here—which are not burgh customs. Now, with regard to the tables issued by the magistrates, they are not titles. They are merely aids to the tacksman and for the information of the public. They may be used against the parties entitled to make the exaction. The Lord Ordinary has held that the old table may be so used here. When the Magistrates have issued a table and taxed under it for more than forty years, they cannot go back and re-impose dues levied prior to its institution. Dues levied prior to 1772, but dropped out, cannot be inserted in the table of 1854. The main question argued to us was the meaning of the word "merchandise." Parties being agreed that the word is only to be extended to articles brought in for sale and not for private consumption, I think the Lord Ordinary's interlocutor is correct upon this as upon the other points of the case.

Lord ARDMILLAN concurred. His Lordship said—I agree with Lord Curriehill that an important peculiarity in this case is that it does not concern burgh customs properly so called. There is therefore an absence of the elements of common interest and common good. This is the case of the Magistrates having acquired from private parties a right to levy a tax. It is legally distinguishable from the right to levy proper burgh dues. The table of 1772 was clearly not the title of the Magistrates. That table is, however, a document of very great importance. It is the foundation of the whole proof of actual exaction, and actual exaction upon that proclaimed table is usage. The right was avowed. That table has been, I think, quite correctly treated as a limit to the rights of the Magistrates as to subjects and rates. The Magistrates appear to have so regarded it themselves in 1772 and 1854. (His Lordship here quoted from the minutes of Council, and then proceeded)—It is obvious from these passages that the Magistrates themselves looked upon that table as the limit of their right to exact dues. It is also clear that when during forty years articles have been passing across this bridge without the exaction of dues upon them, that is a contrary usage sufficient to detract from the authority of the table. Upon the question as to the meaning of "merchandise" which occurs only in the table, this is a word explainable by usage. I agree with the construction put upon it by the Lord Ordinary.

The Court therefore adhered to the Lord Ordinary's interlocutor, and found the pursuers entitled to expenses, subject to modification.

Counsel for Pursuers—The Solicitor-General and Mr Marshall. Agents—Messrs Scott, Bruce, & Glover, W.S.

Counsel for Defenders—Mr Patton and Mr Cook. Agent—Mr William Kennedy, W.S.

SECOND DIVISION.

ANDERSON *v.* M'CALL AND CO.

(*Ante* vol. i., p. 250).

Sale—Delivery—Usage of Trade. Held that the property of a quantity of grain stored in a warehouse kept by a firm who stored in it their own grain and also that of others for hire, was not passed by a delivery-order addressed to the storekeeper and an entry in the books of the store that it belonged to the alleged transferee.

The pursuer in this action is William Anderson, accountant in Glasgow, trustee on the sequestrated estate of Andrew Jackson & Son, grain merchants in Glasgow, and James Jackson & George Jackson, grain merchants there, the individual partners of that firm; and the defenders are John M'Call & Company, corn factors, Glasgow, and Thomas M'Call, George M'Call, James M'Call, and George Low, corn factors there, the only known individual partners of that firm.

The case was tried on the 27th March 1866, before the Lord Justice-Clerk and a jury, upon the following issues:—

"It being admitted that on 23d May 1864 the estates of Andrew Jackson & Son, grain merchants in Glasgow, were sequestrated under the Bankruptcy Act, and that the pursuer William Anderson is trustee upon said estates,

"Whether, after the first deliverance in the sequestration, the defenders removed from the stores, situated at 69 James Watt Street, Glasgow, and took possession of the quantities of wheat specified in the schedule hereunto annexed, or any part thereof, belonging to the sequestrated estate of Andrew Jackson & Son; and are resting-owing to the pursuer, as trustee foresaid, the sums specified in said schedule, or any part thereof, as the price or value of said quantities of wheat, with interest thereon at the rate of 5 per cent. per annum from the respective dates mentioned in schedule?"

Schedule.

1. The price or value of 1386 bolls of red French wheat, *ex* "Agriculteur," £1371, 5s. 3d., with interest at 5 per cent. per annum from 25th September 1864.

2. The price or value of 1490¼ bolls of wheat, *ex* "Ludovic," £1407, 7s. 3d., with interest at 5 per cent. per annum from 13th October 1864.

3. The price or value of 1324 bolls of wheat, *ex* "Amazon," and 1260 bolls of wheat, *ex* "Romp," £2512, 2s. 11d., with interest at 5 per cent. per annum from 13th October 1864.

4. The price or value of 1729½ bolls of wheat, *ex* "Bonne Mere," £1717, 16s. 10d., with interest at 5 per cent. per annum from 13th October 1864.

Or,

"Whether, prior to the first deliverance in the sequestration, the defenders had obtained delivery of the said grain as proprietors thereof?"

On the direction of the Court the jury returned a special verdict in the following terms:—Find that the bankrupts Andrew Jackson & Son were from and after the month of November 1860, down to the date of their sequestration, the owners of certain stores in James Watt Street, Glasgow, and that Robert Angus was the foreman storekeeper who acted for them in the management of the said stores, and was paid for his services as such by weekly wages received from the said bankrupts: Find that the said stores were used by the said bankrupts partly for storing grain belonging to themselves, or consigned to them, and of which they had the possession, control, and disposal, and partly for storing the grain of other persons, for which they charged such persons warehouse rent at certain fixed rates: Find that in the storekeeper's books kept at the store, and also in the store rent-book, kept by the bankrupts at their counting-house in Oswald Street, they were charged with warehouse rent, and all other charges for the grain stored by them in the said stores, in the same way and at the same rate as other persons storing grain therein: Find that in their business-books the bakrupts kept the whole accounts of their business as storekeepers separate from the

accounts of their business as grain merchants, but carried the balance of profit and loss on the business of storekeepers into the general profit and loss account of the firm: Find that there was in and prior to the year 1864 an understanding in the grain trade in Glasgow, generally acted on, that grain belonging to the owners of such a store as that kept by the bankrupts in James Watt Street, when deposited in the store of the owners of the grain, might be effectually transferred by constructive delivery, through the means of a delivery-order and transfer in the warehouse-books, in the same way and to the same effect as if the grain were in the hands of a third party: Find that prior to the 26th of February 1864 the whole grain mentioned in the schedule appended to the pursuer's issue was stored in the said store in name of the bankrupts, and was their property: Find that on the said 26th February the bankrupts addressed and delivered to the said Robert Angus a writing of the following tenor:—

"Transfer and charge rent, &c., to the buyer,
at days after date.

Glasgow, 26th February 1864.

To Mr R. Angus, James Watt Street.

Deliver to the order of Messrs John M'Call & Co. all our French wheat *ex* 'Agriculteur,' p. 240 lbs., say 1386 bolls. ANDREW JACKSON & SON."

Find that the said Robert Angus, in return for the said writing so delivered to him, signed and delivered to the bankrupts a writing of the following tenor:—

"69 James Watt Street,
Glasgow, 26th February 1864.

Messrs John M'Call & Co.

I have transferred to your account from Messrs Andrew Jackson & Son, 1386 bolls French wheat, p. 240 lbs. p. boll, *ex* 'Agriculteur,' which I hold to your order. 26/2/64.

Say 1386 bolls. ROBERT ANGUS, Storekeeper."

Find that the bankrupts enclosed the said last-mentioned writing in a letter addressed and delivered by them to the defenders, of the following tenor:—

"Glasgow, 26th February 1864.

Messrs John M'Call & Co.

Gentlemen,—We beg to hand you transfer-line for 1386 bolls red French wheat, *ex* 'Agriculteur,' lying in R. Angus' store, James Watt Street, which we wish you to hold on our account, and will thank you to hand us a cheque for say £1250 to-day, as advance on this lot.

This is an entire parcel, and as regards the other two lots you alluded to, we do not see the necessity of weighing over, as you get the *whole* remainder; but if you still consider it is required you can let Mr Russell know.—Yours, &c.,

ANDREW JACKSON & SON."

Find that on the same day—viz., the said 26th of February—the defenders advanced to the bankrupts the sum of £1250, and obtained from the bankrupts a receipt therefor in the following terms:—

"Glasgow, 26th February 1864.

Received from Messrs John M'Call & Co. cheque for twelve hundred and fifty pounds as advance on wheat, per 'Agriculteur.'

£1250 sterling.

ANDREW JACKSON & SON.
26/2/64.

Find that on the same day the defenders wrote, addressed, and delivered to the bankrupts a letter in the following terms:—

"Glasgow, 26th February 1864.

We have your favour of date, handing transfer-note of 1386 bolls French wheat in Robert Angus' store, which you consign to us for sale on your account, and as advance against same we hand you herewith £1250 stg. We notice this is an entire parcel, and we keep it covered against risk of fire under our floating policy of insurance."

Find that the wheat to which all the said writings relate is the wheat mentioned in the first head of the schedule appended to the pursuer's issue: Find that immediately thereafter the said wheat was entered on a separate page of the books kept by the said Robert Angus under the name of the defenders, and as belonging to them or being under their control: Find that as regards all the other parcels of wheat mentioned in the 2d, 3d, and 4th heads of the said schedule, writings of precisely the same import and meaning passed between the bankrupts and the defenders on the 1st of March 1863 as regards the wheat mentioned in the 2d head; on the 3d and 11th of March as regards the wheat mentioned in the 3d head; and on the 21st March as regards the wheat mentioned in the 4th head of the said schedule; and that the advances of cash mentioned in the said documents—viz. (1) £2500; (2) £1560; and (3) £2300—were made by the defenders to the bankrupts respectively on each of the said dates, and that entries were made by the said Robert Angus in the books kept by him in regard to each of the said parcels of wheat mentioned in the said 2d, 3d, and 4th heads of the said schedule, of the same kind as were made in regard to the parcel mentioned in the 1st head thereof: Find that the object and intention of the bankrupts and the defenders in the said transactions were to give the defenders a security over each parcel of the said wheat for the advance made by them to the bankrupts at the time when each of such parcels was entered in name of the defenders by Robert Angus in the books kept by him at the store; but whether such security was valid and effectual in law the jury are ignorant and pray to be advised: Find that after the first deliverance in the sequestration of the said bankrupts, the defenders, by means of delivery orders addressed to the said Robert Angus, and acted on by him, obtained actual delivery and possession of the said quantities of wheat, and sold the same for the purpose of repaying the sums of money advanced by them to the bankrupts, and offer to account for the balance, if any, to the pursuer; but whether the wheat was so taken possession of and sold under a valid title, or whether the same formed part of the estate vested in the pursuer as trustee in the said sequestration, or whether, in respect of the facts above found, the defenders obtained effectual delivery of the said grain as proprietors thereof, prior to the date of the first deliverance in the sequestration, the jury leave to the Court to determine as questions of law, and to enter up the verdict for the pursuer or defenders according to their judgment on the said questions of law.

On the question of law raised by this verdict, SCOTT, for the pursuer (with him E. S. GORDON), argued—By the law of Scotland actual delivery was required to transfer the property of moveables, unless this was impossible or at least difficult to be done. There were no decisions throwing doubt upon this doctrine, except one or two, which are now allowed to be erroneous. In the present case the only delivery given was an alteration in the bankrupts' own books of the name of the party to whom the grain belonged; and the

fact that the bankrupts warehoused the goods of other parties along with their own could not affect the question of delivery. Besides, the transaction was one of pledge; and a pledge can only be constituted by actual delivery. Local understanding in the grain trade in Glasgow, though found to be generally acted on, could not affect the common law of Scotland. Ersk., 3. 3. 8; Bell Com., i. 171, 5th ed.; Salter, M. 14,202; Hill, M. 14,200; Viscount Arbuthnot, M. 14,200; Mathison *v.* Alison, Dec. 23, 1854, 17 D., 274; M'Eachern *v.* Ewing, February 19, 1824, 2 S. 724.

LANCASTER (with him CLARK and MONCRIEFF), for the defenders, submitted — The principle of constructive delivery was that the public should be certiorated of the change of ownership by some overt act. In this case the warehouse being one which received the goods of other people, the alteration of name in the warehouse books was a sufficiently overt act to show change of ownership, and to put the public upon their inquiry as to those to whom the goods belonged. Therefore such an act was sufficient delivery; for the foundation of the requirements of actual delivery in order to transfer property was to put the public on their guard against false credit, and there was no danger of that under the present circumstances. Bell Com., i. 175, 5th ed.; Pothier, Treatise on Sale, sec. 314; Digest, xli. 2, 21; Bell's Prin., sec. 1303; Boak *v.* Megget, February 13, 1844, 6 D. 662; Gibson *v.* Forbes, July 9, 1833, 11 S. 916; Lang *v.* Bruce, July 7, 1832, 10 S. 777; M'Ewan *v.* Smith, January 14, 1847, 9 D. 434; Smith *v.* Aikmans, December 24, 1859, 22 D. 344; Elmore *v.* Stone, 1 Taunton, p. 458; National Bank *v.* Forbes, December 3, 1858, 21 D. 79.

At advising,

The LORD JUSTICE-CLERK—This case is important, as every case in this department of mercantile law must be; but I do not think it is attended with any difficulty. The real nature of the transaction between the bankrupts and the defenders was the creation, or the attempted creation, of a security for an advance of money over goods in the warehouse mentioned. But the manner in which that security was proposed to be constituted was this—That a delivery order should be addressed by the bankrupts to Angus in absolute terms, without any qualification upon the face of it, and without showing that it was delivery for the purpose of security. It does not make any difference to the title of the defender that it appears upon the face of the order that a security was meant; because when the delivery-order in absolute terms is presented to a warehouse keeper, and given effect to by him in the warehouse books, that makes a complete transference of the goods from the previous owner to the possessor of the delivery-order, and puts him in possession of the goods to the same effect as if he had bought them and obtained actual delivery of them upon a contract of sale. I therefore think that no great difficulty arises from the form of the issue; and I am willing to consider the case as on the same footing as Hamilton *v.* Western Bank, in regard to the nature and effect of the delivery-order. In reality the right conferred on the defenders was a security, and the letters of the 26th February, by Jackson & Son to M'Call & Co., and by the defenders to Jackson & Son, show that it *was* a security; and the defenders say they are prepared to account for the balance of the value of the goods, after paying themselves the amount of the advances they made. But the question is whether the delivery-order and the transfer of the goods by the warehouse keeper operated delivery to the defenders; and that turns on the question whether the warehouse keeper was identified with the seller? For it is perfectly clear that when the seller of goods has them in his own possession, no entry made in his books will operate any delivery to the purchasers; and therefore if there is identity between the defenders and Angus who kept the books at the store, there is no delivery here. The finding of the special verdict is that "Angus was the foreman storekeeper who acted for the bankrupts in the management of the said stores, and was paid for his services as such by weekly wages received from the said bankrupts." That clearly demonstrates that the defenders were the warehouse keepers. It was they who stored the grain of other people, and it was they who charged other people for warehouse rent for keeping that grain. Angus is therefore their servant, and is consequently identical with them. But it is said that although this is clear in law, the present case is affected by the usage of trade. On this I can only say that the custom of trade sought to be set up is a peculiar one. The finding in the special verdict is that "in and prior to 1864 an understanding in the grain trade in Glasgow, generally acted on, that grain belonging to the owner of such a store as that kept by the bankrupts in James Watt Street, when deposited in the store of the owner of the grain, might be effectually transferred by constructive delivery through the means of a delivery-order and transfer in the warehouse books, in the same way and to the same effect as if the grain were in the hands of the third party." This understanding was clearly a misunderstanding in point of law. It was a belief that the law was the opposite of what it is in this particular. What does the verdict find? It is that it existed in and prior to 1854 in the grain trade in Glasgow. That comes to this—that in one locality, and in one branch of trade in that locality, dealers were under a misapprehension as to a particular rule of mercantile law, and acted on that misapprehension. Was that a custom of trade? I am afraid that if such misapprehension constituted the custom of trade, very few cases would be decided according to law. It is such misapprehensions that bring parties into Court here; and the only difference between the ordinary case and this is, that the misunderstanding prevailed generally. But a general misunderstanding will never alter the common law; and therefore I attach no importance to the finding in this verdict as to the supposed custom of trade, and that brings me back to the principle of law which must decide the case. The rule is "traditionibus non nudis pactis dominia rerum transferuntur." Whether constructive delivery is an exception to that rule I shall not inquire. But what is constructive delivery? In order to operate constructive delivery by means of a delivery order there must be three independent persons—a vendor, a vendee, and a custodier—and if the custodier is identical with vendor, there ceases to be constructive delivery; and applying that rule to this case, I think our verdict must be for pursuer.

Lord COWAN—I hold that in Mathison's case the principles of law are fully explained which are applicable to this. Upon that occasion I explained fully the grounds of my opinion, and these were the principles which ultimately ruled the judgement of the Court. I think it would be useless to recapitulate the grounds of my opinion, because anyone can see them by turning up the case. The only distinction between the cases consists in the fact that in Mathison's case the warehouse was merely the storehouse of the seller,

and was used for storing his own goods only. In the present case the storehouse was used by the defender, not only for storing his own grain, but also for storing that of other persons. But does that speciality remove the present case from the ruling decision in Mathison's case. In judging of that, suppose that there is no intermediate person as storekeeper, but that the store which the proprietor kept, and in which he deposited his own goods, he throws open for the goods of others, charging store rent. I don't think this touches the important question that the delivery was never here passed, because the goods are in his own warehouse still, and there they remain. Hence that speciality that the warehouse belongs to him, and is kept by him, although opened to receive the goods of others, cannot touch the question whether the real right can pass by simple constructive delivery. But it is said that not only was the store kept by the seller, but that he kept a warehouse book, and that in this there was an entry for a sale effected by him to the purchaser. I am still taking the case of there being no intermediate party. But what about the entry in the books? Does the entry in his own books transfer the property? The principle of our law of constructive delivery is, that the custodier of the warehouse where the transfer is made becomes the custodier for the purchaser. By delivery, the real property is passed, and the matter no longer stands on a mere personal contract. The *jus in re* is in the purchaser, and the *jus ad rem* transferred. Having cleared the case in this way, and satisfied my mind that the mere circumstance of throwing open the store to admit the grain of others don't affect the question, we have to consider what was the position Angus occupied. Suppose Angus had been the tenant of the warehouse, and had himself drawn all the rents of the property stored, that would just be a case of his acting as an independent storekeeper. But that is not the position of Angus. He is, according to the finding of the special verdict, the mere servant or clerk of the storekeeper. The verdict identified Angus with the bankrupt. The speciality I have mentioned does not take the case out of the general principle. Then as to the question as to the usage of trade. Usage of trade must be universal. There must be a usage which shall have the effect of touching the law of the cause, affecting the position of parties. But when it is merely stated that there is an "*understanding*" only, and when it is said that this is generally acted upon, and only in Glasgow, I refuse to give effect to that usage of trade. I think it would be most dangerous if the creditors of a bankrupt should be affected by a usage so limited in its nature, and so local in its application, and therefore so innocuous in its legal effects.

Lord BENHOLME—I agree as to the principles upon which this case has been decided by Lord Cowan and your Lordship. The key of the case is the ascertained position of Robert Angus. What Lord Cowan said is satisfactory to my mind, and I only supplement it by one observation. It is rather remarkable that the bankrupts in keeping their books charged themselves with warehouse rent for grain belonging to themselves, thus indicating, though slightly, that they were due themselves warehouse rent, or rather giving rise to the suggestion that there was a separation of interests. I think this was done only to ascertain how their profits were made. They charged themselves with warehouse rent only for clearness in showing how their profits arose. The only other thing that can be said at all as bearing on Angus' position is in reference to his letter of 26th February 1864, addressed to M'Call—"I have transferred to your account from Andrew Jackson and Son 1386 bolls of wheat which I hold to your order," as if he was acting independently of his master. This is very like a *conatus* to make him a separate person. But the truth is, the grain was still held by Jackson, and not by Angus. The man may have been under a misapprehension as to his position.

Lord NEAVES—The old law of Scotland is that no security over moveables can be constituted *retenta possessione*. Even an instrument of possession will not pass property without delivery. It was argued by the defender that the only foundation of our law on the subject was public credit. That is not the foundation of our law. The foundation of it is that property does not pass by consensual contract, such as sale, and that no contract such as, "I hereby sell these goods"—nothing in the way of consensual contract—will pass the property. But will a consensual contract pass the grain because the bankrupt had other grain in the warehouse of which he is not the possessor? I see no reason for that. I think the statute 6 Geo. IV., c. 94, has an important bearing on the question. The statute only favoured certain cases which it prescribed. It does not supersede the old law of constructive delivery. As to the usage of trade, I think in matters which depend upon the contract of parties there is great weight to be given to usage. There are words to which persons in certain localities give certain meanings; and if you make a contract in that part of the country you use the glossary of the country. Nay, there may be local usage as to particular parts of duty. But real rights of property—preferences in bankruptcy—in their legal effects don't depend upon contracts. The law applies to contracts its own principles, and contracts do not rule the law.

The Court accordingly entered up the verdict for the pursuer.

Agents for Pursuer—Webster & Sprott, S.S.C.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Saturday, June 2.

FIRST DIVISION.

EDMOND *v.* DUFFUS.

Bankruptcy—Stat. 1696, *c.* 5—*Issue—Prior Debt.* Averments of prior debt which, though vague, held sufficient.

This was an action of reduction at the instance of a trustee on a sequestrated estate founded upon the Act 1696, c. 5, and also upon fraud at common law. The defender pleaded that there was no issuable matter upon record.

The transaction sought to be set aside was an alleged sale of flour and butter to the bankrupts to the defender on 9th December 1864, within sixty days of their bankruptcy, and when they were in a state of insolvency, in satisfaction or security of a prior debt, to the prejudice of prior creditors of the bankrupts.

The pursuer proposed the following issues:—

"It being admitted that the estates of the said A. & W. Gray were sequestrated under the Bankrupt Statutes on 28th December 1864, and that the pursuer, Francis Edmond, is trustee on the said sequestrated estates:

"1. Whether, on or about 26th December 1864, and within sixty days before their said sequestration, the said A. & W. Gray delivered to