a matter which can be done, and done as a matter of certainty. The Court, if it be done, cannot say anything against the sale; it must just give its sanction and approval of the sale if all the statutory formalities are carried out. There is no difficulty here, it appears to me, therefore in Sir Douglas Stewart doing what he is bound to do, I think, by the offer and acceptance, viz., in the first place, to execute a disposition of this entailed estate, and after having done that to proceed under the 5th section of the Act of 1853 and the subsequent Entailed Statutes, and get the sanction and approval of the Court, which will follow as a matter of course if the statutory requisites are all attended to. Therefore I agree with your Lordship that the first thing is to ordain Sir Douglas Stewart to execute a disposition of this estate.

The Court adhered to the interlocutor of the Lord Ordinary in so far as it repelled the first, second, and third pleas-in-law for the defender, and found, decerned, and declared in terms of the declaratory conclusions of the summons: *Quoad ultra* recalled the interlocutor *in hoc statu*, and appointed the pursuer to lodge in process within fourteen days the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer in fulfilment of the contract of sale constituted by the missives of sale dated 19th and 20th September 1888 founded on by the pursuer.

Counsel for the Pursuer (Respondent)—Lord Adv. Robertson, Q.C.—D.-F. Mackintosh, Q.C.—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Reclaimer)—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Saturday, February 9.

FIRST DIVISION.

[Lord Trayner, Ordinary.

THE DISTILLERS COMPANY (LIMITED) *v.* DAWSON (W. & J. RUSSELL'S TRUSTEE).

Sale—Constructive Delivery—Undivested Owner—Bankruptcy.

A company of distillers sold to a customer certain parcels of whisky lying in their bonded warehouse, and received payment of the price. The warehouse was only used for the storage of whisky made by the company on which duty had not been paid. The purchaser sub-sold the whisky, and granted a delivery-order to the vendor, which was duly intimated to the company, and an entry notifying the sale was made by them in their books, but no delivery of the whisky ever took place. The vendor became bankrupt. In an adjustment of accounts between the trustee on his sequestrated estate and the company, *held* (*per* the Lord President, Lord Adam, and Lord Kinnear, *rev.* Lord Trayner) that there had been no delivery of the whisky actual or constructive, and that the company therefore remained the undivested owners, and were not bound to deliver it to the trustee as a condition of their obtaining a ranking in the sequestration (*diss.* Lord Mure and Lord

Shand, who held that the circumstances disclosed a case of constructive delivery).

On 15th October 1887 the estates of the firm of W. & J. Russell, wine merchants in Edinburgh, were sequestrated, and Adam Dawson, Edinburgh, was appointed trustee thereon.

The Distillers Company, Limited, 12 Torphichen Street, Edinburgh, and who carried on business at Cambus, Cameron Bridge, Carsebridge, and elsewhere, were creditors of the said firm, and they lodged a claim in the sequestration, in which, after making certain deductions, they showed a balance as due to them of £993, 1s. 7d., and they claimed to be ranked therefor. The trustee admitted the claimants to an ordinary ranking for the sum of £246, 4s. 2d., but only upon the condition that before drawing a dividend the claimants should deliver up to him certain whiskies purchased by the bankrupts from third parties, and lying with the claimants in their capacity as warehouse-keepers, or to pay him the value thereof, amounting to £224, 4s. 4d. The Distillers Company appealed against this qualification in the trustee's deliverance.

The facts were ascertained to be as follows:—The appellants sold the quantities or parcels of whisky above specified to certain third parties, and received payment therefor. The whisky was not delivered to the buyers, but remained in the custody of the appellants in a bonded store belonging to them at their distilleries of Cambus, Cameron Bridge, and Carsebridge. It was admitted that the whisky sold was easily identified and distinguished from the other goods in the appellants' bonded stores. The buyers of the whisky sub-sold it to W. & J. Russell, who paid the price, and received in return a delivery-order addressed to the appellants, which intimated to them the sub-sale to W. & J. Russell. The whisky continued to lie in the stores at the date of the sub-sale and of the bankruptcy of W. & J. Russell. The delivery-orders were duly intimated to the appellants, who acknowledged their receipt, and in consequence thereof transferred the said whisky in their books from the name of the original purchasers to that of the bankrupts. The whisky accordingly stood at the date of the bankruptcy in the name of the bankrupts, who were entitled to demand and obtain delivery thereof on payment of any warehouse rent or other charges due in connection therewith. At the date of the bankruptcy the bankrupts were indebted to the appellants in the sum for which a ranking had been allowed by the trustee. In these circumstances the appellants claimed a right of retention over the whisky in question, not merely for warehouse charges, but also for the debt due by the bankrupts to them. The trustee disputed this right, and claimed delivery of the whisky, subject to payment of warehouse charges only.

In a joint minute of admissions it was stated, *inter alia*, that said warehouses were occupied solely by the appellants, but were subject to the surveillance of the officers of Excise for payment of the Excise duties, and were known in Excise law as "distillers' bonded warehouses;" that the appellants did not keep, and under the Excise rules it is not lawful for them to keep, any whisky in the said "bonded warehouses" but such as was manufactured by themselves, but that they owned and occupied a general bonded warehouse at Queensferry in which they kept whiskies purchased by themselves for the purpose of blending, and which were there blended; that the appellants did not store any whisky except what had been, as above mentioned, either manufactured by them or purchased by them for blending.

The appellants averred, *inter alia*—"Although intimation of their having acquired said stocks was made by W. & J. Russell to the appellants by transmission of delivery-orders in their favour (except in the case of the 20 quarters Carsebridge whisky, of which the delivery-order was in favour of the respondent), and although acknowledgment of said intimation was made by appellants' representatives, transferring said stocks in the appellants' books to the name of the said firm, yet said stocks were never removed out of appellants' possession, but continued all along to lie in their bonded warehouses, and delivery thereof was never demanded prior to the sequestration." They further averred, that though the prices of the said stocks of whisky were paid to them by the original purchasers or their assignees, they were yet entitled to retain and sell them off against the general debt due to them by W. & J. Russell, and that the trustee's deliverance, so far as it negatived this right, was unwarranted.

The respondent (the trustee) averred that "after receiving the said delivery-orders the appellants entered the bankrupts in their books as the owners of the said whisky, and the persons to whose orders it was deliverable, and for whose behoof it was held. Explained that by the custom and practice of the whisky trade throughout Scotland, as well as at common law, delivery-orders such as those above referred to, followed by acknowledgments thereof by warehouse-keepers, constitute an absolute conveyance of the property of the whisky therein mentioned (which is specified and distinguished by the Excise numbers of the casks) from the person in whose name the whisky formerly stood in the bonded warehouse to the person in whose favour the delivery-order is granted, and that after the intimation of said delivery-order the distiller or other warehouseman in whose warehouse the whisky may be deposited holds the whisky for the person in whose favour the delivery-order is granted, as warehouseman for him."

The respondent further founded on the following facts which were thus set forth in the minute of admissions—"The books of the said warehouses are kept by the company's clerks as a part of their office work, and the Excise authorities have a clerk of their own at the several warehouses for the purpose of making out and granting warrants for removal of spirits; that the appellants' clerks keep a warehouse ledger, in which is entered in separate columns the whiskies sold (described by separate numbers, indicating the quality and amount in gallons), the name and residence of the purchaser, the date of the sale and the date from which warehouse rent is charged (it being explained that the appellants do not as a rule charge any warehouse rent for whisky unless it lies for more than six months), the date of delivery, any transfer or transfers which may take place, with the date of the transfer, and the date from which warehouse rent is charged against the transferee—these last-mentioned entries being

made upon presentation by purchasers of delivery-orders by sellers in their favour. The said delivery-orders are in the following or similar terms :—

"*Messrs The Distillers Company, Limited,* 188 .

" *Distillery,*

"Please deliver to the order of the under-mentioned butts, hhds. qrs. whisky,

Numbers.	Date of Bonding.

And oblige,
Yours truly,

"The acknowledgments by the appellants of the receipt of said delivery-orders are in the following or similar terms :—

"*No.* . *Distillery,* 18 .

"Dear Sir—We beg to acknowledge receipt of delivery-order dated 18 granted by in your favour, and we have to intimate that rent on the casks therein specified will be charged to you from .—We are, Dear Sir, yours obediently,

"The Distillers Coy. (Ld.)
per

"*For terms see over.*

"Conditions of Sale.

"*Spirits in Transit.*—Buyers will please see whether casks have been tampered with before signing carriers' delivery-book. If signed for 'in good order,' no claim can afterwards be entertained.

"*Spirits in Bond.*—All spirits sold and stored in the company's bonded warehouses are subject to the following conditions :—

"1. The spirits lie insured by the company, against fire, to the amount of the original invoice.

"2. The spirits will be subject to a rent-charge as follows :—

For casks 80 gallons and upwards, 2d. a a-week ; and for smaller cask, 1d. a-week, payable on demand.

"3. The company reserves power to order removal of spirits from their warehouses when from want of room or other cause they find it necessary to do so.

" *Casks.*—Casks charged if not returned within three months.

"When returning casks take receipt from railway company or other carrier, and advise the distillery to which they belong. If this is neglected, and the casks lost, the sender will be held liable for their value."

The appellants pleaded, *inter alia*—"(1) The appellants having a right of retention over the said stocks of whisky specified in the part of the trustee's deliverance quoted in condescendence 3, are entitled to hold the same in security of W. & J. Russell's general debt, subject to their deducting the value thereof in ranking. (2) The said stocks of whisky being the undelivered property of the appellants, they are entitled to retain it against the sub-purchasers' trustee for any debts due to them by the sub-purchasers on general account."

The respondent pleaded, *inter alia*—"(2) The appellants having been paid the price of said whisky by the original purchasers thereof, and granted a discharge therefor, and having accepted delivery-orders regarding said whisky, and granted acknowledgments thereof, and transferred the said whisky in their books to the name of the bankrupts or their trustee, and agreed to hold it for them, all claims at their instance as original proprietors and sellers of the said whisky were extinguished, and their subsequent possession of the said whisky was solely as warehousemen for the bankrupts. (3) Constructive delivery of the said whisky to the bankrupts having taken place by means of the intimated delivery-orders and acknowledgments and entries following thereon, and the appellants' former possession of said whisky having been converted into possession for the bankrupts, or their trustee, the appellants have no lien or right of retention over said whisky for general account."

On 4th July 1888 the Lord Ordinary (Trayner) dismissed the appeal and sustained the deliverance appealed against.

"*Opinion.*—The trustee in this sequestration has admitted the appellants' claim to a ranking, but 'before drawing a dividend the trustee calls on the claimants to deliver to him' certain specified 'goods purchased by the bankrupts from third parties, and lying with the claimants in their capacity as warehouse-keepers.' The appellants appeal against this restriction or condition placed on their right to draw a dividend.

After a statement of the facts above set forth his Lordship continued:—"The ground on which the appellants maintain that they have a right of retention for the debt due by the bankrupts is, that they were not merely warehousemen or custodiers of the whisky, but were at the date of the bankruptcy the undivested owners of the same. Never having delivered the whisky to the original purchasers the property in the whisky did not pass to them, and they could not confer on the bankrupts a higher right than they had themselves, namely, a right to demand delivery. Therefore, as owners of the whisky, they plead the right to retain it on account of debt due to them by the person demanding delivery, on the authority of *Melrose* v. *Hastie*, 13 D. 880; *Harvey* v. *Wyper*, 23 D. 606, and other cases. I am of opinion that the right of retention claimed by the appellants cannot be sustained.

"It is undoubtedly still the law of Scotland (notwithstanding the provisions of the Mercantile Law Amendment (Scotland) Act 1856) that the property in moveables does not pass to a purchaser without delivery, and if the appellants were here in a question with the original purchasers of the whisky the doctrines laid down in *Melrose* v. *Hastie* and other cases would fall to be applied. But these doctrines are plainly inapplicable to a case where delivery has taken place, and I think, in the present case, that there was delivery of the whisky to the bankrupts. The intimation of the delivery-order to the appellants, and the consequent transfer in their books of the whisky to the name of the bankrupts operated, in my opinion, constructive delivery. 'When a delivery-order in absolute terms is presented to a warehouse-keeper, and given effect to by him in the warehouse books, that makes a complete transfer of the goods sold from the previous owner to the possessor of the delivery-order, and puts the possessor of the delivery-order in possession of the goods to the

same effect as if he had bought the goods and obtained actual delivery on a contract of sale'—*per* Lord Justice-Clerk Inglis in *Anderson* v. *M'Call*, 4 Macph. 768. The case I have just quoted from was cited to me as an authority, showing that an intimated delivery-order was insufficient to pass the property, for in that case the delivery-order was not held to have that effect. But *Anderson* v. *M'Call* differs materially from the present case. In that case there was no sale at all; what was really attempted was to effect a security over moveables *retenta possessione*. Dealing with it, however, as a case of sale, it was held that the delivery-order was insufficient to pass the property, because it was a delivery-order by the seller, intimated to the seller himself, in whose custody the goods were. There was no more effected towards passing the property by entering the delivery-order in the seller's books than was effected by the entry in the seller's books, debiting the purchaser with the price of the goods. The judgment in that case proceeded on the identity of the seller with the warehouseman, and in reference to that fact in its legal consequences the Lord Justice-Clerk observed—'In order to operate constructive delivery by means of a delivery-order there must be three independent persons—the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order.' I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters the vendor, the bankrupts vendees, and the appellants warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters, and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen or custodiers of the goods. Whatever right remained in the appellants, arising from non-delivery to the original purchaser, was surrendered or lost when they delivered the goods constructively to a third and independent party who had no connection with the original sale. I am of opinion, therefore, that constructive delivery of the whisky was given to the bankrupts when it was transferred in respect of the delivery-order, to their name in the appellants' books. It follows that the appellants have no right to retain the whisky, their only right is the warehousemen's lien for warehouse charges connected therewith."

The Distillers' Company reclaimed, and argued—The property of these goods remained with the sellers as there had been no delivery, and nothing but delivery, actual or constructive, could pass the property. Admittedly there had been no actual delivery, for the goods were still in the cellars of the company; nor had there been constructive delivery as occurred where the goods were committed to the care of (1) a neutral carrier, and (2) a neutral custodier, with an entry in their books. Sometimes also goods might remain in the possession of the seller, and yet be held as constructively delivered as in the case when the purchaser leased it to the seller, who then held it under a new and lower title of hire—Bell's Com. vol. i. 5th ed. p. 180, and case there cited—*Gibson* v. *Forbes*, July 9, 1833, 11 Sh. 916; *Smith* v. *M'Ewen*, January 14, 1847, 9 D. 434, 6 Bell's Apps. 340; *Melrose* v. *Hastie*, March 7, 1851, 13 D. 880; *Mathieson* v. *Alison*, December 23, 1854, 17 D. 274; *Wyper* v. *Harvey*, February 27, 1861, 23 D. 606; *Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765. But there was nothing in the present case to transform the vendors into mere neutral custodiers of the goods. The sub-sales could not do this, as the purchasers could not give a better or higher title than they themselves had; the goods belonged to the undivested owner, and all that the original purchaser could give the sub-vendee was a personal right to demand delivery—a *jus ad rem*, not a *jus in re*. Letters by the seller to the original owner which had not the effect of divesting him of possession, did not carry possession to the vendee—*Pochin* v. *Marjoribanks*, March 11, 1869, 7 Macph. 622.

Argued for the respondent—This was a case of constructive delivery. There was here an intimation of the delivery-order, and effect was given to that order, and the assent of the custodier was obtained by the transfer in his books from the name of the vendor to that of the vendee. A bonded warehouse was in a peculiar position; it was under Revenue supervision, and so, though belonging to the vendor, goods stored in it were really in neutral custody. There were thus three independent parties, the vendor Watters, the custodier the company, and the vendee the bankrupt. There were thus the conditions necessary for constructive delivery. The company held two distinct and different positions, manufacturers and sellers, and also warehousemen for rent. They might have had a right of retention against Watters, but that ceased when he sold to W. & J. Russell. If the argument of the other side was correct, then but for the Mercantile Law Amendment Act the company could have retained the whisky against the last purchaser for a debt due to them by any of the intermediate purchasers—*Hamilton* v. *Western Bank*, December 13, 1856, 19 D. 152; *Orr* v. *Tullis*, July 2, 1870, 8 Macph. 936; Mercantile Law Amendment Act 1856; *Mein* v. *Bogle*, January 17, 1828, 6 Sh. 360; *Duncanson* v. *Jefferies' Trustees*, March 4, 1881, 8 R. 563; *Robertson* v. *M'Intyre*, March 17, 1882, 9 R. 772. There was in the present case a new contract of warehousing. If this was established, then the authorities cited by the other side were not in point. The original seller *quoad* the last purchaser was only a warehouseman, though at one time he might have held a higher title.

The case was finally re-heard before their Lordships of the First Division along with Lord Kinnear.

At advising—

Lord President — The question we have to decide in this case arises upon a balancing of accounts in bankruptcy, and of course what is to be done in a case of that kind is to state both sides of the account as they stood at the date of the sequestration, and to strike a balance accordingly. The trustee in the sequestration and the appellants (the Distillers' Company) have adjusted the accounts so far

between them with one exception. The bankrupts were owing the appellants considerable sums of money, and the appellants held in their hands parcels of whisky which had been bought by the bankrupts from them, but the price of which had not been paid, and in regard to these there is no question at all.

But there were other whiskies in the hands of the appellants which stood in a different position, and with reference to which this question has arisen. These parcels of whisky were sold some time ago by the appellants to a person in the trade, and the price was paid, but the goods remained in the hands of the appellants, the sellers. There are certain very important admissions in regard to this matter which it is necessary to keep in view at the outset.

In the joint minute of admissions for the parties it is stated "that the parcels of whisky in question were at the date of the original sale by the appellants lying stored in bonded warehouses which belong to the appellants at their distilleries of Cambus, Cameron Bridge, and Carsebridge; that said parcels of whisky continued to lie in said warehouses at the dates of the several sub-sales, and of the bankruptcy of Messrs W. & J. Russell, and are still there lying; that said warehouses are occupied solely by the appellants, but are subject to the surveillance of the officers of Excise for payment of the Excise duties, and are known in Excise law as 'distillers' bonded warehouses;' that the appellants do not keep—and under the Excise rules it is not lawful for them to keep—any whisky in the said bonded warehouses but such as is manufactured by themselves, but that they own and occupy a general bonded warehouse at Queensferry in which they keep whiskies purchased by themselves for the purpose of blending, and which are there blended; that the appellants do not store any whisky except what has been, as above mentioned, either manufactured by them or purchased by them for blending."

Now, with regard to the bonded warehouses at the appellants' distilleries, it is necessary to keep in view that these are, in a question like the present, simply the premises of the sellers. They are "bonded warehouses" in this sense, that the goods have not paid duty, and they are therefore under the control of the officers of Excise in this sense, that the appellants cannot deliver goods out of the warehouses except upon payment of the Excise duties. That is the single particular in which a warehouse of this description differs from the premises of an ordinary dealer in spirits. In the next place, this admission establishes one very important fact—that from the date of the original sale no delivery of these goods had been made in any sense whatever. The goods were lying at the date of the original sale in the very same warehouse in which they are now. This warehouse is not a warehouse in any other sense than this, that it is a place of custody for the use of the appellants, and of no one else. It is not a warehouse in the sense that the appellants store the goods of other people in it. That is very distinctly admitted in the passage I have just read from the joint minute. Therefore it seems to me that the state of the fact as regards the original sale is just this, that the goods were sold but not delivered.

But the party who originally purchased the goods re-sold them, and the question comes to be, what is the condition and what are the rights of the sub-vendee in such a case? The original purchaser cannot sell the goods in any proper sense, because they do not belong to him. They belong to the undivested owner, and therefore the only thing which the original purchaser can give to the sub-vendee is a personal right to demand delivery of the goods—that is to say, a *jus ad rem*—but the original purchaser having no *jus in re* he cannot give anything more, so that the goods still remain the property of the original seller. No doubt the sub-vendee, having received a delivery-order from the original purchaser, intimated that delivery-order to the original seller in whose hands the goods were. What is the effect of that? Nothing but this, so far as I can see, that it is an intimation to the original seller that the original purchaser has parted with the right he had to demand delivery. He could give no more to the sub-vendee than he had himself. If he himself had only a *jus ad rem*, he could not convey to the sub-vendee a *jus in re*. The delivery-order was intimated to the original seller, and the intimation was acknowledged, and a note was made in the original seller's books that the right to ask for delivery of the goods had passed from the original purchaser to the sub-vendee. It is plain that that cannot operate constructive delivery, because the goods were not in the custody of a third party, but were still in the hands of the original owner of the goods, who remained undivested. Suppose that process of sub-vendition were repeated seven or even twenty times over, the effect would have been just the same in each case. What was passed in each sub-sale was just the same right that the original vendee had, and nothing more—that is to say, the *jus ad rem*, the right to ask for delivery. While the goods remained undelivered they could not pass by constructive delivery, because they remained in the possession and control of the original seller.

The Lord Ordinary has, I think, somewhat misunderstood the position of the case in this respect. His Lordship quotes an observation which I made in the case of *Anderson* v. *M'Call*, 4 Macph. 760, to this effect—"In order to operate constructive delivery by means of a delivery-order, there must be three independent persons, the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order." His Lordship then goes on to say—"I think the conditions thus stated as necessary to constructive delivery are fulfilled here. There were three independent persons—Watters the vendor, the bankrupts vendees, and the appellants warehousemen. The appellants were not both sellers and warehousemen *quoad* the bankrupts. They had sold to Watters and been warehousemen for Watters, but the only relation in which they ever stood to the bankrupts was that of warehousemen or custodiers of the goods." Now, there I think the Lord Ordinary is in error. There are not three independent persons in this case, but only two, because the vendor and the custodier of the goods are identical, and while that continues to be the case

there cannot be three independent persons. There are only two—the vendor and the vendee or his representative the sub-vendee, for the sub-vendee is only the representative of the original vendee, and comes precisely into his shoes.

Upon these grounds it appears to me that the Lord Ordinary is in error, and I think the goods in this case, according to all the authorities, remain the property of the original vendor. Therefore in balancing accounts with the bankrupts he is entitled to set off the security which he held over these goods by way of retention against any claim made against him on behalf of the bankrupt estate.

Lord Mure—The whisky here in question belonged at one time to the appellants. It was sold by them several years ago—some of it as far back as 1881—to various parties, by all of whom the price was paid at the time of sale. None of it was actually delivered, but upon the sales being effected the whisky was duly invoiced to each of the purchasers, and entered in the books of a bonded warehouse belonging to the appellants as having been sold to those purchasers, who were charged with warehouse rent by the appellants. When stored in this warehouse the casks were so marked and numbered as to admit of their being easily identified and distinguished from casks belonging to other parties which were stored in the same warehouse; and the appellants thus became custodiers of the whisky for the purchasers.

Some time after the whiskies were so stored they were sold by the original purchasers, and the price paid to them. On the respective sales taking place an order was given by the original purchaser, who had then become the seller, upon the appellants to deliver to the new purchaser the whisky sold to him, which was duly accepted by the appellants. The name of the new purchaser was then entered by the appellants in their warehouse-book as the party to whom the whisky had been transferred, with a notandum as to the time from which warehouse rent was to be charged against him. On that being done a letter of acknowledgment of the delivery-order, in the form used by the appellants, of which copies have been produced, was sent by the appellants to the purchaser who had presented the order, intimating that "rent on the casks therein specified will be charged" against the new purchaser by the company, which was accordingly done. The appellants in so acting were in all material respects acting as warehousemen, and as such became custodiers of the whisky for the party who had purchased it.

Each of the five parcels of whisky in question were in this way transferred by the appellants to various purchasers, whose names were entered as transferees in the appellants' books. By the month of May 1887 the whole five parcels had been acquired by the bankrupts W. & J. Russell, wine merchants in Edinburgh, and so the matter stood till the sequestration of that firm in October 1887.

Since then the respondent, the trustee on the bankrupt estate, has applied to the appellants to hand over the whisky to him, as carried to him by the sequestration, with a view to the division of the proceeds among the creditors of the bankrupt, including the appellants. This the appellants have declined to do, on the ground that at the time of the original sales the whisky belonged to them, that it had never been actually removed from their warehouse, and was consequently never delivered, so that the property had never actually passed from them either to the first or any of the other purchasers. The ground of the claim of retention therefore is that the right of property is still in the appellants, and that they are entitled to retain the whisky in payment *pro tanto* of their claim against the bankrupt on a general account, and to that extent to obtain a preference over the other creditors of the bankrupt. This plea has been rejected by the Lord Ordinary, on the ground that there had been constructive delivery of the whisky, as explained in his note, and in that judgment I concur.

The case is attended with some nicety and difficulty, arising from the circumstance that the appellants were the proprietors of the whisky at the time of the first sales. But apart from that circumstance, to which I will immediately advert, it was not, and I do not think it can be disputed that what was done by the appellants, in acknowledging and giving effect to the delivery-orders in the way I have described, amounted to, what is called constructive delivery.

In dealing with this question Mr Bell, in the part of his work to which we were referred (vol. i. p. 183, 5th ed.), thus expresses himself—"Where goods are lying in the hands of a warehouseman or wharfinger at the time of the sale, the transfer of them in the wharfinger's books to the name of the buyer, by order of the seller, completes the delivery, making the wharfinger henceforward the custodier for the buyer."

In support of this view he refers to various cases both in this country and in England, and in particular to the opinion of Lord Ellenborough in a case of this description, that of *Harman* v. *Anderson*, 2 Camp. 243, where his Lordship said—"The goods having been transferred into the name of the purchaser, it would shake the best established principles still to allow a stoppage *in transitu*. From that moment the defendants became the trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of the rent in these cases is a circumstance to show on whose account the goods are held, but it is immaterial here, the transfer in the books being in itself decisive. I am clearly of opinion that the assignees are entitled to recover." And the law is laid down to the same effect in the passage in your Lordship's opinion in the case of *Anderson*, 4 Macph. 765, quoted in the Lord Ordinary's note.

Applying this rule to the present case it is of importance to attend to what occurred at each of the transferences in question; and I take, by way of illustration, the first of the five transfers mentioned in the joint minute for the parties, that of J. & G. Stewart, the orignal purchasers. They sell their whisky, which was in the appellants' custody as warehousemen, to Watters, and grant an order on the appellants as their custodiers to deliver it to Watters, and that order is accepted. This the appellants could not refuse to do, for the price had been paid, and they had no claim to hold as against J. & G. Stewart. They were therefore bound to deliver, either actually or

constructively, whichever was required. Watters did not want actual delivery at the time, and knowing that the appellants kept a bonded warehouse in which they stored, and held themselves out to the trade as warehousemen ready to store, whisky on payment of warehouse rent, it was arranged that he was to get constructive delivery in the manner I have described, and that delivery is given by the appellants as in compliance with the order.

Now, the effect of this was to give Watters constructively full possession of the whisky just as much, to use the words of Lord Ellenborough, "as if the goods had been delivered into his hands." After that delivery the right which in the person of J. & G. Stewart was a *jus ad rem*, became in Watters a *jus in re* by the joint action of J. & G. Stewart and of the appellants, who were custodiers for Stewart. The appellants were thus by their own act divested in favour of Watters of the right of property in respect of which they now claim to retain the whisky, and the full and complete right of property passed to Watters, and through him to the bankrupts, and so was transferred to the trustee by the sequestration. The appellants therefore cannot now, in my opinion, be allowed to revert to and found upon their original right of property in the whisky as still to any extent remaining in them. It passed from them as I have explained, and the whisky now belongs to the trustee for the general creditors of the bankrupt.

This appears to me to have been beyond doubt what must have been held to have been effected in the case of an ordinary warehouseman. The question is, was there constructive delivery to Watters? If the whisky had been stored by J. & G. Stewart in a warehouse belonging to another party than the appellants, such a transfer as was here made would admittedly have been constructive delivery of the whisky. But it is said not to be constructive delivery, because the forms of delivery were gone through by warehousemen who had been owners of the whisky which was still in their possession. Now, it humbly appears to me that the present is on that account rather an *a fortiori* case. I can myself see no good reason why the original sellers should not be allowed to make constructive delivery to Watters of property, the price of which had been paid to them, and which they had then no right to retain. They were at the time bound to deliver, for they had by accepting the delivery-orders agreed to deliver either actually or constructively. It is admitted that they could have done so actually, and why they should not be held to have done so constructively I must confess myself unable to comprehend. In the view I take of the case I do not consider myself entitled, in justice to parties situated as Watters then was, to interpose such a difficulty in the way of a man getting possession constructively of the goods he had paid for, and of which he was entitled to get full possession; and yet that is what the appellants now contend for, and on this broad ground, as I understood the argument, that in no case could constructive delivery be given by a seller of goods which remained in his possession. But this is, I think, a misapprehension of the law in this respect.

In the part of Mr Bell's work to which I have already referred, he gives (p. 176) several instances of cases of that description to which the rule of constructive delivery would apply. One case is that of trees sold standing, which it is the practice to mark for the buyer, as to which he says—"Such marking is good constructive delivery." Another case is that of cattle sold in a field, which it is the practice "to mark with the buyer's mark, and to leave them for grazing in the inclosure of the seller, the buyer paying the rent." In England a similar rule seems to prevail, for in the case of *Hurry*, 1 Camp. 462, quoted in a note by Mr Bell, goods sold and warehoused by the seller, who also kept a warehouse and charged rent against the buyer, were held to be constructively delivered. Mr Bell doubts the authority of that case, in so far as the charging of rent was of itself held to be sufficient to constitute constructive delivery, but assuming the charging of warehouse rent to be constructive delivery, it is a distinct decision to the effect that the circumstance that the goods warehoused had belonged to the seller, and had never been removed from his warehouse, was no bar to the application of the doctrine of constructive delivery. So also in the case of *Elmore* v. *Storer*, 1 Taunton 460, where a horse-dealer, who also took horses in at livery, sold a horse, and at the request of the purchaser immediately took the horse into livery at his stables, where it was taken charge of by the horse-dealer's servants. In a dispute about the price, the question turned on whether there had been delivery, and it was held that the horse-dealer's charge of it when at livery must be held as possession for the purchaser, although the horse had never been out of the seller's possession. In giving judgment Mansfield, C.-J., said—"In the present case after the defendant had said that the horses must stand at livery, and the plaintiff had accepted that order, it made no difference whether they stood at livery at the vendor's stables or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as owner of the horses, but as any other livery stables' keeper might have them to keep."

Plainly, therefore, there is no fixed rule of law to the effect contended for by the appellants as applicable to their position; and holding the question thus raised by them to be open, I am quite unable to see any grounds in law, and there are certainly none in equity, for holding that their proceedings in acting as warehousemen, and giving, in obedience to delivery-orders served on them by the sellers of goods of which they were the paid custodiers, what in law is constructive delivery of those goods, are not to receive effect.

The appellants have been holding themselves out to the trade as warehousemen who store goods on certain conditions as to payment of warehouse rent as other warehousemen do, and goods are stored with them on those conditions and warehouse rent paid. They accept orders made upon them for delivery of those goods, and by doing so they undertake and contract to deliver them, and, as I have already remarked in regard to the case of Watters (and the same observation applies to all the other cases of transfers by the first purchaser), they could not have refused delivery, for they had received payment of the price of the goods, and had no grounds for refusing to act upon the

orders or for withholding delivery. Watters did not require actual, but asked for constructive delivery, and they gave it in a form which in law was good constructive delivery, and so passed the full right of property to Watters, which was transferred by him to the bankrupts. By so acting the appellants gave up, as it appears to me, any right of property that remained to them in the goods. Now, all this was done by the appellants in their character of ordinary warehousemen, and they cannot, as I conceive, now be allowed to set up their alleged right of property as a ground for refusing to hand over the goods to the trustee. I am therefore of opinion with the Lord Ordinary that their plea to that effect should be repelled.

In coming to this conclusion I do not think that I am in any respect disregarding the decisions in the cases of *Matheson*, 17 D. 274, or of *Anderson*, 4 Macph. 764, founded on by the appellants, in both of which judgments I should have concurred. In the case of *Matheson* there were only two parties concerned, viz., Matheson and Alison, the trustee on Dunlop & Company's estate, who had sold the whisky to Matheson. The sale had been entered in the seller's books, but nothing more had been done. There had been no re-sale to any other party, and no delivery-order granted. The Court were unanimous in preferring the trustee on Dunlop & Company's estate, on the ground that there had been no constructive delivery, and held that the purchaser must just rank as an ordinary creditor of the bankrupt. And so also in the case of *Anderson* there were only two parties, viz., the trustee on the sequestrated estates of the seller, and M'Call & Company, the purchasers. An attempt was made to show that the goods had been transferred by an order on a third party—Angus, a storekeeper who had entered the purchasers' name in his books. On inquiry, however, it turned out that the alleged storekeeper was only a servant acting for the seller, and that the form he had gone through could not be held to amount to more than a mere entry of the sale, and of the purchaser's name by the seller in his own books, so that there was in reality no third party concerned. The claim of the purchaser was therefore rejected.

In the present case, however, the facts are altogether different. In each transaction, after the date of the first purchase, there have been three separate parties concerned, taking the transaction I have already given in illustration, viz., J. & G. Stewart, the original purchasers who re-sold the whisky, Watters who purchased it from them, and the appellants, who had assumed the character of the paid custodiers of the whisky for the Stewarts, and who accepted and undertook to act upon the delivery-order granted by the Stewarts, and in obedience to and in implement, as I think, of that order, had constructively delivered the whisky to Watters by transferring it to his name in their warehouse-books, under an arrangement by which he was to be charged with the payment of warehouse rent. This, on the grounds I have explained, completely divested the appellants, and passed the full right of property in the whisky to Watters.

On the whole matter, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary should be adhered to.

Lord Shand—The question in this case is, whether the appellants the Distillers' Company, Limited, were entitled to retain certain parcels of whisky lying in their stores or warehouses, standing entered in their books as belonging to Messrs W. & J. Russell, who are now represented by Mr Dawson, the trustee on their sequestrated estate. They claim a right of retention for the payment of a general balance on an account arising out of transactions between them and Messrs Russell entirely unconnected with the transactions by which the latter acquired right to the whisky in question. Mr Dawson, as trustee on the estate of Messrs Russell, and as representing their creditors, is willing to pay all warehouse charges which the Distillery Company may have for storing the goods, but he disputes their right to retain the goods for their general balance on account.

The decision of the case depends on the question whether the goods are the property of the appellants. If the goods be their property, then the appellants are entitled to plead retention as against the debt due to them by the bankrupts; if not—if the appellants were custodiers merely at the date of Messrs Russell's sequestration in October 1887—then they are only entitled to withhold the goods until they receive payment of their warehouse charges under the right of lien which they have as warehousemen or custodiers of the goods.

The question raised is important, and I think it is a new question. Hitherto, so far as I am aware, the Court in the cases which have occurred for decision has had to deal only with rights of retention pleaded by a seller in respect of claims by him against the original buyer. The right of retention for that class of debts has been maintained against the buyer's creditors where the seller has become bankrupt, and also against sub-purchasers. In this case no such claim is made, and no such claim exists. The appellants, the original sellers of the whisky, have no right of retention in respect of claims against the original purchaser. But although the right to the goods has been acquired by a series of sub-purchasers, and was ultimately acquired by Messrs Russell, the appellants, founding on an alleged right of property in the goods, claim a right of retention against Messrs Russell, the last of the sub-purchasers, because of a debt due by them on general account.

The position of the different parcels of whisky is detailed in the appendix No. 2 and joint minute for the parties, boxed 22nd November last. In all of the cases the appellants sold the goods several years ago, and at the time of the sale, or shortly afterwards, they received the price of each parcel sold. From that date down to 1887 a variety of transfers of the goods have taken place. In the case of one of the parcels, consisting of two quarters of whisky, there have been six transferences since the goods were originally purchased from the appellants in May 1881. In two other cases there have been four such transfers, and in the remaining cases two transfers. In each of these cases the original purchaser, having paid the price and re-sold the goods, granted a delivery-order addressed to the appellants in the terms stated in the joint minute, and this order having been intimated to them the appellants immediately made entries of

the transfer in their warehouse ledger, taking the goods out of the name of the original purchaser and entering them in the name of the sub-purchaser. At the same time they granted an acknowledgment by letter to the sub-purchaser of the receipt of the delivery-order, adding—"And we have to intimate that rent on the casks" therein specified will "be charged to you" from a date specified, being the day on which the delivery-order was intimated to them; and appended to these letters were certain conditions specifying the rate of rent to be thereafter charged against the transferee for warehousing the goods. In the case of each transfer by the sub-purchaser in favour of another sub-purchaser the same course was pursued—the delivery-order intimated, the transfer of the goods recorded in the appellants' books, and the goods transferred to the name of the transferee, and an acknowledgment of the delivery-order issued with an intimation that the new sub-purchaser would be charged rent at the rates specified.

The appellants are possessed of large bonded warehouses at their different distilleries of Cambus, Cameron Bridge, and Carsebridge, in which whisky manufactured by them is stored. In these bonded warehouses they have been in use for a number of years, by arrangement with persons dealing with them, to allow the goods to remain on storage rent, and each quantity of whisky as purchased is not only entered in the name of the purchaser, and transferred from time to time to sub-purchasers in the manner just explained, but the different casks are marked so as to be readily identified as being the goods specifically described in the delivery-orders and transfer entries. The information furnished by the parties does not show in detail the extent to which the company store or warehouse the goods of others as compared with their own stock; but there can, I think, be no doubt that whisky belonging to themselves and unsold must form a small proportion of the total quantity of goods in their bonded warehouses. Goods sold by them during a number of years have been constantly in use to be left in their custody for payment of warehouse rents, while I should suppose that as manufacturers they will endeavour to make sales of their own goods as soon after they are manufactured as possible.

In considering the effect of the appellants' sales, the delivery-orders and acknowledgments in the terms already mentioned, and transfer entries in their books, as bearing on their claim to be now proprietors of all the whisky in their warehouses, it appears to me to be of much importance to have in view the provisions of the Mercantile Law Amendment Act of 1856. Prior to that statute several cases had occurred in which, although the sellers of goods had received full payment of the price and implement of the contract on the part of the buyer, their creditors on their bankruptcy were held entitled to refuse delivery to the buyer or his creditors, and thus they got the benefit, first, of the price of the goods which the the bankrupt had received, and next of the value of the goods themselves. Even in the case of a sub-purchaser, who in his turn had paid the price of the goods to the first purchaser, and had obtained and intimated a delivery-order, the original seller, notwithstanding the receipt of the price due to him, and the fact that he held the goods merely as an accommodation to the buyer and for his behoof, was held entitled to a right of retention for a balance due to him by the first purchaser on new and different transactions. It appears to me to be impossible to dispute that these cases resulted in serious injustice. I am humbly of opinion that it was not a creditable state of the law that in such circumstances the rights of purchasers who had paid for their goods should have been defeated, and that the sellers who had obtained payment of the price of the goods, which were left in their possession admittedly by arrangement for custody only, or their creditors should still be entitled to refuse delivery. The decisions were rested partly on the doctrine that until delivery of goods under a contract of sale was made the right of property or *jus in re* remained with the seller, and partly on the doctrine of reputed ownership, or at least on the view that merchants were entitled to assume that goods which were in their debtor's possession were their property—that to hold otherwise would enable sellers to obtain fictitious credit—and that this was a good reason for refusing to give effect to constructive delivery. This last was the express ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison* v. *Allison*. In regard to the first of these grounds the result was arrived at by the application of the principle expressed in the brocard, *traditionibus non nudis pactis transferuntur rerum dominia*.

It has always seemed to me that that principle was carried to an extreme length in the cases I refer to—I mean more particularly the cases of *Melrose* v. *Hastie* and *Mathison* v. *Allison*, neither of which unfortunately was reviewed in the House of Lords—that in these cases the principle received effect in circumstances which did not warrant its application. I assume it to have been clearly established in the law of Scotland—as I believe it to have been properly so established—that where there was a simple contract of sale with nothing following on it the property should remain with the seller. But where something material had followed beyond the *nudum pactum*, where the seller had been actually paid the price of the goods, had entered the goods in his books as belonging to the purchaser, and had set them aside and ear-marked and retained them in his premises by arrangement with the buyer for custody only, I am humbly of opinion that the brocard *traditionibus non nudis pactis transferuntur rerum dominia* had no proper application. I should perhaps rather say it had been fully satisfied, because the bare agreement, the *nudum pactum*, had been followed and clothed by implement on the part of the buyer, and by acts on the part of the contracting parties, which constituted constructive delivery. Happily, however, by the legislation of 1856 the gross injustice which had been done to buyers who had not only bought but paid for their goods was in a great measure removed as regards the subsequent dealings of traders; and in the case of sub-purchasers who had intimated their purchases by delivery-orders or otherwise to the original seller all possible right of retention on the seller's part on the ground of any claim of indebtedness against the original buyer on other transactions was abolished. It is true that the enactments of the statute do not alter the legal principle that

the seller of goods retains a right of property in them, or *jus in re* until delivery, actual or constructive; but the statute provided a remedy for the injustice and, as I think, the mischief of the law, as it had been interpreted by decisions, to an extent which it appears to me materially affects the decision of the present case. After an examination of the statute with reference to the change effected in the law, Lord Blackburn observed in the case of *M'Bean* v. *Wallace & Company*, 8 R. (H. of L.) 112—"The chief practical difference arising from the *jus in re* remaining in the vendor and the *jus ad rem* going to the purchaser was that the vendor's creditors by poinding and by sequestration could take the goods. There is a nominal difference still between the law of England and the law of Scotland; but for all practical purposes the law of Scotland, where there has been a contract of sale though no delivery, is made identical with the law of England in the actual result." In the case of a sub-purchaser, particularly who has intimated his sub-purchase, it seems to me that his Lordship's words are literally true.

The appellants in this case set up a claim of property to the goods which they sold years ago, and the right to which in some cases has, as I have observed, passed through several parties till it became vested in the bankrupts. They have admittedly no claim whatever to hold the goods against the purchaser from them. They have received the price, and even if the original purchasers were debtors to them in account they cannot on that ground maintain any right to retain the goods against a sub-purchaser who by intimation of the delivery-order has intimated his sub-purchase. The only means by which the appellants could have acquired such a right was not by asserting any right of property in the goods, but by resorting to the diligence of arrestment of their debtor's goods—*i.e.*, the goods of the original purchaser—in their own hands—a diligence which is competent to all other creditors of the purchaser, but which must be resorted to before intimation of the sub-sale.

It is in these circumstances that the legal effect of the intimated sub-purchase, the transfer of the goods in the books of the company, and the intimation of a charge for rent is to be considered—and that in a question with persons who as part of their ordinary business store goods for rent. It humbly appears to me that the result of the dealing between the appellants as the original sellers—who can no longer retain the goods on account of any obligation of the purchaser from them—and sub-purchasers, is that constructive delivery of the goods has been given to the latter. The system on which the company acts, and has acted for years, in my opinion makes them (as the Lord Ordinary has held) warehousemen or store-keepers in a question with sub-purchasers with whom they have dealings; and it is only right that this should be so, for much the greater part of the goods in their warehouse is held for sub-purchasers and for payment of warehouse rent. There is no doubt that if the delivery-orders and relative intimations and transfer entries in the company's books had occurred in the case of goods stored in an ordinary public warehouse, that would have been conclusive in the respondents' favour. Why should the result be different in the case of the appellants who are to a large extent warehousemen or storekeepers, although they do not receive and store whisky other than their own manufacture? It is said that the legal effect is different because they were originally sellers of the goods. The provisions of the statute have destroyed the rights of retention which persons in their position formerly had, at least to the extent I have already stated; and these provisions have at the same time, as it appears to me, made it also more easy than formerly for persons buying from the original purchasers to obtain from the appellants constructive delivery of the goods so bought and warehoused with them; and for the appellants to give such delivery. The appellants were bound to give actual delivery if asked, as they could not retain the goods even if the original purchaser owed them a general balance, and there is every presumption in favour of constructive delivery and against the notion that the sub-purchaser would elect so to transact as to leave the appellants owners of the goods which he merely stored with them.

It do not know whether it is maintained by the appellants that they cannot give constructive delivery of goods of which they were the original sellers, and which have continued to lie in their warehouse. If that be maintained, I think the contention is clearly unsound. Lord Mure has given several instances of constructive delivery of subjects purchased and left with the seller, even where the seller did not hold himself out, as the appellants do, as warehouse keepers for rent. Professor Bell mentions the case of the purchaser of a vase who, having paid for it, leaves it with the seller to have certain work executed on it. A person may purchase a horse, and having paid the price, may leave the animal with the seller at livery, or let it to the seller on hire. Surely it could not be successfully maintained that the purchaser of the vase must take it up and carry it outside the seller's premises and return with it, or that the purchaser must take his horse outside of the stable, when he may take it back again, in order to have effectual delivery. The constructive delivery is surely complete without any such proceeding of personal apprehension and removal of the subject from the seller's premises. The law, as I understand it, does not require this form to be gone through, for it would be little more than a mere form. Constructive delivery is complete by payment, followed by the new contract or arrangement made with the seller, which entirely changes his title to the goods from one of property to one of depository, hirer, or otherwise. So also with a purchaser of cattle who, having paid the price, agrees to leave the cattle for grazing at a rent or charge agreed on. The constructive delivery, I cannot doubt, would be quite as effectual as actual delivery by the removal of the cattle by the purchaser outside of the seller's field and putting them back again. A purchaser of books may leave them to be bound with a seller who also carries on business as a bookbinder, and such instances might be indefinitely multiplied. Whether anything can be maintained against constructive delivery being allowed by the law or not because of the doctrine of reputed ownership is a different matter, to which I shall refer immediately. But apart from this, I can see no reason to doubt that in the cases which I

have mentioned constructive delivery would in *bona fide* transactions be quite as effectual as actual delivery by the removal of the subjects purchased from the custody of the seller.

And so also in the case of a general warehouse or store. A purchaser of goods, desirous of leaving them with the warehouseman and willing to pay rent for them, intimates his delivery-order and gets the goods transferred in the warehouse books to his name. There has been no actual delivery or personal taking possession of the goods. But the constructive delivery is complete, because the contract of deposit with the sub-purchaser has been completed. This illustration shows, as the other illustrations do, that it is not correct or true to say that the purchaser must take physical possession of goods purchased. That is certainly not required, and if delivery with its legal consequences be effected in the case of a warehouseman, or in the other cases I have mentioned, it must, as it appears to me, be equally effected in the case of goods lying with a seller where the price is paid and the goods are left, entirely because of a new arrangement that the seller shall hold them on deposit, or shall so hold them and store them in return for a certain charge or rent. I cannot assent to the view that a seller by the law of this country cannot effectually make such an arrangement, nor can I believe that such constructive delivery, if the facts are clear and the *bona fides* of the parties is evident, is not as effectual as actual delivery would be. I do not regard an arrangement to pay rent as at all essential or necessary, though the payment of rent is a clear piece of evidence as to the true nature of the agreement of the parties. If the purchaser were by his servants, in his dealings with the appellants (and I say the same of sub-purchasers), to roll the puncheons of whisky out of the store in order to take actual possession, and to roll them back again, but clearly on an arrangement for custody and deposit only, this would be taking actual delivery. Surely constructive delivery can be given and taken without going through this process. I cannot doubt that if on the occasion of the intimation of the delivery-orders by the original purchasers of the goods in question being intimated to the appellants—who, as I have shown, were bound to give actual delivery if asked. because they could have no claim to retain the goods for a debt due by the purchaser—the appellants had acknowledged the order, and in their letter had undertaken expressly to hold the goods for the sub-purchasers as warehousemen or custodiers for rent for their accommodation, the delivery would have been effectual. But this would only have been the giving and taking of constructive and not actual delivery.

And in effect this in my opinion was what occurred in reference to the goods now in question. The appellants had no power to hold them for a day after the original buyer demanded them, and his sub-purchaser was in a position to take either actual or constructive delivery as he chose. Is there any reason for saying he preferred to take neither, but to leave his original sellers that *jus in re* which they now seek to plead and enforce after all that has occurred? The appellants are warehousemen—though they only agree to store goods of their own manufacture—for they have regular stores which are largely used by third parties who arrange to pay storage rents or charges; and when goods are transferred by the original buyer, who having paid the price and being under no obligation of any kind to the seller, is under the statute to all practical effects the owner (the seller having no possible right of retention of the goods)—when the transfer is duly recorded in the warehouse books—and an intimation given to the sub-purchaser that henceforth "rent" will be charged against him for the goods, I am of opinion that the goods are then left with the appellants and accepted by them as custodiers or warehousemen for custody on rent. Under this arrangement they cannot in my opinion rear up or revert to their former right of ownership, an empty right which, if it existed at all when the sub-sale was intimated, had then no legal effect or consequences even in a question with the original purchaser. If I be right in so thinking, of course they cannot obtain the preference they now seek to gain over the general creditors of Messrs Russell.

The view I have now stated does not conflict with the decision in the case of *Anderson* v. *M'Call & Company*, on which much of the appellants' argument was based. I should without difficulty have concurred in the decision of that case, for as soon as it was settled that the storekeeper Angus was merely a servant of Jackson & Son, the owners of the goods there in dispute, and that therefore in giving a delivery-order on him they were merely giving an order on themselves, the case resolved into an attempt on the part of persons giving an advance on moveable property to have an effectual pledge although the property was left entirely in the debtors' hands. Jackson & Son continued themselves to hold the sugars on the security of which their creditors made the advances, and an undertaking to hold these sugars, which were their own property in every sense of the word, in their own possession for behoof of a particular creditor was of course ineffectual, because a pledge cannot be given by a debtor who continues in possession of it. The law is entirely different in a case of purchase and sale where the price has been paid. It seems to me, accordingly, that the *dicta* in the case of *Anderson* v. *M'Call*, founded on by the appellants, must be regarded as *obiter* in a question like this of purchase and sale and sub-sales followed by the dealings above detailed. The passage mainly founded on in the opinion of your Lordship is as follows:—"In order to operate constructive delivery by means of a delivery-order there must be three independent persons, the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor there ceases to be a third independent person; and therefore constructive delivery cannot in that case be effected by a delivery-order. That is the clear law of Scotland, which is well established, and has received effect in a number of cases. Applying that rule of law I am of opinion that this verdict is for the pursuers." If that passage be read as limited in its application to such a case as that of *M'Call*, where it was attempted to make a security effectual over moveables *retenta possessione* of the owner, I entirely agree with it. But it has no relation, I think, to a case like this where sub-purchasers' rights at common law and under the statute are in question. In that case there was no sub-

purchase and no delivery-order by the first purchaser to a sub-purchaser who had paid for the goods. In this case in each sub-purchase there were three parties concerned, and for the reasons I have explained I think the appellants, who were one of these parties, and who were the custodiers of the goods, were truly third parties, although they had at one time been owners and sellers of the goods. It is said there were only two persons, viz., the original sellers or owners and the buyers or their mandatories or assignees. This seems to me to be begging the whole question. The original sellers had in my opinion become custodiers or warehousemen of the goods by contract. In any case they had a double character. The sub-purchasers had acquired an independent position. It is only by regarding them as sellers and owners only that the appellants can maintain their argument, for they could not be custodiers only of their own property. But if the appellants were custodiers only, as I think they were, by contract having lost any right of property after constructive delivery of the goods, there were plainly three persons taking part in each sub-sale and delivery.

In my opinion, however, already explained, I do not think that it is in the least degree necessary to constructive delivery that three persons shall take part in the transaction.

Any question of reputed ownership, or of the supposed inference as to ownership, to be drawn from the mere possession of goods which to a large extent entered into the decision of the cases of *Melrose* v. *Hastie* and *Mathison* v. *Allison*, and which formed the ground of judgment of Lord Deas and Lord Benholme in the case of *Mathison*, does not, I think, arise here. The appellants are here themselves only claiming their contract rights. They are not represented by creditors who might plead that they had been induced to give credit because of continued possession of goods allowed to their debtor. But even if the question had occurred with creditors of the appellant seeking to gain the preference over the general creditors of the sub-purchasers which the appellants now do, I am clearly of opinion that the plea of apparent or reputed ownership would not avail. If the appellants are the owners they must succeed in their plea of retention on that ground. If they are not, there is no room for saying that the sub-purchasers have so acted as to warrant third parties to assume or believe that the appellants were the owners. In the case of *M'Bean* v. *Wallace & Company* this subject was discussed in reference to a ship in the course of being built in the shipbuilders' yard, and the plea did not receive much countenance—and the cases of *Orr* v. *Tullis*, 8 Macph., and *Robertson*, 9 R., are recent authorities showing that the title of possession is the point to which persons must look in giving credit to others. In Prof. Bell's Principles, sec. 1315, he says—"Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors are entitled to rely, for the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence, every legitimate cause of possession makes an exception to the credit of apparent ownership. So in Commodate the possession of the borrower is no lawful ground of credit to him. In Hiring, neither the subject let nor materials in the hands of a workman under *locatio operis* can afford a fair ground of enlarged credit to the possessor. In Deposit, though the thing deposited may appear as part of the custodier's stock, it remains separate on his bankruptcy as the property of the depositors." This seems to me to be quite applicable to the present case, and to be conclusive. I do not think that because goods for the buyer's convenience are left in a seller's warehouse after being sold and the price paid, there is ground for reputed ownership—especially now, having regard to the provisions of the Mercantile Law Amendment Act as affecting the rights of sellers and their creditors. And in so far as the judgments of *Melrose* v. *Hastie* and *Mathison* v. *Allison* proceeded on that view, they were, I think, unwarranted. In some of the cases on this branch of the law Judges have said it was the buyers' own fault that they did not take actual delivery, and they must take the consequences. I see no fault in the matter, nor do I see any reason for this consequence, viz., that they should lose the goods they had paid for. The exigencies of business and the convenience of merchants (and I think the convenience of trade should have great weight in such questions) often require, or at least make it highly desirable, that goods bought and paid for should remain with the original seller, not as his goods, but on the contract of deposit. If this be arranged constructive delivery results. The transaction cannot be held invalid or ineffectual because third parties choose to infer without warrant that the possession of an original seller is necessarily continuous as the possession arising from ownership, whatever may have been the seller's contracts or dealing with his goods.

Finally, I think reputed ownership is out of the question with reference to such a business as that of the appellants, whose warehouses in the knowledge of everyone dealing with them are so much used for the storing of goods sold often years before by the appellants to third parties.

I am, on the whole, of opinion that the judgment of the Lord Ordinary is sound, and that it should be affirmed.

Lord Adam—By the laws of Scotland the property of goods sold but not delivered remains with the seller.

Nothing but delivery, actual or constructive, will pass the property. There has been no actual delivery in this case. The whisky sold is now, and has all along been, in the possession of the Distillery Company. It lies now, and has lain all along, in the cellars or warehouse of the company.

Has there then been constructive delivery? The Lord Ordinary is of opinion that if the company were here in a question with the original purchaser, they must have prevailed. I agree with him, for I think that the cases of *Matheson* v. *Alison*, and *Wiper* v. *Harvey*, rule this case. In the case of *Matheson* v. *Alison*, as in this case, the whisky sold remained in the seller's warehouse, but the price of the whisky was paid by the vendee. An invoice was sent to him, and the sale recorded in the warehouse-books of the seller. But the Court held that all this did not operate constructive delivery, that the vendor remained the undivested owner of the goods,

and that what passed to the vendee was a right to demand delivery of the goods sold.

The only difference that I see between this case and that of *Alison* v. *Matheson* is that on the invoice sent to the vendee there is endorsed as a condition of the sale that the spirits would be held free of rent charge for six months in the company's casks and twelve months in customer's casks from date of invoice, and that thereafter the spirits should be subject to a rent charge of 1d. or 2d. a-week as the case might be.

It is said, as I understand, that the effect of this condition was, that thereafter the vendor held the goods, not in his title of undivested owner, but as a warehouseman under an implied contract to that effect.

It is, I think, quite settled that if the owner of goods delivers them to a warehouseman, or other neutral custodier to hold them for him, that an order by the owner to the custodier to deliver them to the purchaser intimated to the custodier will operate as constructive delivery of the goods, and transfer the property of them to the purchaser.

Your Lordship in the case of *Pochin* v. *Robinow*, 7 Macph. 622, thus states the law in this respect—"Constructive delivery may take place, and generally does take place, where specific goods or other moveables being in the custody of some person other than the owner the owner gives to the purchaser of these goods a delivery-order addressed to the custodier ordering him to deliver to the purchaser those specific goods. When this delivery-order is intimated to the custodier, constructive delivery is effected, because the custodier becomes from that time holder for the purchaser, just as before he was holder for the seller. But to the completion of such constructive delivery two things are indispensable, that the holder shall occupy an independent position, and be neither the owner nor in any way identified with the owner of the goods." That, I think, is a correct exposition of the law, but I can find no facts admitting of its application in this case.

I cannot see how a condition such as the one in question adjected to a contract of sale for the mutual accommodation of the vendor and vendee can have the effect of converting the vendor into a neutral warehouseman or independent custodier of the goods. So far, then, I concur with the Lord Ordinary, and I think he is right in saying that the Distillery Company must have prevailed in a question with the original vendee. But I differ from him in thinking that it makes any difference that the question has arisen with a sub-vendee.

If the original vendee had, as I think he had, only a *jus ad rem*—a right to demand delivery of the goods—he could give no higher right to a sub-purchaser. The original vendee could not give delivery of the goods to the sub-vendee, because he never had possession of them himself. The course of dealing with the goods in this case was this. The vendee granted to the sub-vendee a delivery-order—that is, a request addressed to the vendor to deliver to him, the sub-vendee, the goods therein mentioned.

This delivery-order was intimated to the vendor. The receipt of it was acknowledged by him, with an intimation that rent for the casks would be charged from a date stated, and the transfer is entered in the vendor's books.

The effect of this appears to me to be simply to substitute the sub-vendee in place of the original vendee. It gives the sub-vendee a right to demand delivery of the goods from the vendor—which is just the right which the original vendee had—and completes the transaction as between the vendee and sub-vendee.

The Lord Ordinary quotes with approval the statement of the law by your Lordship in *Anderson* v. *M'Call*, that "in order to operate constructive delivery by means of a delivery-order, there must be three independent persons—the vendor, the vendee, and the custodier of the goods, and if the custodier of the goods be identical with the vendor, there ceases to be a third independent person, and therefore constructive delivery cannot in that case be effected by a delivery-order."

But when the Lord Ordinary goes on to say that in this case there are three independent parties, the vendor—*i.e.*, in his view the original vendee—the bankrupts vendees, and the appellants warehousemen, I think he has mistaken the contract of which implement is sought.

There is no question as to implement of the contract of sale between the original vendee and the sub-vendee. That was implemented by the delivery to the latter of the delivery-order and its intimation to the Distillery Company.

The contract here which is sought to be enforced is the contract between the original vendor and vendee, and to this contract there are only two parties, the vendor and the sub-vendee, as coming in place of the original vendee. There is no third party concerned, independent or otherwise.

On the whole matter I am of opinion that the Distillery Company have all along been in possession of the goods in question in their title of undivested owners, and that they are entitled to retain them against the general balance due to them by the bankrupts.

Of course the number of times any particular parcel of whisky may have been transferred can make no difference in the result.

Lord Kinnear—I agree with your Lordship in the chair, and therefore I need hardly say that I also agree with Lord Shand in thinking that the doctrine of reputed ownership has no bearing whatever on this question. The only point which we have to consider is, whether the goods have or have not been delivered to the bankrupts as now represented by the trustee on their sequestrated estate, who is the respondent in the reclaiming-note.

If it could have been considered an open matter whether delivery had been made to the first purchaser, the question is one which might have given rise to some difficulty, and might have required serious consideration, but I think that all your Lordships are of opinion along with the Lord Ordinary that it is absolutely concluded by authority, and accordingly we are all agreed, as I understand, that the goods were not delivered to the first purchaser, and that they remained with the sellers as undivested owners. Now, that being so, it follows as a necessary consequence that the position of the first purchaser was that of a creditor under a personal obligation to deliver the goods, and that was the only right

which the first purchaser could give to any sub-purchaser from him. He could not deliver the goods to his own sub-purchaser, because they were not delivered to him, and were not in his possession. All he could do was to put the sub-purchaser in his shoes, and enable him to go to the seller and ask for delivery. And accordingly I do not understand that those of your Lordships who agree with the Lord Ordinary are prepared to hold that delivery was given by the first purchaser to the sub-purchaser. I rather think that the view which your Lordship has adopted is, that the original vendor delivered to the sub-purchaser upon an intimation to him of the first purchaser's assignation. But then the original vendor did nothing more upon that assignation being intimated to him than he was bound to do whether he intended to deliver to the sub-purchaser or not, because, as both Lord Mure and Lord Shand have pointed out, he had no alternative after the intimation was made to him that the goods which he held undelivered to the first purchaser had been assigned by that purchaser to a sub-purchaser, except to acknowledge that he had received that intimation, and to make the corresponding entries in his books, which placed the sub-purchaser in the position of the original buyer. Now, if that was what he was bound to do whether he delivered or not, I have great difficulty in seeing how constructive delivery could thereby be effected. But I have a further difficulty, because I cannot see how the granting of letters of acknowledgment or the alteration of entries in the seller's books which would not have the effect of delivery to the first purchaser could possibly have the effect of delivery to the sub-purchaser or to anyone else.

I cannot help thinking that a great deal of perplexity has been introduced into the argument by the introduction of the elementary question whether delivery is or is not necessary. That is a question of law, but when once it is held that delivery is necessary, I think we are all agreed that the question whether it has taken place or not is a mere question of fact, and is to be proved just as much as any other question of fact. You require to prove a case of what is called constructive delivery in the sense in which that expression has been used in the argument, just as you would prove a case of what is called actual delivery of goods. When goods sold are not in the hands of the seller but in the hands of a third person subject to the seller's order, then delivery of an order upon the custodier, and one intimation of that order to him, is just as much delivery in fact as if the goods had gone out of the hands of the seller, and had been handed over by him to the buyer, because the intimation of the delivery-order controls the position of the seller, and vests the buyer with possession, just as effectually as if the seller or the custodier having civil possession of the goods had handed them over to the actual possession of the buyer himself.

I think there is some unfortunate expression in the argument arising from the fact that the case has been treated as a case of constructive delivery in the sense in which that expression is used in cases where delivery has been dispensed with, and where from the position of things it is impossible to give possession to the buyer in any actual sense, such cases have been suggested to us by way of illustration, but I do not know how far the principles of law upon which they depend, and which have been borrowed from the law of England would be carried into effect or not in our law. Such cases are, however, altogether outside the present question. I have no doubt whatever that in a case where goods are in the hands of a custodier for the seller, and are put into the possession of the buyer by the delivery to him of an order upon the custodier, there is actual delivery terminating the possession of the seller and putting the buyer into his place. If that be so, it would follow that whatever effect ought to be given to the book entries, and to the letters of acknowledgment upon which the respondent relies, they cannot be founded upon as inferring constructive delivery. There can be no delivery till they leave the possession of the seller and go into the absolute and actual possession of the buyer. The case is just the same as if there had been no sub-purchaser.

It is, however, quite possible that the seller of goods in the position in which this Distillers' Company stands may place themselves by contract or by a course of conduct in such a situation with a buyer that they would be precluded from maintaining any such right of retention as is claimed here, or a right of property in goods even although these may remain in their custody. If a seller had undertaken to deliver in terms that would prevent him from pleading a right of retention against a sub-purchaser, he must deliver according to his undertaking, and would be in no different position from a person who had given an obligation to give a right of property to another. And therefore the real question appears to me to be whether there is anything in the contract or in the conditions of sale to suggest such an obligation as that? For the reasons to which I have already referred I think there cannot be, because there is nothing in the contract beyond what one would have expected to find there whether there was to be delivery or not. It is therefore quite impossible to put any interpretation either upon the letter of acknowledgment or upon the book entries which would bar the original vendor from pleading his right of retention to the same extent as he would have been entitled to plead it apart altogether from such acknowledgment and entries.

But then it is said that the vendor holds the goods for the assignee under an intimated assignation. But the assignee is in the same position as his cedent as regards the vendor. The vendor still remains undivested owner under obligation to deliver when called on to do so unless before delivery is made he can establish some good right which will justify him in resisting such a demand. If so, then it seems to follow that when a sub-purchaser to whom the goods have been sold calls upon the original vendor to perform his obligation to deliver up the goods sold, he is in a position to say that he will not perform his contract because of another transaction on which money is owing to him, and in regard to which the purchaser has not performed his obligation. He may say as to the goods still undelivered that he is ready to deliver them on payment of the general balance due to him.

If that is the position at common law I do no

think that the Mercantile Law Amendment Act makes any difference upon it. The effect of that Act has been repeatedly considered, and its effect in a question of this kind was fully discussed in the case of *Wyper*.

The Court pronounced the following interlocutor :—

"Recal the interlocutor reclaimed against, and the deliverance of the trustee appealed from, and remit to the trustee to rank the appellants for the sum of £742, 13s. 10d., and to allow them to retain the whisky in dispute as their own property." . . .

Counsel for the Distillers Company—Balfour, Q.C.—Goudy. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for W. & J. Russell's Trustee—Jameson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, February 20.

SECOND DIVISION.

SCOTT AND OTHERS *v.* HORSBRUGH (SCOTT'S TRUSTEE).

Bankruptcy—Sale of Furniture left in Bankrupt's House—Reputed Ownership—Mercantile Law Amendment Act 1856, *sec.* 1.

In 1885 a bankrupt entered into a composition arrangement with several of his creditors, including his mother-in-law, who in reduction of her claim bought his furniture as valued by an appraiser. She thereafter lent it to her daughter, the wife of the bankrupt, and it remained in his house until 1888, when his estates were sequestrated. *Held* that the trustee in bankruptcy was not entitled to sell the furniture in a question with the bankrupt's wife and sister, to whom their mother had bequeathed the furniture.

The Mercantile Law (Scotland) Amendment Act 1856 (19 and 20 Vict. c. 60) provides by section 1 that "From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

The affairs of William Begg Scott, now butcher, Bervie, became embarrassed in 1885. At that time he was a baker and grocer in Montrose, and consulted Mr Ramsay, agent for the Bank of Scotland there with a view of coming to an arrangement with his creditors.

The following circular, unsigned but drawn up by Mr Ramsay, was issued :—

"*Bank of Scotland,*
Montrose, 11th February 1885.

"Dear Sir,—Mr W. B. Scott, baker and grocer, Ferry Street, Montrose, has put his affairs into my hands, with a view to an arrangement with his creditors. He has made an agreement with a baker in town to take over the whole stock, plant, &c., at valuation in May next. When he advertised the business he was under the impression that with some help from his friends he would be able to pay 20s. per £ to all his creditors. But I have gone thoroughly into his affairs, and I find he is hopelessly insolvent. There is such a large deficiency that his friends cannot undertake any responsibility connected with it.

"The following is an abstract of the assets and liabilities :—

Assets.

Bakehouse plant and utensils . (Estimate by Mr M'Queen, baker).	£104	14	9
Stock of baking and grocery goods, with shop-fittings, &c. . .	146	14	5
Book debts, £68 (of which doubtful, £15), say	60	0	0
Life Policy p. £200 (dated 1879) .	20	0	0
Household furniture . . .	70	0	0
	£401	9	2
Less preferable debts—rents	38	10	0
	£362	19	2

Liabilities.

Trade debts .	£408	13	3	
Accommodation from bank and relatives	688	0	0	
				£1096 13 3
Showing a deficiency of . .				£733 14 1

and a dividend of 6s. 7½d. per £.

"With assistance Mr Scott proposes to pay 7s. per £ on promissory-note, payable 3 months hence—the bill to be countersigned by his brother Mr George Scott, cattle-salesman, and to be met out of the proceeds of the purchase price of the stock from the new tenant. There cannot be a doubt that this proposal is as favourable as the creditors need expect. If it is not agreed to it will be necessary to take out sequestration, I fear, to prevent preferences being forced. I may say that Mr Scott will not make any higher bid to avoid the unpleasantness and publicity of sequestration. I may add that in making the offer of 7s. he is doing more than the state of his affairs prudently warrants; because I have little hope that the stock will come up to the valuation put on it when it comes to be taken over.

"Trusting you will agree to the proposal for settlement—I am, yours faithfully,

"*P.S.*—Under sequestration the yield will be very much less of course. The furniture will not produce nearly £70 if brought to the hammer."

Scott afterwards settled with most of his creditors by paying them 8s. in the £. Among these creditors was his mother-in-law Mrs Gouk, who had a preferential claim for the rent of a house, amounting to £25, and a claim to rank *pari passu* with other creditors for a loan of £100. In reduction of these claims she bought his furni-