In the case which gave rise to these observations, this point had not been decided in the Court of Session: It was therefore remitted for judgment by that Court; with certain observations from the Lord Chancellor, which plainly indicated his opinion that the doctrine of compensation would apply to the case.[1] But it was not decided on the remit.

It will, however, require great consideration before this doctrine in its full extent be judicially admitted in Scotland. It will be found opposed by the necessity of holding the heir-at-law disinherited by mere implication; which the law of Scotland does not recognize. And practical difficulties of no mean importance must be encountered in the making up of titles, and in giving effect to the implied will.

PART III.

OF PROPERTY IN MOVEABLES CORPOREAL.

THE class of subjects which next demand attention as a fund of credit, or of payment of debt, comprehends the property of Moveables. And, *First*, Of property in ships, as a peculiar subject ruled by special statute: *Next*, Of property in goods and merchandise.

CHAPTER I.

OF PROPERTY IN SHIPS.

PROPERTY in ships may be either of BRITISH or of FOREIGN vessels. The difference between them may be generally stated thus:—1. FOREIGN or ALIEN SHIPS are liable to alien duties when engaged in neutral trade; and to forfeitures and penalties when engaged in the trade, of which, by statute, a monopoly is secured to British vessels; and, 2. BRITISH SHIPS enjoy commercial privileges and immunities which greatly augment the value of that sort of property.

consequence held to have made their election to reprobate the deed, so that they could not under it claim the liferent interest. And thence a question arose, whether the residuary legatees, by way of compensation for what they lost by the reduction of the deed, could claim compensation out of the profits during the lives of the Ladies Kerr? or whether the Ladies Kerr were not, as next of kin, entitled to those profits as not disposed of by the will?

[1] 'The Court has not yet determined whether 'the respondents are, or are not, entitled to take 'their compensation, until the death of the survivor 'of the appellants;—the Court below having given 'no opinion, it is impossible that we should give 'any opinion upon that point. It is for their de- 'termination in the first instance. The cause must, 'in point of form, be remitted, with a view to have 'that question decided. It appears to me very easy 'of solution. There are certain persons who, ac- 'cording to the expression and principles of our law, 'have a vested remainder in the capital. They have 'also, by way of compensation, a title to the life- 'interest, preceding that remainder in the fund. Hav- 'ing, therefore, the whole interest, I do not understand 'upon what ground it can be argued, that there ought 'to be an accumulation of the profits, until the decease 'of the survivor of the appellants. If the appellants 'have no right, and the respondents have all the right, 'in the subject of litigation, why is it not to be ap- 'plied immediately by way of compensation, upon the 'ground, that, the condition of the gift being rejected, 'the life-estate did not form a part of the disposition?' 1. Bligh, 26.

It has been questioned, whether a foreign built ship, owned by British subjects, can legally be employed by them in the same trade in which it may be employed by an alien owner. Upon this point, Lord Eldon, while presiding in the Court of Common Pleas, had occasion to deliver this opinion: 'That a British owner of a foreign built ship may 'engage in neutral trade, and will be liable to the alien duties; but it is not the policy of 'the legislature to prevent British subjects from employing foreign ships in neutral trade, 'in as ample a manner as they can be employed by aliens.'[1]

The methods of acquiring property in foreign vessels must, of course, depend on the rules of the law of the state to which the ship belongs. But I shall confine myself to the consideration of property in British ships.

The great peculiarity of property in British ships, as distinguished from property in foreign ships, or in other moveables, is, that it depends on written titles, which are recorded in a public register; and that on the state of the property, as appearing from those titles in the register, creditors and purchasers may rely. In this respect, property in ships may be likened to property in land; which, in so far as creditors are concerned, is held, by the law of Scotland, to be correctly set forth, with all its burdens and encumbrances, in the records of sasines, of inhibitions, and of adjudications.

It appears that, at all times, the property of ships has been transferred with greater solemnity than that of ordinary moveables. In England, this species of property, from very early times, was evidenced by written documents;[2] and although, in Scotland, a written conveyance does not appear always to have been required for the transference of a ship,[3] this has, by custom, been long since deemed essential. Besides the written instrument by which the property of ships is conveyed, there are other very important solemnities required by the Navigation Acts. Those Acts were not meant to regulate the transference of ships, but merely to give encouragement to shipping and navigation in this island: But, in the course of securing these objects of national policy, a system of regulations, and a public record of this sort of property, sprung up, which have proved of the most essential use in regulating the interests of ship-owners and of their creditors. Courts of justice have not been blind to the uses which might be derived from the record that came thus to be established, and have thought it of importance to preserve and improve this record for the benefit of the public. Every rule of construction has been favoured which could lead to this beneficial end.

A short review of the history and policy of the Navigation Acts, with a commentary on the requisites enjoined by those Acts, for establishing the character of a British ship entitled to the privileges, and for transferring and burdening this sort of property, will present a view of all the law on this subject.

§ 1. HISTORY AND POLICY OF THE NAVIGATION ACTS.

Without recurring to the earlier codes of maritime law, in which a policy similar to that of the Navigation Acts may perhaps be traced, the first English statute on the subject was in Richard II.'s time, when it was ordained, that no merchandise should be shipt out of the realm but in British ships, on pain of forfeiture.[4] Amidst the civil distractions of England after that time, the maritime interest suffered neglect. An abortive attempt was made to introduce a navigation law in the time of Henry III.; and it was not till the

[1] LONG against DUFF, (1800), 2. Bos. and Pull. 216.

[2] ABBOT, Treat. of the Law relative to Merchant Ships, and Seamen, 1.

[3] 16th June 1681, CATHCART against HOLLAND; 2. Stair's Decisions, 876.

[4] 5. Rich. II. St. i. c. 3.; 14. Rich. II. c. 6.

sitting of the Long Parliament that the proposal was revived and adopted. To whatever motives we may trace this measure; whether to private animosity, or to national hostility, against Holland; the regulations are acknowledged to have been framed with as much wisdom as if dictated by the most enlightened views of maritime policy: And, indeed, at that moment, national animosity, and the true interests of England, coincided in a very remarkable manner.

It was in 1646 that the first Navigation Act was passed, for more effectually securing the trade of the British colonies in the West Indies to British shipping. In 1651, Cromwell's Act was passed; and, with improvements, it was, after the Restoration, re-enacted in England in 1660, and in Scotland in 1661.[1] By these laws, certain duties and forfeitures were imposed on foreign ships, while the trade of England and Scotland was confined to ships truly belonging to natives. A species of register was appointed by both those Acts; it being enacted, that an oath should be taken to the ownership, and a certificate granted; and that of all those certificates a register should be kept. Farther improvements were introduced in the reign of Charles II., of William III., and of George II. During the administration of Mr Pitt, the whole of those laws were revised, and consolidated into a system, under the care and by the exertions of the late Lord Liverpool, than whom no man was better skilled in the naval policy of Great Britain.[2] The system thus established, after having been amended by particular statutes,[3] was again consolidated in an Act of his present Majesty, the 4. Geo. IV. c. 41. This statute, however, was repealed by the Act of last Session, 6. Geo. IV. c. 105., entituled, 'An Act to repeal several 'Acts relating to the Customs,' on occasion of the general reformation made on the laws of Custom and Excise. And by the Acts of the same session, c. 109. and 110., the system of registry was re-enacted, with only the changes necessary from the new arrangement of the establishment of the Customs. These two statutes, which came into operation on 5th January 1826, contain a digest of the whole of this department of the law.[4]

This is not the place in which to discuss the policy and expediency of these Acts, or their effects on foreign trade or domestic industry. Their aim was national defence; an object of vital importance in a country like this; and with regard to which, it seems the part of wisdom not entirely to trust to the indirect effects of an augmenting commerce, but to add the force of legislative enactment, in the creation of naval power.

The great objects proposed to be attained by the Navigation Acts, are—

1. The creation of a body of skilful and hardy seamen.

2. The augmentation of the shipping actually in the possession of the natives of this country. And,

3. The encouragement of the skill and industry of our own ship-carpenters, by confining the privileges to ships British built.

It would be a false inference from the comparative tardiness in restricting the privilege to British built ships, that the encouragement of this branch of our national manufacture has been regarded as of little importance by the legislature. It must be recollected, that the number of vessels British built was not, till of late years, by any means adequate to the occasions of our trade; and that it was not till 1786 that the legisla-

[1] The English statute is 12. Car. II. c. 18.; and the Scottish 1661, c. 45.

[2] 26. Geo. III. c. 60.

[3] 27. Geo. III. c. 19.; 34. Geo. III. c. 42. and 68.; 35. Geo. III. c. 58.; 37. Geo. III. c. 63.; 48. Geo. III. c. 70. The Registry Acts are in force in Ireland. See Irish Statutes, 27. Geo. III. c. 23.; British Acts, 42. Geo. III. c. 61.

[4] 6. Geo. IV. c. 109. Act for the encouragement of British shipping and navigation; and, c. 110. Act for the registering of British vessels.

ture could, with any regard to true policy, restrict the monopoly to British built ships: They were forced to rest satisfied with ships that were British owned.[1]

The monopoly of trade secured to British ships is, 1. Of the trade from Britain to the British settlements and plantations. 2. Of the coasting trade. 3. Of the importation of many bulky or valuable articles into Great Britain; with a share of this importation trade to ships of the country of the produce or manufacture, or from which the goods are imported, (with certain exceptions). 4. Of the fisheries for importation into Great Britain. These privileges are guarded and made valuable, by forfeitures and alien duties against foreign ships;[2] and they are confined to ships duly registered as British ships, and navigated by a British master, and three-fourths of the crew British seamen.

But it is proper to give more precisely the description of such vessels as are required to be registered, and which, being registered, are, while the register is in force, entitled to the privilege of British ships.

§ 2. OF A SHIP'S NATIONAL CHARACTER.

The privileges of trade being shared between British and foreign ships, the legislature has been careful to distinguish the description of either character.

1. DESCRIPTION OF BRITISH PRIVILEGED SHIPS.

By the recent statutes, no ship shall be entitled to the privileges of a British ship, unless, 1. It shall be duly registered and navigated as such; or, 2. It shall be under 15 tons burden, and confined to inland or coast-trade, and wholly owned and navigated by British subjects.

1. REGISTERED SHIP.—The leading description, according to the late Act, of a ship entitled to be registered, or which having been registered is to be deemed duly registered, comprehends, (1.) 'Such ships as are wholly of the built of the united kingdom, or of 'the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, &c. 'in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to the 'King at the time of the building of such ship.' And, (2.) 'Such ships as shall have 'been condemned in any court of admiralty as prize of war, or in any competent court 'as forfeited for breach of the law for prevention of the slave-trade, and which shall 'wholly belong, and continue wholly to belong to his Majesty's subjects, duly entitled to 'be owners of ships or vessels registered by virtue of this Act.' 6. Geo. IV. c. 110. § 5.

Two exceptions to this description are made: 1. That where a ship has been repaired in a foreign country, if such repairs shall exceed the sum of twenty shillings for every ton of the burden of the ship, (unless made necessary by extraordinary damage sustained during absence, to enable her to perform the voyage in which she was engaged, and to return to the King's dominions), she shall not continue to enjoy the privilege of a British ship; § 6.[3] 2. The other exception is, where such ship has been captured and become

[1] By the accounts taken in 1801 of British ships registered in the different ports of the empire, the number of vessels manned and navigated by British subjects amounted at that time to 17,295; their tonnage to 1,666,481 tons; and the number of seamen employed, on an average of one man to 17 tons, to 129,546.

[2] 6. Geo. IV. c. 109. § 2—11. By § 4. to exercise the privilege unregistered, exposes the ship to forfeiture; and by § 23. 'if any goods be imported, exported, or 'carried coastwise, contrary to the law of navigation 'herein before contained, all such goods shall be for-'feited, and the master of such ship shall forfeit the 'sum of one hundred pounds.'

[3] It is provided, that a ship undergoing such repairs in a foreign country, shall, by the master, &c. on arrival, be reported to the collector and comptroller of the customs at the port, under the penalty of twenty

prize to an enemy, or been sold to foreigners; and the character as a British registrable ship shall, in that case, be redeemable only under the provisions of the 5th section, by condemnation as prize of war, or for breach of the laws for prevention of the slave-trade.

It is a part of the national character as a British ship, that the owners shall be British. And, 1. No person who has taken the oath of allegiance to any foreign state, (except under the terms of some capitulation), unless afterwards he become a denizen or naturalized subject of the united kingdom, shall, in whole or in part, or directly or indirectly, be owner of any ship required or authorized to be registered. 2. Neither shall any one be such owner if he usually resides in a country not under the King's dominion, unless a member of a British factory, or agent or partner in a house or copartnership actually carrying on trade in Great Britain or Ireland; § 13.

With these requisites, a ship, in order to enjoy the privilege of a British registered ship, must have the sanction of a certificate of registry, guarded by the surveys, oaths, and other precautions enjoined in the Act. See below, p. 156. et seq.

2. Ships not Registered.—Ships British built, under 15 tons, though not registered, if owned and navigated by British subjects, are British ships, in all navigation in the rivers and on the coasts of the united kingdom, or of the British possessions abroad, not proceeding over sea; or such vessels, not exceeding 30 tons, and not having a whole deck, employed in fishing on Newfoundland banks and shores, &c. are also admitted as British; 6. Geo. IV. c. 109. § 13.

Honduras ships also, owned and navigated as British ships, are entitled to the privilege of British ships in all direct trade between the united kingdom and that settlement, on producing certificates of the built and ownership from the superintendent of the colony; § 14.

3. Navigated as British.—It is a requisite in all cases, that ships professing to be British shall be navigated by a certain proportion of British subjects. Every registered ship, while she claims the privilege, shall be navigated during the whole of every voyage, with cargo or in ballast, by a master who is a British subject, and a crew whereof three-fourths at least are British seamen; and in the coasting trade, or among the British islands, or in fishing there, the whole crew shall be British; § 12, 13.

Two provisions are added for clearing difficulties: 1. The character of British master or seaman includes natural born subjects; or subjects by naturalization or denization; or by conquest or cession taking the oaths; or serving in time of war for three years in a ship of the King; § 16.: And, 2. As to the proportion, if there be one British seaman for every 20 tons burden, the ship shall be deemed duly navigated, although the number of other seamen should exceed one-fourth of the crew.[1]

2. DESCRIPTION OF FOREIGN PRIVILEGED SHIPS.

In order that a ship should be admitted to be a ship of any particular country, to share the privilege of trade with British ships, it is requisite,

1. That she be of the built of such country; or, 2. Prize of war to such country, and condemned as prize; or, 3. Forfeited to such country under laws for the prevention of the slave-trade, and condemned as forfeiture; or, 4. British built, not being a prize of war from British subjects.

shillings per ton; and if satisfied on the points in the Act, they are directed to certify, on the back of the register, that the privileges of the ship have not been forfeited; § 6. It is further provided against combinations of workmen in British ports, that the Privy Council may permit a ship to repair to a foreign port for necessary refitting; § 7.

[1] On these points, occasional exceptions are admitted, or power given by royal proclamation to make relaxations, for which see the Act, § 17—20.

Under this law a question sometimes arises, whether a ship repairing in a foreign port be of the built of that particular country; as when a Russian cargo was imported in a ship originally built in Holstein, but which having been wrecked on the coast of Russia, was there repaired at the expense of two-thirds of her value, which, by the Russian law, entitled her to navigate as a Russian ship. It was held by Lord Ellenborough, that she was not Russian built; that *repair* is not *built;* that a ship must be of the built of the place of her original construction; and that the Russian law cannot control the Navigation Act of Great Britain.[1]

2. It is necessary that such vessel should be navigated by a crew of which three-fourths are subjects of that country, and owned by subjects of such country; 6. Geo. IV. c. 109. § 15. And the rule of proportion of one seaman for every twenty tons is applied as in the case of British navigators, § 16.

§ 3. OF THE REGISTERING OF BRITISH SHIPS.

While a ship continues in the hands of the builder, the property of it is, like that of any other moveable, unaffected by any of the regulations of the Navigation Acts. If it is to be attached by creditors, they must use the ordinary diligence for affecting moveables. If it is to be transferred, a bill of sale, with delivery, is a sufficient conveyance.[2]

But as soon as the vessel is ready for sea, and before she departs from port, she must be registered in terms of the Acts; or, after a ship captured from the enemy comes into a British port, and is condemned as lawful prize, if she is to be fitted out for sea under British ownership.

By the recent Act, (6. Geo. IV. c. 110. § 2.) no ship or vessel is to be entitled to any of the privileges or advantages of a British registered ship, until the person or persons claiming property therein shall have caused the same to be registered, and shall have obtained a certificate of such registry. And by § 4. ships not duly registered, and not having obtained the proper certificate, and exercising any of the privileges of a British ship, shall be subject to forfeiture, and with the guns, ammunition, &c. may be seized by any officer of the customs. But this is declared not to affect any vessel registered under former Acts, until such time as, by the subsisting Act, they shall be required to be registered de novo. The occasions on which registers de novo are required, are these: 1. Where the owner or owners shall have transferred all his or their share or shares, the ship shall be registered de novo, before sailing or departing from the port to which she belongs, or from any port in the same part of the kingdom, or with a provision for a certificate on the back of the existing certificate, if time presses, enabling him to sail upon that voyage, § 13. 2. When a certificate of the registry of a ship is lost, on proof thereof made, the commissioners of the customs may permit a register de novo, and a certificate to be granted on bond to deliver up the lost certificate when found, to be cancelled, § 26. 3. When the certificate of a ship is unduly detained by the master, &c. after certain precautions the ship may be registered de novo, § 27. 4. When a ship, after being registered, shall be so altered as not to correspond with all the particulars mentioned in her certificate, she shall be registered de novo, as soon as she returns to her port, or any port in the same part of the kingdom, § 28. And, 5. No certificate, except under the subsisting Act, or under the Act of 4. Geo. IV. c. 41. for the registering of vessels, and spe-

[1] REDHEAD against CATER, 4. Camp. 188. This question arose under the old laws.

[2] OXENHEIM against GIBBS, 1807; Abbot on Shipping, 57.

cifying the shares of the vessel held by each owner, shall be in force after the 5th January 1826, or the ship's arrival at her port after that date; unless where time has been granted for ascertaining the number of shares, § 35.

The following points are fixed as to the registry and certificate:—

1. Persons authorized to make Registry, and grant Certificate.—The collector and comptroller of his Majesty's customs in any port in the united kingdom, and in the Isle of Man; the principal officer of the customs in Guernsey or Jersey, together with the governor or commander-in-chief of these islands, &c.; are authorized and required to make registry and grant certificates, § 3.

2. Where to be Registered.—Registry shall not be made, nor certificate granted, in any other port or place than that to which the vessel shall properly belong, otherwise to be void and null; unless specially authorized by an order in writing under the hands of the commissioners of customs, § 11. And the port of a vessel shall be that at or near to which some or one of the owners who shall take the requisite oath shall reside, § 12.

3. Proofs of the Built or Condemnation.—Before the owner can obtain a certificate, certain proofs must be given of the place in which the ship has been built, or of her condemnation as a lawful prize, and of the ownership.

Built.—The evidence of the 'built' is a full and true account, under the hand of the builder, of the denomination of the ship, time and place of building, tonnage, and name of the first purchaser. Such account the builder is, by the statute, required to give on the same being demanded; and this is confirmed by the oath of the owner, that the ship to be registered is the same with that described by the builder.[1]

Certificate of Condemnation.—If the ship to be registered is a prize captured from the enemy, or forfeited for breach of the slavery laws, a certificate must be produced of the condemnation, under the hand and seal of the Judge of the court in which the ship was condemned; and also an exact account or survey under the order of the condemning court; and an oath to the identity of the ship.[2]

4. Survey of the Ship.—In order to enable the collector and comptroller of customs to grant a certificate, truly and accurately describing the ship; and to enable other officers of the customs, on due examination, to discover the identity of the ship, one or more persons, approved by the commissioners of the customs, go on board and examine, and take the measurement, of the ship.[3]

5. Ownership.—The proofs of ownership are intended to prevent foreigners from being proprietors of British ships. They partly arise out of the documents produced to prove the built, and partly out of the oath of the owners. Before obtaining a registry, an oath is prescribed to be taken before the persons who grant the certificate, by the owner, if only one; or if two, and both resident within twenty miles of the port, by both; if both or either resident at a greater distance, by one. If the number of owners exceed two, then by the greater part, (not exceeding three), if resident within twenty miles of the port; and if all are resident beyond twenty miles, one shall suffice. This oath expresses the name and description of the vessel; the name of the master; the name of every proprietor or owner; with every particular relating to their character as British subjects; and it contains, also, a positive averment, that no foreigner, directly or indirectly, has any share or interest in the ship.[4]

[1] 6. Geo. IV. c. 110. § 25.

[2] Ib. § 29. Prize vessels are not to be registered at Jersey or Guernsey, or Isle of Man, § 36.

[3] 6. Geo. IV. c. 110. § 16.; and the rules of admeasurement are laid down in § 17, 18, 19, and 20.

[4] 6. Geo. IV. c. 110. § 14. If a corporate body, the oath must bear the name of the company or corporation.

6. Register and Certificate.—The particulars relating to the description of the ships ıs collected, are inserted in a register. Of this a certificate is granted, which bears, ıat in pursuance of the Act, the owners having taken and subscribed the oath required, d sworn that (in the proportions specified on the back) they are the sole owners of the ip, by her name and port; that she is of such a burden; and that such a one is master; d that the ship was built at such a port, &c. And that the surveying officer, by name, ving certified that the ship is of such and such dimensions, and rigged in the manner rticularly specified, and that the owners having consented and agreed to the description, d having caused sufficient security to be given, as required, the said ship by name has en registered at such a port. On the back of the certificate of registry there shall be account of the parts or shares held by the several owners; the several shares being ıtributed among owners not exceeding in number thirty-two. See below, p. 159.

At every port of registry, a book is to be kept by the collector and comptroller of e customs, in which the entry shall be duly made, each being numbered in progression; d within one month at farthest, a true and exact copy shall be transmitted to the com-ssioners of the customs. They again are bound, in Scotland and Ireland, to transmit, the end of every month, true and exact copies to the commissioners of customs in Eng-ıd.[1] This record has collaterally, as already observed, come to serve as a useful repre-ntation of the actual state of the shipping interest of this country.

The certificate is written on parchment, and delivered to the captain, signed by the llector or comptroller of the customs, to be a voucher and safeguard to the vessel of her ıaracter and privileges as a British ship.

7. Precautions against the abuse of the Certificate.—It is only by the certificate at an officer can determine whether a ship is entitled to the privileges of a British ship, d it is of great importance on this point to prevent abuse. For this purpose, in the *first* ace, Security by bond is granted by the master and owners in a large penalty, that e certificate shall not be lent, sold, or disposed of, but shall be faithfully kept for the e of the ship, and returned on the several events which render it no longer useful:[2] nd, *secondly*, The certificate is intrusted to the custody of the master, who is bound deliver up the certificate to the proper officer of the customs, for the use of the ship, occasion shall require, under high penalties: And it is not essential that this detention ould be malicious; it is sufficient if it be wilful.[3]

8. Lost Certificate.—When a certificate shall be lost or mislaid, and proof thereof to e satisfaction of the commissioners shall be made, they are authorized to register the ssel de novo, and grant a new certificate; or when the ship is far from her port, to ant a license, under which she may sail in safety to the extent permitted. The addi-ıal precaution, however, is taken of an oath or bond as to the lost certificate, that it all, if found, be delivered up to the proper officer.[4]

9. Effect of Certificate as Proof of Property.—The use of the certificate is to prove e identity of the ship as privileged. But the privilege is so combined with the pro-rty as sworn to in the owners specified, that it serves also as a badge of the property ownership in British ships: and while no one whose name does not appear in the cer-ıcate, or by indorsation on it, is deemed a proprietor; those who appear still as owners ı the register, are held as such, and their creditors may seize the ship as their untrans-

[1] § 11. and 47.

[2] 6. Geo. IV. c. 110. § 21, 22, 23.

[3] The Court of Admiralty will, in suit for possession of ships, order delivery of certificate where necessary. Barbara, Chegwyn, 4. Rob. A. R. 1.

[4] 6. Geo. IV. c. 110. § 26.

ferred property. But the proof by the register is not absolute, to the effect of vesting the property in one who has not given authority for the transfer.[1]

Where the precautions enjoined by the Act have been neglected in cases intended as trusts for benefit of others, the registry is held the sole criterion of property, and the right of those for whose benefit the sale was intended will be defeated.[2]

10. Of Ships held in Shares.—Under former statutes, there was much confusion and vagueness relative to shares in ships. By the Act of 4. Geo. IV. c. 41. and the renewed Act of 6. Geo. IV. c. 110. § 32—35. it is provided,—

1. That the property in every ship or vessel, of which there are more than one owner, shall be considered as divided into sixty-four shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts, no person being entered as owner in respect of any share which shall not be an integral sixty-fourth part of the same, § 32.

2. That upon the first registry of any ship, the owner or owners who shall take the oath before registry, shall swear to the number of such parts thus held by each, and the registry shall be accordingly; it being provided, that the owners of fractional parts, wherever in a division the property of a ship comes to be separated into any number of parts, may transfer to each other, or join in transferring to a stranger, the fractional parts, by memorandum on their respective bills of sale, or by fresh bills of sale without stamp, § 32.: And by § 34, 35. provision is made for clearing in the registry the titles to all shares of ships registered before 31st December 1823.

3. That it shall be lawful for any number of owners named and described in the registry, being partners in any house or copartnership actually carrying on trade within the King's dominions, to hold any ship, or share of a ship, in the name of such house or partnership, as joint-owners, without distinguishing the proportionate interest of each owner; and that the ship, or shares so held in copartnership, shall be held to be partnership property to all intents and purposes, and shall be governed by the same rules as relate to and govern all other partnership property in other goods, § 32.

4. That not more than thirty-two persons shall be legal owners at one and the same time, under the exception, *First*, Of the equitable title of minors, heirs, legatees, creditors, or others duly represented by, or holding from, any persons within the number registered as legal owners; *Secondly*, Of joint stock companies for the purpose of owning ships or vessels

[1] Tinkler against Walpole, 14. East. 226. Trewhella against Rowe, 11. East. 435.

[2] Thus, under the former Acts, a ship intended to be for a partnership, but one of the parties alone being sole registered owner, his separate creditors were preferred to the creditors of the partnership. Curtis against Perry, 6. Vesey, Jun. 739.

Again, in a similar case, a ship was bought by a company, and paid from its funds, and every thing relative to the purchase marked it as a purchase by the company; but the registry was in the name of one of the parties alone; and in a question between the joint and separate creditors, the latter were preferred, the Lord Chancellor Eldon holding the registry to be the evidence of the property, and that it must be taken so to be even among creditors. Yallop ex parte, 15. Vesey, Jun. 60.

The same decision was given where 10-16ths of a ship were bought by a company, and 5-16ths registered in the name of one partner, and the other 5-16ths in the name of another, in a question between the joint creditors and the creditors of one of the partners, as to one of those 5-16ths. Houghton ex parte, and Gibble ex parte, 17. Vesey, 254.

A ship purchased by a company of four persons was registered in the name of two of them alone; an action on a policy of insurance on freight was not maintainable by the company; freight arising only from ownership, and there being no right, either legal or equitable, in the company as owners of this vessel. Cambden against Anderson, 5. Term. Rep. 709.

See Stringer against Murray, 2. Barn. and Ald. 248.; where one contracting to have a ship built for him in the East Indies, agreed to sell a share, and received the price; held that the ship, having been registered in the name of the former alone, the latter had no legal interest.

Brewster against Clarke, 2. Merivale, 75.

See ex parte Burns, 1. Jac. and Walker, 378. Ships registered in the name of one partner, but in the order and disposition of both, belong to the partnership.

as their joint property, who shall have elected any number, not less than three, of those members to be trustees for them; in which case it is declared lawful for such trustees, or any three of them, with permission of the commissioners, to take the oath required before registry; except that instead of stating therein the names and descriptions of the other owners, they shall state the names and description of the company to which such ships shall in such manner belong, § 33. This provision was introduced into the Act of 6. Geo. IV. for the first time, to provide for a case which had raised many doubts under former Acts. There are partnerships whose partners are so numerous, that it is very desirable to avoid the necessity of having a title from each in case of a sale. Shipping companies, and companies for herring fishery, &c. sometimes consist of perhaps a hundred persons. And in practice under former Acts, the registry of ships belonging to such companies was, in general, made in the name of certain persons, as trustees for themselves, and all the other partners by name, as persons carrying on trade under such a firm: and when a ship of the company was sold, the transfer was made on the back of the certificate by the trustees, as authorized either by general powers, or by a special minute of the company. This method, however, had never been judicially sanctioned, and might have been exposed to much doubt, which is now removed.

Conclusion.—In order to bring the whole shipping property of Great Britain under the operation of the system established by this last Act, it is provided, that from the 5th January 1826, or from the first arrival or entry of any ship after that day at the port to which she belongs, or any port in the same part of the kingdom, or in the same colony, &c.; no certificate of registry shall be in force, except such as are granted under one or other of the Acts, 4. Geo. IV. c. 41., or 6. Geo. IV. c. 110. and in which the share shares held by each owner shall be set forth;[1] and to facilitate this, no stamp duty is required on the bond for the first registry under this Act, § 36.

§ 4. of the sale and transference of ships.

Under the older statutes, the whole doctrine of the sale and transference of ships was difficult and embarrassing, unsuitable to a species of property so much the subject of daily transfer. The matter is now reduced to great simplicity, by the statutes of 4. Geo. IV. c. 41. and 6. Geo. IV. c. 110., the latter being very nearly a transcript of the former.

1. sale of a ship.

To the sale of a ship three things are necessary: A bill of sale or instrument in writing; an entry on the register at the ship's port; and either an indorsement on the certificate, or a new registry.

Bill of Sale.

(1.) Bill of Sale.—The written deed of vendition, which had in Scotland become by usage in some degree necessary in transferring the property of ships, has under the Ship Registry Acts been required as indispensable. Under the old statutes it was required, that every transfer or mortgage of a ship, in whole or in part, and every contract for such transfer,[2] should be by a bill of sale, or agreement, or instrument in writing, in which

[1] § 35. Indulgence is given where the collector and comptroller certify that time has been granted for ascertaining the shares.

[2] As a *transfer* such agreements were void; but it was doubted whether a personal obligation to transfer, and complete the sale according to law, though undoubtedly not of force to change the property, might not be sufficient to ground an action for implement. The words, 'every contract *for* such transfer,' it was said, *may* mean contracts intended as a transfer. But Lord Thurlow seems to have had a correct view of the

'the certificate of the registry of such ship or vessel should be truly and accurately 'recited in words at length;' otherwise such bill of sale, transfer, or contract, or agreement for transfer, should be utterly void and null, and should not be valid or effectual to any purpose whatsoever.[1] This rule was adhered to with the greatest strictness; insomuch, that although a mere clerical mistake was held not sufficient to void a bill of sale,[2] yet very trivial errors were held fatal.[3]

But this inconvenient, and truly unnecessary strictness, was removed by the Act of 4. Geo. IV. c. 41. § 29. re-enacted by the 6. Geo. IV. c. 110. § 31.; whereby, after requiring that the transfer, in all cases where the property in any ship shall, after registry thereof, be sold to any other of his Majesty's subjects, shall be 'by bill of sale or other instrument in writing, 'containing a recital of the certificate of registry of such ship or vessel, or the principal 'contents thereof, otherwise such transfer shall not be valid or effectual for any purpose 'whatever, either in law or equity,' it is enacted, 'That no bill of sale shall be deemed 'void by reason of any error in such recital, or by the recital of any former certificate 'of registry instead of the existing certificate, provided the identity of the ship or vessel 'therein intended be effectually proved thereby.' This places the recital on the true footing on which it ought to stand: And although perhaps the expression, 'the principal 'contents thereof,' may be held ambiguous, it cannot be doubted that a fair recital of all

point, when, in a private opinion delivered to the counsel in the case of HIBBERT against ROLLESTON, he held it to have been the policy of these Acts, (distinguishing the question from all the analogies at common law), that no such thing as an equitable title to a ship could effectually subsist. See 11. Vesey, Jun. 625.

In England, a bill of sal way of mortgage, was found void under this Act, *so fa. as regarded the conveyance of the property in the ship*, but held sufficient to support action *for the money lent*. KERRISON against COLE, 8. East. 231.

In Scotland, the following case was decided.—Letters were exchanged, offering and accepting the purchase of a ship, but without any recital of the certificate. The master was directed to obey the buyer's orders, and did so. The seller then tendered a regular vendition, which having been refused, an action was raised for payment of the price; and the Court held the vendee effectually bound to pay, as the statute was supposed to apply only to venditions themselves, and contracts having the effect of transfers, not to the preliminary agreements intended to be followed by the regular conveyance. 2d December 1808, M'NAIR against MILLAR; First Division.

Of this decision it was doubted whether it were according to the sound policy and plain intendment of the statutes.

[1] 26. Geo. III. c. 60. § 17.; 34. Geo. III. c. 68. § 14.

1. A bill of sale, intended as a mortgage for a promissory-note, held void for want of the recital; and though the grand bill of sale and actual possession of the ship were delivered, yet, as against the creditors of the granter, the vendee had not even a lien. 3. Term. Rep. 406. ROLLESTON against HIBBERT; and 3. Brown's Ch. Cases, 571. same case.

2. In a proceeding in Admiralty, for the purpose of dispossessing a shipmaster and part-owner, the defence was, that by an agreement to sell certain shares, for which he had accordingly paid, the master held the majority of shares. 'Independent of any other 'objection,' said Sir William Scott, 'I do not think 'that, under the Act of Parliament, it would be possible 'for the Court to recognize such a transaction as this; 'for the words of the Act are as strong as they can 'be.' 20th July 1802, The New Draper, Walker, master; 4. Rob. 287.

[2] ROLLESTON against SMITH, 4. Term. Rep. 161. This was a prize-ship transferred while the ship and certificate were at sea. The date of the sentence of condemnation was in the recital said to be 28th May 1783, and of the certificate of freedom 23d January 1783. The true date of the condemnation was 28th May 1782; and the mistake was palpable on comparing the dates. The error in the recital was not held to be fatal to the transfer.

[3] WESTERDELL against DALE, 7. Term. Rep. 306. Here, in the recital, the word *oath* was used instead of *affirmation*; the non-residence of any other part-owner within twenty miles was omitted; and a different name was given to the master. Every thing else was truly stated. The Court held a person who had sold by this incorrect transfer liable for repairs, though the ship had passed in the meanwhile through several hands.

It has been held, that, to one effect, a conveyance is good, though the requisites of the Registry Acts have not been observed, viz. to the effect of supporting an action for the money lent. See above, KERRISON against COLE, 8. East. 231; and in MESTAER against GILLESPIE, 11. Vesey, Jun. 621. the Lord Chancellor and Sir William Grant gave their opinions in favour of the efficacy of such a conveyance in carrying freight.

that truly relates to the several points which are in the Act considered as essential to the identification of the ship, would be a sufficient recital.

Entry in Registry.

(2.) Entry in Book of Registry.—No bill of sale, or other instrument in writing, is under the new statute valid, or effectual to pass the property in any ship, until produced to the collector and comptroller of the customs of the port at which the ship is registered, or of the port at which she is about to be registered de novo; and until such collector or comptroller shall have entered in the books of registry, or of intended registry of such ship, the name, residence, or description of the vender, or of each if more than one; the number of shares transferred, with the name, residence, and description of the purchaser, or of each if more than one; and the date of the bill of sale, and of the production of it; sect. 37. Besides indorsing these particulars on the certificate as hereafter to be mentioned, the collector and comptroller are required, if called upon so to do, to certify by indorsation on the bill of sale, that the particulars as above have been entered in the book of registry, and indorsed on the certificate.

Effect of Entry.

When the entry is so made, the bill of sale is valid and effectual to pass the property as against all, and to every intent and purpose, except against subsequent purchasers or mortgagees, who shall first procure indorsement to be made on the certificate of registry; sect. 38. See below.

As the indorsement on the certificate, or registry de novo, is thus the criterion of preference among competitors for the property, or rival mortgagees, provision is made for allowing sufficient time to the vendor to have his vendition so indorsed on the certificate. By sect. 39. after an entry of particulars in the book of registry, there shall be no entry of any other bill of sale, &c. from the same vendor to any other vendee, till thirty days shall have elapsed from the day when the other entry was made: Or in case of the ship's absence from her port, where the former entry was made, till thirty days from the day of her arrival in her port.

Indorsement on Certificate.

(3.) Indorsement on the Certificate, or new Registry.—The sale is not completed, to the effect of passing the property effectually, until either the certificate of registry is produced, and an indorsement made on it of the particulars mentioned in the entry in the book of registry;[1] or a new registry is made, and certificate granted to the vendor.

Indorsement.

1. Under the first statutes no indorsement was required. It was first made necessary by 34. Geo. III. c. 68. § 15.; and then it was a more complex operation than it is now: in so much, that difficulties almost insuperable were experienced in practice. This appears in the decided cases, which may now be regarded only as matter of history. One most essential improvement in the recent Acts is, that the penal effects of not having the entry made in the book of registry indorsed on the certificates, are taken away; the only effect of such neglect now being, that priority of right is with the first indorsement.

Order of Indorsement.

As already noticed, thirty days are allowed after entry of the transfer in the book of registry, before another transfer from the same person to another vendor can be entered; and the collector and comptroller are required, 1. To indorse on the certificate of registry the particulars of the bill of sale of such person as shall produce the certificate of registry for that purpose, within the thirty days after the entry of his bill in the book of registry; or within thirty days after the return of the ship to port, in case of her absence at the time of entry. 2. Where no one so produces the certificate within thirty days of the entry of his bill, &c. the officers are to indorse on the certificate the particulars of the

[1] That indorsement is made by the collector and comptroller thus:—

'Custom House, Leith, 27th May 1826.'

'A B, of Leith, merchant, has transferred, by bill of sale, dated 25th May 1826, the ship Atlas to C D, of Edinburgh, merchant.'

'E F, Collector.'

'G H, Comptroller.'

bill of sale, &c. to such person as shall first, after the expiration of the thirty days, produce the certificate of registry for that purpose; sect. 39. 3. If the certificate be lost or mislaid, or improperly detained, so that indorsement cannot be made in due time; and proof thereof shall be made to the satisfaction of the commissioners of the customs, it shall be lawful for them to grant such further time as may be necessary for recovery of the certificate, of which a memorandum shall be entered by the collector and comptroller in the book of registry, and during such further time no sale shall be entered; ib. 4. To prevent the necessity of the vessel resorting to the port of her registry, for the mere purpose of completing a transfer by indorsement, it is provided, that such indorsement may, under certain precautions, be made in another port. And, *First*, The bill of sale, &c. must be entered at the port of registry. *Secondly*, The bill of sale must contain a notification of such record, signed by the collector and comptroller of the port of registry. *Thirdly*, The collector and comptroller of the port where the ship lies, shall give notice to those of the port of registry, of the requisition to make indorsement; and they, again, shall thereupon send information, whether any, and what other bills of sale have been recorded in the registry book. *Fourthly*, The collector and comptroller of the port where the ship is, shall then indorse on the certificate the transfer. *Finally*, They shall give notice thereof to the collector and comptroller of the port of registry, who shall record the same, inserting the name of the port at which the indorsement was made.

New Registry.

2. Instead of an indorsement on the old registry, a new registry may be obtained on every transfer of property. By sect. 42. it is provided, that if, upon any change of property, the owners shall desire a new registry, although not required by the Act, it shall be lawful to make registry de novo, all the requisites being observed: And such new registry, whether required by the Act, or made in compliance with the desire of the party, as fully completes the transfer, as if the indorsement had been made on the certificate.

Effect of Indorsement.

3. By sect. 39. it is declared to be the true intent and meaning of this Act, that the several purchasers and mortgagees, where more than one appear to claim the same property, shall have priority one over another, not according to the respective times when the particulars of the bill of sale, &c. were entered in the book of registry, but according to the time when the indorsement is made upon the certificate of registry.

2. SALE OF SHARES IN A SHIP.

Transfer of Shares.

It has already been seen, that ships owned by more than one, are held to be divided into sixty-four shares, and that each owner must hold a certain number of sixty-fourth parts; no person being entitled to be entered as owner in respect of any share not being an integral sixty-fourth part. All the requisites of bill of sale—entry in the book of registry—and indorsement on the certificate—already enumerated as applicable to the sale of ships, are to be observed also in the transference of shares of ships.

3. SALES IN ABSENCE OF OWNERS.

Provision is made by the Act for two cases which sometimes occur: 1. Where a ship or any shares of it belonging to one who is absent from the kingdom, are sold by his known agent or correspondent, under directions express or implied, the commissioners of the customs are authorized, on application made, and a proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry de novo be necessary; or recorded and indorsed, as if legal power were produced; good and sufficient security being given to produce a legal power or bill of sale within a reasonable time, or to abide the future claims of the absent owner and his heirs. And, 2. A similar provision

is made for the case where, from death, or absence, or distance of time, a bill of sale cannot be produced or proved to have been executed, and registry de novo shall have become necessary; sect. 44.

4. TRANSFERENCE TO HEIRS, CREDITORS, &c.

Transfers by Law.

The passing of property in ships to heirs or to creditors, is not within the words of the statute, which requires either an instrument in writing, or an entry in the book of registry, or an indorsement on the certificate. The 31st section of the Act relative to transfers by bill of sale, speaks only of the property 'in any ship, &c. belonging to any of his 'Majesty's subjects, *being sold* to any other of his Majesty's subjects.' The 37th section relative to the entry in the book of registry, mentions only *vendors or mortgagors.* The 45th and 46th sections refer only to mortgages or assignments to trustees, for the purpose of selling for the payment of debt. But the transmission by confirmation to the executor, or the right acquired and assigned by commissioners of bankruptcy in England, or by the adjudication which, in sequestration, passes the property of a bankrupt in Scotland to the trustee, is not comprehended within the words, nor is within the spirit, of the provisions relative to sales and mortgages. There is, in such cases, no sale from one subject of the King to another,—there is a mere transmission of right as to personal representatives of the owner. Under former Registry Acts it was held in England, that the requisites of those Acts did not apply to transfers, deriving their effects by peculiar provision or operation of law; as assignments by commissioners of bankruptcy to the assignees.[1] And although this decision in some degree proceeded on the peculiarity of the conveyance from the commissioners, as not being from a former owner in the strict terms of the Acts in question; the general principle seems to have been admitted, that the conveyance to the assignees is a conveyance of powers to be exercised in making a transference, rather than itself a transference. I have no doubt that this precedent would be followed both in England and in Scotland. If a question were to arise in bankruptcy with a purchaser or mortgagee, not having got an indorsement till after the right of the English assignees, or of the Scottish trustee, were completed, by assignment in the one case and adjudication in the other; it would seem that the sale or mortgage would be defeated. Bankruptcy alone would not indeed prevent the completion of the mortgage or purchase, by indorsement on the certificate:[2] But the assignment or adjudication being complete without indorsement, the subsequent indorsement of the bill of sale or mortgage would not seem to avail against the creditors; at least it would not, if the term of thirty days from the bill of sale, or from the ship's arrival, had been allowed to elapse without an indorsement.[3]

5. MORTGAGE OF SHIPS AND DEEDS IN SECURITY.

Mortgage.

There are two methods of using property in ships as a fund of credit—by mortgage, and by assignment to a trustee, for the purpose of being sold for payment of debt. Both these

[1] Abbot, 74. BLOXHAM and Assignees of WARD against HUBBARD, 5. East. 407. YALLOP ex parte, 15. Ves. 60. HAY against FAIRBAIRN; 2. Barn. and Ald. 196.

[2] DIXON against EWART, 3. Merivale, 322. where, under the former Acts, the indorsement being an act to be performed by the vendor or his attorney, was not held barred by bankruptcy.

[3] In a case on this part of the Act, however, (May 1826), I found, in consultation, my opinion opposed by that of two eminent English counsel, who were both of opinion, that a trustee in sequestration, or an assignee under an English commission of bankruptcy, must be held, on the strict words of the statute, bound to enter the transference to him in the registry, and indorse it on the certificate, otherwise the right will be bad.

forms of security are regulated by the 45th and 46th sections of the Act, by which many of the doubts and practical difficulties are removed which attended the doctrine of mortgages under the former Acts.[1]

It is enacted, that where any transfer of a ship, or share thereof, shall be made as a security for debt by way of mortgage, or any assignment to a trustee for selling the same for payment of debt, the collector and comptroller of customs of the port of registry shall make an entry in the book of registry, and also an indorsement on the certificate of registry, as in the case of a sale; and in such entry and indorsement shall state and express, that such transfer was made only as security for the payment of a debt by way of mortgage. The mortgagor is not, by reason of his mortgage, to be deemed the owner of such ship or share; nor shall the person or persons making such transfer be deemed, by reason thereof, to have ceased to be owner or owners; except so far as may be necessary for the purpose of rendering the ship or share available, by sale or otherwise, for payment of the debt for securing which the transfer was made.

Where any transfer of a ship or share shall have been made for security of debt, either by way of mortgage or of assignment, and such transfer shall have been duly registered according to the provisions of this Act, *i. e.* entered in the book of registry, and indorsed on the registry, the right or interest of the mortgagee or assignee shall not be affected by any act of bankruptcy of the mortgagor or assignor, after the time when such mortgage or assignment shall have been so registered; although such mortgagor or assignor, at the time he shall become bankrupt, shall have in his possession, order, and disposition, and be the reputed owner of the ship or shares; and the mortgage or assignment shall be preferred to any right, claim, or interest, which may belong to the assignee of such bankrupt; sect. 47.

6. EVIDENCE IN MATTERS OF OWNERSHIP IN VESSELS OR SHARES.

It was, under the former Acts, found very inconvenient, on occasion of trials relating to the ownership of vessels, to require the registering officer to attend, and bring up the records: To remedy which it has been enacted, 1. That there shall be exhibited, upon request for inspection and examination, the oaths and affidavits, registers and entries: 2. That copies may be taken, or an extract; which, on being proved a true copy, shall be allowed and received as evidence upon any trial at law, without the production of the originals, and without the testimony or attendance of the collector or comptroller, or any one acting for them; sect. 43.

CHAPTER II.

OF PROPERTY IN GOODS AND MERCHANDISE.

THE great mass of property which forms the subject of mercantile dealings, and which we see undergoing incessant changes in commercial cities, consists of moveables corporeal; goods, wares, merchandise, in a rude, or in a manufactured state. And the infinite variety of situations in which this species of property is found, from the first moment that the rude material is begun to be prepared for the market, to the final exhibition of the completed manufacture in the warehouse of the merchant, in the manufactory

[1] See Trollop's Treatise on Mortgage of Ships.

of the artisan, in the shop of the retailer, or in the hand of the purchaser, or of the carrier who undertakes to transport it to the purchaser's residence, occasion questions of difficult solution.

Where a merchant fails with his goods lying consigned in the hands of factors, or in the course of being worked up by the manufacturer; or the agent of a foreign house, with his warehouse full of goods, partly his own, partly belonging to his correspondent abroad; or the seller of goods, after receiving payment, or good bills for the price, becomes insolvent, while yet the commodity lies in his repositories waiting a message from the purchaser for delivery; or the buyer of wares fails, without paying the price, and the goods are still with the vendor, or, having just left his warehouse, are on the road, or at least in their passage, to the buyer to be delivered:—in all such situations, matter of doubtful right arises, in regard to which the rules of the ancient jurisprudence are hard to be reconciled with the facilities required in modern trade, or the usages which manufacturers and merchants have found to be necessary or convenient in conducting their intercourse.

The contest in such discussions resolves into matter of disputed right between an individual claimant and the general body of creditors: the former asserting his claim of property, to the effect of diminishing the general fund for division; the latter maintaining their right, as in the room of their debtor, to sell and distribute the goods in satisfaction of their debts. This inquiry corresponds with that which the continental lawyers have so amply discussed in questions concerning 'creditores dominii.' And it seems necessary to consider,

1. The rules, in their simplest form, respecting the completing of transferences; where, the price being paid or secured, there is no disturbance of the right on account of insolvency.

2. The equitable right, on the insolvency of the buyer, to retain or stop in transitu goods which have not been paid for.

3. The remedy afforded against fraud, even after the commodity has been delivered. And,

4. Certain circumstances in which the true ownership yields to the right of those who, by collusion, have been enabled to acquire false credit on the apparent ownership of goods.

SECTION I.

OF THE TRANSFERENCE OF GOODS AND COMMODITIES BY SALE AND DELIVERY.

THERE exists in name, though not in reality, a remarkable difference between the law of Scotland and that of England, relative to the effect produced on the right of property by the contract of sale. In England, the completion of the mere contract is said to pass the property. But it is not the absolute property which so passes; it is only a qualified and imperfect right which subjects the buyer to the risk of the commodity, but confers on him no title to demand possession of it, or to exercise any dominion over it: And it therefore cannot be said that the property passes, otherwise than nominally, until the contract is followed by delivery and possession.[1] In Scotland, property is not transferred,

[1] See BLOXAM against SANDERS, 1825, for a statement of this imperfect right in English jurisprudence. The propositions laid down by Mr Justice Bayley in delivering the judgment of the Court, are, 1. Where goods are sold, and nothing said as to time of delivery or of payment, and every thing the seller has to do is complete, the property vests in the buyer, so as to subject him to the risk of accidents, and entitle him to demand possession or payment of the price: But he has no right of possession till the price be paid. 2. The seller's right in respect of the price, is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion; and payment or tender of the price is a con-

either nominally or effectually, without delivery of the commodity; and yet the risk of the thing is with the buyer, as completely as by the law of England, from the moment the contract is completed.

Essentially, therefore, the law of the two countries in this matter is the same; and yet it is very necessary to keep the nominal distinction in recollection, in comparing the writings of lawyers, or perusing the language of judicial decisions, in either country. It is not perhaps of any importance to contend for the greater purity of principle or of language by which the law of Scotland, in this matter, is distinguished; and yet I cannot help observing, 1. That it is inconvenient, and apt to introduce confusion of ideas, to use the word PROPERTY in different senses. Correctly speaking, property imports 'dominium;' the entire and exclusive dominion over the thing spoken of; the proprietor being the dominus, and having the sole disposal of it. The departure from this simplicity of language has required, in English juridical expression, the qualifying terms (not understood in common speech) of Absolute and Special property: whereas, in Scotland, the term is used in one uniform and unvaried sense, importing the right of exclusive possession and uncontrolled disposal. 2. It does not, to a Scottish lawyer, appear correct in reasoning to ascribe to property alone that risk attending commodities sold, which is inconsistent with the other features of a right admitted to be imperfect, and at the same time is sufficiently accounted for, (consistently with the imperfect transference), by referring it to the principle of the law of contract; the obligation undertaken by the seller being discharged by the perishing of the commodity without his fault.[1]

According to the Roman jurisprudence, which, in this matter, is followed in Scotland, there are, in the transference of property by sale, two distinct parts: 1. The contract or agreement to transfer, regulated by the law of obligations; and, 2. Tradition, by which the transference is completed; which constitutes the right of property, and, in its effects, is ruled by the law of property. In the language of the Roman law, the contract is distinguished as the Titulus, the tradition as the Modus transferendi dominii.

The completion of the contract, or Titulus transferendi dominii, confers no real right. Without tradition, it passes no property or dominium. It only establishes against the person who means to transfer, the obligation to deliver the thing sold; and bestows on the person who means to acquire, a jus ad rem.

It is by the completion of the Modus transferendi, accompanying a legitimate contract, that the property passes, and the jus in re is established, by which the right of the vendee is distinguished from that of the general creditors of the vendor.[2]

dition precedent on the buyer's part, till when he has no right to possession. 3. If the goods are sold on credit, and nothing said of time, the buyer has right to possession as well as property; but his right of possession is not absolute, but liable to be defeated if he become insolvent before he obtain possession. 4. If he fail to pay when the credit expires, and is insolvent, it is as if no bargain for credit had been made; the seller has a right to stop in transitu in virtue of his original ownership, the right of the buyer being defeated. Much more has the seller a right to retain the goods. 5. The buyer can maintain no action which requires both a right of property and a right of possession, but on payment of the price.

Add to this the effect of the Act of 1. James I. c. 19. below, next note.

[1] The chief distinction in practical effect between the English law in passing the property, and the Scottish in leaving the goods untransferred, is visible on occasion of a sale where the price has been paid. In England, this entitles the buyer to possession, and in all cases *at common law* makes a perfect transference, so that the creditors of the seller cannot take it: In Scotland, the property is not passed, and the creditors of the seller will be entitled to it as part of the fund of division. By the English statute 21. James I. c. 19. the same practical effect is produced in England with that which results from the operation of the common law in Scotland: goods remaining in the seller's possession, although paid for, going to his creditors as if untransferred.

[2] Traditionibus dominia rerum non nudis pactis transferuntur. Cod. de Pact. l. 2. tit. 3. l. 20.

In the following passage, Pothier has delivered, with great clearness, the distinction between real and personal rights, according to the doctrine of the civil

Sale as a contract will be considered hereafter. At present it is to be assumed, that a contract of sale has been concluded, unexceptionable, and established by the legitimate evidence; the present inquiry being directed to the doctrine of tradition or delivery; the modus transferendi by which the real property is passed in conformity with such contract.

The property of moveables is, according to the received maxims of the law, presumed from possession; and this possession, the badge of such property, is conferred by tradition, implying the consent and act of the vendor to confer on the vendee, at once possession and the jus dominii.

Delivery or Tradition, originally, was a clear and unequivocal act of real possession, accomplished by placing the subject to be transferred in the hands of the buyer, or of his avowed agent, or in their respective warehouses, vessels, carts, &c. This sort of delivery was well entitled to be held as the true and proper badge of transferred property; as importing full evidence of consent to transfer; preventing the appearance of possession in the transferrer from continuing the credit of property unduly; and avoiding uncertainty and risk in the title of the acquirer.

But an adherence to this plain and simple rule is utterly impossible amidst the complicated transactions of modern trade. It often happens that the purchaser of a commodity cannot take instantaneous delivery. Its bulk; the distance from his house; the frequency of bargains concluded by correspondence between distant countries; the peculiar situation of the goods, deposited, perhaps, in public custody for the duties, or in the hands of a manufacturer, for the purpose of having some operation of his art performed upon them, to fit them for the market; and many other obstructions—make it often impracticable to give, or to receive, actual delivery. The fair occasions of trade have been thought to require that, in such cases, the original rule should not be adhered to rigidly; that something short of actual delivery should be admitted to transfer the property. Thus, when the seller, in a distant country, puts the goods on board a ship to be transported to the buyer, and delivered to him; or when, the distance between them being by land, a carrier receives the goods from the seller to carry to the buyer; or when, the goods being in the hands of a manufacturer, or packer, or in a public warehouse, an order is given to the buyer to receive delivery; these acts come constructively to be regarded as fair badges of transference, entitling the buyer, who has paid the price, to take the wares as his own. By the admission of these, and such acts as these, to have the effect of delivery, commerce is facilitated, and the rapid circulation of commodities, and busy employment of stock in speculation and mercantile enterprise, fostered and encouraged.

But when the buyer suddenly fails, before the price is paid, and the goods are still in a state of transit to the buyer, the situation of the seller is thought hard, and an extension of the right of the seller to retain his undelivered goods, is naturally attempted. His goods are still distinguishable, and have not yet reached the buyer; they have not gone into his stock; they have not contributed to mislead others by raising a credit on the property; and in this way, and from the indulgence of equitable considerations,

law. 'Les conventions seules et par elles-mêmes ne 'produisent que des obligations: c'est leur nature; 'c'est pour cela qu'elles sont établies. Ces obligations ne donnent à celui envers qui elles ont été contractées, qu'un droit contre la personne qui les a 'contractées. Ce droit est bien un droit *par rapport* 'à la chose qu'on s'est obligé de nous donner; mais 'ce ne peut être un droit *dans* la chose; c'est encore 'moins le domaine de la chose.' He afterwards adds, 'De ce principe que le domaine d'une chose ne peut 'ordinairement passer que par la tradition de la chose, 'il suit, que quelque convention que j'aie avec une 'personne qui s'est obligée de me donner une certain 'chose, tant qu'elle ne m'en a pas fait la tradition 'réelle ou feinte, elle en demeure toujours la propriétaire. C'est pourquoi ses creanciers peuvent la saisir 'valablement sur elle, sans que je puisse être reçu à 'demander la récréance de cette chose n'en étant pas 'encore devenu le propriétaire.' Traité du Droit de Propriété, tom. iv. p. 436. No. 245. 247.

and notions of hardship, a privilege arises to sellers of following and stopping their goods before they come into the buyer's hands.

This may be regarded as a general view of the principles and considerations on which the law with respect to the transference of goods, merchandise, &c. has in this country been arranged; and which, in the prosecution of this inquiry, is now to be more particularly detailed:—the doctrine of delivery in this section; the provisions against injustice in the next.

§ 1. OF RISK AS A CRITERION OF THE TRANSFERENCE OF GOODS.

In attempting to reconcile the jarring principles, and resolve the difficulties of the doctrine of delivery, it has been thought, that the simplest and least objectional criterion of transference is to be found in the RISK; and that if in any case it be doubtful whether the property be altered, the most correct decision is to assign the right to him who must bear the burden of the loss, should the subject perish. If the legal effects of risk were not to be accounted for on any other theory than as the accompaniments of ownership, the conclusion would be unavoidable. But, without admitting ownership as in any degree influenced by the completion of the contract, all the effects of the maxim, 'Periculum rei venditæ nondum traditæ est emptoris,' may be justified as legitimate consequences of the personal obligations under that contract. And in the law of Scotland it is settled, that risk is no test of property; and that the question of risk forms a point in the law of Obligation, not in the law of Transference; the decision of it depending upon principles quite distinct from those concerned in the question of property.

If a person have sold a particular cask of wine, and received the price, he has, by the contract of sale, conferred on the vendee the jus ad rem; and he is, by the obligation contained in that contract, bound to deliver the wine when demanded: But as tradition alone passes the property, or jus in re, he continues still the undivested proprietor. The buyer may by action compel delivery; and if this have become impossible by the fault of the seller, he will be entitled to damages. But if by unavoidable accident the wine perish, the obligation to deliver cannot be enforced; and as no damages can be due where there has been no fault, the wares are said to have perished to the buyer. It is only a concise way of expressing this doctrine to say, that the risk lies with the buyer.[1]

The best proof of this doctrine is, that if the subject of the obligation be not specific, but indefinite, (a certain number of quarters of corn, for example, or of pipes of wine), then, as the obligation may be fulfilled although all the wine in the vendor's cellars have perished, so the loss is not to the buyer; the seller has no good defence against the claim for delivery. Thus, in the contract of sale, the buyer is creditor, and the seller debtor for *delivery;* the seller is creditor, and the buyer debtor for the *price:* The buyer is entitled to enforce the obligation to deliver, under which the seller lies; the seller on

[1] 1. Stair, 14. § 7.; 3. Ersk. 3. § 7. See also Pothier, Tr. des Obligations, part 3. c. 6. Tr. du Cont. de Vente, vol. i. p. 481. § 56.

The legislators employed in constructing the new civil and commercial code of France, departed from these views, and assumed the principle, that the property of goods sold is acquired to the buyer, from the moment of completing the *contract.* 'La vente est 'parfaite entre les parties, et la *propriété est acquise de 'droit à l'acheteur à l'égard du vendeur,* dès qu'on est 'convenu de la chose et du prix; quoique la chose 'n'ait pas été encore livrée ni le prix payé.' Code Civile, § 1583.

In the passage of Lord Stair, cited above, there is an idea extremely similar to this:—'The intention 'and tendency of the property being to the buyer, if 'the seller be not in mora, the case is as if the de'livery were made, and the property changed, as to 'the intention and meaning of the parties, which regu'lates contracts.'

his part to enforce payment from the buyer.[1] The seller's obligation, being for a specific subject, is extinguished wholly, or to a certain extent, by the annihilation, or partial destruction, of the subject without his fault; the buyer's, being for a sum of money, can admit of no such defence.

It is thus that the subject comes to perish to the buyer, and to be at his risk: not because the transference to him is complete, but merely because the property is the subject of an engagement by the seller, which is extinguished by its destruction. In no sense, either actually or constructively, is the real right of property altered. Possession, the true badge of property and foundation of credit, remains with the seller; and even the very maxims of the law which lay the risk upon the buyer, distinguish the property as still untransferred. While, by one maxim, 'Traditionibus dominia rerum non nudis pactis 'transferunter;' by another, 'Periculum rei venditæ nondum traditæ est emptoris.'[2] After a bargain of sale, therefore, the goods which still remain in the seller's warehouse, perish to the buyer;[3] but if the buyer become a bankrupt without paying the price, the goods are still the seller's; nay, though the price has been paid, the creditors of the seller finding the goods in his warehouse, are entitled to take them as a part of his estate, leaving the buyer to claim a dividend for the price.

In England, the doctrine of risk, considered in its practical effects, is almost precisely the same with that which has now been explained; but the principle seems different. In that law, it appears that the risk may correctly be stated as the criterion of property: For the determinations touching the question seem to proceed on the ground, that the property passes with the completed contract; and is suspended while the contract is incomplete; and that the risk attaches to the thing, and so to the owner of it.[4] But practically the decision is not different in this class of cases in the two countries. In England, the property passes when the contract is complete, not sooner: In Scotland, the obligation to deliver does not attach, till the same point of completion. But taking the principle of the law of Scotland, the doctrine of risk (whatever it may be in England) is quite unconnected with the question of transference; it affords no true criterion by which the question of property can be decided; and some other method must be taken of reconciling the apparent inconsistencies of the doctrine of delivery, considered as a badge of transference.[5]

[1] The buyer is entitled besides to have his commodity, according to agreement, with all its intermediate advantages; and he must take it with all its accidental damage.

[2] Contrast the 8th law of the Pandects, (lib. 18. tit. 6. De peric. et com. rei vend.), where the doctrine is laid down concerning the effect of completing the *contract*, with the 20th law of the Code, lib. 2. tit. 3. De Pactis.

[3] See Pothier, Con. de Vente, vol. i. p. 579.; 1. Stair, 14. 7.; 3. Ersk. 3. 7. In M'DONALD against HUTCHISON, 3d January 1744, the Lords determined the general point, 'that *periculum rei venditæ nondum tra-* '*ditæ* lies on the buyer.' The case was, 'A parcel 'of spirits in the King's warehouse was sold, and a bill 'given for the price, but the spirits not delivered; and 'next day the warehouse was broken, and the spirits 'taken away, yet the buyer found liable for the price.' Elchies, voce Sale, No. 5.

[4] The principles of English law on this subject seem to me to be justly stated by Mr Brown, in his treatise on the Law of Sale, p. 355. et seq., and I fear that I am accountable for the fault of having overlooked this distinction, and misread the case of RUGG against MINNET, 1809. In this case, turpentine was sold by auction, and certain casks bought by Rugg. They were to be filled up by the sellers during a certain time, while they remained in their warehouse till the last payment was made. Some of the casks were filled up, and nothing remained for the sellers to do; others were not so filled up: and in this state of matters, a fire happened which consumed them. The Court held the former to be at the risk of the buyer; the latter at the risk of the seller. 11. East. 210.

In the case of ZAGURY against FURNELL, 2. Camp. 240. relative to goat-skins, which by usage are counted over before the contract is complete, the same principle was followed; the whole having been burnt before counting off. See in HINDE against WHITEHOUSE, 7. East. 558.

[5] For the obligations to deliver, and their effects, see below, Of Sale.

§ 2. OF COMPLETION OF THE TRANSFERENCE BY DELIVERY.

The general doctrine of delivery is laid down in very clear terms by one of the best of our lawyers :—' Transmissions of every subject, of whatever kind, (says Kilkerran), must ' be completed by some public act that may come to the knowledge of third parties, and ' without which the transmission will be incomplete, be it ever so fairly and honestly in- ' tended. The transmission of the property of moveables is completed by delivery ; of ' lands, by infeftment ; of tacks, (leases), and other rights which require no infeftment, by ' possession.'

Keeping in recollection, that, in this first part of the inquiry, the rules are to be considered in their most simple form, as unaffected by any failure in the payment, or satisfaction given for the price, it is to be observed, that although delivery of the commodity is necessary to the passing of property, it still is not indispensably required that it should be of that actual and unequivocal kind, which places the thing sold within the grasp, and in the personal apprehension of the buyer, or of his servants, clerks, and others, whom the law identifies with him and considers as his hands ;[1] but that acts of possession less immediate and direct are, by construction of law, held sufficient, when actual tradition into the buyer's hands cannot be given.

It appears, that at first the rule of law which required actual delivery in order to complete a transfer of property, was rigidly observed, unless where actual delivery was in the circumstances of the case impracticable. And the confusion which has been introduced into the doctrines of the law, by the relaxation of the rule, even to this extent, gives warning of the danger with which any further indulgence may be attended. It is by no means uncommon, however, to find every fancied conveniency or facility to the dealings of traders represented as a case of that sort of necessity which the law has in contemplation in admitting constructive delivery ; not reflecting that this doctrine, in its true nature, is not meant as an indulgence to imprudent carelessness, nor the ancient rule of tradition intended to be broken in upon for the attainment of mere conveniencies. There is no end to the multiplication of small distinctions ; and traders will be found infinitely ingenious in discovering cases in which mere conveniency and facility in the management of their dealings may be made to assume the appearance of necessity, till all the fixed principles of the law shall be unsettled, and a miserable pretence of mercantile usage, varying in every port, and with each new set of dealers, be permitted to usurp the place of those great rules to which it is so easy to conform. If a merchant buy and pay for a pipe of wine, which is marked and set apart for him in the vendor's cellar, it may be a great conveniency to him that it should remain there ; and, in one sense, he may be said to suffer a hardship, should that wine be taken by the seller's creditors on bankruptcy, as a part of the divisible fund : but that is a hardship to which the buyer voluntarily exposes himself for the sake of this very conveniency, and against which he may provide by taking immediate delivery, or by having the wine locked up, and the key delivered to him. But if he order this wine from a distance, and pay for it, and it is put into the hands of a carrier,

[1] 2. Ersk. 1. § 19. ' Non est corpore et actu ne- ' cesse comprehendere possessionem, sed etiam oculis ' et affectu, et argumento esse eas res quæ propter ' magnitudinem ponderis moveri non possunt, ut co- ' lumnas : nam pro traditis eas haberi si in re præsenti ' consenserint.' Dig. lib. 41. tit. 2. De possess. l. 1. § 21. See also Pothier, Tr. du droit de Propriété, vol. iv. p. 419. where, speaking of the sale of a log of wood by a timber-merchant, who points it out as the vendee's, and other similar cases, he says, ' Dans tous ' ces cas, les yeux de celui à qui on fait la montrée de ' la chose dont on entend lui faire la tradition, lui font ' acquerir la possession d'une chose mobilière de même ' que s'il l'eut reçue entre ses mains.'

See Ulpian's doctrine, Dig. L. 18. tit. 6. l. 1. § 2. De Peric. et Comm. ; and that of Paulus, ib. l. 14. § 1.

or shipmaster, to be transported to the buyer, all is done that can be done; all the delivery is taken that the circumstances of the case allow. It is only a necessity of that absolute kind that can, in strict principle, authorize constructive delivery. Where the goods are at sea; or require to be sent from a distance by a carrier; or are in a public warehouse; or in the hands of a manufacturer, to have some operation of art performed; these are truly cases of necessity, and, without some relaxation of the rule of actual delivery in such cases, it has been supposed impossible to carry on trade.

In England, it appears, from some recent decisions, that this doctrine is in danger of being unsettled, not merely by the admission of conveniency, to supply the place of the impossibility of making actual delivery, which formerly was held essential to constructive delivery; but even by admitting this imperfect delivery to have the effect of divesting the seller of his right to stop in transitu.

To make the explanation of this doctrine as plain as possible for practical uses, the cases may be considered in the following order:—

1. Where goods are in the seller's own custody at the time of delivery; and the delivery is made directly to the buyer, or into his warehouse, ship, or cart.
2. Where the goods are in the custody of a third person.
3. Where the seller and buyer are at a distance, and the goods are to be sent by sea or land-carriers.
4. Where the buyer is represented by another person.

ART. I.—TRANSFERENCE OF GOODS IN THE SELLER'S OWN POSSESSION, DIRECTLY TO THE BUYER.

Delivery de manu in manum.

1. The simplest case of all is, where a person goes into a shop, and buys and brings off with him an article there exposed for sale: As, if I go into a bookseller's, and purchase and bring away with me a book; I have received actual delivery, and the transfer is to all intents and purposes complete.

'The clearest possession,' says Lord Stair, 'is of moveables, and it is the first possession that was amongst men; for so did the fruits of things common become proper; and, thereafter, ornaments, clothes, instruments, and cattle, became proper; the possession whereof is simple and plain; holding and detaining them for our proper use, and debarring others from them, either by detaining them in our hands, or upon our bodies, or keeping them under our view or power, and making use of them, as having them in fast places, to which others have no access. This possession of moveables was so begun and continued, and, by contrary acts, interrupted and lost, when others exercised the same acts either without the possessor's consent, or by their tolerance, or tradition and delivery, or by forsaking and relinquishing them; so that in the matter of possession of moveables there can be little controversy.'[1]

Protracted course of delivery.

2. Where the commodity is not a single article; but, like a cargo of grain, requires repeated acts, and a long protracted course of delivery; circumstances may fall out so critically, as to make it of importance to draw the line between what is actually delivered, and what is not yet delivered. If, for example, a merchant in Leith have in his warehouse 100 bushels of corn, which he sells to another merchant, and 50 bushels of the grain have been delivered over to the buyer; is it to be held that delivery has taken place only of that part of the cargo which has, in truth, been given out of the warehouse, and received by the buyer; while the other is still in point of fact undelivered? Or is the whole to be held as delivered? In such a case, even where the price has been paid, the delivery can-

[1] 2. Stair, 1. 11.

not, on strict principle, be held complete, so as to prevent the creditors of the seller from taking the undelivered part, leaving the buyer to claim a dividend on the price.[1]

Delivery into Seller's carts.

3. Where the seller sends his carts, waggons, &c. to the premises of the buyer, the goods continue undelivered while they are still on the carts unpacked.[2]

Delivery by Buyer's carts.

4. Where the buyer sends his cart to receive delivery, and the ware is delivered over and placed on his cart; this is actual delivery, transferring the property.

5. Where the commodity is delivered to any one entitled to represent the buyer, and give it a new destination, in which the seller is not participant; or to one who, as his clerk, servant, custodier, &c. is to hold the goods till, by a separate and uncontrolled act of the buyer, a new destination is impressed on them, the delivery is effectual to all purposes. Where it is made even to a third person, and for the sole purpose of the goods being carried farther, the delivery is good to pass the property in all cases, except where the seller stops for the price.

Delivery into warehouse of Buyer;

6. The delivery of commodities into the warehouse of the buyer, whether he be present or not, is as complete delivery, as in the example already given of a book put into the hand of the buyer. So, where one has a granary or a warehouse under the care of a servant or clerk, delivery into that granary or warehouse passes the property. Nay, it has been decided in England, that 'if a trader be in the habit of holding the warehouse 'of a wharfinger, or of a packer, as his own, and making it the repository of his goods, 'delivery into such warehouse is actual and real delivery.'[3]

Or into the King's warehouse.

7. Under the bonding acts, the bond warehouse is to be held as the merchant's own warehouse, where his goods lie at his disposal, and into which they may be delivered for his use. A delivery by the seller into the bond warehouse, for behoof of the buyer, of goods bonded in the buyer's name, is as effectual delivery as if made into the buyer's own cellar.[4] So it is with delivery into the warehouse of a public warehouseman in the buyer's name.

[1] COLLINS against MARQUIS's Creditors, 23d November 1804; 13. Fac. Coll. 413. Here a cargo of timber was commissioned by Marquis from Collins, and sent by a ship, which, on arrival, was partly unloaded: Part of the timber was taken into Marquis's timber-yard,—part was still on the shore,—part remained on board,—when the process of delivery was stopt by the shipmaster, doubtful of the security for his freight. Collins then applied to the Sheriff to have the cargo inventoried and sold for his behoof. But in the meanwhile, Marquis's creditors, to gain an advantage, paid the freight, and got possession of the whole timber from the shipmaster. The question was brought to trial by an action on the part of Collins for restitution of the whole cargo. The Court held Collins entitled, 1. To that part of the cargo which remained on board; and, 2. To that which was on the shore undelivered: But, 3. They found the creditors of Marquis entitled to 'that part of the cargo which 'was, at the date of Collins' apprehension, within the 'wood-yard, or other premises belonging to Marquis.'

This decision may admit of some question, if it can be considered as falling under another class of cases, hereafter to be discussed. See below, p. 197.; and in that view, the English case of SLUBEY against HAYWARD, quoted ineffectually in Collins' case, was perhaps the true decision. In the simple case of delivery from the seller to the buyer, the decision seems to be law, and I should have been inclined to think it ought to have ruled, accordingly, the case of BROUGHTON against AITCHISON, below, p. 180.

[2] BLAKEY against DIMSDALE, 1774. Here a quantity of corn had been sold by sample to Blakey, deliverable in a month. It was sent by the seller, in a cart, under the charge of his own servant, to Blakey's premises; and while the servant was in the act of uncarting the corn, part being already lodged in Blakey's repositories, and the rest still on the cart, a seizure was made of a certain proportion for the whole out of what remained on the cart as payment of a market-toll. The question was, Whether Blakey was proprietor of the grain, so as to maintain his action of trespass? Lord Mansfield was of opinion, that the delivery to the servant, for Blakey's behoof, was sufficient to vest the property in him as to third parties: and to this effect constructive delivery was sufficient. But the opinion on which I rely at present is this:—His Lordship proceeded to say, 'But what is still stronger in 'this case is, *that the corn was absolutely brought to the 'plaintiff's house, and part of it unloaded before the 'trespass was committed.* That is an actual, not a con-'structive possession.' Cowper's Rep. 664.

[3] RICHARDSON against GOSS, 3. Pull. and Boss. 127.; SCOTT, &c. against PETTIT, ib. 469.; and LEEDS against WRIGHT, ib. 320.

[4] STRACHAN against KNOX and Company's Trustee,

Delivery into a ship of the Buyer.

8. Where a buyer sends his own ship for the goods, or a ship chartered by him for a definite period, and entirely at his own command; delivery into such ship is effectual to all intents and purposes. In the former case, it is his own repository in which the goods are placed; in the latter, the possession of the ship being with his hired servants, not for a mere voyage, but for such destination as he may choose to give, delivery into such vessel is delivery into the hands of the buyer.

9. But where a ship is on general freight only for a particular voyage, and in order to bring home to the freighter those particular goods from abroad, the freighter having no control over the ship; the delivery, though not held as made into the buyer's repository, is effectual to pass the property, the price being paid. And in such a case, it makes no difference whether this affreightment is made by the buyer, the ship being sent from Britain; or by the seller, freight being got abroad; the engaging of the entire vessel not differing essentially from engaging a part of a general ship.

The doctrine of these two paragraphs is illustrated in the cases quoted below.[1]

21st January 1817; 19. Fac. Coll. 253. Knox and Company of Aberdeen ordered from Strachan of London, wine in casks, to be sent from Oporto. Strachan's agent at Oporto, accordingly, shipped the wine for Aberdeen, where, on arrival, it was lodged in the King's cellars, bonded for the duties, in the name of a merchant acting for Knox and Company. While the wine lay thus in bond, and not paid for, Knox and Company failed. Strachan applied to the Sheriff for a warrant to have the wine delivered to him, as stopped in transitu, not yet having reached the hands of the vendee. The Sheriff refused his application; and, on appealing to the Court of Session, they, recognizing the distinction stated in the text, held the King's cellar to be the cellar of the person in whose name, and for whose behoof, the wines were bonded; and that in this case the delivery to Knox and Company was complete.

[1] In England, the following cases have been determined:—

Fowler, &c. Assignees of Hunter and Company, against M'Taggart and Kymer, tried by Mr J. Grose at Bristol, Mich. Term, 1797. In that case, M'Taggart and Company had shipped a quantity of tobacco by order of Hunter and Company, the bankrupts, on board of a vessel chartered to the bankrupts for three years, and in which the goods in question were to be carried out to Naples and Alexandria. The goods were shipped 4th February, and the mate's receipt given for them, and an invoice made out by the sellers in name of the buyers. The vessel was, by contrary winds, detained at Portsmouth; and, in March, the buyers becoming bankrupts, the sellers procured bills of lading from the captain to themselves, and, in September 1794, got possession of the tobacco—got it relanded, and disposed of it. It was held, that the shipping on board the vessel thus chartered by the buyers was an actual delivery, transferring the property of the goods, and divesting the sellers of the right to stop. 7. Term. Rep. 442.; and 1. East. 522.; 3. East. 396.

Inglis, &c. Assignees of Crane, against Usherwood, tried in King's Bench, 9th June 1801, (1. East. Rep. 515.) Lord Kenyon incidentally expressed an opinion apparently extending the doctrine of Fowler's case to a common affreightment. But this was corrected in the following case.

Bothlingk against Inglis. Crane chartered a vessel from London, and sent her to Petersburgh for a cargo. In consequence of Crane's order, Bothlingk and Company shipped the cargo between the 19th and 29th October; but hearing of Crane's insolvency, they sent one of the bills of lading to London, and the goods were stopped. The question was, Whether this delivery into the vessel, thus chartered, was equivalent to actual delivery? and the Court held that it was not. An extract from the opinion of Lawrence, J., who delivered the judgment of the Court, will show the doctrine:—'For 'the benefit of trade, a rule has been introduced 'into the common law, enabling the consignor, in 'case of the insolvency of the consignee, to stop 'the goods consigned before they come into possession of the consignee: which possession Mr Justice Buller, in Ellis against Hunt, says, means an '*actual* possession. That the possession of a carrier is not such a possession has been repeatedly 'determined; and the question now is, Whether 'the possession of the master be any thing more 'than the possession of a carrier, and not the actual possession of the bankrupt? As to this, it 'appears, that Usherwood, the master, contracted 'with the bankrupt to proceed from hence to Petersburgh, and to bring in his ship a cargo of 'goods, which Crane engaged should amount to the 'tonnage of the ship: which does not differ from a 'similar contract entered into by the consignor, by 'the direction of the consignee, at the loading port, 'for the conveyance of the goods from him to the 'vendee; in which case it would hardly be contended, that a delivery by the consignor to the 'master of the ship, for the purpose of carriage, 'would be such a delivery to the vendee as to prevent the right of stoppage *in transitu*. In each 'case the freight would be to be paid by the consignee; in each case the ship would be hired by 'him, and there would be no difference, except 'that, in this case, the ship, in consequence of the

10. Where goods are in a repository of the seller, from which the buyer does not wish them removed, but which he is willing to make the ultimate place of their destination for a time; the giving up of the key of that repository by the seller to the buyer, is an act of real delivery.[1] It differs from symbolical delivery in this, that a symbol is properly nothing more than the sign of the thing transferred,—the image by which it is represented to the senses; whereas the delivery of the key gives to the buyer access to the actual possession of the subject, and power over it, while the seller is excluded; in which particular it corresponds with what Lord Stair delivers in his definition of actual possession,—'having the goods in fast places, to which others have no easy access.' It will not prevent this kind of delivery from having effect, that the seller has a double or master-key by which he may open the door; or that he may get access by some indirect and unusual means; or that there is a door of communication with some other part of the premises which the seller may clandestinely open.[2] It does not, however, seem to be altogether settled, (though the decision would probably be in the negative), whether the circum- Delivery of a Key.

'agreement, goes from England to fetch the cargo; 'in the other case, the vessel would bring it immediately from the loading port. Both in the one 'case and in the other the contract is with the master for the carriage of goods from one place to another; and until the arrival of the goods at their 'port of destination, and delivery to the consignee, 'they are in their passage, or transit, from the consignor to the consignee. If a man contract with 'the owner of a general ship to take goods, which 'are equal to half the tonnage of the ship, and the 'master complete the loading of his ship with the 'goods of others, there would be no question but 'there might be such stoppage. And surely it will 'not be said, that the right of stoppage depends on 'the quantity of the goods consigned. In support 'of the defendant's claim, the case of Fowler against 'M'Taggart has been relied on. The more proper name of that case is, Fowler against Kymer 'et al. which was tried before Mr Justice Grose at 'Bristol. But that case is very distinguishable from 'this: There the bankrupts, Hunter and Company, 'were in possession of a ship, let to them for a term 'of three years, at L. 52. 10s. a-month, they finding 'stock and provisions for the ship, and paying the 'master; during which time they were to have the 'entire disposition of the ship, and the complete 'control over her. The ship had been one voyage 'to Alexandria, and had the goods put on board her 'to carry them on another voyage to the place; not 'for the purpose of conveying them *from* the plaintiffs *to* the bankrupts, but that they might be sent '*by the bankrupts* upon a mercantile adventure, for 'which they had bought them. There the delivery 'was complete. And the facts of that case differ 'widely from this, where Crane had no control over 'the ship, and had merely contracted with the master 'to employ his ship in fetching goods for him.' BOTHLINGK against INGLIS, East. Rep. 395.

In SCOTLAND, these cases were decided:—

ROBERTSON and AITKEN against MORE. On the 25th February 1796, Sinclair and Williamson purchased 127 quarters of wheat from Robertson and Aitken, with whom it was to remain till an opportunity occurred of sending it to Leith. The buyers having afterwards purchased, by their agent in that part of the country, another quantity of grain, hired a vessel at Leith, and sent it to the port of Eyemouth to take delivery of both quantities; and, accordingly, both were put on board, and the vessel sailed again for Leith. The bills of lading and invoices were regularly sent to Sinclair and Williamson. They became bankrupts; and the grain in the harbour of Leith was claimed by the sellers. There was some difference of opinion on the Bench, as to whether the delivery in this case was actual delivery; but it was at last decided, that the grain might be stopped. 3d July 1801.

PIERSON against BAXTER. A similar judgment was given, where the ship was chartered by the buyer for the purpose of carrying the grain. The Judge-Admiral, in respect it was not denied that the wheat 'in question was put on board a ship or vessel, char- 'tered by Henry Thomson, the purchaser, found, that 'the putting said wheat on board a vessel so char- 'tered, was equivalent to actual delivery into the 'hands and custody of the purchaser; and that the 'right to stop *in transitu* was thereby barred.' This judgment was altered by the Court of Session, 8th July 1807; 12. Fac. Coll. 549.

[1] 'Si quis merces in horreo repositas vendiderit,' (says Gaius), 'simul atque claves horrei tradiderit 'emptori, transfert proprietatem mercium ad empto- 'rem.' Dig. lib. 41. tit. 1. l. 9. § 6.; Instit. lib. 2. tit. 1. § 44.

[2] In the case of MORE against DUDGEON and BRODIE, 3d July 1801, the latter had sold to Sinclair and Williamson a quantity of grain deposited in a loft. The question related to the delivery of the key, and the effect of it. But the Court was clear, (on the supposition that the key was truly delivered), that the circumstance of the sellers having it in their power, by an open compartment over a communication door, to get access to the loft, and bar the door on the inside, to the exclusion of the buyers, could have no effect in destroying the reality of the delivery and possession.

stance of the repository being within an enclosure, the doors of which may be shut against the buyer, has any force in destroying the effect of the delivery of the key.[1]

11. Where the seller's warehouse is one in which goods of others also are received for rent, the taking of rent by the seller is held delivery in England.[2] But that is not yet decided as the law of Scotland.

12. Where standing trees are bought, they cannot be instantly cut down and removed, and the practice is to mark them for the buyer. Such marking is good constructive delivery.

13. In the sale of growing corn, no actual removal can take place till the corn be reaped. A delivery by symbols was held good to exclude creditors; but it has not been determined whether the transit could be held as completed.[3]

14. But in the sale of cattle, the practice is extremely common to mark them with the buyer's mark, and leave them for grazing in the enclosure of the seller, the buyer paying rent: This seems to be effectual delivery.[4]

15. In selling a farm-stock of sheep, it is often difficult to deliver them to the buyer; for they are scattered over many miles of pasture hills, and cannot be collected. The delivery is in parcels: the shepherds alone know when they have gone through the whole: and the sheep cannot advantageously be removed from their native farm. Usage seems to give the only rule where the question turns on the completion of the transit.

16. There is another case of necessity, which seems to give sanction to constructive delivery, viz. Where goods are purchased from a manufacturer before some necessary operation of his art is completed. Contracts of this kind are frequent. A person buys a ship on the stocks; or a piece of cloth at the printfield; or a vase in the hands of a goldsmith unfinished; or a merchant, having an order from abroad for cotton goods, goes round among the manufacturers, and buys all the cloth upon their looms in a state of preparation. Actual change of the possession is generally speaking impracticable; but if the accidental bankruptcy of those manufacturers were to entitle their creditors to seize the goods, and there were no means of securing the property to the buyer, ruin might, in extensive speculations, ensue to the foreign merchant and his factor. Where, in such cases, the evidence of the contract is clear; where the subject purchased is specific; and where there is no ground for pleading on the effect of reputed ownership, as giving additional credit[5]

[1] STEIN bought from SOMERVILLE and Company a quantity of whisky, which was counted over and lodged in a cellar, and the key delivered to the purchaser. The purchaser became bankrupt; and when the goods were demanded, the seller refused delivery, because the bills were bad. The answer was, that there was no longer any power of retention, the delivery being completed by delivery of the key. The seller replied, that he held the full power of the outer gate, by which alone access could be obtained to the loft. In the papers there was some discussion on the point under review, but no decision on this question. I should rather be inclined to think, that as this circumstance could have no effect in disturbing the right of possession of the tenant of a loft or granary so situate, and as he might demand and enforce access at any time; so should it prove of as little avail in a question of the kind now under consideration. And the remarks that incidentally fell from the Judges, in the case of Dudgeon and Brodie, seemed to me to favour this conclusion. In that case, there was no room for a direct judgment on the point. The loft was situate within a court, the door of which was locked at night: but this court was not exclusively the property of the vendors; several others had cellars and lofts there, and the gate was common.

[2] HURRY against MANGLES, 1. Camp. 452. See below, Of Stopping in Transitu; also p. 179.

[3] 21st July 1758, GRANT against SMITH, 2. Fac. Coll. 277. Here it was held, that a quantity of growing corn being sold while yet green, the property passed by symbolical delivery, so as to exclude the seller's creditors, by whom it was afterwards poinded when ripe.

[4] In an old case, where cattle were sold, and marked by the buyer, and a bill given for the price, the cattle were left in the seller's enclosures till the buyer could conveniently take them away. Some were taken away. The servant who had the charge of the enclosures joined the rebels in 1745, and under his direction the rest of the cattle were carried off. The Court held the buyer liable for the price. 15th July 1748, CAMPBELL against BARRY; Elchies, voce Sale, No. 7.

[5] As to which, see below, On Reputed Ownership and Collusive Possession.

to the holder of the goods; there is a constructive tradition sufficient to transfer the property, the price being paid.[1]

17. In England, where a specific existing subject has been sold, and all the delivery has been given which the nature of the case admits, although the thing continues in the hands of the vendor, it has been held as constructively delivered.[2] But where the subject is not in existence at the time of the contract, it is held, that no property passes till it is finished and delivered; the contract for the thing being considered as entire, not to be separated into parts.[3]

In Scotland, the purchase of a specific subject, or materials, the price being paid, is, without actual delivery, effectually completed by such constructive possession as the case admits; and this may take place successively, without any necessity of the whole being completed.[4]

[1] If we seek for authority for this doctrine in the civil law, we shall find it, 1*st*, In the constitution of Honorius and Theodosius the younger, which lays down, that a donation, or sale, with retention of the usufruct, requires no other tradition; 'sed omni modo 'idem sit in his causis usumfructum retinere quod 'tradere.' Cod. lib. 8. tit. 54.; De donat. l. 28. 2*d*, We shall find the principle laid down by Ulpian, (in the 77th law of the Pandects, De rei vind. lib. 6. tit. 1.), that, in donation, a feigned tradition, resulting from the retention of the subjects in the character of tenant, puts the donatory in possession, and transfers to him the property. The doctrine of the civil law on this subject is thus delivered by the editor of the Pandects.— 'Traditionis fictæ species est, quum is, qui rem alicui 'traditurus est, hanc illius nomine se possidere con- 'stituit, v. gr. usumfructum retinendo simpliciter; 'etiamsi non stipulatus fuerit emptor venditorem viri 'boni arbitratu fructurum, quæ cautio in constituendo 'usufructu interponi solet. Hoc enim ipso quod sibi 'usumfructum retinet jam rem tanquam alienam tenet, 'eamque jam non sibi emptori et per hoc hujus pos- 'sessionem ad emptorem transfert. Idem est si con- 'duxerit.' Pothier, Pandect. Justinian, vol. iii. p. 109.

The question has given birth to much controversy on the continent. On the one hand it was contended, that tradition alone, and not convention merely, transfers property, (Lib. 3. tit. 3. Cod. de Pact. l. 20.); and whatever may be the effect of such agreement between the parties, a feigned tradition, without any external act, can have none against third parties; Belordeau, liv. 1. chap. 18. On the other hand it was maintained, that by such agreements the vendee truly takes possession, and acquires the property; for we may acquire possession and property by the agency of a third person; and in these cases the seller takes possession in the buyer's name: and against the law of the Codex is opposed the 3d and 9th law of the Pandects, De acquir. poss. lib. 41. tit. 2. and the 77th law, De rei vind. lib. 6. tit. 1.; Guy Pape, decis. 112. With this latter opinion the lawyers of chief authority on the continent concur.

[2] MANTON against MOORE, 24th November 1796; 7. Term. Rep. 67. 73. A Canal Company employed Langwith, as their engineer, to build locks and bridges. He purchased materials, which he laid down on the company's premises, the banks of the canal. In this situation, the company advanced him money, and he made a bill of sales to them of the materials; and, to make all sure, gave a symbolical delivery by a half-penny. A question occurred between the company and the assignees under Langwith's bankruptcy. This case may be resolved into two questions: 1*st*, Whether this was a good delivery to transfer property? 2*d*, Whether the assignees were not entitled to challenge it under 21. James I. c. 19. § 11. as a case of collusive possession? The Court of King's Bench sustained the delivery as effectual, being the only delivery possible in the circumstances of the case.

See below, p. 178. where in the more recent determinations in England, such delivery has been held effectual to divest the seller of his right to stop.

[3] MUCLOW against MANGLES, 1. Taunt. 318. In this case, Royland, a barge-builder, undertook to build a barge for Pocock. Before the work began, Pocock advanced money to account, and as the work proceeded, he paid him more, to the amount of L.190, the whole value of the barge. When it was nearly finished, Pocock's name was painted on the stern. Two days after the work was completed, an execution was issued against Royland, and the barge was taken in execution. It was given up to Pocock on an indemnity; and in an action of trover by the assignees of Royland, a verdict was given for them. On a motion that the sum of L.190, the price of the barge, should be deducted from the amount of the verdict, on the ground of the property having vested in Pocock, the Court of Common Pleas refused the rule. They held the property not to be passed till the barge was finished and delivered, and drew the distinction between the sale of an existing subject and the contract, Do ut facias. 'If the thing be in existence at the time of 'the order, (said Heath, J.), the property of it passes 'by the contract, but not so where the subject is to 'be made.' See the next Note.

[4] The following case is nearly the same with the English case last quoted.

SIMSON against DUNCANSON'S Creditors, 2d August 1786; 9. Fac. Coll. 446. Simson employed Duncanson to build a ship; the materials of the hull to be

18. In this class of contracts, a distinction is to be made between what may be called a generic and a specific purchase. If I go into a goldsmith's shop, and order and pay for a vase of a certain shape, and weight, and fineness, which the workman agrees to make for me, I am a mere personal creditor of his for the vase; there is in such a case no delivery, real or feigned, and consequently no transference nor constitution of a real right. But if I find standing in the shop a vase begun, and purchase and pay for that specific vase, which I order him to proceed in finishing for me, the property of the vase will be transferred to me by the feigned tradition. And the same consequence would seem to follow, if I purchase and pay for a mass of silver, or a quantity of dollars, which I set apart and order to be made into a vase. In either case, it would be absurd to carry away the materials, or the vase, by way of taking possession, when it was to be instantly returned for manufacturing. Every objection to the holding of feigned delivery as a completion of the transference, applies as strongly to the device of actual delivery and the immediate return of the materials to be manufactured.

19. In no other case does the law of Scotland seem to hold delivery sufficient for passing the property, in which there is not a manifest change of custody. In England, from the operation of the special statute already alluded to, the same effect should be expected: and, till lately, there was no case in which, against the policy of the Act of James I., goods were held to be sold and effectually delivered, without passing out of the warehouse of the seller, or some alteration of place indicative of change of property. But this came to be relaxed on one occasion; where altering the situation of commodities, in execution of a sale and transference, though the commodity had not passed out of the seller's custody, was held sufficient to entitle the buyer to have the goods, the circumstances not admitting of an immediate removal;[1] but the case partook, in some degree, of the nature of partner-

furnished by the builder; the masts and other articles by the employer. The price was to be paid in three sums; one at laying the keel, one when the ship was planked to the gunwale, and the last when she was launched. After receiving the first sum, the builder failed; and the factor for the creditors claimed the vessel as the untransferred property of the bankrupt. The Court held Simson to be the proprietor, in consequence of the particular nature of the bargain, and the appropriation of the vessel from the time of laying the keel.

Lord Justice-Clerk M'Queen said, that, taken upon general principles, it was a nice question; but he thought the special nature and terms of the contract should decide it. In the case of a simple bargain for the building of a ship, the materials to be furnished by the builder, he would incline to the opinion, that the unfinished vessel belonged to the builder, or his creditors; but in the particular case, when, by the contract, one-third of the price was to be paid when the keel was laid, another when the building was advanced, he held, that there was an appropriation of the vessel to the employer from the time of laying the keel. In this opinion Lord Eskgrove concurred. The rest of the Court went chiefly on the ground, that the creditors of Duncanson, taking the benefit of the contract, could not refuse credit for the payments which had been made to Duncanson himself.

In comparing those two cases, so nearly similar, there is, perhaps, a distinction which may entirely reconcile them. In the English case, there was no contract, as in the Scottish, to make progressive transfers; and no progressive conveyances were executed. Accordingly, the Court of Session proceeded on the principle, that the agreement was merely of the nature of the contract, Do ut facias, of the civil law, to pay money for a barge to be finished; but seem to have held, that, till completed, the obligation of the builder was only an executory contract, which could not transfer property.

At all events, I incline to think the Scottish determination the more correct; in holding the property of what was finished capable of appropriation, on payment of the price; though still retained in the vendor's hand for the purposes of the contract. Perhaps, the principle of accession might have operated in some degree, in adding the property of each new part of the work to that which was already considered as vested in the buyer.

To this question, perhaps, the principle laid down by Julian, in the 61st law of the Pandects, De rei vind. lib. 6. tit. 1. § 1. may apply. Julian, in commenting on a response of Minicius, (who being asked, Whether a ship, repaired with the wood of another, continues the property of the repairer? answered, That it did), draws a distinction where a ship is built with another's materials,—' Nam proprietas totius ' navis,' (says Julian), ' carinæ causam sequitur.'

[1] FLYNN and FIELD. These persons being at Liverpool, with the intention of purchasing plantation tar, found lying on the quay, to be disposed of, 500

ship. In another case, it seems to have been taken for granted, that goods deposited in a hovel belonging to the seller, for the purpose of the buyer taking them away, were delivered to all effect but that of divesting the power to stop.[1] And more recently it has been held, that wherever the universal custom is such as to make the public aware of the possibility of a transference while the goods continue with the seller,[2] it is an effectual constructive delivery, and even good as actual tradition, if the vendee has marked the goods as his own, or if he has paid warehouse rent for them.[3] There seems to be a qualification of this doctrine, however, where something remains to be done by the vendor in measuring over or separating the goods.[4]

barrels belonging to Matthews. It was agreed that they should purchase two-thirds of the whole, and take the other third on consignment for sale for Matthews; he to pay the cartage and porterage, and expense of shipping the whole; and they to sell his share free of charge; and that, in execution of this bargain, the goods should be removed from the quay, and lodged in a warehouse, till an opportunity should occur of shipping them. All this was clearly expressed in a bill of parcels, containing an acknowledgment for the bills. Matthews, accordingly, put the tar into a warehouse or cellar of his own; and, having become a bankrupt, his assignees took possession of the tar remaining in the bankrupt's warehouse. Lord Hardwicke ordered the property to be given up, on two grounds: 1. That this was a joint concern, and common property, and the possession of one was the possession of all: And, 2. That Matthew's possession was merely a temporary custody, because the buyer of the tar had not an opportunity of selling it, by shipping it off immediately to Ireland. 1. Atk. Rep. 185.

[1] GOODALL against SKELTON, 2. Henry, Blackst. p. 316.

[2] See THACKTHWAITE against COOK, 1811, 3. Taunt. 487. Moore sold 78 pockets of hops to plaintiff, who paid for them. They were to remain with the seller at a rent, till the plaintiff should resell them. A custom in the hop trade was relied on as sanctioning the transfer; the hops remained unmarked. Verdict for the plaintiff was, on a rule for non-suit, held bad. The Court required a custom such, that persons dealing with the trade may see and know that the goods may possibly not be the property of the possessor; and thought a new trial unnecessary, as no evidence could be given consistent with the evidence in the cause, that could prove such custom as is required.

In KNOWLES against HORSFALL, 1821, 5. Barn. and Ald. 134., several casks of brandy were sold, some of them in seller's own vaults, some of them in bonded vaults of one Ledson. The price was paid. No notice was given to Ledson, and the casks in the seller's custody remained there without rent, only marked with K in chalk. It was relied on as a sufficient custom to make strangers aware of the possibility of another right, that goods thus situated are frequently sold without delivery, and it was said that the transaction in question was publicly known. The Court held, 1. That notice to Ledson would have passed the property; but, 2. That neither the casks in his custody, and far less those in the seller's own vaults, were effectually passed; but, as under the statute, still as in the order and disposition of the bankrupt.

[3] In HAMMOND against ANDERSON, (See below, p. 197. Note [2]), the weighing of the goods by the buyer was a fact much relied on as completing the transit.

In HURRY against MANGLES, 1. Camp. 452. Lord Ellenborough held 'the acceptance of warehouse 'rent as a complete transfer of the goods to the pur-'chaser. If (says he) I pay for a part of a ware-'house, so much of it is mine. This is an executed 'delivery by the seller to the buyer.' Again, he says, 'It would be overturning all principles to allow 'a man to say, after accepting warehouse rent, "The 'goods are still in my possession, and I will detain 'them till I am paid." The transitus was at an end. 'The goods were transferred to the person who paid 'the rent, as much as if they had been received into 'his own warehouse, and there deposited under lock 'and key.'

In STOVELD against HUGHES, 1811, Hughes sold a quantity of timber lying at his own wharf, and it was marked with Dixon the buyer's initials. Dixon resold it, and the second buyer brought a notice from Dixon to deliver it to him. Hughes went to the wharf, and showed the timber to the second buyer, who, in his presence, marked it with his initials. Part of the timber had been delivered to the first buyer before this new sale. The second buyer paid the price to Dixon, who failed, without paying Hughes. The question was, Whether Hughes could stop as against the second buyer? The Court of King's Bench held unanimously, that the transit was at an end by the marking in presence of the seller. 14. East. 308.

[4] WHITE against WILKS, 1813. Shuttleworth bought from Wilks 12 tons of linseed oil at L.1200; but not being immediately in want of it, and it never having been measured off, it was agreed that it should remain in the cisterns under Wilks's care, the purchasers paying rent for the warehouse room. The invoice had this note:—'Mr Wilks holds the above in 'cisterns for Messrs Shuttleworth's accommodation, 'charging them 1s. per ton per week rent.' Before the bills were accepted, the buyers failed. The assignees brought an action of trover against the seller. Mansfield, Ch. Justice, on a motion for a new trial,

In Scotland, there is only one case in which property has been held as passed to the buyer while lying without necessity in the warehouse of the seller; and it seems to require a very full reconsideration of the matter before this decision is admitted as law.[1]

(verdict having gone for the seller), said, 'In trover 'for a quantity of sugar, where the sale had been 'agreed upon, but there had been no actual delivery, 'the Court was of opinion the action was not main-'tainable, (Austin against Craven), and certainly su-'gar is of a more divisible nature than oil. The ques-'tion here is the separation, which I think is essential 'for the support of this action; and there certainly 'has been no separation of the oil in question.' The rule refused. 1. Marshall, Rep. C. P. 2.

See also above, BLOXAM against SAUNDERS, p. 166.

[1] The case to which I allude in the text, I have fully reported; not that it may stand for a precedent, but that the peculiarities of the case may be pointed out, and the danger of holding it as a precedent fully explained.

BROUGHTON against AITCHISON, 15th Nov. 1809. On 9th Sept. 1807, Aitchisons, bakers in Edinburgh, bought eight bolls of wheat from Crow and Wood in Leith, and had it delivered. Being pleased with the quality, they, on 17th Sept. entered into a bargain by letter for 90 bolls more at the same price, the original quantity being included in the contract:—'We hereby 'offer you 98 bolls Virginia wheat, at 40s. per boll, to 'be settled one-half in cash, and the other by bill at 'three months.' This was accepted by a counter letter. The bill was granted, and part of the cash paid; the rest offered when the question arose. The wheat was part of a cargo which lay in a loft hired by Crow and Wood, and under the care of Aitken, their own servant. At the time of the bargain, the greater part of this cargo had been sold to different persons, but a considerable quantity (161 bolls) still lay in the loft; and it appears that Crow and Wood intended to sell to Aitchisons all of this quantity that remained unsold. The buyer was to take the wheat when convenient for him; and he received an order to enable him to do so, addressed to the servant who had the care of the loft:—'Deliver to J. and A. Aitchisons, Edinburgh, 90 bolls 'Virginia wheat, from Cathie's high loft.' The other buyers gradually received deliveries to the amount of 62 bolls, after the bargain with Aitchisons; and at last Crow and Wood called their creditors together. At this time, there lay 99½ bolls in the loft, 90 of which were sold to Aitchisons; the rest belonged to the vendors. The day after the creditors were called together, Aitchisons applied for their wheat; which was refused, on the ground that the bankrupts could do nothing to alter the condition of their creditors. An application was then made to the Sheriff, and he granted warrant for delivery of the wheat. The question came into the Court of Session by bill of suspension for the factor under the sequestration. The Lord Ordinary held,—'That neither the order of de-'livery by Crow and Wood to Aitchisons, nor that 'obtained from the Sheriff, could be held equivalent to 'actual delivery and possession of a quantity of wheat 'remaining in the warehouse at the time of the bank-'ruptcy, so as to operate as a transfer of the property, 'or prevent its passing to the interim factor as part of 'the sequestrated estate.' In the Inner House of the First Division, there was much difference of opinion: but by two judgments, the determination of the Lord Ordinary was reversed, and it was found,—'That the 'property of the wheat in question was legally vested 'in the vendees.'

This judgment is not to be held as a precedent; for not only was there much division of opinion on the Bench, but some of the Judges proceeded on a misapprehension of the facts. Thus, 1. It was held, that the 8 bolls first purchased, were part of the original bargain; and that actual delivery of a part, was delivery of the whole. 2. That the subject sold was, in truth, a specific subject, not part of a mass; for at the bankruptcy, all the grain had been taken away but this, the small remnant not being entitled to consideration, being only the 90th part of the whole. 3. The most important mistake, in fact, was, that Aitken was a mandatory, not the servant of Crow and Wood, but one who could, and did act, as the servant of the buyer after the purchase.

The opinion of the majority of the Judges, so far as it touched the abstract point, seemed to be, that the necessity of their trade required bakers to have a power of continuing their grain in the loft where it was purchased, and taking delivery gradually; and that an order, like the one in this case, was all the delivery that the case allowed: that where the price is paid, part delivered, and an order given for the rest, the transfer is completed: that this being, in truth, the sale of a specific subject, the payment of the price, with an order to deliver, transfers the property: that insolvency of the seller could not stop delivery legally required; and here delivery was required before bankruptcy; nay, a warrant of the Sheriff was granted, which must be held equivalent to delivery.

The opinion of Lord President Blair was extremely strong against the judgment. He began with stating this as a case of infinite consequence to the law. He held that this was a concluded bargain on the 17th September, when the sellers were in good credit; and that, in consequence of it, the respondents had a good title to sue for implement by delivery. Such a right, however, is merely personal; a jus ad rem: it ranks among personal creditors, some of whom claim money, others wheat, there being no difference among obligations from the subject of them. Aitchisons here claim as being proprietors, and holding antecedent to the bankruptcy a jus in re. The question is, Whether, at the date of the proclaimed insolvency, when the creditors were called together, the property was transferred? After that, the bankrupts could do no effectual act. If they had paid a debt, the trustee

It cannot be said that there is any judgment fixing the law, that either marking goods, or the payment of warehouse rent, has in Scotland the effect of delivery, where the goods are with the seller. In one case, the measuring out of grain, and setting it apart, when that was done by the seller, was not held final delivery.[1] It may well admit of a different construction where the same thing takes place respecting goods in the hands of a third party. See below, p. 184.

20. It is not a possession equivalent to delivery, where goods being in a warehouse, or grain in a granary, the buyer or his servant receives the key to sift the grain or air the goods, the key being returned to the sellers.[2]

21. It does not seem to be sufficient to answer the purpose of delivery, that samples

might have had restitution; if they had delivered wheat, it might have been reclaimed for the creditors.

The payment of the price is to be laid out of the question; for nothing is better fixed, than that payment of the price has no effect whatever on the transfer of the property. Yet this has in some degree been allowed to enter into consideration. Suppose that the buyers had failed without paying the price, would the wheat in Crow and Wood's possession have belonged to the buyer's creditors, as part of their sequestrated estate? On principle, there can be no doubt, that if the property is transferred in the one case, so must it be in the other. The completion of the *contract* of sale and payment of the price, have no effect at all in transferring without delivery; sasine in land, actual possession in moveables, are absolutely indispensable.

Then what possession was held by the sellers before their bankruptcy? This grain was not under deposite; it was in their own hands,—in the hands of their own servant; the possession was the same which a merchant has of goods in his shop, or a gentleman of his furniture; not civil, but actual possession. To transfer the property, the titulus transferendi must have been accompanied with the same possession which the seller had. But here there was no delivery, even in appearance, made of the grain. An order was given, it is said, and it was intimated to Aitken: suppose this intimation proved, is this delivery of moveables? No. There must be something ostensible; something to pass to the vendee the same possession which the vendor had. As to constructive delivery, this is not a case for it. Where goods are in the hands of a third party, an order and intimation places the buyer in the seller's situation; so of goods at sea; goods in a bond-cellar. But here, no necessity, no civil possession by a third party. The buyer might have got delivery; the order entitled him at any time to do this; but he did not. He trusted to the bankrupts; so did the other creditors; and how should he be in a better situation than they? How justify a sale and transference retenta possessione, which is reprobated by law?

Practice, and the necessity of trade, have been founded on. It may be common for the buyer, if he trusts the seller, to leave the goods in his hand; and this is convenient: But does it therefore follow, that the real right goes with the buyer? Such a doctrine would outrage that most valuable rule, which makes property and possession in moveables go together; it would subvert all the common principles of mercantile dealing. If I buy, and don't choose to trust to the seller, I pay and carry off my purchase, and trust only to the goods. But shall I, having done so, be exposed to the claim of a former buyer, who has bought and got the anomalous kind of transfer founded on in this case? It would be found, that the new rules adopted in order to simplify, would only confound and lay embargo on traffic in moveables. Transfer the argument to pledge: If this kind of delivery is sufficient to transfer property, so must it be to constitute pledge; and a debtor wishing to give a pledge, does it by an order on his own servant! Is this law? These doctrines are most dangerous, and contrary to the fundamental principles of the law of Scotland; and will, if admitted, destroy at length all security and uniformity in the law of transference.

If the application to the Sheriff had been made before the declared insolvency, an order would have procured delivery, and, if disobeyed, would have been equivalent to delivery. But on the 30th September the insolvency was proclaimed, and the property fixed in the creditors as at that time. 15th November 1809.

See a report of this case, 15. Fac. Coll. 411. See also next Note.

[1] Salter bought 60 bolls of malt from Knox and Company, to be delivered afterwards. He paid the price, being about L.67. About two months afterwards, Knox and Company gave notice to Salter, that they had measured out, and set apart for him, the stipulated quantity. A few days afterwards, Knox and Company having failed, the factor on their sequestrated estate took into his possession the whole malt found in their warehouses. Salter applied to the Court of Session for a warrant to have the 60 bolls delivered up to him. But the Judges were unanimous in rejecting his claim. It was observed by one of the Judges, —'That a purchaser had, indeed, an equitable claim 'to the goods of which he had paid the price; but 'however equity may afford relief, by undoing what 'had been illegally done, it cannot, in a question with 'third parties, supply the want of those things which, 'though required by the law, have been left undone.' 7th February 1786, SALTER against Factor on KNOX and Company's estate; 7. Fac. Coll. 391.

[2] DUDGEON and BRODIE against MORE, 3d July 1801, where the above circumstances were held insufficient to pass the property.

have been taken while the commodity remains with the seller. Samples are useful in affording evidence of a completed *contract;* and a test of comparison, should any question arise concerning the quality or identity of the article sold:[1] But as a badge of delivery, or as supplying the place either of actual or constructive tradition, the taking of samples has no effect.[2]

22. Delivery to a person in order to have some operations of art performed on goods sold, is not delivery to the vendee, where the workman is employed by the vendor: As where a goldsmith sold plate, on which the purchaser wished to have his arms engraved, and the goldsmith sent for an engraver, to whom he gave directions to engrave the arms, and bring the plate to the workman for payment; the goldsmith was found entitled to stop as in transitu.[3] But, on the other hand, there seems to be little doubt, that if one buy goods, and order them to be delivered for manufacture to his own engraver or bleacher, who, on finishing the operations of his art on them, is to bring them to the vendee, as his paymaster, the delivery will be held as complete.

Materials prepared for building.

23. Where the contract of sale is complicated with locatio operarum, it does not seem to be settled, whether mere delivery of the materials be sufficient to transfer. If, intending to build a house, I purchase the materials, and employ a mason and a carpenter to construct and fashion them to my wish, the materials, the stone, the lime, and the wood, when brought upon my premises, are actually delivered to me, independently of the operations of the builder and the carpenter. There are here two contracts distinct;—a contract of sale, and a contract of locatio operarum, which may be completed independently of each other. But if I contract with a builder, and he procure the materials,—are those materials, when laid down on my ground, or deposited in my sheds, actually delivered, although that final act, which was to close the workman's undertaking, and to complete the transfer of the particular materials, is unperformed? In the more complex machines, it is necessary not only to have the wheels, &c. properly prepared and nicely fitted, but to have a person of skill to erect them in the place where the engine is to be used. Watt and Boulton, for example, when they receive an order for a steam-engine, not only send the various parts of the engine, but send persons along with it properly qualified to place the work. In the same way, where a machine is to be improved; or, having received injury, any of the wheels are to be taken off, and others substituted; the engineer does not hold his order as completed, merely by sending the necessary wheels, but he sends a workman to put them up. On the other hand, it often happens, that in large manufactories, engineers are kept by the manufacturer for the purpose of attending to the machinery; in which case, the person who furnishes the wheels, &c. is not required to

Machinery not yet erected.

[1] With a view to which, the samples should be sealed at making the bargain. 29th January 1713, CHEAP, Forb. 653.

[2] In this case, HILL against BUCHANAN, 26th January 1785, 9. Fac. Coll. 307., samples were delivered; but although this kind of delivery was aided by other circumstances, the Court refused to hold the property as transferred; and this judgment was affirmed in the House of Lords. The case was, that Buchanan having imported a cargo of tobacco, offered for sale to Messrs Wilson and Brown, 30 hogsheads, 'to be delivered to you, or order, at Greenock, as it 'lies in the King's cellars, and at the weight it passed 'at the King's scales,' &c. Wilson and Brown accepted of the offer, and samples were delivered. Eight of the 20 hogsheads were actually delivered to the order of the purchasers, and put on board a vessel; but they becoming bankrupt next day, gave up the bill of lading to the vendees, who got it cancelled by the shipmaster, and a new one granted to themselves. On account of some irregularity in the shipping of the hogsheads, they were relanded, and lodged again with the rest, by order of the custom-house officers. The trustee under the sequestration claimed the property of the whole, as transferred to Wilson and Brown. But the Court decided in favour of Buchanan, the vendor. Affirmed in the House of Lords, 11th April 1786.

[3] OWENSON against MORSE, 7. Term. Rep. 64.

send a person to place them. In cases of this kind, the determination may often be difficult; but probably a distinction would be made between vendition, when simple; and when complicated with the contract of locatio operarum. Wherever the contract is fairly resolvable into simple vendition, the possession of the thing ordered, the delivery of it upon the premises of the vendee, seems to be sufficient, as an absolute and perfect transference: Where, again, it is resolvable into a contract for performing a particular act, or piece of labour, of which the articles sent are merely the materials, the act of delivery seems not to be complete till the work be performed.

ART. II.—TRANSFERENCE OF GOODS IN THE CUSTODY OF ANOTHER FOR THE SELLER.

This division of the subject includes several important cases; the decision of which depends on this principle, that whatever changes the custody, and makes him who originally held for the seller continue his possession for the buyer, alters the property as effectually as it could be altered by actual delivery.

I. GOODS IN THE HANDS OF WHARFINGERS, WAREHOUSE KEEPERS, AND AGENTS.

1. Where goods are lying in the hands of a warehouseman or wharfinger at the time of the sale, the transfer of them in the wharfinger's book to the name of the buyer, by order of the seller, completes the delivery; making the wharfinger thenceforward the custodier for the buyer.[1]

[1] MAIN against MAXWELL, 27th July 1710; Forbes, 436.; Dalrymple; Bruce, 35. James Maxwell had 10 hogsheads of tobacco in the public weigh-house of Glasgow. He sold it to Mrs Simpson, and had it weighed over to her, and marked in the books as sold to her. The casks were also marked with the initials of her husband's name, R. S. Next day, however, not satisfied with the security, he had it marked again in the books as cellared on his own account; and some time afterwards he removed the goods, and had it so marked in the books, along with the note of payment of the cellarage. A creditor of Mrs Simpson had attached the goods in the weigh-house before their removal; and the Lords found, 'that a declaration of the weigh-house clerk of Glasgow, bearing, 'that James Maxwell had weighed over to Robert 'Simpson's wife the 10 hogsheads of tobacco, weighing 4,500 pounds weight, marked R. S. did transfer 'the property to Simpson; and that, therefore, the 'keepers of the weigh-house were liable to make the 'tobacco forthcoming, and that they could not warrantably suffer James Maxwell to remove the same; 'and that it ought to be delivered up to Main, the 'arrester.'

HARMAN against ANDERSON, 1809; 2. Campb. 243. Dudley bought from Harman 600 casks of butter, lying in the warehouse of Anderson, a wharfinger. With the invoice Dudley received an order for delivery on Anderson. Anderson, on receiving notice of the order, transferred the goods in their books to Dudley's name, and debited him with the warehouse rent: Dudley then became insolvent, and Harman gave Anderson notice to hold the butter on his account. A commission of bankruptcy issued against Dudley, and his assignees demanded the butter from Anderson, but he delivered it to the seller. The action was trover for the butter. Lord Ellenborough said,—'The goods having been transferred into the 'name of the purchaser, it would shake the best established principles still to allow a stoppage in transitu. From that moment the defendants became 'trustees for the purchaser, and there was an executed delivery as much as if the goods had been delivered into his own hands. The payment of the rent, 'in these cases, is a circumstance to show on whose 'account the goods are held; but it is immaterial 'here, the transfer in the books being of itself decisive. 'I am clearly of opinion that the assignees are entitled 'to recover.' Verdict for the plaintiffs. In the ensuing term the Attorney-General expressed his acquiescence in this direction of Lord Ellenborough.

WITHERS against LYSS, 1815. Here Lyss and Company sold rosin lying in their warehouse, and received payment. Withers and Company, the buyers, desired it might for some time continue there in this manner. They then sold to Bromer, by a broker, and sale-notes exchanged; and a delivery order was given, addressed to Lyss and Company,—Please weigh and deliver to Mr D. Bromer, our rosin in matts, about 30 tons, more or less. This order was lodged with Lyss and Company, but no one came to have the rosin weighed. Bromer stopt; and the question was between Withers and Company stopping the goods, and the assignees for the creditors of Bromer. Verdict went for the former, on the sole ground, that the weighing, which was necessary to ascertain the price, was not done; and Lord Chief-Justice Gibbs said, that 'if nothing 'had remained to be done to ascertain the price, a

2. But it is not indispensable that there should be a transfer in the books. It is the *notice* to the custodier that operates as a transfer of the property. In the law of Scotland, a transfer of the custody has always been held as effectual delivery to the buyer.[1] On the same principle, Lord Ellenborough delivered the law in the sequel of the case of Harman, already referred to.[2] The change of custody may be proved in many ways; as by a transfer in the book; acceptance of the order by the custodier; the testimony of clerks, or of the custodier; the post-mark of a letter transmitting the order; or proof of the presentment of the order,[3] or notice to the custodier.[4]

3. Acts of ownership done by the buyer, with the seller's authority, upon goods in the custody of a warehouseman, or other custodier, will be available to pass the property, on this principle, that such acts of ownership effectually give notice of the transference, and change the custody. We have already seen,[5] that, in England, the payment of warehouse rent, or the marking of goods by or for the buyer, have been held to pass the property, even where the goods were in the seller's own custody: That, on strict principle, seems to be doubtful

' delivery order lodged with the warehouseman is a ' sufficient transfer of the possession;' 4. Campb. 237. See below, p. 185.

[1] In the case of HALL and Company against AULD, 12th June 1811, (to be afterwards detailed), the doctrine of a change of custody, by notice to the custodier, being equivalent to actual delivery, was stated by Lord President Blair as the undoubted law of Scotland; and fully acquiesced in by the Court.

[2] In HARMAN'S case, (supra, p. 183. Note [1]), the Attorney-General, arguing on the direction given to the jury, moved to reduce the damages, on the ground, that, as to one parcel of the butter, *no transfer had been made in the defendant's books*. The fact was, that, as to this parcel, the delivery note was sent to the wharfinger; but he neither made any transfer in his books, nor *did any thing to testify that he accepted the delivery note, or held the goods on the buyer's account*. Lord Ellenborough said,—' After the note was deliver- ' ed to the wharfinger, he was bound to hold the goods ' on account of the purchaser. The delivery note was ' sufficient without any actual transfer being made in ' the books; from thenceforth they became the agents ' of Dudley, the bankrupt. They themselves might ' have a lien on the goods, and be justified in detaining ' them till that was satisfied; but, as between vendor ' and the vendee, the delivery was complete, and the ' right to stop in transitu was gone.' The other Judges concurred. 2. Campbell, 245.

STONARD against DUNKIN, 1809. Knight gave an order to Dunkin, a warehouseman, to hold malt on the account of Stonard; and Dunkin gave a written acknowledgment that he so held it; and on this Stonard advanced to Knight L.7,500, the malt being his security. It was contended, that *remeasuring* was necessary to a transfer in such articles; and the bankruptcy of Knight having intervened before measurement, the property was with the assignees. A verdict for Stonard, the buyer, under the direction of Lord Ellenborough. 2. Campbell, 344.

[3] HAWES against WATSON, 1824; 2. Barn. and Cress. 540. A quantity of tallow lying on wharf, sold with an order to the wharfinger. The vendor sold to another, and the wharfinger gave to that other a written acknowledgment, that he had transferred the tallow to his account. On the original buyer's bankruptcy, the Court of King's Bench held the tallow to be with the wharfingers, as agents of the last purchaser.

On this view of the law, doubts may be entertained of one part of the decision of the Court of Session in the case of Viscount ARBUTHNOT against PATERSON, 20th November 1798.

By the leases of the estate of Arbuthnot, Fordoun, and others, the tenants were bound to deliver annually certain quantities of oats and barley to the Viscount. In 1796, his Lordship wished to raise money by a sale of the grain then due to him, and Messrs Bisset and Sons purchased the whole, and granted bills for the price, being L.1141. Upon which Lord Arbuthnot's factor issued precepts or orders to the tenants to deliver the grain to Messrs Bisset and Sons; and the tenants in some cases bound themselves in writing, at the foot of the orders, to deliver; in others, they refused to do so. Upon the bankruptcy of Bisset and Sons, without paying their bills, a competition arose between Lord Arbuthnot and the trustee for the creditors. The Court found, that ' the factor for the ' creditors has right to the price of the parcel of grain ' which was under accepted precepts by the tenants; ' but that Lord Arbuthnot has a right to the price of ' the parcel of grain which was in the hands of the ' tenants who did not accept the precepts upon them.'

[4] In BLOXAM against MORLEY, 1825, it was taken for granted by Bayley, J. in delivering the judgment of the Court, that notice to one in whose warehouse the seller had his goods deposited, would have made a perfect transfer to the buyer. 4. Barn. and Cress. 952, foot of page.

See also KNOWLES against HORSFALL; Barn. and Cress. 134, et seq.

[5] Above, p. 178, 179.

as law in Scotland; but the same acts have been admitted to this effect, the goods being in the hands of a custodier;[1] and the cases, though English, are good precedents in Scotland.

4. Where goods, already in the hands of a manufacturer, are sold, and notice of sale given, with an order of delivery addressed to the manufacturer, he will be held, like any other custodier, as the servant of the vendee, to hold the goods for the buyer.

5. But where any thing remains to be done by the sellers in the way of ascertaining the price or quantity of the commodity sold, or, in order to put it in a deliverable state; the transfer is not completed by a delivery note given to the buyer, addressed to the keeper of the goods, with notice to the custodier; or even by a transfer in the custodier's books. Till the commodity is weighed, or till the other act, whatever it may be, shall be performed, which remains to be done in order to put the commodity in a deliverable state, the property is untransferred. This was settled in England, *first*, in the case of a sale of starch, where the amount of the price was to depend upon the weight.[2] Next, it was settled that the delivery by a note intimated to the wharfinger was not completed in a sale of oil, where the price and quantity were both ascertained, but an operation customary in such sales remained unperformed, viz. that the seller's cooper should search the casks, and a broker ascertain the foot-dirt and water in each, for which allowance is made, and then that the casks should be filled up.[3] A distinction was made by Lord Ellenborough between that case and another, where a person having sold 10 tuns of oil out of 40 contained in a cistern, afterwards accepted a delivery note from the buyer in favour of a third party.[4] In this last case, he held that the goods were in a deliverable state, and nothing remained to be done by the seller in order to

[1] WRIGHT against LAWES, 4. Espinasse, 82. where wine was delivered to an agent of the buyer at Yarmouth, and the buyer being at Norwich, came to Yarmouth, tasted, and took samples of the wine; it was ruled by Lord Kenyon, that the transit was completed.

In a late case, Lord Ellenborough said,—'The 'change of mark from A to B, on bales of goods in 'a warehouse, by the direction of the parties, was 'clearly held by the House of Lords, in a late case, 'to operate as an actual delivery of the goods, and 'this after three days' argument at their bar: though 'I own it appeared to me that the case only re-'quired to be stated, in order to be disposed of at 'once.' Dict. in STOVELD against HUGHES, 14. East. 312.

[2] HANSON against MEYER, 1805. Wallace and Hawes employed Wright a broker to buy starch from Meyer. It lay at the Bull Porters, Seething Lane. Wright bought it at L.6 per cwt., and exchanged the bought and sold note. He bought *all* Meyer's starch lying there, more or less, at the above rate; and the mode of delivery usual was followed, viz. the seller gave a note to the warehouse keeper 'to weigh and 'deliver to Wallace and Hawes all my starch.' This order was lodged, and delivery of part was required. Part was, accordingly, weighed, and taken away; the rest remained unweighed, and at the buyers' charge, at the Bull Porters, till the buyers failed. The seller got the remainder of the goods. Action trover by assignees of the buyers. Verdict for Meyer the seller, under the direction of Lord Ellenborough. The Court of King's Bench held the weighing to be precisely necessary to alter the property, as being necessary to ascertain the price to be paid; and therefore judgment went for the defendant, Meyer the seller. 6. East. 614. See above, p. 183. WITHERS against LYSS.

[3] WALLACE against BREEDS, 1811. Here Anderson and Eadis bought of Heselton and Smith, by the broker, 50 tuns Greenland oil, at L.44 per tun, to be paid by acceptance at four months. The oil lay with Breeds, a wharfinger, and an order was given by the sellers, addressed to Breeds, 'to deliver to Messrs 'Anderson and Eadis 50 tuns of our Greenland oil, 'ex 90 tuns.' The order was sent to the wharfinger, and received by the clerk. The buyers failed, and the order was countermanded, nothing having been done on the order. Heselton and Smith having got the oil, trover was brought by the assignees of the bankrupt buyers. The usage is, before Greenland oil is delivered, to have the casks searched by the seller's cooper, and that a broker for both parties make a minute of the foot-dirt and water in each cask, and the casks are then filled up by the seller, and delivered in a complete state; nothing of all which had been done. Verdict for plaintiff, subject to opinion of Court, who concurred in a judgment of nonsuit, *i. e.* against the buyers. 13. East. 522.

[4] See below, p. 186. Note [5]. WHITEHOUSE against FROST.

omplete the sale as between him and the buyer; whereas in the former much remained to e done before the custody as for the buyer was complete. In a sale of 10 out of 18 tons f flax in the possession of a wharfinger, the rule was confirmed, that, something remaining to be done on the part of the seller to put the flax into a deliverable state, the transfer is not completed by an order to deliver intimated to the wharfinger while those acts re not performed.[1]

In a case in Common Pleas, Lord Chief-Justice Gibbs said,—'The principle upon which both Courts of King's Bench and of Common Pleas have decided is this, That the order sent by the vendor to the wharfinger to deliver the goods, is sufficient to pass the property to the vendee, provided nothing remains to be done to ascertain the price, but to make the delivery. If it be necessary, by the terms of the contract, or by the order to the wharfinger, that any thing should be done previous to the delivery, the transfer is not complete till that thing be done.'[2]

6. If every thing on the part of the seller be done which is necessary before delivery, hen, although the order for delivery applies only to a part of a larger quantity under he care of the wharfinger or agent, the transfer of the custody will be completed as to hat part. Thus, in England, an order of delivery of 10 tuns of oil, part of 40 tuns contained in a cistern, under the care of a third person, was held to make a complete transfer, on being accepted by the custodier.[3]

Where goods are lodged in the warehouse of a general commission agent, to be disposed of for the benefit of the owner, the dealings are generally made in the name of the agent, and the bill taken payable to the owner of the goods. But there seems to be no reason o doubt, that the principle which regulates the transfer in the cases already mentioned would be held applicable to this case; and that from the moment the sale is completed by delivery of the bill, on the one hand, and weighing or marking or approving of the goods, on the other, the custody is changed and the transfer completed; so that there shall not henceforward be any right in the seller to stop the goods as in transitu, more than if a delivery note had been given by the seller, and intimated to the custodier.

II. GOODS WAREHOUSED FOR THE DUTIES.—COMMENTARY ON THE WAREHOUSING ACTS.

The Warehousing Acts, which have engaged much of the attention of the legislature for nearly a century, have for their object some very important points of commercial policy. The duties payable to government on foreign goods imported, are properly due only upon the sale of those goods, when the merchant derives his profit from the market.

[1] BUSK against DAVIES, 1814, 2. Maule and Selwyn, 397. See also AUSTEN against CRAVEN, 4. Taunt. 644.; SHEPLEY against DAVIES, 5. Taunt. 617.

[2] WITHERS against LYSS, 1815, 1. Holt's Rep. N. P. 18. and 4. Campbell, 239. See above, p. 183. Note [1].

[3] WHITEHOUSE against FROST. Dutton and Bancroft were proprietors of 46 tuns of oil, lying in one of the cisterns of the oil-house at Liverpool, and they held the key of this cistern. They sold 10 tuns of it to J. and L. Frost, and received the price. The Frosts afterwards sold these 10 tuns to Townsend; who gave his acceptance for the price, and got from the Frosts, along with the bill of parcels, an order of delivery, addressed to Dutton and Bancroft. This order was taken to them by Townsend; and they on the face of it wrote, '1809, Accepted, 14th February, Dutton and Bancroft.' Townsend was made a bankrupt, and his assignees made a demand against Dutton and Bancroft for the 10 tuns of oil, which still remained commingled with the rest. The action was trover by the assignees against Frosts and Dutton and Bancroft, and a verdict was found for the plaintiff, subject to the opinion of the Court. Lord Ellenborough held, that 'from the moment of acceptance of the order, Dutton and Bancroft became bailees of Townsend the vendee: the goods had arrived at their journey's end, and were not in transitu. All the right, then, of the sellers was gone by the transfer; and they could no longer contradict that delivery to which they had virtually acceded, by means of their order on Dutton and Bancroft, accepted by the latter.' The other Judges concurred. 12. East. 614.

To demand payment of the duties in the very moment of importation, and this, too, payment in cash, not as in the dealings of merchants with each other by bills, in which the time of actual advance is made to answer to that of probable reimbursement, greatly increases the weight of the duties to the merchant, while it diminishes the public revenue, and operates as a restraint on importation. The object of the warehousing system is at once to relieve the trader from the pressure of this advance; to free him from the risk of the perishing of the goods before they are sold; to encourage importation even of goods prohibited to be sold or used here, to the effect of making this country a great emporium of trade, filling our warehouses with goods, to be kept safely there till a market at home or abroad shall open; and to facilitate the operations of commerce in relation to goods thus warehoused for use and sale in this country, by having them exposed to sale in the warehouse, without requiring payment till they are taken out for consumption.

This system was first recommended to adoption by Dean Tucker, in his discourse on trade; afterwards proposed to Parliament by Sir Robert Walpole, but without effect; then revived and recommended by Mr Pitt, and at last digested in a practicable shape, under the administration of Mr Addington. Successive Acts have been passed for improving this system; and in the year 1823 an Act was passed, in the nature of a consolidating Act, 'for making more effectual provision for permitting goods imported to be secured in 'warehouses or other places, without payment of duty on the first entry thereof;'[1] and the subsisting Act, which has come in place of it, is entituled,[2] 'An Act for the warehous-'ing of goods;' and comprehends, with the relative Acts concerning the customs, the whole system as now in operation. Of this Act, it may be proper to give a short analysis, before resuming the inquiry into the transference of delivery of goods thus warehoused.

1. PROVISIONS OF THE WAREHOUSING ACT.

Analysis of Warehousing Act.

The whole laws relating to the Customs were lately repealed and placed on a new footing, which forms the subject-matter of fourteen statutes, including those for the registering of ships and for the warehousing of goods.[3] In particular, the repeal of the former laws included 'all the laws relating to the warehousing of goods; and the new 'Act is to take effect from and after 5th January 1826,[4] for the warehousing of goods im-'ported into the United Kingdom, without payment of duty upon the first entry thereof; 'or notwithstanding that such goods may be prohibited to be imported into the United 'Kingdom, to be used therein;' sect. 1.

1. The objects of the Act are, 1. To secure the duties payable to government on goods lawfully imported for use and sale in this country; 2. To guard against the evasion of the laws, against the use or sale of prohibited goods, consistently with the privilege of stowing such goods in British warehouses; and, 3. To permit the transfer of goods, without the necessity of paying the duties; preserving the lien of ship-owners for their freights in particular cases.

1. WAREHOUSING PORTS.—In order to afford the means of safely warehousing goods, it was by former Acts[5] provided, that the commissioners of the treasury should be empowered

[1] 4. Geo. IV. c. 24. passed 12th May 1823, repealed by 6. Geo. IV. c. 105. (along with the other laws of the customs) as from 5th July 1826.

[2] 6. Geo. IV. c. 112.

[3] 6. Geo. IV. c. 104. to 118. inclusive.

[4] As to the commencement of the Act, it may be observed, that in the repealing Act, (6. Geo. IV. c. 105.) the repeal is to take effect from 5th July 1826. But to clear all doubts it is enacted, (by 6. Geo. IV. c. 111. § 17.) that any regulation which is appointed to come into operation on 5th January, shall be deemed the only subsisting regulation in force relative to that matter.

[5] 4. Geo. IV. c. 24. § 5. and 14., and former statutes.

to appoint by warrant, to be published in the Gazette, ports in which any goods, or any particular goods, or any particular articles, should be warehoused; while it was declared lawful for the commissioners of the customs to direct and allow the warehousing in *any* port, of such goods as were not prohibited, or such as were not required by the commissioners of the treasury, or by statute, to be placed under special security. By the new Act, the commissioners of the treasury are to appoint, by warrant, from time to time, what ports are to be warehousing ports, for the purposes of the Act; and the commissioners of the customs, under the control of the commissioners of the treasury, have the power of appointing in what warehouses, of special or of ordinary security, in such ports, and in what parts of such warehouses, any goods, and what sorts of goods may, or may only be kept and secured without payment of the duties.[1]

Warehouses of Special Security.

2. WAREHOUSES under this Act are of two descriptions: those of special security, and those of ordinary security.[2] 1. Warehouses of special security are either such as are appointed by an order of the commissioners of the customs, published in the Gazette,[3] or such as are connected with wharfs for the landing of goods, and enclosed with such wharfs within walls, 'as required by any Act for the constructing of such warehouses and 'wharfs, being legal quays.'[4] The purpose of appointing such warehouses of special security is, that a more complete protection may be afforded to the manufacturers of this country against the sale of the prohibited articles,[5] and the abuse checked of importations against the navigation laws.[6]

Ordinary Warehouse.

2. Warehouses of ordinary security are such as are authorized by order of the commissioners of the customs, for the warehousing of goods for sale or consumption, requiring no extraordinary precautions, but merely such as shall ensure the payment of the duties.[7]

3. SECURITY FOR DUTIES is given partly by bond, partly by lien.[8] The bond is either,

General Bond.

1. A general bond given by the proprietor or occupier of the warehouse, with two sufficient securities, for payment, within three years, of the full duties of importation on all

Special Bond.

goods which shall be warehoused therein, or for the due exportation thereof, sect. 8.; Or, 2. A similar bond by the importer, in respect of the particular goods imported by him, to be in force for three years, and no longer, sect. 8.; and which may be superseded by the bond of the purchaser, in case of sale of the goods, without removal, sect. 28. It is not necessary here to detail the regulations for settling the account of duties; for checking the decrease or increase; or for giving relief of duties in case of accidental loss in landing, warehousing, delivering, or shipping. The goods can be taken from the warehouse only on due entry, and under the care of officers for exportation; or on due entry or payment of the full duties in ready money for consumption, if they be such as may be used in the kingdom, sect. 16. If it be necessary to take proceedings for recovery of the

[1] 6. Geo. IV. c. 112. § 2.

[2] A distinction may also be observed between warehouses and King's warehouses. 'WAREHOUSES, (without the addition), 'are any house, shed, yard, timber-'yard, or other place, in which goods may be lodged 'without payment of duty, or although prohibited to 'be used in the United Kingdom.' KING'S WAREHOUSE, is a place provided by the Crown, for lodging goods therein, for security of the customs. 6. Geo. IV. c. 107. § 115. See also § 133.

[3] Ib. § 3. and 7.

[4] Ib. § 3. By 6. Geo. IV. c. 107. § 135. legal quays existing at the date of the Act are to continue so; and power is given to the King to appoint ports and quays, in future, for the landing of goods.

[5] 4. Geo. IV. c. 24. § 6. 'Whereas it is expedient, 'for the protection of the manufacturers of this coun-'try, that the several goods and merchandise, the im-'portation of which hath been prohibited by any Act, '&c., but which, by virtue of this Act, may be im-'ported and warehoused, for the purpose of exporta-'tion only, should be lodged and deposited in ware-'houses of special security.'

[6] See 6. Geo. IV. c. 107. § 52, 3, 4. relative to prohibitions and entry for exportation only.

[7] All warehouses appointed under previous Acts, are to continue as if under this Act.

[8] The bonds made under former Acts, to be in force as if under this Act.

duties, the remedy is double, viz.—on the bond, or by sale of the goods. If the former be adopted, the sureties in the case of a bond by the importer, or the warehouse keeper and his sureties in case of a general bond, will be entitled to an assignment of the Crown's remedy. If the goods are not taken out of store within three years, either for consumption or exportation, (unless further time be allowed by the commissioners of the treasury), they may, by the commissioners of the customs, be ordered to be sold; subject to the conditions to which they were subject previous to the sale; a further time of three months being allowed for the clearing of the goods from the warehouse. The produce of such sale is to be applied, not to the payment of the duties, for still the goods *may* be exported by the buyer, when no duty will be exigible; but to the payment of warehouse rent and other charges, and the overplus, if any, paid to the proprietor. But the goods so sold, if not relieved within the three months, are to be forfeited, sect. 14. When goods are carried to the King's warehouse for security of the duties, or to prevent them from coming into home use, warehouse rent is to be paid for the time during which they remain therein, 'at the same rate as may be payable for the like goods when warehoused in any ware-'house in which such goods may be warehoused without payment of duty,'[1] or as shall be fixed by the commissioners of the treasury or of the customs;[2] and in case such goods be not duly cleared from the King's warehouse within three months, they may be destroyed, if not worth the duties, or sold by auction for home use, or for exportation; and the produce, if sold for home use, applied to the duties, and in either case, to the warehouse rent and charges; the overplus to the person appointed to receive the same.[3]

4. Goods are either prohibited or not prohibited. 1. If prohibited either absolutely to be sold, or to be sold when imported contrary to the navigation laws, the object of the security provided is to prevent the rivalship with British commodities, or rivalship with British navigators; and to secure exportation as the sole condition of clearing the goods from the warehouse. 2. If not prohibited, they may either be sold for consumption or for exportation: In the former of which cases, the payment of the duties forms the sole condition of the clearance; in the latter, the exportation of the goods forms the condition. The arrangements authorized by the Act for the accomplishment of these objects, and facilitating a market for goods, consistently with safe custody and with indulgence for payment of duties, relate to the entry and warehousing of the goods; the examining and due preservation of them; the sale of them in the warehouse; and the preservation of the rights of the parties interested in the goods.

1. Upon the entry and landing of any goods to be warehoused, the proper officer of the customs shall take a particular account of them, mark the contents on each package, and the word 'prohibited' on such as are not allowed to be imported for home use; and the goods shall be carried to the warehouse under the care or with the authority of the officer; and in such manner, by such road, by such persons, and at such time, as he shall appoint, § 12, 13. With the goods so warehoused, the proper officer is charged, till duly discharged on their being taken out for use, or for exportation, or sold for charges and duties.

2. The facilities for examining; for removing to another port or another warehouse in the same port; for sorting, separating, and repacking; or for taking out for cleaning, or managing, improving, and bottling of wine and spirits, are particularly detailed in the Act.[4]

3. The facilities for sale of the goods not prohibited are of great importance in the

[1] 6. Geo. IV. c. 107. § 133.

[2] 7. Geo. IV. c. 48. § 9.

[3] 6. Geo. IV. c. 107. § 134. Provision is also made for payment in the first place, out of the price, of the freight of such goods as may have been landed by officers without payment of the freight.

[4] 6. Geo. IV. c. 107. § 10. 20—27. 29—36.

present inquiry. Under former Acts, there was a degree of uncertainty relative to the custody and transfer of goods, which led to many questions. In the subsisting Act, by section 9th, goods secured in warehouses in the actual occupation of the importer or proprietor of the goods, and which shall be bona fide sold by such importer or proprietor, shall be validly sold, although allowed to remain in the warehouse, provided the agreement shall be in writing, signed by the parties, or there shall be a written contract by a broker, or person legally authorized; and the price shall be paid or secured; and the transfer entered in the officer's book ordered to be kept for the purpose.[1]

4. There are regulations for preserving uninjured the rights of parties; and, *First*, The owners of the goods are to be indemnified against embezzlement, damage, or loss occasioned by the negligence of officers. On prosecuting the officer to conviction, the importer or proprietor of the goods is to have exemption from duty on the goods lost, damaged, or embezzled; and the damage sustained is to be paid and made good by the commissioners of the customs or excise, under orders to be established, § 39. *Secondly*, The masters and owners of ships in which goods shall be imported, and landed, and lodged in the custody of the proprietors of docks, have their claim of freight preserved to them over the goods in the dock-warehouse; and the proprietors of the docks, their servants or agents, are authorized, empowered, and required, on notice given to them, to detain and keep such goods till the freight, rates, and charges be paid, or a deposite made sufficient to answer therefor; sect. 45.[2]

2. TRANSFERENCE OF GOODS WAREHOUSED AND UNDER BOND.

Returning from this short analysis of the Warehousing Acts, it is now to be explained how goods under the operation of those laws are to be transferred.

Goods secured under the Warehousing Act either belong to the person who is proprietor or occupier of the warehouse; or to persons who have no other concern with the warehouse than in having their goods deposited there. And these cases are regulated by different rules.

GOODS THE PROPERTY OF WAREHOUSEMAN.

Goods which belong to the occupier of the warehouse, stood formerly in a predicament in which it was difficult to effect a transference of them while they continued in the warehouse. The occupier of the warehouse was, under former laws, properly speaking, the custodier of goods lodged there; the officer having only a superintendence and key for security of the duties: And the question might arise, whether, after a sale by the proprietor of goods lodged in his own warehouse, there was, by the law of Scotland, such tradition as to pass the property? or by that of England, such termination of the order

[1] 'That if any goods lodged in any warehouse, 'shall be the property of the occupier of such ware-'house, and shall be bona fide sold by him, and upon 'such sale there shall have been a written agree-'ment signed by the parties, or a written contract of 'sale, made, executed, and delivered by a broker, or 'other person legally authorized, for or on behalf of 'the parties respectively, and the amount of the price 'stipulated in the said agreement or contract shall 'have been actually paid, or secured to be paid, by 'the purchaser; every such sale shall be valid, al-'though such goods shall remain in such warehouses, 'provided that a transfer of such goods, according to 'such sale, shall have been entered in a book to be 'kept for that purpose by the officer of the customs 'having the charge of such warehouse, who is hereby 'required to keep such book, and to enter such trans-'fer, with the dates thereof, upon application of the 'owners of the goods, and to produce such books 'upon demand made.' The regulation was first introduced in 4. Geo. IV. c. 24. § 82., and the following expression, that goods thus sold 'shall, by such sale, 'be transferred and vested in the buyer to all intents 'and purposes,' is weakened in the new Act, with what view does not appear.

[2] See also above, for freight secured on sales in King's warehouse, by c. 107. § 134.

and disposition of the goods in the warehouse proprietor, as, under the statute of James I. to put an end to reputed ownership? The difficulties attending this situation are removed by the recent Acts, whereby, 1. The officer is charged in such cases with the duty of keeping a book of transfer; and, 2. A written contract of sale, with notice and entry in the officer's book, is declared to make a complete sale.[1]

GOODS IN THE BOND WAREHOUSES OF THIRD PARTIES.

Goods lodged in a warehouse not in the ownership or occupation of the proprietor of the goods, are by the statute left to the common law: And it would seem that the same rule should apply to the case of goods originally belonging to the occupiers of the warehouse, but sold as above, and an entry made in the officer's book; in consequence of which such goods are completely separated from the warehouseman's own property.

Goods in this predicament are either in the warehouses of docks, or in ordinary warehouses.

1. Dock Warehouses.—The confusion arising in the loading, landing, and warehousing of goods, and the dangers of collision, damage, and peculation, both to the revenue and the merchant, on ordinary wharfs, have led to the establishment of docks in the great emporiums of trade, with the proper accompaniments of wharfs and warehouses. The effect of this in practice is important. These are private institutions under legislative sanction.[2] The dock companies are remunerated by means of rates authorized by the several Acts to be levied. And it is a counterpart of this right that the public shall enjoy the security as well as facilities of the docks and of the warehouses (for rent), while their goods are in the course of being landed or deposited there. On the occasion of any question relative to the safety or transference of goods in any dock warehouse, or on any dock wharf, the particular provisions of the Act relative to that dock ought to be referred to, lest any peculiarity in the Act should alter the disposition of the common law on the subject.[3]

Generally speaking, however, the dock company, or the proprietors and directors of the dock, will be held as custodiers of goods landed and lodged in their warehouses. In the London, West India, and other docks in the Thames, and in those of Bristol, Liverpool, &c. very regular arrangements are made, and books kept, and receipts or certificates granted. Under those arrangements it has been held:—

[1] 6. Geo. IV. c. 112. § 9. See above, p. 190. In a case which occurred in the Court of Session, some years before this Act, the idea of a record in which such an entry might be made, to the effect of completing a sale in such circumstances, occurred as a consequence deducible from the regulations of the then subsisting Acts. Auld against Hall and Company, 12th July 1811; 16. Fac. Coll. 290. Lord President Blair said,—'That the law of Scotland and 'custom of merchants concur in requiring intimation 'of the sale; and this intimation must be entered in 'a book which, by statute, must be kept for that pur-'pose, and which affords a security nearly equal to 'that of the record of sasines in land rights.' But there was nothing in those former Acts to support such a result, and the usages of different ports were so various, that in some there was a distinct set of books, in which every alteration of the property appeared; in others, no record whatever was kept.

[2] In England, the London docks, in 1800, (39. and 40. Geo. III. c. 47.; 55. Geo. III. c. 3.)—the West India docks, (39. Geo. III. c. 69.; 42. Geo. III. c. 113.)—the East India docks, in 1803, (43. Geo. III. c. 126.; 54. Geo. III. c. 228.)—with two others called the Rotherhithe docks, are for the accommodation of the port of London. There are also docks at Bristol and at Liverpool, the two other principal ports of England.

In Scotland, docks are established at Leith, as the port of Edinburgh, by certain Acts, 28. 38, 39. 45. 47. 53. Geo. III.; and 7. Geo. IV.; Loc. and Pers. Acts, c. 105.

[3] There is one general law, however, applicable to all dock establishments, by which the freight of goods landed under the provision of the Warehousing Acts, is secured by a continuance of the lien to which such goods were liable while on board, 6. Geo. IV. c. 112. § 45. This will demand attention afterwards, in treating of lien for freight. Below, Book IV.

1. That due notice to the warehouse keeper is sufficient to complete the transference, as in a question with creditors. This has been laid down by the greatest authorities in England, on the same principle which rules the transference of goods in the hands of wharfingers.[1] There is no case on this point in Scotland; but the principle on which the English law proceeds is distinctly recognized with us.

2. The proper course, however, is to make the transfer by indorsement of the dock warrant. The inconvenience was felt of going to the docks, on the occasion of every transfer, to see notice duly given; and the existence of a document capable of indorsement, with the ready analogy of a transferable bill of lading, (see below, p. 198.), introduced the practice of transferring by means of the document or dock-warrant alone. The parties, by the original conception of those certificates or dock-warrants, arrange the mode of transfer; for there is printed a blank delivery order, to be filled up when the goods are sold.[2] The practice of England is quite settled, that goods in this situation may effectually be transferred by indorsement of the warrant; and it is now sanctioned by judicial determinations giving effect to such transfers, as consistent at once with mercantile usage and legal principle.[3] In Scotland, the practice has been extremely loose. The docks established here have not been ordered, in respect to the arrangements for recording the entry and transfer of goods, with sufficient precision or regularity to serve as the groundwork of that convenient practical system which prevails in England; but the principles and the analogy on which that usage has proceeded, are the same in Scotland as in England.

In cases such as have now been stated, a competition between a person purchasing on the transfer of a dock-warrant, and one purchasing with notice to the Dock Company, or

[1] LUCAS against DORRIEN, 1817; 7. Taunt. 278. Here Doorman applied to Dorrien, his banker, for L. 10,000 on his note, with a collateral security over sugars in the West India Docks. The dock-checks were delivered, duly indorsed, and the money was advanced. A change afterwards was made for certain dock-checks of molasses, which also were duly indorsed. The certificates were preserved and examined at the warehouse, and the clerk said they were sufficient. Some of the goods were taken out of bond, others remained. On the bankruptcy of Doorman, the clerk of the Dock Company refused farther delivery without assent of the assignees. In an action by the assignees, one question was, Whether the assignees were entitled to recover for the molasses? Judgment went for the banker. Mr Justice Dallas said, 'The 'clerk of the Dock Company, on the dock-warrant 'being exhibited to him, said, "This will suffice." 'Therefore I must take it that the Dock Company, 'through their agent, had notice of the transfer; and 'though nothing was done in consequence of that 'notice, it falls within the case in Campbell, where 'Lord Ellenborough held that the mere giving notice 'to the wharfinger, without any thing done thereon, 'was effective to complete the transfer of property.' Mr Justice Burrough said,—'The moment that no-'tice was given to the Dock Company, they were 'converted into trustees for the defendants, if it be 'necessary so to contend.' But the case, though it would have been decided in favour of the banker on this ground, did not, in fact, require the aid of actual notice; for the whole Court held the *indorsation alone sufficient*. See below, Note [3].

[2] A dock certificate on a transfer is in this form:—

Warrant of Transfer, { No. of order, 500. / Ship's rotation, No. 30.

West India Dock Warehouse, No. 6. I certify, that the following 3 casks, lot 6. of coffee imported by the ship Aurora, Captain T. Smith, from Jamaica, entered by J. B. and Co. on the 10th May 1826, have been transferred in the books of the warehouse into the name of John Smith. Rent commences 26th June 1826, inclusive. (Date and subscription.)

No. 20. folio 520.

Entered, J. W. SANSUM, *Clerk*.

(Then a schedule of the marks and weight of each cask.)

A blank delivery order is subjoined, printed, thus:—

London, 1*st July* 1826.

Deliver the above-mentioned goods to
or order.

No.

Examined and entered the 10th August 1826.

[3] In SPEAR against TRAVERS, 1815, one of those dock-certificates, after passing through several hands, was transferred to Spear, as a security for L.2000, by Greaves. Greaves had not paid the price to Mr Mealy, from whom he bought the goods; and to aid Mealy, the original holder of the certificate (in whose name the goods still stood on the books) gave notice to stop; and having applied for a duplicate certificate, on a false statement that the former had been lost, he

its officers, might be of doubtful issue. If the above were by statute prescribed as the regular method of transfer, (as in the case of goods belonging to the proprietor of the warehouse, supra, p. 190.), it might be doubtful whether any other mode of transfer would be effectual. But this is a mode introduced by usage alone, proceeding on the practical arrangements made, and the facilities thereby afforded for the transaction of

got it. Under the direction of GIBBS, Chief-Justice, a verdict was given for Spear. The gentlemen of the special jury observed, that, in practice, the indorsed dock-warrants and certificates are handed from seller to buyer, as a complete transfer of the goods. 4. Campbell, 251.

In the above case of LUCAS against DORRIEN, (see p. 192. Note [1]), this doctrine was well canvassed and established. Mr J. DALLAS says,—'There are two 'parts in the case of Harman and Anderson; and 'though Lord Ellenborough, C. J. did say at the trial 'that the transfer in the books passed the property, 'yet he afterwards says, "The delivery note was sufficient, without any actual transfer being made in 'their books." Spear against Travers is valuable for 'two purposes:—1. It shews what Gibbs, C. J. held, 'respecting the operation of these dock-warrants. '2. It shews that a special jury have expressed an 'opinion upon the subject. The sugars must be deposited with the Dock Company for securing the 'duties. The warrant itself contains a form of indorsement. What can be stronger to shew the intention 'of the parties that the property should pass by indorsement, than the form of indorsement put on 'it in the original making of the instrument?'—Again he says,—'I have been several times stopped by a special jury, they being satisfied that 'the goods pass from hand to hand by indorsement of 'these instruments. All special juries cry out with 'one voice, that the practice is, that the produce 'lodged in the docks is transferred by indorsing over 'the certificates and dock-warrants; and, therefore, 'there is no reputed owner, if he does not produce 'his certificate.'

Mr Justice Burrough says,—'This instrument is 'perfectly well known to all traders, and it is also 'known to them that the goods pass by indorsement 'of it, and there is no reason why they should not: 'it is a transfer of a mere chattel, and there is no 'reason why an order for delivery of the goods should 'not pass the property. I should have thought, independently of the notice to the Dock Company, that 'the property was transferred by the mere indorsement for a valuable consideration.' Again,—'I know 'not whether these instruments were in use at the 'time when the case of Gordon against the East India 'Company was decided; but Lord Kenyon, C. J. 'relies there on the absence of a document which 'Taylor could have carried to market for the purpose 'of disposing of that property. Here is that document. What Mansfield, C. J. says in Thackthwaite 'against Cock, (3. Taunt. 491.), is material to the 'present case. He says,—"There is not such a clear, 'distinct, and precise custom proved, as would enable 'others to see that these may not be the hops of the 'possessor." Here subsists, I will not call it a custom, but so clear an understanding of the trade, that 'this instrument by indorsement would pass the property, that every one may see that they are no longer 'the property of the bankrupt, who has ceased to 'possess this document.'

In ZWINGER against SAMUDA, 1817, 7. Taunt. 265., there was a fraud. Roebuck, in order to buy coffee, got from Samuda, money, in security of which he transferred the coffee by the usual note into Samuda's name in the dock-books. He then sold it to Zwinger, and, on a false pretence, got from Samuda the certificate, with Samuda's name signed to the blank delivery order. On the faith of this, Roebuck got the price from Zwinger. Samuda stopped delivery at the docks; and the question was, Whether he could against Zwinger? It was adjudged he could not. Dallas, C. J. said, 'The person who enabled Roebuck to commit this fraud was the defendant, by lodging these 'delivery notes in Roebuck's hand, and enabling him 'to go to market with them. The act of Roebuck, 'therefore, was the act of the defendant. It is said 'that it would be inconvenient, if property may be 'transferred by these delivery notes. The best test 'of their convenience is the use of them, which has 'obtained ever since these docks have been erected. 'Two witnesses, very conversant with this trade, stated, 'that there was a general practice prevalent, to receive 'these warrants in the market, and to pay for the 'goods therein specified, without going to the dock-house to examine whether any stop was put on them. 'Without saying that this is such an usage as to constitute a rule of law, there is, in the particular case, 'enough to show that there is no foundation for the 'observation that the practice will be productive of 'inconvenience. It is enough, therefore, to say, that 'the persons who hold these bought notes, have given 'a valuable consideration for them, and that, therefore, 'they are entitled to the property.'—Park, J. 'I am 'of the same opinion: it is the defendant who is to 'blame, for sending out Roebuck into the world with 'these symbols in his hands; and the plaintiffs, by 'purchasing them, obtain a right to the delivery of 'the coffee. As to the custom, it is asked by the defendant's counsel, how can a custom grow up in so 'short a time as hath elapsed since the making of 'these docks? but in the Newfoundland case, (Noble 'against Kennoway, 2. Doug. 510.), it was held, that 'one year was enough for a practice of trade to grow up.'—Burrough, J. 'I hope it will be understood, 'that the Court does not proceed upon any thing like 'a custom in this case: the only use to be made of 'the evidence of the practice of the trade, is that put 'by my Brother Dallas: it shews that no inconvenience 'results from the use of these warrants.'

business. It would, however, seem, that the holder of the dock-warrant was preferable: 1. Because this may fairly be held as the mode of transfer stipulated and agreed to by the importer or depositor of the goods, in the very form of the receipt received from the warehouse. 2. Because the mercantile usage is, to rely on such transfer by indorsement. And, 3. Because a purchase made without care taken to see the dock-certificate cleared, indicates something of collusion.[1]

2. Ordinary Bond Warehouses.—1. In the ordinary bond warehouses, not connected with docks, there seems to be no such uniformity of practice as to be the safe foundation of a usage similar to that of the dock-warrant transfers. In some warehouses for bond goods in Scotland, the arrangements are very correct; and in practice there have occurred cases in which regular entries in the warehouse books have been made, and formal receipts or transfer notes have been delivered by the warehouse keeper for goods deposited. And to a certain extent the practice has prevailed, that where the buyer again sells the whole quantity contained in such note, he gives over the note with an indorsed transfer to the second buyer. This is a course of practice similar to the English usage in the case of dock-warrants; but less regular and settled, and not to be relied on as having the force of mercantile usage, or as the groundwork of any settled rule of transference. In some cases which occurred nearly twenty years ago, it was questioned, whether such transfer was equivalent to a complete delivery of the goods, as if they had been taken out of bond, or as if the delivery order had been fully intimated to the keeper of the cellar? The Court of Session held the delivery to be complete.[2] The determination of the question was not merely as between the purchaser, on the faith of an indorsed order, and the creditors of the seller; but it went the whole length of finding, that to all intents and purposes, in a case of stoppage in transitu, the delivery note as completely carried the property, as, in the case of Lickbarrow, a negociable bill of lading was found to do, where indorsed to a buyer while the goods were at sea. It was, on the one hand, maintained, that the usage

[1] In the arguments delivered in the above cases, (p. 192. Note [3]), the law of such a case will be found almost delivered.

[2] 1st February 1809, Tod and Company against Rattray. In November 1802, Ritchie and Son imported rum, and it was lodged in the King's cellar, under the care of M'Lauchlan and Company. Ritchie and Son sold 91 puncheons to M'Kellar, who granted bills, and they gave an order on M'Lauchlan and Company by letter, which, after specifying the particular casks, bore,—'You will please deliver the 'above-noted 91 puncheons of rum to the order of 'Mr D. M'Kellar, charging us with cellar rent to '30th December next, should any lie so long.' Ten days afterwards, M'Kellar sold 22 puncheons to Mathie, and gave him an order of delivery, addressed to M'Lauchlan and Company. Mathie again sold to Frew 9 puncheons for L.268, and the money was paid. Frew received a note of the puncheons thus purchased by him, with an order on M'Lauchlan and Company to 'deliver to the order of Mr R. Frew 'the under-noted 9 puncheons of Jamaica rum, he 'paying cellar rent, one month after date.'—This order was intimated to M'Lauchlan and Company, and Frew's name marked, as purchaser, after Mathie's; 6d. per puncheon being paid for this entry. Many months afterwards Mathie became a bankrupt, without having paid for the rum to M'Kellar, who had sold to him; and M'Kellar claimed a right to stop it, as in transitu.

The Judges found themselves embarrassed by the former cases, especially by that of Auchie, Ure and Company, which was a solemn decision, not then reversed, but which several of the Judges thought very questionable. But they entertained much less doubt respecting this peculiar shape of the case. The majority of the Court was satisfied, 1. That it is the practice of trade to carry on dealings, to a very great extent, in rum, &c. while it continues in bond; and that merchants are accustomed to trust to the delivery and intimation of an order for the quantity sold; 2. That it is of most essential benefit to commerce that this course of delivery should not be discouraged; and that it is truly the policy of the Bonding Acts to give uncontrolled power of trade, subject only to the pledge for the duties; and, 3. That the analogy of Lickbarrow's case should be admitted; and that a vendee, receiving delivery by an order and intimation, and paying full value for the goods, is not to be questioned, or to have the goods withheld for payment of the price due on some prior sale. The case was first decided thus in the Court of Session, before its division, (31st May 1808). It then came under review of the First Division, and Lord President Blair added the weight of his opinion to the determination.

was so uniform as to admit that analogy: on the other it was maintained, that no such usage was either proved, or could (in the short time that had elapsed since the Bonding Acts were made) possibly be established to the effect of constituting a rule of mercantile law. The Court of Session held, that the right of the original seller to stop in transitu, could not be claimed or made effectual against subsequent purchasers paying the price on the faith of a transfer of the delivery note.[1] Looking to the entire want of uniformity in the practice of the country, it is difficult to estimate the precise effect of these determinations. In England, the Judges have rested much on the uniformity of the practice, as giving notice to every one who shall deal with the importer or owner of goods, that he is not, in the case of dock-certificates, to hold himself safe to buy on mere notice, without calling for the certificate. But this principle cannot rule cases in Scotland, from ports where the usage is not settled. Notice under the common law will furnish the only sure rule to be followed, even in cases where usage is alleged.

2. Where there is no settled usage, or where the delivery note still remains in the hands of the original buyer, the principle of change of custody has been admitted as good; and is indeed the only groundwork of a mode of transfer short of a complete change in the disposition of the goods.

3. The Act of 6. Geo. IV. c. 112. § 28. makes provision for the case where a new owner changes the bond, releasing the original owner. Little doubt can be entertained that this would be an effectual alteration of the property.

4. But it has been doubted what shall be sufficient notice to change the custody, and who is properly custodier, to whom the transfer of goods warehoused is to be intimated? A great deal of discussion took place at one time on questions of this sort, before the system of the Bonding Acts was fully completed. It was in the Court of Session questioned, whether it was not necessary that the duties should be paid and the goods actually taken out of the cellar, and delivered to the vendee, in order to make a complete transfer? And in three several cases it was determined, that an order of delivery on the keeper of the warehouse, though accompanied by a notice of that order, and a transfer in the cellar books, was not sufficient to transfer the goods.[2] But the House of

[1] M'EACHERN against EWING and Company, 19th February 1824; 2. Shaw and Dunlop, 724. In this case, rum bonded in Greenock was sold to Menzies, and by him to Gordon. No notice was given to the warehouse keeper till he demanded payment of the duties from the importer, when he was told the rum had been sold to Menzies. Menzies paid the duties, and got the rum. The Court held the delivery to be correct, and refused to admit a proof of usage that goods passed only with the delivery order.

[2] CAMPBELL, RUTHVEN and Company, were importers of rum, of which, while in the King's cellars, they sold 50 puncheons to Telfer and Company. Samples were delivered, but no order of delivery. The buyers authorized Robertson, a commission agent, to sell their rum, and he had free access to it. Telfer and Company sold the rum, and gave this order on Robertson:—'I have agreed with Mr Taylor for the 'rum in your hand; please, therefore, deliver it to 'his order.' This was, by the purchaser, sent to Robertson, with orders respecting the future sales, in a new course of employment, as his agent. On payment of duties, 18 puncheons were delivered; 32 had been sold to different dealers, but were still unremoved when Telfer and Company failed, without having paid the price, and the importers stopped the goods. This was found a good stoppage. Winter Session 1803.

ROBERTSON, HARVEY and Company, against Creditors of ADAM.—Robertson, Harvey and Company, were importers of rum, which was bonded. William Adam purchased from them, and received an invoice with the warehouse keeper's receipt, and an order of delivery to Adam indorsed; who intimated his holding the receipt, and the order, to the keeper of the warehouse. He sold 2 puncheons, which, on payment of duties, were delivered. He failed without paying the price, while 6 puncheons were still in bond. The sellers applied for those, and having paid the duties, received them. Adam's creditors demanded restitution. The Commissary of Glasgow held the delivery to be complete. Lord Meadowbank, in the Bill-Chamber, affirmed that judgment. But the Court held, that the delivery was not complete, so as to divest the importers of their right to stop. 24th November 1803.

AUCHIE, URE and Company, against SPENCE.—

Lords reversed these judgments,[1] and notice to the warehouse keeper was held effectual to transfer.

In England, the same principle is recognized, to the effect of not only passing the property, but of satisfying the requisition of the Act of James I. as to reputed ownership.[2]

But although notice made to the keeper of the warehouse, and recognized by him, is, in law, sufficient to transfer the property, it is far from being well settled how such notice is to be given; and it seems to be matter for a jury on the facts of each case.

The keeper of the warehouse is properly the custodier of the goods. The officer of the revenue has no duties of that sort to perform, except in so far as he is ordered, by the 9th section of the recent Act, to keep a book for the transfer of goods, the property of the warehouse keeper. It is to be wished, perhaps, that this appointment had been a little broader, so as to include all transfers in ordinary bond warehouses. But in absence of

Auchie, Ure and Company, were importers of rum, which was placed in bond in the cellars of Sandieman and Company of Greenock. Auchie, Ure and Company sold 32 puncheons by auction to Mathie, and he drew for the price on Hugh Mathie and Company at four months. An invoice was delivered, with an order to the keeper of the warehouse subjoined:—'Please 'deliver to the order of William Mathie, the under-'mentioned 32 puncheons of rum.' 18 of the 32 puncheons were accordingly delivered, on payment of the duties. The order was intimated to Sandieman and Company. In their scantling-book, Mathie the purchaser's name was duly entered by them opposite to the several puncheons; and the order itself was filed among the other orders in Sandieman and Company's custody. Mathie, the vendee, and also Hugh Mathie and Company, failed, without paying the bill; and Auchie, Ure and Company, applied judicially to stop the 14 puncheons still in bond. The water-bailie of Clyde 'found Auchie, Ure and Company, entit-'led in law to reclaim the 14 puncheons of rum sold 'by them to the defender, Mathie, still remaining in 'the King's cellars, in respect the price thereof has not 'been paid.' The cause was then removed to the Court of Session, and Lords Balmuto and Hermand successively in the Bill-Chamber adhered to this judgment; and the Court affirmed their sentence. The Judges whose opinion went to support this judgment, proceeded chiefly on the ground of the decided cases, strengthened by what they understood to form the uniform line of distinction between actual and constructive delivery; the former requiring delivery into the corporeal possession of the vendee; the latter giving effect to acts short of this, for the special purpose of completing transference where the price is paid. On the other hand, Lord Meadowbank vindicated his judgment in the Bill-Chamber in the former case, on the ground that such order and intimation were equivalent to the delivery of the key of the warehouse; that the warehouse became thenceforward that of the vendee, where the goods lay at his risk, and at his disposal, subject only to the King's pledge; and that the commerce of all bonded goods, and the very existence of the privilege intended by the Bonding Acts, required that it should be possible to make an effectual transference, without the necessity of paying the duties in order to get actual delivery. 18th December 1804.

[1] House of Lords, 16th March 1810. The House of Lords, by their judgment, 16th March 1810,—'Find, that the pursuers in the application to the water-'bailie, (Auchie, Ure and Company), are not entitled 'in law, in respect that the price was not paid, to 'retain the puncheons of rum in question, sold by them 'to William Mathie, which were remaining in the 'King's cellars: find, that in the circumstances of this 'case, these goods ought (in a question as between 'the vendor and vendee thereof in whose possession 'the same were) to be considered as being in the pos-'session of William Mathie, the vendee, before he 'became bankrupt; inasmuch as Messrs Sandiemans 'ought, in such a question between such parties, in 'the circumstances of this case, to be considered as 'holding them prior to the bankruptcy, as the agents 'and servants of the vendee only; and it is, therefore, 'ordered and adjudged, that all parts of the several 'interlocutors complained of, so far as they are incon-'sistent with this finding, be, and the same are here-'by reversed: And it is further ordered, that, with this 'finding, the cause be remitted back to the Court of 'Session in Scotland, to do therein, and as to the 'several interlocutors complained of, as this finding 'requires, and is consistent therewith.'

It may be observed, that on occasion of a case which occurred prior to this judgment, Lord President Hope, before the division of the Court, urged the importance of adjudging this point differently from the determination in Auchie and Company's case: and the Court came to be satisfied accordingly, on a more careful review of the system of the Bonding Acts, that the former determination was erroneous. 1st February 1809, Tod and Co. against Rattray. Supra, p. 194. Note [2].

[2] Knowles against Horsfall, 1821; 5. Barn. and Ald. 134. In this case one of the parcels of brandy was in the bond warehouse of Ledson. And in King's Bench, Lord Chief-Justice Abbot, and Bayley and Best, Justices, were of opinion, that if notice had been given to him, the goods would have been effectually transferred, and out of the order and disposition of the vendor.

such regulation, the officer is properly the guardian of the right of the Crown alone, as concerned for the duties; a mere superintendent, on account of the revenue, of the proceedings of the warehouse keeper. With the exception of the cases provided for in the 9th and 28th sections of the Act, (above, p. 190. and 195.) it neither is required by the Act, nor is it the practice, to make intimation to the officer of any change in the ownership of the goods, which is not accompanied with a removal or alteration of the goods themselves. And the officer would take no notice of such intimation, though made to him; as not having any effect on the Crown's right. It is to the warehouse keeper, therefore, that notice of a transfer is to be made. He is the custodier for the merchant; and becomes, by such notice, (according to the rule already laid down), the servant and custodier of the buyer.

A question already alluded to may be again mentioned as incident to all the situations which fall under this section; viz. What shall be the effect of delivery begun, but not completed, as requiring a series of repeated acts? In the simple case of delivery between seller and buyer direct, there seems reason to conclude, that the delivery might be stopped at any point of time, the price not being paid, and the buyer becoming bankrupt.[1] But where the goods are in the hands of a third party as custodier, the principle which seems to rule the case is the change of custody. If notice of the buyer's right and acceptance of the charge on his account, be sufficient to complete the transfer, the commenced delivery seems to be good evidence of such notice and acceptance; entitling the buyer thenceforward to consider the custodier as his agent, provided the contract be entire. And this I take to be the true principle of the cases cited below, where the delivery was held complete.[2]

[1] See above, p. 172, 173.

[2] SLUBEY against HEYWARD. George and Henry Browns ordered Slubey and Smith to send 7061 bushels of wheat, to be paid for at a future day. The wheat was shipped at Baltimore on board the Pomona, the bills of lading deliverable to the buyers, and by them sold to Scott. When the ship arrived, the goods were entered in the name of Scott's agents at the custom-house. Two days after, 800 bushels were taken out by Scott's agents on his own account; and the Browns becoming bankrupts, the original sellers gave notice to the shipmaster to stop delivery. The Court were of opinion, 'that, under the circumstances of this particular case, the transitus was 'ended by the delivery of the 800 bushels of wheat, 'which must be taken to be a delivery of the whole, 'there appearing no intention, either previous to, or at 'the time of, the delivery, to separate part of the cargo 'from the rest.' 6th May 1795; 2. Hy. Blackst. 504.

The determination of this case is stated as a general decision, and relied on in the subsequent case of HAMMOND against ANDERSON; 1. Bosanquet and Puller, N. S. 71. In that case, a number of bales of bacon, lying at a wharf, being sold for an entire sum, an order was given to the wharfinger to deliver. The buyer came, weighed the whole, and took away some bales. He then failed, and the seller attempted to stop, by ordering the wharfinger not to deliver. And although, by the custom of trade, the seller was to pay charges of warehouse for 14 days, the buyer was held to have taken possession of the whole, and the seller to have no right to stop what remained with the wharfinger. All the Court concurred in thinking that the seller having undertaken for the warehouse rent was a mere incident, which did not enter into the case: But they relied on these points:—1. That the contract was entire; 2. That the case was stronger than Slubey against Heyward, in so far as the whole was weighed over by the buyer, which was a taking of possession of the whole; and, 3. That the leaning had gone far enough in favour of stoppage.

In a late treatise on charter-parties, Mr Lawes seems to think that an important distinction may be taken, where the seller gives delivery of a part, and where the buyer or his servants separate part from the rest, and take that part away; p. 510. But it seems inexpedient to multiply small distinctions in such cases: and it really does not appear that there is any satisfactory ground in law for the distinction; for it cannot be doubted, that the mere weighing over, without taking away a part, would not complete the delivery.

On these cases, the doctrine is thus stated absolutely by Lord Chief-Justice Abbot, (*Law of Merchant Ships*, 3d edit. 364.)—'If the master has begun to unload, 'and has delivered part of the cargo to the consignee, 'the consigner's right to countermand is wholly at an 'end, and cannot be exercised over the residue of the 'cargo.'

§ 3. TRANSFERENCE OF GOODS AND MERCHANDISE WHILE IN THE HANDS OF SHIPMASTERS AND CARRIERS.

Goods sold may already be in the hands of a shipmaster, carrier, or other person employed to transport them: Or they may be delivered to the carrier or shipmaster expressly for the buyer. The completion of the transfer in these two distinct cases depends on different principles. The former case I shall consider here; the latter falls under the next section.

A transfer of goods in the hands of a carrier most frequently happens while the goods are at sea. In the direct passage of goods by land carriage, and even in the regular carriage by smacks, so universally established now in the coasting trade, the buyer has it commonly in contemplation to obtain a direct delivery to himself: And only a receipt is given for the goods; deliverable to the buyer, or according to the address. In the importation of goods from foreign countries, the intention more frequently is, that the consignee should, in the way of general sale, take advantage of the market to which the goods are sent: In such cases, the obligation of the shipmaster is so conceived as to facilitate a sale of the goods, even before their arrival. The shipmaster grants to the shipper a Bill of Lading, acknowledging that goods of a particular description have been delivered to him in good condition; and binding himself to deliver them at the port of destination, either to the shipper; or his order, or assigns; or to the bearer; or to the consignee or buyer by name, or his assignees. When the consignee's name is not expressed, the consignor indorses his own name on the bill, either filling up the indorsation with an order to a particular person, or leaving it blank in the name of the consignee. In the former case, the bill has the same effect as if taken originally to the person named in the indorsement; in the latter, it is equivalent to an undertaking to deliver to the holder of the bill of lading. The shipmaster is, in the common case, to hold himself as trustee, for the person by whom fulfilment of the obligation in the bill of lading is demandable; for the consignee named in the bill or in the indorsation; or for the person holding a legal conveyance from him; or for him who holds the blank indorsation.

Goods at Sea.

The indorsation and delivery of the bill of lading is thus, without intimation, good delivery to the buyer. The nature of the shipmaster's contract is, that he binds himself to deliver to the holder the goods shipped, and to hold those goods for him who shall, by indorsation, acquire right to the bill of lading. No intimation, therefore, is necessary to convert the possession; but the delivery of the document, upon the sight of which the shipmaster is bound to give up the goods, and without which he cannot be forced or entitled to do so, transfers at once the right and the civil possession.[1]

Sale by Bill of Lading.

In England, this doctrine is well established.[2] The cases which have occurred in Scot-

[1] In France, no sale of a *ship* at sea could deprive the creditors of the seller of their right to it, but *goods* might be sold by the bill of lading. Valin lays down the law thus:—'We must conclude, then, that the 'negociation or assignment of an invoice or bill of 'lading completes the transference to the person re- 'ceiving them, without waiting for the actual tradi- 'tion, or requiring notice; like the indorsation of a 'letter of exchange, or a note payable to the bearer;' vol. i. p. 608.

See, on this subject, below, Of Stopping in Transitu.

[2] 'If goods by bill of lading are consigned to A, A 'is the owner, and must bring the action against the 'master of the ship if they are lost. But if the bill be 'special, to be delivered to A to the use of B, B 'ought to bring the action. But if the bill be general 'to A, and the invoice only shows that they are upon 'the account of B, A ought always to bring the ac- 'tion, for the property is in him, and B has only a 'trust; *Per totam curiam:* And *per Holt, Chief-Jus- 'tice*, the consignee of a bill of lading has such a pro- 'perty as that he may assign it over. And *Shower, J.* 'said, that it had been adjudged so in the Exchequer.' EVANS against MARTLET, 1. Lord Raymond, 271.

In WRIGHT against CAMPBELL, (according to a note of it taken by Mr Justice Buller, though it is differently reported by Sir James Burrow, vol. iv. 2046—51.),

land, upon bills of lading, are comparatively few; but they establish this principle clearly, that the assignment of the bill of lading is a complete transference of the property, where the question turns not upon the right to stop in transitu. This doctrine was held in a case so early as the middle of last century;[1] a few years afterwards, there was a similar determination;[2] and the principle was afterwards very strongly confirmed, first in the Court of Session, and afterwards by the House of Lords,[3] and is now settled law.

Whether equivalent to actual delivery.

But the custody thus held by a shipmaster is regarded as so peculiar, and so much is attached to the notion of *passage* while the goods are still on their voyage and undelivered, that as between the seller delivering over a bill of lading, and the buyer receiving it, the delivery is not considered as equivalent to actual delivery, nor the custody as transferred to the full effect already noticed in the case of wharfingers and other cus-

Lord Mansfield laid it down, 'that ever since the 'case in Lord Raymond, it had always been held, 'that the delivery of a bill of lading transferred the 'property at law.' 2. Term. Rep. 74.

In the case of LICKBARROW against MASON, Mr Justice Buller said,—'It has been argued at the bar, 'that no case has yet been decided that a bill of lading 'does transfer the property; but, in answer to this, it 'is to be observed, that all the cases upon the subject, '(Evans against Martlet, Wright against Campbell, 'Caldwell against Ball), and the universal understand-'ing of mankind, preclude that question.' 2. Term. Rep. 75.

[1] M'Lauchlan and Drummond, merchants in Maryland, having borrowed from Robert Swan of Annapolis in Maryland L.152, gave him an indorsed assignment to a bill of lading of 38 hogsheads of tobacco, consigned by them to James Johnston, merchant in Glasgow. The bill of lading bore delivery at the aforesaid port of Glasgow unto Mr James Johnston, or to his assigns. The cargo was delivered to Johnston before the bill of lading came to hand, and was arrested in his hands by the creditors of the consignors. A competition arose between Swan, the indorsee to the bill of lading, and those creditors of the consignors; which, of course, turned upon the point, whether the cargo remained still the property of the consignors, or was legally transferred to the indorsee? 'It was the opinion 'of the Court,' says Lord Kames, 'that the assign-'ment on the back of the bill of lading made a com-'plete transference of the property to Robert Swan;' and upon that medium he was preferred. 13th June 1764, BUCHANAN and COCHRAN against SWAN; Kames, Sel. Dec. 216. 280. Lord Kames, in reporting this case, has omitted to mention the assignable nature of the bill of lading.

[2] In 1765, Dunlop, in Virginia, consigned some tobacco to Hastie and Jamieson, the proceeds to be applied in payment of the price of goods which Dunlop had received from them. This bill of lading was to H. and J. and their assigns. The ship arrived, and the cargo was arrested by a creditor of Dunlop, the consignor. The consignees pleaded, that the property was transferred; and founded on the mercantile practice of Holland, Britain, and America. The Lord Ordinary, and the Court of Session, found,—'That there appears no sufficient evidence that the 'said Archibald Dunlop was divested of the property 'of the cargo in favour of Hastie and Jamieson, and 'consequently, that the same was liable to be affected 'by the diligence of his creditors.' But in the House of Lords the judgment was reversed, and it was declared that the appellants, Hastie and Jamieson, have a special property in the cargo, preferable to the respondent's arrestments. 10th April 1770, HASTIE and JAMIESON against ARTHUR.

[3] Monteith was consignee of a parcel of sugars, and had a blank indorsed bill of lading. He sold the goods to Bogle, while they lay on board in the harbour of Greenock, and gave over to him the bill of lading blank indorsed. Bogle gave an obligation to Dunmore and Company, the ship-owners, for payment of the freight; and Monteith having become bankrupt, Dunmore and Company, as creditors of Monteith on another account, unshipped the goods, put them into their own warehouse, and refused to deliver them up till Monteith's debt was paid. There were two questions:—1. Whether, supposing the property not to be transferred to Bogle by the transference of the bill of lading, Dunmore and Company could claim a lien or retention for a former debt? And, 2. (which is the question we are at present considering), Whether there was a transference of the property or not? 'A majority of the Court was of 'opinion, that the proper possession of the goods was 'held, not by the shipmaster or owner, but, through 'them, by the shipper, and then by the indorsee to the 'bill of lading, animo; delivery of possession being 'made in an effectual manner, and such alone as the 'case was capable of; and therefore they sustained 'Bogle's claim for the goods, as legally transferred to 'him.' 2d February 1787, BOGLE against DUNMORE and Company; 7. Fac. Coll. 305. 470. This judgment was affirmed on appeal.

But the Court found, in the case of YOUNG against STEIN's creditors, that an indorsation of a bill of lading to a factor, was not such a transference of the possession as to entitle him to insist that the vessel, when driven back to her port, should set sail, that he might have retention for advances previously made. 23d July 1789, 8. Fac. Coll. 144.

todiers. The transitus is still held to subsist, and the goods may be stopped. And there is only one exception to this rule, viz. in the case of third parties who have purchased from the vendee on the faith of the bill of lading as a negociable instrument. This important doctrine will afterwards be fully considered.[1]

§ 4. TRANSFERENCE BY DELIVERY TO A THIRD PERSON AS REPRESENTING THE BUYER.

Delivery to servants, agents, &c.

The acts of delivery which have been enumerated, may, as already said, be performed either to the buyer in person, or to those employed to act as his hands,—his servants, clerks, and agents, having orders from him to take final delivery in his name, and into his stock.[2]

1. Where a buyer sends his servant, or commissions his clerk, or empowers any third party as his factor and special agent, to receive delivery of goods bought by him; the delivery so received will be considered as effectual to divest the seller, and effect a complete transfer of the property, as if the delivery were made into his own hands.[3]

2. Delivery even to a wharfinger, authorized to receive goods in his warehouse as into the buyer's stock, and where the buyer is accustomed to hold goods so delivered as at their ultimate destination for his behoof, is delivery as effectual as if made into the buyer's own warehouse.[4]

[1] See below, Of stopping Goods in transitu, p. 214.

[2] 'Per procuratorem, tutorem, curatoremve,' (says Paulus), 'possessio nobis acquiritur:' And Ulpian says, —'Procurator si quidem mandante domino rem emerit protinus illi acquirit possessionem.' Dig. lib. 41. tit. 2. De acquir. vel. am. possess. l. 1. § 20.; and l. 42. § 1. See also, Cod. lib. 7. tit. 32. De acquir. poss. l. 1.

The doctrines of the civil law, on this point, are well summed up in a few words by Pothier:—'La tradition réelle est celle qui se fait par une préhension corporelle de la chose, faite par celui à qui on entend en faire la tradition, ou *par quelqu'un de sa part*. Lorsque la chose est un meuble corporel, la tradition réelle s'en fait à une personne, en la remettant entre ses mains, ou *en celles d'une autre qui la reçoit pour elle de son ordre*. Par exemple, si j'ai acheté un livre chez une libraire, ce libraire me fait la tradition réelle de ce livre en me le remettant entre les mains, ou entre les mains de mon domestique par qui je l'ai envoyé querir.' Pothier, Tr. du droit de Proprieté, No. 195. vol. iv. p. 417. See also, Tr. de la Possession, No. 49. et seq. vol. iv. p. 539.

Possession is by Lord Stair defined, 'the holding or detaining of any thing, by ourselves or others, for our use;' and he proceeds to shew, that a person 'who detains or holds a thing not at all for his own use, but for another's, who doth detain by him as a servant or procurator, doth not possess;' the possession is in the principal. B. 2. tit. 1. § 17. And in another place he lays down the law, that a mandator, or agent, empowered to act for others, 'may *acquire*, transact, or contract, immediately in name of his constituent; in which case the real right stands immediately in the person of the mandant, and the obligation constitutes him creditor,' &c. B. 1. tit. 12. § 16.

[3] Such, accordingly, is pretty universally the law of the continental states. Cassaregi Discursus de Commercio, Disc. 38. No. 51, 52.

This doctrine was very early admitted by the Court of Session in the case of PRINCE against PALLET, where goods having been ordered to be sent by a particular shipmaster, were held actually delivered when put into the shipmaster's hands. Udney having ordered three tons of wine from Bourdeaux by one Gillespie's ship, the wine was delivered to Gillespie, who put it on board. Udney's circumstances becoming suspicious, the foreign merchant wrote to a correspondent in this country to receive the goods from the skipper when they arrived, and to prevent them from coming into Udney's hands. A competition arose between the seller and a creditor of the buyer arresting the goods in the hands of the shipmaster. The Court found, that the wine being delivered to the skipper upon Udney's order, the property was stated (vested) in Udney. 23d December 1680; 2. Stair's Dec. 823.

In England, the doctrine seems never to have been questioned.

[4] The doctrine I have laid down seems first to have been delivered by Mr Justice Chambre in the case of RICHARDSON against GOSS, where it was not, however, necessary to determine the point. 'If it were necessary to determine the point, I should strongly incline to think, that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse.' 3. Puller and Bos. 127.

3. Delivery to a third person for behoof of the buyer, and to abide the buyer's orders for their future destination, is complete delivery, to all purposes.[1]

4. Delivery to a factor authorized to dispose of the goods, or to send them on a new destination, or to the best market, has been held complete delivery to all intents and purposes.[2]

Delivery to Agents.

5. Delivery to a person on the part of the buyer, though not for the purpose of terminating the transit, and bringing the goods to their ultimate destination, but merely that the goods may be forwarded in their journey and transitus to the buyer, on the ultimate destination which he has given them, is good delivery, the price being paid. But it has been held, that where in such a case the price is not paid, the transit is not irrevocable: The person who receives the goods is considered merely as a middleman; receiving goods as for the buyer, but still holding a lien as for the seller. See below, p. 213. 221.

Marking of Goods.

6. Where goods are bought to be delivered to the buyer at a distance, and having arrived at their journey's end, are put into the hands of a wharfinger, or into a public warehouse or cellar, not at the desire and appointment of the buyer, but for the conveniency of the carrier or shipmaster, and to wait the appearance of the buyer to claim them; this is not delivery to pass the property: The goods are still in the hands of the seller's agent, till they are taken possession of by the buyer. But if, while the goods remain in this situation, the buyer claim the goods, and mark them as his, the delivery is completed.[3]

This doctrine was adopted very fully in the subsequent case of SCOTT and Others against PETTIT. Berkly, a merchant in London, ordered goods from Walker of Manchester, which were forwarded to his address at the Bull and Mouth Inn, London. From that inn they were sent to the house of Pettit, a packer; in consequence of a general order to send all goods thither directed to Berkly. Berkly lived in lodgings, and had no warehouse of his own; and on the goods arriving at Pettit's house, they were booked for Berkly, and unpacked by Pettit on his account. Berkly absconded, and the seller reclaimed the goods. In a question between him and the assignees of Berkly's estate, the question was, Whether the goods were actually delivered? and the Court of Common Pleas held that they were; that there was no ulterior destination; and that the transitus was at an end. 3. Pull. and Bos. 469.

[1] DIXON against BALDWEN, 1804. Battiers, traders in London, were in the custom of sending orders to Baldwen for goods to be forwarded to Metcalf and Company at Hull, in order to be shipped for Hamburgh; and when the goods arrived at Hull, the Battiers sent orders to Metcalf and Company, where, and to whom, to send the goods at Hamburgh. The goods in question were thus sent:—They were, by direction of the Battiers, sent in packages with a certain mark, 'for order, and to be forwarded to Messrs Metcalf 'and Sons, to be shipped for Hamburgh, as usual.' The Battiers failed; the sellers went to Hull and stopt the goods; four bales having been actually on board for Hamburgh. One question in the case was, Whether the delivery had been completed to the buyer? Lord Ellenborough thought the delivery complete: 'The 'goods had so far gotten to the end of their journey, 'that they waited for new orders from the purchaser 'to put them again in motion; to communicate to 'them another substantive destination; and without 'such orders they would continue stationary.' Lawrence and Le Blanc, J. agreed with him. Grose, J. held, 'that the right to stop in transitu was not at an 'end when the vendors took possession of the goods.' 5. East. 175. 188.

[2] LEEDS, &c. against WRIGHT, 1803. Thus, Moisseron, who was general agent in London for the house of Le Grand and Company of Paris, and who held powers to send goods, purchased for them, either to Paris, or such other markets as he should think fit, bought goods in the name of Le Grand and Company, and directed them to be sent for him to the house of Wright, a packer in London. On their arrival, Moisseron went to Wright's house, and unpacked, and sent away some of the goods; the rest were repacked. While the repacked goods were in Wright's possession, news arrived of Le Grand and Company's failure; and the seller tendered to Wright his charges, and claimed the goods as not finally and actually delivered. The Court of Common Pleas held, that although the goods were intended for exportation, the delivery to Wright was clearly a delivery to Moisseron; who might, if he pleased, have made London the place of their ultimate destination, by disposing of the goods there. 3. Pull. and Bos. 320. The doctrine confirmed, 5. East. 175. DIXON against BALDWEN. See preceding Note.

[3] ELLIS, &c. against HUNT. Moore, in London, ordered a parcel of files from Ellis and Company, at Sheffield. They were sent by Royle's waggon, directed to Moore. They were brought to the Castle and

Taking Samples.

7. The exercising of any other act of ownership on goods in the above mentioned situation, such as tasting and taking samples, would seem to be sufficient to complete the transit.[1] But it would rather seem, that a creditor arresting the goods while under detention, would not be held to have taken actual delivery on the part of the buyer, his debtor. His right as arrester is entirely dependent on that of his debtor; and he has no power as representative, or under any conveyance, express or tacit, to take possession of his debtor's property.[2] The trustee or assignee for the general creditors, may, in England, take delivery for the

Falcon Inn, 22d June, and there attached by a creditor of Moore's. Moore had become bankrupt, and the provisional assignee, on 24th November, demanded the goods, and put his mark on them, but did not take them away. Four days afterwards, the sellers wrote to the warehouse keeper to stop the goods. The question was between the sellers and the assignees of the buyer. Lord Kenyon said,—'If a corporal touch were necessary to defeat the right of the vendors, it took place here. It is true, the provisional assignee did not alter the situation of the goods; but they were then arrived at the end of their destined journey, and deposited in a place where they would have remained till the bankrupt could have carried them to a warehouse of his own. All this happened on the 24th November; and it was not till the 28th that the vendor wrote to countermand the delivery of the goods: but that was too late, for the goods were no longer in transitu; they were then in the possession of the party to whom they were consigned, or of those who represented him. In cases of this sort, we cannot but feel for the situation of the manufacturers; but it is such as necessarily results from their mode of delivery: however, the severity of the case cannot induce us to break through the rule of law.' Ashurst, J. agreed, that 'before the plaintiffs thought of countermanding the goods, the provisional assignee, who then stood in place of the bankrupt, had actually taken possession of them, and put his mark on them.' Buller, J. assented to this:—'In this case, there is the strongest evidence of the consignee's taking actual possession of the goods, by his assignee putting his mark on them. It was said by the plaintiff, that the carrier would have been liable in an action by the vendor; but he would not have been liable in the character of carrier, for the goods had got to the end of their destined journey, but only as warehouse keeper, in respect of the recompense which he was to receive for warehouse room. But the instant the provisional assignee put his mark on the goods, the warehouseman became the agent or servant to the bankrupt.' Grose, J. said,—'When the goods were marked, they were delivered to the consignee, as far as the circumstances of the case would permit; the assignee could not then take them away, because they were at that time under an attachment. After the mark was put on them, they were no longer in transitu; and, consequently, the vendor's right to loose them was divested.' 3. Term. Rep. 464. 470.

See also Stoveld against Hughes, 14. East. 308. where timber being sold on credit, before the credit expired the buyer resold it, and the second buyer, in presence of the original seller, marked the timber. Held, that the original seller could not stop as in transitu on the failure of the first buyer.

[1] See the cases of Wright against Lawes, and the case referred to by Lord Ellenborough, as adjudged in the House of Lords, supra, p. 185. Note [1]. The inference from those cases to the point stated in the text seems to be clear.

[2] In Trompousky and Company against Niesh, 8th July 1807, the question was in some degree complicated, but the result rather tends to confirm this position. Niesh bought hemp from Trompousky and Company of Riga. The goods did not arrive till after Niesh had failed, and left Arbroath. There being no person to receive them, the shipmaster lodged them in a public warehouse, where they were arrested by a creditor of Niesh's. The shippers afterwards, in the action of forthcoming, appeared by a mandatory, to whom they had indorsed the bill of lading; and pleaded that this appearance was equivalent to stoppage in transitu. The question lay between the seller and the arresting creditor. The Judge-Admiral preferred the arresting creditor,—'In respect the hemp in question was not attached or stopped in transitu by the vendors prior to the arrestment.' The Court of Session altered this judgment, and preferred the sellers, on the ground that the buyer had left Arbroath before the goods arrived, and that there was no person to receive delivery.

Smith against Goss, 1. Camp. 282. was a similar decision in England. Scaiffe ordered from Smith of Birmingham some packages of hardware, which he directed to be forwarded to him at Newcastle; 'and if sent by London, to be addressed to the care of Goss, Bull Wharf, with directions to send them by the first vessel for Newcastle.' The goods were so sent accordingly to Goss; and, while with him, Scaiffe wrote to Smith that he was insolvent, and declined accepting the goods. On this Smith stopt the goods in Goss's hands. In the meanwhile, the goods were attached by process out of the Lord Mayor's Court, at the instance of a creditor of Scaiffe. Lord Ellenborough held Smith entitled to recover his goods; as they had been sent to Goss, for the purpose of being forwarded to Newcastle; were merely at a stage upon their transit, and could not be considered as having reached their final destination when at the wharfinger's in London. He also held, that the right of the seller to stop in transitu could not be defeated by the process out of the Mayor's Court, at the suit of the attaching creditor, who could have no greater right in the goods than Scaiffe himself.

buyer; and the courts of England have held the marking of the goods by the assignee as actual delivery.[1]

Goods delivered for carriage.

8. There is another important class of cases, where goods are delivered to shipmasters and carriers for carriage to the buyer. We have already considered the case of goods transferred while in the hands of shipmasters or carriers: The point now to be considered is, how far the shipmaster or carrier, to whom goods are delivered for the purpose of being transported to the buyer, or according to his order, takes delivery for the buyer? 1. Where the goods are delivered to the shipmaster of a GENERAL ship, on a bill of lading taken in name of the seller or consignor, and afterwards indorsed to the buyer; or on a bill of lading to the bearer, which is afterwards delivered to the buyer; or on a bill of lading to the buyer by name; the goods are effectually delivered[2] to pass the property, but are still subject to stoppage.[3] 2. Where goods are delivered to a common land-carrier;[4] or to the wharfinger of a smack company; or on board a smack with an address to the buyer; the goods are effectually delivered to the buyer, so as to pass the property; but while they remain in the hands of the carrier or shipmaster, they are subject to stoppage. 3. Where, for goods so delivered, a receipt is granted to the buver by the carrier or clerk of the shipping company, with the consent or by the direction of the seller; this is effectual delivery of the goods.[5] Such receipt is much the same with actual delivery to the buyer, and a subsequent embarkation of the goods by him on a receipt to himself. But such receipt or bill of lading by a shipmaster or carrier to the buyer will not transfer the property, if it shall have been granted without the seller's authority. And it has been ruled, 1. That a restrictive receipt, in the seller's name, prevents the shipmaster from giving a bill of lading to the buyer: 2. That even a general receipt is a bar to such a bill

[1] See the case of ELLIS against HUNT, p. 201. Note [3].

[2] This case has already been considered. See above, p. 200, 201. with the cases in Notes.

[3] See below, Of Stoppage in transitu.

[4] DUNLOP against SCOTT and Company. Bowie, a travelling merchant, ordered goods from Scott and Company of Glasgow. The goods were sent in a chest to the carrier between Glasgow and Edinburgh, and the carrier's clerk gave this receipt for the chest:—'Received from Scott and Company a chest, directed 'to William Bowie, Edinburgh, which we promise to 'deliver in good order, and which was directed to lie 'till called for.' On arrival, the chest was placed in the warehouse of the carrier's agent at Edinburgh, and was there arrested by a creditor of Bowie. Scott and Company then demanded the goods as unpaid for; and the Court held them entitled to stop them as in transitu. 22d February 1814; 17. Fac. Coll. 576.

[5] FRAGANO against LONG, 1825; 4. Barn. and Cress. 219. NOBLE against ADAMS, 1816. Noble bought of Cross and Company of Glasgow, goods invoiced at L.556, and granted two bills of exchange for the amount. The goods were sent by Cross and Company to Noble at London, by the smacks of the Shipping Company, and this receipt was taken at placing them with the Shipping Company:—'Received *from* '*Mr Joshua Noble*, three boxes and eight bales, 'marked, &c. to be shipt at Leith in the Hope, de-'liverable at Glasgow Wharf, London.' Adams, the company's wharfinger at London, refused to deliver the goods to Noble, who tendered freight and charges, because Cross and Company had given notice to stop. The case chiefly turned on an alleged fraud, and on that ground it was decided for Cross and Company. But incidentally the question of delivery was spoken of. Lord Chief-Justice Gibbs said,—'He inclined to 'think the vendors had lost their right to stop in tran-'situ. They have not taken a receipt from the Glas-'gow company *to themselves*, which they might have 'done, but have suffered them to give an absolute and 'unconditional receipt to the plaintiff. I have doubts 'on this part of the case, and will reserve the point.' Holt, 248. When the cause came to be argued on a motion for a new trial, the Chief-Justice said,—'That 'although he had reserved the point of stopping in 'transitu, he was of opinion, and the Court concurred 'with him, that there was no pretence for exercising 'that right. The Shipping Company at Glasgow had 'acknowledged the receipt of the goods *from the plain-'tiff*, which showed that the delivery to the latter 'from Cross and Company was complete. If Cross 'and Company had taken a receipt *to themselves* from 'the owners of the vessel, the case might have been 'otherwise, because it would have been more like the 'case of Bothlingk against Inglis, (See above, p. 174. 'Note [1]); but, as the case stood, there did not appear 'to be any connexion between them.' 2. Marshall, Rep. 366.

The doctrine which was thus fully laid down, had been taken for granted in CRAVEN against RYDER, 1815 and 1816; 2. Marshall, 129. See below, p. 204. Note [1].

of lading, without assent by the seller;[1] and, 3. That while no receipt has been granted, though required by the vendor, a bill of lading granted to the vendee will not transfer the property:[2] 4. Receipts are seldom taken unless either there is an intermediate person, as a lighterman, between the shipper and the shipmaster, who is to be acquitted by the receipt; or where the goods are sent by a shipping company. In the former case the receipt is intermediate; in the latter, it generally stands instead of a bill of lading. The bill of lading is often settled without any previous receipt; but, whether a receipt has been previously given or not, without authority, the master has no right to grant a bill of lading to any one but the shippers.[3] What shall be deemed authority to this effect, is a question of usage or of evidence; in which it may occur to be tried, whether the seller,

[1] CRAVEN against RYDER, 1815, 1816; 2. Marsh. 126.; 6. Taunt. 433. Craven and Company, sugar refiners, sold 24 hogsheads of Hamburgh loaf sugar to French and Company, 'to be delivered free on board 'the George, Captain Ryder, for Hamburgh.' The goods were sent by Craven and Company to the ship with this order:—'To the commanding officer on 'board the George, Captain Ryder. Receive the 'under-mentioned goods for and on account of Craven 'and Company.' This receipt was brought back:— 'Received on board the George, &c. the under-men- 'tioned sugars for Hamburgh, for and on account of 'Craven and Company.' This was an unusual form of receipt introduced recently by the lighterman who carried those goods to the ship. French and Company failed, and the lighterman demanded the goods on the part of Craven and Company, tendering the freight and charges, and producing the receipt. But French and Company having in the meanwhile sold to Caldas, he had gone to the shipmaster, who inadvertently gave him a bill of lading. The action was trover against the shipmaster, and a verdict went for the plaintiffs, the vendors, under the direction of Mr Justice Dallas; the special Jury themselves being of opinion, 'that it 'was contrary to the course of business, and to the 'defendant's duty, to give up the bill of lading without 'the receipt; that the defendant had received the 'sugars on account of Craven and Company, and had 'given a restrictive receipt accordingly.' 1. Holt, 100. Mr Sergeant Lens moved for a new trial, on the ground that the absolute sale to French and Company, with a subsequent sale, had divested the original seller of his right to stop. Lord Chief-Justice Gibbs said,— 'Independently of the particular form of the receipt, 'I take it that the regular practice is, that the person 'who is in possession of the receipt is alone entitled 'to the bill of lading; and the captain, therefore, 'ought not to give the bill of lading except to the 'person who can give the receipt in exchange; conse- 'quently, the person holding the receipt has a con- 'trol over the goods till he has exchanged it for the 'bill of lading. My brother Dallas, who tried the 'cause, says he has no doubt as to the propriety of 'the verdict, and the jury were equally certain that 'this was the practice. Unless, therefore, we saw 'our way very clearly, we should not disturb their 'verdict. The goods were originally the property of 'the plaintiffs, and they sold them to French and 'Company to be delivered free on board; but unques- 'tionably retaining their right of stoppage in transitu 'till delivered, in case of any insolvency on the part 'of the purchasers. It is true, that French and Com- 'pany might sell their right again; but the plaintiffs 'might still reserve to themselves their right of stop- 'page, and it would be for them to determine when 'they would take off that restraint. In this state of 'things, French and Company sell the goods to Cal- 'das, who obtains the bill of lading from the defen- 'dant. But the defendant gave the bill of lading to 'Caldas in his own wrong; because, according to the 'usage, and to common sense, he should not have de- 'livered it without taking the receipt in exchange for 'it. It turns out, that French and Company were in- 'solvent while the receipt was still in the hands of the 'plaintiffs. The jury considered that the receipt kept 'full control over the goods till it was given up, and 'it does not appear to me that any thing has deprived 'the plaintiffs of their right to stop in transitu. I do 'not rely mainly on the particular form of the receipt, '(though that is not to be laid out of our considera- 'tion), but I think that if the receipt had been in the 'usual form, the effect would have been the same. 'The ground of my opinion is, that the original seller 'had never parted with his right of stoppage in tran- 'situ.' Mr Justice Dallas,—'I think the jury deter- 'mined properly. They said it was contrary to the 'course of business, and to the defendant's duty, to 'give up the bill of lading without the receipt; and 'that the plaintiffs had never parted with the property, 'as they kept possession of the receipt.'

[2] RUCK against HATFIELD, 1822, 5. Barn. and Alder. 632., where rum was bought at 1s. 5d. free on board; invoices sent to the buyer; a bill drawn and accepted; and the rum shipt, with the tender to the mate (master not on board) of a receipt as 'shipped 'on account of the vendors.' This was not signed, and afterwards the master signed bills of lading to the buyer's correspondent at Hamburgh. On the seller again tendering the receipt, the master refused to sign it. The question was, Whether the goods were stopt as in transitu? The seller had a verdict; and a new trial was refused. See also CRAVEN against RYDER, 1816, preceding note.

[3] See cases of CRAVEN and RUCK, above, Notes [1]. and [2].

permitting the ship to sail, without taking care to obtain a bill of lading, is not to be held as giving implied assent to the bill of lading that may have been granted by the master.

9. Where, after notice to stop, delivery has by accident been made, it is not delivery to the effect of passing the property.[1]

The various kinds of delivery now enumerated have the effect of transferring the property, wherever the vendor has not failed in observing or fulfilling any of the essential parts of his contract: The goods pass out of the estate of the vendor, and become part of the estate of the vendee: The creditors of the former cannot take them as part of his divisible estate: the creditors of the latter may *vindicate* them as the property and part of the estate of their debtor.

So far all is clear. But where the vendor has failed to observe any essential part of his bargain, stipulated or implied as a condition of the transference; where, for example, he is unable to perform his engagement by paying the price; those cases of real or supposed hardship arise to which I have already alluded, and exceptions have been contended for and admitted, which confound, in no small degree, the simplicity of the doctrine.

I shall, in the following section, consider the grounds of these exceptions to the general rule.

SECTION II.

OF THE SELLER'S RIGHT OF RETENTION FOR THE PRICE, AND OF STOPPAGE IN TRANSITU.

ACCORDING to the settled law of MUTUAL CONTRACT, if either of the parties in sale be unable or refuse to perform his engagement, the other may withhold performance of his part of the contract, while still in the course of execution; and may demand, besides, damages for any loss he may sustain.[2] If the BUYER fail while the goods are still with the seller, the seller may withhold delivery, and claim the direct damage which he has suffered by the disappointment: If the goods have left the seller, but are still on their way, not yet come into the buyer's possession, the seller may follow the goods, stop them on the way, and resume possession. This privilege, then, of stopping goods in transitu, is truly a qualified extension of that rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform his part.

1. HISTORY OF THE DOCTRINE OF STOPPAGE OF GOODS IN TRANSITU.

It is a little more than thirty years since the doctrine of stopping in transitu was introduced into the law of Scotland, by a decision of the House of Lords. Whether on this

[1] LITT against COWLEY, 1816. Here a carrier, after notice to stop, had, by mere mistake, delivered the goods to the buyer. Under the direction of Lord Chief-Justice Gibbs, a verdict went for the sellers against the assignees of the buyer, a bankrupt; and the Court of Common Pleas refused a new trial. 7. Taunton, 169.

[2] 'In mutual contracts, if either party be unable 'to perform, the other has a double remedy; either a 'process for damage and interest, or, if he please, a 'declarator, concluding that the contract should be 'found void, in respect of non-performance, and each 'party restored to his place.' 1. Dict. 595. See also the authorities there relied on; 13th July 1670, RAITH against WOLMET; 20th July 1675, MAITLAND against LAIRD of Gight.

Non pretium continet tantum empti judicium, sed omne quod interest emptoris. Dig. lib. 19. tit. 1. De act. Empt. l. 43.

occasion the course of our own practice should have been entirely set aside, and a rule adopted from England, where different principles regulate the contract of sale, this is not the place to inquire: it is enough that the revolution thus occasioned has been confirmed by uniform practice and many decisions since; and that the doctrine of stoppage in transitu is now law in Scotland. At the time when this doctrine was introduced, our lawyers were little versed in English determinations, even on mercantile questions; and in particular, they were very much at a loss for the rules and distinctions of the new doctrine which had been promulgated among us. I had soon after, while employed in the first composition of this Work, much communication with Lord Thurlow, who presided in the House of Lords when the decision alluded to was made; and both in his written and oral communications on the subject, he expressed himself as very sensible of the difficulties which were to follow on this decision, and which then were felt in England. He saw the increasing danger of yielding to mercantile convenience, as affecting the purity and uniformity of legal principle; the difficulty of reconciling the doctrine (even to the length to which it had then been carried) with the settled rules of law; and the necessity of questioning and denying much that had been decided, in reducing this department of jurisprudence to a system.[1]

[1] In the first edition of this Work, I expressed the general result of these communications; and in revising now, at the distance of more than twenty years, the statement of a doctrine not even yet reduced to perfect uniformity, I think it not unfit to restore from that early edition the passage to which I allude:—'When we come 'to contemplate the effects of the admission of acts 'of constructive delivery, upon the doctrine as occur- 'ring in bankruptcy, we find it often productive of very 'wide deviation from principle. Instead of a simple 'doctrine, we find one so complex and inconsistent, 'that an act which, in one situation, is held a good 'delivery and effectual transfer, is, in another, held to 'be wholly unavailing. In short, those ideas of hard- 'ship, which, at first sight, seem so natural, are found 'most deceitful and delusive, leading to arbitrary and 'ill-settled rules; such as should either be carried fur- 'ther, or not indulged so far. A creditor who has lent 'money to his friend, or one who has bought a bill, 'and sees the acceptor become bankrupt before the 'day of payment, suffers the loss without exciting in a 'Judge any commiseration, except that general regret 'which belongs to the condition of every creditor. But 'where a seller has parted with his goods, without re- 'ceiving the price, and the goods are still in existence, 'and distinguishable; or where a buyer has paid the 'price, and is likely to lose the goods for which he has 'paid; a degree of hardship is thought to exist, fit to 'be relieved by courts of justice. And yet between 'the condition of these several creditors there is truly, 'and in principle, no distinction to be taken. What 'appears in one view to be a hardship, is, when pro- 'perly considered, merely the event of a risk which 'the parties thought it their interest to run.

'Considering the doctrine under this aspect, and 'not in its gradual rise and establishment, the true 'principles would appear to be these:—In contracts 'relative to the transference of goods, the parties are, 'previous to delivery, under personal engagements to 'each other; they are mutually debtors and creditors; 'and it depends on the nature of their contract, 'whether the one or the other is entitled to take pre- 'cedence in the demand of performance. In the ge- 'neral case, and without specialty in the agreement, 'neither party can, without performance or tender of 'his part, call upon the other. But this may be diffe- 'rently arranged. The seller may give time for pay- 'ment, or the buyer for delivery; and where they do 'so, the delay and the risk are compensated in the 'rate of the price. As the parties are, prior to pay- 'ment or performance, equally debtor and creditor to 'each other, so, after performance or payment on one 'part, the right of the person so paying or performing 'is not a jot improved—he is a mere creditor still. 'The delivery of the goods to the buyer does not make 'the *seller* less a personal creditor for the price than 'before; it does not transmute his jus ad rem into a 'jus in re, entitling him to any preference for the 'price of his goods over the other personal creditors: 'nor, on the other hand, can the payment of the price 'to the seller bring about any alteration of the *buyer's* 'right, or convert his claim from a personal into a real 'right over the goods.

'If principle, then, were to be adhered to in this 'branch of law, the real right of the buyer or of 'the seller ought to be judged of by the simple fact 'of delivery, unswayed by the circumstance of perfor- 'mance on the one part as altering the right of him 'who has performed: And the following principles may 'be stated as almost self-evident:—

'1*st*, That declaring any act to be a delivery, in 'case the price is paid, which would not be adjudged 'a delivery in any other case, is declaring, in other 'words, that delivery is not an essential requisite to 'the transfer of property.

'2*d*, That declaring any act to be no delivery, in 'case the price is not paid, which, in any other case, 'would be adjudged delivery, equally violates that 'fundamental rule of law.

'3*d*, That not only the value of the time given for

Since that time the determinations both in England and in Scotland have been numerous; and although a distressing degree of uncertainty has prevailed, it may now be assumed as the general principle which rules the whole doctrine, that goods may be stopt by the seller for the unpaid price, where they are still in the hands of a middleman, and in the course of transit to the buyer, or to the destination which he has appointed for them. But it may still be useful to retain the statement of the progress and history of this doctrine.

The principle on which this doctrine depends, is well known in the law of Scotland; but the remedy to the seller was formerly carried with us a good deal farther. There formerly prevailed in Scotland, as on the continent, a doctrine of more extensive application, which superseded almost entirely the distinctions that were found necessary in England. Restitution was allowed to the seller on the ground of presumptive fraud within three days of the bankruptcy of the buyer. It was held, that the impending bankruptcy must have been known secretly to the buyer, and that he was guilty of a fraud in not communicating it. And this presumption threw the onus probandi on the buyer or his creditors, to shew perfect fairness in the bargain. On the continent, the matter was carried still farther. The influence of the doctrines of the civil law, and of certain notions of commercial expediency, led almost universally to the rule, that a seller was entitled, even after actual delivery, (not merely on a presumption of fraud subject to inquiry, but in all cases), to have restitution of his goods, if unchanged in form, and distinguishable plainly from the rest of the buyer's stock.[1]

' performing a contract of sale, but the risk also ensu-
' ing thereon, is considered and compensated in the
' terms of the contract; and,

' *4th*, That the event of such risk, for running which
' the party suffering has already received a considera-
' tion in terms of his contract, furnishes no reasonable
' ground for further relief.

' Such seem, à priori, to be unquestionable princi-
' ples in the general doctrine of delivery. But even
' in departing from them, no strict principles of excep-
' tion have been followed. On the contrary, the ideas
' of hardship, so freely admitted, have occasioned de-
' viations even from what at first appears a fair line of
' distinction.

' (1.) The supposed hardship of not receiving goods
' for which the price has been paid, has led to the chief
' departure from the simple rule of actual delivery, by
' admitting constructive deliveries as equivalent to real
' delivery in that particular case. But the arbitrary
' nature of the principle on which this exception has
' been received, has been productive of much doubt
' and uncertainty with regard to the description of
' constructive delivery; whether it be necessary to
' send the goods by a carrier, or to deliver them to
' some intermediate person? or whether it is not suffi-
' cient to set them apart, mark them, or put them in
' packages for the buyer, or to do any other act denot-
' ing the settled and irrevocable purpose to deliver a
' particular subject? And the risk which, by a com-
' mon rule of law, is laid on the buyer, even before de-
' livery, has been brought into consideration, as mate-
' rially affecting the question of hardship.

' (2.) The hardship of losing the price of goods de-
' livered, has induced courts to find distinctions and
' pretences for allowing the seller to recall goods, even
' after such delivery as falls within the true and cor-
' rect definition of actual delivery. Such as, delivery
' to an agent of the buyer; delivery into a ship
' freighted by him, &c.

' (3.) The hardship of the goods being at the risk
' of the buyer, while the property continues untrans-
' ferred, has misled some into an opinion, that the
' question of risk forms the only true criterion of
' transference.

' Thus the law loses its certainty, and becomes a
' mass of decomposed principles; occasions of litigation
' are multiplied; new distinctions are taken; new prin-
' ciples of decision adopted; a continual uncertainty
' and wavering of judgment is encouraged; and the
' law becomes a disease, not a relief.'

[1] The French legislators, in constructing the Code ' de Commerce,' rejected the old law of revendication in mercantile dealings, and adopted that of stopping in transitu. The grounds of this change are thus explained in the ' Discours des Orateurs du Gouverne-
' ment:'—' Les auteurs du projet du Code de Com-
' merce avaient demandé l'abolition de la revendica-
' tion, comme contraire à l'intérêt du commerce: des
' chambres et des tribunaux de commerce avaient
' applaudi à cette proposition; mais d'autres avaient
' voté pour le maintien de la revendication, s'appuyant
' principalement sur cette raison, qu'il ne fallait pas
' changer sans nécessité un usage anciènnement établi
' en France, et suivi dans quelques pays étrangers. On
' a reconnu que l'usage de la revendication était une
' source de procès et un moyen de fraude; que son
' plus grand inconvénient était de laisser, à l'aide de
' ce privilège, le sort des créanciers à la merci de la
' volonté du failli, qui pouvait à son gré favoriser l'un
' et sacrifier l'autre, en maintenant ou dénaturant les
' signes qui peuvent constater l'identité, et en retardant

The last case in which the rule of presumptive fraud was admitted in Scotland, was decided in 1789; but, in an appeal to the House of Lords, this doctrine was, on the authority of Lord Thurlow, rejected; and it has since been entirely abandoned.[1] The

' ou accélérant la vente des effets qui lui auraient été ' livrés. C'est d'après ces considérations, que l'on s'est ' décidé à ne permettre la revendication que comme il ' est dit en notre article 577. et suivans. On a espéré, ' par ces moyens, rendre un service essential au com- ' merce, tarir la source d'une foule de procès, et remplir ' le vœu de la majorité des chambres et des tribunaux ' de commerce dont on a consulté l'opinion.'

It is rather remarkable to find, in contrast to this passage, written to vindicate the adoption of the rule which prevailed in England, a suggestion from English Jurists, that ' perhaps it would be wise to adopt a re- ' gulation similar to that which we perceive, from cer- ' tain cases and authorities, to be the law of Russia ' and of France: viz.—That if a seller can identify the ' property, though it may be in the possession of the ' insolvent vendee, yet that he shall be entitled to ' have it back again.' Eden's Bankrupt Law, 295. But see Abbot on Shipping, 375.

The whole title of the Code de Commerce is comprehended in the following extract, in which the leading principles of the doctrine of stoppage are well and clearly given:—

' 576. Le vendeur pourra, en cas de faillite, reven- ' diquer les marchandises par lui vendues et livrées, et ' dont le prix ne lui a pas été payé, dans les cas et aux ' conditions ci-après exprimés.

' 577. La revendication ne pourra avoir lieu que pen- ' dant que les marchandises expédés seront encore en ' route, soit par terre soit par eau, et avant qu'elles ' soient entrés dans les magasins du failli, ou dans les ' magasins du commissionaire chargé de les vendre ' pour le compte du failli.

' 578. Elles ne pourront être revendiquées, si, avant ' leur arrivée, elles ont été vendues sans fraude, sur ' factures et connoissemens ou lettres de voitures.

' 579. En cas de revendication, le revendiquant sera ' tenu de rendre l'actif du failli indemne de toute avance ' fait pour frêt ou voitures, commission, assurance ou ' autres frais, et de payer les sommes dues pour mêmes ' causes, si elles n'ont pas été acquittées.

' 580. La revendication ne pourra être exercée que ' sur les marchandises qui seront reconnues être iden- ' tiquement les mêmes, et que lorsqu'il sera reconnu ' que les balles, barriques, ou enveloppes dans les- ' quelles elles se trouvaient lors de la vente, n'ont pas ' été ouvertes, que les cordes ou marques n'ont été ' enlévées ni changées, et que les marchandises n'ont ' subi en nature et quantité ni changement ni altéra- ' tion.

' 581. Pourront êtres revendiquées, aussi longtemps ' qu'elles existeront en nature, en tout ou en partie, ' les marchandises consignées au failli, à titre de dé- ' pôt, ou pour être vendues pour le compte de l'en- ' voyeur: dans se dernier cas même, le prix desdites ' marchandises pourra être revendiqué, s'il n'a pas été ' payé ou passé en compte courant entre le failli et ' l'acheteur.

' 582. Dans tous les cas de revendication, excepté ' ceux de dépôt et de consignation de marchandises, ' les syndics des créanciers auront la faculté de retenir ' les marchandises revendiquées, en payant au récla- ' mant le prix convenu entre lui et le failli.

' 583. Les remises en effets de commerce, ou en ' tous autres effets non encore échus, ou échus et non ' encore payés, et qui se trouveront en nature dans le ' porte-feuille du failli à l'époque de sa faillite, pourront ' être revendiquées, si ces remises ont été faites par le ' propriétaire avec le simple mandat d'en faire le re- ' couvrement et d'en garder la valeur à sa disposition, ' ou si elles ont reçu de sa part la destination spéciale ' de servir au paiement d'acceptations ou de billets ' tires au domicile du failli.

' 584. La revendication aura pareillement lieu pour ' les remises faites sans acceptation ni disposition, si ' elles sont entrées dans un compte courant par lequel ' le propriétaire ne serait que créditeur; mais elle ces- ' sera d'avoir lieu, si, à l'époque des remises, il était ' debitéur d'une somme quelconque.

' 585. Dans les cas où la loi permet la revendica- ' tion, les syndics examineront les demandes; ils pour- ' ront les admettre sous l'approbation du commissaire: ' s'il y a contestation, le tribunal prononcera, après ' avoir entendu le commissaire.'

Code de Commerce, 1807, L. 3. tit. 3. De la Revendication.

[1] ALLAN, STEWART and Company, against STEIN'S Creditors. At the bankruptcy of Stein, part of large quantities of grain deliverable under a current contract, had been actually delivered, part stopped in the very act of unloading, and part stopped before bulk had been broken. The Court of Session decided the case on the ground of presumptive fraud, as entitling the seller to restitution even of what was delivered. Lord Chancellor Thurlow, however, laid it down, and the House of Lords adopted it in their judgment, that the notion of a presumptive fraud was untenable; that the sole question in such a case is, Whether the goods have been stopped while in transitu, according to the rule which had, within a hundred years, been introduced into England? The cause was, accordingly, remitted, to apply this rule.

The opinion of Lord Thurlow, in so far as respects the doctrine of presumptive fraud, will find a fitter place hereafter. Of what he said on the question of stopping in transitu, the following note was taken at the time:—' The question is, Whether the respondents ' (vendors) were entitled to stop certain cargoes of ' grain which were consigned or forwarded by them to ' Stein the bankrupt, before the actual delivery to ' him, the bankruptcy having intervened? By the law ' of England, and, as I conceive, by the law of Scot- ' land also, the shipping of goods to one who commis- ' sions them, or the delivery of them to a carrier to be ' conveyed to him, was a completed sale. But within

law of Scotland has from that time adopted the doctrine of STOPPING IN TRANSITU as established in England. And on that footing many cases have been decided; while the practice of trade has been regulated by this principle.

It has been much doubted, what is the true principle on which this doctrine was established. While some have held the seller, in stopping his goods, to be in the exercise of his strict *legal* rights, looking on him as a proprietor, undivested, till the moment of actual delivery; others have considered the property as, in law, changed, from the moment even of constructive delivery, and the right of the seller as an *equitable* interposition, for the purposes of justice, to prevent goods from coming into the stock of a man who cannot pay for them.[1] The latter of these views seems not only to accord with the history of the doctrine, but to be more consistent with all the more minute details, and to afford a more simple and satisfactory principle for regulating the questions that have occurred in this department. And it seems now to be considered as the true doctrine in England.[2]

This doctrine was first admitted in England towards the end of the seventeenth century. At law, upon a case ordered out of Chancery, the assignees of the bankrupt purchaser had a verdict; although the goods had been stopt before the ship sailed from the port of the sellers. But Chancery gave relief on this ground, that the goods were still the proper goods of the foreign merchant; and, 'therefore, that the vendee having paid no 'price for them, if the vendor could by any means get his goods again into his hands, or 'prevent their coming into the hands of the bankrupt, it was but lawful for him so to 'do, and very allowable in equity.'[3]

As this case shows the equitable extension of the right of property to maintain the powers of the seller, notwithstanding a constructive delivery; the next case that occurred may throw some light on the principles by which the Judges thought themselves restrained from carrying it the length of a right of restitution, after delivery actually completed. The case to which I allude was decided by Lord Chancellor Hardwicke in 1743.[4] The doctrine to be collected from it, so far as concerns the present inquiry, seems to be, 1. That for goods given to a carrier to be delivered to the consignee,

'the last hundred years a rule has been introduced, 'from the customs of foreign nations, that, in the case 'of the vendee's bankruptcy, the vendor might stop and 'take back the goods in transitu, or before they came 'into the hands of the vendee; and this is certainly 'now a part of the law of England, and I understand 'it to be law likewise in Scotland.' 23d December 1790.

[1] See two sketches of the history of this doctrine, delineated by the hands of masters: by Lord Rosslyn, in the case of Lickbarrow against Mason, 1. Henry Blackst. 364.; by Mr Justice Buller, in Ellis against Hunt. 3. Term. Rep. 464.

[2] Selwyn's Law of Nisi Prius, 1826, vol. ii. p. 1207.

[3] WISEMAN against VANDEPUT, 21st March 1790.

[4] SNEE, &c. Assignees of TOLLET, against PRESCOT, &c. 23d February 1743. Tollet consigned to Raguenan and Company at Leghorn, German serges, to be sold, or bartered, for Italian goods. R. and Company made agreements for Italian goods, half to be paid in Tollet's goods, half in money, and they put on shipboard the goods, (silks), and sent Tollet one of the three bills of lading for 12 bales. The bills of lading were taken to the order of R. and Company, indorsed by them in blank, and thus transmitted to Tollet. Tollet had borrowed money from Julian and Le Blon, and, in security, assigned the bill of lading, and failed. R. and Company were in advance for Tollet, on these transactions, L. 2,757. Prescot, their correspondent in London, hearing of Tollet's failure, wrote to R. and Company to take measures for preventing the silk coming into his hands; and they sent the two parts of the bill of lading which they held, and an order on the shipmaster to deliver to Prescot. The ship having arrived, Julian and Le Blon, to whom the bill of lading was assigned, demanded the goods; the shipmaster refused to deliver them. The question arose among the three parties—1. Prescot for R. and Company claimed the goods as still in R. and Company, untransferred, and subject to stoppage; 2. Snee, &c. claimed the goods as transferred to Tollet, and now the fund of his general creditors, subject to the claim of those who held the bills of lading in security; and, 3. Julian, &c. claimed payment of their loans out of the subjects of the bill of lading. Lord Chancellor Hardwicke viewed the case in this way:—1. That it was a

and which are countermanded by the consignor, on hearing of the bankruptcy of the consignee, no action of trover will lie for the assignees, because the goods, while they are in transitu, are subject to be countermanded; and, 2. That where bills of lading are taken blank to the consignor's order, and delivered to the consignee, there being no substantial reason for refusing to a consignor the right of recovering the goods after actual delivery, unless it proceeds on the general credit gained by the possession of the goods; so while goods are not in the consignee's hands, but still with the consignor, there can be no reason for refusing to give effect to a countermand by the consignor.

The doctrine which thus took its rise in courts of equity, was soon adopted in courts of law in England, and is now daily administered by those courts as part of the established law of England in the sale of commodities.[1] As such, it had for a century been established, when it was adopted into the jurisprudence of Scotland.

harsh demand by the bankrupt's creditors against Raguenan and Company to seek these goods, without reimbursing them for their advance upon them, but leaving them to come in as creditors for half-a-crown in the pound; that R. and Company have now the goods in their custody, under a specific lien, for such advance; and that a court of equity will lay hold of any thing to save this advantage to them. 2. That as R. and Company would have had a specific lien for their advance, had the goods not been consigned, so the consignment makes no difference in the case: For, 'suppose goods are actually delivered to a carrier, to 'be delivered to A, and while the carrier is upon the 'road, and before actual delivery to A by the carrier, 'the consignor hears that A, his consignee, is likely 'to become bankrupt, or is actually one, and counter-'mands the delivery, and gets them back into his own 'possession again, I am of opinion, that no action of 'trover would lie for the assignees of A; because the 'goods, while they were in transitu, might be so coun-'termanded.' He then argues, that here there was no consignment to a particular person; but the bills of lading were rather in the nature of an authority: and in stating the evidence on the custom of merchants as to the effect of bills of lading indorsed, he holds the strongest proofs to be with the consignor's having in them a sufficient power to countermand. 3. That 'though goods are even delivered to the principal, he 'could never see any substantial reason why the ori-'ginal proprietor, who had never received a farthing, 'should be obliged to quit all claim to them, and come 'in as a creditor, only for a shilling, perhaps, in the 'pound, unless the law goes upon the general credit 'the bankrupt has gained by having them in his cus-'tody. But while goods remain in the hands of the 'original proprietor, I see no reason why he should 'not be said to have a lien upon them till he is paid, 'and reimbursed what he so advanced; and therefore 'I am of opinion the defendant, Prescot, had a right 'to retain for himself and Company.' 4. That if the bankrupt's assignees had, by strictness of law, recovered in an action of trover, the courts of law would not have suffered execution on the whole goods; and the Chancery would, on a writ of inquiry, have ordered the half price paid by R. and Company for the silks to be deducted; à fortiori, this ought to be done in a court of equity. 5. 'If the defendant, Prescot, had 'got the goods back again by any means, provided he 'did not steal them, I would not blame him; and I am 'of opinion, that to take them from him would be ex-'tremely inequitable.' The judgment was for the Master to take account of the money received by Prescot on the sale of the silks, and to charge him and his partners with it: that the produce of the bales over which the pledge extended, was to be applied, in the first place, to pay the share of R. and Company's advance upon those bales, and next to the persons holding the pledge: that the pawners, if they were not fully paid, should come in as creditors under the commission; and if a surplus, it should go first to pay costs, and next to the assignees of Tollet. 1. Atk. 245. 251.

[1] The principles on which this adoption is to be justified, are thus explained by Mr Justice Buller, in the case of TOOKE against HOLLINGWORTH:—'I have 'always thought it highly injurious to the public that 'different rules should prevail in the different courts 'on the same mercantile case. My opinion has been 'uniform on that subject. It sometimes, indeed, 'happens, that in questions of real property, courts 'of law find themselves fettered with rules from which 'they cannot depart; because they are fixed and 'established rules, though equity may interpose, not 'to contradict, but to correct the strict and rigid rules 'of the law. But in mercantile questions, no distinc-'tion ought to prevail. The mercantile law of this 'country is founded on principles of equity; and when 'once a rule is established in that court as a rule of 'property, it ought to be established in a court of 'law. For this reason, courts of law of late years 'have said, that even where the action is founded on 'a tort, they would discover some mode of defeating 'the plaintiff, unless his action were also founded on 'equity; and that, though the property might, on 'legal grounds, be with the plaintiff, if there were any 'claim or charge by the defendant, they would con-'sider the retaining of the goods as a conversion.'

In the concise and excellent treatise of Mr Cullen, the following passage contains, in one proposition, the general result of the determinations on this subject:—'When goods are not delivered immediately 'to the vendee, but sent or consigned from a distant 'place, and delivered in the first instance to a third 'person, as a carrier or master of a vessel, to be car-

It has already been observed, that the principle on which it rests was not unknown to the law of Scotland, though the doctrine of restitution superseded its application, and probably prevented a series of distinctions in making out the detail of its application to practice, similar to that which has taken place in England. There are cases to be found in our books which seem to point to some such train of decisions, had it been necessary to have recourse to them. Thus it was decided, that a person who, having sold land, had delivered to the buyer a precept of infeftment, which, without any farther act of the seller, enabled the buyer to complete his real right, was entitled to process for stopping the infeftment, when the buyer became unable to perform his part:[1] And, on the same principle, where the purchaser of a house had got into possession, but had not received sasine, which alone is effectual tradition of heritable property, the seller was held entitled to have the sale annulled, on the purchaser becoming insolvent.[2] But whatever might have been the progress of the Scottish jurisprudence on this point, had it been left to its natural course, there can be no doubt, that the doctrine of stoppage, as established in England, with all its modifications, so far as they are consistent with sound principle, is now to be held as the law of Scotland. And in what remains to be discussed of this subject, the cases and authorities in the English law, with such distinctions as necessarily arise from difference in the system on which this doctrine was grafted, are to be relied on, as of the same efficacy in this country as in England. The Court of Session has repeatedly acknowledged their authority, and permitted them to be quoted as precedents before them.

The great difficulty has been, to distinguish the cases in which the privilege of stopping in transitu is to be exercised; or rather, to find a rule according to which the cases may be arranged in which it is to be admitted or rejected.

The first principle of classification adopted was that by which delivery is distinguishable as ACTUAL or CONSTRUCTIVE. And this had the sanction of those eminent Judges in England whose determinations were in greatest credit at the time the doctrine was introduced into Scottish jurisprudence; particularly Lord Mansfield, the father of the mercantile law of England, and Mr Justice Buller.

But further experience demonstrated the necessity of discriminating a little more correctly: For cases occurred which it was impossible to doubt came under the description of constructive delivery, and yet where the privilege of stopping in transitu was justly denied; as where goods were in a warehouse, and notice of sale was given to the warehouse keeper to change the custody; or goods in the bond warehouse were transferred by a dock-warrant; or a transference was made in the books of the warehouse keeper: And so of constructive deliveries, those which carried the goods at once to the buyer, or his servants or special agents, were distinguished from those which left the goods still in the hands of a middleman, and in the course of their transit.

' ried and delivered to the consignee; in that case, if ' the goods have not been paid for beforehand, and ' the consignee becomes insolvent or a bankrupt be- ' fore the arrival and delivery into his possession, it ' has been determined, in a multitude of cases, (Wise- ' man and Vandeput, 2. Vern. 203.; Exp. Clare, ' Cook's B. L. 405.; Exp. Frank, cited 1. Atk. 250.; ' Snee and Prescot, ib. 245.; Exp. Walker, Cook B. ' L. 419.; Exp. Wilkins, Ambl. 400.; D'Aquila and ' Lambert, ib. 399.; Birkins and Jenkins, Cowp. ' 296.), that the consignor may stop them while they ' are yet in transitu; and if he can obtain possession ' of them again by any means short of violence or ' fraud, before actual delivery, he will be entitled to ' retain them against the consignee, or his assignees. ' This is perfectly settled as between consignor and ' consignee.' Cullen's Principles of Bankrupt Law, 260.

[1] ' If, in consequence of a mutual obligement, ' (contract), one dispone with procuratory and pre- ' cept, process is competent to stop infeftment, and ' draw back the disposition, when the other party ' becomes insolvent without power to implement the ' mutual cause.' 1. Dict. 597.; December 1721, SELKRIG against SELKRIG; 1. Kames, 83.

[2] SANDIEMAN against STEWART, in 1771.

The result seems to be,—1. That in no case of actual delivery is it competent for the seller to reclaim possession of the goods for security of his price: 2. That in certain cases even of constructive delivery, the privilege of stopping is not to be exercised: 3. That wherever the constructive delivery goes no further than to forward the goods on their course towards the buyer in the charge of a middleman, they may be stopt for the price.

2. RULES OF RETAINING GOODS, OR STOPPING IN TRANSITU.

CIRCUMSTANCES IN WHICH GOODS MAY BE STOPT.—In explaining more particularly the cases which fall under the general rule now stated, the circumstances in which goods may be stopt first demand attention.

I. It is a general rule, that where goods sold have been actually delivered into the possession of the buyer, or his clerks or servants,[1] there is no longer any right to the seller over those goods; the property is passed beyond recall: And they are held so to be delivered, although within the premises of the seller, if they are locked up, and the key given to the buyer.[2]

To this rule, however, two exceptions have been admitted: One in the case of a sale made under the express condition that the price shall be paid in cash and no credit given, or that good discountable bills shall be exchanged for the goods, and the vendee has, without fulfilling this condition, and without any waiver or consent to depart from it on the part of the seller, obtained possession of the goods: The other exception is, where the buyer, conscious of insolvency, takes the goods into his warehouse custodiæ causa, but without intending to complete the transference. These exceptions, however, will demand attention hereafter; the former in considering restitution after delivery, the latter in treating of the vendor's rejection of goods.

II. Where, on the other hand, the actual possession continues with the seller, there is stoppage for the price on the buyer's insolvency. But it is not a continuance of such possession if the goods, though in the seller's premises, are locked up and the key delivered.[3]

In England, exceptions have been admitted to this rule which do not seem to be recognized in Scotland. Where goods have been sold, and lodged in the seller's hovel, for the purpose of the vendee taking them away; or where they are to remain in the vendor's warehouse till it shall be convenient for the buyer to remove them; we have already seen, that in England the bare lodging of the goods in the hovel, or the payment of warehouse rent, or the marking of the goods for the vendee, are held good delivery, not only to pass the property, the price being paid, but also to divest the vendor of his lien;[4] the only limitation of this doctrine being, that the goods shall be in a place where it may be understood that goods of others than the proprietor may be found.[5] In Scotland, the only case which gives the least countenance to such a doctrine is that of BROUGHTON,[6] which was much doubted at the time; and in regard to which it may be observed, 1. That the price was paid, and there was no question of stoppage; and, 2. That if doubts were to be entertained in such a case, they ought to be doubly strong in a question of stoppage or retention.

III. The above form the extreme points, between which are to be found the difficult

[1] See above, p. 200.

[2] See above, p. 175.

[3] See above, and p. 175.

[4] See above, p. 179. GOODALL against SKELTON, HURRY against MANGLES, and STOVELD against HUGHES, Notes [1]. and [3].

[5] Ibid. Note [2].

[6] See above, p. 180. Note [1].

cases under this doctrine. It is not enough, generally speaking, to give the right to stop, that the delivery is of the kind called constructive; but, on the other hand, there are constructive deliveries which take away the privilege. The distinctions, so far as they are yet settled, seem to be the following:—

1. Where goods are delivered into a warehouse, whether of a public warehouseman or a bond warehouse, for the buyer, and entered there in his name, not merely as in the course of their journey, but to abide the market or the order of the buyer; the delivery is good, not only to pass the property,[1] but to deprive the seller of his right to stop.

2. Where goods are delivered to the buyer's own shipmaster, or into a ship hired by him on time, or for the voyage, it has been held that the property passes, and the right to stop is discharged.[2]

3. Where the goods are in the hands of a warehouseman for sale, or a manufacturer for some operation of his art; notice to the warehouse keeper, or manufacturer; transference in their books; payment of warehouse rent; or of the hire of the workman's labour; or marking of the goods for the buyer, are sufficient acts of final and conclusive delivery to deprive the vendor of his right to stop.[3]

4. Where goods are in the bonded warehouse, entry of the transfer in the officer's books, where the seller of the goods is proprietor of the warehouse;[4] or notice to the warehouse keeper, or marking the goods for the buyer, paying of warehouse rent, and such other acts of ownership as give notice of the transfer, are effectual to pass the property, and take away the right of stopping.[5]

5. Goods in dock warehouses are effectually transferred by transfer and indorsation of the dock-warrants, so as to prevent stoppage by the original seller:[6] But in such cases, the right of stoppage will not be destroyed, unless the indorsee be in bona fide, and give a valuable consideration for the transference.[7]

6. Where goods are on their passage from the seller to the buyer, in the hands of a middleman, that is the proper case for the exercise of the right of stopping, But even this proposition involves many doubtful cases. The law is fixed in favour of the right to stop, where goods are either in the hands of the vendors, shipmaster, carter, &c. or in the hands of a common carrier by land or water, including shipping companies. Masters of ships on general freight, lightermen, waggoners, and all those who hold themselves out as carriers for the public, are properly middlemen, who hold a neutral character, and receive goods for the preservation of the seller's lien on the one hand, and of the buyer's right of property on the other. Wharfingers and warehousemen, porters, and all necessary auxiliaries of the carrying trade, are classed also as middlemen. But it is important to observe the limitations and exceptions under which this general rule must be received.

(1.) Goods in the hands of a shipmaster may be excepted from the common rule of stoppage, by the terms of the receipt, if expressly taken to the vendee:[8] Or under the terms of the bill of lading, where it is taken deliverable to indorsees, the right to stop may be discharged, if the bill have in consequence been indorsed to a third party, buying in bona fide on the faith of it. Effect of Bills of Lading.

In a question with the buyer and his general creditors, indeed, the price not being paid, the delivery of a bill of lading will not bar stoppage in transitu: Whether the bill of

[1] See above, p. 173.

[2] Fowler against M'Taggart, and Bothlingk against Inglis, supra, p. 174.

[3] See above, p. 183—186.

[4] See above, p. 190.

[5] See above, p. 193, &c.

[6] Keyser against Suse; 1. Gow, N. P. Cases, 58. See the cases quoted p. 192. et seq.

[7] See below, those qualifications of the indorsee's right, in the case of bills of lading, p. 217.

[8] See above, p. 203.

lading be taken *to the consignor, and indorsed by him to the buyer;*[1] or taken to the *buyer*[2] *by name;* or taken to *the consignors, and transmitted to the buyer with a blank indorsation;*[3] whatever, in short, may be the form in which a bill of lading is expressed, the seller is not thereby deprived of his right to stop in transitu, where the question is with the buyer, or his general creditors alone. But it is of great importance to trade that a merchant shall have it in his power, while goods are in the course of their voyage, to dispose of them and carry on his trade as if they were actually arrived. The rapidity of commercial operations is thus most beneficially increased, and the purchaser of goods is enabled to provide a fund for answering the bills for the price of those very goods, when their arrival happens to be long delayed. Such sales, while goods are at sea, are accomplished by transferable bills of lading; and the object cannot, in its full extent, be attained, unless those bills of lading give a power of unconditional disposal, untrammelled by

Use of negociable Bills of Lading.

[1] HALL of Salisbury had written to ASKELL and Co. of Malaga, to send him 20 butts of olive oil. Askell, accordingly, bought them, and shipped them on three bills of lading, to his own order. He sent an invoice, and one of the bills indorsed to Hall; and to Jones, his correspondent in England, he sent a bill for the price, with another of the bills of lading indorsed. Hall not having paid his bill, Jones applied to the shipmaster, who promised to deliver the oils to him. The ship not having been reported to the custom-house, the oils could not instantly be delivered; and before they were delivered, Hall borrowed L. 200 on the faith of an indorsement to his bill of lading, and the indorsee applied for the goods. The shipmaster, however, delivered them to Jones. On the general question,—'Merchants were examined on both sides, 'and seemed to agree that the indorsement of a bill 'of lading vests the property; but that the original 'consignor, if not paid for the goods, had a right by 'any means that he could to stop their coming to the 'hands of the consignee till paid for. One of the 'witnesses said he had a like case before the Chan-'cellor, (probably the case of Snee and Prescott, de-'cided ten years before), who, upon that occasion, 'said, he thought the consignor had a right to get the 'goods in such a case back into his hands, in any way, 'so as he did not steal them.' So far with regard to the mercantile practice. In point of law, the doctrine was confirmed by Lord Chief-Justice Lee, who, in summing up the evidence, said,—'That, to be sure, 'nakedly considered, a bill of lading transfers the 'property, and a right to assign that property by 'indorsement; that the invoice strengthens that right 'by showing a further intention to transfer the pro-'perty. But it appeared, in this case, that Jones had 'the other bill of lading, so as to be a curb on Hall, 'who, in fact, had never paid for the goods. And it 'appeared by the evidence, that, according to the 'usage of trade, the captain was not concerned to 'examine who had the best right in the different bills 'of lading. All he had to do was to deliver the goods 'upon one of the bills of lading, which was done. 'The jury, therefore, were directed by the Chief-'Justice to find a verdict for the defendant, which 'they accordingly did.' The defendant was the ship-master. FEARON against BOWERS, 28th March 1753; 1. Henry, Blackst. 364. Note.

The case in which the doctrine of stopping in transitu was first applied in Scotland, was also a case of a bill of lading taken to the consignor, and indorsed to the vendee. Allan and Stewart had, in execution of an agreement with Stein, purchased and shipped grain on bills of lading to their own order: they indorsed the bills to Stein. The goods were stopt; but all inquiry into the particular situation in which they were in respect of actual delivery having been suspended in the Court of Session, by the particular view taken of the case as involving a question of fraud, the House of Lords sent it back to ascertain the facts, as with relation to the point of stopping in transitu. 4th December 1788, ALLAN and STEWART against JEFFREY and other Creditors of STEIN; 8. Fac. Coll. c. 48.; p. 84. Appeal Cases, 23d December 1790, Jeffrey and others, appellants.

[2] BURGHAL in London had given an order to BROMLEY at Liverpool to send him a quantity of cheese. Bromley, accordingly, shipped a ton of cheese on a bill of lading, deliverable to Burghal in London. Burghal having become bankrupt before the ship arrived, the shipmaster was ordered, on the behalf of Bromley, not to deliver the goods; and accordingly refused, though the freight was tendered. The action was on the case upon the custom of the realm against the shipmaster as a carrier. 'Lord Mansfield 'was of opinion, that the plaintiffs (the assignees of 'Burghal, the vendee) had no foundation to recover; 'and said, he had known it several times ruled in 'Chancery, that where the consignee became bank-'rupt, and no part of the price had been paid, it was 'lawful for the consignor to seize the goods before 'they came to the hands of the consignee, or his 'assignees; and that this was ruled, not upon the 'principles of equity only, but upon the laws of pro-'perty.' Guildh. Sitt. after Hil. 32. Geo. II., cor. Lord Mansfield; 1. Hy. Blackst. 365. Note; Ass. of BURGHAL against HOWARD.

[3] In the great case of LICKBARROW against MASON it was held, that there is no distinction between a bill of lading blank indorsed, and an indorsement to a particular person. 2. Term. Rep. 63. See below, p. 215.

the particular state of accounts between the original seller and buyer, and in every respect as complete as if the holder of the bill had the goods themselves to deliver over. It has always been understood, accordingly, by merchants, that such documents are negociable, like bills of exchange: and while the necessities of trade require such unlimited powers in the holders of the bills of lading, the original seller, who transmits the bill of lading, if he has not sufficient confidence in the buyer's credit, may insert some qualification in the bill, or make the goods deliverable in such a way as to form an exception from the common rule, and carry notice to every person who may be desired to deal on the credit of that bill of lading.

Indorsed Bill of Lading without notice.

On this question very different doctrines have been delivered by two of the greatest commercial lawyers of Europe. VALIN has maintained, that although, by the law of France, a ship cannot be effectually sold at sea to the prejudice of the creditors of the seller, the law is different with respect to a cargo or merchandise on board; and that bills of lading are negociable like bills of exchange. EMERIGON, on the other hand, maintains, in opposition to Valin's doctrine, that there can be no sale of commodities at sea, so as to prejudice the claim of the seller for the price; and that bills of lading are not negociable instruments. The reasonings of such men, and their enlightened and liberal views of mercantile jurisprudence, cannot be too much recommended to the perusal of the profession.[1]

In England, it would appear, that an unconditional bill of lading has always been considered in mercantile practice as negociable, unclogged with any power of stoppage against the stranger indorsee: The question was, however, held to be very doubtful in point of law. Judges of great name differed in opinion—even the Courts of King's Bench and Exchequer Chamber were at variance: And two very opposite views were taken, both of the principle of the right of stoppage in transitu, and of the nature and effect of a bill of lading.[2]

In the Court of King's Bench, the right of stopping was found to be ineffectual against the indorsee of a bill of lading for value, and without notice of non-payment. The Court proceeded upon these grounds:—1. That by the transmission of a bill of lading, in which the goods are made deliverable to the consignee by name; or to the shipper's order, with an indorsation, either in blank, or to the consignee expressly; the property is legally vested in the consignee: 2. That the bill of lading is a negociable instrument, and the property vested by it may be as effectually transferred by indorsation and delivery, as the right to the sum in a bill of exchange may be transferred to an indorsee: And, 3. That the privilege of stopping in transitu having been introduced merely as an equitable exception on the buyer's failing to pay the price, it cannot operate against his indorsee, who has given a valuable consideration, trusting to the indorsement of the negociable instrument, as he would have advanced money on an indorsation to a bill of exchange; and against whom, therefore, no claim of equity can lie, available to a person who, by his own act, has enabled the consignee to deceive him.

In the Exchequer Chamber, the Judges of the Common Pleas and Exchequer sitting in review reversed this judgment, after a very elaborate argument of Lord Rosslyn, who delivered the opinion of the Court. It was held, that a bill of lading is merely the evidence of a contract for the carriage and delivery of goods; the shipmaster having a special property to support his possession as in right of another, and to enable him to perform his undertaking; and the general property remaining with the shipper

[1] VALIN Nouveau Comment. sur l'Ordonnance de la Marine, v. i. p. 572—6. EMERIGON Tr. des Assurances et des Contrats à la Grosse, vol. i. p. 319, 320.

[2] This discussion took place in the great case of LICKBARROW against MASON, which came first into the King's Bench on a demurrer; was afterwards decided in the Exchequer Chamber; and finally in the House of Lords.

until he is divested by some act sufficient to transfer property: That bills of lading are not negociable, like bills of exchange, but merely assignable; the indorsation being an assignment of the goods themselves simply, or rather, a direction of the delivery of the goods, entitling the indorsee to discharge the shipmaster; but only such an assignment as that of goods in pawn, or of goods bought and not delivered, which transmits no right, without its attendant burden: That such assignment differs from an indorsement of a bill of exchange, which passes the whole interest so completely as to leave the indorsee unaffected even by the creditors of the indorser: That bills of lading may be indorsed for many purposes, and, therefore, always imply an inquiry before credit can be given to them implicitly; while bills of exchange never are indorsed but for the unqualified transfer of the debt: and that, consequently, the indorsee of a bill of lading must inquire under what title it is held by the indorser; and can acquire no better right than the indorser had: That it is a begging of the question to say, that the consignor gives a power to the consignee to deceive third parties; for that power depends entirely on the legal effect of a bill of lading, and the extent of the right of the holder: But from the oldest times the payment of the price is a condition precedent in sale, the sale not being executed before delivery, and delivery not being complete, entirely to divest the seller, till the goods have come into the buyer's possession: and this was held to be not an equitable exception, but a right, proceeding upon the legal title as owner not divested; to show which, Lord Loughborough took an elaborate review of the judgments hitherto pronounced.[1] This judgment, in its turn, was reversed in the House of Lords, on a point of form, and a new trial was ordered, after the Judges had delivered their opinions. In this new trial, a special verdict was found of the same facts which had been formerly set forth, with this addition,—'that by the custom of merchants, bills of 'lading, expressing goods or merchandises to have been shipped by any person or per-'sons, to be delivered to order and assigns, have been, and are, at any time after such 'goods have been shipped, and before the voyage performed for which they have been 'or are shipped, negociable and transferable by the shipper or shippers of such goods, 'to any other person or persons, by such shipper or shippers indorsing such bill with his, 'her, or their name or names, and delivering or transmitting the same so indorsed, or 'causing the same to be so delivered or transmitted to such other person or persons; and 'that by such indorsement and delivery or transmission, the property in such goods hath 'been, and is transferred and passed, to such other person or persons; and that by the 'custom of merchants, indorsements of bills of lading in blank, that is to say, by the 'shipper or shippers, with their names only, have been, and are, and may be filled up 'by the person or persons to whom they are so delivered or transmitted, as aforesaid, 'with words ordering the delivery of the goods or contents of such bills of lading, to be 'made to such person or persons; and according to the practice of merchants, the same, 'when filled up, have the same operation and effect, as if the same had been made 'or done by such shipper or shippers, when he, she, or they indorsed the same bills of 'lading with their names, as aforesaid.'[2] The Judges of the Court of King's Bench, saying only that they retained their former opinion, gave judgment as at first. The case was again brought into the House of Lords, but the writ of error was afterwards abandoned; and it is now the admitted doctrine, that the consignee may, by indorsation of his bill of lading for value, and without notice, confer an absolute right on the indorsee, indefeasible by the consignor attempting to stop in transitu.[3]

[1] 1. H. Blackst. 357.

[2] 5. Term. Rep. K. B. 683. Lord Kenyon had, in the meanwhile, been promoted to this Court, and in another case, (Salomons against Nissen, 2. Term. Rep. 674.), had expressed his approbation of the first judgment pronounced, as grounded on principles of policy and common honesty.

[3] Abbot, 373.

Strictly speaking, this was not a final determination, establishing any clear distinct proposition, the case having gone off upon what is technically called a Venire de novo. But it is understood to have established, that the consignee of goods, by the assignment of the bill of lading to a third person for valuable consideration, confers an absolute property upon such assignee, indefeasible by any claim on the part of the consignor.

The doctrine thus understood to be settled in England, has not been established by any express decision in Scotland;[1] but the law has been considered here, as well as in England, to be conclusively fixed, and cases have been determined in which it has been so assumed and reasoned upon, both at the Bar and on the Bench.[2]

Exceptions to the rule.

(2.) It is important, however, to mark the limitation under which the right of the indorsee is admitted to control the vendor's right of stopping in transitu; and, 1. It is to be observed, that the whole weight of the decision in the case of LICKBARROW rests upon the understood negociability of bills of lading, and on the implied conclusion which the indorsee is entitled to draw, that he will be exposed to no latent claims by persons in the right of the seller, as against the buyer. But it seems to follow, from the very necessity of admitting an implication in the transaction, that the indorsee of a foreign bill of lading must lay his account with such right as the foreign vendor may have, to seize the goods while under the jurisdiction of the foreign country. Now, it was formerly the general rule of law in foreign states, that a seller may, even after actual delivery, seize his goods for the price, on the bankruptcy of the buyer. And this rule was, in some countries, strengthened by special regulations. In Holland, under the former jurisprudence, before the French conquest, the courts interposed while goods were still on shipboard, not having left the country, and ordered them either to be unshipped, or new bills of lading to be made to a consignee of the shippers, where the buyer became a bankrupt without payment of the price; and to that jurisprudence it is now to be presumed they have returned.[3] In Russia, a country

Effect of Foreign Laws.

[1] In the case of BOGLE and DUNMORE, the question was not, Whether the consignor could stop in transitu for the price, against an onerous indorsee of the bill of lading? but, Whether a creditor of the consignor, and who had possession of the goods, could stop them as the property of the consignor, and as in his possession, subject to a right of retention on the consignor becoming bankrupt, for all debts due to the person holding the possession? 2d February 1787, 7. Fac. Coll. 470.

Again, the question may, at first sight, seem to have been implicated in the case of Lord ARBUTHNOT against the Creditors of BISSET, 20th November 1798: But the Judges were anxious to prevent the possibility of their being understood to have decided that point. The tenants in that case were bound to deliver grain to Lord Arbuthnot, and he gave to Bisset an order on the tenants, which they accepted. In considering whether this was sufficient to bar the right of stopping in transitu, as in a question with the creditors of Bisset, it was natural, incidentally, to consider the question as it would have stood with a purchaser from Bisset, had he carried his documents to market. But although a very high authority rather seemed to intimate, that in such a case he would have thought the sale effectual, and Lord Arbuthnot divested of his right to stop in transitu, he wished, and the rest of the Judges concurred with him that the judgment of the Court should be understood as not in any shape including a decision on that point.

[2] Lord Woodhouselee, in his Dictionary of Decisions, at the suggestion of Lord President Campbell, entered the case of LICKBARROW against MASON as settling this question; 4. Dict. 252. And in the case of TOD against RATTRAY, 1st February 1809, (see above, p. 194. Note [2]), the great question was, Whether an order of delivery of goods in the King's cellar, was a negociable document, to be disposed of according to the rule of Lickbarrow's case, taking the rule of that case to be law.

[3] Lord Rosslyn, in Lickbarrow's case, thus reports a case before him at Guildhall, Trinity Term, 1789.—'It appeared in evidence, that one Bowering had 'bought a cask of indigo of Verrulez and Company, 'at Amsterdam, which was sent from the warehouse 'of the seller, and shipped on board a vessel com-'manded by one Tulloch, by the appointment of 'Bowering. The bills of lading were made out and 'signed by Tulloch, to deliver to Bowering or order, 'who immediately indorsed one of them to his corres-'pondent in London, and sent it by the post. Ver-'rulez having information of Bowering's insolvency 'before the ship sailed from the Texel, summoned 'Tulloch, the shipmaster, before the court at Amster-'dam, who ordered him to sign other bills of lading, 'to the order of Verrulez. Upon the arrival of the 'ship in London, the shipmaster delivered the goods, 'according to the last bills, to the order of Verrulez. 'This case, as to the practice of merchants, deserves,' says his Lordship, 'particular attention; for the Judges

with which we have a very close intercourse in trade, the same rule is observed, and is, indeed, laid down expressly in the code of mercantile and navigation laws of the empire.[1] Wherever these rules are established in foreign countries, it would appear, that the purchaser of a bill of lading from that country should be held to lay his account with an interruption.[2] 2. What has hitherto been said applies only to the case of a purchase of goods on a bill of lading, for a fair price, and in the course of the market, and without notice of any circumstances which render the bill of lading not fairly and honestly assign-

Indorsation with notice.

' of the court at Amsterdam are merchants of the most ' extensive dealings, and they are assisted by very ' eminent lawyers.' 1. Henry Blackst. 364.

The following case was laid before two advocates (Juris Utriusque Doctores) of the city of Amsterdam. —' A, at Amsterdam, upon the written order of B, ' empowered by C at Glasgow, purchased and sent to ' Rotterdam, for the purpose of being expedited to ' Leith in Scotland, 50 bales of Phernambuck cotton, ' for the amount of which, A, in conformity to the or- ' ders he received, drew upon D at London, who ac- ' cepted the draft. The foresaid cotton having arrived ' at Rotterdam, was there loaded on board the ship ' the Magnet, Captain John Moyes, destined to Leith. ' This being accomplished, the captain signed the bills ' of lading drawn out to the order of B. Then, before ' the vessel could sail, A was informed by B that the ' house of C at Glasgow had failed; B, in the mean ' time, put into the hands of A, which was indorsed by ' B to A, the bill of lading of this cotton, (he, B, hav- ' ing already transmitted to the foresaid house at Glas- ' gow, one of the other bills of lading); upon which ' bill of lading A made the cotton be unshipped against ' payment to the captain of three-fourths of the freight, ' free-keeping him of all after-demands, in regard to ' the bill of lading, which had been transmitted to ' Glasgow; and which unshipping, A conjectured he ' might do with the more safety, as he was not paid for ' the cotton; and also, that the house in London upon ' which A had drawn, had happened to fail. The ' captain having arrived at Leith with his ship, was, ' however, required to deliver the cotton, conform to ' the bill of lading sent to Glasgow, which had been ' *hypothecated*, or put in pawn, by the house at Glasgow.

' It is, therefore, asked,

" If A, according to the laws and usages of this ' country, could not, or might not, in this case, so ' conduct himself as he has done? and if the captain ' also was not bound and obliged, upon presenting, ' and in consequence of the overgiving and indorse- ' ment of the bill of lading by B to A, to redeliver the ' foresaid cotton to the said A?"

' ANSWER.—" 29th Sept. 1803.—Seen by us under- ' signed, J. U. Doctores and Advocates, residing with- ' in the city of Amsterdam, the before case, and in ' answer to the questions therein proposed, we think ' (under correction) that A, according to the laws and ' usages of this country, so could and might have con- ' ducted himself as he has done; and that the captain ' was bound and obliged, in consequence of the over- ' giving and indorsement of the bill of lading by B to ' A, to redeliver the cotton mentioned in the before- ' written case to the said A.'

[1] The following attestation by three Judges of the Customhouse Court of St Petersburgh, delivered in consequence of an Imperial Ukaas, is good evidence of this law.—' By his Majesty's Imperial Ukaas, and ' resolution of the Customhouse Court of St Peters- ' burgh, this attestation is given to the St Petersburgh ' merchants of the first class, Bothlingk and Company, ' upon their request; that concerning a suit at law, ' having in London, with the London merchant, T. ' Crane, they wanted an attestation of the 138th sec- ' tion in the mercantile navigation laws, and that this ' law is generally received and acted upon; wherefore ' they demanded a testimony of this tenor, that the ' seller or shipper of merchandise, if he have reason to ' suspect the circumstances of the purchaser or con- ' signee, and being not yet paid for his merchandise, ' has a right, by virtue of the said law, to reclaim and ' take back this merchandise out of the ship in which ' it may be loaded, although the bills of lading were ' already transmitted, and without regarding that the ' ship has been chartered abroad, or here, or out of ' the house, warehouse, or other place belonging to ' the purchaser; and that the merchandise must be ' given back to the seller or shipper, and is not brought ' in *concurs*. And whereas it is ordered, in the above- ' mentioned mercantile navigation laws, published the ' 25th June 1781, in the 138th section,—If, in the ' case of unpaid debts or bankruptcies, any body has ' reason to suspect, that the debtor or bankrupt has ' any thought of making the creditor lose, and there- ' fore loadeth on board of ship or vessel, goods or car- ' go;—in such a case, the creditor is to give notice, in ' town, to the head Judge of the Court, in districts, to ' the Chief, that the ship or vessel, or goods, or the ' whole cargo, should be retained time enough, until ' the full payment is made to whom due. In conse- ' quence whereof, and by virtue of this law, if the sel- ' ler or shipper, in case of bankruptcies, can identify ' that this merchandise, belonging to him, is here in ' ship, warehouse, or wherever they may be; in such a ' case, the goods must be given back to the seller or ' shipper, being his property, and cannot be brought ' in concurs. In consideration, this attestation is given ' to them, Bothlingk and Company. Underwritten ' by the preceding Judges, and sealed by the seal of St ' Petersburgh Customhouse Court, the 25th September ' 1800.' BOTHLINGK against INGLIS, 3. East. Reports, 386.

[2] There may be some doubt whether a *shipmaster*, who has signed bills of lading, deliverable at a particular place, will be liberated, by delivering the goods before the voyage is completed or begun; at least,

able. But if the bill of lading be indorsed upon a confidential footing; and especially, if there be an agreement to participate in the right of the consignee; or with notice that the price, stipulated to be in ready money, is not paid; or that the stipulated security is not given; the indorsee is entitled to no privilege, but comes into the place of the original holder.' It is not sufficient that the indorsee should know, at the time when the bill of lading was indorsed and delivered to him, that the consignor had not received payment in cash for his goods; but had only taken the consignee's acceptances, payable at a future day not then arrived:[2] for that suggests nothing which makes it unfair in the consignee to assign, or in an indorsee to accept the assignment of the bill of lading. But if he also know at the same time that the consignee was insolvent, and could not pay his bills; then his taking the right to the goods is palpably to disappoint the just rights and expectations of the seller, and amounts to a fraud on the right to stop. On this point some confusion arose formerly from the use of the word notice, 'If the 'indorsee shall not have notice.' But this has been clearly expressed to mean, 'notice of 'such circumstances as rendered the bill of lading not fairly and correctly assignable.'[3] 3. Questions have arisen on this matter in relation to factors. And, (1.) If a bill of lading

where he delivers the goods voluntarily, knowing the rule of the country, and takes indemnity from the foreign merchant. But it would appear, 1*st*, That a bill of lading must be taken in all cases, with the qualification attached to it by the law of the country where it is made; and, 2*dly*, That, on the principles of international law, effect must, in our courts, be given to the rules of law and decisions of courts of foreign countries. Perhaps the law of bills of exchange may be taken as furnishing analogies for illustrating the doctrine of bills of lading. The acceptor is bound to pay against a particular day; if he pay before that time, he exposes himself to a second demand. (Chitty on Bills of Exchange, p. 125.) But if, by the laws of a foreign state where the acceptance was made, the obligation is by any means vacated, it will no longer have any obligatory force in this country. Ib. p. 83.

[1] SALOMONS against NISSEN. Hagues bought 705 pigs of lead for L.1000 from Nissen and Company in Liverpool, and ordered it to be shipped to Rouen. It was shipped in the Jane, the bill of lading indorsed blank, and sent to Hagues. Salomons, on 16th March, gave Hagues an acceptance for L.700, and, in return, Hagues delivered the bill of lading to them, with an obligation, 'in case the lead is not remitted for by the 'time these bills fall due, they shall be renewed for 'two months longer.' The acceptances were paid when due. On 21st March, Hagues and Salomons agreed to a partnership concern in the lead, which was to be accounted for to Salomons, the profits divided, &c. The vessel was forced back to port by a storm, and the Nissens stopt the goods, as not paid for. The question was, whether Salomons were entitled to prevent the exercise of this right of stoppage?

The distinction taken by the Judges between this case and Lickbarrow's was, that, by the contract of 21st March, Salomons not only made themselves partners with Hagues, quoad this transaction, but also became paymasters, and must take the bill of lading, subject to the same rights with the original consignee; especially since, though Hagues acted as the visible owner, it appeared on the agreement that he had not paid for the goods. 2. Term. Rep. 674.

[2] It is laid down by Cullen, 'that if an assignee 'purchase, with notice of the goods *not being paid for*, 'he must stand in the same situation with the consig- 'nee himself; and that the consignor may stop in tran- 'situ, and retain possession as against such assignee.' Cullen's Principles of Bankrupt Law, 266, 267.

This doctrine I questioned in my former edition: But I was not then aware of a case in which my doubts are confirmed, CUMING against BROWN, 1808, 9. East. 506. Here the original seller stipulated on the invoice, 'Payable by bill on London at three months.' The bill was drawn and accepted. The buyer afterwards indorsed the bill of lading to another for a full and valuable consideration; and in two months afterwards absconded, leaving his acceptance unpaid. It was admitted by the indorsee of the bill of lading, that he had taken this indorsation as a security for L.500 already due to him, and of a farther advance of L.1300; and that he was aware the goods had not been actually paid for, but that he believed them to have been acquired in the course of trade, and that they would be paid for. The question turned on this, Whether notice that the goods had not been paid for in money, was notice which ought to have prevented the indorsee from taking the indorsement? The Court held the assignment unexceptionable, and Lord Ellenborough, in pronouncing judgment, observed these points: 1. That against the assignee of the bill of lading it should have been shewn, that the consignor had bargained for payment, before assignment of the bill of lading; or, 2. That he had assisted in contravening the terms of the bargain, or had reasonable expectations or rights connected therewith, as by knowledge of insolvency, and the want of likelihood that the bill should be retired, or the price paid.

[3] CUMING's case above.

has been indorsed to the buyer's factor, who, in consequence, comes under acceptance to the buyer, or even receives it as a security for acceptances already undertaken, the factor will be entitled, as any third party would be, to have the goods in opposition to the vendor, as fully transferred by the indorsed bill of lading.[1] (2.) If such indorsement be made as a consignment on general account, and where the factor takes only in his relation as factor, and nothing beyond that character, it would seem that the factor has not, for any balance of debt already in account with his principal, a right to consider the transfer as complete. And, (3.) Where such indorsement, though not made as a specific pledge for advances, is in the course of a continued practice of acceptance, and the factor comes under new acceptances accordingly on general account, the vendor has, even in such a case, been held entitled to stop the goods as still in transitu. These two points are illustrated in the cases quoted below.[2] Where, in cases of this description, the indorsee to the bill of

[1] VERTUE against JEWELL, 4. Camp. 31.

[2] HAILLE against SMITH, 1. Bos. and Pull. 563.

PATTEN against THOMSON, 1816; 5. Maule and Selw. 351. Wheat was sold by Patten to Hickman and Company; put on shipboard; bills of lading taken, deliverable to Hickman and Company's assigns, which were transmitted, and bills drawn and accepted at three months for the price. Hickman and Company sent the bill of lading to their Liverpool correspondents, indorsed. The Liverpool house were in the course of receiving consignments, bills, &c. from Hickman and Company, and of accepting their drafts; and about this time accepted very extensive drafts for Hickman and Company. They both failed while the wheat was on shipboard, and the provisional assignee of the Liverpool house went on board and claimed it, and afterward succeeded in getting possession of it, on the one hand; while the creditors gave notice to stop, on the other. The Court of King's Bench (Lord Ellenborough, and Abbot, Bayley, and Holroyd, J.) were clear that there was still a right to stop. The action was by the vendors against the assignee of the Liverpool house, to recover the value of the wheat. Lord Ellenborough said, 'If it is to be taken, that the cargo was consigned to the Liverpool house, as a security for advances made by them, this may afford a ground for their claim to detain the same until such time as they are indemnified against these advances, or the responsibility they have contracted in respect of the cargo. But the case, as it now stands, seems to me to go further, and that the defendant, in order to succeed in his claim, must make out this position, that wherever a principal consigns goods to his factor for sale, and is at the same time in a course of drawing on the factor upon account, this single circumstance of there being mutual credits between them, does of itself give to the factor a right, not merely to detain such consignments as shall come to his hands, but to anticipate the possession, and keep it against the unpaid seller. If there had been any specific pledge of this cargo in the course of the transaction; if bills had been accepted by the Liverpool house on the credit of this particular consignment, or if it had been so stipulated, this would have been a different case. But it appears from the whole transaction, that this is a mere naked case of a factor, to whom a quantity of wheat is consigned for the purpose of being sold by him, and who is to account for the sale, and render the proceeds to his principal. In such a case, if the factor has received the proceeds, he will be entitled to his lien upon them, to the extent of his indemnity, but he can have no rights antecedently to possession, in respect of the consignment, but such as he has in his representative character of factor, in order to effectuate the object of the consignment.' He adds, 'It seems to me, that this is neither the case of a pledge by way of security for advances made, nor of an assignment of the bill of lading, except for the purpose of enabling the factor to receive the property, and carry it to the account of his principal;—that here, the unpaid vendor is not deprived of his right, in consequence of the failure of the vendee, to stop in transitu; and therefore these plaintiffs are entitled to judgment, they having done all in their power to stop the cargo, by laying claim to it; which was frustrated only by the messenger under the commission of Hodgson and Company, seizing the cargo in spite of the captain's undertaking to hold it for the plaintiffs; and I am not aware of any authority which clashes with this case thus considered.'

Mr Justice Abbot (now Lord Chief-Justice), observed a peculiarity which may deserve attention in other cases, and expressed some doubt on the general point. 'I am not (he said) prepared to say, that, upon the facts here stated, it might not be fairly argued, that the Liverpool house accepted the drafts enclosed to them in the letter of the 8th June, upon the faith of this very cargo, the bill of lading for which they received by the same letter. This, perhaps, was a question of fact for the jury. But, taking this case as one between principal and factor, who were engaged in a general course of dealing, the principal consigning to his factor from time to time cargoes to be sold for his account, and remitting bills, and drawing upon him in such manner as to form a general account between them, I should have required farther time, as I have already stated, to consider, whether, if the factor might have retained this cargo had it come to his possession, he would not also have had a right to insist upon taking possession, in order that he might retain. Kinloch against Craig differs in this

lading is himself a bankrupt, and incapable of performing the engagements undertaken as the consideration for the indorsement, it does not appear that he or his creditors can interfere to alter the rights of vendor and vendee, as they would have stood independently of that indorsement.[1]

Middleman, converted into Special Agent.

(3.) A middleman may, by the agreement of the parties, be converted into a special agent of the buyer; so that the goods in his hands, or ship, or warehouse, in that character, will not longer be subject to stoppage. One example of this has already been referred to in the case of a shipmaster granting his receipt or bill of lading, with consent of the vendor, to the buyer himself.[2] So where a wharfinger's warehouse is made the final repository of the goods for the buyer, in which they are either to abide the market, or wait for further orders from the buyer; the wharfinger is considered no longer as a middleman, but as special agent or custodier for the buyer; and stoppage is not competent.[3]

Special Agent, whether can be held a Middleman.

Whether the converse holds, viz. that a special agent may be converted into a middleman, by the act which he is directed to perform being only in furtherance of the passage of the goods to the buyer? is a question which seems doubtful. Not only in such a case is the special agent of the buyer not selected by the seller, or intrusted with the preservation of any right of his; but he seems to be as exclusively the representative of the buyer as when a middleman is converted into a special agent of the buyer. Yet the cases leave this matter undetermined, and indeed seem rather to tend towards the establishment of some such distinction as this: That where there is any interval between the delivery of the goods, and their progress further, during which the person receiving them is in suspense till a new direction or order is given by the buyer, they are to be considered as still in their transit, and liable, on the buyer's insolvency, to be stopt.[4] Such a rule

' respect, that there the bill of lading was unindorsed. ' Perhaps, however, my doubt might, upon considera- ' tion, turn out to be not well founded; and it is not ' material upon the present occasion, because here not ' only did the factors not take possession of the cargo, ' but they were not in a condition to do so, or to per- ' form the trust upon which it was sent to them, they ' having become bankrupts.' Mr Justice Bayley and Mr Justice Holroyd unqualifiedly agreed with Lord Ellenborough.

[1] PATTEN against THOMSON, supra, p. 220. Note [2].

[2] See above, p. 203.

[3] Such are the cases already quoted, p. 200. et seq. Note [4].

[4] STOKES against LA RIVIERE; 3. Term. Rep. 466. A fuller report of this case is in 3. East. 397. Stokes being a ribbon weaver, Messrs Duhems of Lisle, who had just arrived in London, applied to him for a quantity of ribbons. He made up the bale, value L.186. and delivered it to La Riviere and Company, to be forwarded to Lisle. The goods were, accordingly, with other goods from one Twigge, forwarded to Bine and Overman, La Riviere's correspondents at Ostend, with directions to send them to the order of Duhems. On the receipt of the goods, Bine and Overman wrote to Duhems an acknowledgment, and that they waited their directions. On 12th June Duhems stopt; and consented, by instrument, to Twigge's taking back his goods; but not having fulfilled some engagement to La Riviere and Company, and being in debt to them, they had (31st May) countermanded the orders to Bine and Overman, as to the delivery of the goods, and directed them to alter the marks, and deliver them to their order, which was accordingly done. La Riviere and Company contended, that, on delivery of the goods by Stokes to them, the property vested in Duhems, so as to entitle La Riviere and Company to retain it as theirs. At the trial of the cause, Lord Mansfield said, ' The fact I take to be this:—The Duhems bought ' goods of the plaintiff, which were ordered to be de- ' livered to La Riviere, to be shipped to Duhems, who ' are since become insolvent, after the goods were ' sent to a factor at Ostend. La Riviere, who have ' got them back again, stand as they originally did. ' No point is more clear, than that if the goods are ' sold, and the price not paid, the seller may stop them ' in transitu: *I mean in every sort of passage to the ' hands of the buyers.* There have been a hundred ' cases of this sort. Ships in harbour, carriers, bills, ' have been stopt. In short, where the goods are in ' transitu, the seller has that proprietory lien. The ' goods are in the hands of the defendants to be convey- ' ed; the owner may get them back again.' 18th December 1784, Sit. at Guildhall before Lord Mansfield.

HUNTER, &c. Assignees of BLANCHARD and LEWIS, against BEAL. Steers and Company of Wakefield sent to Beal, an innkeeper, a bale of cloth, directed for Blanchard and Lewis. Beal's book-keeper gave immediate notice to Blanchard and Lewis, that a bale was arrived for them, and, at the same time, Steers and Company sent them a bill of parcels by post, the receipt of which they acknowledged, and wrote that

would dispose differently of goods, which the buyer desires the seller 'to deliver to his 'agent, A B, to be forwarded to him;' and of goods which the seller is desired 'to deliver 'to his agent, A B,' such agent being subject to the buyer's order to send the goods to him; and yet a distinction like this seems to rest on no intelligible or useful principle.

7. As the right of stopping in transitu subsists only for the purpose of enforcing payment of the price, or securing the seller in the performance of the engagements which make the counterpart of the delivery of the goods, two things are necessary to entitle the seller to exercise this right: The price must be still unpaid; and the buyer must be unable to perform his engagement. 1. Although there can be no stoppage where the price has been paid, the payment of a *part of the price* is not sufficient to take away the right of stopping. A question of this kind was, in England, raised, on the ground that there can be no stoppage of that part of the goods, the value whereof has been paid; and that as the contract is entire, there can be no apportionment, but the partial payment must attach to the whole. But this plea, though it had the effect at first to induce the Court of King's Bench to order the question to be solemnly argued, was finally rejected, as not in any degree sufficient to raise an exception to the general rule.[1]

Payment of part.

they had placed the amount to the credit of Steers and Company. Blanchard and Lewis then gave orders to the book-keeper at Beal's to send the bale down to the galley quay, in order to ship it on board the Union for Boston. This was accordingly done; but the ship being loaded, the bale was carried back to Beal's. Within ten days afterwards, a clerk of Blanchard and Lewis went to Beal's warehouse, when Beal asked him what should be done with the bale? He was ordered by the clerk to keep it in his custody till another ship sailed, which would happen in a few days. Blanchard and Lewis soon after became bankrupt, and Steers and Company sent orders to Beal not to let the bale out of his hands. Accordingly, when the bankrupts applied for it, he refused to deliver it. Lord Mansfield was clearly of opinion, that the goods in question might be legally delivered to the buyer for many purposes; yet, as for this purpose, (of an entire divestment of the seller), there must be an absolute and actual possession by the bankrupt, the goods must have come to the corporal touch of the buyer, otherwise they might be stopt in transitu; delivery to a third person to convey them not being sufficient. Sittings before Lord Mansfield, Trin. Term, 1785; 3. Term. Rep. 466.

Of this case, however, Lord Ellenborough has said, —'I cannot but consider the transit as having been 'once completely at an end, in the direct course of 'the goods to the vendee, *i. e.* when they had arrived 'at the innkeeper's, and were afterwards, under the 'immediate orders of the vendee, thence actually 'launched, in a course of conveyance *from him*, in 'their way to Boston, being in a new direction, pres-'cribed and communicated by himself. And if the 'transit be once at an end, the delivery is complete; 'and the transitus for this purpose cannot commence 'de novo, merely because the goods are again sent 'upon their travels towards a new and ulterior desti-'nation.' See DIXON against BALDWEN, 5. East. 184.

HODGSON against LOY. E. Ward, a butter merchant in Cumberland, purchased 60 firkins of butter from Couper, and paid him one halfpenny, by way of earnest. It was agreed, that on a certain day Ward should pay L.40 in part. He, on that day, got 44½ firkins of butter, and paid L.30, which, with a debt due to him by Couper, made L.50, and he gave a bill for the balance, being L.100. He purchased also 34 firkins from Wilson; and both Couper and Wilson agreed to deliver the butter to Golding, a carrier, and to mark it C. W., being the initials of the name of the buyer's brother, to whom it was to be sent to London, to be sold for the buyer. The butter so marked was delivered to Golding, who was desired by Ward to forward it (as usual) to Wilkinson, the wharfinger usually employed by Ward at Stockton, to be by him shipped for London. Golding swore on the trial, that he carried it to E. Ward's account; and that he entered it in his book and way-bill in E. Ward's name, the sellers telling him that E. Ward was to pay the carriage. Golding delivered the butter at Bowes to Savage, another carrier, who received no other instructions than from the way-bill. He proceeded with it to Stockton, and delivered it to Wilkinson the wharfinger, who had general directions to send such butter to C. Ward in London. Wilkinson received the butter as on E. Ward's account, and immediately wrote to him, acknowledging the receipt of it. And he wrote also to C. Ward, acquainting him with his having received it, and telling him the name of the ship by which it was to be forwarded to London. Before the butter reached London, both the Wards stopt payment, and the agent for Couper and Wilson got possession of the butter on its arrival in the river. The question was, Whether the delivery was still merely constructive, so as to sanction this stoppage in transitu? Lord Kenyon said,— 'That on the general question respecting the right of 'the vendors to stop these goods in transitu, no doubt 'could be entertained; for that this case could not be 'distinguished from those cited, in which that doctrine 'had been established and recognised; and that the 'case of Hunter against Beal was much stronger than 'the present.' 7. Term. Rep. 440.

See also ELLIS against HUNT, p. 201. Note [3].

[1] In HODGSON against LOY, this doubt was moved, 7. Term. Rep. 440. Lord Kenyon, in delivering the

2. As to the circumstances of the buyer, which entitle the seller to stop in transitu, (although the first act of stoppage must be permitted periculo petentis), the point of true importance in the inquiry is, What degree of insolvency, on the part of the buyer, will entitle the seller to proceed in his remedy? And to this it may be answered, (1.) That absolute bankruptcy is the proper and legitimate justification; for the inability to proceed with the contract is then complete, so far as the buyer is concerned; and the only possibility of going on with it must arise from a new proposal from the creditors to pay the price, or find security for it. But, (2.) Insolvency, or such an alteration of circumstances as shall throw the buyer into gross suspicion of inability to proceed with the contract, will also justify stoppage. In running over all the cases, this will appear a point taken for granted and admitted. The criterion to which the question is to be brought, would appear to be the same with that which is applicable to an arrestment in security. In circumstances where such arrestment would be loosed without caution, a court would probably refuse to sanction stopping in transitu. Insolvency of Buyer.

8. Although an act of ownership, or even of virtual possession, exercised on the goods, when the sale is unconditional, and after the goods have got to the end of their journey, has been held sufficient to put an end to the transitus; as, for example, the vendee placing his mark on the goods, after the completion of their voyage or journey,[1] or claiming[2] them at the close of the journey;[3] it is, notwithstanding, to be observed, that these acts of possession will have no such effect, if done conditionally, or before the voyage is completed. Acts of ownership conditionally, or before end of voyage.

(1.) In England, if delivery of the goods be made conditionally and not absolutely, the seller has still the privilege of stopping.

Thus, if, before delivery, the seller annex the condition, that security shall be given before taking possession; or that the price shall be paid in ready money; or that a bill shall be delivered; the property will not pass by the mere act of the buyer's attaining the possession.[4] No case or authority is to be found in the Scottish law to this effect. But if the buyer, foreseeing his bankruptcy, reject the goods, he may receive them into his own warehouse, *custodiæ causa*;[5] or his clerks may place them in a warehouse conditionally for custody, so as to prevent the transit from being concluded.[6]

(2.) Acts of virtual possession, or ownership, are held insufficient to destroy the right of stopping in transitu, where the voyage and proper transit of the goods has not been terminated, but the buyer has by anticipation marked the goods for his,

judgment of the Court, said, the rule was of too much importance to be disturbed by trivial circumstances.—'We would not have it supposed, (said he), that there 'is any doubt on this question.' The verdict went for the plaintiff, he repaying what had been paid by the bankrupt. See above, p. 222. Note.

FIESE against WRAY, 3. East. 93. A bill had been accepted, and was indorsed, and of course, in the indorsee's hands, might and would be ranked on the vendee's estate. This was said to amount just to a partial payment, which, by the above case, did not prevent the stoppage. See p. 224. Note [3].

[1] ELLIS against HUNT, 3. Term. Rep. 464.

[2] HOLST against POWNAL, 1 Esp. N. P. Cases, 240.

[3] NORTHEY against FIELD, 1. Esp. 613.

[4] It appears from the case of BOTHLINGK against SCHEIDER, 3. Esp. 58., that this is the doctrine of English law. Goods were there ordered from Russia, and shipt in a vessel ordered by the consignor. This was held good delivery, (erroneously, see above, p. 174.); but another point arose. The plaintiff's counsel gave in evidence a letter, dated 19th October, from the plaintiff, requiring the vendee to give security to their correspondent in London, before the goods were delivered. Lord Kenyon said, the whole question is, Whether there was a delivery to Crowe of the goods before this letter was written or not? Before the delivery, the party may annex any condition to it; but not after.

[5] See below, Of the Vendor's Rejection of Goods. 16th November 1810, A. and C. STEINS against HUTCHISON, First Division.

[6] 12th July 1813, GOWANS against PHIN, First Division.

though still detained on the voyage; or where a creditor has attached them while the transit is not over. But it would appear, that the doctrine in questions of this description must be limited to cases in which no actual delivery has been taken by the buyer, but only such equivalent acts have passed, as, at the end of the voyage, might have stood for delivery, had it been impossible to get the goods actually into the buyer's custody. If the doctrine be carried so far as to deny to the buyer the power of taking actual delivery during the transit, it seems to be destitute of any sound principle.[1] The right of stopping in transitu is not stipulated between the parties, so that such anticipation cannot be considered as a breach of contract: The transit is meant merely to convey the goods to the buyer; and if he should meet them on the way, there seems to be no rational impediment to his abridging their voyage, and taking them into his custody. If he has happened to sell them to one residing at a point of the journey nearer to the original seller, shall he be prevented from taking them out of the carrier's possession there, instead of allowing them to make a useless journey, to be immediately sent back?[2] If, indeed, the circumstances should amount to a fraud in thus anticipating the natural time of delivery, such fraud would not be permitted to defeat the seller's equitable remedy.

3. BY WHOM THE RIGHT OF STOPPING MAY BE EXERCISED.

In determining who may stop goods in transitu, the general rule is, that the right of stoppage exists only as between seller and buyer: And so, between principal and factor this right does not exist.[3] Neither does it subsist between one having a lien, and the

[1] Accordingly, in all the cases of this sort which appear in the books, it is only where the goods have been marked as delivered, but not actually taken away, that the seller has still had his privilege preserved. Thus, an attachment by a creditor of the buyer, used at Ostend while the goods were in the course of their voyage, was found unavailable against the seller stopping in transitu. STOKES against LA RIVIERE. 3. Term. Rep. 466.

Again, in HOLST against POWNAL, the assignees under a commission of bankruptcy issued against the buyer, went on board a vessel, which was ordered to quarantine, and opened the packages, &c. and, as far as they could, took delivery. But Lord Kenyon, at Nisi Prius, is reported to have found this insufficient to make an actual delivery; and the Court of King's Bench is also said to have confirmed the opinion on a motion for a new trial. 1. Espinasse, Cases at N. P. 240.

[2] In MILLS against BALL. Goods having been carried part of the way by water, were delivered to a wharfinger, to be forwarded by land to the buyer, and placed to his account. The buyer having failed, refused to receive the goods; and the question was, Whether the transfer was not completed by actual delivery, so as to preclude the buyer from renouncing them? Lord Alvanley took occasion to say,—'If, in 'the course of the conveyance of the goods from the 'vendor to the vendee, the latter be allowed to exer- 'cise any act of ownership over them, he thereby 'reduces the goods into possession, and puts an end 'to the vendor's right to stop them. So, though 'it has been said that the right of stoppage continues 'until the goods have arrived at their journey's end, '*yet if the vendee meet them upon the road, and take* '*them into his own possession, the goods will then have* '*arrived at their journey's end, with reference to the* '*right of stoppage.*' 2. Pull. and Bos. 461.

Here the latter part of the opinion seems quite sound; but it is doubtful whether it be correctly extended to any other act of ownership short of actually taking possession of the goods.

And in conformity with this opinion of Lord Alvanley, Chambre, J., in his judgment in the case of Oppenheim against Russell, 3. Bos. and Pull. 42. says,— 'Perhaps the consignee himself may intercept the 'goods in their passage; and, indeed, I have little 'doubt but that if he do intercept them in their pas- 'sage, before the consignor has exercised his right of 'stopping in transitu, *and do take an actual delivery* '*from the carrier before the goods get to the end of their* '*journey*, that such a delivery to him will be complete.'

[3] In KINLOCH against CRAIG, the general state of the fact was, that Sandeman and Graham acted as factors for Stein: that they were under very large acceptances for them on the credit of consignments to be made; that, while one consignment was on the way, Sandeman and Graham, by want of remittances from Stein, failed; that, when the vessel arrived, they did not take delivery; and that Stein also having failed, the trustee on his estate got the consignment, and sold it. The action was for restitution of the price to Sandeman and Graham's estate. Here the right of property remained in the consignors; the only right to which the consignee could lay claim was a lien by agreement. But lien requires pos-