is evident that for many important purposes it regulates the law affecting the interests under the contract.

It appears to me that in all its qualities and circumstances this is a Scotch contract. That one of the contracting parties is a Frenchman is of no consequence. The party who had to perform it was a Scotchman whose place of business is in Scotland. It has an indissoluble connection with another contract which was also Scotch, and but for which this second would never have come into existence. The first related to the building of ships in the defender's yards in Greenock, and the second stipulated that two per cent. commission was to be ascertained and paid to the present pursuer upon the price of the vessels. Scott was not to be found anywhere except in Greenock. It was there he was domiciled and resided and carried on his business. No place could be contemplated as the place of this contract except Greenock.

A great deal of misunderstanding has been created by the way in which many authors on foreign law have written upon this subject. The *locus* of a contract according to them appears to be the place where it is reduced to writing and signed, whereas what is really meant is locality as ascertained from the nature of the contract itself, and what is to be done under it when it is to be executed. The Civil law is similar to what I have just stated—"A party is to be held as contracting in that place where he undertakes to perform the contract;" that is, the place of the contract is the place of its performance.

Indeed, it seems to me that this case will not admit of serious argument. The two parties happened to be in Paris at the time of signing. That was a mere accident; at anyrate it was not an incident of the contract. Of course the idea of a Scotch contract requiring a French stamp to make it admissible is out of the question, and I think the judgment of the Lord Ordinary should be affirmed.

Lord Deas—This contract was objected to as the case was first presented to us, not merely to the extent of its not being evidence, but it was said it was null and void, and that the law of the place where it was made must be the law for determining that question. That plea was supported by a plausible argument, and it made no matter for that purpose whether the contract were Scotch or French. The plausibility was further supported by conflicting opinions of judges and jurists upon the points which were cited to us. I was rather disposed to think that we might have an inquiry before answer, to ascertain how far the pursuer's averments of the nullity of the contract were correct.

But the moment it was found necessary to go beyond that and to say that this was a French contract, the plea of the defenders entirely failed. This is clearly a Scotch contract; and that being so an inquiry would be useless.

Lord Ardmillan—I do not think it is necessary to go further here than to say that this is a Scotch contract.

There is, I think, some looseness of language in many of the authorities upon the branch of international law which was argued before us. The *lex loci contractus* is in many instances interpreted to be the place where the contract was written, but that is more accurately termed the *lex loci actus*. The *lex loci contractus* is more truly the law of the place where the contract is intended to be fulfilled.

Lord Mure—I have come to the same conclusion. If this letter, which constitutes the contract, had been an undertaking to pay standing by itself, I should have had some hesitation—looking to Erskine and the other authorities—in holding this to be a Scotch contract. But having regard to the previous contract, and to the fact that the one before us was executed on the same day with that and is referred to as being so signed, I have no difficulty in holding this to be a Scotch contract. That being so, I think the contention of the defender fails.

Lord President—I forgot to advert to a passage in Erskine (iii. 2, 40) which lays down a very important doctrine, and one that is frequently given effect to regarding the solemnities of deeds. A deed may be good and valid here if signed in a foreign country according to our statutory forms or according to the form of the country where it is written, but it does not follow if the second course is followed that it is a foreign deed. It may be a Scotch deed or a Scotch contract, and the two cases of the *Master of Salton* and *Muquet La Pine* which are quoted by Erskine are merely cases where effect was allowed to be given to deeds as if made according to Scotch law because they happened to have been executed in a foreign country. This doctrine of law, as quoted in Erskine, was given effect to in the case of *Purvis' Trustees*, March 23, 1861, 23 D. 823.

Lord Deas—I ought to add that I come to the same conclusion in this case upon the footing that there is no reference to the previous contract.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Asher—J. P. B. Robertson. Agents—John Wright & Johnston, Solicitors.

Counsel for Defender (Reclaimer)—Dean of Faculty (Watson)—Trayner. Agents—Mason & Smith, S.S.C.

Tuesday, July 4.

SECOND DIVISION.

[Sheriff of Forfarshire.

BRITISH SHIPOWNERS COMPANY *v.*

J. & A. D. GRIMOND.

Contract of Affreightment—Injury to Goods—Damages—Delivery—Punctum temporis.

750 bales of jute were shipped to the port of D. On arrival the consignees' clerk took delivery for three or four days over the ship's side, but on the 5th day at noon a heavy shower came on, and 91 bales were damaged. None of these bales were removed from the quay for about a week, when they were placed in the consignees' warehouse. The consignees claimed damages for their loss on the 91 bales, and led evidence

as to a custom at D. by which no goods were checked until placed in the consignee's carts, and further maintained that until that time there was no completed delivery.—*Held* that the evidence was not sufficient to establish anything beyond mutual arrangement as to checking, and that without peculiar custom the goods were delivered when put into the hands of the consignee or his employees.

This was an action at the instance of the British Shipowners Company (Limited), of Liverpool, against Messrs J. & A. D. Grimond, merchants in Dundee, concluding for £95, 2s. 2d. as the balance of freight for the carriage of a quantity of jute per "British Princess" from Calcutta to Dundee. The ship belonged to the pursuers, and in February 1875 she took on board 750 bales of jute, 500 bales weighing 400 lbs. each, and 250 bales weighing 350 lbs. each, to be delivered at Dundee to the order of James Duffus. The ship arrived in June 1875, and the defenders produced to the pursuers' agents the bills of lading endorsed to them, and took delivery, according to their admissions, of 659 bales. The whole freight due was, according to the pursuers, £397, 8s. 2d., of which only £302, 6s. was paid, leaving a balance of £95, 2s. 2d., now sued for. The defenders in their statement alleged that the pursuers had failed to perform their obligation by not taking due care of or giving due delivery of 91 of the 750 bales in question. These 91 bales were, according to the defenders, discharged from the ship in very wet weather, the jute was saturated with rain lying on the quay, and very much damaged. The pursuers, on the contrary, explained that on the arrival of the vessel she was ordered to the particular quay in question, and that Messrs J. & A. D. Grimond did not remove their jute as it was laid down. Especially on Thursday, June 10th, they left about 90 bales unremoved until the following afternoon, when, rain having intervened, the jute was wet. For five days it was allowed to remain on the quay, and there was heavy rain during those days. The defenders ultimately removed the 91 bales of jute to their warehouses, and three weeks afterwards, without however intimating any damage to the pursuers, they petitioned the Sheriff to remit to a qualified person to examine the 91 bales of jute and report as to their condition. The Sheriff remitted to Messrs Smith & Phillip, who reported a loss of £42, 10s. on the bales. To this the defenders added certain expenses, bringing the amount up to £59, 4s. 1d., and the defenders accordingly tendered the difference between this sum and the amount sued for. The pursuers denied that the jute inspected came out of their ship, and alleged that it was impossible to recognise it, as it was quite common to meet with jute marked in the same way as that included in the defenders' bills of lading.

The pursuers pleaded—"(1) The pursuers having carried and delivered the defenders' jute in terms of their bill of lading, are entitled to decree for the balance of the freight of the jute as concluded for. (2) In the circumstances of the present case the judicial inspection is of no value against the pursuers. (3) The defenders having taken possession of the jute and removed it to their own premises, and kept it there for three weeks before allowing the pursuers to examine it, are barred from pleading the alleged damage against pursuers. (4) The defenders having taken delivery of the jute without intimating damages to the pursuers or claiming it from them, are barred from pleading damage against pursuers."

The defenders pleaded—"(1) The pursuers having failed to implement their contract under said bills of lading, and the defenders having sustained damage through the fault of the pursuers or their servants, or others for whom they are responsible, are entitled to set off such damage against the freight, and they accordingly plead compensation. (2) The 91 bales of jute in question having been dealt with and disposed of under judicial authority, the defenders are entitled to recover from the pursuers all loss and damage sustained, and charges and expenses incurred by them in the premises. (3) The defenders having tendered payment before proceedings were raised of the balance then due, will fall to be assoilzied, with costs."

A proof was taken on 22d November 1875, and amongst other witnesses the following gave important evidence:—George R. Thom, defenders' clerk, was sent by them to superintend delivery of the jute. By 9th June 250 bales were delivered, and 70 on 10th June; on the 12th 105, on the 17th 234, and the rest (the 91 bales) on the 18th. "I did not take any of those bales that had been exposed to the wet away from the quay till the 18th, and the 91 that I then removed had been all of them discharged between the 10th and the 18th. *Cross.*—There were about sixteen different marks on the 500 bale parcel. My instructions from the defenders were not to send up any jute till I got enough of one mark to make up a load—a load being about 5 bales. The harbour porter, who refused to remove the jute to the shed when I told him to do so, was paid by us." W. Foreman, a harbour porter—"I remember Mr Thom coming down on Friday morning to see what jute of his was ready to go away, but he did not take any away that morning, as he found he had not enough of any particular mark to make up a load. The Friday I speak of was a fine day in the morning, and the delivery proceeded as usual. About mid-day on Friday a violent thunderstorm, accompanied by heavy rain, came on and lasted for a good while. These bales that got the thunder shower lay at all events three or four days on the quay before they were taken away. They were not removed till after the whole of the rest of the cargo was gone. I remember the Sunday after the Friday of the thunder shower was a very wet day." George Phillip gave evidence that he had examined the 91 bales under remit from the Sheriff, and found them damaged. James Caithness—"I have been for seven years harbour weigher. I superintended the discharge of the 'British Princess,' and I produce the books kept by me in connection with it. I make the various entries as the goods are put upon the cart, and the shipper's clerk and the shipping clerk usually make their entries at the same time. Some of the defenders' bales were wet, and they were removed from the quay on the 18th." Andrew Gray, merchant in Dundee—"The different merchants' goods come out promiscuously from the ship, and are separated on the quay. I never make any entry in my books till the goods are on the cart, when I enter them with the carter's number, and that is the usual

practice. That is the practice both with the merchant's clerk and the ship's clerk, and the shore-dues man does the same. When the ship's berth is at the open quay the goods usually have to be discharged on the quay, wet or dry; but when it is wet it is my invariable practice when acting for the ship to put sawdust on the quay before I land the goods. While it is actually raining I stop delivery." George Campbell—"I am one of the harbour weighers at the harbour here, and was at the discharge of the 'British Princess' from the 7th to the 14th of June inclusive. The east quay where she was lying was causewayed to the breadth of about 18 feet. I remember a big thunder-storm occurring in the course of the discharge. It was on Friday the 11th. On the previous evening I counted either 41 or 43 of defenders' bales lying on the quay when the ship stopped, and they were still lying there the next morning when I counted them again. The Thursday was quite a good day. When the storm came on all the defenders' bales that were on the quay were gathered together in one place on the causeway, and when there I calculated that there were from 80 to 90 bales altogether. The ship's people put a sail over them, but not at once. When I left the vessel on the 14th the parcel in question was still on the quay with the sail over it." Another witness spoke to the fact that Messrs Grimond had removed no goods on the morning of the 14th, though some of their jute was lying on the quay; and that their clerk had said that his reason for not removing the bales was that there were not enough of one mark to make a load.

On 22d December 1875 the Sheriff-Substitute (CHEYNE) pronounced the following interlocutor and note:—

"Finds, in point of fact, as regards said counter claim of damages, (1) that the practice and custom as to the delivery of jute cargoes at the port of Dundee is, that after due notice to the various consignees of the ship's readiness to discharge, the bales are, as they came out of the ship, deposited upon the quay, from which the consignees remove them in carts without delay; (2) That the 'British Princess' was on her arrival at Dundee in the beginning of June last berthed by the harbour-master on the east side of the Camperdown Dock, where there is no shed accommodation; (3) that the discharge of the cargo, which consisted of 8144 bales of jute, consigned to four different firms, and a few chests of tea, commenced on 5th June; (4) that by the evening of 10th June the defenders had removed from the quay 320 bales of the jute consigned to them; (5) that on the evening of said 10th June (which was a Thursday) about 40 bales of defenders' jute which had been landed on the quay that afternoon were lying on the quay unremoved; (6) that though the clerk who was superintending the discharge on behalf of the defenders was down at the ship on the following (Friday) morning and saw those bales upon the quay, he did not, as he easily might have done, and as according to practice he should have done, remove them in the course of the forenoon, during which the weather was fine; (7) that about noon of said Friday a thunder-storm accompanied by heavy rain came on; (8) that the foresaid 40 bales, along with between 30 and 40 others, also forming part of defenders' jute which had been landed that morning, were exposed to the storm without protection, and were when afterwards removed to defenders' warehouse found to be to some extent damaged by rain water; (9) that a few more of defenders' bales were notwithstanding the remonstrances of the clerk landed during the storm (which seems to have lasted two or three hours), or at all events while the quay was still wet and dirty, and that they too sustained some damage in consequence; (10) that the whole of the bales mentioned in the two immediately preceding findings were allowed to remain on the quay till 18th June, when the defenders removed them to their warehouse, and that on some of the days during which they lay on the quay rain fell; and (11) that the defenders incurred about £12 of expenses in obtaining a judicial inspection of the damaged parcel: Finds, in point of law, and under reference to the accompanying note, that the pursuers are not liable for the damage sustained as aforesaid by the goods landed on the Thursday evening, in respect of the undue delay on defenders' part in removing them from the quay, but that they are liable for the damage done to the goods landed on the Friday by the rain of that day: Assesses the loss and damage suffered by the defenders for which pursuers are liable, at the sum of £25 sterling; to this extent sustains the defences, and decerns against the defenders for payment to the pursuers of the sum of £70, 2s. 2d. sterling," &c.

"*Note.*—It appears to the Sheriff-Substitute that there is not much difficulty in regard to the facts of the case, and in support, or rather explanation, of his findings he thinks it will be sufficient to remark that he distrusts the accuracy of the witness Thom's memory, and looks upon the evidence of the pursuers' witnesses as more to be depended upon. In particular, he considers the evidence of the witness Campbell entitled to full credence. The real difficulty is in determining what is the legal conclusion to be deduced from the facts as regards the pursuers' liability for the damage complained of. Now as to this the pursuer's agent very properly conceded at the recent discussion that his clients were liable in damages so far as the bales (from 150 to 200 probably) landed on the Friday afternoon were concerned, in respect that they landed them during rain, or at least placed them upon the wet quay without protecting them from the wet by putting sawdust or planks below them; but he contended that their responsibility extended no further, and he rested this contention upon the broad ground that the moment the bales were placed on the quay they were under the control, and therefore at the risk, of the consignees. It was argued, on the other hand, on behalf of the defenders, that until placed on the carts the goods were in the possession of the carriers, and that the latter must be held responsible for the damage done to the whole parcel by the shower, inasmuch as the whole parcel was still in their custody when the shower came on, and though the shower was the act of God, still but for their neglect of ordinary precautions no damage would have resulted. After full consideration, the Sheriff-Substitute has found himself unable to adopt either of these contradictory views. It seems to him that the true view as to the mutual obligations of parties under the practice which prevails here in regard to the landing of jute cargoes from what was

really a general ship—(and it need hardly be remarked that in such a matter the practice of the port governs, see Abbott on Shipping, p. 364)—is that the shipowners are not discharged by merely putting the goods over the side, but are bound to take charge of them for a reasonable time after they are landed, for it would be unreasonable to expect that the consignees should keep carts constantly in attendance waiting for their goods to come out; but that, on the other hand, if the consignees fail to remove their goods with due and reasonable despatch they and not the shipowners must stand the consequences of such a *casus fortuitus* such as occurred here—the question what is due and reasonable despatch being of course a jury question, depending on the circumstances of each case. Now, applying these principles here, the Sheriff-Substitute has no hesitation in saying that, so far as the 40 bales landed on the Thursday are concerned, there was, in his opinion, undue delay on the part of the defenders in removing them from the quay, and consequently that the pursuers are not answerable for the injury done to them by the inclemency of the weather. It may be that they were landed too late on the Thursday afternoon for removal that day, but most certainly they could and should have been removed on the Friday forenoon before the rain commenced. The reason why they were not then removed appears to be that the defenders' clerk had instructions from his employers not to send up a load composed of bales of different marks, and that there was not in the parcel which he found lying on the quay on the Friday morning a sufficient number of bales of any one mark to make up a load. This, as in a question between the defenders and their clerk, may justify the latter for his inaction (though as he saw that the weather was uncertain he might, it is thought, have taken upon himself to disregard his instructions), but so far as the pursuers are concerned it is no reason at all; and on the whole matter it seems to the Sheriff-Substitute that it would be inequitable to hold the pursuers responsible to any extent for the damage sustained by the 40 bales in question. As regards the bales landed on the Friday morning, however, the Sheriff-Substitute feels compelled to come to a different conclusion, for he cannot say that in not removing them before the shower came on the defenders were guilty of any undue delay; while as regards the remaining portion of the damaged parcel—viz., the bales landed on the Friday afternoon—the pursuers, as already said, no longer dispute their liability in damages. The only other question is the amount of the damages which the defenders can justly claim from the pursuers. As to this the Sheriff-Substitute cannot altogether overlook that the defenders allowed the damaged parcel to lie on the quay for a week before they removed it, and that rain fell on some of the days of that week. These facts seem to justify him in awarding to the defenders somewhat less than the full damage according to Messrs Smith & Phillips' report; and after careful consideration he thinks he will do justice between the parties by allowing the defenders a deduction of (1) £17 in respect of actual damage done by rain-water to the bales landed on the Friday; and (2) £8 towards the expenses incurred by them in connection with the judicial inspection."

Both parties appealed, and on 18th February 1876 the Sheriff-Depute (MAITLAND-HERIOT) adhered to the interlocutor appealed against with the following variation:—

"Recals the sentence beginning 'Finds in point of law,' and the whole interlocutor subsequent thereto, and instead thereof finds in point of law that the pursuers are not liable for the damage sustained as aforesaid by the goods landed on the Thursday evening, nor for the damage sustained as aforesaid by the goods landed on the Friday morning, and before the thunderstorm and heavy rain came on; but finds that they are liable for the damage done to the goods landed during the storm; assesses the said damage suffered by the defenders, for which the pursuers are liable, at the sum of £5, 7s.; to this extent sustains the defences, and decerns against the defenders for payment to the pursuers of the sum of £89, 15s. 2d. (being the difference between the sum sued for and the damages herein found due), with interest thereon at the rate of five per cent. per annum from the date of citation till paid; finds the pursuers entitled to expenses, subject to a deduction of one-sixth of the taxed amount thereof," &c.

The Sheriff's note was as follows:—

"This is an action for £95, 2s. 2d., as the balance of freight due for the carriage of 750 bales of jute from Calcutta to Dundee in the pursuers' ship the 'British Princess.' From this sum the defenders claim a deduction of £59, 4s. as damages and expenses, in respect that 91 bales of said jute were through the fault of the pursuers damaged by having been 'unduly and improperly discharged during very wet and rainy weather, and put down on the open quay on the east side of Camperdown Dock of the harbour of Dundee, amongst wet mud, exposed to the rain, and unprotected from the wet in any way.'

"Now, had the defenders been successful in proving the facts stated in this defence there can be little doubt they would be entitled to deduction of the full amount claimed by them; but the Sheriff is of opinion that, except as to the 10 bales after referred to, the defenders have failed in proving their case.

"The 91 bales as to which this dispute has arisen were all landed on Thursday and Friday, the 10th and 11th of June, viz., the first lot of about 40 bales on the Thursday afternoon, the second lot of about 40 bales on the Friday forenoon, and the third lot of about 10 bales on the Friday afternoon. It is of importance to ascertain the state of the weather during these two days, and so far as this case is concerned we have little to do with the weather during the landing of the other goods previous or subsequent thereto. As to Thursday afternoon, no doubt Thom, the defenders' clerk, and who was superintending the delivery of the jute on their behalf, states 'the afternoon became a wet one;' but, so far as the Sheriff can discover, he is supported in this statement by no other witness. On the contrary, he is contradicted by several. Baxter, the broker's clerk, says 'the Thursday afternoon had been quite fine.' Campbell, the harbour-weigher, says 'the Thursday was quite a good day;' and Martin, the shipping clerk, says 'the weather on the Thursday was good enough.' Then these witnesses are supported, and Thom is contradicted, by the transcript from the weather-register produced by Robertson, the harbour-master,

which registers the weather as follows, viz.—'On Thursday, 10th June, P.M., light breeze and clear, fine.'

"Then as to the Friday, all the witnesses concur that the morning and forenoon were fine, but that a severe thunderstom and heavy rain came on about mid-day, and lasted for two or three hours. It was the rain that then fell that damaged the defenders' jute.

"There is no dispute as to the bales comprising the third lot of jute above referred to. They were landed on the Friday afternoon during the storm, in weather which the pursuers now admit was unfit for landing such goods on an open quay. One witness states the number of bales so landed at from 6 to 12, and another at from 8 to 10, so that the Sheriff cannot be far wrong in holding the number to be 10. Taking the damage to these at 3 per cent., which seems according to the report to be the highest estimate of damage done to any of the bales, the amount comes to £5, 7s. For this sum the defenders are admittedly entitled to credit.

"As to the first and second lots above referred to, viz., 3 bales landed on the Thursday afternoon and the Friday forenoon—these seem to the Sheriff to be in a different position. According to the evidence they were landed in good weather. It would appear that until the thunderstorm came on about mid-day on Friday they had got no rain and sustained no injury whatever.

"The question for consideration in such circumstances is, Who is responsible for the damage done to the jute while on the quay during the Thursday storm? This seems to the Sheriff to depend on another question, viz., At what precise period did delivery of the bales take place?

"The pursuers, on the one hand, contend that delivery took place as soon as (all connection between the ship and the bales being removed) they were put into the hands of the harbour porters. The defenders, on the other hand, contend that delivery did not take place until the bales, having been lifted from the quay, were placed in their carts. The Sheriff-Substitute, again, has adopted a medium between these two periods, and considers that the defenders are entitled to a reasonable time after they had been placed on the quay to have them removed, and he has held accordingly that the pursuers are not liable for the damage to the lot landed on Thursday afternoon, in respect that the defenders had had a reasonable time for their removal, and had not availed themselves of it, but that the pursuers are liable for the damage to the lot landed on Friday forenoon, in respect that the defenders had not had such reasonable time.

"The Sheriff has carefully considered these three views, and is of opinion that the contention of the pursuers is the correct one. Such a ship is discharged by men called 'lumpers,' who are in the pay of the shipowners. These men bring the bales to the deck, whence they are generally 'run' down a plank on to the quay. At the bottom of this plank they are taken possession of by the harbour porters, who are in the pay of the merchant. The Sheriff is of opinion that as soon as each bale, after having been put over the ship's side on to the quay by means of a plank, or otherwise, is taken possession of by the harbour porters, it has been duly delivered to the merchants.

"These harbour porters are paid by the merchants, and in this question they must be reckoned their servants. Then this delivery to the harbour porters takes place in the presence of the merchants' clerk, who is either present or ought to be present during the course of delivery. The goods after being disposed of by these porters are 'under the dominion and control' of the merchants. (See Judge Willis in *Mypersteen* v. *Barlow*, Nov. 24, 1866, C.P. 2, 38, 50.) The bales are placed by the porters at such part of the quay as the merchants' clerk directs. After having been handed over to the porters, it is the merchants and not the shipowners who provide carts for the removal of the bales. It is the merchants or their clerks who have to determine how long the goods are to remain on the quay. The merchants can have the goods placed at once on to a cart or truck (as the Messrs Cox did on this very occasion), or they can have them placed on the quay for sorting, as the defenders did. The defenders were receiving bales of jute out of this ship with at least 16 different marks. For their own convenience they saw fit to arrange with their clerk that he was not to cart off any of the bales until he could collect together 5 bales (being a cartload) of one mark. This arrangement seems to the Sheriff to account for so many of the defenders' bales having been on the quay—'scattered over the quay,' as Campbell described it—'in parcels of twos, threes, and fours.' If the defenders had had them carted away as soon at least as 5 were landed, there would have been few or none remaining when the storm came on. But the defenders' mode of dealing with their bales after having got them into their control was for their own convenience. The pursuers could not prevent their so dealing with them. The pursuers had no longer any control over such bales; they could not order carts for their removal. It was the merchants or their representatives, and not the shipowners, who determined how long to let the bales remain on the quay and when to cart them away, whether to leave them lying there for hours, or days, or weeks. The merchants' clerk in this very case allowed these 91 bales to lie on the quay for at least a week, viz., from the 10th and 11th June till the 18th June. Had the shipowners had the power, they might have had them removed at once on being landed, but they had no power in the matter. In such circumstances, it would seem to the Sheriff to be inequitable to hold the shipowners liable in damages for having allowed the defenders' jute to remain on the quay exposed to the rain when they had no power to remove it.

"The Sheriff concurs with the Sheriff-Substitute in opinion that the pursuers are not liable in damages in respect of the bales landed on Thursday afternoon. The Sheriff, however, goes further, and holds that the pursuers are not liable in damages either in respect of the bales landed on the Friday forenoon. He arrives at this result on the ground that both lots had been duly delivered to the defenders, that after such delivery the pursuers had over them no further control, but that they lay on the quay as long as the defenders wished, at the defenders' own risk. It seems to have been decided in the case of *Bannatyne*, 15th Nov. 1814, F.C., as stated in Bell's Com. 2, 97, that lien existed over wood launched from the hold of a vessel on to a raft

fastened to the ship's side only until the raft was finished and the connection with the ship cut away. In like manner, in this case, at the time when the storm came on, all connection between the bales had ceased. While the pursuers had lost all lien or other control over the delivered bales, they had also, as it seems to the Sheriff, lost all responsibility connected with them.

"It is no doubt true that the various clerks do not take a note of the bales in their respective books until they have been placed in the carts in lots of five for removal. This is what creates any difficulty that may exist in the case; but, on the whole, the Sheriff cannot regard that fact as determining the *punctum temporis* of delivery. The goods are large and cannot be carried off, and it is easier for the clerks to note the goods after having been classified and arranged into lots of five all with the same mark; but that period of making their entries seems to the Sheriff to be adopted for the mere convenience of the clerks, and not as affecting the question of delivery. Before the goods are so noted they have been, as Judge Willis expressed it, 'under the dominion and control of the merchants.' These very bales were not placed on the defenders' carts until the 18th of June, and would not be noted in the clerks' books until that day, but it can scarcely be contended that delivery had not taken place before that date. If so, delivery and the marking in the clerks' book are not identical."

The defenders appealed to the Court of Session, and argued—Delivery cannot be held to have been completed until the bales were put upon the cart of the consignee, and in this case accordingly when the damage was incurred the delivery was yet incomplete. There was not in this case a bill of lading for the contents of the ship, but a bill of lading to deliver certain goods to a certain person at a certain port. The feature of this is the stipulation for delivery to a person, and accordingly the contract of carriage was incomplete until the goods were delivered to that person. In the case of the *Norway*, the question at issue was breach of contract, by the shipmaster refusing to go to a particular wharf. There is no case of undue delay made out by the pursuers, and they say that there was delivery as soon as the goods touched the quay.

Argued for the respondents (pursuers)—If reasonable notice is given to the consignees to be there when the goods are put over the side, then laying down on the quay is delivery. The goods were taken off the pursuers' hands by delivering them over the side, and their obligation was discharged.

Authorities—*Collins* v. *Marquis' Creditors*, 1804, M. 14,223; *Howard* v. *Sheppard*, 9 C.B. 297, and Maule, J. there; Addison on Contracts, b. ii. c. i. sec. 2, pp. 480, 481; Bell, i. 494, 605; ii. 97; Abbot on Shipping, 334 (last ed.), and cases there; Story on Bailments, 547, par. 545; case of the *Norway*, 12 Law Times, N.S. 61, and Dr Lushington there; *Bannatyne*, 15 Nov. 1814, F.C.; Parsons on Shipping, pp. 152 and 251; *Myerstein* v. *Barlow*, 24 Nov. 1866, 2 L. R., C.P. 38, and Willes, J. there.

At advising—

Lord Justice-Clerk—In this case I am of opinion that the judgment of the Sheriff should be affirmed. The whole question is one of delivery. Now, it is clear we have a case where goods have been purchased and are in transit, and then have to be delivered to the consignees. That delivery takes place when they are placed in the control of the consignees and beyond the control of the carriers. Accordingly, I am of opinion that here, *prima facie*, the evidence shews that these bales of jute were delivered. The bill of lading does not say where the goods are to be delivered, beyond the words "at the port of Dundee." There is no particular dock or quay indicated. On the other hand, if by the rule and universal practice of the port of Dundee all goods landed were necessarily checked before the buyer could take them away, that would place matters on a totally different footing. But it is not so, and the proof we have here of the practice of the port does not nearly amount to that. All the evidence given as to checking is utterly insufficient to qualify the contract, and accordingly I think that the carriers had discharged themselves of their obligation and had relinquished their lien on the goods by delivering them over the ship's side.

Bnt I may also observe that the purchasers, the Messrs Grimond, left these goods lying on the quay for a whole week after the rain on Friday the 11th June, and then they come forward and claim damages for the whole injury done to the jute—mixing up the injury done by that Friday's rain and the injury caused by the subsequent exposure in showery weather. Accordingly, reserving entirely the whole question as to the custom of the port, I am, on the evidence presented on record, for affirming the interlocutor appealed against.

Lord Neaves—I am of the same opinion, and have nothing to add.

Lord Ormidale—I concur, and without any difficulty. There is not on record any allegation of a peculiar custom of the port of Dundee. I do not think that anything has been proved which affects the question of delivery at all; for the checking here alluded to appears to have been merely an arrangement to suit both parties, not a peculiar and definite custom of the port. I may observe that delivery actually was taken for three or four days prior to the disputed occasion; the consignees' clerk was present during the delivery over side, and indeed ultimately all the bales, including the 91 in question, were taken possession of by the Messrs Grimond, and stored in their own warehouse. But even though there were delivery, yet there may be damage done to the goods for which the ship is responsible, and indeed the ship conceded a certain amount which the Sheriff allowed for. There were, however, 40 bales delivered before the rain began—Why were they not removed? The only answer I can find to that is, that the reason was that it did not suit the consignee. We cannot mulct the carriers in damages on that score, and accordingly I am for affirming the Sheriff's judgment.

Lord Gifford—I agree with the Sheriff, and very much on the same grounds as those on which his judgment is based. The whole of the dispute in reality arises from the want of sufficient shed accommodation at the harbour of Dundee, and I cannot think that the ship is

liable on that score. The vessel at first was at a berth where there was shed accommodation, and then she was removed to one where no shedding existed. I think that the point of delivery was when the goods left the hands of the crew. The consignee was then represented by his clerk and his porter, for the shore porter is in such a case really the servant of the consignee, though he may be an official—for he is paid (according, no doubt, to a certain tariff) by the consignee. Further than this, the delivery had for some days been going on, and the Messrs Grimond had been receiving the goods.

All this amounts clearly to delivery, unless a custom to the contrary be proved, and I do not think that the checking spoken to by the witnesses amounts to that; clearly it is not the *punctum temporis* of delivery. The consignees did not choose here to take away all their bales; it is in evidence that there were not less than 16 marks on these bales, and they wanted to keep the same marks together, and to arrange the bales on the quay. This was a matter for the Grimonds' own convenience; it was no business of the carriers; and there is no evidence of custom to show that the ship took charge of the goods in the interval between the putting over side and the checking. The checking took place only on removal from the quay; it had nothing to do with delivery; and in the absence of some contrary custom we must hold putting over the ship's side as delivery.

The Court dismissed the appeal, and affirmed the judgment of the Sheriff, giving the expenses of the appeal to the respondents.

Counsel for Appellants (Defenders)—Dean of Faculty (Watson)—Asher. Agents—Macara & Clark, W.S.

Counsel for Respondents (Pursuers)—Fraser—Jameson. Agent—P. Douglas, L.A.

Wednesday, July 5.

FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

DUDGEON *v.* THOMSON AND DONALDSON.

(*Ante*, p. 384.)

Process—Breach of Interdict—Proof—Jury Trial.

Held that a petition and complaint for breach of interdict against a firm consisting of two partners, one of whom had been interdicted at the instance of the complainer, was a case for proof before the Court, and was not suitable for jury trial.

Opinion (*per* Lord Deas) that as a question of breach of interdict is one of contempt of Court, it is the duty of the Court themselves to decide whether the contempt has been committed.

A petition and complaint for breach of interdict at the instance of Richard Dudgeon, with concurrence of the Lord Advocate, against William Thomson and Benjamin Donaldson, sole partners of the firm of William Thomson & Co., Glasgow, was presented to the First Division of the Court. The interdict which it was alleged had been broken was obtained in 1873 by the complainer against William Thomson, who afterwards went into partnership with the other respondent Donaldson.

In the answers lodged for the latter he maintained that as the interdict had no application to him personally he could not be guilty of a breach thereof or of contempt of Court. After answers had been lodged and counsel heard, the cause was remitted to Lord Rutherfurd-Clark (Ordinary) in terms of the Act of Sederunt 11th July 1828.

The Lord Ordinary thereafter closed the record, and pronounced an interlocutor in which he assigned a diet for the adjustment of issues.

Against that interlocutor the complainer Dudgeon reclaimed, on leave being granted for the purpose.

He argued that in a case of breach of interdict a jury trial was unusual, and referred to the following authorities — *Mackenzie* v. *Mags. of Dingwall*, Feb. 12, 1839, 1 D. 487; *Gray* v. *Petrie*, Feb. 17, 1848, 10 D. 718, and 11 D. 1021; *Menzies* v. *Macdonald*, Feb. 13, 1864, 2 Macph. 652; *M'Neill* v. *Scott*, March 17, 1866, 4 Macph. 608; Act 6 Geo. IV. cap. 120 (Judicature Act), sec. 28; Act 29 and 30 Vict. cap. 112, sec. 4; (Evidence Act 1852).

The respondents argued—The case was fitted for jury trial (1) as being of a quasi-criminal nature; and (2) because the question of Donaldson's liability was one which a jury would best decide.

At advising—

Lord President—I am against a petition and complaint for breach of interdict being tried by a jury, for the two reasons which have been mentioned in support of that view by the counsel for the respondents. The first is, that it will come out in the course of the trial that this is a case of a quasi-penal character, and therefore peculiarly suited for a jury. If that should happen, it would prejudice the mind of the jury in an illegitimate way, such as is not desirable. That is one reason; and the other is, that there is a very difficult question raised here as to the liability of the defender Donaldson as a partner of Thomson, and the question will be, not whether Donaldson has infringed the patent so much as whether he is so involved as to have committed a contempt of Court. That is a question which is particularly well suited for the decision of the Court without the assistance of the jury.

Lord Deas—There is no doubt that a question of breach of interdict is a question of contempt of Court, which cannot be sent to a jury in this case without committing to them to the whole extent our jurisdiction and our duty to ourselves to decide whether the contempt has been committed.

Lord Ardmillan and Lord Mure concurred.

The following interlocutor was pronounced:—

"Recal the interlocutor, and remit to the Lord Ordinary to appoint the cause to be tried before himself without a jury, reserving all questions of expenses."