

fulfillment on our part of this undertaking, you hold two lots of Baltic whites flour, warehoused in December and January last." The Baltic whites flour thus mentioned consisted of 1,500 sacks, being the flour originally pledged to the plaintiffs. In the interval between the giving of these last-mentioned acceptances and the time of their becoming due, one of the firm of Denis Daly & Sons, on the 13th of May, 1878, applied to the defendants to advance them a sum of £2,500 on the security of 1,500 sacks of flour deposited, as has been stated, with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants, in entire ignorance of this fact, and believing the flour to be the property of Denis Daly & Sons, agreed to advance the £2,500 on the security of the flour, but on the terms that they were to have absolute possession of the flour, and to warehouse it in their own name, and to have power to sell it. For the fraudulent purpose of obtaining possession of the flour, so as to be able to give possession of it to the defendants, Arthur Daly, one of the firm of Denis Daly & Sons, brought to the plaintiffs, but unknown to the defendants, a memorandum in these terms: "14th May, 1878. We have sold Messrs. R. & J. Lawson 1,500 sacks Baltic whites, payment as follows: "£1,000 upon delivery, £1,000 in fourteen days, £1,000 in a month, which amounts we will hand you as received. D. Daly & Sons." The plaintiffs, by the fraudulent misrepresentation that Denis Daly & Sons had found a purchaser for the flour, and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, on the 14th of May, a delivery order to Denis Daly & Sons; and subsequently addressed a written direction to the landlord of the warehouse, which they delivered to Arthur Daly, to transfer the room in which the flour was deposited to Lawson & Co., which was accordingly done. The defendants, on the same day that the delivery order was given by the plaintiffs to Denis Daly & Sons, namely, the 14th May, advanced to Denis Daly & Sons the sum of £1,725, and on the next day the further sum of £775 in cash. It is stated in the case that the fraudulent memorandum of the sale to the defendants, by which the plaintiffs were induced to give the delivery

order for the flour, was brought to them by Arthur Daly after banking hours on the 14th, from which it may be inferred that the £1,725 advanced by the defendants to Denis Daly & Sons on that day was advanced before the possession of the flour had been given up to the latter by the plaintiffs. Possession of the flour having been transferred to defendants, they, between the 18th May and the 1st June, by virtue of the right to sell vested in them by the agreement with Denis Daly & Sons, sold the flour in the Liverpool market for sums amounting in the whole to £2,647 10s. 3d., and the flour was delivered to the respective purchasers. Of the £2,500 thus advanced by the defendants to Denis Daly & Sons, £500 was paid by the latter to the plaintiffs, as part of the price received on the sale of the flour. But the plaintiffs have received no further payment, and Denis Daly & Sons have become bankrupts. We have in this case to discharge the unpleasant duty of deciding on which of two innocent parties the loss, occasioned to one or other of them by the fraud of a third, shall fall. In discharging such a duty, a court, to use the words of Lord Cairns in *Cundy v. Lindsay*, (1 L.N. 351) "can do no more than apply rigorously the settled and well-known rules of the law." Unfortunately, however, some difficulty presents itself in the present case in applying the law. For the case is, so far as we are aware, *sui generis*, the contract out of which the claim of the plaintiffs arises being of an altogether exceptional character. The contract is not one in which goods are deposited upon the ordinary terms incidental to a bailment of pledge, namely, that the thing pledged shall remain in the possession of the pledgee until the engagement of the pledgor, which it was given to insure, has been fulfilled. Here the pledgors, when they find a purchaser, are to have possession of the thing pledged, in order to sell it, not in the name, or even on behalf of the pledgees, but as their own, subject only to the condition of handing over the proceeds in liquidation of the debt. It may be doubted whether under such a contract any special property, however limited, vested in the pledgees, or whether their right was not limited to the possession and custody of the goods, so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the oppor-