a writing could not have been prepared by a man of business, for it is always a strong case for letting in other evidence when it is proved that a man of business could not be got; there is no such evidence here, and it is not even denied that a regular writing could have been had here. This must be taken along with the fact I have previously stated, that this was not a *mortis causa* donation, but a donation out-and-out. In donations of that class either of two things may be fatal to the donee. In the first place, it is enough if the whole transaction be suspicious, or if the donee does not exclude the possibility of suspicion; and in the second place, even if there be not enough to amount to suspicion, if the proof of donation is not perfectly satisfactory.

Here the proof not only is not satisfactory, but in some cases is suspicious. Further, there is evidence of a certain amount of solicitation on the part of the defender, and although the man was so far in the possession of his faculties, yet he was old and ill, and in such a position as to render this transference subject to the criticism that it was not satisfactory. I think, therefore, that the defender has not made out a case of donation.

Lord Shand—I concur with your Lordships in thinking that the defender has failed to show sufficient grounds for disturbing the judgment of the Lord Ordinary.

It is true, and a point in the defender's favour, that the deposit-receipts were endorsed and are in her possession. A question was raised in the course of the proof whether the signatures are those of the deceased, but it was not pressed, nor has it been urged upon us in the argument for the pursuers. Endorsation is an ambiguous act, and may be done for the purpose of administration or of making a donation, and the presumption is strongly against donation. It appears to me that in the circumstances of this case the defender has failed to overcome that presumption. I think it a strong circumstance against her that those deposit-receipts constituted the whole of William Matthew's personal estate; by giving them he made a clean sweep of all that he had, so that it was not a donation in favour of one relative of part of his estate only. In the next place, though there were plenty of neighbours about who could have been witnesses to the alleged donation, the only persons who were witnesses to it are the defender, who says she got the deposit-receipts, and her son, who was under her influence, and who was sent to get delivery of them. In the third place, it appears that while it would have been natural and proper, if there was to be any transference of William Matthew's personal estate, his other relatives should have had an opportunity of visiting and seeing him, that was purposely prevented by the defender, who sent them no intimation of his illness. So that these facts make thus a case which must be proved very clearly by evidence besides that of the defender and her son. The question is whether the evidence of three neighbours is enough to overcome the presumption against the donation, strengthened as it is by the facts. But it must be remarked that the evidence of these neighbours is quite consistent with the idea of administration. No doubt it goes to corroborate the evidence of the donee, but then witness after witness expresses the belief that the testator talked of giving "charge," and that would be administration and not donation. The possibility of the gift being made for purposes of administration is not excluded by independent evidence, and before the defender can succeed she must exclude such a possibility. Even her son when asked as to this matter is not distinct, for he says—"(Q) Did he not say that he had given your mother all charge of the money?—(A) Well, he might; I do not know. (Q) Will you swear that was not the expression used?—(A) I do not remember the very words he used, but they were to that effect. (Q) That he had given your mother charge of all his money?—(A) Yes." With that testimony of the defender's son, and particularly with the ambiguous expressions spoken to by the independent witnesses, I think the defender has failed to make out her case.

There are other circumstances not so material which have influenced me in arriving at this conclusion. There is the fact that this woman set about making a will herself, on the footing that the deceased was making some sort of settlement. She took the position of testator herself instead of calling in some-one, not necessarily a writer; it would have been quite sufficient if some respectable person in the neighbourhood had been called in to witness the donation.

I do not think that such loose expressions as we have in this evidence can overcome the presumption against donation, and therefore I think we should adhere.

Lord Mure was absent on Circuit.

The Court adhered.

Counsel for Pursuer—Scott—Watt. Agent—James M'Caul, S.S.C.

Counsel for Defender—Jameson—G. W. Burnet. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 21.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

TOD & SON *v.* THE MERCHANT BANKING COMPANY OF LONDON (LIMITED) AND JAMES BROWN & CO.

SOMMERVILLE & SON *v.* THE SAME.

Security — Agent and Principal — Diligence — Arrestment.

B. R. & Co. having purchased a cargo abroad, arranged with their bankers in this country that the latter should accept bills drawn by the seller for the price, receiving in security the bills of lading for the cargo blank endorsed. On the arrival of the cargo B. R. & Co. effected sales in their own name, the arrangement between them and the bank being that the bank, as holders of the bills of lading, would authorise delivery to be made on receiving letters from the purchasers engaging to pay the price direct to the bank. In two cases the bank authorised delivery before obtaining such letters, on the undertaking of B. R. & Co. that they would be sent by the purchasers. After delivery had been made, creditors of B. R. & Co. used

arrestments in the hands of the purchasers to attach the price. *Held*, in a multiplepoinding to determine the right to the price, that B. R. & Co. were the radical owners, and had sold for themselves; that the bank being merely security-holders, had by authorising delivery released their right of security; and that therefore the arresters should be ranked and preferred to the price.

In January 1882 Messrs Bryant, Ridley, & Co., esparto grass merchants, Newcastle-on-Tyne, chartered the vessel "Newcastle" to convey a cargo of esparto from Spain to be delivered at Leith. The Merchant Banking Company (Limited), London, their bankers, arranged to undertake liability on their account on condition of the bills of lading being endorsed and forwarded to them, and this arrangement was intimated to Mr Oyarzabal, the seller, by letter from the Merchant Bank dated 11th January 1882—"By request and for account of Messrs Bryant, Ridley, & Co. we are prepared to accept your drafts on us at 90 days' date, for cost of about 250 to 280 tons esparto, to be shipped per 'Newcastle' to the Tyne or a Scotch port, on receipt of the entire set of b/ lading. The price not to exceed £8 (eight pounds) per ton." The bills of lading were accordingly blank endorsed to the Merchant Banking Company, who accepted Mr Oyarzabal's drafts for £2440, which amount was placed by the Merchant Banking Company to Bryant, Ridley, & Co.'s debit. The "Newcastle" arrived in Leith on 1st March 1882, and notice of this was sent to the Merchant Bank by Bryant, Ridley, & Co. On the same day the bank forwarded the bills of lading to Messrs Britcha & Co., their agents in Leith, with the following letter:—"By request of Messrs Bryant, Ridley, & Co., of Newcastle-on-Tyne, we hand herewith a bill of lading for 305 tons esparto p. 'Newcastle,' @ Malaga, arrived at your port. The goods are to be held subject to our order, which please confirm to us, and the above firm will arrange for payment of freight and charges as before." Britcha & Co. answered on 2d March acknowledging receipt of the letter, and agreeing to hold the cargo to the orders of the Merchant Banking Company. They also promised in the event of it becoming necessary to land any of the cargo, to telegraph immediately to the Merchant Banking Company. Bryant, Ridley, & Co. then proceeded to get orders for the esparto, it being expressly stipulated by them with the Merchant Banking Company that letters of guarantee should be sent by the purchasers to the bank before they would allow delivery to be made of the quantities sold. On 3d March 1882 a contract was concluded with Messrs Tod & Son, papermakers, St Leonard's Mill, Lasswade, in the following terms:—"Sold to Messrs Wm. Tod & Son about 50 tons, say fifty tons esparto, 'Lorings' best Malaga bales, with usual quantity of loose, if any. Delivery *ex* 'Newcastle,' now at Leith. Price £9 (nine pounds) per ton, c.i.f., Leith. Payment by our draft at 4 months' date from date of delivery, adding 3 month's interest at $5\frac{1}{2}$°/₀ p. an., payable in London. Any dispute arising under this contract to be settled by arbitration in the usual manner, the contract not being void on account thereof.—BRYANT, RIDLEY, & Co. Draft to be remitted to Merchant Banking Co., London." Messrs Tod sent this letter to the Merchant Bank on 4th March:—"We have purchased esparto to the value of about £450 from Messrs Bryant, Ridley, & Co., of Newcastle, and will remit our acceptance to you of the amount (at 4 mos.) on recpt. and checking off the deliveries as desired by Messrs Bryant, Ridley, & Co." And on 6th March the bank wrote to Brichta & Co.—"You may deliver fifty (50) tons esparto *ex* 'Newcastle' to the order of Messrs William Tod & Son, of Lasswade." A second contract was then made between Tod & Son and Bryant, Ridley, & Co., the terms of which are embodied in a letter from the former to the latter of 7th March:—"Your telegram from Edinburgh as follows:—'Simply to save warehousing, will send 30/40 tons more Lorings esparto at £8, 17s. 6d., c.i.f., Leith. Reply Post Office, Edinburgh. Reply paid.' We replied—'You may send on 30/40 tons more Lorings if at £8, 15s., c.i.f., Leith, but not unless.' In farther reference, we do not require grass for three months, and will have to store at considerable inconvenience, and will be quite as well pleased should you decline our offer as if you accept it." Bryant, Ridley, & Co. then wrote to the Merchant Bank on 7th March:—"We have just heard (our principal having left business) that Messrs Wm. Tod & Son, St Leonard's Mills, Lasswade, N.B., take 40 tons more esparto, and Messrs Wm. Sommerville & Son, Dalmore Mills, Miltonbridge, N.B., take 20 tons esparto; all *ex* 'Newcastle.' Letters have been sent for signature, and will be sent you in due course. In the meantime perhaps you would telegraph Messrs Brichta & Co. to-morrow giving them orders as over. This would greatly expedite the discharge, and we will undertake that you receive the letters in order." On 8th March the Merchant Bank telegraphed to Brichta & Co.:—"Deliver 40 tons more to Tod, Lasswade . . . Bryant says all this week to discharge." And on the same day they wrote to Bryant, Ridley, & Co.:—"We wrote you 4th instant, and have now before us your favour of yesterday requesting us to wire F. Brichta & Co. to deliver 40 tons more esparto to W. Tod & Son, and 20 tons to Wm. Sommerville & Son, both lots *ex* 'Newcastle,' which we have done, noting that you undertake that we shall receive in due course letters of engagement from the buyers. Please wire us early to-morrow as to fire insurance on whatever is landed and not sold *ex* both vessels." Bryant, Ridley, & Co. on 8th March wrote to Tod & Son: —"We enclose contract-notes, and should you not have sent a few lines to Merchant Bank as usual, may we ask you to do so at once." In accordance with the instructions of the Merchant Bank in their telegram of 8th March, confirmed by letter of the same date, Brichta & Co. forwarded the 40 tons sold to Tod & Son on 8th March, and it was delivered to them on the 9th without any letter being granted by them to the bank. Owing to a misunderstanding on the part of Brichta & Co. as to who was to pay freight a delay was occasioned, and therefore it was not until the 10th that Tod & Son wrote to Bryant, Ridley, & Co. as follows:—"We enclose accepted contract for 40 tons *ex* 'Newcastle,' having altered the terms to correspond with former contract. Please do not draw for this until we have weight checked, and see the proportion of loose. We refer to another matter in a separate letter, but as it affects this 40 tons very materially, we ask

you to notice that no 'Merchant Banking Coy.' clause is added, and we have not written them about this 40 tons." The document enclosed was—

"*Lasswade, 8th March* 1882.

"Bought of Messrs Bryant, Ridley, & Co. about 40 tons, say forty tons, esparto, 'Lorings' best Malaga bales, with usual quantity of loose, if any. Delivery p. 'Newcastle,' cost, freight, and insurance price eight pounds fifteen shillings p. ton, say (£8, 15s. p. ton). Payment by our acceptance at 4 months from date of delivery, payable in London, with 3 months' interest added at 5½ p. cent. p. annum.

"Any dispute arising under this contract to be settled by arbitration in the usual manner, the contract not being void on account thereof."

"William Tod & Son."

The matter to which reference was made in this letter was that on 10th March, the day on which it was written, arrestments to found jurisdiction in an action at the instance of Messrs James Brown & Co. against Bryant, Ridley, & Co., concluding for payment of £325, the summons in which was signeted the same day, had been used in the hands of Tod & Son. On 11th March arrestments on the dependence were also executed at the instance of Brown & Co. in the hands of Tod & Son. Decree in this action was pronounced on 18th July, 31st October, and 14th November 1882, against Bryant, Ridley, & Co., decerning for payment of £325 in name of damages, and £134, 3s. 10d. of expenses. Arrestments were also used on same dates in the hands of Messrs Sommerville & Son, Dalmore Mills, Milton Bridge, to whom 20 tons of esparto had been sold on the same terms as the sales to Messrs Tod & Son, the price being £182, 13s. 9d., no letter having been granted to the Merchant Banking Company.

A question having arisen between the Merchant Bank and Brown & Co. as to which of them was entitled to the price of the esparto arrested in Messrs Tod & Son's and Messrs Sommerville & Son's hands, actions of multiplepoinding were raised in name of Messrs Tod & Son and Messrs Sommerville & Son to have the rights of parties determined, the Merchant Banking Company being the real raisers.

In *Tod's* case the Merchant Banking Company pleaded—"(1) The said esparto having been the property of the claimants, by whom the same was sold to Messrs William Tod & Son, they have exclusive right to the price thereof. (3) In any event, the right to the said price having been validly transferred to the claimants prior to the said arrestment, the said price was not attached or affected by the said arrestment."

James Brown & Company pleaded—"(1) The fund *in medio* being due by the nominal raisers Messrs William Tod & Son to Messrs Bryant, Ridley, & Co., and having been legally and effectually arrested by Messrs James Brown & Co., on the dependence of their said action against Messrs Bryant, Ridley, & Co., Messrs James Brown & Co., the claimants, are entitled to be ranked and preferred in terms of their claim. (2) Or else the said esparto, being the property of Messrs Bryant, Ridley, & Co., and having been delivered to Messrs William Tod & Son prior to the date of the said arrestment at the claimant's instance, was validly attached thereby; and the claimants are entitled to be preferred to the fund *in medio*, being the price, as the *surrogatum* therefor."

In *Sommerville's* case the same pleas, *mutatis mutandis*, were stated for both parties.

The Lord Ordinary (M'Laren) on 19th December 1882 pronounced this interlocutor:— . . . . "Ranks and prefers the claimants James Brown & Co. *primo loco* on the fund *in medio* in terms of their claim, under deduction of whatever sum they may recover under the arrestments used in the hands of William Sommerville & Son: Ranks and prefers the claimants the Merchant Banking Company of London, Limited, upon the balance of said fund, after satisfying the claim of James Brown & Co., and decerns: Finds the claimants the Merchant Banking Company liable in expenses to the claimants James Brown & Co.; Allows an account, &c.

"*Opinion.*—In this case I must sustain the claim of James Brown & Co. to a preference over the fund *in medio*, consisting of the price of esparto sold by Bryant, Ridley, & Co., but really the property of the competing claimants the Merchant Banking Company of London, Limited.

"I assume that the Merchant Banking Company under the bill of lading had a title of property to the esparto, with an equity in Bryant, Ridley, & Co. to reduce that right to a security on a settlement of accounts between them and their bankers. That being assumed in favour of the Merchant Banking Company, I am notwithstanding of opinion that Bryant, Ridley, & Co. sold to Messrs Tod in their own name; that the unpaid price was a debt due to Bryant, Ridley, & Co., and that it was arrestable in the hands of the purchaser by Bryant's creditors. It is true that the Merchant Banking Company had employed a separate representative to take charge of the cargo at Leith, and intended that deliveries should only be given against obligations to pay to themselves. If they had adhered to that practice in this case, they would have defeated the arrestments, because an obligation to pay to them would have been a novation of the contract by substituting the Banking Company as creditors in place of Bryant & Co. But unfortunately for their claim, the Merchant Banking Company were prevailed on to grant delivery-orders in anticipation of the obligatory letters which they expected to receive; and the intervention of the arrestments made novation impossible, or at least limited its effect to the surplus remaining after payment of the arresting creditor.

"This result might have been obviated if the Merchant Banking Company had instructed Bryant to sell in their name; but they evidently did not wish to do so. They are not esparto merchants, but bankers, and most probably it would not have suited the requirements of their business to become vendors of papermaking material. In so doing they might have incurred liability to purchasers for defects in the quality of the goods supplied, such as constitute the ground of action of Messrs Brown, the arresting creditors in this action. At all events I am satisfied that in this case the sellers to Messrs Tod, the arrestees, were Bryant, Ridley, & Co., and not the Merchant Banking Company.

"The case of *Sommerville* must, in my opinion, be ruled by the present case."

The Merchant Banking Company reclaimed, and argued—That in making sales Bryant, Ridley,

& Co. had merely acted as their agents; that they were the true owners of the esparto, and were therefore entitled to be ranked and preferred to the price in the hands of the purchasers —*Cullen* v. *Maclean*, June 18, 1833, 11 S. 733; *Gibson* v. *Wills*, Dec. 2, 1826, 5 S. 74.

Argued for James Brown & Co.—The Merchant Banking Company were merely security-holders who consented to the radical owners selling as for themselves, and by doing so they released their security and got no obligation in return.—*Arthur* v. *Hastie & Jameson*, M. 14,209, *rev.* 2 Paton's App. 251; *Fox & Another* v. *Nott*, 6 H. and N. 630; Benjamin on Sale, p. 721; *Barber* v. *Meyerstein*, L.R., 4 E. & Ir. App. 317; *Gibbs* v. *British Linen Co.*, June 23, 1875, 4 R. 630; Bills of Lading Act 1855 (18 and 19 Vict. c. 111).

At advising—

LORD PRESIDENT—The arrestments in these cases were used by Messrs Brown & Co. in the hands of Messrs William Tod & Son, St Leonards, and Messrs William Sommerville & Son, Dalmore, the funds arrested being debts due by the arrestees to Messrs Bryant, Ridley, & Co., the contract under which the money was due to them being for the sale of esparto grass which was shipped from Spain, and it is said that the price was not paid at the date of the arrestments, and was still in the arrestees' hands. The contract of sale is contained in two bought-and-sold notes, which show distinctly what were its terms, viz., that Messrs Tod & Son had bought from Bryant, Ridley, & Co. fifty tons esparto, Loring's best Malaga bales, at the price of "£8, 15s." a ton, payment by our acceptance—that is, the purchaser's acceptance—at four months from date of delivery, with three months' interest at 5½ per cent. per annum, payable in London. Now, that is the whole contract, and the two notes are signed respectively by the seller and the purchaser. On the day following the date of the contract an invoice of the goods was sent by the sellers Bryant, Ridley, & Co. to Messrs Tod & Son, and the invoice bears that the goods are sold to the purchasers by Bryant, Ridley, & Co. as the sellers, and the price brought out is £348, 5s. 8d. Now, if the case stood there, of course there would be no difficulty whatever, because confessedly at the date of laying on these arrestments the contract price had not been paid, and it is equally clear that the arresting creditor was and is a creditor of Bryant, Ridley, & Co., found to be so by a judgment of the Court. But then it is maintained upon the part of the other claimants here, the Merchant Banking Co. of London, that they have a preferable right to this price in the hands of the purchasers, because the sale was made on their account by Messrs Bryant, Ridley, & Co. as their agents, or at least was made by Bryant, Ridley, & Co. for their behoof; that they were the true creditors on this price, and that it was part of the arrangement under which this contract with Tod & Son and one other contract were made that the price should be remitted to them. Now, the state of the facts which is brought out in the evidence, and particularly in the documents, is simply this—the cargo of esparto grass, of which these sales formed a part, was shipped from Malaga upon the order of Bryant, Ridley, & Co.; the bill of lading was sent home with an open endorsement, there being no consignee named, by the shipper with a Spanish name, which I do not undertake to pronounce [Oyarzabal], who endorsed the bill of lading before sending it home; that Bryant, Ridley, & Co. not having funds to pay for the cargo which they had thus ordered, applied to their bankers, the Merchant Banking Co., of London, to honour the drafts of the shipper, and they undertook to do so; that they authorised drafts accordingly, and, in fact, paid for the cargo. For their security of repayment of these advances they obtained the bill of lading with the open endorsement upon it from Bryant, Ridley, & Co., and retained that as their security; and in law undoubtedly they thereby obtained a legal title to the property of the cargo. No one disputes, at the same time, that the true nature of the transaction between Bryant, Ridley, & Co. and the Merchant Banking Co. was simply this, that the bank held the bill of lading of the cargo, and had under it a title of property, but that they truly held it in security for the advances they had made, and that when Bryant, Ridley, & Co. were in a condition to pay these advances the title to the cargo should revert to them. There had been a sale to Messrs Tod before the one we are now dealing with here, and in the arrangement for that sale they had been requested to send their remittance for the price to the Merchant Bank of London, which they did, and that is certainly not a thing that would startle anybody, because nothing is more common than that a merchant selling to a manufacturer should ask the manufacturer to remit the amount of the price of the goods to his banker, and it meant nothing more than that. The object of course was that the seller who was creditor for the price should obtain credit with his own banker for the amount, and Mr Tod readily assented to that; and certainly there was nothing striking or alarming in that request. The present contract had nothing in it whatever regarding the application of the price, and unless it can be held that Bryant, Ridley, & Co. were not truly the sellers, but were only agents of the sellers, I do not see how it is possible to resist the conclusion that they were creditors for the price of the goods. Well, now, were they agents? Most certainly not. They were selling on their own account and for their own behoof, but no doubt they were selling for behoof of their creditors, the bank who had advanced money on the cargo. That was the case when sales were made to Mr Tod, and to others, and the bank granted delivery-orders, and in doing so they just parted with so much of their security. Bryant, Ridley, & Co. made the sales on their own account, and the letters produced show that they did so for themselves, and not as agents for the secured creditor, and such was the course pursued by Bryant, Ridley, & Co. in this transaction. Mr Tod was asked in a letter, which has been referred to several times—a letter of the 8th March—to send a letter to the Merchant Bank to the effect that he would pay the price to them. Now, what the effect of this letter which he was asked to send might have been if it had been sent I do not stop to inquire, because it is one of the ascertained facts in this case that it was not sent, and there is therefore no proof of an arrangement of any kind between the purchaser of the goods and the Merchant Bank, nor of any obligation by the purchasers to

the Merchant Bank, and no proof of any kind of an agreement between them to prevent the ordinary relation of debtor and creditor subsisting between the seller and the purchaser so long as the price remained unpaid. Now, when I come to this point, it seems to me that the case is really at an end, unless the Merchant Banking Co., the reclaimers here, can make out that Bryant, Ridley, & Co. were acting as their agents, and for that contention I have been unable to find any grounds at all. It has been said, and quite rightly said, that supposing the property of the goods was vested in the Merchant Banking Co. in a fuller sense than can be said here—suppose they had been the original owners of the goods, and that Bryant, Ridley, & Co. had, not as agents, but on their own account, sold the goods, and had entered into a contract with the purchaser for delivery of the goods, and that they were enabled by the true owners of the goods to make that delivery, they would become creditors for the price just as fully under the contract of sale as if the goods had belonged to themselves. I can only say that that is not the case that occurs here, and that it has little bearing on the present case.

It is needless to go into the separate action of multiplepoinding in which *Sommerville* is concerned, because that case differs in no material respect from the case of *Tod*, except perhaps in this, that Tod had got to know in his previous transaction with Bryant, Ridley, & Co. that the Merchant Bank had an interest to receive the proceeds or prices of the goods, whereas Mr Sommerville knew nothing whatever of that. He was asked to send a letter to the Merchant Bank of London, but that he declined to do, and I rather think that in the circumstances he was well advised not to do so. I am not sure what the effect in law would have been if he had sent the letter in the terms desired, supposing an arresting creditor had come in with his diligence before the money was actually paid or a bill granted and had arrested the price in his hands. I cannot help thinking he acted very wisely in declining to write the letter; at all events he did decline, and so in that respect his case stands just the same as Mr Tod's.

I am for adhering to the Lord Ordinary's interlocutor.

Lord Shand—The goods the prices of which were here arrested were unquestionably sold by Bryant, Ridley, & Co. to Tod and Sommerville. In effecting that sale the whole verbal communications that occurred, the correspondence, and telegrams, as well as the invoices, were all in the name of Bryant, Ridley, & Co. as the sellers of the goods, and Tod knew no one else in the transaction. In these circumstances the arrestment of the price of these goods in the hands of Tod & Son as a debt due to Bryant, Ridley, & Co. must have effect, unless it can be shewn, as it has been attempted to be shewn, either that Bryant, Ridley, & Co. were not the owners of the goods, but were merely the agents of the Merchant Banking Co., who were the true owners, or that the Merchant Banking Co. had in some way in the course of dealings acquired right to the price, so that when these arrestments were used they were in a position to compel Tod & Son to pay the price which was really due to them. An alternative argument to the effect I have now stated has been maintained by the Merchant Banking Co., but I am of opinion with your Lordship that that argument entirely fails.

In the first place, in regard to the ownership of the goods, the whole actings of the parties to the sale which I have already noticed point to the ownership being in Messrs Bryant, Ridley, & Co., but when we trace the history of the goods in this case I think the question of ownership is put beyond all dispute. Undoubtedly Bryant, Ridley, & Co. purchased this esparto in Spain. The bank who made the advances on the cargo corresponded with Messrs Bryant, Ridley, & Co. as owners of it, and I see there is a correspondence about the insurance of the cargo which undoubtedly was done in the interests of Bryant, Ridley, & Co., who are the persons who paid the premiums and had to be consulted about the terms of the insurance. It is quite clear that whatever was to be the outcome of that cargo—profit or loss—the profit or loss was to accrue, not to the bank, but to the true owners of the cargo, Bryant, Ridley, & Co. It is true that the bank in agreeing to give an advance on the security of this cargo took a title—the best they could possibly have—a title of property to it, which would enable them to dispose of the property itself, or at all events to keep the property entirely under their control. I think they were secured of payment of its full value. But although that was a title of property, it was nevertheless a security-title. The bank never meant to secure that property out-and-out with the view of selling it themselves, as a matter out of which they were to make a profit or a loss. That being the state of matters, it appears to me that when the cargo arrived at Leith what occurred was simply this, that Bryant, Ridley, & Co. sold their own property in the terms in which they did to the esparto buyers whose names have been mentioned in these proceedings, and it being so sold, the company from time to time consented to waive the security they held by agreeing to the delivery of parcels of these goods from time to time. The bank undoubtedly had their security in such a shape that they might have refused to allow delivery of the goods until they got bills or else obligations for the price. They had it in their power, undoubtedly, to secure themselves in repayment of their advance, and to insist on the prices of the cargo coming to them, and to withhold delivery-orders for those particular portions of the cargo until they got bills or obligations by the persons who bought them, and to whom they were invoiced, and they were not bound to sign delivery-orders before they got the bills or obligations. Having done so, they were simply in the position of having parted with their security over the goods which had been sold by the owners, with the result that the price of the goods due to Bryant, Ridley, & Co., the owners of them, was properly arrested in the hands of Messrs Tod & Son.

I had occasion to consider, as has been observed in the course of the argument, a case of the same class as this, viz., the case of *Gibb* v. *The British Linen Bank*, and in the opinion or judgment I there delivered I think that I have illustrated this class of case by referring to other questions that may and do arise in practice—for example, the owner of an heritable property borrowing money upon it, the lender insists upon having an absolute

disposition to the property as his security-title and having no title to the property the true owner proceeds to sell it; he can make an effectual sale, but not until the security is realised; but if the holder of the security proceeds to sell, in virtue of his security, he may do so, but only under the obligation of accounting to the true owner for the price after payment of his loan, and if before payment to the true owner the price be arrested in the hands of the creditor or of the purchaser, the arrestment will be effectual; and the case now under consideration appears to me to be precisely of that character.

I presume all I have said in the case of Messrs Tod to be applicable to the case of Messrs Sommerville. They had been asked to grant an obligation in the same terms as that which Messrs Tod did when they purchased the first lot of grass, but they decline to do so; they are therefore in the same position as Messrs Tod. They granted no obligation or undertaking that they would pay the price to the Merchant Banking Co. If I assume now all that I have said in *Tod's* case as applicable to *Sommerville's* case, I come to the conclusion that the arrestment in their case is effectual. So much for the argument upon the question of property. I hold it is quite clear that these goods were in no sense the property of the bank, and that the bank were not the true sellers.

The other point which has been maintained is one upon which the bank equally fails. It is said there was a term in this contract of sale of this second parcel of esparto by which the purchaser Tod has now become liable to pay the price of the esparto to the Merchant Banking Company. I do not think that was a term of the contract. There was a letter accompanying the contract-note in which Messrs Bryant, Ridley, & Company no doubt said "You will send a letter of obligation to the Merchant Banking Company, just as you did before," and if Tod & Son had complied with that request the arrestment would have been futile. But they did not comply with it, and in the meantime arrestments were used. What was the state of matters then? It was not that the Merchant Banking Company had acquired any right directly to themselves to the price of this esparto; there was simply a request by Bryant, Ridley, & Company, the owners of these goods, that the price should be paid to a particular creditor of theirs. But that did not vest that creditor with a right that could not be defeated. The Merchant Banking Company had no invoice. There had been no document passed between them and Messrs Tod & Son so as to create an obligation on them to pay the price to the bank. And in that state of matters, although no doubt the sellers of the esparto did request the buyers of it to pay the price to the Merchant Banking Company, a creditor intervening and arresting that price would be enabled to destroy that direction and to attach the price which was in the hands of the debtor, and therefore, holding as I do that the argument on behalf of the Merchant Banking Company fails, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD DEAS—This case has been very fully and very anxiously discussed at the bar. I cannot say that in the course of the argument I heard anything which would materially shake my confidence in the interlocutor of the Lord Ordinary. We have no detailed opinion from his Lordship, but that has been to my mind very fully supplied by the reasons given by your Lordship in support of that interlocutor, and as Lord Shand has stated—so far at least as he is concerned—very fully his views upon this branch of the law in the case of *Gibb* v. *The British Linen Company*—a decision which I think, so far as I have been able to follow these proceedings, is very much applicable to this case. I do not know if there is almost any opinion on this branch of law stated at greater length than the opinion of Lord Shand in the case of *Gibb* v. *The British Linen Company.* I suppose it is one of the longest and most anxious opinions that his Lordship has delivered, and that being so, I think it is quite superfluous in me to attempt to repeat or to add to the reasons of your Lordship in support of the Lord Ordinary's views, and therefore I entirely agree with the opinion given by your Lordship.

LORD MURE was absent on Circuit.

The Court adhered.

Counsel for the Merchant Banking Company—Guthrie Smith—Strachan. Agent—T. F. Weir, S.S.C.

Counsel for James Brown & Co—Mackintosh—H. Johnston. Agents—Hagart & Burn Murdoch W.S.

Thursday, June 21.

SECOND DIVISION.

[Sheriff of Inverness-shire.

MACKENZIE *v.* LORD LOVAT.

Landlord and Tenant—Sequestration of Tenant for Rent—Jus quæsitum tertio—Bona fide *Purchaser.*

The stock and crop on a farm were sequestrated by the landlord for arrears of rent, and in security for rent current. By an arrangement between the landlord and tenant the latter sold the sequestrated effects on the farm by public roup, and accounted to the landlord for the price. At the sale a stack of hay was *bona fide*, and in ignorance of the sequestration, bought by a third party, who was prevented from taking possession of it by the landlord. In an action by the purchaser against the landlord for the value of the hay, or for damages for its wrongful detention — *held* that the landlord was not entitled, in virtue of the sequestration or otherwise, to prevent delivery; that the buyer was entitled to be compensated for the damage he had sustained, and that it was not a good answer to his claim that he might have appeared in the process of sequestration and claimed the hay as his property.

Donald Fraser was tenant of the farm of Platchaig, in the parish of Kilmorack, Inverness-shire, be-