furniture dealer and his wife's furniture had been put into his shop and apparently exposed for sale.

LORD KINNEAR and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Complainers — Clyde. Agents—Mitchell & Baxter, W.S.

Counsel for the respondent—C. S. Dickson—A. O. M. Mackenzie. Agent—Robert Broatch, L.A.

Tuesday, February 27.

FIRST DIVISION.

[Lord Low, Ordinary.

MITCHELL *v.* HEYS & SONS.

Contract of Hire — Lessee Holding Himself out as Owner — Lien — Question which of Two Innocent Parties is to Suffer by Fraud of Third Party.

M. J. & Co. calico printers, hired a quantity of copper rollers for use in their business from M. M. J. & Co. had no print works of their own, and, in accordance with a common practice in the trade, employed other printers to print for them, to whom they sent their cloth with the rollers to be used in printing it. One of the firms so employed by M. J. & Co. was H. & Sons, and in the course of their business M. J. & Co. sent a number of the hired rollers to this firm, to whom they falsely represented that the rollers were their own property. M. J. & Co. having become insolvent, H. & Sons refused to give up the rollers to M., on the ground that they had a lien over them for a balance due them by M. J. & Co. It was admitted that by the custom of the trade printers employed to print for others had a general lien over the cloth and rollers of their customers.

Held that M. was entitled to delivery of the rollers, in respect (1) that M. J. & Co. had no authority to subject his rollers to the lien of a third party; (2) that he had done nothing with the intention of misleading H. & Sons into the belief that the rollers were the property of M. J. & Co.; and (3) that in fact H. & Sons had not relied on any representation by M., but solely on the false representations of M. J. & Co.

Observed that proof of custom of trade might determine the incidents of a contract or explain its terms between the contracting parties, but that it could not affect the rights and property of others, which fell to be determined by the settled rules of law.

In 1885 Mitchell, Johnston, & Company, calico printers in Manchester and Glasgow, hired a number of copper rollers from William Mitchell, who had shortly before retired from business as a calico printer in Glasgow. By the terms of the agreement between the parties the rollers were to be used by Mitchell, Johnston, & Company in their business of calico printers, and to be engraved with such patterns as they should think proper, but for no other purpose whatever. The seventh head of the agreement provided that the whole of the rollers should be kept distinctly numbered and marked with the lessor's name, in order to identify them as his property, and in the event of the lessees parting with the custody of the rollers to any printer or other third person, that they should deliver them to such printer or other third person on the lessor's behalf under a receipt bearing expressly that they were "received from William Mitchell."

This agreement expired in 1889, and another agreement to the like effect was then entered into between the parties. In this agreement Mitchell, Johnston, & Company further undertook to add new rollers to William Mitchell's stock when necessary, in order to provide against loss of copper in turning off old patterns and depreciation in the value of copper.

Mitchell, Johnston, & Company had no print works of their own, and in accordance with a common practice in the trade, they employed firms who had print works to print for them, and sent their rollers and cloth to these firms in order to have the cloth printed. One of the firms which Mitchell, Johnston, & Company employed in this way was Z. Heys & Sons of Barrhead, and they were in the habit of sending this firm rollers they had hired from William Mitchell in order to have their cloth printed from them.

In June 1892 Mitchell, Johnston, & Company became insolvent, and at this time there were in Heys & Sons hands 902 rollers belonging to William Mitchell, which had been hired from him by Mitchell, Johnston, & Company.

William Mitchell applied to Heys & Sons for delivery of these rollers. Heys & Sons, however, claimed a right to retain them in security of a general balance of £4529 due them by Mitchell, Johnston, & Company, and William Mitchell then brought an action against them for delivery of the rollers.

The defenders made, *inter alia*, the following averments—"The pursuer knew that Mitchell, Johnston, & Company had full possession and control of the said rollers, and that they dealt with them as their own property, and were in the practice of sending the said rollers to these defenders, *inter alia*, in order that these defenders might engrave the same and use them for printing cloth for or on the orders of Mitchell, Johnston, & Company, and he intended all along that this should be done. The pursuer knew all along that by the usage and custom of the calico printing trade in Glasgow, all rollers delivered to calico printers actually engaged in printing (as these defenders are) were delivered and received on the footing that the engravers and printers (as these

defenders were) should have a general lien thereon for their whole account for engraving and printing. He knew that these defenders regularly advertised and intimated this on their business papers, and that all rollers sent to them by Mitchell, Johnston, & Company were sent by them and received by these defenders subject to this general lien as aforesaid. The pursuer never disclosed that the rollers in question were his private property. By the usage and custom of the calico printing trade in Glasgow, these defenders have a general lien on the said rollers for the sums due to them for engraving and printing done on the employment of Mitchell, Johnston, & Company."

The defenders pleaded, *inter alia*—"(3) In respect these defenders have a lien on the said rollers as condescended on, they should be assoilzied. (4) The defenders should be assoilzied in respect—(3d) The rollers were delivered to Mitchell, Johnston, & Company by the pursuer in order that they might deal with them as their property; *et separatim*, that they might deliver them to these defenders to be engraved and printed from subject to said general lien."

Proof was allowed. The result of the evidence, so far as it is necessary to refer to it, was as follows — It was admitted that by the custom of the calico printing trade in Glasgow, printers who were employed to do printing for others had a general lien over the cloth and rollers belonging to their customers, and it was also admitted that the defenders intimated to all their customers, and, *inter alios*, to Mitchell, Johnston, & Company by notice printed on their business papers that all rollers sent to them were subject to a general lien, and that Mitchell, Johnston, & Company dealt with them on this footing.

Evidence was led for the defenders to show that by custom of trade this general lien attached to all rollers received by a printer from his customers, whether they belonged to the customers or to third parties, and evidence to the opposite effect was led for the pursuers.

Several witnesses for the pursuers said that it was not unknown in the trade that printers, who had no works of their own, should hire rollers and mentioned instances of this practice which had come to their knowledge. Witnesses for the defenders alleged that there was no recognised custom of hiring rollers, and that the instances which had occurred were all cases of family arrangements.

The evidence as to whether the name on the receive notes sufficiently indicated the ownership of the rollers was contradictory.

It appeared that Mitchell, Johnston, & Company began to do business with the defenders in 1885. At first, when they sent William Mitchell's rollers to the defenders, they sent them on receive notes in William Mitchell's name, but on the defenders objecting to the form of the receive note they altered it, and they also made direct representations to the defenders that they were the owners of the rollers. The evidence as to their dealings with the defenders in these respects is fully examined in the Lord Ordinary's opinion. The pursuer had no knowledge that Mitchell, Johnston, & Company had altered the form of the receive notes, or were holding themselves out as owners of his rollers.

On the other hand, it appeared that the defenders all along believed that the rollers received by them from Mitchell, Johnston, & Company belonged to that firm, and that they printed for them in that belief and on that footing. Mr Z. H. Heys, a partner of the defenders' firm, deponed—"When I met the partners of Mitchell, Johnston, & Company to arrange terms and prices for printing, one of the special conditions laid down with regard to our dealing was that they were to supply us with their own copper and their own cloth. These are the only terms upon which we print for any one. . . . These continued to be the terms until this stoppage took place."

Of the 902 rollers in dispute in this action, it appeared that 125 had been the property of Mitchell, Johnston, & Company at the time they were sent to the defenders, and that they had been subsequently transferred by Mitchell, Johnston, & Company to the pursuer, to make good loss and depreciation in his stock in terms of their agreement with him.

On 7th March 1893 the Lord Ordinary (Low) pronounced an interlocutor sustaining the defences and assoilzieing the defenders.

"*Opinion.*—There are some points raised upon record which are not now in dispute, and which may be disposed of at once.

"It is established beyond doubt that the pursuer was not a partner of Mitchell, Johnston, & Company, and that he was not interested in that firm. It is also established that the property of the rollers which are in dispute is in the pursuer.

"It is further admitted that according to the universal custom of the trade, calico printers who like the defenders are actually engaged in printing have a lien over all rollers belonging to a customer for the general balance due by that customer.

"The means relied on by the pursuer in the agreements by which he hired rollers to Mitchell, Johnston, & Company, for securing that his rollers should not be subject to a lien for accounts incurred by Mitchell, Johnston, & Company were two in number. He stipulated, in the first place, that his initials should be stamped upon each roller, and in the second place, that the receive notes should be in his name.

"I do not think that the stamping of initials on the rollers afforded much, if any, security that the calico printers to whom they were sent would recognise that they were the property of the pursuer. The initials are not put upon a prominent part of the rollers, and are not regarded in the trade as an index of property, because rollers may and do change hands without any alteration being made upon the

initials. The initials may be useful for distinguishing rollers which have got mixed up with a different set in the printing works, but what the printers chiefly concern themselves with is the pattern number which is stamped prominently on the side of the roller.

"The receive notes are more important. No doubt if the rollers are sent to the printers by third parties, such as engravers or calenderers, the name upon the receive note may be no indication of the ownership of the rollers. But when the person employing the printer sends his own rollers, the practice is for him to send a receive note in his own name. For an employer therefore to send his own rollers with a receive note in the name of another would be unusual, and would not unnaturally, I think, suggest to the printer, if he had observed the terms of the note, and had it in view that he might require to claim a lien over the rollers—to inquire why the ordinary practice had been departed from, and to whom the rollers belonged. I think that the suggestion of the advisability of inquiry would be all the stronger if, as happened in this case, the customer sent the cloth with a receive note in his own name, and the rollers with receive notes in the name of another.

"I do not think, however, that the precautions taken by the pursuer were complete. Mitchell, Johnston, & Company were a Manchester firm, and they sent their cloth from Manchester with receive notes dated from Manchester. The receive-notes of the rollers, on the other hand, were always dated from Glasgow, even when they were sent from Manchester. In such circumstances I think that the defenders, who knew that the Glasgow branch of Mitchell, Johnston, & Company's business was conducted in the pursuer's office, might quite well have assumed that the pursuer was their custodier or receiver of rollers in Glasgow, through whom and in whose name they were sent to printers. Again, all the receive notes which were actually sent from the Glasgow office of Mitchell, Johnston, & Company were collected by one of the defenders' carters, and never came under the notice of the partners of the firm at all. Further, although a receive-note sent to a printer by a customer is presumably in the name of the owner of the rollers, the object of the receive note is not to intimate to the printer in whom is the property of the rollers, but only to show on whose account the rollers are sent so that they may be kept together and separate from the rollers of other customers. Even, therefore, in the case of a receive note sent by post, the partner of the firm receiving it would simply pass it on to the roller department and would not pay much attention to the precise terms of the receive note. Further, the defenders intimate to all their customers that they only do business upon the footing that all cloth and copper sent to them shall be subject to their lien. I think that they were entitled to assume that if the customer did not intend to be bound by that condition he would give them distinct warning, and I do not think that it would occur to them critically to examine the receive notes to guard against the contingency of a customer sending rollers not his own property, and thereby depriving them of their lien.

"I am therefore of opinion that the safeguards for which the pursuers stipulated were not perfect. He knew that by the custom of the trade a lien over the customers' rollers was recognised, and if he wanted to secure that no claim of lien over his rollers should be made for a debt due by Mitchell, Johnston, & Company, I think that he should have stipulated that that firm should give unequivocal notice to the printers to whom they might send the rollers that they were not their property and were not to be subject to the printers' lien, or he should himself have sent such a notice to the printers.

"I do not think, however, that it is material to consider what would have been the result as regards the respective rights of the pursuer and the defenders if Mitchell, Johnston, & Company had, during the whole course of their dealings with the defenders, sent receive notes for rollers in the pursuer's name alone, and the defenders had accepted them without remark or objection. Because, as matter of fact, the defenders did, at a comparatively early period, call attention to the form of the receive notes, and thereafter the form was to a considerable extent altered.

"It is therefore necessary to see precisely what the facts are.

"Mitchell, Johnston, & Company had from the first an office in Glasgow. Until 1887 they had a room in the pursuer's office and paid half the salary of one of his clerks and then they took an office of their own. They commenced to do business with the defenders in 1885, and from that date until October 1887 (after they had moved into their own office) the receive notes for rollers were sent regularly in the name of the pursuer alone. The defenders say—and I see no reason to doubt them—that so long as Mitchell, Johnston, & Company's place of business in Glasgow was the pursuer's office, they assumed that the rollers were stored with the pursuer, or that he was custodier of them. But when Mitchell, Johnston, & Company went to a separate office of their own, the defenders asked that their name should appear on the receive notes.

"Mr Z. H. Heys (one of the defenders) says—'When I learned that Mitchell, Johnston, & Company had ceased to use William Mitchell's office, I told the carter that receive notes in the old form were of no use, and he must get "on account of Mitchell, Johnston, & Company" put on them. I wanted that change made because the carter was not lifting the rollers from William Mitchell's store.'

"M'Kendrick was at that time Mitchell, Johnston, & Company's clerk in Glasgow, and a letter from him to that firm dated 28th October 1887 is produced in which he

says—'Please note that Heys will not lift any rollers unless receive note is made out as being on account of Mitchell, Johnston, & Company.'

"In reply Mitchell, Johnston, & Company instructed M'Kendrick to send the receive notes as before, 'and if they' (*i.e.* the defenders) 'make any further remark, say that Mr W. A. Mitchell, from Manchester, will be in Glasgow very soon and see them on the subject.'

"Notwithstanding these instructions, M'Kendrick took it upon himself to make out the receive notes in the terms desired by the defenders.

"Mr W. A Mitchell came to Glasgow about Christmas 1887, and saw Mr Z. H. Heys in regard to the receive notes, and the latter says—'He stated to me that they were simply using up William Mitchell's old receive notes. There was nothing further said about the matter so far as I remember. I was quite satisfied with the explanation.'

"M'Kendrick says that at that time he spoke to Mr W. A. Mitchell about the receive notes, but the latter gave him no instructions on the subject and he continued to send out the receive notes in the form which he had been using since the previous October, viz., 'On account of Mitchell, Johnston, & Company.'

"That form of receive note was continued until October 1889 when the defenders' carter again took objection to the form of the receive note, and it was made to run 'per' or 'p. Mitchell, Johnston, & Company.' The person who was the defenders' carter at that time cannot be found, and it is not quite clear why the alteration in the form of the receive note was made. I think, however, that it is pretty evident that some notes had been sent in the original form, *i.e.*, in the pursuer's name alone; that that had drawn a protest from the carter, and that the new form, 'per Mitchell, Johnston, & Company' was adopted by the carter and M'Kendrick without much consideration, and as being practically the same as 'On account of Mitchell, Johnston, & Company.'

"The form of note adopted in 1889 appears to have been continued down to the stoppage of Mitchell, Johnston, & Company in 1892, with a few exceptions, when receive notes in William Mitchell's name were sent. These exceptions were, I think all, or almost all, in cases in which new rollers were sent from Manchester, the receive notes also being sent from Manchester.

"I do not think, however, that the pursuer can found upon these later notes in his name as indicating to the defenders that the rollers belonged to him, because there are letters from Mitchell, Johnston, & Company to the defenders in 1889 and subsequently which in my opinion amount to distinct representations that the rollers were the property of Mitchell, Johnston, & Company, and were subject to the defenders' lien.

"In 1889 Mitchell, Johnston, & Company were in arrear of their payments to the defenders, and apparently continued to be so until their stoppage, and on 11th February 1889 Mr W. A. Mitchell wrote to the defenders as follows—'I have Z. Heys & Sons' letter to our firm this morning about payments. It is unfortunate that we have let them lately get behind, and we have no excuse to offer. We are very careful of our credit, which we think stands high here, and it is only your account that we can let stand a day overdue. This you will say is very candid and very hard on you, but you were not often very pressing, *and we always knew that you had so much cloth and copper of ours that you might not consider it very risky.*'

"I cannot read the words which I have italicised as meaning anything else than that the copper as well as the cloth was subject to the defenders' lien.

"Again, on 15th January 1891 the defenders, who were pressing for payment of their account, wrote to Mitchell, Johnston, & Company—'We are sorry to have to push this matter, but we must insist on our terms being stuck to, as we are not disposed to give anyone credit to the extent of more than the value of the copper in our hands.'

"Mr Z. H. Heys explains that cloth as well as copper should have been mentioned in this letter, and I think that that is obviously the case, but the letter was in any event notice to Mitchell, Johnston, & Company that the defenders regarded the rollers as a security for their debt.

"In their reply Mitchell, Johnson, & Company say—'We trust the question you raise' (*i.e.*, as to the value of the security which they had by reason of the rollers in their possession) 'may never be one between us, but at the same time we would mention that you have rarely less than £2500 to £3000 of our own cloth at your works.'

"I am unable to read that sentence as the pursuer contended it should be read, as a repudiation of the assumption in the defenders' letter that they had a security over the copper. I think that Mitchell, Johnston, & Company mention the cloth only simply because the defenders had omitted to specify cloth as well as copper in their letter. In short, I read Mitchell, Johnston, & Company's letter as simply pointing out to the defenders that they had a much better security than they represented themselves to have in their letter of 15th January, as in addition to the copper they had from £2500 to £3000 worth of cloth.

"Then on 9th January 1893 the defenders wrote to Mitchell, Johnston, & Company as follows—'We are very much annoyed at not receiving payment of our September account this morning as promised, and shall refrain from expressing what we think about it. We have certainly lost all confidence in your promises, and are at a loss to know what to do. We notice that your Glasgow house when sending copper send a receive-note bearing the name of William Mitchell. We presume this is some old receive-notes that you are just

using up, but to keep matters all in order you will be good enough to send us a letter by return saying you understand we hold a lien over all the copper and cloth we have, notwithstanding the fact that the copper is sent on receive-notes bearing the name of William Mitchell for M., J., & Co.'

"Upon the 11th January Mitchell, Johnston, & Company sent the following reply —'We are sorry that remittance has not been sent you yet, but we have been very much disappointed. . . . As to the copper, we quite understand you hold this, and it is all sent you now on our account. Three years ago we contracted for all the copper not our own for £3000, and we have added £1600 of new copper to it since.'

"That appears to me to be a perfectly distinct statement on the part of Mitchell, Johnston, & Company, that all the rollers then in the hands of the defenders were their property.

"On 20th February 1892 the defenders wrote to Mitchell, Johnston, & Company as follows—'The enclosed receive-note for copper came in your letter this morning. Will you be good enough to send us a fresh one in your own name, as we do not know who William Mitchell is? We spoke or wrote about this once before. Your immediate attention will oblige.'

"The answer of Mitchell, Johnston, & Company was to send to the defenders the receive-note printed in the Print of Documents, and which is in the name of Mitchell, Johnston, & Company alone.

"That receive-note appears to be applicable to the last lot of rollers which was sent by Mitchell, Johnston, & Company to the defenders.

"Finally, on the 23rd April 1892, Mitchell, Johnston, & Company, writing to the defenders, said—'As you know, we have very largely reduced your account in the last year, and with the security you hold of cloth and copper, you are not in a bad position, even if you do not take into account the security of our credit and other estate.' It appears to me that the only meaning which the defenders could attach to that sentence was that they had the security of both the cloth and the copper in their hands.

"I may also mention one somewhat curious piece of evidence which goes to show that the defenders were led by Mitchell, Johnston, & Company to believe that the rollers in question were their property.

"On one occasion Mitchell, Johnston, & Company sent to the defenders rollers belonging to a firm of the name of Ellinger & Company, and they then wrote to the defenders—'We send you six rollers we got to print with; they are not ours.'

"I think that the defenders would naturally assume, upon reading that letter, that all the other rollers which had been sent to them did belong to Mitchell, Johnston, & Company.

"I should also notice that some 123 rollers now in the possession of the defenders were purchased by Mitchell, Johnston, & Company in 1888, and were then sent to the defenders. They were at that time unquestionably the property of the defenders, but the receive notes did not in any respect differ from those sent with the pursuers' rollers. These rollers were transferred to the pursuer in 1891, but no notice of the transfer was given to the defenders.

"Upon the whole evidence I am of opinion that, as regards the great bulk of the rollers, the defenders were led by Mitchell, Johnston, & Company to believe, and did believe, that they belonged to the latter. . . .

"In these circumstances, the question of law to be determined is, whether the defenders are entitled to the lien over the rollers which they claim?

"In regard to the 123 rollers which were the property of Mitchell, Johnston, & Company when they were sent to the defenders, I do not think that there is any doubt because the defenders could not be affected by a subsequent change of ownership of which they had no notice.

"I am also of opinion that the defenders are entitled to retain the other rollers.

"I have no doubt that the defenders were in the *bona fide* belief that the rollers belonged to Mitchell, Johnston, & Company, but it was contended for the pursuer that the form of receive notes was such as to put the defenders on their inquiry, and that if they had properly inquired into the matter, as, for example, by communicating with the pursuer, they would have ascertained that the rollers belonged to him. Now, as matter of fact, the defenders were put upon their inquiry, but I think that they did all in the way of inquiry that was incumbent upon them. They, in the first place, in October 1887 asked, through their head carter, that the form of the receive notes should be altered, and that was done without demur—at least no demur was made to them. Then at Christmas 1887 Mr W. A. Mitchell told Mr Z. H. Heys that they had been using up old receive notes of the pursuer. Such a statement could only have one meaning, namely, that notwithstanding the form of the receive notes the rollers belonged to Mitchell, Johnston, & Company. We have only Mr Heys' account of that interview, because Mr W. A. Mitchell disappeared when his firm stopped payment. But I saw no reason to doubt the honesty of Mr Heys' evidence, and it is corroborated to this extent, that M'Kendrick says that W. A. Mitchell told him that he had had an interview with Mr Heys, but did not instruct him to alter the form of receive notes which he had been sending since the previous October. Finally, the letters to which I have referred from 1889 onwards, seem to me to constitute quite unambiguous representations on the part of Mitchell, Johnston, & Company, that the rollers were theirs, and were subject to the defenders' lien.

"I am further of opinion that Mitchell, Johnston, & Company were the proper parties for the defenders to communicate with in regard to the rollers. The defenders were employed by that firm, and came in contact with no one else, and they were entitled to assume that the partners of the

firm were honest men whose representations could be relied upon.

"The question remains, whether in these circumstances the defenders were entitled to retain the rollers as against the pursuer for the general balance due to them by Mitchell, Johnston, & Company.

"Both parties referred to the judgment of the House of Lords in *The London Joint-Stock Bank* v. *Simmons*, 1892, App. Cas. 201, as laying down principles of law applicable to the present case. The question there was as to the right of the bank to retain negotiable securities for payment of a balance due by a broker who had fraudulently pledged the securities with them as against the true owner. The House held that the bank was entitled to retain and realise the securities, having taken them for value and in good faith, and there being no circumstances to create suspicion.

"There were three questions in the case—1st, whether the securities belonged to the party claiming them from the bank; 2nd, whether they were negotiable instruments; and 3rd, whether the bank took them in good faith. The judgment proceeded upon an affirmative answer to all these questions. If any one of them had been answered in the negative I apprehend that the judgment would have been different.

The decision, therefore, goes no further than this, that the *bona fide* pledgee for value of a negotiable instrument can retain it for the debt for which it was pledged against the true owner. The same rule, I apprehend, also applies to the impledging of documents of title such as an endorsed bill of lading, or a delivery order upon a warehouseman, or of goods held under such documents of title. But the rule does not in my judgment necessarily apply where what is pledged is a corporeal moveable not the property of the pledger, and of which he has the bare possession without any document of title. In such a case it is not sufficient to prove that the pledgee took the article in good faith and in the absence of circumstances calculated to excite his suspicion.

"In the *London Joint Stock Bank* v. *Simmons*, Lord Herschell thus states the law—'The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner no title is acquired against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown a good title is acquired by personal estoppel against the true owner.'

"It therefore seems to me that the question here is whether the pursuer so acted as to mislead the defenders into the belief, or so as to make them liable to be misled into the belief that Mitchell, Johnston, & Company were owners of the rollers.

"Upon this question the case of *Brown* v. *Marr*, 7 R. 427, was referred to. In that case a retail jeweller fraudulently obtained articles of jewellery from wholesale dealers upon contracts of 'sale and return,' and pawned them. It was held in a question between the wholesale dealers and the pawnbrokers that the latter were entitled to retain the jewellery. There was a great deal of discussion as to the true nature of a contract of 'sale and return,' and opinions were expressed upon the point, but I think that all the judges were of opinion that it was sufficient for the decision of the case that the retail jeweller having undoubtedly authority to sell the jewellery, could also pledge it, and that of the two innocent parties dealing with him, that party (viz., the wholesale dealers) who had put it in his power to commit the fraud must suffer.

"Lord Justice-Clerk Moncreiff, when dealing with this view of the case, said—'Lord Stair says (i. 14. 5), "Property or dominion passes not by conditions or provisions, but by tradition, or other ways prescribed in law." From which it follows that possession or some symbol of tradition, are the only true indications of property in moveables. Thus, it is held in England, that when tradition or possession has been obtained by fraud, and has been used to induce transactions with third parties, of two innocent parties he shall suffer who has enabled the wrongdoer to commit the fraud. This is simply another way of saying that a purchaser or pledgee is not bound to look beyond the ostensible title of possession, and that if the true owner has knowingly conferred this ostensible title, although induced thereto by fraud, a *bona fide* purchaser cannot be required to restore what he has bought on the ground of latent stipulations between the seller and his author.'

"I have already pointed out that one ground of judgment in *Brown* v. *Marr* was that the owners of the watches had put them into the hands of the retail dealer Marr with authority to sell them, which involved authority to pledge them. I think, however, that there was another important element in the case, namely, that Marr was a dealer in jewellery, and was known by the pawnbrokers to be so. Now, suppose that the pursuers, the wholesale dealers, had been right in one of their contentions, namely, that Marr did not get the watches for 'sale or return' but merely 'on approbation,' I am not sure that the result would have been affected. Because if a person puts goods into the hands of another whose business it is to sell goods of that description, I think that a third party purchasing from the possessor in good faith for value, and in the ordinary course of trade, would get an unchallengeable title.

"That view is in consonance with the opinions expressed by judges of high authority in the case of *Pickering* v. *Busk*, 15 East. 38. In that case one Swallow was a broker and sale agent. Pickering purchased hemp through Swallow. The hemp was transferred at the desire of Pickering in

the books of the wharfinger, from the name of the seller to that of Swallow, as regarded one parcel, and to the name of Pickering or Swallow as regarded another parcel. The question was whether Swallow could give a good title to a purchaser. He had contracted for the sale of hemp, and having none of his own to deliver had transferred Pickering's hemp to the purchaser. It was held that the purchaser from Swallow was entitled to the hemp in a question with Pickering. Lord Ellenborough said — 'Strangers can only look to the acts of the parties and to the external indications of property, and not to the private communications which may pass between a principal and his broker, and if a person authorises another to assume the apparent right of disposing of property in the ordinary course of trade it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is to be afterwards tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject-matter, and there would be no safety in mercantile transactions if he could not.' In this same case Le Blanc, J., said—'The law is clearly laid down that the mere possession of personal property does not convey a title to dispose of it. Then, after referring to the circumstances of the case he added — 'This is distinguishable from all cases where goods are left in the custody of persons whose proper business it is not to sell.'

"There are two cases, one in England and the other in Scotland, the circumstances of which are very like those in the present case. The English case is *Weldon* v. *Gould*, 3 Espinasse 268. The circumstances are thus stated in the report—'The plaintiff had delivered calicoes to one Pearce to have them printed; he delivered them to the defendant, who was a calico printer; the defendant did not know that the goods did not belong to Pearce, and he kept the goods for the balance of a general account between Pearce and him.'

Lord Kenyon decided in favour of the defendant. I confess that I am unable to see any material distinction between the circumstances of that case and the present.

"The Scotch case is *Lesly* v. *Hunter*, M. 2660, and Elchies *voce* Hypothec, No. 18. The defender Hunter was a bleacher, and he was employed to whiten certain cloth by George and Archibald Arnot, weavers. The Arnots' name was stamped upon the cloth. They got delivery from Hunter of a portion of the cloth, promising to pay for the bleaching of the whole cloth when they uplifted the remainder. The Arnots' became bankrupt, and Lesly, who was proved to be the owner of part of the cloth remaining in Hunter's hands, claimed delivery of that part upon paying the expense of bleaching it. Hunter, upon the other hand, claimed a lien over the cloth for the whole account due to him by the Arnots. Hunter had taken the cloth in the belief that having Arnots' name stamped upon it, it belonged to them. The Court held that Hunter was not entitled to the lien which he claimed, but Lord Elchies states that the judgment was carried only by the casting vote of the President.

"If, therefore, the circumstances of that case are substantially the same as those of the present, it is plain that it is an authority directly in the pursuer's favour.

"The reports of this case are somewhat meagre, and the session papers, so far as they have been preserved, do not add much to the information given in the reports. It appears that the Arnots had woven the cloth for Lesly from yarn supplied by him, and he gave evidence that he had not authorised the Arnots to put their name on the cloth. It does not, however, appear whether Lesly had authorised the Arnots to get the cloth bleached, or whether it was the custom of the trade for weavers to get cloth which they had been employed to weave, bleached for their customers. If the Arnots had no authority, express or implied, to get the cloth bleached, I can well understand that Hunter could not claim a lien for the general balance, because Lesly had in that case done nothing which was calculated to mislead him into the belief that the cloth belonged to the Arnots. Further, there is no note of the opinions of the Judges. I am thus unable to regard the decision as giving much assistance in the present case one way or the other.

"It therefore appears to me that except the judgment of Lord Kenyon in *Weldon* v. *Gould*, there is no authority directly in point; but a consideration of the whole authorities, so far as I know them, and of the principles which may be deduced therefrom, leads me to the conclusion that the defenders must prevail.

"The ordinary practice of the trade is for job calico printers to have their own rollers, which they send along with cloth to printers who have works, and who do the actual printing process. Further, by the admitted custom of the trade, printers have a lien over the rollers of their customers. The pursuer knew the ordinary practice of the trade, and the inveterate custom as to lien, and in that knowledge he gave his rollers to Mitchell, Johnston, & Company for the very purpose of being sent by them to printers. By so acting the pursuer put it into the power of Mitchell, Johnston, & Company, while using the rollers for no other purpose than that for which they had authority to use them, to mislead printers to whom the rollers were sent, and he also rendered the printers to whom the rollers were sent very liable to be misled. In such circumstances I am of opinion that the defenders, who held the rollers in the *bona fide* belief, induced by the representations of Mitchell, Johnston, & Company that they were the property of the latter, are entitled to retain them even against the pursuer. To hold otherwise would, in my judgment, not only be contrary to sound

principle, but would be most prejudicial to the interests of those engaged in this and similar trades."

The pursuer reclaimed, and argued—The admitted facts of the case afforded a legal ground upon which the pursuer was entitled to judgment. It was admitted that the rollers were the pursuers' property, and that Mitchell, Johnston, & Company had only right to them as a hirer. It was not said that there was *mala fides* on the pursuers' part, or that he knew that his lessees were holding themselves out as owners of the rollers. Now, the fact that a person who had received goods under a contract of hire or under a limited title of that kind dealt with them as his own would not give any right to persons receiving the goods from him, unless the true owner had acted so as to mislead the third party into the belief that the hirer had the right to deal with the goods as he did—*London Joint-Stock Bank* v. *Simmons*, L.R., 1892, App. Cas. 201, *per* Lord Herschell; *Marston* v. *Kerr's Trustee*, May 13, 1879, 6 R. 898; *Murdoch* v. *Greig & Son*, February 6, 1889, 16 R. 396; *Martinez* v. *Gomez*, January 23, 1890, 17 R. 332; *Lesly* v. *Hunter*, M. 2660; and Elchies *voce* Hypothec, No. 18. These cases showed that it was not incumbent on the owner of goods, who had hired them out, to take any precautions to obviate possible fraud on the part of the lessee. The Lord Ordinary was mistaken in thinking that in *Lesly* v. *Hunter*, the person to whom the cloth was entrusted by the owner had no power to send it to be bleached. The session papers showed that he had, and that case was therefore a direct authority in the pursuers' favour. *Brown* v. *Marr* was not an authority applicable to the present case, for there the contract was one of sale and return, and the vendee had power to sell, and therefore to pledge the goods delivered to him. Nor did the cases of principal and agent, such as *Pickering* v. *Busk*, apply; for an agent or factor for sale was held to have power to pledge. But even in the cases of principal and agent the law laid down favoured the pursuer's contention—*Cooke & Sons* v. *Eshelby*, 1887, L.R., 12 App. Cas. 271. *Pochin & Co.*, *Vickers*, and *Babcock* were all cases of delivery-orders, and the *ratio* of these decisions was that the true owner of the goods had put an instrument into the hands of the second party which enabled him to commit the fraud. The case of *Rose* v. *Spavens* was decided on the same principle. These were also cases of principal and agent, and were distinguishable from the present on that ground. *Weldon* v. *Gould* was a case of agency; and further, that decision was at variance with the views expressed by the Court in the cases of *Marston* and *Pickering*. In no case had it been held that a lessor was barred by putting another party in possession of his goods under a contract of hire from claiming them from a third party to whom they had been fraudulently transferred by the lessee, unless the lessor was in some way to blame for the deception practised on the third party. No duty was laid on the pursuer to intimate to the printers employed by Mitchell, Johnston, & Company that the rollers used by that firm were hired from him, especially as it was proved that the practice of hiring rollers was known in the trade. If, however, the pursuer was bound to take any precautions, he had sufficiently satisfied whatever obligation lay upon him by stipulating in the agreement of hire that the rollers should be stamped with his initials, and sent on receeive notes in his name. The initials on a roller might not be conclusive evidence of ownership, but there was a presumption that they were the owner's initials, and this presumption was very strong in the case of new rollers. The form of the receive notes was still stronger evidence that the pursuer was the owner of the rollers. At all events, the defenders were in the circumstances put upon their inquiry, and their obligation to make inquiry was not satisfied by applying to Mitchell, Johnston, & Company for an explanation. The evidence showed that their suspicions were aroused, and that being the case, they were bound to take the best means of ascertaining the truth, namely, by asking the pursuer. Having wilfully disregarded this obvious means of knowledge, they could not plead that they were the innocent victims of a fraud — Opinions in *Raphael* v. *Bank of England*, 17 Scott's Rep., 1855, C. B. 171, and 25 L.J., C.P. 33. The pursuer was, therefore, entitled to succeed on one or other of the following grounds—(1) When goods were delivered under an ordinary contract of hire, the lessor was not bound to take any precautions to prevent third parties being deceived, unless he knew that the lessee was dealing with the goods contrary to the contract. (2) If the pursuer was bound to take any precautions, the precautions he took were sufficient. (3) At all events, the defenders were barred from saying that a deception had been practised upon them, for their suspicions had been aroused, and they had neglected the obvious means of ascertaining the truth. They were therefore in *mala fide*.

Argued for the defender—Courts were at first slow to recognise general liens, and they were only recognised when the courts were convinced of their commercial benefit—Bell's Comm. (7th ed.) ii. 101. It was admitted that in the trade in question printers had a general lien over the cloth and rollers of their customers, and the pursuer was aware of the existence of this general lien. He also knew that his rollers would be sent to third parties. He was bound in these circumstances to take precautions to prevent these third parties being deceived, especially as there appeared from the proof to be no recognised custom of hiring rollers in the trade. The precautions he took were quite insufficient, for the initials on a roller were not regarded as an index of ownership, and the receive notes only indicated the custodier of the rollers from whom they were forwarded to the printer. The position of matters accordingly was that the pursuer put

Mitchell, Johnston, & Company in a position to deal with the rollers as their own, and failed to take proper precautions to prevent third parties being deceived by their being apparently owners of the rollers. But if a party clothed another with the ostensible ownership of moveable subjects, the latter might effectually pledge them. It lay with the owner to secure himself. The principle to be applied in the circumstances of the case was, that where two innocent third parties were injured through the fraud of a third party, the loss must fall on the one who had put the third party in a position to commit the fraud—*Brown* v. *Marr, Barclay, &c.*, January 8, 1880, 7 R. 427; *Babcock* v. *Lawson*, 1879, L.R. 4 Q.B. Div. 394; *Pochin & Company* v. *Robinson and Marjoribanks*, March 11, 1869, 7 Macph. 622; *Vickers* v. *Hertz*, March 20, 1871, 9 Macph. (H. of L.) 65; *Rose* v. *Spavens*, June 15, 1880, 7 R. 925. The equitable considerations applied in the case of principal and agent were applicable here. *Weldon* v. *Gould*, 3 Espinasse 268, was a direct authority for the defenders. The English cases as to contracts of hire only gave effect to the rights of the true owner against a party claiming a recognised lien where there was a recognised custom of hiring in the trade, but no such custom was proved to exist in the printing trade—*Crawcour* v. *Salter*, 1880, L.R. 18 Ch. Div. 30. In *Marston* the question was between the true owner and the hirer's trustee in bankruptcy, and the doctrine of *tantum et tale* therefore applied. The rule applied in *Brown* v. *Marr* had been recognised as sound in the subsequent case of *Macdonald* v. *Westren*, July 19, 1888, 15 R. 988, though the judgment in the latter case differed, owing to the question being between the true owner and the trustee in bankruptcy of the party who had received the goods from the owner. If any obligation was laid on the defenders to make inquiry, they had discharged that obligation by going to their customers—Lord Chancellor Halsbury in *Cook* v. *Eshelby*, L.R., 12 App. Cas. 276; and in *Earl of Sheffield* v. *London Joint-Stock Bank*, L.R., 13 App. Cas. 338. As to *Lesly* v. *Hunter* the Lord Ordinary's view of the session papers was correct. The cloth in that case was sent to the bleachers by a party who had no authority to do so, and that case was therefore different from the present.

At advising—

LORD KINNEAR—This is an action for delivery of certain copper rollers belonging to the pursuer, and presently in the possession of the defenders. The defenders Messrs Heys & Sons, who are calico printers, claim right to retain the rollers by virtue of a lien created by a contract with the now insolvent firm of Mitchell, Johnston, & Company. It is admitted that the rollers in question are the property of the pursuers, from whom they were hired by Mitchell, Johnston, & Company for the purpose of being used in printing. Mitchell, Johnston, & Company were calico printers, who had no print works of their own, and it appears to be a common practice in the trade for printers in that position to send their cloth and rollers to the print works of others that the rollers may be used in printing patterns on the cloth. The rollers in question having been hired from the pursuer, were put into the hands of the defenders by Mitchell, Johnston, & Company to be engraved with patterns and used in printing according to the common practice, and the defenders claim to hold the rollers as well as the cloth for a general balance arising upon their account for engraving and printing. It is admitted, as the Lord Ordinary says, that according to the custom of trade, calico printers who, like the defenders, are actually engaged in printing, have such a lien over the rollers and cloth belonging to their customers. In addition to the general usage, it is admitted that a special contract was constituted between the defenders and their customers, including Mitchell, Johnston, & Company, by a notice printed on the business papers passing between them, that all rollers sent to the defenders were subject to a general lien for their whole account for engraving and printing. I have not observed any paper in these terms in the voluminous print which has been laid before us, but it was admitted at the bar that the defenders' statement to this effect is correct; and further, that the subsequent course of dealing had established the assent of Mitchell, Johnston, & Company to the terms expressed in the defenders' notice. We must take it, therefore, that by usage of trade, and also by a special contract, the defenders have a valid lien which would admittedly be effectual as regards the rollers now in question if these were the property of Mitchell, Johnston, & Company. But whether it be inferred from usage, or expressed in terms, this is a lien which rests upon contract, and to make it available against the pursuer, who was no party to the contract, it must be established either that he authorised Mitchell, Johnston, & Company to subject his property to a lien for their debt, or that he is barred by conduct or representations from exercising his rights as owner. Evidence has been adduced for the purpose of proving that the defenders have by custom of the trade a lien over cloth and rollers belonging to third parties. But that cannot be the effect of any custom of trade, and the evidence ought not in my opinion to have been admitted. Usage may determine the incidents of a contract, or explain its terms as between the contracting parties. But whether it affects the rights and property of others is a question to be determined by the settled rules of law, and not by the understanding or opinions of traders.

There can be no question as to the extent of Mitchell, Johnston, & Company's right under the contract of hiring between them and the pursuer. There were two agreements—one in 1885, and a second in 1889—and by both it was stipulated that the lessees were to use the copper rollers in their business of calico printers, but that they

should be used for no other purpose whatever. They were to have no claim of property to the engraving in any roller, but the same should belong exclusively to the lessor subject to a right of use during the currency of the hire; and it was further stipulated that the whole of the said copper rollers should be kept distinctly numbered, and also marked with the lessor's name in order to identify them as his property, and that in the event of the lessees parting with the custody to any printer or other third person, they should deliver them to such person under a receipt which should bear expressly that they were received from William Mitchell—that is, from the pursuer by name, and not from Mitchell, Johnston, & Company. So far as this contract goes, therefore, there can be no question that Mitchell, Johnston, & Company had no authority to pledge the pursuers' property directly or indirectly, or to hold themselves out as the true owners of his rollers. There may be a question whether the stipulated precautions for identifying his property were in fact sufficient, but there can be none that as between the contracting parties the lessees had no authority to hold themselves out as owners of the hired rollers, but, on the contrary, were required to make it apparent to printers and others, in whose custody they might be placed, that they did not belong to themselves but to the pursuers.

The difficulty arises from a direct breach of this condition. This appears from the evidence of the defender Mr Heys, whose testimony, the Lord Ordinary tells us, is entitled to credit. This witness depones that when the terms of dealing were arranged between him and Mitchell, Johnston, & Company, it was laid down "as a special condition that they were to supply us with their own copper and their own cloth. These are the only terms on which we print to anyone. . . . These continued to be the terms until the stoppage took place." The obvious purpose of this stipulation was of course that the defenders' lien should attach to all the copper, as well as to all the cloth, which might be put into their hands by Mitchell, Johnston, & Company; and that firm by assenting to the defenders' terms, and by the course of dealing which followed upon their assent, undoubtedly represented that the rollers now in question were their own, and bound themselves on that footing to submit to the lien. In these circumstances I do not think it necessary to consider a question which the Lord Ordinary has discussed, whether the markings on the rollers, and the terms of the receive-notes which were asked and obtained from the defenders, would of themselves have been sufficient to show that the rollers were not the property of their customers. I am disposed to think that when a customer takes receive-notes for cloth in his own name, and for copper rollers in the name of another, he gives a very significant indication that the rollers are not his own. But the defenders called for an explanation of this peculiarity and were satisfied by the answer they received. They therefore relied on the stipulation they had made, and upon the representation of their customers that they were acting in accordance with their contract. The question is, whether they can plead their contract with Mitchell, Johnston, & Company in answer to the pursuer's demand for delivery of his property.

The general rule is perfectly well settled that the possessor of corporeal moveables can give no better title to a purchaser or pledgee than he has himself acquired from the owner. If this rule is applicable, the pursuer must prevail, and the defenders have, in my opinion, shown no sufficient reason for excluding its application.

I agree with the Lord Ordinary that the doctrine of law upon which this question must be decided is that stated by Lord Herschell in the passage which he has quoted—"The general rule is, that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner." It is to be observed, upon this statement of the law, that it is not enough that the person taking the property should be misled. He must be misled by the act of the rightful owner; and what is meant by a misleading act of the owner is further defined by his Lordship's reference to the doctrine of personal estoppel. Estoppel has been defined by Lord Cranworth in the case of *Jordan* v. *Money*, in language which was cited with approval by Lord Selborne in the later case of the *Citizens Bank of Louisiana* v. *The National Bank of New Orleans*, L.R., 6 E. and I. App. 360—"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." If this be so, the doctrine of personal estoppel would appear to be identical with our own doctrine of personal bar; and according to the definition two things must be established in order to raise the plea. The party against whom it is taken must have made representations by words or conduct concerning existing facts, with the intention of inducing another to act in the belief that these representations were true; and the party raising the plea must in fact have contracted or altered his position, in reliance on the truth of the representations. It appears to me that neither of these points has been established. The conduct which is said to amount to a representation on the part of the pursuer is that he put his

property into the hands of Mitchell, Johnston, & Company, without taking precautions to inform third parties that he was himself the true owner. But this was not done with the intention of inducing Mitchell, Johnston, & Company to deal with it as their own, or of inducing third persons to transact with them in that belief. The intention of the contract of hiring was the very reverse. It is said that by empowering his lessees to send his copper rollers to a printer for the specific purpose for which they were hired, he authorised or allowed them to represent that the rollers were their own. But there is no presumption of law that all the copper rollers in the possession of a jobbing printer are his own property. They may be borrowed or hired. And accordingly Mr Heys' evidence shows that the defenders did not in fact rely upon any inference of ownership arising from possession, but thought it necessary to stipulate expressly that all the copper sent to them by Mitchell, Johnston, & Company should be their own. He says that these are the only terms on which they print for anyone. But there would be no occasion for such terms if the defenders did not suppose that otherwise rollers might be sent to them that did not belong to their customers. The conclusion is, in the first place, that the pursuer made no representation by words or conduct on which he intended that the defenders should act; and secondly, that they did not in fact rely upon any representation of his, but solely on the false representations of his lessees.

It is said that Mitchell, Johnston, & Company had an ostensible authority to deal with the pursuers' rollers as their own; and the defenders' counsel appealed to the cases in which it has been held that the authority of an agent is to be measured by the extent of his usual employment, and not by his private instructions. The rule applies where an agent is carrying on a public business and deals with goods entrusted to him in the ordinary course of that business. But a rule for determining the extent of an agent's authority cannot apply to a case where there is no relation of principal and agent. Mitchell, Johnston, & Company were in no sense the pursuer's agents. They had a definite right of use for a specific purpose. In the exercise of that right, they might deal with the lessor's property to the extent of the interest they had acquired under a contract of hiring. But they had no authority to make any contract on his behalf, or to affect in any way the right with which he had not parted. I see no ground on which it can be held that they could subject the pursuer's property to a lien, which would not equally support a pledge or sale. But I do not understand it to be maintained that they could have pledged the rollers for their own debt, or that they could have given a good title to a purchaser.

I am therefore of opinion that the case falls within the general rule stated by Lord Herschell, and not within the exception.

The cases cited by the defenders' counsel do not appear to me to create any difficulty in the application of the general rule of law. It is obvious that the decisions as to negotiable instruments have no bearing. It is settled law that such instruments, passing from hand to hand, like the ordinary currency of the country, may be retained by those who acquire them in good faith and for value, notwithstanding any defect of title in the persons from whom they are acquired. The cases in which principals have been held bound by the contracts of their agents are inapplicable for the reason already given. But it may be right to examine more carefully the three decisions which the Lord Ordinary has cited in his opinion.

Weldon v. *Gould*, 3 Esp. 268, was a decision at *nisi prius*, and the facts are very briefly reported. But, as I understand the statement, the plaintiff had put calicoes into the hands of one Pearce, as an agent to contract with the defendant or others for the printing of the calicoes, and the agent contracted in his own name. Lord Kenyon likened the case to that of a factor for sale, and cited *George* v. *Claget* as an authority in point. Now, *George* v. *Claget*, 2 Smith's L.C. 113, has been much discussed in more recent cases. The rule which it establishes is thus stated by Mr Justice Willes in *Turner* v. *Thomas*, L.R., 6 C.P. 613—"Where a factor sells in his own name to a third person, who buys without notice that he is dealing with an agent, the latter has ordinarily a right to be put in the same position as if the factor were the real principal in the transaction, and may set up against the concealed principal any defence which he may have against the factor. That rule is founded upon principles of common honesty. Where one satisfies his contract with the person with whom he has contracted, he ought not to suffer by reason of its afterwards turning out that there was a concealed principal." The same distinguished Judge says, in *Semenza* v. *Brinsley*, 18 C.B. (N.S.) 467, that "in order to make the defence a valid defence within the rule, it seems obvious that the plea must show that the contract was made by a person whom the plaintiff entrusted with the possession and ownership of the goods, that he sold them as his own, in his own name as principal, with the authority of the plaintiff, and that the defendant then believed him to be the principal in the transaction." The case is explained in the same way by the learned Lords who decided *Cooke* v. *Eshelby* in the House of Lords, L.R. 12 App. Cas. 271. It is true that their Lordships point out that the authority of the agent to appear as the contracting party may be inferred from conduct. But whether the agent's authority is expressed or implied, the rule which these cases illustrate appears to be, that where the agent of an undisclosed principal is allowed to contract in his own name, the persons with whom he contracts are entitled to consider him as to all intents and purposes the principal.

But to bring the rule into operation a contract must have been made on behalf of the principal which the latter has right to enforce. It is inapplicable to a contract made by a lessee on his own behalf for delivery of goods which do not belong to him, and which he has no title to dispose of.

Pickering v. *Busk* is discussed by Lord Blackburn in *Cole* v. *The North-Western Bank*, L.R., 10 C.P. 364; and I think it will be useful to quote what his Lordship says, not only for his statement of the point decided, but also for his comment upon the passage cited by the Lord Ordinary from the judgment of Lord Ellenborough—"In *Pickering* v. *Busk*, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were at the plaintiff's desire transferred into the name of Swallow. It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further; he says:—'If a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessary and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principal in respect of the subject matter, and there would be no safety in mercantile transactions if he could not.' It is to be observed, however, that the other Judges based their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell, and that Lord Ellenborough limits his more extensive doctrine to the case of a person 'authorising another to assume the apparent right of disposing of property in the ordinary course of trade,' or in other words, 'entrusting it to an agent whose business it is to sell,' and on *Wilkinson* v. *King* being cited in the argument he says 'That was the case of a wharfinger whose proper business was not to sell, and to whom the goods were sent for the mere purpose of custody,' from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were entrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent."

Neither of these decisions appears to me to be applicable to a case where the person from whom goods are acquired is not in possession either as owner or as agent, and has no authority, express or implied, from the true owner to make any contract on his behalf.

Brown v. *Marr*, 7 R. 427, depends upon a different principle, which seems to me altogether inapposite. A retail dealer had obtained articles of jewellery from wholesale firms on contracts of sale and return on pretence that he meant to trade with them, and without attempting to trade he straightway pawned them with various pawnbrokers. The main ground of judgment was that by such a contract all the substantial rights of ownership pass to the buyer. He has an option to return the goods within a stipulated time instead of paying the price. But whenever he exercises any right of property as by selling or pledging the goods, the option ceases, and accordingly the title he may give to third persons dealing with him in good faith, does not depend upon any authority derived from the vendor on sale and return, but upon his own absolute right of property. The Lord Ordinary observes that the same judgment would have been given if the contracts had been sales on approbation, but if so, it would have been based upon precisely the same reasoning, for Lord Moncreiff points out that the two forms of contract differ in this respect only, that in a sale on approbation the goods may be returned if not approved, which on sale and return may be returned if not sold, and in both the sale becomes absolute and the right to return is lost if the goods are retained beyond a stipulated or beyond a reasonable time, and therefore, if the contracts had been honestly obtained, there could be no question of the buyer's power to pledge in respect of his right of property, which, even if it were not absolute from the first, although subject to a resolutive condition, necessarily became absolute as soon as he thought fit to determine the condition. The difficulty was that the contract had been obtained by fraud. But the answer is that contracts obtained by fraud are valid until they are rescinded, and therefore that they cannot be rescinded to the prejudice of rights and interests acquired by third parties in good faith and for value.

Lord Moncreiff may seem to lay down a wider doctrine in the passage cited by the Lord Ordinary, but his Lordship's observations must be read with reference to the case he was considering. The principle to which his Lordship refers, that where one of two innocent parties must suffer by the fraud of a third, the loss must fall upon him who has enabled the wrongdoer to commit the fraud, has been applied in cases where the wrongdoer has not merely been entrusted with goods or documents of title, but has also been clothed with an apparent authority to dispose of them. Where there is no such authority, the rule is that stated by Lord Cairns in *Cundy* v. *Lindsay*, L.R. 3 App. Cas. 463, that where it is necessary to determine as between two parties both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both must fall, the Court "can do no more than apply rigorously the settled and well known rules of law."

For these reasons I am of opinion that the defenders are not entitled to retain the rollers which are admittedly the pursuer's

property. But it appears that 123 of the rollers which he claims were bought by the pursuer from Mitchell, Johnston, & Company, and were not delivered to him, but had been sent to the defenders in the ordinary course of business by the vendors before the sale to the pursuer, and are still in their possession. I agree with the Lord Ordinary that the right thus acquired by the defenders cannot be affected by a subsequent contract of sale. So far as regards these rollers the defenders should be assoilzied, and the pursuer should have decree for delivery of the remainder.

LORD ADAM concurred.

LORD M'LAREN—If there had been any difference of opinion among your Lordships I should have had no vote, as I was not present the last day on which the case was argued, but I heard an excellent argument in the two opening speeches, and I should like to say that I entirely concur in the principles of law laid down by Lord Kinnear, and their application to the facts of the case.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, and ordained the defenders to deliver to the pursuer the copper rollers mentioned in the summons, with the exception of the 123 rollers mentioned in the last paragraph of Lord Kinnear's opinion, and 5 rollers which were not admitted to be in the defenders' possession, and the pursuer's claim to the said 5 rollers was reserved.

Counsel for the Pursuer — Guthrie — M'Clure. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—C. S. Dickson —Salvesen. Agent—F. J. Martin, W.S.

Wednesday, March 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

M'BRIDE *v.* CALEDONIAN RAILWAY COMPANY.

(Sequel to case reported *ante*, vol. xxix, p. 208, and 19 R. 255.)

Title to Sue--Reparation—Damage to Property—Title to Sue of Owner who has Granted Conveyance ex facie Absolute, but really in Security.

In 1880 A conveyed a property of which he was owner to a bank by an *ex facie* absolute disposition. The bank reconveyed the property in 1893 by a disposition which proceeded on the narrative that the disposition of 1880, though *ex facie* absolute, had really been granted in security of an advance made to A by the bank, which had been repaid. *Held* that A's true right being instructed by the terms of the reconveyance, he had a good title to sue a railway company for damages which he alleged had been caused to the property in 1890 by their negligence.

Reparation—Damage to Property—Negligence—Issue.

An owner of house property sued a railway company for damage alleged to have been caused to his buildings owing to the negligent way in which the company had conducted certain operations for the construction of a sewer in the street where his property was situated. Form of issue *approved.*

By disposition dated 20th December 1880, John M'Bride disponed to and in favour of the Clydesdale Bank "for sundry good and onerous causes and considerations . . . heritably and irredeemably," certain subjects forming Nos. 39 to 55 M'Alpine Street, Glasgow. The disposition was unqualified in any way and was *ex facie* absolute.

By an agreement dated 25th January 1889 between the bank and M'Bride, the latter agreed to make payment to the bank of the sum of £500 by instalments of a certain amount, and the bank undertook that when the whole of the said sum of £500 should have been paid, they would reconvey and surrender their interest in the M'Alpine Street property to M'Bride.

By disposition and reconveyance dated 1st March 1893 the Clydesdale Bank, on the narrative that by the disposition of 1880 M'Bride had disponed to them the subjects therein mentioned, and, "considering that although said disposition was *ex facie* absolute, it was truly granted in security of an advancement of £2500 made by us to him, and now seeing that he has made payment to us of certain sums of money which we have agreed to accept in full satisfaction of said advance," disponed and reconveyed the said subjects to M'Bride with their whole right, title, and interest in the same.

In the end of 1889 the Caledonian Railway Company began to construct a sewer in M'Alpine Street uuder the provisions contained in sub-section L of section 41 of the Glasgow Central Railway Act 1888, whereby it was provided that where any of the works authorised by the Act should interfere with the sewers under the control of the corporation, the company should provide substituted works, the corporation being bound to communicate their powers so far as necessary.

In May 1893 M'Bride raised an action against the Caledonian Railway Company in the Sheriff Court at Glasgow for payment of £5500 as damages, averring that owing to the "reckless, negligent, and unskilful manner" in which the company had conducted their work in certain particulars, they had seriously damaged the buildings on his property.

The defender pleaded, *inter alia*—"(1) No title to sue."

On 13th September 1893 the Sheriff-Substitute (SPENS) allowed a proof.