CLARK and GEBBIE for advocator.

ORPHOOT for respondent.

The Court refused to make the proposed alteration. It was not admitted that judgment was pronounced in the terms proposed, and their Lordships had no notes of what had been done on this point.

LORD BARCAPLE doubted the competency of the proposed motion.

Agent for Advocator — Alexander Morrison, S.S.C.

Agents for Respondent—Jardine, Stodart, & Frasers, W.S.

Thursday, March 11.

FIRST DIVISION.

POCHIN & COMPANY *v.* ROBINOW & MARJORIBANKS.

Mandate—Sale—Pledge—Delivery Order—Fraud.

P having purchased a quantity of iron, which he allowed to remain in the general stock of the Iron Company, wished to sell, and employed C to find a purchaser. C wrote that he had found a purchaser, whereupon P sent him an order on the Iron Company, to "deliver to the order of C so many tons of iron *ex* stock, lying to my order." An invoice was also sent bearing that C was the purchaser. C having received this order, raised money on the iron, transferring the delivery-order to the lender. C having become bankrupt, *held*, in a question between P and the lender, that P had, by transmission of the order to C, put C in a position to go into the market as owner of the iron, and effectually to make over the right to the iron to a *bona fide* lender or purchaser.

This was an advocation from the Sheriff-court of Glasgow of an action at the instance of Pochin & Co., chemical manufacturers, Salford, against Robinow & Marjoribanks, iron, grain, and commission merchants in Glasgow, and James Wyllie Guild, trustee on the sequestrated estate of Campbell Brothers, iron brokers in Glasgow.

"Previous to the correspondence and dealing between the advocators and Campbell Brothers out of which the present dispute has arisen, the advocators had purchased considerable quantities of pig-iron from the Carron Company. On the 24th November 1865 they bought 1200 tons at 58s. 6d. through the Carron Company's agents at Manchester, Messrs Carrick & Brockbank. The iron had not been delivered, nor was it in any way separated from the general stock of the Carron Company. The relation therefore of the advocators and the Carron Company was that of parties to a mere personal contract, the obligation of the Carron Company being to deliver, on payment of the stipulated price, a certain quantity of iron of a specified quality.

"On the 20th April 1866 the advocators wrote to Campbell Brothers of Glasgow, inquiring whether they could sell pig-iron. No. 1 Carron, at 67s. 6d. or any thing better. This is said to have been the first business communication between the advocators and Campbell Brothers, and though the employment proposed to the Campbells in this letter is that of agents or brokers for the advocators, it is not disputed that the advocators were aware that the Campbells were also iron merchants in Glasgow. Several letters passed on the same footing, and on the 4th May Campbell Brothers telegraphed:—'We can get 64s. for 1000 tons Carron. Payment five weeks after receipt of delivery documents. Will that suit? It is the very best offer we have been able to get, buyers being very shy at present." This proposal was accepted after some farther correspondence, and on the 7th May the advocators wrote to Campbell Brothers intimating that they confirm the sale, "and inclose order for 1000 tons No. 1 Carron pig-iron as requested.'

"The order inclosed was of the same date, and was addressed to the Carron Company by the advocators, requesting them "to deliver to the order of Messrs Campbell Brothers, Glasgow, 1000 tons, No. 1 Carron pig-iron, viz., 200 tons ex stock lying to our order, and 800 tons as per accompanying order from Messrs Carrick & Brockbank." The 200 tons here mentioned are part of the 1200 tons previously purchased from the Carron Company, and lying to the order of the advocators at Carron. The "accompanying order" for 800 tons represents a new purchase then made through Carrick & Brockbank. This "accompanying order" is made by Carrick & Brockbank as agents for the Carron Company, and requests the Carron Company to deliver to order of the advocators 800 tons. It was when sent to Campbell Brothers by the advocators indorsed thus, "Deliver to the order of Messrs Campbell Brothers, Glasgow, (Sd.) H. D. Pochin, 7/5/66." The delivery order was also accompanied by a bought note or invoice in the following terms:—'*Manchester, May* 8, 1866.—Messrs Campbell & Company, Glasgow, bought of H. D. Pochin & Company, brokerage 1 per cent., No. 1 Carron hot-blast pig-iron 1000 tons at 64s. per ton, f. o. b. at Grangemouth, or f. o. r. Grahamstown Station, £3200. Net cash, 10th June.'

"The right of the advocators to the 800 tons was not different in any respect from their right to the original purchase of 1200 tons. It was a personal right to demand delivery of a certain quantity of pig-iron of a specified quality at a stipulated rate of price. But it did not constitute a sale of any specific goods.

"Down to this time the advocators believed and were entitled to believe that Campbell Brothers, as agents for them, had sold to a third party to whom the iron was to be delivered through the medium of Campbell Brothers. But they may have acted imprudently and negligently in granting their own delivery order for 1000 tons directly in favour of Campbell Brothers, and also indorsing in their favour directly Carrick & Brockbank's delivery order for 800 tons, and sending at the same time an invoice bearing that Campbell Brothers were purchasers of the iron, for this put Campbell Brothers in a position to use the orders as parties having the absolute right of creditors in the obligations of the Carron Company to deliver. The prudent and safe course, particularly as Campbell Brothers were hitherto strangers to them, and they knew that they were iron merchants themselves, was to ascertain from them the name of the purchaser, and to make out the delivery order in his name. Had they done so, there would have been no opportunity for the fraud which was subsequently practised.

"Indeed the advocators very soon became conscious of the imprudence they had committed; for on the 12th May, only four days after they had sent the delivery orders to Campbell Brothers, they wrote to them thus:—"In the pressure of business this week, we have not noticed until this

morning that you omitted to give us the name of the purchaser of the 1000 tons Carron iron. We have generally had the name of purchasers in previous sales of this kind, and shall be obliged by your giving us the information in course of post. During the present monetary panic, we wish to know exactly how we stand, and what we can depend upon." The answer of the Campbells was, —"We are sorry to say that we ourselves are the purchasers of the Carron iron, your telegram of the morning of the 7th having given the real purchasers an opportunity, of which they availed themselves, to declare off." This was a sufficiently startling announcement, and the letter of the Campbells being dated the 14th, ought to have reached the advocators at Salford on the 15th or the 16th at farthest, and yet it is not till the 21st that the advocators reply:—"We do not understand this transaction, how you, being our agents, can be the sellers on our account and the buyers on your own, and until further advised on the matter we must decline to recognise the transaction, notwithstanding our having given you the delivery order, as we sent the transfer under the belief that you had made a *bona fide* sale to a good man on our account." The pretence of Campbell Brothers, that there had been a real purchaser who had declared off, was too transparent to command one moment's credit on the part of the advocators; and on the same day that this last letter was written, Mr Pochin made his appearance personally in Glasgow, but unfortunately too late to prevent the consequences of the imprudence of his firm in trusting Campbell Brothers with the documents which gave them apparently the command of the iron.

"No sooner were Campbell Brothers in possession of the delivery orders, indorsed in their favour, than they proceeded to use them for their own pressing purposes. They obtained from the defenders on the 8th of May, the very day they received these documents, an advance of £2000 in consideration of their transferring the delivery order to the defenders. This was done by appending to each of them (that is, to the delivery order for 1000 tons addressed by the advocators to the Carron Company and to the delivery order for 800 addressed by Carrick & Brockbank to the Carron Company) an additional order or indorsement in the following words:—"Deliver to the order of Messrs Robinow & Marjoribanks. CAMPBELL BROTHERS." It is not disputed that the defenders advanced the money and took these documents as their security in good faith. On the same date (8th May) they sent them to the Carron Company inclosed in a letter, requesting the Company to 'confirm to us in writing that you hold the above 1000 tons No. 1 Carron pig-iron to our credit and at our disposal for shipment, f. o. b. Grangemouth, when required." To this the answer of the Manager of the Carron Company is an acknowledgment of the indorsed delivery order for 1000 tons "which," he adds, "we have placed to your credit for your disposal for shipment, f. o. b. at Grangemouth.'

"This transfer, as it is called, was thus completed on the 8th of May. But it was not till the 21st that the advocators interposed and made the Carron Company aware of the fraud of Campbell Brothers and requested them to make no delivery of the iron. At this time no portion of the iron had been delivered by the Carron Company to the defenders. But Campbell Brothers had stopped payment, and David Campbell, the managing partner in Glasgow, had absconded.

"Thereafter the Carron Company delivered the iron to the defenders in 25 different parcels, the delivery commencing on the 23d of May, and extending over the remaining days of May and the whole of June and July.

"The advocators took no steps by interdict to stop this delivery. But on the 18th of June they raised the present action in the Sheriff-court, directed against Robinow & Marjoribanks and the Trustee on the sequestrated estates of Campbell Brothers, but without calling the Carron Company as a defender. The conclusions are in substance that the defenders Robinow & Marjoribanks should be decerned to deliver the iron in question to the advocators; or otherwise, upon the pursuers (advocators) making payment to Robinow & Majoribanks of the balance due of their advance to Campbell Brothers, that these defenders ought to be decerned either to deliver the iron or the value thereof to the advocators."

After a proof, the Sheriff (H. G. BELL) pronounced an interlocutor, in which he found, in point of law, "That when a factor or agent is accredited with the ostensible ownership of goods, not merely by being intrusted with the bare custody, but by having documents put into his hands which *ex facie* confer upon him the character of owner, so as to enable him to deceive those with whom he transacts, he may effectually impledge the property of his principals by the transference of such documents to a party making *bona fide* advances on the goods, such party being entitled to rely on the probative title with which the factor has been clothed, and not being bound to make restitution without repayment of his advances: Finds, however, that in such circumstances the pledgee cannot retain against the true owner for any other advances than those actually made on the security of the goods, or for any general balance which may be due by the factor; and this is more especially the case when, as in the present instance, the advance is made as a separate transaction, and not on the faith of any prior or subsequent security: Finds, further, that when a *bona fide* purchaser from a factor so accredited has parted by a resale with the possession of goods so purchased, before he is required to restore them to the owner, and without the fraudulent purpose of disappointing said owner, he is not liable to him for the value of the goods unless in so far as he may have made profit by the resale: Finds that it follows from the above legal principles that, in so far as the summons concludes for absolute and unconditional restitution of the iron or its value, and for payment of the sum of £427,10s., being the price received for the 150 tons sold by the defenders before any demand had been made on them by the pursuers, the claim cannot be sustained; but that, in as far as the summons concludes for restitution of the remaining 850 tons or their value, on the pursuer making payment to or crediting the defenders with the sum of £1579, 10s. 7d., being the balance of their advance, with interest, the claim is valid; and, in respect the defenders disposed of said 850 tons (so as to incapacitate them from returning the iron in specie) subsequent to the 22d May 1856, when it was reclaimed by the pursuers, decree will fall to be given under said deduction for the value of said iron."

The Sheriff-Substitute (CLARK), to whom the case was remitted for further procedure, pronounced an interlocutor (to which the Sheriff adhered), holding that "the price which the pursuers might

have realised for the 850 tons iron in question was 58s. per ton, or £2465 in all; that the defenders are liable to account to the pursuers for said amount; that the only credit they are entitled to is the sum of £1579, 10s. 7d., being the balance of their advance to Campbell Brothers on the pursuers' 1000 tons of Carron iron, and that, said amount being deducted accordingly, leaves the sum of £885, 9s. 5d. resting owing by the defenders;" and finding the defenders liable in three-fourths of the pursuers' taxed expenses.

The pursuers advocated.

SCOTT and J. M'LAREN, for advocators.

CLARK and SHAND for respondents.

At advising—

LORD PRESIDENT—This is a case of considerable importance, in which more than usual attention is necessary to the precise state of the facts on which the question of law arises; because there is a considerable amount of evidence, both parole and documentary, which has very little bearing on the true issue. I shall therefore, in the first place, state the whole facts which appear to me to be material.

His Lordship then gave the narrative quoted above, and continued—

The Sheriff has given effect to the latter alternative conclusion of the summons, and has pronounced judgment against Robinow & Marjoribanks for £885, with interest, in which they have acquiesced. The advocators are not satisfied with this partial success, but demand judgment in terms of the first alternative, that is, a judgment against Robinow & Marjoribanks for delivery of the iron without reimbursing them of their advances.

The form of action adopted by the advocators might have given rise to considerable difficulty. But we are relieved from all embarrassment on this account; for the defenders and respondents in the advocation state no plea against the competency of the action or the applicability of the remedy sought, but, on the contrary, desire to have the real dispute between them and the advocators disposed of under this action. In these circumstances, following the rule of the recent statute "The Court of Session Act 1868," we can have no hesitation in allowing any amendments that may be necessary to enable the advocators to obtain a remedy, if we shall be in their favour on the merits.

The substantial question is, whether the defenders are to lose the amount of these advances made to Campbell Brothers, in good faith, on the security of the documents above mentioned, or whether the advocators must bear this loss? The answer to this question depends on principles of mercantile law of general importance.

It is impossible, in my opinion, to hold that the property of the iron ever passed from the Carron Company to any other person till it was actually delivered to the defenders. By the law of Scotland the property of moveables in no case passes by personal contract, but only by tradition actual or constructive. But constructive delivery could not in the circumstances of this case be effected, so long as the iron remained in the hands of the Carron Company, as a mere unseparated portion of their general stock. Constructive delivery may take place, and generally does take place, where specific goods or other moveables being in the custody of some person other than the owner, the owner gives to a purchaser of these goods a delivery order addressed to the custodier, ordering him to deliver to the purchaser these specific goods. When this delivery order is intimated to the custodier, constructive delivery is effected, because the custodier from that time becomes in law holder for the purchaser, just as before he was holder for the seller. But to the completion of such constructive delivery two things are indispensable,—that the custodier shall hold an independent position, and be neither the owner nor in any way identified with the owner of the goods (*Anderson* v. *M'Call*, 4 Macph. 765), and that the goods themselves shall be specific in this sense, that they be capable of identification, either as one total undivided quantity stored in a particular place, or at least a specified quantity, forming part of an identified whole. But the subject of sale in the present case was so situated that neither of these two conditions could be fulfilled. It remained till actual delivery in the hands of the original owner; and till actual deliveryit had no proper existence as a specific subject, for the personal obligation of the Carron Company to deliver might have been performed by delivering iron which had been manufactured after the obligation was undertaken, and at any time before actual delivery was required. The transaction between the advocators and the Carron Company was truly not so much a proper contract of sale, as an order for goods addressed by a customer to a manufacturer, and undertaken by the manufacturer. In such cases there is, generally speaking, no room for a transfer of property till the order is fulfilled by the manufacturer sending or delivering the manufactured goods to the customer. Nor will any assignation or other transfer to a third party of the right of the customer to require fulfilment of his order alter the relation which subsisted between the parties under the original order. The giving and accepting of the order creates mutual personal obligations, but nothing more; and in such cases the use of phrases applicable to proper contracts of sale of specific moveable property, and to the transfer of the property sold by constructive delivery, can only serve to mislead.

The 1200 tons of iron ordered by the advocators in November 1865 were ordered in the usual form as between manufacturer and customer, for in the letter of their agents, Carrick & Brockbank, the acceptance of the order by the Carron Company is in these terms:—"We have entered your esteemed order for 1200 tons, &c., delivery 100 tons monthly, from January to December inclusive, 1866;" and the only reason why the order for 800 tons assumed a different form in Carrick & Brockbank's letter to the Carron Company of 7th May 1866 was because the advocators were desirous of immediately transferring their rights as the customers of the Carron Company to Campbell Brothers.

When, therefore, the advocators wrote their order to the Carron Company in favour of Campbell Brothers, and delivered it to them through the post on the 7th May 1866, they did not and could not convey to Campbell Brothers a real right, a *jus in re*, nor indeed could they convey to them even a *jus ad rem;* they only made them their mandatories to receive delivery of the goods they had ordered from the Carron Company.

But, on the other hand, the mandate or authority which Campbell Brothers received was unqualified. It did not express that Campbell Brothers were to use or act upon it in any representative character, or that it was given for any particular or limited purpose. It was expressed precisely in the same terms as it would have been if it had been given to a purchaser directly, and was accompanied by an

invoice bearing that Campbell Brothers were purchasers. A purchaser receiving such a mandate becomes in legal effect the assignee of the mandant. For, according to strict legal principle, an assignation is truly a mandate or procuratory, and the assignee is styled by the older authorities *procurator in rem suam.*

Though then the right which the advocators had as against the Carron Company was merely that of creditors in a personal obligation, it was not the less on that account capable of being transferred by assignation, and the only question here (if the element of fraud were out of the case), would be, whether the delivery order made by the advocators when presented to, and acknowledged by, the Carron Company, was equivalent to an assignation of an incorporeal personal right.

If there had been no fraud, if Campbell Brothers had been the true purchasers, and had granted bills for the price, and received the delivery orders in the same form as in the present case, they might have transacted with the Carron Company directly, and obtained from them the same letters of obligation which that company granted to the defenders. In these supposed circumstances if Campbell Brothers had become bankrupt without retiring the bill for the price, or receiving actual delivery of the iron, could the advocators have successfully claimed the iron in the hands of the Carron Company in competition with the general creditors of Campbell Brothers? I apprehend they could not. There would of course be no room for any right of retention, for the simple reason, that the custody of the iron was not in the hands of the advocators or of any one in the position of their agent; and there is no lien of any kind known to the law that could have availed them. They would, in the case supposed, have parted with their right to demand delivery from the Carron Company by a transaction in the ordinary course of business, and put it in the power of Campbell Brothers either to receive actual delivery of the iron, or to become in their room creditors in the personal obligation of delivery undertaken by the Carron Company. Such a transaction would, I think, be equivalent to an assignation of a *nomen debiti* duly intimated to the debtor.

In the present case, no doubt, if Campbell Brothers, having no right to become themselves the purchasers, and no right to use the delivery orders except for the purpose of implementing a sale to a third party, had gone direct to the Carron Company, and obtained from them such a letter as the defenders obtained, the creditors of Campbell Brothers could not, on the occurrence of their bankruptcy, have demanded delivery of the iron, and the advocators would have been preferred to them in competition. But this would have been so only in respect of the fraud on the bankrupts, of which their creditors could not have been allowed to take advantage.

But the defenders, being ignorant and innocent of the fraud of Campbell Brothers, and acquiring their right in *bona fide* for an onerous consideration, maintain that the advocators alone must bear the loss arising from the commission of that fraud, because it was through their own imprudence that Campbell Brothers were enabled to commit the fraud. If the advocators, they argue, had insisted on making the delivery orders in favour of the purchaser in the supposed sale, instead of making them in favour of Campbell Brothers, the latter could not have used them for their own purposes.

This argument is unanswerable, if the assumption on which it proceeds be clearly established, viz., that the possession of the documents sent by the advocators to Campbell Brothers enabled them by indorsation or assignation effectually to transfer the right which the documents represented to a *bona fide* purchaser, or to a creditor advancing money on their security. But if this assumption be not well-founded in law, the supposed imprudence or negligence of the advocators will hardly avail the defenders much; for there would be little imprudence or negligence in sending to Campbell Brothers documents which did not in law enable them to transfer the right represented by the documents.

Clearly, therefore, the decision of the case must depend solely on the question whether the documents sent by the advocators to Campbell Brothers enabled them to go into the market as owners of the iron, or, more accurately speaking, as creditors in the personal obligation of delivery, and offer this right to demand delivery for sale, and give a good title to the purchaser by transferring that right in the way they did? My opinion is, that they were invested with that power by what the advocators did, and that the transfer made by Campbell Brothers to the defenders, followed by the letter of acknowledgment by the Carron Company, made the defenders creditors in the original obligation of delivery by the Carron Company, and made the Carron Company debtors in that obligation to the defenders.

In the course of the argument much importance was attached to the fact that the defenders were not purchasers of the right transferred, but only creditors advancing money on the supposed security of the documents transferred to them; or, in other words, that the transaction between Campbell Brothers and the defenders was not a sale, but a loan. I am not moved by this specialty. If a creditor, in return for his advance, receive a transfer of property or an assignation of a debt or personal obligation of any kind in terms absolute and unqualified, such as would be employed in a transfer to a purchaser of the property or right of credit, he has all the powers of a proprietor or absolute assignee, for the purpose and to the effect of enabling him to recover his advances. No doubt he is bound to account and reconvey whatever remains after satisfying his just demands (and to this obligation the Sheriff has given effect in the judgment under review). But till his just demands are satisfied he is entitled to use the absolute right given to him as if he were truly proprietor or assignee upon a purchase and sale.

I am therefore of opinion that the interlocutors in the Inferior Court are substantially quite sound, though some variation will require to be made on the decree for interest, as was pointed out by the respondents' counsel in the course of his argument.

LORD DEAS substantially concurred.

LORD ARDMILLAN—In the course of the argument in this case, very important and delicate questions of law have been argued with great ability. If it had been necessary to decide these questions in order to dispose of the present action, I should have felt some of them to be attended with much difficulty. But in the view which I take of this case, I think that the more difficult questions raised do not really require to be decided.

That David Campbell, who had been employed by the pursuers Pochin & Company, as a broker was guilty of a serious fraud is very manifest. Both the parties to this action are innocent parties. The loss and damage caused by the fraudulent conduct of Campbell must fall on one or other of these innocent parties. Each is contending *de damno vitando;* and the question is, Which of the two shall suffer the loss?

It appears to me that the position of Campbell, as doer of wrong, in relation to the two parties, one of whom must suffer from the wrong, is a matter of fact which lies at the foundation of the case. The Campbells were the brokers of the pursuers, David Campbell transacting the brokerage business in Glasgow. The pursuers dealt with Campbell only as a broker, and it is, I think, established on the proof that they corresponded with, and transacted with, Campbell on the footing of Campbell's agency for them as their broker. In that capacity he defrauded them.

On the other hand, the Campbells were acting and known to be acting in Glasgow as iron merchants on their own account. It is proved that they carried on a considerable business as iron merchants, apart from their brokerage business. The defenders Messrs Robinow & Marjoribanks transacted *in optima fide* with the Campbells as iron merchants, not as brokers representing the pursuer, nor as brokers representing an unknown principal, but as themselves iron merchants, transacting on their own account. The transaction between the defenders and the Campbells, which led to this case, was a perfectly legitimate and honourable transaction on the part of the defenders, who paid £2000 as an advance on the security of the iron for which the Campbells held delivery orders from the pursuers. I need not recapitulate the facts of the case which your Lordships have most clearly explained. It is enough to say that the pursuers had themselves no property in any specific iron in the hands of the Carron Company; and they could not, and did not by these delivery orders, transfer the property of any such iron to the Campbells. But they had right to demand from the Carron Company delivery of a certain quantity of iron, and had the power of directing the Carron Company to deliver that quantity of iron, unseparated and unspecified, to any one to whom they chose to make over their right. The delivery orders by the pursuers to the Campbells were intended for the purpose, and were effectual for the purpose, of transferring to them the right and power of demanding delivery from the Carron Company. The iron had never been set apart or specified. The Carron Company were bound to deliver to the pursuers, or to whomsoever the pursuers might appoint, to take delivery. They held at the pursuers' disposal, and subject to the pursuers' order, iron out of their general stock up to the limits of their obligation. Now the delivery orders had been given by the pursuers to the Campbells in order that they might hand over the iron, or the right to obtain the iron, to some party believed by the pursuer to have purchased it through the medium of the Campbells as brokers. One of two courses was contemplated by the pursuers,—either the presenting by the Campbells of the delivery orders, and, on their getting the iron, the subsequent delivery by them of the iron to the supposed purchaser, or the indorsation by the Campbells of the delivery orders to that purchaser, was the course of procedure intended, and entered on by the pursuers. In either case the Campbells were placed by the pursuers in the position of holding the delivery orders, with power of disposal, and with nothing apparent or disclosed in regard to their position which could put anyone transacting with them for purchase, or for advance on security, in bad faith.

It appears that Campbell informed the pursuers that he had found a purchaser for their iron, but he did not state the name of the purchaser. The omission to state the name was unusual, and was at once perceived to be unusual, and the pursuers asked for information. But without getting it they signed and transmitted the delivery orders in favour of the Campbells themselves. This also, though in good faith, must have been different from accustomed practice,—a step peculiar and unusual, for the delivery order ought to have been in favour of the purchaser. But this departure from the usual course of business, this granting the delivery order, not to the purchaser, but to the broker,—that broker being notoriously an iron merchant,—was the cause of the disaster which subsequently occurred, for by this the pursuers put the right to demand the iron into the hands and under the control of Campbell. The pursuers by their procedure gave Campbell a power to deal with these orders which he would not otherwise have had.

The Campbells indorsed the delivery orders to the defenders, who advanced to them £2000, and next day the orders were presented to the Carron Company and acknowledged by them, as is instructed by the important letters of 8th May 1866. After the date of the letter of Carron Company of 8th May, they held 1000 tons of iron at the credit, and for the disposal of the defenders. These are the words of the letter (No. 42 of process) in which they acknowledge the indorsed orders. The defenders had thus become, through the indorsation which the pursuers had enabled the Campbells to give, the creditors of the Carron Company for delivery of iron up to the limits of the order. In due time they obtained delivery; and after they are in possession of the iron delivered to them by Carron Company on these orders, and as the result of a transaction in the ordinary course of business, and with an iron merchant, this action has been brought at the instance of the pursuers.

I am humbly of opinion that the pursuers are not entitled to succeed. I concur very much in the views expressed by Sheriff Bell in this case, and in the views expressed by Sheriff Galbraith in the case of *Vickers,* where a similar question is raised.

I do not enter on the question whether the Factors' Acts apply to Scotland. There has been no decision on the point, and I shall only say that I am not satisfied with the argument against the application of these Acts to Scotland. I also reserve my opinion on the question whether such a delivery order as this is, under the "Factors' Acts," a "document of title." It is enough for this case that it is a mandate, and that it was accepted and acted on. But I really entertain no doubt that the defenders, transacting with the Campbells as merchants, and in the ordinary course of business, and ignorant of their connection with the pursuers in the capacity of brokers, and receiving from them indorsed documents well known in the trade, and having presented these documents to the Carron Company and obtained from them, first, a distinct acknowledgment that they held the iron at their

disposal; and secondly, actual delivery thereof, are safe in respect of that acknowledgment, and are not liable in restoration of the iron, or in second payment of the price to the pursuers. I find abundant authority for this as the rule of the common law, apart from, and prior to the enactment of the Factors' Act; and therefore, even if these Acts are left out of our consideration, I think that the defenders are entitled to absolvitor.

The Campbells were, by the pursuers' act, clothed with an ostensible right to deal with these orders. There was nothing to disclose to the defenders any restriction or qualification of that right, and the defenders were entitled to act, and did act, on the belief that there was no such restriction. The relations between the Campbells and the pursuers, and the limitation of Campbell's power of disposal arising out of that relation, were latent. The defenders, dealing with the Campbells as iron merchants, could not be affected by the latent relations of the Campbells. In the case of a bill of lading, the question seems to be settled by decisions, some of which are mentioned in the Sheriff's note. I do not say that this delivery order is in all respects similar to a bill of lading; I do not think it is: but in any view of it, it is a mandate to Carron Company, and an authority granted by the pursuers to Campbell, who had thereby an ostensible title without apparent restriction. In dealing with the Campbells as merchants, on the footing of their being really, as they were ostensibly, entitled to dispose of the delivery orders to the effect of transferring the right to obtain delivery of the iron, I think that the defenders were not only in good faith, which is not disputed, but that they were acting according to mercantile usage and understanding. I can see no reason whatever why they should not have transacted with Campbell; since no restriction or qualification of Campbell's right was known to them. On the other hand, I think that the pursuers departed from the usual, and the prudent course, by indorsing and transmitting to the Campbells the delivery orders, which ought, according to usual and correct procedure, to have been indorsed to the purchaser. They state that they did not know who the purchaser was, but they should have ascertained that fact before transmitting the orders. Instead of doing so, they indorsed and transmitted the orders. just as if there had been a sale to Messrs Campbell, the brokers. I think they did this at their own risk, in a question with a person making a *bona fide* transaction with the Campbells as iron-merchants in the ostensible right to the delivery orders.

Where, in a transaction, open and ordinary, a fraud has been committed by a broker or factor, and where both parties to the action of restitution or damages have acted in good faith, I am of opinion that the party who employed the broker or factor, and clothed him with ostensible title, more especially when deviating from usual practice, must suffer the loss.

I do not think that the productions recently made, with the new plea in law for the pursuers, create any material difference in this case.

After the delivery orders had been presented to the Carron Company, and acknowledged by them in that most important letter of 8th May 1866—ten days before the Campbells stopped payment—wherein the Carron Company distinctly state to the defenders that they have placed to their credit, for their disposal, the 1000 tons of iron—and after they had in their books transferred the iron to the credit of the defenders, the pursuers could not stop the completion of the transaction or prevent the delivery of the iron. That acknowledgment or confirmation of the transferred mandate, which, I think, in the law of England is called "attornment," and to which effect has been often given,—and that book entry of the transferred iron, which naturally followed, was sufficient, in my opinion, to protect the defenders from any attempt on the part of the pursuers to interpose by countermand so as to deprive them of the iron which they had acquired by open, onerous, and *bona fide* transaction with the Campbells. The mandate to deliver having been followed by acknowledgment on the part of Carron Company to the defenders, as holders of the delivery order, and by transference to the credit of the defenders in the books of the company, was beyond the reach of countermand to the prejudice of the defenders. There are many decisions to this effect; and if I am right in the views which I have expressed on the other parts of this case, then there is nothing in this new plea to lead me to alter that opinion. It was very natural that the pursuers, on learning that the Campbells were in difficulties, should attempt to countermand delivery; but, under the circumstances, the attempt could not succeed.

In regard to the second question as to lien, no plea is now maintained. But I agree with your Lordship that the Sheriff is right.

On the whole matter, I am of opinion that the judgment of the Sheriff is correct, and that the defenders are entitled to absolvitor.

Lord Kinloch—I am of opinion that, in substance and practical result, the Sheriff has arrived at a right conclusion in this case.

The facts lie within a narrow compass. In the end of April 1866 the advocator, Mr Pochin, who carried on business under an assumed firm of H. D. Pochin & Company, had right to 1000 tons Carron pig-iron out of the stock of the Carron Company. The iron was not then separated from the rest of the Carron Company's stock, so that Mr Pochin had no real right in the iron, but a mere personal claim for delivery against the Carron Company.

Mr Pochin employed Messrs Campbell Brothers, iron brokers and iron merchants in Glasgow, to sell this iron on his behalf. In the early part of May these gentlemen intimated to him that they had found a purchaser at 64s. per ton, which Mr Pochin ultimately agreed to take.

In order to enable Campbell Brothers to deliver the iron to the purchaser, Mr Pochin, on 8th May 1866, handed them two delivery orders addressed to the Carron Company; the one for 200 tons, then lying in stock to his order, subscribed by the firm of Pochin & Company in favour of Campbell Brothers; the other for 800 tons granted in favour of Mr Pochin by Carrick and Brockbank the agents of the Carron Company at Manchester, and indorsed by him in favour of Campbell Brothers.

In point of fact there had been no sale made by Campbell Brothers; and when they received the delivery orders they made use of them to raise money for their own purposes. The respondents, Robinow & Marjoribanks, advanced to them in good faith, on the 8th and 9th May, a sum of £2000, receiving the delivery orders indorsed to them by Campbell Brothers. These delivery orders

the respondents transmitted on the 8th May to Carron Company, requesting them to acknowledge their receipt, and to say that they thenceforward held the iron at their, the respondents', disposal. A letter to this effect was on that same day written by Carron Company, and transmitted to Robinow & Marjoribanks.

On the 17th May Campbell Brothers stopped payment. Mr Pochin then attempted to stop delivery of the iron by Carron Company. But that company held themselves bound to make delivery to Robinow & Marjoribanks by virtue of the indorsed and intimated delivery orders. And accordingly Messrs Robinow & Marjoribanks obtained possession of the iron, and disposed of it in the market. With regard to 150 tons, they had, prior to the insolvency of Campbell Brothers, agreed to take them over on the footing of a sale at 57s. per ton, making the price £427, 10s., which sum they credited in extinction of their advance of £2000.

The substantial question in the case is, whether Messrs Robinow & Marjoribanks were legally entitled to obtain and keep this iron in liquidation of their special advance to Campbell Brothers. The Sheriff has found in the affirmative, and I agree with him in opinion.

I think a great deal of unnecessary complexity has been introduced into the case by elaborate discussions at the bar on the distinction between real and personal rights in moveables. It is unquestionable that Pochin had no real right in the iron. But he had notwithstanding a true and very important right in the commodity; and a right capable of transmission to another, and which might be turned into a very effectual real right in that other's favour. In a strict technical tense, Pochin was not owner of the iron. He had a personal right to delivery and no more. In a popular and practical tense he *was* owner of the iron; that is to say, he had a full right to delivery of it, either to himself or to any one else to whom he assigned his right. It is further alike unchallengeable that delivery of it to another could be competently and effectually accomplished by granting or indorsing in favour of that other a delivery order addressed to Carron Company, and the intimation to and acknowledgment of that order by Carron Company. This appears to me wholly indisputable. Had Pochin himself sold the iron at Manchester, and granted a delivery order in favour of the purchaser, who can for a moment doubt that, by virtue of this delivery order, the purchaser could have legally and effectually obtained delivery of the iron from Carron Company? If that purchaser sold to another, indorsing the delivery order in his favour, that other could in like manner, by intimation to Carron Company, obtain a full title to the goods, and a right to have them transferred at pleasure to his possession.

It may be true that, in legal metaphysics, the delivery order did not, in any of those cases, form the legal title; but was merely executory of a contract separately made. The title lay in the contract of sale, and the implied assignment which every such contract involves; such an agreement, made in regard to a moveable subject being legally probative by parole evidence. But it is not the less true that the delivery order was a document by which, in connection with such a contract, the full control over the iron competent to Pochin was transmitted; and a right to the delivery of the iron effectually constituted.

I am of opinion that when Pochin transmitted the delivery orders to Campbell Brothers he put it in their power, as his agents for sale, effectually to make them over, and thereby effectually to make over the iron, to any one *bona fide* advancing money to them on the security of the iron. I consider this to follow from the long established principle of the law of Scotland—a principle which did not require any Act of Parliament for its introduction—thatwherever a merchant entrusts his agent either with the actual possession of his goods, or with such documents as enables the agent at pleasure to obtain such possession, he thereby gives the agent power effectually to give over these goods to any one *bona fide* contracting with him, either for a purchase of the goods, or an advance on their security. I cannot, in this question, draw any distinction between actual possession of the goods, and the possession of a document by which the goods can at any one moment be obtained; and the delivery of which to the contracting party enables him at once to obtain the goods. If Campbell Brothers had, before concluding the transaction with Robinow and Marjoribanks, got delivery of the iron from Carron Company (which they unquestionably could have done), and then delivered it over to Robinow and Marjoribanks, the transaction would undoubtedly have been effectual to these latter gentlemen. I cannot see that it makes any difference that, in place of delivering the iron, they gave Robinow and Marjoribanks the delivery order by which Robinow and Marjoribanks immediately got delivery themselves, or, which is exactly the same thing, got the iron transferred to their name in the books of the Carron Company, and held thereafter by that Company at their order and disposal.

It has been contended that this result will only follow where the document held by the agent is what is called a proper document of title, that is to say, is a document the possession of which *eo ipso* transfers the real right, as in the case of a bill of lading. I am of opinion that there is no foundation for this position. It is enough, I think, if the agent has given to him a document which places him in the same position as to control over the goods, as actual possession would do; which is clearly the case with a document by means of which he can at any one moment obtain possession. The ground on which the legal doctrine as to the agent's powers is rested, is not any subtle distinction between real and personal rights. It is the broad ground of equity and common sense, that where a man entrusts his agent either with the actual possession of his goods, or, which is the same thing, a document by which possession can be at any one moment obtained, and the agent, in abuse of his trust, raises money on his ostensible right from a *bona fide* lender, it is the employer of the agent who should suffer the loss, and not the innocent third party, with whom the agent was enabled to contract by the employer's own conduct. This is the true principle of the case; which must be steadily kept in view amidst all theoretical difficulties. The principle will clearly apply where the agent is in the actual possession of the goods; although that possession be not connected with any written document at all; but rests entirely on verbal agreements. I conceive it equally applicable where the agent, by having handed over to him a document on which he, or any one to whom he may indorse it, may at once obtain possession, is, as I think, exactly in the same position as if actual possession had been given him.

In the Factory Act, 5 and 6 Vict., cap. 39, it is enacted by the first section:—"That from and after the passing of this Act, any agent who shall be thereafter entrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, *bona fide* made by any person with such agent entrusted as aforesaid:" And the document of title here mentioned is, by the fourth section, declared to comprehend "any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business as proof of the possession or control of goods; or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented." It is plain that the Act contemplates not merely a case of proper pledge, such as may require the possession of a real right to support it, but generally all cases of "security" constituted over the goods; and the document of title by the terms of the Act is not merely such as will imply a real right, but every document entitling the holder to obtain possession of the goods. I see no reason for considering this, or the previous Act on the same subject, confined in its operation to England. The Acts were dealt with in argument on both sides as applying to transactions in Scotland in the appeal case *M'Ewan* v. *Smith*, 20th March 1849, 6 Bell 340. But this is, in my view, of less importance, that, in the matter now in question, I think the statutes embody a common law principle of our own law.

I would only add, in conclusion, that the case does not seem to me affected by the notice given by Mr Pochin to Carron Company not to deliver the iron on or about 22d May 1866. According to the view already stated, Robinow & Marjoribanks had long previously acquired a complete right to delivery of the iron, incapable of being defeated by Mr Pochin, as the employer of the agent from whom the right was derived. I think a great deal too much has been made by Mr Pochin of the fact that down to this date the iron was lying with Carron Company unseparated from the rest of their stock, and therefore, as he argues, with no real right constituted over it in the person of any one. The fact might be important in a case which has been throughout the argument much confounded with the case truly before the Court—I mean in any question which might possibly occur with the creditors of Carron Company, taking possession of their stock on a bankruptcy, and excluding any one in competition who had a mere personal claim. But no such question now arises. The competition is between Mr Pochin, himself only holding a personal right, and Robinow & Marjoribanks, who, by the act of his agent, thereto enabled by Mr Pochin's own proceedings, *bona fide* obtained a transference of Pochin's right; and, a fortnight before Mr Pochin's attempted stoppage, had had the iron transferred to their credit and disposal in the Carron Company's books—a proceeding which made over to them the full right to the iron in a question with every one except the possible assignees or creditors of Carron Company. In such a competition. I am very clearly of opinion, that Robinow & Marjoribanks are entitled to prevail.

Agent for Advocators—A. K. Morrison, S.S.C.

Agents for Respondent—Hamilton & Kinnear, W.S.

Thursday, March 11.

GRAHAM *v.* MACFARLANE & CO.

Arrestment — Bank — Deposit - Receipt. Terms of Arrestment which *held* inept to attach funds due by a Bank.

This was an appeal from the Sheriff-court of Argyllshire. The appellant, Duncan Graham, residing in Daltot, in the parish of North Knapdale, is executor-dative to the deceased Mrs Janet Graham or M'Arthur, innkeeper, Tayvallich, in the said parish; and in course of realising her estate he proceeded to uplift a sum of £162 which she had deposited in the Union Bank, Lochgilphead, of which Messrs H. & A. M'Ewan are agents. The bank refused to pay this money, alleging that it was arrested at the instance of the respondents, Messrs Macfarlane & Co., distillery agents and wine and spirit merchants, Paisley, who are creditors of the deceased in a sum of £110, 9s. 3d. Graham presented a petition to the Sheriff for recall of this arrestment. According to the terms of the schedule of arrestment, the officer arrested, "in the hands of you, Messrs H. & A. M'Ewan, agents of the Union Bank of Scotland at Lochgilphead, the sum of £200, less or more, due or addebted by you to the said Duncan Graham, defender." The Sheriff-substitute (HOME) held that these words, "agents of the Union Bank," could only be read as being used for the purpose of identification, and that the arrestment could apply only to a sum which Messrs M'Ewan might hold in their own hands as a firm; and, as there was no averment of any such sum, he recalled the arrestment. His Lordship added the following note to his interlocutor:—

"*Note.*—In this case arrestments were used in the hands of 'Messrs H. & A. M'Ewan, agents, Union Bank of Scotland, Lochgilphead,' to secure certain funds deposited with the Union Bank there, to which the petitioner had right as executor of the late Mrs Janet Graham or M'Arthur. To this arrestment the petitioner takes exception, on the ground that it is not an arrestment in the hands of the Union Bank of Scotland, but only in the hands of H. & A. M'Ewan. A somewhat similar point was raised, but not decided, in case of *Henderson's Trustees*, 20th May 1831, where arrestment was laid in the hands of a person described as manager of a certain bank, and Lord Newton indicated a strong opinion that this would only affect the funds held by the manager as an individual. Here, however, the case is stronger, for Messrs M'Ewan are merely described as agents, Union Bank, Lochgilphead. They are well known to act as agents for many other persons besides the Union Bank, and it does not therefore appear that this is necessarily anything more than a description for the purpose of identification, and is probably as natural a one as any other which might be used in order to arrest money in their hands as a firm. It therefore seems to the Sheriff-substitute that the arrestment could only be held to apply to money in their hands as a firm, and not as agents for the Union Bank, and that it is inept as regards the Union Bank.

"As to the question of recal, there is no assertion that Messrs M'Ewan have, or ever had, a farthing belonging to either Mrs M'Arthur or the petitioner in any other way than as agents for the bank, or that there is any doubt of the identity of the debt sought to be arrested; the bank also object

to pay the sum in their hands on account of this arrestment, and it seems to the Sheriff-substitute that, in these circumstances, the petitioner has a good right to object to the continuance of such a diligence. He has therefore recalled it."

The Sheriff (CLEGHORN) took a different view, holding that the arrestment was not inept to interpel the bank from paying debts due by them, and arising out of transactions entered into through their agents. In a note the Sheriff said, "It is not seriously urged that the arrestment in this case is nimious or oppressive. The alleged debt due by the deceased is £110, 9s. 3d., and the object of the diligence was to attach a sum of £162 due to her in deposit-receipt by the Union Bank at Lochgilphead. There is no objection to loosing the arrestment on caution, and as the executor wishes to draw the sum avowedly to pay claims on the estate, and as the caution found by him in the confirmation was restricted to £5, it seems not unreasonable that the defenders should have the security of caution before the sum attached passes into the pursuer's hands.

"But the point really raised here is quite different. It is alleged that the arrestment is inept, that is, as regards the bank, and ought to be recalled so far as it may be supposed to interpel the Messrs M'Ewan from paying a debt due by the bank. The Sheriff has some doubts whether this is the proper form for trying such a question. But he is not disposed to stand on technical niceties, and he has examined the authorities on both sides referred to in the pleadings with much attention. As there seemed some doubt also as to the exact terms of the arrestment, he has referred to the document itself, which is produced in the action raised by the pursuer against the bank for payment; and he finds that it has been erroneously set forth in the petition, and that the Sheriff-substitute has been led to found his judgment on a misconception as to the state of the fact. It appears that the officer arrested 'in the hands of you, Messrs H. & A. M'Ewan, agents of the Union Bank of Scotland, at Lochgilphead, the sum of £200, less or more, due or addebted by you to the said Duncan Graham, defender,' and the said defender is designed, in the outset of the writ, as executor-dative *qua* next of kin of the late Mrs Janet Graham or M'Arthur. It further appears, being stated by the defenders and not denied in the answers, that while Mr A. M'Ewan carries on business as a writer, the firm of H. & A. M'Ewan are exclusively agents for the Union Bank. On this state of facts, the Sheriff is not able to hold that the arrestment is inept. There is no express decision upon the point. But it is held that debts due by a bank or company may be effectually attached by an arrestment in the hands of the treasurer or manager, and arrestments in the hands of a commissioner attach debts due by the constituent. It is also held that companies carrying on business by branches or agencies may be sued before the local Courts, where their subordinate offices are, and cited through their agents, and the pursuer has proceeded upon this view in this action against the bank. The fair inference seems to be that an arrestment in the hands of the local agents, who represent the bank, and contract obligations for it, though they are not properly or personally debtors in the obligations so contracted, is a valid diligence, at all events to some effects, such as to interpel the bank from paying through these agents, and probably also to found an action of forthcoming against the bank. It is a different question what effect this arrestment would have in competition with one laid on at the head-office, or if payment had been made of the debt at the head-office in ignorance of this arrestment in the hands of the local agent. But the views indicated sufficiently prevent the diligence being looked on as inept. It is quite common, it is believed, to use arrestments both at the head-office and at the branch, and there is a sound reason for it, because, if they were used at the head-office only, payment of the debt might be drawn at the branch before intimation was sent down of the arrestment.

"The Sheriff, on these grounds, must refuse to recal the arrestment, without caution; and, on the same grounds, he would sustain the defence for the bank in the other action, but as that case is not formally before him, he must leave it to the pursuer to judge, knowing the Sheriff's views, whether he will press it further."

Graham appealed.

KEIR & MACLACHAN for appellant.

MILLAR, Q.C., and W. A. BROWN in answer.

The Court held that the words "agents of the Union Bank" without the prefix "as" did not show that the arrestment had been used against H. & A. M'Ewan in a representative character. If these words were read as the designation of the parties in whose hands the arrestment was laid, that excluded the case of arrestments laid in the hands of the bank; if they meant anything else, the arrestees were not designed. But the Court reserved their opinion on the point whether, if the arrestment had been used against H. & A. M'Ewan, not as individuals or a firm, but as representing the bank, it would have been apt to attach funds due by the bank.

Agent for Appellant—William Sime, S.S.C.

Agents for Respondents—Murray, Beith, & Murray, W.S.

Friday, March 12.

CARLYLE *v.* BAXTER.

Landlord and Tenant—Obligation—Summons of Removing — Prescriptive Possession. Circumstances in which a defence against a summons of removing, founded on forty years' possession on a tack signed only by the landlord, *sustained.*

On 4th February 1824 there was addressed to Mrs Hastie and her niece, Miss Farries, the following letter:—"Mr Andrew Hyslop, father of the deceased Mr Samuel Hyslop of Waterbeck and guardian of James Hyslop, his grandson, having empowered me to let feus upon his property here, I hereby lett you that piece of ground from the Communion Holm to the plantation on the south point, bounded on the west by the road leading to Waterbeck, and on the north-east by Foultoun, belonging to Sir John Maxwell, and that for the space of 99 years, at the agreed on feu-rent of ninepence per fall; but then you are to cover the house proposed to be built thereon, with good sclate; for if it is only thatched with straw, then the lease is only to continue 30 years as you pay rent for the park for two years, no feu-rent to be paid until eighteen hundred and twenty-six, from then until Whitsunday eighteen hundred and twenty-seven to be as above, when Master James Hyslop comes of age, he is either to ratify this agreement by