earlier devices a cut-off arrangement had been used to modify the effect of steam pressure in the casing so that at certain points in the stroke of the engine-piston the pressure should not be so great as at other parts of the stroke. In one case this was done to give greater freedom to the slide valves admitting the steam into the cylinders at the moment at which these slide valves were being moved in their seats by the eccentric. In another case a cut-off was used to check the entrance of steam into the cylinder at a certain stage of the stroke so as to allow the steam already in the cylinder to expand. But these devices did not act with the purpose of stopping all flow of steam into the control valve casing when the engine was not in motion; they only controlled the steam which was passing in by the open control valve. The pursuer's arrangement had a different purpose—the exclusion of steam from the control valve casing when the engine was not working.

In my opinion the pursuer secured a master patent for effecting a useful purpose which had not been previously effected. That being so, the question is whether the defenders' apparatus intended to effect the same purpose is an infringement of the patent of the pursuer.

The pursuer in his apparatus as he applies it in practice uses a sliding control valve. Upon its shaft he places two slopes or slides, with a horizontal space between their lower ends. In this horizontal space when the control valve is closed there rests the end of a valve which when it is in that position shuts of the steam from entering the valve casing. When the control valve is moved so as to open the passage to the engine, one of the slides pushes the cut-off valve out of its seat and thus allows the steam into the control valve casing and so on to the engine. On the control valve being brought back to zero the cut-off valve once more comes into action and stops the passage of steam into the casing.

The defenders' arrangement consists of a rocking valve, which by being turned to one side or other opens a port to admit steam to one end or other of the cylinder. Upon the spindle of this valve there is an eccentric, the rod from which closes a valve in a small pipe into which steam can enter, and which steam holds a cut-off valve in the closed position, the steam from the boiler pressing equally on both sides of the valve. When the control valve is moved the eccentric is also moved, with the effect that the small pipe which was full of steam has a port open to the air, and the pressure being thus relieved from one side of the cut-off valve, it is opened and the steam to drive the engine is free to pass on by the control valve to the cylinder. On the control valve being again turned to the neutral position, the small pipe is again sealed, and the steam entering it under pressure the cut-off valve is once more held in position and steam shut off from the control valve casing.

It appears to me that the apparatus of the defenders is only an equivalent for that of the pursuers, effecting the same purpose by well-known means, and only substituting one detail device for another without any real difference. On the whole matter I agree with the Lord Ordinary in his reading of the pursuers' specification, and in holding that the pursuers have established their claim against the defenders as infringers of their rights under their patents. As regards the question of damages, I do not see any sufficient ground for interfering with the Lord Ordinary's decision on that matter.

LORD YOUNG concurred.

LORD TRAYNER—I concur. The validity of the pursuers' patent is not in dispute. The question is, has it been infringed by the defenders. I agree with your Lordship and the Lord Ordinary in thinking that it has.

LORD MONCREIFF—I am of the same opinion. I agree with and adopt the reasons clearly and concisely given by the Lord Ordinary.

The novelty and value of the pursuers' invention being indisputable the only question is whether the defenders' specification constitutes an infringement of it.

I am of opinion with the Lord Ordinary and your Lordships that it does. The methods adopted by the defenders are not identical, but for all that they are equivalents, more complicated, but calculated and intended to attain the same result as the pursuers' invention, and thus deprive the pursuers of the profits to which they are entitled under their patent.

The Court adhered.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Sandeman. Agents—Steedman & Ramage, W.S.

Counsel for the Defenders and Reclaimers—Ure, K.C.—Hunter. Agents—Miller & Murray, S.S.C.

Tuesday, November 8.

SECOND DIVISION.

[Lord Low, Ordinary.

M'DOWALL & NEILSON'S TRUSTEE *v.* J. B. SNOWBALL COMPANY, LIMITED

Sale—Stoppage in transitu—Duration of Transit—Construction of Agreement—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *secs.* 44 *and* 45.

By c.i.f. memorandum of agreement a firm of Glasgow timber merchants purchased from a firm of timber merchants at Chatham, New Brunswick, certain timber at a price "including freight and insurance to Glasgow." "The goods," the agreement provided, "are deliverable in the usual and customary manner at Miramichi (a New Brunswick port)

with all reasonable dispatch . . . Should the vessel or vessels fixed for this contract be lost previous to loading . . . then sellers to have the option of substituting another." The sellers shipped the timber in a vessel previously chartered by them to "sail and proceed to load at Miramichi, and being loaded proceed to a direct safe port on the west coast of England, Glasgow, east coast of Ireland. . . ." The bill of lading was granted to the sellers in these terms—"Shipped . . . by (the sellers) . . . in and upon the good ship . . . now lying in the port of Chatham, N.B., and bound for Glasgow," a cargo to be delivered "on arrival at the aforesaid port of Glasgow."

The sellers having heard of the buyers' insolvency stopped the cargo immediately on the vessel's arrival at Glasgow.

Held that the transit of the cargo as between seller and buyer did not terminate at Miramichi but at Glasgow, and that the stoppage was effectual.

Bill of Exchange — "Approved" Bill—Payment by "Approved" Acceptance—Alleged Meaning of Non-technical Terms by Custom of Particular Trade not Admissible to Proof—Unpaid Sellers—Sale of Goods Act 1893 (56 *and* 57 *Vict. c.* 71), *sec.* 44.

A memorandum of agreement between a buyer and seller for the purchase and sale of a consignment of wood contained the following provision as to payment—"Balance of invoice to be by approved acceptance to seller or seller's agents' draft." The seller took bills accepted by the buyer a few days before sequestration. These bills proved to be valueless.

Held that the words "approved acceptance" had a well-known legal import, and meant an acceptance to which no reasonable objection could be taken, that proof of an alleged custom of the wood trade giving these words a different meaning was incompetent, and that the seller was an unpaid seller in the sense of section 44 of the Sale of Goods Act 1893.

The Sale of Goods Act 1893, section 44, enacts—"*Right of Stoppage in transitu.*—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price."

Section 45 — "*Duration of Transit* — (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee or custodier."

By c.i.f. memorandum of agreement, dated 11th February 1903, entered into between M'Dowall & Neilson, timber merchants, Glasgow, and J. B. Snowball Company, Limited, timber merchants, Chatham, New Brunswick, the former purchased and the latter sold, through the agency of Messrs Farnworth & Jardine, of Liverpool, certain timber "as classified at port of shipment, and all foreign measure. The prices stated below are in British sterling money, including freight and insurance to Glasgow, or so near thereto as she may safely get always afloat. Lighterage, if any, to be at the expense and risk of the buyers. The goods are deliverable in the usual and customary manner at Miramichi (a New Brunswick port) with all reasonable despatch, according to the season of the year, and agreeably to the custom of the port during the shipping season 1903. . . . Should the vessel or vessels fixed for this contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or cancelling the contract, but in the latter case the buyers to have the option of taking the goods at an equivalent f.o.b. price, and usual f.o.b. conditions calculated at the date of this contract, such option to be declared without delay. *Payment.*—Buyers to adopt usual charter-party and pay freight in accordance therewith, balance of invoice to be by approved acceptance to sellers or sellers' agents' draft, payable in London at one hundred and twenty days from sight of and in exchange for bill of lading, policy of insurance, and other shipping documents. If required the buyer shall give sellers or sellers' agents an approved acceptance at thirty days from date of bill of lading for advances, &c., made abroad on account of freight, receiving in exchange the captain's receipt on the bill of lading and a policy of insurance for amount of said advance, the premium of same to be paid by the ship as usual."

The timber was shipped by J. B. Snowball Company, Limited, in September 1903 on board the "Angelo Padre," chartered by them on 15th December 1902, the charter-party bearing that it was agreed between the owners and Messrs J. B. Snowball Company, Limited, Chatham, N.B., that the "Angelo Padre," or substitute should, "with all convenient speed, sail and proceed to load at Miramichi for four consecutive trips, commencing first open water 1903," a cargo of timber, "and being so loaded, shall therewith proceed to a direct safe port on the west coast of England, Glasgow, east coast of Ireland, London, or a safe port between Bordeaux and Havre, both inclusive, Rouen excluded, as ordered on signing bills of lading, and deliver the same." . . .

The bill of lading of the cargo, dated in Chatham, N.B., 3rd September 1903, was granted by the master to J. B. Snowball Company, Limited, and was as follows:—"Shipped in good order and condition by J. B. Snowball Company, Limited, in . . . the 'Angelo Padre,' whereof A. Girardi is

master for the present voyage, and now lying in the port of Chatham, N.B., and bound for Glasgow; to say," a quantity of timber "to be delivered in like good order and condition in dock as ordered on arrival at the aforesaid port of Glasgow." . . .

The vessel arrived in Glasgow on 25th September 1903. Immediately on her arrival, and before any of the cargo had been discharged, J. B. Snowball Company, Limited, having learned that M'Dowall & Neilson were insolvent, served a notice of stoppage *in transitu* on Girardi, the master of the "Angelo Padre."

The master, Girardi, thereafter unloaded the cargo and handed it over to Macgregor & Ferguson, timber merchants, Glasgow, to be held for the true owners after payment of freight and charges.

On 1st October 1903 the estates of M'Dowall & Neilson were sequestrated, and Robert Reid appointed trustee.

On 13th October an action of multiplepoinding was raised at the instance of Girardi and Macgregor & Ferguson, in which the cargo was the fund *in medio*. The cargo was sold by order of the Court, and the proceeds, after deduction of freight, charges, and expenses, were consigned.

Claims in the multiplepoinding were lodged by J. B. Snowball Company, Limited, and by Robert Reid, trustee on the sequestrated estate of M'Dowall & Neilson.

J. B. Snowball Company claimed to be ranked and preferred to the proceeds of the cargo to the extent of the price of the goods. They averred, *inter alia*, that the 'Angelo Padre' "was chartered by these claimants on their own account for the purpose of said shipment, conform to charter-party dated 15th December 1902, which is herewith produced. The pursuer A. Girardi on 3rd September 1903 granted bills of lading in favour of these claimants, by which he acknowledged that said cargo had been shipped by them, and made the said cargo deliverable to their order or the order of their assigns, they paying freight for the said goods in terms of the charter-party under which said cargo was loaded. The claimants thereupon forwarded said bills of lading to their agents in England, the defenders Messrs Farnworth & Jardine, who on 15th September 1903 drew two bills for £3378, 7s. 5d. and £3000 upon the said M'Dowall & Neilson, the purchasers, at 120 days after the date thereof. These two drafts, along with the bills of lading and other documents, having been forwarded by the claimants' agents to Messrs Singleton, Dunn, & Company, timber brokers, Glasgow, were sent by them to Messrs M'Dowall & Neilson. The latter accepted said drafts and returned them to Messrs Singleton, Dunn, & Company on 18th September 1903. The said M'Dowall & Neilson were at the date of receiving said drafts and documents from Messrs Singleton, Dunn, & Company, insolvent, and aware of their insolvent position. The acceptances which they purported to grant to Messrs Singleton, Dunn, & Company of said drafts were not at the time they were granted capable of being discounted in the course of business on the acceptors' credit, and were not approved acceptances in the sense of the contract."

They pleaded—"(1) The claimants being unpaid sellers of the goods named in the summons, and having effectually stopped them *in transitu* on the insolvency of the buyers, they are entitled to the proceeds of said goods to the extent of the price due to the claimants. (2) The averment as to custom of trade contained in the claim for the trustee Robert Reid is irrelevant to be admitted to probation."

M'Dowall & Neilson's trustee claimed to be ranked and preferred to the proceeds of the whole cargo, or in any event to the balance after payment of the price. He averred, *inter alia*—"The said goods were deliverable in the usual and customary manner at Miramichi and agreeably to the custom of of that port during the shipping season of 1903. . . . The said goods were duly delivered by the sellers to the buyers at Miramichi, the place of delivery mentioned in said agreement, and the *transitus* from the sellers to the buyers was thereupon ended. It was necessary for the buyers to give fresh instructions as to the destination of the goods, and the said M'Dowall & Neilson instructed J. B. Snowball Company, Limited, as their agents in that behalf, to ship the said goods to Glasgow. The said J. B. Snowball Company, Limited, in fulfilment of these instructions, chartered on behalf of the said M'Dowall & Neilson the vessel 'Angelo Padre' for the conveyance of the said goods from Chatham to Glasgow. . . . On 15th September 1903 Messrs Singleton, Dunn, & Company, timber brokers, Glasgow, as representing the said J. B. Snowball Company, Limited, wrote the said M'Dowall & Neilson enclosing the bill of lading for the said goods, endorsed by the said J. B. Snowball Company, Limited, to Messrs Farnworth & Jardine, and again endorsed by the latter, and the title to the goods was thereby transferred, with consent of the sellers, to the said M'Dowall & Neilson. There were also enclosed the invoice, specification, and two drafts for £3000 and £3378, 7s. 5d. for acceptance. The said M'Dowall & Neilson, in the ordinary course of their business, and while solvent, duly accepted the said two drafts and returned them to Messrs Singleton, Dunn, & Company, and the latter, on 17th September, sent M'Dowall & Neilson the charter-party, and on 19th September the policies of insurance. The said two bills of exchange were retained by J. B. Snowball Company or their agents until 5th October 1903, when they were sent to the claimant, although they knew that the claimant was from 28th September acting for the creditors, and had been appointed judicial factor on the sequestrated estates on 1st October. The said two drafts of M'Dowall & Neilson were accepted and approved of by J. B. Snowball Company, Limited, and are approved acceptances in terms of said agreement. They were accepted by J. B. Snowball Company, Limited, in full payment and satisfaction of and in substitution

for their claim for the price of the goods under the contract of sale. The said J. B. Snowball Company, Limited, thereafter intended to rely, and did rely, solely on the credit of the said two approved acceptances. In any event, by the usage and custom of the wood trade, an 'approved acceptance' is understood to mean a bill accepted in full payment and satisfaction of the price of the goods in respect of which the bill is granted. The said usage and custom is well known to the said J. B. Snowball Company, Limited, and both parties to the contract of sale had such usage and custom in contemplation when they entered into said agreement."

He pleaded, *inter alia*—"(2) The goods in question having reached their destination under said agreement, and having been taken possession of by the buyers, there was no stoppage *in transitu*. (3) In any event, the goods in question having been paid for, stoppage *in transitu* was not competent."

On 19th March the Lord Ordinary (Low) pronounced the following interlocutor:—"Sustain the claim for J. B. Snowball Company, Limited: Repels the first head of the claim for Robert Reid, trustee on the sequestrated estates of M'Dowall & Neilson: Sustains said claim to the balance of the proceeds of the cargo of timber after payment of the price of said cargo."

Opinion.—"The first question in this case is whether the goods were in fact *in transitu* when the sellers stopped delivery on board ship at Glasgow.

"The trustee in bankruptcy of the purchasers avers that the goods were delivered to them at Miramichi, and that the *transitus* as between seller and buyer then came to an end, and that the shipment of the goods by the sellers from Miramichi to Glasgow was carried out by the latter, not as sellers of the goods, but as agents whom the buyers employed for that purpose.

"If Miramichi was the destination of the goods under the contract between the sellers and the buyers, and if the buyers or their agents actually took delivery of the goods there, and then entered into a new contract with the sellers to carry the goods to Glasgow, I do not think that the voyage between Miramichi and Glasgow would be part of the *transitus* as between buyer and seller, because it would not be a *transitus* in pursuance of the contract of sale and for the purpose of conveying the goods from the seller to the buyer.

"The averments of the buyers, however, are extremely bare. I do not think that in the peculiar circumstances of the case they are sufficiently specific to be remitted to probation.

"The circumstances, so far as admitted or established by the documents founded upon, are as follows:—[*His Lordship stated these circumstances.*]

"The contention of the trustee that the goods were not *in transitu* when on the voyage from Miramichi to Glasgow is founded, in the first place, upon the terms of the agreement for the sale of the timber.

"That agreement is partly printed, and appears to be a form of agreement used by Farnworth & Jardine, the agents of Snowball Company in England.

"The agreement bears that M'Dowall & Neilson purchase, and J. B. Snowball Company, Limited, sell, through the agency of Farnworth & Jardine, the under-mentioned wood goods; and then it proceeds:—'The prices stated below are in British sterling money, including freight and insurance to Glasgow, or so near thereto as she may safely get always afloat. Lighterage, if any, to be at expense and risk of buyers. The goods are deliverable in the usual and customary manner at Miramichi with all reasonable dispatch, according to the season of the year, and according to the custom of the port during the shipping season 1903.'

"There then follow provisions which seem to me to show very clearly that it was contemplated that in any case the goods would require to be sent by ship by the sellers from Miramichi to their final destination. For example, it is provided that 'should the vessel or vessels fixed for the contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or' (subject to certain conditions) 'cancelling the contract.'

"M'Dowall & Neilson's trustee founded upon the provision that the goods were deliverable at Miramichi, and argued that that established that the *transitus* as between seller and buyer terminated there. I am unable so to read the contract, because, as I have said, it contemplates that in order to carry it out it will be necessary for the sellers to send on the goods by ship from Miramichi, and the conditions upon which that is to be done are enumerated.

"I do not know precisely why the clause making the goods deliverable at Miramichi was inserted. I imagine, however, that the deals and battens required to be brought from up-country to Miramichi, where they could be put on board ship, and one object of the clause certainly was to secure that the goods should be brought to Miramichi 'during the shipping season,' which I gather from the charter-party to mean when the bay is not closed by ice. I am not therefore satisfied that the clause meant more than that the goods were to be brought to Miramichi in a manner and at a time suitable for shipment.

"Further, I think that it is plain that the buyers must have named Glasgow as the destination of the goods. I do not see how otherwise Glasgow should have been mentioned, nor why the price should have included freight and insurance to Glasgow.

"The trustee, however, avers (and he asks proof of the averment) that 'the said goods were duly delivered by the sellers to the buyers at Miramichi, the place of delivery mentioned in said agreement, and the *transitus* from the sellers to the buyers was thereupon ended.'

"Now, I do not know whether that means

that the goods were actually handed over to the buyers or their agents at Miramichi, or whether the averment is merely the inference which the trustee draws from the provision in the contract as to delivery at Miramichi, as he construes it.

"My impression is that the latter is the case, because the learned counsel for the trustee could not tell me to whom the goods were delivered. All the information he had was that there had been a good deal of correspondence between the buyers and the sellers as to the despatch of the goods from Miramichi. Snowball Company, on the other hand, say that no delivery was made to anyone at Miramichi.

"Now if actual delivery of the goods was given at Miramichi, the trustee must know who was the representative or agent of the buyers to whom delivery was made, and I do not see my way to allow a proof of the averment with which I am dealing unless it is amended by adding a statement to that effect. I do not think that I would be justified in putting the parties to the expense of a proof upon an averment of doubtful relevancy, when the circumstances, the specification of which would make the averment relevant, must be known to the trustee if they actually existed.

"The trustee, however, contended that even assuming that the goods were not delivered to any third party representing the buyers at Miramichi, still the *transitus* there came to an end, because when the goods reached Miramichi nothing further could be done with them without further instructions. The leading authority founded upon was *Dixon* v. *Baldwen* (5 East. 175), where Lord Ellenborough said that the *transitus* had come to an end because 'the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them in motion again, to communicate to them another substantive destination, and that without such orders they would continue stationary.'

"Now, in the first place, I do not understand why new orders from the buyers should have been necessary so far as fixing the ultimate destination of the goods was concerned. Glasgow was in fact the ultimate destination, and 'Glasgow' was named in the contract in terms which it seems to me could have no meaning unless it was the place to which it was intended that the goods should be sent; and as I have pointed out, freight and insurance to Glasgow were included in the price.

"But even assuming that when the goods arrived at Miramichi it was necessary for the buyers to give the sellers instructions where to send them, that, in my judgment, would make no difference. It is plain from the contract that the goods were in no case to remain at Miramichi, but were to be forwarded by ship from Miramichi by the sellers to the purchasers. Therefore, assuming that the goods remained for a time at Miramichi in the sellers' custody awaiting the buyers' instructions where to send them, the transit would not be at an end, because the sellers would not be holding the goods as the buyers' agents to take possession of and to keep them, but only for the purpose of forwarding them in fulfilment of the contract of sale.

"In the case of *Dixon* v. *Baldwyn* the circumstances shortly stated were these:—Battier of London was in the habit of buying cotton goods from Baldwin of Manchester to be forwarded to Metcalf & Company at Hull, for the purpose of being shipped by the latter to Hamburg. The course of dealing was, that after Metcalf & Company received the goods, they held them for Battier until they received instruction from him when and to whom to ship them to Hamburg. In ordering from Baldwin the goods in regard to which the question of the seller's right to stop *in transitu* arose, Battier wrote to Baldwin specifying the goods and telling him to forward them to Metcalf & Company 'to be shipped to Hamburg as usual.' It was upon the latter words that the sellers maintained that the goods were still *in transitu* after they had been shipped to Hamburg by Metcalf & Company pursuant upon instructions which they had received from Battier.

"It was held as between Battier and Baldwin the *transitus* ended when the goods were delivered to Metcalfe & Company, the latter being Battier's agents to hold the goods altogether at his disposal. It seems to me that the circumstances in that case were substantially different from those with which I am dealing.

"A case much more easily allied to the present is the *Rosevear China Clay Co.* (11 Ch. Div. 560.) In that case James, L.J., said —'The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. . . . It seems to me that the mere fact that the port of destination was left uncertain, or was changed after the contract of sale, can make no difference.'

"In the same case Brett, L.J., said—'It seems to me that it can make no difference whether the destination of the goods is communicated to the vendor at the time of the contract for sale, or whether the destination is to be named after the contract but before the shipment."

"I am therefore of opinion that unless the goods were actually delivered to the buyers or their representative at Miramichi they were still *in transitu* during the voyage between Chatham and Glasgow.

"The next question is, whether, assuming that the goods were *in transitu* when they were stopped by Snowball Company, the latter had not received payment of the price.

"In the memorandum of agreement it was provided—'Balance of invoice to be by approved acceptance to sellers or seller's agents' draft, payable in London at one hundred and twenty days from sight of and in exchange for bill of lading, policy of insurance, and other shipping documents.'

"On 15th September Farnworth & Jardine sent to M'Dowall & Neilson, through Singleton, Dunn, & Company of Glasgow, the bill of lading, and two bills of exchange at 120 days, for £3378, 7s. 5d. and £3000 respectively, drawn by Farnworth & Jardine upon M'Dowall & Neilson. Upon 18th September the latter firm accepted the bills, and returned them to Singleton, Dunn, & Company. The estates of M'Dowall & Neilson were sequestrated under the Bankruptcy Acts on 1st October, and their trustee avers that on 5th October the bills were returned to him by Singleton, Dunn, & Company.

"The question therefore is, whether in these circumstances Snowball Company were unpaid sellers who were entitled to stop the goods *in transitu*.

"As a rule when a bill is taken instead of present payment of a debt, and the bill is not paid at maturity, the creditor may sue for the debt just as if the bill had not been granted. In short, payment by bill is in general only conditional payment, and I do not think that it makes any difference that payment is stipulated to be by 'approved' bill, because that is a stipulation in favour of the creditor, an 'approved bill having been held to mean a bill to which no reasonable objection can be taken.

"Now, here the bills were worthless, having been granted by M'Dowall & Neilson upon the eve of bankruptcy, and their estates having been actually sequestrated a few days afterwards. In such circumstances it seems to me that Snowball Company cannot be held to have received payment of the goods unless either they contracted to take the bills as in full payment and discharge of the price, or so acted as to bar themselves from maintaining that they had not done so.

"The averment of M'Dowall & Neilson's trustee is as follows:—'They (the bills) were accepted by J. B. Snowball Company, Limited, in full payment and satisfaction of and in substitution for their claim for the price of the goods under the contract of sale. . . . In any event, by the usage and custom of the wood trade an 'approved acceptance' is understood to mean a bill accepted in full payment and satisfaction of the price of the goods in respect of which the bill is granted.

"Now, in regard to the first of these averments, I do not know whether the trustee is merely stating what in his view is the legal result of the memorandum of agreement, or if he means to say that there were circumstances (which he does not specify) which show that the bills were in fact taken in full payment and satisfaction of the price. If he means the former I do not agree with him; if the latter, the averment, in my opinion, fails for want of specification.

"I am unable to read the memorandum of agreement as binding Snowball Company to take the bills as in full payment and satisfaction even although they should turn out to be worthless. The stipulation in regard to 'approved acceptance' is contained in a clause which has the general heading 'Payment,' that word not being used in the clause itself. I may say, however, that I do not regard that as material, because I apprehend that the mere fact that in such a case the agreement says that payment is to be by bill is not equivalent to a stipulation that the bill shall be taken as in satisfaction and discharge of the price, and renders the payment by bill otherwise than conditional. The clause provides for a variety of things. It commences — 'Buyers to adopt usual charter-party and pay freight in accordance therewith.' Then follow the words which I have already quoted, to the effect that 'balance of invoice to be by approved acceptance,' and so on; and finally it provided 'that if required the buyer shall give sellers or sellers' agents an approved acceptance at thirty days for advances made abroad on account of freight, receiving in exchange the captain's receipt and a policy of insurance for the amount. I do not think that there is anything in that clause to make the payment by bill other than a conditional payment."

"Coming now to the averment in regard to the alleged custom of trade I would, in the first place, remark that as averred it seems to me to be no more than a statement of a proposition in law of general application. I do not doubt that if sellers of goods in fact take a bill as 'in full payment and satisfaction' of the price, then the price will be held to be paid. What the trustee intends to aver however is, I understand, that according to the custom of the wood trade in cases where an approved bill is stipulated for, whenever the seller takes without objection a bill from the buyer it is regarded as an approved bill accepted by him in full payment and discharge of the price. In other words, the alleged custom is that by 'approved bill' is meant a bill of which the seller has indicated his approval by taking it, and not as in the ordinary case a bill to which no reasonable objection can be taken.

"Whether, however, that is or is not a correct statement of the view of the trustee I am of opinion that this is a case in which it is not competent to prove an alleged custom of trade in order to construe the agreement. Such a proof could only be allowed on the grounds that the words in the agreement, 'approved acceptance,' were technical words of the trade and required explanation of what they signified in the trade. These words, however, are not technical words of the wood trade, but are common in mercantile contracts and have a well-known legal import. To allow evidence in such a case would therefore, it seems to me, be to practically hand over to the witnesses the construction of the contract, which is a matter for the Court alone. I may refer to the case of *Calder* v. *Aitchison & Company*, 1831, 9 S. 777, 5 W. & S. 410; and *Steel Company of Scotland* v. *Tancred, Arrol, & Company*, December 22, 1887, 15 R. 215, 25 S.L.R. 178, March 7, 1890, 17 R. (H.L.) 31, 27 S.L.R. 463.

"The result upon the whole case is that, in my opinion, unless M'Dowall & Neilson's

trustee is in a position to amend his statements by making them more specific in the particulars to which I have referred, his claim to the whole fund *in medio* falls to be repelled, and he is only entitled to be ranked to the balance of the fund after payment to Snowball Company of the price of the goods."

The claimant M'Dowall & Neilson's trustee reclaimed, and argued — 1. The goods when stopped were not *in transitu*. The transit as between seller and buyer ended at Miramichi, and thereafter J. B. Snowball Company were carrying them as agents for the reclaimers. Miramichi was the place at which under the agreement the goods were "deliverable." The fact that an ulterior destination, viz., Glasgow, was in the contemplation of parties did not signify—*Cowdenbeath Coal Company, Limited* v. *Clydesdale Bank, Limited*, June 15, 1895, 22 R. 682, 32 S.L.R. 549; *Morton, &c.* v. *Abercromby*, January 7, 1850, 20 D. 362; *ex parte Miles*, 1885, 15 Q.B.D. 39. Miramichi was the only place at which there was any obligation on the seller to deliver, and if asked to deliver elsewhere he could have objected—*ex parte Watson*, 1877, 5 Ch. Div. 35; *ex parte Gibbes*, 1875, 1 Ch. Div. 101; *Dixon* v. *Baldwen*, 1804, 5 East 175; *Valpy* v. *Brown*, 1847, 4 C. B. 837. 2. The respondents were not unpaid sellers. The goods were paid for in the manner provided for in the contract, viz., by bills taken by the respondents as payment for the goods. They took them without objection and thereby "approved" of them. The meaning of the agreement was that if they took the bills they took them in full satisfaction of the debt, even although the bills subsequently turned out to be worthless. This was the customary meaning of "approved bills" in the wood-trade, and the reclaimers were entitled to proof of that averment—*Hodgson* v. *Davies*, 1810, 2 Campbell 530; *Foster, Alcock, & Company* v. *Grangemouth Dockyard Company*, June 8, 1886, 23 S.L.R. 713; *Robinson*, v. *Read*, 1829, 9 B. and C. 449; *Cowasjee* v. *Thompson*, 1845, 5 Moore, P.C. 165.

Argued for the claimants and respondents, J. B. Snowball Company, Limited—(1) The transit did not end till Glasgow. The documents properly construed all showed that Glasgow was the destination. There had been no delivery at Miramichi, and there was no third party there to whom it was even averred that delivery could have been made. Mere constructive delivery would not suffice to prevent stoppage *in transitu*—*Bethel* v. *Clark*, 1888, 20 Q.B.D. 615; *The Rosevear China Clay Company*, 1879, 11 Ch. Div. 560; *Berndtson* v. *Strang*, 1868, 3 Ch. App. 588. (2) They were unpaid sellers, the bills having proved valueless, and payment by bill being conditional. An "approved" bill meant one to which no reasonable objection could be taken (Bell's Principles, sec. 107), and had no special meaning in the wood trade. Proof of such alleged meaning was incompetent, as the expression had a well-known legal import, and was not a technical term of trade.

At advising—

LORD JUSTICE-CLERK — The circumstances of this case are so clearly and fully stated in the note to the interlocutor under review that I do not consider it necessary to recapitulate them.

I agree with the result at which the Lord Ordinary has arrived. The contention of the trustee that delivery was taken of the goods at Miramichi is not, I think, tenable. It is unfortunate that the word "deliverable" was used in the contract in connection with Miramichi, but I do not read that word as meaning to be delivered to the buyers at that port, but only that they were to be deliverable on board ship for transmission to this country with "all reasonable dispatch" as it is expressed, the meaning being that they must be brought down country to the port of loading without any undue delay, so that they might be forwarded on and reach this country with all convenient speed.

In point of fact the bill of lading contradicts the contention of the trustee, for the bill of lading was taken out, not to the purchasers, as might have been the case had the purchasers received delivery at Miramichi, but to the sellers, who then held the document, the possession of which gave them the power over the goods while they were on the voyage. I think it cannot be doubted that J. B. Snowball & Company could at any time while the goods were on the voyage have given a good title to the goods to any purchaser they might have dealt with, they holding the bill of lading. They might be in the position that those who contracted with them for the goods would have a good action of damages against them if they failed to carry out their contract, but I do not see how it could be held that those who made a contract with them could have claimed and successfully asserted their right to the particular goods on the footing that they had been delivered to them and had become their property by delivery.

The trustee desired a proof upon the question of delivery at Miramichi, but taking the view I have expressed I can see no ground for allowing a proof of the very meagre statement on this part of the case, and we were told at the debate that no proposal was made by the trustee to amend his record. It was admitted that nothing more definite could be stated. It was maintained by Mr MacRobert that Miramichi was the only place to which the sellers were bound to send, and therefore that it was the place of delivery. But I agree with the Lord Ordinary in thinking that this was plainly not so, and that the contract contemplated that the goods would require to be sent on from there to their final destination, the conditions as to the right of the sellers to substitute other vessels than those named by them to the buyers indicating that the transaction was not at an end at Miramichi, and the taking of the bill of lading in the sellers' name is in entire consistence with this. The bill of lading also in its terms states Glasgow as the port of delivery.

I cannot doubt therefore that the good were *in transitu* during the voyage to Glasgow, and that the sellers were entitled to exercise the right of stoppage unless they did some other act which completed the buyers' right, so as to cause the goods to be no longer *in transitu* but to be the delivered property of the other party to the contract.

Now, the trustee maintains that this was done by the sellers taking acceptances for the price before the goods arrived in Glasgow, in pursuance of a clause in the contract by which "balance of invoice" was to be by "approved acceptance to sellers or sellers' agents' draft, payable in London at 128 days from sight of and in exchange for bill of lading, policy of insurance, and other shipping documents." The fact is that the bankrupts' acceptances were given on 18th September, and that the sequestration took place on 1st October. Can it be said in these circumstances that these were approved bills? Mr Bell in his Principles says that "an approved bill seems to import only a bill to which no reasonable objection can be made." Applying this test, can this be said of these bills, which, as the Lord Ordinary points out, were plainly worthless? But the trustee makes an averment of custom of trade under which "approved bill" means a bill of which the seller has indicated his approval by taking it. I agree with the Lord Ordinary in holding that these words must be construed according to their legal import in this contract, and that legal import is expressed as I have quoted above.

My view, therefore, upon the whole matter is that the trustee desiring to have a judgment on the record as it stands, and not proposing any amendment, the Court ought to adhere to the judgment of the Lord Ordinary, and I accordingly so move your Lordships.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the conclusion at which the Lord Ordinary has arrived.

The main contention presented by the reclaimer against the Lord Ordinary's judgment was based upon the clause in the agreement or contract of sale between the parties which provides that "the goods are deliverable in the usual and customary manner at Miramichi with all reasonable despatch." I read that as referring to delivery at Miramichi for the purpose of shipment—not delivery there as to the buyer. The whole clause points to this—that there should be no undue delay in the shipment of cargo. Under the contract the seller had to provide a ship to carry the cargo to Glasgow, and to pay freight and insurance to that port, and such an obligation on the seller rather points in the direction of the cargo being still under his control and at his risk until it reached its destination. I do not mean to say that full delivery of the cargo to the buyer could not have been made at Miramichi, so as to vest the buyer with full property, even although there remained on the seller the obligation to find a ship to carry it and also to pay freight and insurance. But certainly in the usual course a contract of sale c.i.f. contemplates delivery of the cargo at the port of discharge, not the port of shipment. However that may be, the question remains, was the cargo in point of fact delivered to the buyers at Miramichi? The Lord Ordinary justly shows that the averments in regard to this are very vague. The buyers were not personally at Miramichi, and could not therefore themselves receive delivery. Their averment is that they instructed the sellers to receive the cargo as for them, and instructed them to ship the same to Glasgow "as their agents in that behalf." But nothing is said as to when or how such instructions were given or said, and this averment of agency is too vague and indefinite. It could and should have been made more precise if proof of it was desired. The claimant Reid (who now represents the buyers) was asked if he proposed to amend his statement on this matter, and the answer was that nothing more specific could be said than was already on record. But I think there is no need of further proof on this part of the case beyond what we already have. It is apparent that the sellers did not deliver the cargo to the buyers at Miramichi, or ship it there as agents for the buyers, for the bill of lading shows that they shipped it in their own name, deliverable to them or their assigns at Glasgow. So long as they held these bills of lading the cargo was under their control, and was so much their property that they could have conferred a right to it upon anyone to whom they pleased to indorse the bills of lading. But the terms of the bills of lading tend also to show that Glasgow was the port of delivery and not Miramichi. I come therefore to the opinion (with the Lord Ordinary) that the transit of the cargo as between seller and buyer did not terminate at Miramichi but at Glasgow, and that being so, the cargo was duly stopped *in transitu* by the sellers' notice to the ship on its arrival at the port of delivery.

The only other argument maintained on behalf of the claimant Reid was that the buyers had paid for the cargo by accepting bills for the price in favour of the sellers, and that the latter were thereby barred from claiming the price of the cargo as on the contract of sale, or exercising any right as sellers—that the only right which remained to them was to operate diligence on the bills. I think it enough to say that in the circumstances of the case that argument is not in my opinion tenable.

LORD MONCREIFF—I am of the same opinion. On both points I agree with the Lord Ordinary. On the first question of transit it is plain from the memorandum of agreement between the sellers and the buyers that the destination of the goods was Glasgow. The vessel to carry the goods from Miramichi was to be chartered by the sellers, and in point of fact it was chartered by them, and the bills of lading

were taken in their own name. The prices for the goods included freight and insurance to Glasgow.

No doubt if on arrival of the goods at Miramichi they had been delivered to the buyers or their agent it might have been held that transit was at an end; but this was not done. The goods were put on board the vessel by the sellers and were still on board when the stoppage took place.

The only clause on which the claimant Reid can found is that in the agreement—"The goods are deliverable in the usual and customary manner at Miramichi," &c.

But this clause must I think be read in the light of the rest of the document, and so read amounts to no more than this, that the goods were to be brought to Miramichi in due time to be shipped there during the shipping season.

The second question is whether the claim for the sellers is barred by their having endorsed the bills of lading in exchange for acceptances by M'Dowall & Neilson. In my opinion the payment so made was conditional, and as the acceptances were immediately found to be worthless owing to the insolvency of the buyers, Snowball Company, Limited were unpaid sellers in the sense of section 44 of the Sale of Goods Act, and were entitled to stop the goods *in transitu* and resume possession of them. The acceptances were not those of a third party but those of the buyers themselves, and they could not have been discounted.

In these circumstances I am of opinion that the mere addition of the word "approved" has not the effect of depriving the payment of its conditional character. I am therefore of opinion that the Lord Ordinary has rightly sustained the claim for the sellers J. B. Snowball Company, Limited.

The Court adhered.

Counsel for the Claimant and Reclaimer M'Dowall & Neilson's Trustee—Clyde, K.C. — MacRobert. Agents — Drummond & Reid, W.S.

Counsel for the Claimants and Respondents J. B. Snowball Company, Limited—Salvesen, K.C. — C. N. Johnston, K.C. — Horne. Agents—Webster, Will, & Company, S.S.C.

Saturday, November 12.

FIRST DIVISION.

[Bill Chamber — Lord Stormonth Darling, Ordinary.

TRAIN *v.* STEVEN.

Bankruptcy—Process—Procedure in Petition for Sequestration—Citation of Debtor—Voucher of Debt under Suspension—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 26.

In a petition presented by A for the sequestration of B's estates, A produced as a voucher of the debt an *ex facie* valid assignation to her by C of a decree in his favour against B for upwards of £50 (the statutory limit), together with the execution of charge. Previous to the presentation of the petition arrestments for more than the sum in the decree had been used in B's hands by certain creditors of C (the assignor of the decree), and B in turn had raised a suspension of the charge and relative warrant and also an action of multiplepoinding, the fund *in medio* in which was the sum in the decree. Both the suspension and multiplepoinding were in dependence at the date of the presentation of the petition.

Held (*rev.* judgment of Lord Stormonth Darling, who as Lord Ordinary on the Bills had dismissed the petition on the ground that the voucher produced was under suspension) that the procedure prescribed by section 26 of the Bankruptcy (Scotland) Act 1856 was peremptory, and that warrant to cite the debtor must in the first instance be granted, any question as to the sufficiency of the voucher produced falling to be considered thereafter.

The Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79), section 26, enacts—"When a petition for sequestration is presented without the consent of the debtor . . . the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite the debtor . . . to appear within a specified period, if he be within Scotland, by delivering to him personally, or by leaving at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him, a copy of the petition and warrant, and if the debtor or his successor be furth of Scotland, to cite him to appear within a specified period by leaving such copy at the Office of Edictal Citations, at the dwelling-house or place of business last occupied by him . . . to show cause why sequestration should not be awarded; and the Lord Ordinary or the Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established."

On September 9, 1904, Miss Isabella Train, residing at Wesley Cottage, Eskbank, presented a petition for sequestration against William Charles Steven, C.A., Edinburgh.

The petitioner stated that she was a creditor of Steven to the extent of £61, 13s. 10d.,