Sale of Food and Drugs Act 1875 (38 and 39 Vict. cap. 63) says that it is to be sufficient evidence of itself of the facts stated in it, and it is of the last importance that all the directions of the statute with regard to it should be strictly complied with. That being so, it appears to me that this objection to the conviction is well founded. It is said that the article here was not butter but margarine. I think there is nothing in that. What was sent to the analyst was sent as butter. He analysed it as butter. He was bound to report upon it as required in the case of butter. I do not know whether in fact it would deteriorate or not. It is immaterial. I think this objection is good. If so, it is not necessary to consider the other objections.

LORD M'LAREN—The first objection to the proceedings is founded on the direction in the schedule appended to the 1875 Act (38 and 39 Vict. cap. 63) as to the weighing of the sample sent for analysis. The direction is that the analyst shall certify that he received on from a sample of for analysis (which then weighed), and it is provided in a footnote that "when the article cannot be conveniently weighed this passage may be erased or the blank left unfilled."

I assume, in accordance with elementary principles, that in the absence of evidence to the contrary the analyst must be held to have complied with the statutory direction and to have applied his mind to the question whether the article could be conveniently weighed or not. All proof on this point would appear to be superfluous, because I assume that he has done his duty, and the only question is whether he ought to have made a special report.

We have sometimes had occasion to criticise public officials who have tried to improve on a statute, but in this case the analyst has complied literally with the statutory directions and has left the form blank as to the matter of weight. This objection therefore entirely fails.

The second objection is more serious. It relates to the failure of the analyst to comply with the direction in the footnote appended to the schedule as to a certificate regarding "milk, butter, or any article liable to decomposition." This direction is imperative as distinguished from the direction contained in the previous footnote which gave the analyst a discretionary power as to entering the weight. In the case of "milk, butter, or any article liable to decomposition," the analyst is required to make a special report as to whether any change has taken place in the constitution of the article that would interfere with the analysis. Here he has not done so.

Now, we are not without guidance in this matter, for this question was very carefully considered in the case of *Hudson* v. *Bridge* (1903, 67 J.P. Rep. 186, 19 Times L.R. 369). I refer particularly to the opinions expressed by Lord Alverstone and Mr Justice Channell. I entirely concur in the reasoning of these learned Judges, and I think the direction in the schedule refers to the article in question, which purported to be butter sent for analysis. The analyst must keep in view the provisions as to a certificate relating to butter when the substance sent him for analysis is sent to him as butter. He cannot know what the article is until he has analysed it, but he is required to deal with it from the beginning as if it were butter which is an article liable to decomposition.

The objection taken is no doubt a strict one, but in my opinion it must be sustained. There ought to have been a special report as to whether any change had taken place in the constitution of the article that would interfere with the analysis. In the ordinary case the examination of the analyst as a witness is dispensed with, and it is necessary in order that advantage may be taken of this economical provision that the report should be strictly in terms of the statute.

In the circumstances it is unnecessary to consider the other objections.

LORD KINNEAR—I agree with your Lordships on both the points decided. I give no opinion on the other points. They are not necessary for our judgment, and therefore I agree with your Lordship in the chair in expressing no opinion upon them one way or the other.

The Court sustained the bill.

Counsel for the Complainer—T. B. Morison. Agent—P. H. Cosens, W.S.

Counsel for the Respondent—M'Clure. Agents—T. & W. A. M'Laren, S.S.C.

COURT OF SESSION.

Friday, December 16.

SECOND DIVISION.

[Lord Low, Ordinary.

DOBELL, BECKETT, & COMPANY *v.* NEILSON.

Sale—Stoppage in transitu—Duration of Transit—Bill of Exchange—"Approved Bill"—Payment by "Approved Acceptance"—Unpaid Sellers—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *secs.* 44 *and* 45.

Held, following *M'Dowall & Neilson's Trustee* v. *Snowball Co., Limited*, reported *ante*, p. 56, and in circumstances practically indistinguishable from those in that case, that a cargo was *in transitu* and the sellers unpaid sellers within the meaning of section 44 of the Sale of Goods Act 1893.

Bankruptcy—Act 1696, *c.* 5—*Illegal Preference—Validity of Security Constituted by Constructive Delivery—Custodier of Goods the Employee of Debtor—Delivery Order not Addressed to Independent Custodier—Position of "Timber Measurers" in Glasgow—Rights of Unpaid Seller and Party to whom Buyer has Transferred*

Cargo by Way of Pledge under sec. 47 of the Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71)—"*Valuable Consideration.*"

A, the sole member of a firm of timber brokers in Glasgow, borrowed a sum of money from B, and gave in security of the loan delivery-orders for certain lots of timber belonging to him, and stored in a timber-yard belonging to a third person. The delivery-orders were in favour of B, and were addressed to C. & Co., a firm of timber measurers, and were intimated to them.

C. & Co., as licensed measurers, were employed by A, in accordance with the custom in the timber trade in Glasgow, to measure the timber on disembarkation and stock it in a yard selected by him. A paid fees to the measurers and rent to the owner of the timber-yard. The yard-owner kept books in which he noted the quantities of timber stored and removed and the names of the respective owners, but for practical purposes the measurers retained control of the timber and could remove it as and when they chose. In practice when timber so stored is sold a delivery-order in favour of the purchaser is addressed to the measurer, who either delivers the timber, or, if it is to remain in the yard, intimates to the yard-owner the name of the purchaser, who is thereafter liable for rent.

A's firm became bankrupt, and within sixty days of the bankruptcy B handed over to A the delivery-orders for the timber so stored in exchange for the bills of lading of a cargo of timber due in the Clyde indorsed in his favour by A. The cargo on arrival was stopped *in transitu* by the unpaid sellers.

In an action by the unpaid sellers, concluding, *inter alia*, for declarator that B had no right in the cargo, B claimed that under section 47 of the Sale of Goods Act 1893 the unpaid sellers' right of stoppage could only be exercised subject to his right of security.

Held (1) that B never had a good security over the timber in the yard in respect that the delivery-orders in his favour intimated to C. & Co. were ineffectual to operate constructive delivery to him, C. & Co. being the employees of A's firm, and not independent custodiers—*Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765, 2 S.L.R. 47, *followed*. (2) That consequently the subsequent endorsation of the bills of lading to B was an illegal preference within the meaning of the Act 1696, c. 5. (3) That B in giving the delivery-orders to A in exchange for the bills of lading did not give a "valuable consideration" within the meaning of the Sale of Goods Act 1893, in respect that he surrendered nothing except the personal obligation of C & Co. to hold the timber to his order, and that, C & Co. being merely the servants of his debtor, this obligation was really nothing more than the personal obligation of his debtor; and accordingly that the unpaid sellers' right of stoppage *in transitu* was not affected by any right in the cargo on the part of B.

Section 47 of the Sale of Goods Act 1893 enacts as follows:—"Subject to the provisions of this Act the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made unless the seller has assented thereto: Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

Dobell, Beckett, & Company, timber merchants, Quebec, by contracts dated 20th February and 4th August 1903, sold to M'Dowall & Neilson, timber brokers, Glasgow, a quantity of timber, which they shipped to Glasgow on the s.s. "Ovidia." On her arrival in Glasgow on 27th September, the agents of Dobell, Beckett, & Company, having learned that M'Dowall & Neilson were insolvent, presented to the master of the "Ovidia" one of the sets of the bills of lading, and intimated that as unpaid sellers they stopped the goods *in transitu*.

Arthur Stuart Neilson, the sole partner of M'Dowall & Neilson, had on the 11th June borrowed £3000 from his brother John Birkmyre Neilson, to whom he gave in security delivery-orders for a quantity of timber belonging to him and lying in timber yards, the property of Connal & Company and the Clyde Navigation Trustees. The delivery-orders were in favour of John Birkmyre Neilson, and were addressed to Haggart & Company, a firm of timber measurers. On September 22 John Neilson gave back the delivery-orders to Arthur Neilson, and took in exchange a set of bills of lading indorsed in his favour of the cargo of the "Ovidia," which was approximately of the same value as the timber in the yards. The estates of M'Dowall & Neilson and James Stuart Neilson, the sole partner, were sequestrated on October 1st, and Robert Reid, C.A., Glasgow, was appointed trustee.

Questions having arisen as to the rights of the different parties in the "Ovidia's" cargo, Messrs Dobell, Becket, & Company in March 1904 brought an action against John Birkmyre Neilson and Robert Reid, in which they craved declarator that (1) "the pursuers were entitled to stop, and did, on or about 27th September 1903, validly and effectually stop, *in transitu*," a cargo of timber "sold and shipped by them under contract with the said M'Dowall & Neilson in or about the month of September 1903" as per certain bills of lading; (2) that "the pursuers, as at the date of the said stoppage *in transitu* had a valid lien" on the timber

"for the sum of £2592, 5s., being the price at which they sold the same to the said M'Dowall & Neilson, and that neither of the defenders has any right or title to demand delivery or to claim possession of said goods or the proceeds thereof except upon payment of said price; . . . (5) . . . that the said M'Dowall & Neilson were at the time when said bills of lading were indorsed by them as aforesaid and transferred by them to the said defender" (John Birkmyre Neilson), "or at least within sixty days of the date of said indorsation or transfer, insolvent and notour bankrupt in terms of the Statute 1696, c. 5, entitled 'An Act for Declaring Notour Bankrupts,' as amended by the Bankruptcy (Scotland) Act 1856, and Acts explaining or amending the same; (6) . . . that the indorsation of said bills of lading by the said M'Dowall & Neilson and the transfer thereof by them to the said defender John Birkmyre Neilson are null and void and of no effect or validity." There followed conclusions for the reduction of the indorsations of the said bills of lading and the pretended transference or conveyance of the said cargo of timber by the said M'Dowall & Neilson, with all that had followed or might follow thereon.

A proof was led before Lord Low. The material facts disclosed in the proof are fully stated in his Lordship's opinion, *infra*.

On 20th July the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the first, second, fifth, and sixth declaratory conclusions of the summons: Finds, reduces, decerns, and declares in terms of the reductive conclusions thereof: Finds that it is unnecessary to dispose of the conclusions of the summons *quoad ultra*: Dismisses the same, and decerns."

Opinion. — "I shall first consider the question which is raised in this case between the pursuers and the defender John Birkmyre Neilson.

"The circumstances are as follows—John Neilson is a brother of Arthur Neilson, who was the only member of the firm of M'Dowall & Neilson, timber brokers, Glasgow. In June 1903 Arthur Neilson asked John Neilson to lend him £3000. Arthur Neilson had been speculating largely and unsuccessfully upon the Stock Exchange, and was at the time insolvent, although he managed to carry on business until the 25th of September following. He did not disclose his financial condition to John Neilson, although he told him that he required the loan on account of losses upon the Stock Exchange. Arthur Neilson said that he would give timber security for the loan. John Neilson had not so large a sum available at the time, so he applied to Mr Woodrow—a brother-in-law of Arthur Neilson—who agreed to find the money, and handed £3000 in cash to John Neilson, who in turn paid it to Arthur Neilson on the 11th of June. There seems to have been an arrangement between John Neilson and Mr Woodrow that they would divide any loss which there might be between them; but that is a matter which is not of any importance in this case. After he received the money Arthur Neilson sent delivery-orders in favour of John Neilson to Haggart & Company, timber measurers in Glasgow, for certain lots of timber which were lying in the timber-yards of Connal & Company and of the Clyde Navigation Trustees. I shall explain presently why these delivery-orders were sent to Haggart & Company, and not to the owners of the timber-yards. The face value of the timber included in the delivery-orders was £3343. From time to time between 11th June and 23rd September Arthur Neilson wished to dispose of portions of the timber for which he had given delivery-orders to John Neilson, and upon these occasions he got a delivery-order for the parcel of which he wished to dispose, and in lieu thereof gave to John Neilson a delivery-order for another parcel of approximately equal value. All the delivery-orders were addressed to Haggart & Company.

"On 22nd September Arthur Neilson, through his salesman Fraser, asked John Neilson to release timber to the face value of £2802, in exchange for the bills of lading of the cargo of wood which is in question in this case, and the value of which was stated to be £2599. After consulting Mr Woodrow and his law-agent, John Neilson agreed to exchange his delivery-orders for the wood in the timber-yards for the bills of lading. John Neilson admits that Fraser told him that his brother was in financial difficulties, and the latter paid off his employees and shut his office on the 25th September, his estates and those of his firm being sequestrated under the Bankruptcy Acts on the 1st of October.

"The bills of lading were therefore indorsed to John Neilson within sixty days of the bankruptcy of Arthur Neilson and his firm, and the pursuers as creditors of M'Dowall & Neilson seek to have the transaction set aside on the ground that security for a prior debt was thereby voluntarily given.

"Whether the pursuers are entitled to succeed or not seems to me to depend upon whether John Neilson had a good security over the timber for which he held delivery-orders, because if the security was good there was no illegality in his exchanging it for another security—*Roy's Trustee* v. *Colville & Drysdale*, 5 F. 769.

"The delivery-orders, as I have said, were addressed to Haggart & Company, timber measurers. That arose in this way. If the consignee of timber arriving in the Clyde desires to store it he employs a measurer, whose duty is to measure the timber and see it properly stacked in the yard selected by his employer. The yards are enclosed, and the gates are kept and the yard watched by the servants of the proprietors of the yard. The stacking of the timber appears to be done by men employed by the measurer, but the part of the yard in which the stack is to be placed is pointed out by the superintendent. An entry is made in the books of the yard-keeper of the number of stacks, the cubic feet in each stack, and the name of the timber merchant for whom the timber is stored. A note also appears to be taken of timber removed from time to time, but

as the rent is regulated, not by the size of the stack but by the ground which it covers, the important removal, from the yard-keeper's point of view, is the last, when the ground is left vacant, and that is the only removal to which he pays much attention.

"The rent is paid by the merchant on whose behalf the timber is stored by the measurer, and if a change of ownership of the timber is intimated to the yard-keeper he charges the rent thereafter against the new owner. The fees and charges of the measurers are paid by the merchants by whom they are employed.

"After the timber is stored the measurer —who must hold a licence from the Clyde Trustees—has, so far as the storekeeper is concerned, practically complete control over it, and he is allowed to remove timber which he has stored as and when he chooses. A practice accordingly appears to have sprung up of addressing a delivery-order to the measurer in the event of timber which is stored being sold, and the measurer either takes the timber out of the yard and delivers it to the purchaser, or if the latter desires it to continue in store the measurer intimates to the yard-keeper the name of the purchaser, who is thereafter liable for the rent.

"Although a delivery-order addressed to the measurer may be a very convenient course to follow in the case of timber in store being sold, it does not follow that it is a competent method of constituting a security. That depends upon whether the measurer is an independent custodier of the goods not identified with the owner who is granting the security.

"It was argued for John Neilson that the measurer was practically custodier of the goods, as he had full control over them, and that in receiving delivery-orders and removing and distributing the timber he was truly acting as agent for the yard-keeper, who would otherwise require to employ a servant for that purpose.

"I do not think that the measurers Haggart & Company were the custodiers, of the timber. The timber had been put in the keeping of the Clyde Trustees and Connal & Company for M'Dowall & Neilson and by their instructions, and Haggart & Company were allowed complete control of the timber in the way of moving it from the yard, not because they were custodians, but because they represented and had the authority of M'Dowall & Neilson.

"But even if Haggart & Company were in a sense the custodiers of the timber, I am of opinion that a delivery-order addressed to them was ineffectual to operate constructive delivery of the timber, because they were the servants of M'Dowall & Neilson.

"It was M'Dowall & Neilson who instructed them to measure the timber and to store it on their behalf; it was M'Dowall & Neilson who paid the measurers or to whom they looked for payment, and the measurers were allowed control over the timber in the yard, not because they were the custodiers or the servants of the custodiers, but because they were the accredited agents of M'Dowall & Neilson. Further, I think that it is plain that if M'Dowall & Neilson had dispensed with the services of Haggart & Company and employed another measurer to look after the timber in store, the yard-keeper would, upon receiving intimation of such change, have been bound to see that Haggart & Company did not thereafter interfere with the timber.

"Now, it is well settled that in order to operate constructive delivery of goods by a delivery-order the custodier to whom the delivery-order is addressed must be independent of the granter of the order, and if, although he is custodier of the goods, he is also in the employment of the granter, there will be no delivery—*Anderson* v. *Call*, 4 M. 765.

"I am therefore of opinion that delivery-orders addressed to Haggart & Company did not operate constructive delivery to John Neilson. If, however, that view is sound, then John Neilson never had a security over the timber—he had at most his brother's obligation to grant a security. Therefore when the bills of lading were indorsed to John Neilson the only tangible consideration for the transfer was the prior debt, and the transaction was accordingly, in my judgment, one which was struck at by the Act 1696, cap. 5. I am therefore of opinion that the pursuers, being creditors of the bankrupts, are entitled to have the transaction set aside.

"I shall now deal with the case in so far as it is directed against the defender Mr Reid, the trustee in bankruptcy of M'Dowall & Neilson. As regards him the pursuers claim to have stopped the cargo *in transitu*, and they maintain that they had a right to do so as being unpaid vendors.

"Reid, upon the other hand, maintains (1) that the goods were not *in transitu* when they were stopped by the pursuers, because under the contract of sale the goods were to be delivered at Quebec, and the pursuers only acted as agents for M'Dowall & Neilson in forwarding the goods from Quebec to Greenock; and (2) that the pursuers were not unpaid sellers, because under the contract payment was to be by 'approved acceptance of sellers' draft,' and the pursuers elected to take, and did take, the acceptances of M'Dowall & Neilson, and in return therefor transferred to the latter the bills of lading.

"The contract for the sale of the timber is not in a very appropriate form for a sale of Canadian timber to be delivered at Greenock. Mr Dunn, however, explains that the form of the contract arises from the fact that it is a printed form which was prepared at a time when the practice was to have the timber delivered f.o.b. at Quebec (or whatever the port of shipment might be), and for the buyer to arrange for the shipment to this country. The printed form therefore runs:—'Contract made this day between Dobell, Beckett, & Company, of Quebec, who sell, and of , who buy, the following wood goods. . . . The goods to be loaded in a vessel or vessels of about tons register (which the purchaser engages to provide), and the sellers to deliver

the goods in the ordinary and customary manner at { Quebec, / Montreal, / Three Rivers. } with the usual dispatch for the season of the year, and with a reasonable number of days for loading.'

"In cases (of which the present is one) in which it is desired that the sellers shall forward the goods to this country, the same printed form is used, but the words in brackets, 'which the purchaser engages to provide,' are altered by deleting the word 'purchaser' and substituting the word 'seller.' That was done in this case.

"Further, the blank spaces for the name and designation of the buyers were filled up with the words 'M'Dowall & Neilson (of) Glasgow,' and at the end of the contract the goods purchased were detailed with the prices, which are stated to be c.i.f., Greenock.

"It is therefore plain enough on the face of the contract that the goods were to be forwarded by ship by the sellers to the buyer from Quebec. The goods were in fact forwarded by the sellers to Greenock in the s.s. 'Ovidia,' and the bills of lading granted by the master bore that the goods were shipped in good condition by Dobell, Beckett, & Company on board the 'Ovidia' now lying in the port of 'Quebec and bound for Greenock,' and were to be delivered at Greenock 'unto order of shippers or their assigns.'

On the 18th and 22nd of September 1903 Messrs Singleton, Dunn, & Company, the pursuers' agents in Glasgow, sent one of the sets of the bills of lading duly endorsed to M'Dowall & Neilson. I should explain that the goods were loaded in separate parcels, for which separate bills of lading were granted. On the 24th September Singleton, Dunn, & Company learned that M'Dowall & Neilson were insolvent, and on the 27th September, when the 'Ovidia' arrived in the Clyde, they presented another set of bills of lading to the master, and also an intimation requiring him to deliver the timber to them as unpaid sellers, and stopping the goods *in transitu*.

"It appears to me that so long as the goods were on board the 'Ovidia' they were in course of transit from the sellers to the buyers, and that the former were entitled to stop them if the purchase price had not in fact been paid.

"That brings me to the remaining question, namely, Whether the pursuers were unpaid sellers?

"The stipulation in regard to payment in the contract was as follows:—'Payment of first cost by approved acceptance of seller's draft, payable in London at 120 days' sight from presentation of and in exchange for bill of lading and shipping documents.' When the pursuers sent the bills of lading for the different parcels of timber to their Glasgow agents Singleton, Dunn, & Company, they also sent two bills of exchange drawn by them upon M'Dowall & Neilson for £2599 and £224 respectively. These bills of exchange were sent by Singleton, Dunn, & Company to M'Dowall & Neilson for acceptance along with the relative bills of lading, and they were accepted by M'Dowall & Neilson on the 23rd September, and posted to Singleton, Dunn, & Company, who received them on the 24th September. Upon the latter day Mr Dunn (of Singleton, Dunn, & Company) was informed that M'Dowall & Neilson were insolvent. He accordingly saw Arthur Neilson, who practically admitted that he was hopelessly insolvent. Mr Dunn then demanded that the bills of lading should be returned, but Arthur Neilson said—'That cannot be done; you are too late,' evidently referring to the fact that he had transferred the bills of lading to his brother John Neilson. In consequence of that interview Mr Dunn did not send a letter which had been written acknowledging receipt of the acceptances, nor did he send to M'Dowall & Neilson the policies of insurance of the cargo, which had not been received when the bills of lading were sent to M'Dowall & Neilson, but which but for their insolvency would have been sent to them in order to complete the shipping documents. Mr Dunn also retained the acceptances until the defender Mr Reid had been appointed trustee in M'Dowall & Neilson's sequestration, when he sent the bills to him.

"It was maintained by the trustee that whenever Singleton, Dunn, & Company, as representing the pursuers, received from M'Dowall & Neilson the bills of exchange duly accepted, the goods were paid for in the way provided by the contract, and the pursuers were therefore no longer entitled to stop *in transitu*. The argument was that the pursuers, having elected to take the bills accepted by M'Dowall & Neilson, such bills must be regarded as 'approved' bills within the meaning of the contract, and when they were returned accepted the goods were paid for and the contract completed.

"I am of opinion that that argument is not well founded. I think that an 'approved' bill means a bill to which no reasonable objection can be taken, and accordingly the phrase refers rather to the quality of the bill than to the conduct of the seller, although no doubt the seller may so act as to bar himself from objecting to a bill which would otherwise be open to objection. Now, in this case the bills were sent to M'Dowall & Neilson for acceptance in the full belief that the latter were solvent and able to meet the bills at maturity. When, however, the bills were accepted M'Dowall & Neilson were insolvent and the bills were worthless. In these circumstances it seems to me that in no way can they be regarded as approved bills, because, in the first place, they were worthless, and therefore were open to reasonable objection; and, in the second place, what the sellers agreed to take were M'Dowall & Neilson's acceptances upon the assumption that they were solvent, but they never agreed to take the acceptances of an insolvent firm.

"Further, it seems to me that there is another short ground upon which this question can be disposed of. It was plainly fraudulent on Arthur Neilson's part to

accept the bills when he knew that he was hopelessly insolvent, and that the acceptances were not worth the paper upon which they were written; and this trustee cannot, in my opinion, be allowed to take benefit by his fraud.

"The pursuers are therefore in my judgment entitled to decree against both sets of defenders."

The defenders reclaimed.

Argued for the reclaimer J. B. Neilson—Any right of stoppage *in transitu* possessed by the respondents could only be exercised subject to his security—Sale of Goods Act 1893, section 47. He had, in virtue of the endorsed bills of lading, a good security over the cargo. It was legal to exchange one security for another within the sixty days, so that the question here really was as to the validity of the original security constituted by the delivery-notes—*Roy's Trustee* v. *Colville & Drysdale*, March 20, 1903, 5 F. 769, 40 S.L.R. 530. That security was effectually constituted. The delivery-order in his favour addressed to Haggart & Company when intimated to them transferred the timber to him by constructive delivery. Haggart & Company were independent custodiers, which differentiated the present case from *Anderson* v. *M'Call*, June 1, 1866, 4 Macph. 765, 2 S.L.R. 47. Even on the assumption that the security was incomplete, it could have been completed without the bankrupt's intervention by the reclaimer taking possession of the timber, it being settled that an incomplete security granted before the sixty days may be completed within the sixty days—Goudy on Bankruptcy, 3rd ed. p. 104; *Scottish Provident Institution* v. *Cohen & Company*, November 20, 1888, 16 R. 112, 26 S.L.R. 73. All, however, that it was necessary to show to bring the reclaimer under section 47 of the Sale of Goods Act 1893 was that he had taken the bills of lading in good faith and had given valuable consideration for them. He had given valuable consideration, having when he took them surrendered, at any rate, in exchange Haggart & Company's personal obligation to hold the timber to his order. There was no evidence that he had acted in anything but good faith.

Argued for the reclaimer Reid—The respondents were not entitled to stop the goods inasmuch as (*a*) the goods were not *in transitu* at the time of stoppage, (*b*) they were not "unpaid sellers." (These points were merely stated and not argued, the present case being indistinguishable from *M'Dowall and Neilson's Trustee* v. *J. B. Snowball Co., Ltd.*, Nov. 8, 1904, reported *ante*, p. 56. The additional case of *Horncastle and Another* v. *Farran*, 1820, 3 Barnewall and Alderson 497, was quoted, and the Court were referred to some evidence given in the proof as to the customary meaning of "approved" bill and "approved" acceptance in the timber trade.) The argument of the respondents on the validity of J. B. Neilson's security was adopted.

Argued for the respondents—The bills of lading having been endorsed to J. B. Neilson within sixty days of bankruptcy, the transaction was contrary to Act 1696, c. 5. It was true that one good security might be exchanged for another within the sixty days, but J. B. Neilson never had a good security under the delivery-orders, as intimation to Haggart & Company could not operate constructive delivery, Haggart & Company being not independent custodiers but merely the servants or agents of M'Dowall & Neilson—*Anderson* v. *M'Call*, *supra*; *Pochin & Company* v. *Robinows & Marjoribanks*, March 11, 1869, 7 Macph. 622, at 628, 6 S.L.R. 417; *Gunn* v. *Bolckow, Vaughan & Company* (1875), L.R. 10 Ch. 491; *Rhind's Trustees* v. *Robertson & Baxter*, March 4, 1891, 18 R. 623, 28 S.L.R. 449; *Young* v. *Aktiebolaget Ofverums Bruk*, November 27, 1890, 18 R. 163. This fact was further sufficient to dispose of J. B. Neilson's other argument, that although he might not have had an effective security over the timber, he had at any rate surrendered a valuable consideration, viz., Haggart & Company's personal obligation. Haggart & Company being the servants of M'Dowall & Neilson, their personal obligation was simply that of their employers, J. B. Neilson's debtors. No custom of trade in Glasgow on this matter could affect the general law. Further, J. B. Neilson had not been in good faith as defined in section 62—*Jones* v. *Gordon*, 1877, 2 App. Cases 616, at 628; *Cuming* v. *Brown*, 1808, 9 East. 505; Benjamin on Sale, 4th ed. 897.

[The respondents were not called upon to reply to the argument for the reclaimer Reid.]

At advising—

LORD TRAYNER—I concur with the Lord Ordinary and have nothing to add to the opinion he has expressed. There were, however, two points raised in the debate before us regarding which the Lord Ordinary has expressed no opinion, and on them I desire to say a few words. The first of these points was maintained by the defenders (the reclaimers), and was to this effect: That assuming no effectual security had been constituted by the delivery-orders intimated to Haggart & Company, and that therefore the right conferred by the endorsed bills of lading within sixty days of bankruptcy was not the substitution of one good security for another previously existing, yet the defender gave a valuable consideration for the bills of lading, and so brought himself within the terms of the 47th section of the Sale of Goods Act. The valuable consideration on which the defender here relies was, according to the argument, this—the personal obligation by Haggart and Company to hold the goods referred to in the delivery-orders for behoof of the defender, which obligation the defenders discharged or surrendered by taking the bills of lading in exchange for those goods. It is no doubt true that when the delivery-orders were intimated to Haggart & Company they, in acknowledging receipt, stated that they held the goods "to your order"—that is, the order of the defender. But the judgment of the Lord Ordinary holding that

the intimation of the delivery-orders to Haggart & Company was ineffectual to transfer, by constructive delivery, the goods to the defender, proceeds upon the ground (as I think rightly) that Haggart & Company were not independent custodiers of the goods, but only the servants, agents, or representatives of M'Dowall & Neilson as the owners. If, therefore, in receiving the delivery-orders Haggart & Company were only acting as the agents or representatives of M'Dowall & Neilson, their acknowledgment of the same and their obligation to hold to the order of the defender must have been granted in the same character. They had no other. Their obligation as agents (for known principals) bound their principals and not themselves. It follows that the obligation which the defender says he surrendered was the obligation of his debtors M'Dowall & Neilson, which was not a valuable consideration for the bills of lading in the circumstances which existed. Accordingly, in my opinion this contention on the part of the defender cannot be given any effect to.

The other point was one maintained by the pursuers. They said that the defender was excluded from the benefit of any privilege conferred by the section of the Act I have referred to, in respect that he was not in *bona fide* when he took the bills of lading, knowing as he did (or might have known) that M'Dowall & Neilson were then insolvent. I am not prepared to sustain this view or to affirm that the defender was not acting in good faith. When he went to consult his law-agents with regard to the subject of exchanging what he then regarded as his valid security over the goods in the Clyde Trustees' yard, for the indorsed bills of lading, I am disposed to think he was desirous of being advised as to the character and extent of the right which an indorsed bill of lading conferred. He explains in his evidence that he had never previously had any transactions based upon an endorsed bill of lading, and he desired information, as I have said, as to the value of such a thing as a security. His law-agent said something about what "if anything happened within sixty days." Now, I quite believe the defender when he says that he did not understand what this allusion to the Act of 1696 meant or imported. That being so, I cannot hold bad faith in any way imputable to the defender, and I have thought it right, so far as my opinion goes, to clear him of any such imputation. The result, however, of my opinion is that the Lord Ordinary's judgment should be affirmed.

LORD MONCREIFF—I agree with the Lord Ordinary upon both points. The pursuers, who are timber merchants in Quebec and London, in February and August 1903 sold certain quantities of timber to M'Dowall & Neilson, and in part execution of their contracts in September 1903 shipped at Quebec and Montreal four lots of timber mentioned in the summons, the price of the lots amounting to £2995, 10s. 2d. On 18th and 22nd September the pursuers' agents in Glasgow sent to M'Dowall & Neilson one set of bills of lading for the said timber, accompanied by two incomplete bills of exchange for the acceptance of M'Dowall & Neilson, and on 24th September the bills of exchange were returned accepted but unstamped.

On 23rd September M'Dowall & Neilson handed to John Birkmyre Neilson the four endorsed bills of lading and immediately afterwards became bankrupt, their estates being sequestrated on 1st October 1903.

The pursuers, having ascertained that M'Dowall & Neilson were insolvent, refused to deliver the cargo to John B. Neilson on its arrival at Glasgow, on the ground that they were unpaid sellers, and that they were entitled to stop it *in transitu* and hold it in security of the price.

1. The bills of lading having been delivered endorsed to John B. Neilson on the eve of the bankruptcy of M'Dowall & Neilson, the endorsation is reducible at the instance of the pursuers unless John B. Neilson can shew that in exchange for the bills of lading he gave up to the bankrupts' firm a security of equal value which he had obtained more than sixty days before their bankruptcy. That question depends upon whether John B. Neilson had at the date of the endorsation of the bills of lading a completed right in security over certain timber belonging to M'Dowall & Neilson which was then standing in the keeping of the Clyde Trustees and Connall & Company; and that again depends upon whether intimation to Haggart & Company operated constructive delivery of the timber to John B. Neilson. I am of opinion, with the Lord Ordinary, that it did not, because Haggart & Company were not independent custodiers of the goods, but were in the employment of M'Dowall & Neilson. The only difference between the present case and *Anderson* v. *M'Call*, 4 Macph. 765, is that while in the latter case the store belonged to the granters of the transfer note, although not at the place where they carried on business, in the present case the store or yard in which the timber was placed did not belong to M'Dowall & Neilson but to the Clyde Trustees and Connall & Company. This difference, however, I think is immaterial, because both in the case of *Anderson* and in the present case the delivery-order in favour of J. B. Neilson was sent to a storekeeper in the employment of the granters and not to an independent custodier.

I am therefore of opinion that when John B. Neilson received the endorsed bills of lading on 23rd September 1903 he held no valid security over the said timber which he could give in exchange for the bills of lading; consequently he received the bills of lading without value, and simply in further security of his advances to M'Dowall & Neilson.

Again, if Haggart & Company were simply servants of M'Dowall & Neilson, they cannot be held by their acknowledgment of receipt of the delivery-order to have given any personal obligation to John B. Neilson.

If these views are correct, it is not neces-

sary to consider whether John B, Neilson took the bills of lading in *mala fide*. I think it clear that on 23rd September he knew that M'Dowall & Neilson were on the brink of bankruptcy; but it is fair to assume that he thought that he was giving up a valid equivalent security.

2. The next question arises with the trustee on N'Dowall & Neilson's sequestrated estates. I am of opinion (1) that the cargo was still *in transitu* when delivery was refused; (2) that the bills of exchange granted by the buyers were not approved bills in the sense of the contract; and that therefore the pursuers as unpaid sellers were entitled under section 44 of the Sale of Goods Act 1893 to stop the goods *in transitu* and retain them until payment or tender of the price. We recently decided practically the same points in the case of *Snowball & Company, Limited* v. *M'Dowall & Neilson's Trustee* in regard to another cargo consigned to M'Dowall & Neilson. I find it unnecessary to say anything in addition to the reasons which were given in disposing of that case. I am therefore for affirming the Lord Ordinary's judgment.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

The Court adhered.

Counsel for the Reclaimer J. B. Neilson —Ure, K.C.—Younger. Agents—J. W. & J. Mackenzie, W.S.

Counsel for Reclaimer Reid (M'Dowall & Neilson's Trustee) — Campbell K.C. — MacRobert. Agents—Drummond & Reid, W.S.

Counsel for Respondents—Salvesen, K.C. —C. N. Johnston, K.C.—Horne. Agents—Webster, Will, & Company, S.S.C.

Thursday, December 22.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

ARMSTRONG *v.* WILSON'S TRUSTEES.

Trust — Administration — Liferent — Management of Heritable Property — Rebuilding and Repairs — Subsequent Depreciation of Subjects — Liability of Trustees — Goodwill.

A testator bequeathed to his sister the liferent of his whole heritable and moveable estate. The estate included considerable moveable property as well as certain buildings in Hawick in which he and his sister had carried on a bakery business. At the time of the testator's death the property was old and dilapidated, and worth little or nothing apart from the site. No express powers were given to rebuild or repair the subjects.

The trustees, having arranged with the liferentrix that she should carry on the business, sold the stock-in-trade to her at a valuation and rebuilt the premises. In rebuilding and repairing the heritable subjects they expended in all £1499. Of this sum £793 was borrowed by them from the liferentrix, the balance being paid out of the truster's moveable estate. On the death of the liferentrix the subjects were sold for £1400. The sum borrowed from the liferentrix was repaid in full, and the resulting loss to the trust estate was £100 plus the value of the site. There was evidence that a considerable fall had taken place in the interval in the value of similar heritable property in the locality.

Certain of the beneficiaries objected to the trustees' accounts on the ground that the trustees were not entitled to credit for the sum spent on the heritable property, in respect that in rebuilding it they had acted *ultra vires* as well as speculatively and imprudently; that no credit was given for any sum as the value of the goodwill of the bakery business; and that the trustees had acted unfairly in the interests of the liferentrix at the expense of the trust estate.

Held that, in the circumstances as disclosed in a proof, it had not been proved that in the management of the trust estate the trustees had acted imprudently, negligently, or unfairly, or that loss to the trust estate had been caused by their fault, and accordingly that the beneficiaries had not made out a case of liability against the trustees.

This was an action of count, reckoning, and payment brought by Ann Henderson Armstrong, 25 Weemsland Road, Hawick, and others, beneficiaries under the trust-disposition and settlement of the deceased Walter Wilson, baker, Hawick, against Andrew Ker, agent of the Commercial Bank of Scotland, 32 Warrender Park Road, Edinburgh, and others, the trustees, original and assumed, acting under the said trust-disposition.

The following narrative of the facts in the case is taken from the opinion of the Lord President:—"This is an action of count, reckoning, and payment at the instance of beneficiaries having right to four thirteenth shares of the estate left by the late Walter Wilson, baker in Hawick, under his testamentary settlement, and the question presented for decision is, whether they have established against the defenders, who are the trustees under that settlement, personal liability in respect of loss which they allege to have been incurred by their (the trustees) rebuilding certain property in Hawick which belonged to the truster, as well as by their failing to give credit for what they allege to have been a saleable goodwill in a baking business in Hawick, and otherwise favouring the liferentrix of his testamentary estate at the expense of the fiars.

"Walter Wilson died on 6th July 1878 leaving a testamentary trust-disposition and settlement dated 11th February 1876, by which he disposed of his means and estate. Under that settlement Miss Wilson, his sister, had right to the liferent of his free