plea, the defender maintains that the holder of a ground-annual cannot raise an action of maills and duties, and reference was made to the cases of *The Prudential Assurance Company* v. *Cheyne*, 11 R. 871, and *Nelson's Trustees* v. *Todd*, 23 R. 1000. By these cases it was decided that neither a superior nor the creditor in a bond and disposition in security of a superiority can pursue an action of maills and duties for recovery of feu-duty. The ground of the judgments is that a superior is not owner of the feu, and has no title on which he can oust the vassal and enter into possession, but he may poind the ground, which one in possession cannot do. The holder of a ground-annual, however, is in a different position, and he can raise an action of maills and duties and enter into possession in the same way that the creditor in an annuity secured by bond of annuity and disposition in security can. This is distinctly laid down in Bell's Lectures on Conveyancing, pages 1147-8, and the same proposition is stated in the last edition of Bell's Principles, section 887a." . . .

The defender appealed to the Sheriff (BERRY), who on 24th November 1898 adhered.

"*Note.*—The pursuer of this action is the holder of a ground-annual under a contract which contains, as is usual, in security of its payment, a conveyance of the subjects and an assignation to the rents in his favour. The question is raised whether he has the remedy of an action of maills and duties for its recovery. I am not aware of any decision bearing directly on the point, but I think that the principle recognised in more than one case, as governing the right to bring such an action, applies to the case of the holder of a ground-annual who stands in right of a disposition to the land and an assignation to the rents. He is in a different position from the superior of the property, who, as having no right to enter into possession, cannot sue in an action of maills and duties. That a superior is excluded from this remedy was decided in the *Prudential Assurance Company* v. *Cheyne*, 11 R. 871. The ground of his exclusion is well stated in the judgment of Lord Rutherfurd Clark in that case. He states that the superior by the very terms of his grant guarantees to his vassal the right to possess the feu. To dispossess the vassal from his position would be a violation of the feu-charter. No such difficulty lies in the way of the holder of a ground-annual, who stands in the right of an assignation to the rents. I think that a disposition to the lands, coupled with an assignation to the rents, places the pursuer in the same position as a heritable creditor in regard to the remedy of an action of maills and duties."

The defender appealed, and argued—The holder of a ground-annual was not a heritably secured creditor. There was no precedent for a holder of a ground-annual suing an action of maills and duties. There was no instance of such in the books of style.

Counsel for the pursuer were not called on.

LORD JUSTICE-CLERK—I think that there is no doubt that this action is competent.

LORD YOUNG—I agree with the judgment appealed against.

LORD TRAYNER—I think that it is quite clear that the Sheriffs were right, and I see no possible ground of objection to their decision.

LORD MONCREIFF concurred.

The Court adhered.

Counsel for the Pursuer — Salvesen — Sanderson. Agents—P. Morison & Son, S.S.C.

Counsel for the Defender—Crabb Watt. Agent—L. M'Intosh, S.S.C.

Friday, March 10.

FIRST DIVISION.

DISTILLERS' COMPANY, LIMITED, *v.* INLAND REVENUE.

Revenue—Stamp—"Warrant for Goods"—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *sec.* 111 (1), *and First Schedule.*

A firm of distillers wrote to Messrs A B as follows:—"We beg to acknowledge receipt of delivery-order dated 31st October 1898, granted by Messrs Y Z in your favour, and we have to intimate that rent on the casks therein specified will be charged to you from 31st October 1898, the goods having been transferred to your name as at that date. *Note.*—This acknowledgment is given subject to the company's statutory right of lien, and to their stipulated right of lien, and other conditions specified on the back hereof."

Held that this instrument was a "warrant for goods," and therefore liable to a stamp-duty of threepence under the Stamp Act of 1891, sec. 111, sub-sec. (1), and First Schedule.

This was a case stated on appeal by the Distillers' Company, Limited, against a determination of the Inland Revenue Commissioners that the following instrument was chargeable as a warrant for goods with a duty of threepence, under the Stamp Act 1891, sec. 111 (1):—

"*Caledonian Distillery,*
"*Edinburgh, 3rd Nov.* 1898.

"Messrs D. & J. Robertson, Edinburgh.

"Dear Sirs,—We beg to acknowledge receipt of delivery-order dated 31st October 1898, granted by Messrs Stodart & Wilson, Leith, in your favour, and we have to intimate that rent on the casks therein specified will be charged to you from 31st October '98, the goods having been transferred to your name as at that date.—We are, dear Sirs, yours obediently, THE DISTILLERS' COY. (LTD.), *per* T. T. SUTHERLAND. *Note.*—This acknowledgment is

given subject to the company's statutory right of lien, and to their stipulated right of lien or retention, and other conditions specified on the back hereof."

The conditions on the back of the instrument bore, *inter alia*, that the company should have a right of lien or retention over the spirits not only for their price and for warehouse rent, but also for any debt due to the company by the person claiming delivery.

The delivery-order referred to in the instrument was in these terms:—

"1419. *Leith*, 31*st October* 1898.

"Messrs Distillers' Co., Ltd.,
Caledonian Distillery.

"Dear Sirs,—Please deliver the undernoted eleven butts seven hhds. and six qrs. Caledonian whisky to the order of Messrs D. & J. Robertson, Edinburgh.—And much oblige, yours faithfully,

STODART & WILSON.

STODART & WILSON,
p. DAVID STODART.

Nos.	*Bonding Date.*
7123/4, 8577/85 10,098/10,110.	April May '96."

One Penny

It was granted upon a sale or transfer of the goods, and was impressed with a stamp denoting the duty of one penny.

The case stated that "the whisky in question was originally sold by the Distillers' Company upon an ordinary trade invoice, specifying the number of casks, and has since remained in the company's warehouses. According to the custom of the trade, where such whisky is removed by the original purchaser, no delivery-order is required. Where the original purchaser does not remove the whisky, but sells or transfers it, he grants a delivery-order in favour of the sub-purchaser or transferee. The sub-purchaser or transferee presents the order to the company, and if he does not remove the whisky he in turn receives an acknowledgment of receipt of the order. The acknowledgments of receipt or intimation of delivery-order issued by the company are not used or transferred in subsequent transactions relating to the whisky by the parties to whom they are addressed. In each subsequent transaction a fresh delivery-order is granted."

The ground of the appeal was that "as the document in question did not specify the goods, was not in suitable form for transfer, and was not in practice transferred along with the delivery-order or delivery-orders relating to the whisky, it could not be regarded as a 'warrant for goods' within the meaning of the Stamp Acts, or as the proper evidence of an assignable title to property free from liens, but was simply an acknowledgment of the intimation of a delivery-order."

The question stated for the opinion of the Court was, "Whether the said instrument, in the circumstances set forth, was liable to be assessed and charged with the duty of 3d. applicable to a warrant for goods?"

The First Schedule of the Stamp Act 1891 (54 and 55 Vict. c. 39) imposes the following duties:—

"DELIVERY ORDER . . . £0 0 1
And see sections 69, 70, *and* 71. . . .
"WARRANT FOR GOODS . . 0 0 3
"*Exemptions*—
'(1) Any document or writing given by an inland carrier acknowledging the receipt of goods conveyed by such carrier.
"(2) A weight-note issued together with a duly stamped warrant, and relating solely to the same goods, wares, or merchandise.
"*And see section* 111."

Sec. 111, sub-sec. (1), of the same statute enacts—"For the purposes of this Act the expression 'warrant for goods' means any document or writing, being evidence of the title of any person therein named, or his assigns, or the holder thereof, to the property in any goods, wares, or merchandise lying in any warehouse or dock, or upon any wharf, and signed or certified by or on on behalf of the person having the custody of the goods, wares, or merchandise."

Argued for the appellants—The determination of the Commissioners was wrong. The instrument in dispute was not a document of title. It was a mere acknowledgment of intimation of a delivery-order. In order to make it a document of title there must be a specification of the *res* transferred, or a reference to some writing under the hand of the warehouseman specifying the goods. Without such specification there was no transference in the property of the goods—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), sec. 16, *et seq.* The warehouseman's lien here was especially reserved, and "warrant" in its usual sense implied something that should pass from hand to hand for value by indorsement free from any claim or lien—*Merchant Banking Co. of London* v. *Phœnix Bessemer Steel Co.*, L.R., 5 Ch. Div. 205, *per* Jessel, M.R., 215; *Gunn* v. *Bolckow, Vaughan, & Co.*, L.R., 10 Ch. 491; *Morrison*, 1859, Bell's Cr. C. 158, 28 L.J., Mag. Cas. 210. The present instrument certainly did not fall within the definition of "document of title" given in sec. 1 of the Factors Act 1889 (52 and 53 Vict. c. 45). In the Stamp Act 1860 (23 Vict. c. 15) what were called "dock warrants were made liable to a 3d. stamp. The definition of "dock warrant" was almost identical with the definition of "warrant for goods" in the 1891 Act. In the Stamp Act of 1870 (33 and 34 Vict. c. 97) "dock warrant" disappeared and "warrant for goods" took its place. But since 1860 this stamp-duty had never been exacted on such instruments as the one under consideration, which afforded some ground for the view that the duty was not really exigible — *Clyde Navigation Trustees* v. *Laird & Son*, July 19, 1863, 10 R. (H.L.) 77, *per* Lord Blackburn 81.

Argued for the respondents—The instrument might or might not be a document of title in the strict English legal sense, but it was evidence of title, which was what the Act required. Granted that the title was

burdened with the warehouseman's lien, the evidence of title was equally conclusive, at all events, in a question between the transferee and the warehouseman—Benjamin on Sales (4th ed.) 786; and *Connal* v. *Loder & Others*, July 17, 1868, 6 Macph. 1095, referred to. The language of the Act of 1891 was perfectly unambiguous—See *Tennant* v. *Inland Revenue*, March 14, 1892, 19 R. (H. of L.) 1, *per* Ld. Ch. Halsbury, 3.

At advising—

LORD PRESIDENT—In my opinion the Commissioners are right.

The theory of the section imposing the duty demanded is that a warehouseman can grant to the owner of goods a writing which is evidence of title to the goods, and I do not see what better could be granted by a warehouseman than such an acknowledgment as that now in dispute. The argument against the decision was that this writing is not the proper evidence of title, the true title being that which is granted by the seller of the goods. But then this argument really means that a warehouseman cannot, in the nature of things, give a title to goods which of course never belonged to him in his quality of warehouseman. The statute, however, in the section before us, says that he can give a writing which is evidence of title, and, as I have said before, I do not see that any more direct evidence of title could be given by a warehouseman than the writing in question. The fact that the writing does not on its face specify the particular articles but refers for this to the delivery-order does not seem to me to affect the question. That you are referred by this writing to another document for the description of the subjects need not in this, or in any other kind of title, deprive it of its validity as evidence of title. In a question with the warehouseman it is direct evidence of title.

LORD ADAM concurred.

LORD M'LAREN—If the warehouseman—in this case I presume the maker of the spirits — had merely acknowledged the delivery-order that was sent to him, I think that acknowledgment would not have been a warrant in the sense of the taxing statute, because it would have left the warehouse-keeper or custodier perfectly free to set up any counter-claim or charge upon the right of the transferee. By merely acknowledging intimation the custodier does not bind himself to anything. But then this deed does more, because it acknowledges that by virtue of the delivery-order the transferee has acquired right to the whisky, subject to no other condition than the payment of warehouse rent during such time as the whisky may remain undelivered. It was therefore, in a question between the transferee and the warehouse-keeper, evidence —I think conclusive evidence as between them, but at all events evidence—that the right of the transferee was acknowledged by the warehouse-keeper, and I cannot doubt that the person who holds such a document is in a better position for transferring the spirits than he would be if he merely held a delivery-order with a simple acknowledgment of intimation. It appears to me, then, as it does to your Lordship, that this is a document of the kind described in the Taxing Act as a warrant evidencing title to the goods. I think it is evidence of title, even although that evidence should be unavailing in a question with outside persons, but good evidence in a question between the grantee of the delivery-order and the warehouse-keeper who is called upon to deliver.

LORD KINNEAR concurred.

The Court confirmed the assessment of the Commissioners of Inland Revenue.

Counsel for the Appellant—D.-F. Asher, Q.C. — W. C. Smith. Agents—Fraser, Stodart, & Ballingall, W.S.

Counsel for the Respondent—L.-A. Murray, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, March 10.

FIRST DIVISION.

[Lord Pearson, Ordinary.

RITCHIE *v.* SCOTT AND OTHERS.

Lease — Title to Grant Lease — Beneficial Ownership — Radical Right — Mandate Inferred from Possession to Grant Lease.

Certain subjects were disponed by the proprietor to R., who was feudally invested therein on an absolute title. A back-letter was granted by R. to S., a third party, who was occupying part of the subjects as tenant, which narrated that though the disposition bore that the price of the subjects had been paid by R., it had truly been paid by or on behalf of S., and that the disposition was truly granted in favour of R. in security for repayment of certain advances, and in relief of cautionary obligations. It was stipulated that R. should at any time be entitled to enter into possession of the subjects and draw the rents, and that on repayment and relief as aforesaid R. should be bound to convey the property to S. It was further declared that on the lapse of five years R. should at any time be entitled to demand repayment, and in default thereof should have right of action and diligence, and power of sale. The main object of the arrangement was to maintain S. in possession of a business carried on in part of the subjects, R. thereby obtaining an outlet for his goods. S. remained in possession of the whole subjects, acting in all respects as if he were owner for a period of nearly ten years. At the end of that period he granted a trust-deed for behoof of creditors, and conveyed his whole estate to a trustee. The trustee took possession of the premises and carried on the business

therein for behoof of the creditors. A lease of the premises was granted nominally by S. with consent of his trustee, but in reality the transaction was carried out by the trustee. R. objected to the granting of the lease, and the trustee was aware of his objections when he granted it. In an action at the instance of R. for the reduction of the lease, *held* (*rev.* the judgment of Lord Pearson) that the granters of the lease had no right or title to grant it, and that the pursuer was entitled to have it set aside.

Abbott v. *Mitchell*, May 25, 1870, 8 Macph. 791, *distinguished*, on the ground (1) that the debtor in the present case had never been infeft in the subjects, and had never had any title to them, but merely a *jus crediti*; and (2) that even if the debtor had an implied mandate to grant the lease from the proprietor feudally infeft, that authority did not extend to his trustee.

On the 21st September 1886 the trustees of the late James Scott, Brechin, exposed to public roup the property forming Nos. 51, 53, and 55 High Street, Brechin, and the subjects were sold to William Scott, grocer, Brechin. By disposition granted in November 1886 the trustees, on the narrative that since the date of the purchase William Scott had declared that it was made "for and on behoof of" George Ritchie, grocer, Dundee, and with the consent and concurrence of William Scott for all his right, title, and interest, disponed the subjects to George Ritchie and his heirs and assignees whomsoever, heritably and irredeemably.

A back-letter dated 18th and 19th November 1886, and recorded in September 1896, was granted by George Ritchie to William Scott, on the narrative that "whereas, notwithstanding the disposition granted by the former proprietors of said subjects, bears that I the said George Ritchie paid the foresaid price of £1326, and is in its terms granted *ex facie* absolutely in my favour, yet said price was truly paid by or on behalf of you, the said William Scott, and said disposition was truly granted in my favour in security as after mentioned; and whereas it is proper I should grant these presents in manner underwritten: Therefore I hereby acknowledge and declare, (*First*) That the foresaid property is to be held by me in security and for repayment of all advances and outlays made and to be made by me to you, or on your behalf, excluding sums due or to become due by you to me for the price of goods supplied in the course of business, but including feu-duties, casualties, taxes, and public burdens, improvements, and repairs, insurance, and generally all charges and expenses incurred and to be incurred by me in connection with the foresaid property, and interest at the rate of five per cent. per annum on all such advances and outlays from the date when the same shall be made by me, until complete repayment thereof, and said property shall likewise be held by me as a security for my relief of all cautionary obligations undertaken or to be undertaken by me on your behalf; (*Second*) I shall at any time be entitled to enter into possession of the foresaid subjects, draw the rents thereof, and apply the same in and towards payment of the foresaid advances, outlays, and interest, and in and towards discharge of the foresaid cautionary obligations; (*Third*) On repayment of the whole of said advances, outlays, and interest, and my total relief of said cautionary obligations, I shall be bound to convey the foresaid property to you and your heirs and assignees, with warrandice from fact and deed under exception of all securities granted by me over said property with your consent; (*Fourth*) Upon the lapse of five years from the date hereof, I or my representatives shall at any time be entitled to demand that the whole advances, outlays, and interest as foresaid, then due by you to me shall be repaid, and that all cautionary obligations undertaken by me on your behalf, shall be discharged, and if at the end of three months after intimation of such demand shall have been made by registered letter posted and addressed to you at your last known place of residence, the said advances, outlays, and interest shall remain unpaid, or any such cautionary obligation shall remain undischarged, I, or my representatives, shall thereupon be entitled (1) to use all manner of action, diligence, and execution, real and personal, against you, or your representatives, for recovery of said advances, outlays, and interest, and for my relief of said cautionary obligations; and (2) and without prejudice to said right of action, diligence, and execution, I, or my foresaids, shall thereupon also be entitled to sell the foresaid subjects either by public roup or private bargain in whole or in lots, and at such price or prices as I or they may think proper, and thereafter to apply said price or prices, *primo loco*, in payment of the whole expenses attending the sale of the foresaid subjects, and, *secundo loco*, in repayment to me of the foresaid advances, outlays, and interest and discharge of the foresaid cautionary obligations."

The letter, which contained a consent to registration for preservation, was recorded in the Books of Council and Session on 3rd September 1896. The letter was signed by Mr Scott in token of his approbation. To enable him to meet the price of the property William Scott borrowed £900, and in accordance with the terms of the back-letter Mr Ritchie agreed to become cautioner for the amount, and a bond and disposition in security of the subjects was granted to the lender. The bond was granted *quoad* the personal obligation therein contained by Mr Scott and Mr Ritchie, and Mr Ritchie with consent of Mr Scott, "for all and any right, title, and interest competent to me in the premises," granted a disposition in security of the subjects.

Mr Scott, who had been in occupation of No. 55 High Street as a tenant, and had carried on a licensed grocery business there, continued in possession of the whole sub-