has acquired right to a debt which may be enforced with all the usual diligences, arrestment on the dependence, and everything of that kind which can be used in any other action."

That dictum covers it. But it cannot live with the Seven Judges case. I think Lord Trayner, who was a dissentient in the Seven Judges case, was quite right when he cited Lord Neaves' authority for his dissent, though for the reasons given I do not think he could claim the authority of the judgment.

Now the Seven Judges case is binding on me, and, further, I agree with it. I am therefore justified in rejecting as overruled the dictum of Lord Neaves — the result being in my mind clearly that *Auld* v. *Shairp* is devoid of all authority whatsoever except for the proposition for which no one cites it, viz., that a communication from a principal of a university to the patron of a chair regarding the appointment to the chair is privileged.

The question of transmissibility of claims for damages for breach of contract is to a certain extent mixed up with the question of the transmissibility of the contract itself The ordinary contract can be transmitted in every sense; that for personal service cannot. The executor cannot offer to perform his part of the contract of personal service; as little, I think, can he affirm whether he will treat a *de facto* dismissal as a wrongous dismissal.

It is obvious that the moment action is raised all difficulty vanishes. Then this becomes an election to treat what has happened as a wrongous dismissal, a present demand for damages, and a present liability to account and pay contingent only on the success of the action, and that is all that the only authority cited, namely, the old case *Wardrop* v. *Fairholm & Arbuthnot* (M. 4860) actually decided.

On the whole matter, though not without difficulty, I agree with the Lord Ordinary that this arrestment attached nothing, and not having been repeated after action raised cannot compete with the universal title of the Commissioner in Bankruptcy.

LORD M'LAREN and LORD KINNEAR were absent at the hearing.

The Court recalled the interlocutor of Lord Mackenzie dated 1st February 1910, sustained the claim of Henry Lindon Riley, and remitted the case to the Lord Ordinary to proceed as accords; found the claimant Walter Angus Ellis, Official Receiver of the Estate of Robert Youde, liable in expenses to the said Henry Lindon Riley since the date of lodging his claim; and remitted the account thereof to the Auditor to tax and to report to the Lord Ordinary, to whom granted power to decern for the taxed amount thereof.

Counsel for the Claimant and Reclaimer Henry Lindon Riley — Graham Stewart, K.C. — J. H. Millar. Agent — James M'William, S.S.C.

Counsel for the Claimant and Respondent the Official Receiver of the Estate of Robert Youde — Wilson, K.C. — Hon. W. Watson. Agents — E. A. & F. Hunter & Co, W.S.

Wednesday June 15.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

LAIRD & SON *v.* BANK OF SCOTLAND AND OTHERS.

Bankruptcy — Right in Security — Bill of Lading — Delivery Order — Holder for Value and in Good Faith—Illegal Preference—Act 1696, *c.* 5.

A cargo of timber was purchased by A, who accepted bills for the price, and in return for his acceptance received the bills of lading blank endorsed. The sale was induced by fraudulent representations on the part of A. The cargo was on arrival stored with a firm of timber measurers subject to A's orders. Thereafter A, in return for advances, granted certain delivery orders to the lenders, to whom the bills of lading were handed over. At the date of these transactions A was in fact in great pecuniary difficulties though still carrying on business. A having become bankrupt within sixty days of the granting of the delivery orders, and the sale having been reduced on the ground of A's fraud, the cargo was claimed by (1) the unpaid sellers, (2) the liquidator on A's estate, and (3) the grantees of the various delivery orders.

Held (*diss.* Lord Johnston on the question of good faith as brought out in the evidence) that as the grantees of the delivery orders had no knowledge of A's fraud in inducing the sale, they were holders in good faith and for value, and consequently that where the logs assigned had been specifically identified, the grantees had acquired a good title to the timber, valid against the unpaid vendors and the liquidator. *Per* Lord Kinnear — "There is no wrong done to any one in dealing with an insolvent person in such a way as to keep his business going for a time so long as the person dealing with him confines his transactions to those for full value" — Lord Mansfield's statement of the principle in *Foxcroft*, 1760 2 Burr 931, *applied.*

Held, further, that a delivery order, although specific and duly intimated to the custodiers of the timber, which had been granted in substitution of a prior delivery order which was not specific, was invalid, it being granted in further security of a prior debt within sixty days of granter's insolvency, contrary to the Act 1696, c. 5.

On 5th July 1907 John Laird & Son, measurers, Port Glasgow, *pursuers and nominal raisers*, brought an action of multiplepoinding and exoneration against the Governor and Company of the Bank of Scotland and others for the purpose of determining the right to a cargo of timber then lying in Laird & Sons' timber yard at Port Glasgow. The cargo was claimed by, *inter alia*, (1) Messrs Price & Pierce, timber merchants, London, the unpaid sellers; (2) Buchanan & French, Limited, timber merchants, Glasgow, the purchasers of the timber, and the liquidators of that company; and (3) in part by the Bank of Scotland and others to whom various delivery orders had from time to time been given by Buchanan & French in return for sums advanced them.

The *facts* and the nature of the claimants' *averments* appear from the opinion (*infra*) of the Lord Ordinary (SALVESEN), who on 20th July 1909 pronounced this interlocutor—"Finds as regards the claim of Price & Pierce, Limited, that on 2nd November 1906 the said claimants sold to Buchanan & French, Limited, a parcel of fresh pitch pine sawn timber consisting of 2664 logs at the price of £4030, as per memorandum of agreement of said date: Finds that the said contract was induced by false and fraudulent misrepresentations by John Buchanan, the managing director of the said company, and that the claimants are entitled to have the said contract rescinded as in a question with the liquidators of said company: Finds, as regards the claim of G. L. Fraser, that the said claimant on 12th March, in respect of a loan of £3000 paid in cash, obtained a transfer to the bill of lading for the said cargo, and also a delivery order for 1166 logs and 416 logs, and that said delivery order was duly intimated to the holders of the cargo, and the logs therein contained identified and ascertained prior to the date of the notour bankruptcy of the said Buchanan & French, Limited: Finds, as regards the claim of T. & R. Duncanson, that the delivery order for 420 logs, dated 18th March 1907, on which the claimants found, was granted in further security of a prior debt within sixty days of notour bankruptcy of the said Buchanan & French, and was therefore ineffectual as against the liquidators of said company or the unpaid vendors: Finds, as regards the claim of the Bank of Scotland, that they have failed to establish that the goods contained in the delivery order for 200 logs and 100 logs, dated respectively 19th and 22nd March, were ascertained or identified prior to said notour bankruptcy, and that no valid security in their favour was constituted thereby: Therefore (first) ranks and prefers the claimant G. L. Fraser to the proceeds of the said 1166 logs and 416 logs, under deduction of the proportion of the charges of the nominal raisers applicable to said parcel, and of the real raisers' expenses of raising and bringing the action into Court; (second) sustains the claim of the Bank of Scotland in so far as it is a riding claim on that of G. L. Fraser, and ranks the Bank of Scotland to that extent; *quoad ultra* repels their claim; and (third) ranks and prefers the claimants Price & Pierce, Limited, to the balance of the fund *in medio* under deduction as aforesaid; repels the claim for T. & R. Duncanson: finds the real raisers entitled to their said expenses of raising and bringing the action into Court," &c.

Opinion.—"The nominal raisers in this case were at the date of the action holders of a cargo of timber discharged from the screw steamer 'Ameland' in March 1907, but which has since been sold and converted into money by agreement. To this fund there are various competing claims.

"The cargo in question was on 2nd November 1906 sold by Price & Pierce, Limited, of London, to Buchanan & French, Limited, timber merchants in Glasgow, at the price of £4030, the purchasers paying freight on delivery. The memorandum of agreement embodying the sale provided that payment was to be 'by approved acceptances to sellers or sellers' agent, draft payable in London at four months at sight of and in exchange for bill of lading and other shipping documents.' At the time of the sale, and until shortly before they suspended payment in April 1907, Buchanan & French, Limited, were in good credit, and ostensibly carrying on a large business.

"The cargo in question was shipped on board the s.s. 'Ameland,' and a bill of lading dated 26th January 1907 granted therefor. The goods under this document were deliverable to the order of Price & Pierce, Limited, or their assigns. On receiving the shipping documents Price & Pierce, on 11th February 1907, made out acceptances for the price payable drawn by them upon Buchanan & French, Limited, and these were duly accepted on the 18th. In exchange therefor the purchasers received the shipping documents, including the bill of lading which was blank endorsed.

"The cargo arrived at Greenock on 11th March, and the discharge was at once commenced and completed on the 14th. Messrs Laird & Company received delivery subject to the shipowners' claim for freight, which was afterwards settled. On 12th March a delivery order for 1166 logs and 250 loads was granted in favour of G. L. Fraser by Buchanan & French, Limited, and was duly intimated to the nominal raisers. On 18th March a delivery order for 200 logs was granted in favour of the Bank of Scotland, and on same day a delivery order for 420 logs in favour of the claimants Duncanson; and on 21st March a further delivery order for 100 logs was granted in favour of the Bank of Scotland. These delivery orders exhausted the entire cargo with the exception of 102 logs. All the delivery orders were intimated and acknowledged by the holders.

"On 11th April 1907 a petition was presented to the Court of Session at the instance of Price & Pierce for the winding-up of Buchanan & French, Limited. On 22nd April the company passed a resolution for voluntary winding-up; and the

Court on the petition already presented afterwards directed the liquidation to proceed under its supervision. Price & Pierce received no payment to account of the purchase price, and if they are to rank simply as creditors in the liquidation they would have to be content with a very small dividend, as the estates of the company were found to be hopelessly insolvent.

"The cargo is claimed by Price & Pierce, Limited, in competition with all the other claimants. . . . [*After rejecting the first contention of these claimants, viz., that the stipulation in the contract that payment was to be made by approved acceptances was suspensive of the sale, that the acceptances received were not of that character, the acceptors being at the time hopelessly insolvent, and consequently that the property of the cargo never passed to the purchasers, his Lordship proceeded*]—"The second ground on which Price & Pierce maintain as against the liquidators that they are entitled to the fund *in medio* is that they were induced to enter into the contract of sale by false and fraudulent statements made by Mr Buchanan; and that the liquidators are not entitled to take benefit from his fraud. I agree with Mr Macmillan, who argued the case for the liquidators and the Bank of Scotland, that a mercantile contract of this kind will not be rescinded because of vague and general statements which were made when the contract was concluded, and which proved to have been false to the knowledge of the person making them. It must be clearly shown, in addition, that but for these statements the contract would not have been entered into—in other words, that it was induced by fraud. The *onus* of proving this lies upon the claimants, and the question for my decision is whether they have satisfied this *onus*, the legal result, if they have, not being in controversy. The case on this head depends on the evidence of three witnesses—Mr Price senior, Mr Benn, and Mr Keith Price, the two former being directors of the claimants' company, and the latter being the person who actually negotiated the sale in question. The result of the evidence of the two former is that they had some dubiety as to the financial position of Buchanan & French, Limited, and instructed Mr Keith Price not to give them any further credit unless he obtained a satisfactory statement as to their position. Up to that time there had been no very strong reason for distrusting the company's ability to meet its obligations; but several circumstances, small in themselves, as, for instance, that the company had some time previously asked a renewal of one of their trade bills, had aroused suspicion in the minds of the two witnesses in question; and their agent in Glasgow Mr Kyle had also in June previous sounded a note of warning. I do not think that the claimants felt any real alarm on the subject, but they had nevertheless, if they are to be believed (and I think their evidence was perfectly frank and trustworthy), come to the conclusion that it would not be advisable to sell any large lot of goods to Buchanan & French, Limited, without obtaining satisfactory assurances as to their financial stability. Moreover, it is certain that before the cargo in question was sold Mr Keith Price had an interview with Mr Buchanan, an interview at which Mr Kyle was present, although he paid no attention to what actually passed. Mr Keith Price jotted down at the time the statements made to him by Mr Buchanan, and a copy of this jotting is in process. That such a jotting was made at the time is spoken to by the two directors already mentioned, who saw it the morning of Mr Keith Price's return from Glasgow. Mr Buchanan was not a witness, having left the country under a cloud, and the liquidators not thinking it worth their while to guarantee the Crown the expense of bringing him back to this country to answer to a charge of fraud.

"The jotting itself contains intrinsic evidence that the materials must have been supplied by Mr Buchanan; and so far as the earlier items in it are concerned they are all accurate with the exception that there is an error in the name of the chairman of the company. The case accordingly turns upon the 'rough idea of the balance-sheet' which forms the last part of the jotting, and which represents the company as having its capital of £70,000 intact, as well as a reserve of £10,000 to meet any deficiency in stock or running accounts. In addition, Mr Keith Price depones that Buchanan told him 'that he was doing a very fine business, and was making very large profits . . . in fact he said he was in a better position by far than he had ever been before.' A statement of this kind, coupled with the rough estimate of the financial position of the company contained in the jotting, was quite sufficient to induce confidence; and I accept Mr Keith Price's statement that but for what passed at the interview, the substance of which he jotted down, he would not have entered into the transaction at all.

"That the statements made by Buchanan were false, I think, is clear from the evidence of both sets of accountants. Within four months Buchanan & French, Limited, had suspended payment, and the statement of affairs made up by Messrs M'Lintock & Company as at 10th April 1907 showed a deficiency of £67,000. Mr M'Lintock admits that the position of the company cannot have been materially better in October 1906 than it was at the finish—and accordingly it must be taken to be a fact in the case that if the company had been wound up on 1st November 1906, when the contract was made, its estates would have proved as insolvent as they actually turned out to be later. There was therefore no spare capital, as the rough balance-sheet represented, nor any reserve, but an indebtedness in excess of the whole assets by over £60,000. Accordingly it is plain that Mr Buchanan must have overestimated the value of his stock and of the running accounts; and still more obvious is it that when he represented the

company's debts at £34,000 he must have left out of view all his trade obligations, for the debt to the bank at that date amounted to about that sum.

"All this, however, perhaps is consistent with Mr Buchanan having an honest belief in the solvency of his company. It frequently happens that business men form an entirely erroneous estimate of the stability of their debtors and of the value of their assets; and what appeared to them as a solvent concern may in a few months turn out to be hopelessly otherwise. There is some evidence that Buchanan believed to the last that his company was solvent; but in his absence I am afraid no importance can be attached to it. Nevertheless the presumption is always against fraud; and the claimants must satisfy the Court that the only reasonable inference to be drawn from the known facts is the inference that the statements of Buchanan were made in the knowledge of their falsity.

"In my opinion there is ample material from which this inference can be drawn. The limited company had been floated the previous year, taking over the assets of the former firm of Buchanan & French as from 31st December 1904. Buchanan was the principal promoter of the company; and it is now plain that in order to obtain an accountant's certificate on which he could go to the public he had found it necessary to make a number of fictitious entries in the books to the amount of nearly £10,000 as brought out in Mr M'Lintock's statement. I agree with Mr M'Lintock that John Buchanan was well aware of the effect that these entries would have upon the trading results and the position of the accounts generally; and I think it is obvious that if they had come to the knowledge of the accountant who certified the annual profits no certificate such as he gave would ever have been granted. Accordingly it is apparent that the very formation of the company could not have been carried through but for the fraud of John Buchanan.

"Of course it does not follow from this that Buchanan knew that the company was insolvent a year later after £43,000 of fresh capital had been infused into the concern; but at the very date when the interview took place between Mr Keith Price and Mr Buchanan the latter was engaged in a series of frauds of a different nature. A large part of the turnover of his business was done with a number of smaller firms or companies which Mr Buchanan had started in business and had continuously financed. The strain upon his company's resources had by this time become so great that he could not have met it but for an ingenious method which he adopted of obtaining a much larger overdraft from the Bank of Scotland than the head-office had authorised. He was aware that the weekly inspection of customer's accounts took place on Tuesday. Accordingly on every Tuesday he obtained bogus cheques from the various firms that he was financing as well as from a writer in Glasgow who had no business connection with him at all, which were paid in to the credit of his account. These cheques reduced the overdraft below the authorised figure; but on the very next day, when the danger of discovery was over, cheques to an equal amount were passed upon the account; and the money obtained for these was at once utilised in meeting the cheques which had been paid in on the previous day. Thus on 28th August 1906 the amount of Tuesday's cheques received was £14,034, and on the other side the repayments of Tuesday's cheques amounted to £13,863. In this way Mr Buchanan was getting for the company an additional overdraft from the bank beyond what the bank had authorised of £14,000. This system had been going on for a considerable time before, and, as might be expected, the success which attended it led to more and more advantage being taken of the bank until the amount of the cross entries in the month of January 1907 reached the large total of £131,885.

"So familiar was Mr Buchanan with the bank's method of doing business, and such elaborate precautions were taken to give the bogus cheques the appearance of payments in the ordinary course of trade, that Mr Robertson, the manager of the bank in Glasgow, did not discover what had been going on until December 1906. The fraud was, moreover, one to which the smaller firms who granted the cheques must have been parties; and it is significant that not one of them has been examined in this case. It was contended for the liquidators that all this was consistent with Mr Buchanan having a genuine belief in the solvency of his company, for if the obligations which these smaller firms had incurred to Buchanan & French, Limited, were good, the company would still have been solvent. I am unable to accept this view. In the first place, Mr Buchanan was practically the parent of all these companies and was intimately acquainted with their business. He must have known that they were not able to meet their obligations, otherwise he would not have continued financing them as he did until the crash came. But further, it is obvious that if he had not succeeded in this way in obtaining an overdraft from the bank far in excess of what had been authorised, the company would have required to suspend its payments long before November 1906. Perhaps Mr Buchanan hoped that if he could only keep these smaller companies afloat he might ultimately be able to pull through; but if so, I am satisfied he had no reasonabie ground for such a hope; and I draw the inference that he concocted and carried through this series of weekly frauds upon the bank for no other purpose than to stave off a declaration of insolvency. I think it was with the same object that he made the statements to Mr Keith Price, for his company could only be kept afloat if he induced others to sell timber to them on credit. It is nothing to the purpose to say that he succeeded in convincing the outside public that his company was doing a prosperous business and that it remained

in good credit until shortly before it went into liquidation, for this result was achieved only by cheating the bank and so obtaining from it facilities without which he would have been unable to continue the business. I accordingly hold that it has been amply established that Buchanan knew that his company was insolvent on 1st November 1906, and that accordingly the claimants Price & Pierce, Limited, are entitled to have the contract rescinded.

"Rescission of the contract, however, cannot prejudice the rights of third parties previously acquired over the cargo in good faith and for value, and all the cargo here except 102 logs is claimed by third parties—the leading claim being by Mr G. L. Fraser for a parcel of 1166 logs and 250 loads. The circumstances out of which this claim arises are briefly as follows:—The freight of the cargo fell to be paid upon delivery, and Buchanan & French, Limited, had not available cash. Mr Buchanan in the first instance approached Mr Robertson for an advance, but by this time the bank had discovered the frauds that had been practised upon them and had instructed that no further advances were to be made. Buchanan thereupon went to the claimant Fraser, having previously arranged with Mr Robertson that the bank would advance the necessary sum to Fraser, and asked him to lend his name for the purpose. Fraser agreed provisionally to carry through the loan if he was sufficiently covered; and his evidence is that having had to leave Glasgow on business he wired his brother to carry through the transaction 'if the Bank of Scotland were willing to make the advance, and if he got ample security and the bill of lading.' Mr John Fraser deponed that on 12th March, having received the wire, and having had a call from Mr Buchanan, the latter handed to him the endorsed bill of lading and a delivery order for an amount sufficient to cover the loan, and that they thereupon went to the Bank of Scotland, saw Mr Robertson, and obtained the advance of £3000. From the £3000, commission and interest, which was the consideration that Fraser received, were deducted, and the balance handed over to Buchanan & French's secretary. A delivery order was handed to Mr Robertson at the same time, and the bank are claiming upon this as a rider on Mr Fraser's claim. The delivery order in Fraser's favour was duly intimated and acknowledged by Messrs John Laird & Sons on 13th March.

"Price & Pierce dispute the claim of Fraser on various grounds. They set forth certain facts, real or assumed, from which they inferred that Fraser's claim was really a claim by the bank; that he gave no value for the timber conveyed to him, and that the whole transaction on the part of the bank and Fraser was part of a scheme whereby each would receive a benefit at the expense of these claimants. They further say that neither Fraser nor the bank were *bona fide* indorsees of the bill of lading. In my opinion none of these inferences have been established so far as Fraser is concerned. The part that he played was really to act as banker for Buchanan & French in the circumstances I have already narrated; he made himself liable to the Bank of Scotland for the advances, and if the security should prove insufficient he must make good the deficiency. I am satisfied that Fraser believed that Buchanan & French were at the time quite solvent, and that he acted in perfect good faith. At the hearing Mr Hunter for Price & Pierce mainly confined his attack on Fraser's claim to two points—(1st) He contended that there was not sufficient evidence that Fraser received the bill of lading, and he founded on various circumstances which he said were real evidence to this effect. These were (1) that there is no mention of the bill of lading in the receipt granted for the money, but only of the delivery order; (2) that the bill of lading was presented not by Fraser but by Buchanan & French to the shipowner; and (3) that the very fact of Fraser taking a delivery order negatives his statement that he already had the bill of lading, as if so a delivery order was entirely unnecessary. In my opinion all these points are satisfactorily explained in the evidence led for Mr Fraser, and I think there is conclusive proof, partly parole and partly documentary, that from 12th March he was in possession of the bill of lading except for two short periods when he lent it to Buchanan & French for a specific purpose. If so, the validity of his claim so far as based on the bill of lading is ruled by the case of *Hayman*, 1907 S.C. 936, where the circumstances seem to me to have been substantially the same as those which occurred here. The delivery order was only an additional security which had the effect, as it was intended to have, of limiting Fraser's right to the bill of lading to the specific parcels described. In this view it is unnecessary that I should consider whether the delivery order was insufficient to pass the property, although on this point I am also inclined to be against the claimants Price & Pierce, because I hold it to be established that prior to the liquidation all the logs contained in this delivery order had been duly identified by having the mark 17 F placed upon them as instructed by the letter of 18th March written by Fraser to John Laird & Sons. The fact was that the 1166 logs comprised all the logs of an average measurement of 30 cubic feet with the exception of about 130, and the measurers accordingly had no difficulty in identifying those which were covered by Fraser's delivery order.

"In this view it becomes almost unnecessary to consider the averments of fraud against the Bank of Scotland, the relevancy of which I regarded as extremely doubtful at the time that proof was allowed. Nevertheless, as a great deal of evidence has been led on the subject, I think it right to express my opinion upon it. The first attack that is made upon the bank is in respect of their having allowed their name to appear upon the prospectus of the limited company in the knowledge (it is said) that a fraudulent

system of credit was being carried on by Buchanan & French, and that that system was being used for the purpose of deceiving the trading public. All I need say on the subject is that I think these averments have been wholly disproved, Mr Robertson having entire confidence at the time in the company's business, and being quite unaware either of the fictitious entries or of the bogus cheques. It is true that in the latter half of December 1906 he did become aware of these frauds, and that he did not disclose his knowledge to the bank until February; but even then there is no evidence that Mr Robertson considered the business insolvent, or that the bank, if it acted with discretion, would not be able to recover the whole indebtedness. An entirely different complexion would have been put on the transaction if the bank had derived any benefit from the advance of £3000 which it made to Fraser for behoof of the company; but Mr M'Lintock in his evidence clearly showed that this was not so, and that the bank neither sought to obtain, nor did actually obtain, any reduction of the indebtedness of the company to them by means of this advance. It may well be that Robertson was remiss in not ascertaining sooner how the bank was being taken advantage of by Buchanan, and he had to answer later to his own superiors for his conduct in the matter. But the bank owed no duty to other creditors of Buchanan & French, Limited, and when they found themselves in the position of having made advances far in excess of what they ever intended to give, they were quite within their rights in choosing their own time for enforcing repayment. Mr Robertson is not even asked whether at the date when he carried through the transaction with Fraser he knew the company to be insolvent, or that they had not paid—far less could not pay—for the goods contained in the bill of lading which they were using as a fund of credit.

"There remain two other claims—that of T. & R. Duncanson in respect of a delivery order dated 18th March for 420 logs, and that of the Bank of Scotland in respect of two delivery orders for 200 and 100 logs respectively. The former claim is disputed both by the liquidators and by Price & Pierce, the latter only by Price & Pierce. The ground of objection to the former claim is that the delivery order was a voluntary preference granted in security of a prior debt by the limited company within sixty days of notour bankruptcy.

"Both partners of T. & R. Duncanson were examined, and they are not quite at one in the evidence they give. Mr Robert Duncanson says that he was called upon by Buchanan on 8th March, and that he then desired an advance of £1000, stating that he had a cargo of pitch pine discharging at Port-Glasgow, and that he would give a delivery order for 500 logs in security of the advance. Both partners say that they consented to the arrangement on this footing; that there and then two bills for £500 and £406, 13s. 5d. were handed to Buchanan; and that in exchange they received from him a delivery order for 500 logs. Mr Robert Duncanson then goes on to say, 'We went into the quantity roughly, and we felt that there was possibly more than sufficient to cover our advance, and I was to release some of them. He asked me to delay presenting this order until he had fuller specification of the timber, and I agreed to do so. He also said that he would give me an order for the exact amount as soon as he could possibly ascertain the cubical contents of the logs. We endeavoured continuously during the next few days to get this order by telephone. Ten days later, on 19th March, we received a delivery order for 420 logs dated 18th March.' It was argued for the Duncansons that this passage in Mr Robert Duncanson's evidence was sufficient to prove that the advance was made on the footing that a delivery order for sufficient logs capable of being definitely ascertained was to be made out and handed to them as soon as the logs could be measured. I am unable so to hold. In cross-examination Mr Robert Duncanson says—'The specific security which I stipulated for was a delivery order for 500 logs. . . . I stipulated for no other security unless there was the qualification that these 500 logs might be too many, and we were willing to give up some of them, which we did.' Mr Thomas Duncanson in cross-examination was asked—'(Q) I take it that when you got the subsequent delivery order of 18th March the first one was superseded?—(A) No, I differ from my brother on that point. My contention is that it was only a portion that was released. (Q) Your contention is that you were getting two delivery orders, one for 500 logs and one for 420, both in security?—(A) No, I said we would release 80 out of the 500.' And in cross-examination by Mr Hunter the same witness says—'(Q) At the transaction of 9th March what was the arrangement made as to the specific security?—(A) The 500 logs was the specific security. Nothing more was to be got. Buchanan said the cargo was either then discharging or about to be discharged.' The evidence of Cockburn, the cashier, who says that at the interviews in question Mr Buchanan said—'We were not to present the order for 500 logs as he did not know the scantling of the logs, but that he would send a right delivery order in a few days'—does not really assist the claimants. I am unable, therefore, to hold it established that Buchanan at that interview came under an obligation instantly and absolutely enforceable to grant the delivery order for 420 logs which he in fact afterwards granted after an interval of ten days,—and this is the test of whether the security is or is not within the rule of the statute. (*Stiven* v. *Scott*, 9 M. 923 and 932.) If, as both Messrs Duncanson admit in cross-examination, the advance was made against the delivery order for 500 logs, then the subsequent delivery order was in further security of a debt already incurred, and is struck at by the statute. That they realised after the advance had been made

that their security was not a good one and pressed for a security which would be made real by intimation to the holders of the logs, does not prove that any obligation had been undertaken by Buchanan to grant such a security, and if, as Mr Thomas Duncanson says, the subsequent delivery order was merely evidence of a release of 80 logs out of the original 500, it is plain that the claim must be based upon the first order. The claimants, however, have admitted that the delivery order for 500 logs not having been intimated to the holders of the fund cannot constitute a security in their favour in competition with the liquidators; and accordingly I hold that their claim falls. The more recent cases to which I was referred were those of *Gourlay*, 2 R. 730; *Gourlay*, 14 R. 403, and *Cowdenbeath Coal Company*, 24 R. 682. All these cases are illustrations of the strictness with which the Court construes transactions of this nature in the interests of the general body of creditors. In the first case of *Gourlay*, the obligation in return for the advance to give within one month delivery orders on stores in Glasgow for wheat, oats, beans, or Indian corn to the full value was held not sufficient to elide the statute. The Lord President said—'It is only an obligation to deliver goods, but no specific quantity of goods. . . . Any grain which might be delivered at the option of the seller would be fulfilment of the obligation. . . . When the security is not specific the right of the creditor who has advanced money is not to demand immediate performance of the obligation.' Even therefore if I had held that, concurrently with the advance made and in consideration of same, Buchanan had promised to give a delivery order for logs sufficient in value to cover the advance as soon as he got the cargo measured, that obligation might have been fulfilled at his option out of any part of the cargo in question, and it was therefore not a specific obligation capable of instant and immediate enforcement.

"There remains only the claim at the instance of the bank in respect of the two delivery orders for 200 and 100 logs respectively. That these delivery orders were granted for full value is apparent from the evidence of Mr M'Lintock. Concurrently with the granting of these orders, the bank released wood which they held in security to an extent in excess of the value of the timber contained in the delivery orders. The orders were at once intimated to Laird & Sons, and acknowledged on 19th and 22nd March. Intimation, however, and acknowledgment combined, are admittedly, under the second part of the case of *Hayman*, not sufficient to create a real right in the bank. Nor can that be effected by a storekeeper simply transferring the special number of logs in his books to the bank's name, as was undoubtedly done in the present case. The logs required to be specifically marked or otherwise identified so that the exact subject of the security might be ascertained at the time. There is a single passage in the evidence of Mr Campbell which is relied upon as establishing that the goods were identified in such a way that the particular logs belonging to the bank could at any moment be picked out of the ponds and delivered to them. Mr Campbell's evidence is, however, not satisfactory as to the exact date when the initials 'B of S' were put opposite the particular logs in the scantling books, and everything depends upon whether this was done before 11th April. Further, it is certain that he was not asked by the bank as he was by Fraser to set aside particular logs in respect of these two delivery orders, nor is there any evidence that he communicated before 11th April what logs he proposed to apply to the orders, or that the bank assented to such proposal. I accordingly reach the conclusion that the logs covered by the two delivery orders were unascertained before the date of liquidation, just as the 500 sacks of flour in the case of *Hayman;* and that the bank has failed to establish that they ever made their right real.

"The result of my judgment on the whole matter is, that I find the claimant Fraser, and the bank as a rider on his claim, entitled to be ranked and preferred to the 1166 logs and 250 loads marked 17 F; and that I find the claimants Price & Pierce entitled to the balance of the cargo. I shall be glad, however, to hear parties on the question of expenses. The claim for the nominal raisers has, I understand, been adjusted between the parties; and I shall expect them also to adjust the figures in view of the logs being no longer in existence but having been converted into money."

The claimants, Price & Pierce, Limited, and T. & R. Duncanson, reclaimed.

Argued for Price & Pierce, Limited—(1) The contract having been reduced these claimants were now the true owners of the timber, and that being so their right thereto was preferable to all save that of innocent third parties, *i.e.*, holders in good faith and for value. The bank was not in that position, for it had, either actual or inferential, knowledge that Buchanan & French were hopelessly insolvent at the time of the transaction. It was aware of the large overdraft, of credit being kept up by a system of dummy cheques, and of the possibility of the bank's bringing them down at any time. The bank therefore knew—or must be held to have known—that Buchanan & French could not give an absolute title to the timber, and that being so it was not in a position to plead its title against that of the true owner—Benjamin on Sale (5th ed.) 457; Carver's Carriage by Sea (5th ed.) sec. 538; Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sec. 23; *Jones* v. *Gordon*, (1877) L.R. 2 A.C. 616, *per* Lord Blackburn at pp. 628-9. The endorsement of a bill of lading did not pass the property where, as here, the indorsee knew that the goods had not been paid for and that the consignee was insolvent—Scrutton on Charter-Parties, (5th ed.) p. 166, sec. 74; Carver (*cit. sup.*);

Cuming v. *Brown*, (1807) 1 Campbell, 104, and 2 Ross' L.C. (Com. Law) 144; *Vertue* v. *Jewell*, (1814) 4 Campbell, 31; *Earl of Sheffield* v. *London Joint Stock Bank*, (1888) L.R. 13 A.C. 333; *London Joint Stock Bank* v. *Simmons*, [1892] A.C. 201, at 218; *National Bank of Australasia* v. *Morris*, [1892] A.C. 287. (2) The claimant Fraser was merely a nominal transferee, the party really interested was the bank. In any event Fraser had no title to the timber, for there was no proper identification of the 1166 logs and the 250 loads prior to the liquidation. (3) As regards the separate parcels of 200 and 100 logs claimed by the bank, the Lord Ordinary was right, for these logs had never been specifically identified as the property of the bank. There was no evidence as to when these logs had been marked as belonging to the bank. They were therefore unascertained goods, and accordingly no right thereto had ever passed to the bank — *Hayman & Son* v. *M'Lintock*, 1907 S.C. 936, at p. 951, 44 S.L.R. 691. (4) The reclaimer Duncanson had no good title to the 420 logs assigned to him, for no specific security over them had been created in his favour. The delivery order on which he founded did not identify the logs. It was immaterial whether the delivery order for 420 was in addition to, or in substitution of, that for 500, for in neither case were the logs ever specifically identified; that being so, no good security over them had ever been created—*Stiven* v. *Scott & Simson*, June 30, 1871, 9 Macph. 923, 8 S.L.R. 605; *Gourlay* v. *Hodge*, June 2, 1875, 2 R. 738, 12 S.L.R. 481; *Gourlay* v. *Mackie*, January 27, 1887, 14 R. 403, 24 S.L.R. 295.

Argued for Fraser (claimant and respondent)—This claimant had a good title to the logs assigned to him under (1) the bill of lading and (2) the delivery order. The temporary lending of the bill of lading to Buchanan & French did not affect his security under it, for the temporary passing of pledged property to the debtor for a specific purpose did not interfere with the pledgee's right of security—*North-Western Bank, Limited* v. *Poynter, Son, & Macdonalds*, November 16, 1894, 22 R. (H.L.) 1, 32 S.L.R. 245.

Argued for T. & R. Duncanson (claimants and reclaimers) — These claimants had a good security for 420 logs. The delivery order for 420 logs was meant to supersede that for 500, under which the reclaimers had also a good security. The advance and the granting of security were part of one and the same transaction—the delivery order being granted *unico contextu* with the advance. The logs were capable of being immediately identified, and that being so the reclaimers had a good specific security valid against the unpaid vendors and the liquidator — 2 Bell's Com. 211; *Cormack* v. *Anderson*, July 8, 1829, 7 S. 868; *Cranstoun* v. *Bontine*, February 2, 1830, 8 S. 425, *affd.* July 6, 1832, 6 W. & S. 79; *Gibson* v. *Forbes*, July 9, 1833, 11 S. 916, at pp. 924 and 931; *Miller's Trustees* v. *Shield*, March 19, 1862, 24 D. 821; *Cowdenbeath Coal Company, Limited* v. *Clydesdale Bank, Limited*, June 15, 1895, 22 R. 682, 32 S.L.R. 549. The case of *Stiven* (*cit.*) was not in point, for in that case there was no proper security. The cases of *Gourlay* (*cit. sup.*) were also distinguishable, for in the former the security subjects were not specific, and in the latter the security was left to the option of the borrower. The substitution of the 420 for the 500 logs was not made "in further security" in the sense of the Act 1696, c. 5, for the mere substitution of a new for an equivalent security granted prior to the sixty days was not reducible—*Roy's Trustee* v. *Colville & Drysdale*, March 20, 1903, 5 F. 769, 40 S.L.R. 530.

Argued for the Bank of Scotland (claimants and respondents)—(1) Price & Pierce, Limited, had failed to show that the bank knew of Buchanan & French's insolvency. *Esto* that the bank knew that the cargo had not been paid for, that did not disentitle it to lend money either to Buchanan & Fraser or to Fraser wherewith to pay for it. The bank had no reason to think the cargo would not be duly paid for, for Buchanan & French were in good commercial credit at the time and able to meet their current obligations. They were commercially solvent, and the bank was therefore entitled to deal with them — Bell's Com. i, 261-8; Goudy on Bankruptcy, 44; *Clark & Company* v. *Miller & Son's Trustee*, June 3, 1885, 12 R. 1035, 22 S.L.R. 685. (2) The validity of the bank's claim depended on that of Fraser, who was clearly a holder in good faith and for value, for he had no knowledge that the vendors had not been paid. The case of *Cuming* (*cit. sup.*) was not in point, for that was a case of collusion, and there was no collusion here. *Esto* that Robertson was negligent, that was not enough, for negligence was not *mala fides*. The security was validly constituted, for the logs in question were both numbered and marked as the property of Fraser and he therefore had a good specific security. The fact that he temporarily parted with the bill of lading for a specific purpose to Buchanan & French did not affect his security—*Barber* v. *Meyerstein*, (1870) L.R., 4 Eng. & Ir. App. 317; *North Western Bank, Limited* v. *Poynter* (*cit. sup.*); *Hayman & Son* v. *M'Lintock* (*cit. sup.*), at p. 950. (3) As regards the parcels of logs last referred to by the Lord Ordinary, the bank had a good security, for they were marked as its property prior to 11th April 1907. *Esto* that Price & Pierce, Limited, were entitled to reduce the contract, they could not both reduce it and claim damages as well. They were bound therefore to account for the freight so far as it had been paid them—Leake on Contracts (5th ed.), 258-9; *Sheffield Nickel Company* v. *Unwin*, (1877) L.R., 2 Q.B.D. 214.

At advising—

LORD KINNEAR—There are two reclaiming notes before us in this case, one at the instance of Price & Pierce, Limited, and the other at the instance of Messrs T. & R. Duncanson. The more important question

is that which arises on the case raised by the claim of Messrs Price & Pierce. I do not think it necessary to recapitulate the facts, because they are stated fully and correctly by the Lord Ordinary, and I do not think it would be a profitable use of your Lordships' time that I should detain you by repeating what is already very clearly before us in print.

It is necessary to refer to certain matters of fact in order to show how the questions in dispute arise. I may say, concerning the evidence on which his Lordship's judgment is based, that having considered it myself I entirely agree with the Lord Ordinary. The way in which the question arises is brought out very clearly in the first sentence of the Lord Ordinary's opinion, where he says—"The nominal raisers in this case were at the date of the action holders of a cargo of timber discharged from the screw steamer 'Ameland' in March 1907, but which has since been sold and converted into money by agreement. The cargo in question was on 2nd November 1906 sold by Price & Pierce of London to Buchanan & French, Limited, timber merchants in Glasgow, at the price of £4030, the purchasers paying freight on delivery. The memorandum of agreement embodying the sale provided that payment was to be by approved acceptance to sellers or sellers' agents, draft payable in London at four months at sight of and in exchange for bill of lading and other shipping documents."

Then his Lordship says, "At the time of the sale, and until shortly before they suspended payment in April 1907, Buchanan & French, Limited, were in good credit, and ostensibly carrying on a large business." In point of fact their business was in a very unsatisfactory condition for some time before they suspended payment. They were bankrupt in April 1907, because a petition for liquidation was then presented, and the dispute which has arisen between the parties arises out of that bankruptcy.

There are certain dates which it is necessary to keep in view in order to appreciate the question exactly. As I have quoted from the Lord Ordinary, the cargo was sold in ordinary course of trade in November 1906. The timber was shipped on board the "Ameland" in December 1906, and arrived on the 11th of March 1907. The delivery out of the ship was completed on the 14th March, and the cargo was stored with Laird & Sons, Port-Glasgow, who are the nominal raisers in the action.

In these circumstances the competition as to the rights in this timber, or in the money which now represents it since it has been sold by agreement, arises between Messrs Price & Pierce, the sellers, who have not received payment from the buyer, and who claim that they are entitled to rescind the contract of sale because it was induced by fraud, and certain other parties who allege that they have a prior claim and have certain valid real rights in the timber which Price & Pierce are not entitled to defeat.

Upon the main ground of claim made by Messrs Price & Pierce I am satisfied, for the reasons given by the Lord Ordinary, that the contract was induced by false representations made to them by Buchanan, the managing partner of Buchanan & French, Limited, and that the contract may be reduced at the instance of the sellers. But that fact was not known to any of the parties to the transaction into which we are inquiring until after the completion of these transactions. The legal principle is perfectly clear and beyond dispute. It is well-settled law that a contract induced by fraud is not void, but voidable at the option of a party defrauded. In other words, it is valid until it is rescinded. It follows that when third parties have acquired rights in good faith and for value, these rights are indefeasible. Buchanan & French therefore, at the time of the transaction with the other claimants, the effect of which I shall explain immediately, had acquired the goods under a valid contract of sale, and until the defrauded seller had intimated his intention to rescind they had a good and valid title to sell or pledge and to give a valid title to a purchaser or to a pledgee, titles which would still remain valid although their own title was subject to rescission, provided always the persons so dealing with them were ignorant of the fraud and gave value for the goods. The only question that is raised on this part of the case appears to be, whether the claimants who claim to have acquired right through Buchanan & French were innocent of Buchanan's fraud and gave value for the goods.

For the purpose of considering the question in chronological order, I think it is convenient to begin with the claim of Mr Fraser, because the main claim of the Bank of Scotland, although they have another minor and separate claim, is a mere rider upon Fraser's claim. The facts upon which Fraser's claim is based are perfectly simple. Buchanan applied to Fraser for a loan on security on certain parcels of the cargo of timber. Fraser advanced to Buchanan £3000 on the 12th March. He borrowed money for that purpose from the Bank of Scotland, undertaking to give to them a security over the security which was to be given to him by Buchanan. He paid the money to Buchanan and received from him the bill of lading blank endorsed, and also a delivery order for 1166 logs and 416 logs, which was duly intimated to and acknowledged by Laird & Sons, the custodiers. He executed a delivery order to the bank, which again was duly intimated to and acknowledged by Laird & Sons, who after that intimation held for the bank. It must be added that the timber included in these delivery orders had been sufficiently identified by Laird, the custodiers, and the whole transaction, including the delivery and acknowledgment of the delivery orders, had been

completed before the petition for winding up had been presented by Buchanan & French. These appear to me to be the only facts that are material to Mr Fraser's claim. But then there are certain points in the history of the transaction between him and Buchanan upon which an argument is founded against the validity of his claim, and therefore I ought to notice them, although I shall do so very shortly. Buchanan had dealt for a considerable time with the Bank of Scotland. He had obtained banking facilities from them, and had been allowed to overdraw his account to an extent greatly in excess of what, according to the ordinary rule on which the bank transacts such business, was proper. He had obtained this overdraft by an ingenious scheme of deceit, which is explained in detail by the Lord Ordinary, the effect of which was to induce Mr Robertson, the bank's agent in Glasgow, to assume that the position of Buchanan's account with the bank was very much better than in point of fact it was. For a time he did in fact deceive Mr Robertson, but before the beginning of the transaction into which we are inquiring the bank had discovered how matters really stood. The head office expressed their displeasure with the state of matters which they had found, and they resolved to, and did, issue instructions that no further advances should be made to Buchanan without security. Therefore when Buchanan went to Fraser for this loan he did so because he could get no further advance from the Bank of Scotland. But although the bank would not lend to him, Mr Robertson, their agent, allowed him to understand that they would be willing to lend to Fraser upon his personal obligation and upon sufficient security. Accordingly the arrangement was made between Buchanan and Fraser that the latter should borrow the money from the bank, on his own obligation, transferring to them the delivery orders in security for the advance, and then lend the money to Buchanan. Upon all that the argument is that these facts disclose a scheme between Fraser and the bank to gain some advantage at the expense of Messrs Price & Pierce. I must say that that argument seems to me entirely baseless. The whole transaction between the bank and Fraser was a perfectly regular proceeding, in perfectly regular order in the course of business. Fraser borrowed from the bank and lent to Buchanan upon what the bank believed to be good security. They are obtaining no advantage as against Price & Pierce, because the whole transaction is that Fraser lends £3000 in good money to Buchanan, and gets security to that extent, and to no further extent. It is of no consequence as between him and Buchanan, or as between him and Price & Pierce, that he borrowed the money from the Bank of Scotland. The result is that he gains no advantage from anybody but can never recover from the transaction more than the actual sum of money he paid to Buchanan. When he made the claim upon these terms he knew what had passed with Buchanan. He knew that the bank had refused to give Buchanan further advances, but he knew nothing of the history of the transaction between Buchanan and the bank which is said to indicate some improper scheme to which he was a party. He knew nothing except that the bank would not advance anything further to Buchanan. It appears to me that in these circumstances Fraser answers exactly to the description of the innocent third party whose title cannot be defeated by a fraud of which he knew nothing. He knew nothing of the manner in which Buchanan had induced the contract, and he paid down money at the moment in return for the security. I am therefore of opinion, and I must say without hesitation, that there is no good answer to Mr Fraser's claim.

If that be so, then I think it follows of necessity that there is no answer to the bank's claim so far as it is a rider upon Fraser's. As between Fraser and Laird, Fraser must have payment of his money, but he is under obligation, which he does not dispute, to pay the bank if his claim is sustained and he is ranked to that extent. Price & Pierce have no direct claim against the Bank of Scotland which will enable them to interpose and prevent the performance of Mr Fraser's obligation to pay. He is bound to do so at his own hand in his application of the money. He does not allege, nor is there anything in the evidence to suggest, that he has any answer to the bank's claim upon his personal obligation. Therefore I think that the decision of Fraser's claim carries with it the decision that the Bank of Scotland's claim, which is a rider upon his, must be also sustained, because I see no interest to dispute it on the part of the competing claimant.

But then I think it is necessary to consider the particular ground upon which the Bank of Scotland's claim as against Price & Pierce is disputed. The bank is, in my opinion, in exactly the same position as Fraser so far as regards ignorance of Buchanan's fraud. It is not alleged that they knew anything about the way in which Buchanan had induced this contract. At all events upon the evidence it is clear enough that they knew nothing about it. They were therefore ignorant of any fraud inducing the contract. They gave value just as certainly as Fraser did. They gave their money in return for a certain security. They took no advantage as against any other claimant. Their claim is simply for return of money actually advanced. If they had been attempting to obtain any undue preference against any other creditors a different question might have arisen, but they took no advantage by giving the full price in return for the pledge. But then it is said that Robertson clearly ought to have known that in the first place he himself had been deceived by Buchanan, and I rather understand the argument to be that he should have known that Buchanan was capable of deceiving other people, and in the second place that Buchanan was utterly insolvent. I am

not satisfied that Robertson knew that the insolvency of Buchanan & French was irretrievable; I do not think it would much matter if he did, but I think it must be imputed to him that he knew they were in what has been described as a tottering condition; that he knew that their business was very much shaken indeed, and I think it must also be ascribed to him that he should have known there was a possibility at least, if not a probability, that the goods which Buchanan bought from Price & Pierce had been bought on the ordinary terms to which the trade is accustomed, that is to say, payment by acceptances, and that the bills were still current. If he had therefore inferred that there was a chance of Messrs Price & Pierce being still unpaid to the full, I think that was an inference which the circumstances would necessarily have fairly suggested. But then, all that does not constitute any fraud on Price & Pierce, because Buchanan was still carrying on his business. I am not at all satisfied that Robertson did not believe he had a reasonable chance of recovering his position. There is no wrong done to anybody in dealing with an insolvent person in the position I have described in such a way as to keep his business going for a time so long as the person dealing with him confines his transactions to those such as we are now considering, viz., transactions for full value. They may buy for full value or take in pledge the goods of a trader in that position without any wrong to other people who may be dealing with him, and without exposing any other creditor to any undue disadvantage. The general principle is stated in the case of *Foxcroft* (1760, 2 Burr, 931), cited to us in the words of Lord Mansfield, where he states that "a notion that lending money to traders knowing them to be in dubious, tottering, or distressed circumstances, upon mortgages or liens, is fraudulent; and consequently the contract void in case a bankruptcy ensues, would throw all mercantile dealings into inextricable confusion. Men lend their money to traders on mortgages or consignments of goods because they suspect their circumstances and they will not run the risk of their general credit." I think that is exactly the position in which the bank stood. It is not the case that the bank took the risk of Mr Buchanan's solvency. It was ready to lend money on good security, and having done so it is to my mind in the position of having given full value for the only right which it obtained, viz., a right of pledge in goods which have now been turned into money. In these circumstances to sustain their claim involves no wrong to any other party, and in particular to the unpaid vendors Messrs Price and Pierce.

The Lord Ordinary has taken the view which I have expressed, and accordingly he has preferred the claim of Fraser to the proceeds of 1166 logs and 416 logs, and also the claim of the bank in so far as it is a riding claim on that of Fraser, and I think that so far we ought to adhere to the Lord Ordinary's interlocutor.

But then there is another separate claim by the Bank of Scotland, standing on different grounds, which the Lord Ordinary has repelled. The way in which the claim arises is this, that the bank obtained two other delivery orders from Buchanan for 200 and 100 logs respectively. There is no doubt that these orders constituted a security for value that could have been carried into effect. They gave in exchange other orders which they already held and accepted the orders in question in substitution. The only question that arises about these orders is whether the intimation to the storekeeper and his acknowledgment thereof and the manner in which the orders were treated amounts to identification sufficient to give a specific real right in the particular timber which formed the subject of the security, or whether it does not. The Lord Ordinary holds that upon the evidence the logs were not so identified as to fix the exact subject of the security intended to be given to the bank, and therefore that in effect it obtained no real security over them. I am unable to agree with the Lord Ordinary in that conclusion. I think that he has attached perhaps too little importance to the evidence of Mr Campbell, a partner of the storekeepers, Messrs Laird & Sons. His evidence seems to me to bring out clearly enough the manner in which the logs in question were identified, and to show that they were ascertained and identified, and that the appropriate entries were made in Messrs Laird & Sons' books so as to give due effect to the order given to the bank. He gives a minute account in the opening of his examination of the manner in which the logs, when they were delivered from the ship, were measured and specified so as to enable him to identify particular logs. With reference to the two delivery orders now in question, he says, upon his acknowledgment of these orders being shown to him, that they had been intimated to him by the Bank of Scotland, and identifies his acknowledgments, that he duly transferred the material referred to in the delivery order to the Bank of Scotland in the firm's books. "As soon as my measurement was completed, and I had received the delivery orders, I gave effect in my own book to the delivery orders that I have referred to in this process." I observe that the evidence given by Mr Campbell is not crossed upon the point by the counsel for either of the competing claimants. The evidence, I think, shows that the goods were sufficiently measured and identified, and that the only effect which the storekeeper could give to the delivery orders was duly given by Mr Campbell. I am therefore of opinion upon that point that your Lordships ought to come to a different conclusion from that of the Lord Ordinary.

There remains only a separate point which is raised on the claim for Messrs Duncanson, and it seems to me to raise what is really a very simple question. Messrs Duncanson agreed to advance certain sums to Mr Buchanan on the security of a delivery order for 500 logs. The de-

livery order was given, but upon condition that it should not be presented, because Mr Buchanan said that he did not know the scantling of the logs, and that he would replace it by giving a right delivery order in a few days. The Duncansons advanced the money on the promise that Mr Buchanan would give them a delivery order, but not on the faith of any actual order except that of the 500 logs which they were not to present. It is not maintained that the order for 500 gives them any security, because it was not intimated to the holder, and the only question is whether the intimation of the order, which was given after an interval of ten days, is sufficient or not. The Lord Ordinary holds, and I agree with him, that the security is struck at by the Act of 1696 as a security for a prior debt—a security given within the term of constructive bankruptcy created by the Act. The answer is, as I understand it, that the parties having stipulated for a specific security over a particular subject, and having given an advance on the faith of that stipulation, the completion of the borrower's obligation by delivery in accordance with the stipulation is not struck at by the Act of Parliament. I agree with the Lord Ordinary that that defence is not good, because there was not stipulated a specific security over a particular subject which could be enforced in order to compel the delivery of a delivery order for 420 logs. The money was really advanced upon the faith of the order for 500. There was no specific security stipulated in respect of the 420 logs when the order was given; and therefore I agree with the Lord Ordinary that the claim of Messrs Duncanson fails.

On the whole matter, therefore, I am of opinion that we ought to adhere to the interlocutor of the Lord Ordinary except in so far as regards the two smaller parcels of logs.

LORD JOHNSTON—I do not think that it is possible without first ascertaining the precise facts to approach the legal question which is the principal point under this reclaiming note, viz., whether Mr G. L. Fraser, and the Bank of Scotland claiming through him, can maintain a right in security over a certain part of a cargo of pitch pine for advances made to the vendees Buchanan & French, Limited, against the unpaid vendors Messrs Price & Pierce seeking to rescind the contract of sale, or whether the unpaid vendors are entitled to revindicate the cargo on the ground of fraud in the inception of the contract of sale. As I have come to a different opinion from that just expressed by my brother Lord Kinnear, and as my judgment depends on certain considerations of facts, I must trespass on your Lordships' time by stating very definitely the conclusions in fact to which I have come on an anxious consideration of the evidence.

Messrs Buchanan & French had carried on business as timber merchants in Glasgow for ten or a dozen years prior to November 1905. They had, latterly at least, leaned very heavily upon the Bank of Scotland for accommodation, which they obtained in three different ways. They had (1) a timber advance account, on which, to a nominal limit of £8000, they obtained advances against the security of definite lots of timber in measurers' hands; (2) an overdraft account, not definitely authorised but customary, and with an understood limit of £7000; and (3) a discount account with a nominal limit of £30,000, the limits in the two latter cases being systematically and progressively exceeded, the excess by the end of 1905 being so large as seriously to alarm the bank. The facts of their position at this time seem to have been that Messrs Buchanan & French had a fairly good and ostensibly profitable general business, but that they were involved by their managing partner John Buchanan with a circle of impecunious dependent businesses in which he was interested, and which have been aptly described as tied houses, that they were brought, principally by their involvements with these dependent firms, to the verge of bankruptcy, and were only kept afloat by a system of fraudulent dealing, which I must assume was not then detected by the bank, whereby they obtained illegitimate but increased banking facilities, and were enabled to keep a series of accommodation bills and cheques in the circle.

But it has an important bearing upon the bank's relations to the transactions in the spring of 1907, upon which the matter at issue turns, that on 2nd November 1905 the head office of the bank wrote thus to Mr Robertson, the Glasgow manager, referring to the flotation of Buchanan & French as a limited company—"The directors are again emphatic in expressing their determination on no consideration to continue the account as hitherto worked, and of this there must be no shadow of doubt in the minds of yourselves or the partners. The directors ask you to report by 30th current what progress is made. If none they will probably instruct drastic action. The enclosed memorandum from the Kirkcaldy office is further evidence of the unhealthy and objectionable business which the firm transacts."

As I have to deal with the Bank of Scotland's relation to a matter in which fraud is of the essence, I wish to state clearly at the outset that no imputation can possibly be made against the bank management in Edinburgh. The action of the head office was strenuous and straightforward in the endeavour to control the situation created by their Glasgow manager. If, in expression, I impute anything to the bank it must be understood as referring to the Glasgow management only, but for that the bank is responsible. . . .

[*After examining the evidence in detail, and coming to the conclusion that the bank through their Glasgow manager must be held to have been aware in March* 1907 *that Buchanan & French were irretrievably insolvent, his Lordship proceeded*]—Now it was exactly at this juncture, when Mr Robertson had had to close

Buchanan & French's ordinary account, and when he was hanging on, on the off chance of some proposal being made and carried into effect which would partially relieve the bank, though it could have no effect on the ultimate solvency of Buchanan & French, and when therefore time was of the essence, that the operation on which the present question hinges was entered into by Mr Robertson. On this 11th March Mr John Buchanan came to him for assistance to meet the freight of the pitch pine cargo *ex* "Ameland" and his other pressing needs. The answer was in effect, I can do nothing for you directly, but bring me an intermediary and through him I will do what you want. The intermediary was at once found in the person of Mr G. L. Fraser, an honest and unsuspecting broker, who was induced to intervene, on the prospect of having the sale of the cargo entrusted to him. And the *modus operandi* was this—Mr John Buchanan placed in Mr Fraser's hands the bill of lading of the "Ameland's" cargo, and a delivery order on John Laird & Son for a portion of that cargo, estimated as sufficient to cover the advance. Mr Fraser went to the bank, and in exchange for an identical delivery order on John Laird & Son was allowed to draw on a special loan account opened for the purpose £3000, less discount. And having drawn it, he there and then handed the proceeds of the cheque to Buchanan & French. Mr Fraser had nothing to do with the arrangement for this advance. When he went to the bank he found it was all pre-arranged between Mr John Buchanan and Mr Robertson. He had nothing to do but play his part as cat's-paw. It is true that the transaction had the semblance of banking business. A loan account was opened in Mr Fraser's name. A cheque on that account was taken from him, which on the face of it made him obligant to the bank. £27, 11s. 6d., being two months' interest or discount, was charged, and the net amount only, or £2972 8s. 6d., handed to him, and by him to Buchanan & French. He apparently got nothing, not even commission for lending his name, nothing but the prospect of brokerage on the cargo. But so regardless of business methods was Mr Robertson that he neither asked to see nor to obtain the bill of lading, and that he took as his formal security a delivery order from Mr Fraser, without knowing that he had any power to grant it, or what was its value and effect when granted. Notwithstanding all that had come and gone, he trusted everything to Mr Buchanan, except that he took Mr Fraser's cheque, and believed Mr Fraser to be good, as he was, for that obligation. Mr Fraser, or rather his brother, who carried through the transaction during his absence, was I think staggered by the put-up aspect of the transaction. But they both acted in ignorance of the circumstances and in complete *bona fide*. None the less Mr Fraser was in my opinion a mere cats-paw, the hand of the bank to make this advance to Buchanan & French. And disguise it as was attempted, I cannot regard that the interposition of Mr Fraser, in the circumstances, affected the situation one whit. On 12th March 1907 Mr Robertson, knowing full well that Buchanan & French were irretrievably bankrupt, that the bank stood to lose heavily, made this further advance to Buchanan & French, not as a banking transaction, for it is impossible to credit that its object was to employ his bank's funds at interest to make the paltry profit of £27 11s. 6d. of discount, but to put Buchanan & French in funds to pay freight on the cargo, and by releasing it—if not, as I think was truly the object, to make the cargo available to give the bank "farther bills and timber £5000"—at any rate to obtain a fund of credit to enable them to carry on for a few days over that meeting which he, Mr Robertson, was to have with the company's directors "on Wednesday next," and at which he still hoped, clinging as to a last straw, to get from them, and particularly from Mr Alexander, some further security to relieve at least *pro tanto* the bank, to the loss of other creditors and at the expense of Mr Alexander. Add to this in view of his knowledge of Buchanan & French's business—and in the absence of inquiry he must be held to have known, and it was not disputed that he did know—that the cargo, a portion of which he believed he was getting as security by means of a delivery order, had not been paid for.

I have said believed he was getting, for I venture to express a decided doubt whether he was really getting such security. I fully recognise the virtue of possession of a bill of lading, as laid down, for example, in the case of *Barber* v. *Meyerstein*, L.R., 4 E. & I App. 317. But assuming that Mr Fraser held the bill of lading as trustee for the bank—a wide assumption looking to the looseness of the transaction — I am not satisfied that the bill of lading was so used as to retain to the holder its virtue. It was handed to Mr Fraser certainly while the cargo was in course of discharge and subject to the ship's lien for freight. But it was never presented by him. He let it out of his hands on 12th March to let the vendees and consignees of the cargo present it, which they did in their own names and without reference to him, and he again let it out of his hand on 2nd April when they finally settled the balance of freight. Otherwise he held it unknown to anyone except the vendees, while the cargo was being discharged, and he allowed the vendees through John Laird & Son to deal with the cargo. A bill of lading may be a good symbol of possession while the cargo is subject to the bill of lading. But I am not prepared to admit that it continues so indefinitely and after the cargo is discharged, at any rate unless active use has been made of it. But in truth Mr Fraser relied upon his delivery order, and the bank on their delivery order, and on John Laird & Son's acknowledgment of them, and I think there is much to be said as to

their invalidity. They were given at a time when the cargo was not in Messrs Laird & Son's hands. They applied to no specific portion of the cargo. The cargo was not a cargo of uniform or identical units, as of so many sacks of uniform contents of identical flour, where it has been recognised that no selection in the delivery is involved any more than where coin is paid out by a bank teller. The delivery order was capable of being implemented on ultimate discharge, measurement, and segregation of the logs of timber, at the discretion of Messrs John Laird & Son in an infinity of ways. The delivery orders when presented to them were indefinite in their application, yet could not be implemented as in the case of bags of flour or bars of pig iron by taking from the heap what first came to hand. Selection was necessary to make the delivery order definite by identification. I doubt whether their subsequent exercise of their discretion in segregating certain logs to satisfy the delivery order, prior to the date of the liquidation, by the warehouseman to whom custody of the whole parcel was committed, validated a delivery order in itself originally bad. But the evidence on the subject is intricate, and your Lordships have come to a different conclusion, which I do not think it proper that I should further dispute. I therefore content myself with indicating my doubt.

My own judgment in favour of Messrs Price & Pierce is founded on different grounds.

I am unable to regard Mr Fraser, notwithstanding the semblance of independence with which he was clothed by arrangement between Mr Robertson and Mr John Buchanan, and notwithstanding his personal innocence of any complicity in that arrangement, as anything other than the bank's agent in the transaction.

I am therefore compelled to regard the transaction as truly and wholly the bank's transaction, just as if it had been entered upon and carried through without the interposition of Mr Fraser.

So regarding it, while there was onerosity, there was very clearly absence of that *bona fides* which is necessary in addition to onerosity to enable a third party successfully to resist the rightful owner's rescission of a contract by which he has been deprived of his property by fraud. Not only was there clear absence of that *bona fides*, but there was clear presence of *mala fides* on the part of the bank's representative. He had long been in full knowledge of circumstances from which the inference that the bank's debtors Buchanan & French were irretrievably insolvent was irresistible. I refer to the *National Bank of Australia* v. *Morris*, L.R. (1892), A.C. 287, which though on its merits depending on a colonial statute on this point is an apposite authority. Mr Robertson, as I think, conspired with John Buchanan to use Mr Fraser as innocent medium, to enable him for his own end to keep these fraudulent bankrupts—for in this matter I cannot distinguish between Buchanan & French and John Buchanan—on their feet for a few days more, and to accomplish that end he advanced his bank's money to the bankrupt upon the security of goods which he must be held to have known were not paid for. It so happened that unknown to him the bankrupt's title to these goods had been obtained by fraud, and was liable to rescission. While, then, I fully admit that we are not in the region of such cases as the *Earl of Sheffield* v. *The London Joint Stock Bank*, L.R., 13 A.C. 333, and the cases on which it proceeded, where the question was of qualification of the title of the transferors and trustee and the transferee, for here the ostensible title was absolute, and there was no notice of its latent defect. Still in the circumstances which I have been at pains to expiscate, the bank in my opinion are not entitled to stand upon that title in order to bar the rescission to which the true owner of the goods is otherwise entitled. The bank through its representative was guilty not merely of gross negligence but of positive *mala fides*—*Goodman* v. *Harvey*, 1836, 4 Ad. & El. 870, 43 R.R. 507.

In coming to this conclusion I am not moved by the technical difficulty of giving effect to the judgment in this process. I do not think that difficulty insuperable. Mr Fraser must be protected. But I think that findings may perfectly well preface an interlocutor repelling both his claim and the bank's riding claim, which will define their position, and which, as they are both parties to this action, will be *res judicata* between them, and will be an answer to any action the bank may attempt against Mr Fraser to enforce his formal obligation, and to any defence the bank may make to his demand to recover the sum which he has already, in ignorance of the circumstances, paid to them.

But while I think that Messrs Price & Pierce ought to prevail, that can only be on their paying the freight effeiring to the portion of the cargo which they are found entitled to recover, which freight was paid out of the funds advanced by the bank, otherwise they would receive a gratuitous benefit by the transaction against which they were being restored.

There are two other minor questions in this case, viz., Messrs Duncanson's claim and the Bank of Scotland's further claim to 200 and 100 logs. As my opinion on the main question is not in accordance with that of your Lordships, I do not think that I should further occupy your Lordships' time except to say that on the footing of your Lordships' judgment on the main question I concur in your Lordships' disposal of these minor points.

LORD PRESIDENT—I am content with the view of the evidence taken by the Lord Ordinary, and I confess I am not able to appreciate the legal proposition on which it is sought to declare that the timber covered by the delivery order given to Fraser should belong to Price & Pierce. But in order to make my meaning clear it is perhaps as well that I should summarise the proposi-

tions of fact to which I am led by the evidence. They are as follows:—The timber was sold in ordinary course of trade under a contract which arranged that payment might be made by acceptances at four months' currency from the date of handing over the shipping documents. The acceptances were given and were discounted by the sellers. The contract of sale was induced by false representations on the part of the buyer, but this fact was not known to anyone but himself till after his bankruptcy—that is, long after the transactions with Fraser and the Bank of Scotland. The contract was a c.i.f. contract for delivery at Greenock. The timber was shipped on board the "Ameland" under the charter-party dated 10th December 1906. She arrived at Greenock on 11th March 1907, and delivery out of the ship was completed by 14th March, the whole of the timber being stored with John Laird & Son of Port-Glasgow. Fraser advanced on 12th March 1907 £3000 in cash to Buchanan & French, the buyers, and in return got the bill of lading blank endorsed, and also a delivery order for 1166 logs and 416 logs, which delivery order was duly intimated to and acknowledged by Laird & Sons. Fraser executed a delivery order in favour of the Bank of Scotland, and they in their turn duly intimated it to and had an acknowledgment by Laird, who thereafter held the said timber for the bank. The said timber was duly marked and identified by Laird, and the entry in his books was duly made, all before the date of presentation of the petition for the winding up of Buchanan & French.

It is not possible to give in the form of an exact proposition the state of knowledge which may be imputed to the bank through their agent Robertson. By this time Robertson knew that Buchanan had been deceiving him, and by means of that deception had secured much larger overdrafts than he would otherwise have been given. He knew also that the head office had forbidden him to make any more advances, and it is a necessary inference that he would know that the refusal of further facilities was likely to incommode Buchanan seriously in the future conduct of his business. I do not myself see that it is necessary to draw the further conclusion that Robertson knew that Buchanan was hopelessly insolvent, although, as I shall presently explain, it could make no difference if he did. I am also willing to assume that Robertson must be held to have known that the ordinary course in the timber trade was to pay cargoes with bills, and that consequently he would be aware that the strong probability was that the cargo in question had been paid for by bills still current—bills which might not be met if Buchanan became unable to continue business. It is also clear that Fraser knew nothing of Buchanan's circumstances, and that Buchanan applied to Fraser with the concurrence of Robertson, because Robertson's own peremptory instructions from the head office prevented him giving any further advance either with or without security to Buchanan. The date of Buchanan's notour bankruptcy may be taken to be the date of the presentation of petition for winding-up, viz., 11th April 1907—in other words, a month after the transaction in question.

On these facts, as I said before, I fail to see what relevant proposition in law can be made against the claim of the bank. It is trite law that a contract induced by fraud is voidable and not void, and is good until rescinded. Therefore at the date of the transaction the contract was good. Under it the goods passed to the buyer, if not sooner at least undoubtedly on complete delivery, and this was effected on the 14th March. Buchanan was therefore entitled to give a good title either by sale or by pledge to any person innocent of fraud. It is here that I humbly think that the confusion which has found a place in the argument advanced comes in. If through Robertson the bank could be held to be cognisant of the fraud by which the contract had been obtained, that is to say the false representation, then clearly the bank could not say that they were innocent holders of the goods on any contract, however onerous, because they would be knowingly taking from a tainted person. But it is not pretended that Robertson or anyone connected with the bank knew anything about the way in which the contract had been made. In what, then, can the fraud of the bank consist? It is said that they knew that Buchanan was insolvent or tottering to bankruptcy, but it is no fraud to deal with a person who may be really insolvent while the insolvency is still undeclared. In the words of Lord Mansfield, often quoted and accepted as law—I need not read the passage, as it has already been quoted by my brother Lord Kinnear—a notion that lending money to traders, knowing them to be in dubious circumstances, upon mortgages is fraudulent, would throw all mercantile dealings into inextricable confusion. It is said, however, that the bank must be held to have known that these particular goods were probably not paid for, viz., that the seller had probably only bills of which the currency was still running. But if a person chooses to sell on credit the eventual failure of the purchaser to pay does not void the contract, and it is an entirely abnormal and unheard-of proposition that before you buy or take an article in pledge you must satisfy yourself not only that the article is the property of the seller or pledger but that he has accounted to the person from whom he may have got the article. To support their contention the reclaimers' counsel relied on a set of cases of which *Virtue* v. *Jewell*, 1814, 4 Campbell 31, may be taken as an example, which lay down that the transference for value of a bill of lading cannot defeat the seller's right to stop *in transitu* if he either knows that *de facto* the goods have not been paid for or knows of the buyer's insolvency. I accept these cases as undoubted law but I ask what application have they to the present position? Stoppage *in transitu* is

a privilege given to the unpaid seller. It arises from the nature of the circumstances when delivery is itself suspended by the exigencies of carriage. When the buyer goes to the shop of the seller the giving up of the goods by the seller and the delivery to the buyer take place at one and the same moment. But when there is a period of carriage there is always a time when the goods have quitted the personal possession of the seller and have not yet reached the buyer. To this period the privilege of stopping *in transitu* applies in favour of the unpaid seller. No further question could arise were it not that by means of the effect which the law, mercantile and maritime, has given to bills of lading it is possible for the buyer to transfer the goods while they are still with the carrier. It is surely a most obvious equity to hold that the transferee of the buyer shall not be allowed knowingly to defeat the seller's right to stop *in transitu* or to claim as against him a higher right than his author the buyer would have had, unless he is ignorant of the state of matters which gives the seller his right.

But the moment that the journey is over and the delivery fully effected all right of stoppage *in transitu* is gone. No one can pretend that Price & Pierce could have stopped *in transitu* after 14th March, nor did they attempt to do so. The cases therefore have no application, and we just get back to the position: What was to hinder anyone buying from Buchanan or taking in pledge goods that had been delivered to him and against which the privilege of stoppage *in transitu* was gone for ever? To make the analogy a true one there would need to have been here, as I have already indicated, not knowledge of the insolvency of Buchanan, which had no legal effect whatever on the original contract of sale, but knowledge of the fraud on which that contract of sale rested—a knowledge no one alleges ever existed.

It seems to me therefore that the case against the bank entirely fails. Had there been any contrivance to get hold of this timber to give security for their existing advances, then a perfectly different question would have arisen, being within sixty days of bankruptcy. But from the point of view of the bankruptcy statutes this was undoubtedly a *novum debitum*. I have dealt with the case as if it had been directly with the bank, because there being as I said no case that is more satisfactory. But I confess if the bank had not chosen to put in a riding claim on Fraser I do not see how the case could ever have been raised. Fraser was free from all knowledge; he gave the money and got the timber. How could that transaction be set aside because he in turn pledged the timber to the bank from whom he received money, simply because it was that money he used in making the advances to Buchanan?

I think I am bound to add one or two words, because in the opinion which my brother Lord Johnston has delivered he has really based his judgment upon an argument which I do not think was presented at the bar. He has dwelt at considerable length upon, first of all, the fraud of Buchanan in deceiving Robertson, and also on Robertson's want of duty towards the head office of the bank in not communicating sooner to the head office these frauds which had been perpetrated on the bank. Now although the word fraud may well be used, one must ask, In what did the fraud consist? The fraud consisted in deceiving the bank, and by means of that fraud getting from the bank larger advances than any bank which conducted its business according to the rules of banking would ever have been likely to give. But I confess that I cannot see what other creditors have to do with that. That is a question between Robertson and the bank. Suppose the bank had been foolish and acted as no bankers ordinarily do, what was there to prevent them making as large advances as they liked to Buchanan without any security whatsoever, and what has any other creditor of Buchanan got to do with that? In the same way, my learned brother examined very minutely the evidence which dealt with the matter of Bailie Alexander. I will assume that Robertson, having undoubtedly got himself into a very unfavourable position with his own head office, was very anxious that Buchanan should continue the business, and that the only way of continuing the business was, as in everything else, to get fresh money into the business. Now it must be remembered that Buchanan's timber business was a very good business. He had no doubt unfortunately become concerned with these smaller ventures, but he had a good trade business, and if sufficient money could be brought forward I do not see anything in the evidence to lead one to suppose that it might not have been possible to carry on that business. But what does that matter if he could get other people to bring in money? And what has that to do with the position of other creditors of Buchanan? I cannot help saying this, that that argument when pressed really comes to this, that the bank's fraud imputed through Robertson consisted in not bringing down Buchanan & French at the precise moment when the timber was still unparted with and the bills still in currency, because unless they had been brought down at that particular moment what good would Price & Pierce ever have got? The fact that these bills were pledged to Fraser for this money is, so far as Price & Pierce are concerned, precisely the same as if the timber had been sold in the open market; and the only way Price & Pierce could have been benefited would have been if, through the action of the bank, Buchanan & French had been brought down while the timber still remained unsold. Are we to accept the proposition that if a person suspecting that another is in a bad way does not bring him down at a certain period, it so taints that person's every transaction that he may not even get payment of money which he has advanced? That is a proposition which I never heard before, and for

which, I humbly think, there is absolutely no foundation in any of our writers who deal with commercial matters or insolvency. Accordingly I confess I am not moved by that argument so much as by the argument at the bar which relied on the stoppage *in transitu*.

On the other matter I agree with Lord Kinnear. On Duncanson's claim I agree with him and the Lord Ordinary.

On the question of the sufficiency of the identification of the two smaller parcels of logs I think there was sufficient identification. You have the original scantling book, which shows that the logs have a running number, and that against these logs with a running number there are the initials "B. of S.," which everybody admits stands for the Bank of Scotland. You have the acknowledgment of Laird that when the delivery order was sent to him he made a transference in his books, and the only question on which the Lord Ordinary was not quite satisfied was whether there was sufficient evidence that the actual identification of the log itself had been made before the date of the bankruptcy. We know that the delivery was finished upon the 14th. The bankruptcy did not happen for nearly a month afterwards, and we have the evidence of Messrs Laird's man. As a matter of fact, they did put the running number on the logs the moment the timber was got into chains after it was toppled out of the ship and put into such packets as could enable it to be moved to the pond. That seems to me perfectly sufficient proof that here this timber was identified long before the bankruptcy happened, because we know that long before that it was in the ponds. I do not think the question of identification was carried so far in the second branch of the claim as to make it absolutely necessary that somebody could go and be absolutely precise as to the particular date on which the identification was complete. Messrs Laird & Company's man could not of course do that, because he says quite naturally—"I cannot tell you the precise day on which I put the running number on the log, but I can tell you our general practice." That coupled with the fact that you find the scantling book in that condition is for me perfectly sufficient.

I must also say one word about what was said by Lord Johnston about the delivery order. It is certainly news to me that a delivery order in general terms is a bad delivery order. If it was, I do not see how you could give a delivery order for a good many articles for which delivery orders are given every day, such as tins of meat, bags of flour, and so on. I have never heard that it was not a perfectly good order to a storekeeper to say, "Deliver so many bags or so many tins." The question of course of the segregation which takes place afterwards is quite different, because until that is done the storekeeper must be held to hold for the person who originally put them there, not for the transferee on the delivery order. What I said about the logs applies to the packet. There being perfectly good identification I see nothing wrong or faulty in any of the delivery orders. Upon the whole matter, therefore, I come to the same conclusion as Lord Kinnear, the result being to uphold the Lord Ordinary's interlocutor, with the exception of the two small packets.

LORD SALVESEN, against whose judgment the reclaiming note had been taken, gave no opinion.

The Court pronounced this interlocutor:—

"Recal said interlocutor in so far as it finds that the claimants the Bank of Scotland 'have failed to establish that the goods contained in the delivery orders for 200 logs and 100 logs, dated respectively 19th and 22nd March, were ascertained or identified prior to said notour bankruptcy, and that no valid security in their favour was constituted thereby': And also recal the ranking 'second' therein contained; and in lieu thereof find that the claimants the Bank of Scotland on 18th and 21st March 1907 obtained delivery orders for 200 logs and 100 logs respectively in exchange and substituted for other timber warrants previously held by them, and that said delivery orders were duly intimated to the holders of the cargo, and have established that the logs contained in said delivery orders were ascertained and identified prior to said notour bankruptcy, and that a valid security in their favour was constituted thereby; and rank and prefer the Bank of Scotland as riding claimants on the claim of G. L. Fraser; and also rank and prefer the said bank to the proceeds of the said 200 logs and 100 logs under deduction of the proportion of the charges and expenses mentioned in the 'first' ranking in said interlocutor: Further, vary said interlocutor by substituting 1907 for 1906, and also £5903, 3s. for £4030, both in the first finding thereof: *Quoad ultra* and with said variations adhere to said interlocutor, and decern. . . ."

Counsel for Laird & Son (Pursuers and Nominal Raisers)—J. R. Christie. Agents—Bryson & Grant, S.S.C.

Counsel for Buchanan & French, Limited, and the Liquidators thereof (Real Raisers and Respondents)—Murray, K.C.—Mair. Agents—Macpherson & Mackay, S.S.C.

Counsel for T. & R. Duncanson (Claimants and Reclaimers)—Blackburn, K.C.—Kirkland. Agents—W. & J. Burness, W.S.

Counsel for Price & Pierce, Limited (Claimants and Reclaimers) — Hunter, K.C. — MacRobert. Agents — Cowan & Stewart, W.S.

Counsel for Bank of Scotland (Claimants and Respondents) — Clyde, K.C. — Macmillan. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Fraser (Claimant and Respondent) — Sandeman, K.C. — Spens. Agents—J. & J. Ross, W.S.

Saturday, July 16.

FIRST DIVISION.

[Sheriff Court at Kilmarnock.

DUNLOP PARISH AND STEWARTON PARISH SCHOOL BOARDS *v.* CUNNINGHAME GRAHAME BURSARIES ENDOWMENT FUND PATRONS.

School Board—Title to Sue—Educational Trust—Scheme for Administering Bursaries—Condition of Passing Qualifying Examination in a Public School of Certain Parishes — Title and Interest of School Boards of Parishes to Enforce Condition.

One of the conditions of a scheme under which bursaries were administered was that candidates must have passed the qualifying examination of the Scotch Code in one of the public schools of certain parishes. The school boards of the parishes raised an action against the patrons of the bursaries for declarator that this condition had been violated, and that the patrons had acted *ultra vires* in awarding one of the bursaries, and for interdict. They maintained that they had an interest, and therefore a title to sue, in that parents might be attracted to the parishes and might send their children to the schools of the parishes, and that in this way a larger grant might be obtained from the Education Department.

Held that the pursuers had no title to sue, as their interest was too slender.

Opinion (*per* the Lord President) that school boards had no title given them *eo nomine* by the Education Acts to raise such questions, yet a title might flow if they had sufficient interest, and that had the bursaries been given to pupils attending the schools which were under these school boards there would have been sufficient interest.

The School Board of the parish of Dunlop, in the county of Ayr, and the School Board of the parish of Stewarton, in the same county, raised an action in the Sheriff Court at Kilmarnock against the Rev. William Young Lindsay, who had recently been Moderator of the Presbytery of Irvine, the Rev. James Lamont Fyfe, the then Moderator of said Presbytery, the Rev. James Symon, minister of the parish of Dunlop, and the Rev. William Falconer Ogilvie, minister of the parish of Stewarton, being the patrons, past and present, of the Cunninghame Graham Bursaries Endowment Fund, acting under a scheme approved by the Court of Session upon 19th June 1908.

The claim or demand of the pursuers, as stated in the initial writ, was "For declarator that the patrons of the Cunninghame Graham Bursaries Endowment Fund, acting at the time under scheme approved by the Court of Session upon 19th June 1908, were acting *ultra vires* and in violation of the provisions and conditions of said scheme, and illegally and unwarrantably, in granting or awarding, on or about 28th November 1908, one of the bursaries payable under said scheme to Agnes Gibb, residing at Parkside, Dunlop; and in subsequently paying over to her the sum of £7, 10s. as a first half-yearly payment on account of said bursary, the said Agnes Gibb not having complied with the conditions prescribed by said scheme for candidates for the examination thereby provided for applicants for said bursaries, and particularly not having passed the qualifying examination of the Scotch Code in one of the public or state-aided schools in the said parishes of Dunlop and Stewarton . . . [*as originally laid there followed a claim for repayment of the* £7, 10*s. to the Endowment Fund, but this claim was abandoned in the Inner House*]; and further, for interdict against the defenders the Rev. James Lamont Fyfe, presently moderator of said presbytery, and the Rev. James Symon and the Rev. William Falconer Ogilvie, ministers respectively of said parishes of Dunlop and Stewarton, and as such the present patrons as aforesaid, making payment to the said Agnes Gibb of said bursary illegally and unwarrantably granted or awarded to her as aforesaid."

The pursuers, *inter alia*, averred—"(Cond. 2) By his trust-disposition and settlement, dated 2nd January 1883, and, with relative codicil, recorded in the Books of Council and Session, 4th September 1884, the late Thomas Douglas Cunninghame Graham, of Dunlop, directed his trustees, on the expiry of a life-rent of the residue of his estate therein mentioned, to invest the sum of £2000 in trust securities, and to make over the same to the Moderator of the Presbytery of Irvine, the minister of Dunlop, and the minister of Stewarton, as permanent trustees or patrons, and that these permanent trustees were to hold the securities as a fund for two bursaries, to be called the 'Cunninghame Graham Bursaries,' the constitution of which bursaries the said permanent trustees were, after consultation with the patrons, to settle and adjust, but always without prejudice to certain regulations and rules referred to in the said trust-disposition and settlement, all as more fully set forth in the report by Mr J. H. Millar, advocate, and scheme for the administration of the endowment. (Cond. 3) The liferents having expired, and objection having been taken by the trustees to the regulations and rules referred to in the said trust-disposition and settlement, a petition at the instance of (*first*) the surviving trustees of the said deceased Thomas Douglas Cunninghame Graham, (*second*) the patrons or permanent *ex officio* trustees of the bequest, was presented to the First Division of the Court of Session for settlement of a scheme for administration of the bequest in the manner specified in the petition. (Cond. 4) A scheme for the administration of the bequest, after having been reported upon as aforesaid, was approved of by the