down to 1866, and the question was, whether in renewing the lease in 1865 it was meant to exclude the Dovecot Park, or to include it among the others? If nothing was said of it at all, it was difficult to say that it was not included in the subject let, looking to the terms of the document itself. No doubt it was said that it was impossible to include land at the present rent, when it had no present rent at all; but that was too critical—and what was meant was plainly this—that the whole subjects formerly possessed for 10 years were to be possessed for 19 years more, at the same rent as formerly. The 8th head of the missives made that more clear, for it said that the condition as to top-dressing was fulfilled and discharged, and that would have been unnecessary if the Dovecot Park was to be given over to the landlord and excepted from the lease.

On the question of Longriggs, it was necessary to have more proof. As to the final clause, this was not a set of regulations in the ordinary sense, —not a set of regulations to which leases were to refer, and which were to be incorporated in the leases. On the contrary, this was a form of lease to be adopted in cases where it was applicable, but not to be adopted into other contracts; and, looking to the clauses of the document, it was plain that they were not applicable to a case like this. This was a mixed lease, the agricultural part being a small part of the subjects let, the house and game being the principal portion. Therefore the defender must be assoilzied from the last conclusion.

The other judges concurred—LORD ARDMILLAN observing that the regulations bore to apply only to the estate of Logan, and plainly had nothing to do with Genoch.

Agents for Pursuer—Tods, Murray & Jameson, W.S.

Agent for Defender—G. Cotton, S.S.C.

Friday, June 25, 1869.

SECOND DIVISION.

METZENBURG *v.* THE HIGHLAND RAILWAY COMPANY.

Liability of Carriers—Conveyance of Goods—Second Carrier—Agent. Held (1) that a Railway Company or other carrier of goods, receiving goods to be carried beyond their own line, are responsible to the consigner for the safe conveyance of such goods by the second company or carrier in whose hands they are placed by the first; (2) that the liability of the first company does not cease by the goods reaching their destination, or being offered to the consignee; (3) that the second carrying company, on the consignee's refusal to take the goods, is bound to hold them for a reasonable time at the disposal of the consigner, giving him notice and an opportunity of taking them up, and that the carrier first receiving the goods is liable for any fault in these respects on the part of the second carrier to whom they are entrusted.

This action was brought in the Sheriff-court of Inverness-shire by Abraham Metzenburg, rag merchant, Inverness, with concurrence of Alexander Mowatt, rag merchant, Aberdeen, for his interest, against the Highland Railway Company, for £65, 7s. 7½d., being the value of thirty bales or bags of rags delivered by Metzenburg through his servant Fraser Rennie, at Inverness, to the defenders, on September 3, 1866, and addressed to Mowat to be delivered by them to Mowat at Aberdeen; and for £2, 10s. 7d., being the expense of sending Rennie to Aberdeen to endeavour to procure delivery of said goods, which was refused. It appeared that the goods were sent in the name of Rennie to Mowat, in the expectation that he would buy them; that on their arrival at Aberdeen, the Great North of Scotland Railway Company, upon whose line they had been carried from Keith to Aberdeen, offered them to Mowatt, who refused to take delivery of them; that the Railway Company then stored them in a warehouse of their own, and communicated the fact to the consigner and the defenders; that an arrestment was then, on 6th September, used in the hands of the Great North of Scotland Railway Company, at the instance of Pirie & Sons, of all goods, &c., in their hands belonging to William M'Donald, rag and stoneware merchant, Inverness; that the Railway Company, believing the said thirty bales to be truly the property of M'Donald, refused, on account of said arrestment, to give them up to Rennie, who called at the office of the company in Aberdeen to demand re-delivery, with a delivery-order from Mowat; that the rags were afterwards sold under a warrant obtained by the company from the Sheriff. It was pleaded for the defenders in the Inferior Court that the defenders were under no liability, in respect that they had performed their part of the contract between them and the pursuer by delivering the goods to the Great North of Scotland Railway Company at Keith, or, at all events, by that company's tender of the goods to Mowatt, and his refusal; and that that company having stored the goods, not as proper agents of the defenders, but as independent warehousemen, at the risk and expense of all properly liable, the defenders were released from responsibility; further, that they were entitled, before parting with the goods, to be released from the arrestment. The Sheriff-substitute (W. H. THOMSON), after finding in fact as above stated, held in law that the Great North of Scotland Railway, in carrying the said goods from Keith to Aberdeen, acted as the agents of the defenders; that an obligation still lay on the carrier in whose hands the goods were at the time of rejection by the consignee to take charge of said goods and redeliver them to the consigner or his representative on demand, the consignee persisting in his rejection of them; that the Great North of Scotland Railway Company were still in this respect agents of the defenders; and that, they having wrongfully refused re-delivery to the pursuer, the defenders are liable to pursuer in the value. He accordingly decerned against defenders for £65, 7s. 7d.

He added the following note:—

"The Sheriff-substitute has no doubt, on the proof (1) that the goods in question were *bona fide* purchased from M'Donald by the pursuer, and were his property, although sent by rail in name of his servant, Fraser Rennie. Apart from the general proof of purchase by the pursuer, the said Rennie, at an early stage of the case, lodged a minute in process repudiating any right of property in them.

"There can be little doubt, in the second place, that the Great North of Scotland Company acted wrongfully in refusing to give up the *goods* to Rennie. He, in whose name they had been sent, appeared at their office, stating that he possessed written authority from Mowatt, the consignee, to

get possession of the goods. They don't even ask to see his authority, nor are they under any difficulty about the payment of the carriage, or for any trouble they have had. They simply refuse to give them up *on the ground of an arrestment* laid in their hands at the instance of a creditor of *W. M'Donald.* So far as appears, they knew nothing of this M'Donald, and had not an iota of proof, or even any reason to suspect, that the goods were his property. The arrestment is of course in the usual general terms, 'all goods, &c., pertaining to W. M'Donald.' The only persons whom they knew anything of in connection with these rags were the nominal consignor Rennie and the consignee Mowatt. The latter had rejected them, and that he persisted in the rejection was proved by the authority given to Rennie to get re-delivery, as they would have seen had they asked for it. (Their agent, Mr Wright, states in his evidence that had he seen that document, he would still have refused to give up the goods.) The other party whom they knew as consigner was Rennie, the very person applying to them.

"The duty of a carrier in such circumstances is very clear from the very nature of things ; and it is so laid down in one of the best English authorities on the law of carriers. (See *Powell on the Laws of Inland Carriers*, pp. 189, 90, 91, 92.)

"So far the case is, in the opinion of the Sheriff-substitute, perfectly clear; but there arises, apart from them, a question of some difficulty, and it is not without hesitation that the Sheriff-substitute has pronounced the above judgment. He has delayed doing so until he should have an opportunity of fully consulting the English authorities, which are much more copious on this branch of the law than the Scotch.

"There is now no doubt whatever that a carrier undertaking to send goods to a particular place which is beyond his own terminus, is responsible for the safe carriage of them by the other carrier to whom he intrusts them in order that they may reach their final destination. The second carrier is the agent of the first. (See *Caledonian Railway Company* v. *Hunter*, 9th June 1858; *Ferguson, Rennie, & Company* v. *Scottish Central Railway Company*, March 30, 1863, and Feb. 27, 1864 ; *Murdoch* v. *Lancaster and Preston Junction Railway*, 8 S. M. & W. 421 ; *Watson* v. *Ambergate, Nottingham, and Boston Railway*, 15 E. Jurist, 448 ; *Scothern* v. *S. Staffordshire Railway*, 8 Exch. 341 ; *Collins* v. *Bristol and Exeter Railway*, 25 Law Journal, 185 Exch. ; *Wilby* v. *W. Cornwall Railway*, 2 H. & N. 703 ; *Coxon* v. *Great Western Railway*, 5 H. & N. 274 ; *Croreach* v. *London and North Western Railway*, 14 C. B. 255 ; *Bennett* v. *Peninsular and Oriental Company*, 6 C. B. 775.)

"Indeed, the defenders, at the debate, did not seriously dispute this general proposition.

"They contend, however, that the agency of the second company for the first cannot extend beyond the actual transit, and that, as the contract of carriage ended with delivery, or, in this case, with a *bona fide offer* to deliver to the consignee, whatever took place afterwards was a matter with which the second company only had to do, and for which the company alone is responsible. That company were, they say, thenceforth not carriers but warehousemen, and acted on their own responsibility as such.

"There is no doubt that the contract of *carriage*, strictly so called, did come to a termination with the act of offering the goods to the consignee, and the *peculiar liability* of the carrier as such then terminated also; and that the responsibility of whoever had, by force of circumstances, the custody of the goods after that time, was that of a custodier only. And as there was now nothing of the nature of an *insurance*, the custodier may not be liable in the same degree and in the same circumstances as when he was the carrier actually engaged in effecting the transit. (See *Garside* v. *Trent and Mersey Navigation Company*, 1 T. R. 27 ; and *Hyde* v. *Trent and Mersey Navigation Company*, 5 T. R. 389 ; *Webb and Others*, 8 Taunt. 443 ; *Cairns* v. *Robins*, S. M. and W. 258.)

"It does not, as it appears to the Sheriff-substitute, necessarily follow from this that the agency of the second company for the first terminated with the contract of carriage the moment delivery was offered. The second company were employed by the first to carry the goods to Aberdeen from Keith, because the line of the first company does not extend beyond the latter place. Had the first company's line extended to Aberdeen, they would, under their contract with the consigner, have carried the goods thither themselves ; would have delivered them or offered delivery themselves, and, on rejection by the consignee, would have found themselves in the position in which the second company actually did find themselves, that of custodiers of rejected goods which they had carried.

"That certain duties and obligations are incumbent *on carriers* in these circumstances cannot be doubted (Powell on Law of Inland Carriers, p. 188). When the goods are rejected, says that writer, 'the carrier ought not to deliver them at once to the consigner, but should keep them a reasonable time, and in a reasonable place,' to give time to the parties to come to terms. In the case of a carrier sending them back prematurely, he was found liable for their loss on the return journey (*Crouch* v. *Great Western Railway*, 2 H. & N. 491 ; *Giles* v. *Taff Valley Railway*, 2 Ell. & Bl. 822).

"There has been no room for their retaining for a reasonable time, as the carrier could easily have ascertained that the consignee had handed back the goods to the consigner ; but it shows, were that necessary, that certain duties lie on the carrier, that is to say, *on the party whose functions of carriage have just ended*, peculiar to the situation in which he is placed. He is not in the position of a mere *finder* of the goods, but is still under an obligation to the owner, arising directly out of his position as actual carrier. That they should fulfil this obligation should the circumstances arise (and they are circumstances of no unfrequent occurrence), is part of the carrier's contract with the owner of the goods, as much as the contract of carriage in the stricter sense of the term, and must be held to be implied in every such contract. It appears to the Sheriff-substitute that it is not stretching the doctrine of agency too far to hold that, for these obligations, the second company is the agent of the first, as well as for the obligation of transit, out of which they arise.

"The defenders, by sending notice that the goods lay at Aberdeen, being rejected by Mowatt, would almost seem to have themselves entertained this view at the time, and to have admitted that the other company held the goods still as their agents.

"The question, however, is, as above remarked, one of great nicety, and there is no direct authority on the subject, so far as the Sheriff-substitute can discover.

"It is further contended by the defenders that

the pursuer has not chosen the proper remedy—that he ought to have brought an action for restitution of the goods, or have raised a multiplepoinding in name of the Railway Company. It certainly was open to the pursuer to follow either of these courses. Had the former been adopted, it would appear, from the case of *Ferguson, Rennie, & Co.* above cited, that it would have been competent on him to call the Great North of Scotland Railway Co. as the respondent, as the actual custodiers, physically so to speak, of the goods; but the Sheriff-substitute is of opinion that this is not inconsistent with the view now taken, that the company, in refusing to redeliver the goods in question, was still the agent of the defenders. At all events, it must be remembered how rapidly the doctrine of the agency of one carrier for another has been developed within the last few years.

"In regard to an action of multiplepoinding, it may be remarked that the course was open to the defenders as to the other railway company. The Aberdeen Company, however, after the present case had come into Court, and after the goods were, according to their own statement, rapidly deteriorating, obtained a warrant for their sale from the Sheriff of Aberdeenshire.

"Whether the pursuer has used the most speedy and cheapest mode of vindicating his rights may be matter of dispute, but the Sheriff-substitute sees no reason for holding that this remedy is incompetent.

"This action is in substance an action of damages, the measure of the damages being the value of the goods to the pursuer at the time when he was deprived of them. The sum charged appears to represent with tolerable accuracy the market price of such goods at the time at Aberdeen, where the goods were, and also at Perth, where, failing a market for them at Aberdeen, they would, presumably, have been sold by the pursuer, had he duly got possession of them.

"If the above judgment shall be affirmed elsewhere, it will be for the defenders to consider what recourse they have against the Great North of Scotland Railway Company."

On appeal, the Sheriff (IVORY) altered, and assoilzied the defenders, holding that the Great North of Scotland Railway Company were justified in refusing delivery, on the ground that Rennie took no means to prove to the satisfaction of Mr Wright, the railway company's agent at Aberdeen, that he was entitled to delivery of the goods; and that the circumstances were altogether calculated to rouse the suspicion of the company and justify them in making further inquiry before they delivered up the goods.

He added the following note:—

"*Note.*—The principal, if not the only demand for delivery of the goods was made by Fraser Rennie. It is not very clearly established that this demand was made on 6th September. But, assuming this to have been the case, and that the refusal therefore took place before the 7th, when the arrestment was actually laid on, the Sheriff is of opinion that John Wright was justified in refusing to deliver the rags to Rennie.

"The consignee appears to have rejected the goods on the morning of the 6th, and this was immediately intimated to the defenders, as the parties who forwarded the goods to the North of Scotland Company, with a request that they should give notice to the sender, and advise early as to their disposal.

"Before, however, notice could be given to the sender, or any advice regarding the disposal of the goods could be received from the defenders, Rennie called on Wright, and demanded delivery. But it appears that Wright was not acquainted with him, and that the latter produced no evidence, and took no steps to establish to the satisfaction of Wright that he was entitled to demand delivery.

"Rennie, moreover, made the demand for delivery solely on the ground that he was owner of the rags. But he now swears that he was not the owner. He had, therefore, no right to demand delivery in his own name. This of itself seems a sufficient ground to justify Wright's refusal to deliver the rags.

"Again, no claim for delivery of the rags was made in name of the pursuer, the real owner. Rennie not only did not produce to Wright any letter from the pursuer authorising him to receive delivery of the goods, but he all along studiously concealed from Wright and the defenders that the pursuer had any right of property in them.

"Further, although the arrestment may not have actually been laid on at the date of the refusal to deliver, the North of Scotland Company had received notice of it. The doubt as to Rennie's right of property in the goods was also strengthened by the latter's admission that the rags had once belonged to M'Donald. These facts, along with Rennie's hasty demand, and the other suspicious circumstances of the case, were all calculated to rouse the suspicion of the company, and, it is thought, justified them in making further inquiry before they delivered up the goods.

"On these grounds, it is thought that Wright was justified in refusing to deliver the rags to Rennie on the occasion in question.

"It does not appear from the evidence that any demand for delivery other than that above referred to was made by the pursuer. But, even if there had been, it appears that before the North of Scotland Railway Company received any answer from the defenders as to the disposal of the goods, the same were duly arrested in their hands, and that the arrestment was in force on 8th October 1866, being the date of the present action. In these circumstances, it is thought that the defenders and their agents were warranted in refusing to deliver the goods to the pursuer prior to the date of the present action.—(*Matthew* v. *Fawns*, 21st May 1842, 4 D. 1242; Ersk. iii., 6, iv., 14.)

The pursuer appealed.

GIFFORD and ASHER for him.

CLARK and LANCASTER in answer.

At advising—

The LORD JUSTICE CLERK, after narrating the circumstances under which the rags became the property of pursuer, and the manner in which they came into the hands of the Railway Company for transmission, proceeded to mention the refusal of Mowatt to take delivery of the goods, and their storage by the Railway Company. His Lordship then went on to say—Before long, there is some little doubt as to the date, but I think on 7th September, Rennie, who had been despatched from Inverness in consequence of an intimation from Mowatt of his intention not to receive the goods, appeared at the Company's office, and asked that they should be re-addressed and delivered to him for the purpose of being re-directed to Alexander Ramsay, a dealer in rags in Perth. I may say that, although there is a difference in the opinion of parties as to whether the interview took place on the

6th or the 7th of September, the fact that the arrestment was used upon the 7th—which I shall immediately speak to—and the fact that the use of that arrestment is spoken of as being the cause why there should not be a delivery or a re-direction of the goods in terms of the applications, seems to me to make it pretty clear that it was on the 7th of September that Fraser Rennie went to the Company's office. Now, it appears that the nature of the demand was that there should be a re-direction of these rags, and it appears, upon the other hand, that that was refused; and I think there is really not much substantial difference between the accounts which were given by Rennie on the one hand, and the goods agent Mr Wright upon the other, as to the ground upon which the refusal was based. Rennie says explicitly that the agent, Mr Wright, said that the goods were arrested, and that he could not give them up; and, alluding to other parts of the conversation in which his want of knowledge is mentioned, and the absence of authority, he says—"He (that is, Wright) said distinctly that, notwithstanding the order and the payment, he could not give them up." Rennie had gone to Mowatt's office, and had got from Mowatt's clerk an order for delivery. It was in his pocket at the time, although it was not actually shown to the agent; but Rennie stated expressly that he had the authority and was really the agent for the owner, and therefore the want of identification cannot be held to have been the true ground of refusal. That appears very clearly from the evidence of Wright,—that there was not any real objection on the ground of want of identification, or the absence of a note from Mowatt, which could have been easily satisfied if the objection had been really rested on that ground. That objection could have been removed by a very easy identification of the party upon the one hand, or by the getting of a formal authority upon the other. Either of these courses, which could have been easily adopted, would have been all that was necessary, if that was the true ground of refusal. But the account which Wright gives of the matter is this:—"A man, calling himself Fraser Rennie, called about them; a woman was with him, but she did not speak. Both were strangers to me,—no letter of introduction to me. Rennie asked for the rags, which he said were his. I told him that they had been offered to Mowatt and refused, and that since that they had been arrested, and that I would not give them up to him at any rate." Now it appears to me that the mere fact of Wright not knowing Fraser Rennie is a matter of no consequence, because the identification, if it was matter of dispute, might have been easily cleared up in either of the ways I have indicated. I think the fact of there being no authority from Mowatt cannot be founded upon in favour of the Company's refusal for the reason I have already assigned,—that there would have been no difficulty about the matter if it had not been made an indispensable condition that the arrestment should be removed. Well, then, Rennie appears and makes a demand as in his own name. He does not state the property to be the property of Metzenburg; and, in the view of the Sheriff who has decided this case in favour of the Company, he studiously conceals the fact that Metzenburg was the proprietor. It appears to me that there is really no foundation at all in the case for that observation. Fraser Rennie, by the very nature of the contract, stood in right of the party who was to get delivery as the consigner of the goods. He was the party in whose name the contract was made, by Metzenburg's express consent and direction; and therefore, in the first place, that constituted a plain authority from Metzenburg,—as plain an authority as if he had given him the most direct authority possible in the matter; and, in the next place, he was the only party whom the Company were bound to recognise in the matter. He was the party whom the Company were bound to recognise, because they accepted as from him the deposit of these goods with the view of their being transferred to Aberdeen; and, consequently, even if Metzenburg had intervened, they might have said that they had nothing to do with Metzenburg. But however that may be, neither upon the one ground nor the other do I find any good reason or foundation for the refusal to re-address these goods as requested on the part of Rennie, unless that is to be found in the arrestment which really was made the ground of refusal.

Now, how stands the matter touching that arrestment? There was no arrestment used of any goods belonging to Metzenburg,—no arrestment used in the hands of the Company of any goods belonging to Rennie. There was an arrestment used of goods belonging to a person of the name of Macdonald; and that arrestment was made by way of a general description "of all goods, bonds, bills," or other things that may pertain and belong to this same Macdonald in the hands of the Company. Therefore there was nothing but a general description of goods, and the general description of goods was only explained to be particular by reference to the property which Macdonald held in these goods. There was nothing specific on the face of the diligence with reference to the specific articles in question at all. There was no mention, as in the case of *Matthew* v. *Fawns* (which I think the Sheriff has erroneously stated as analogous to the present) of any specific goods. In that case there was an attempted specification at least of the goods that formed the subject of arrestment, although it was erroneously stated with reference to the property of the party; but there was nothing stated here, except the general terms, which warranted the detention of goods which were the property of Macdonald. Well then, the Company, if they had had a claim properly put before them, other than anything appearing on the face of the arrestment, namely, a claim to these goods made by other parties as belonging to Macdonald, they would have been in a situation in which they might have brought a multiplepoinding, with a view to the contested question between different claimants being tried. But in this case what they did was apparently to adopt entirely, and to act upon the adoption of the allegation which probably was made to them by some one to the effect that these goods belonged to Macdonald. They believed that they belonged to Macdonald,—an erroneous belief as it has now turned out to be, and was all along,—but they took one side of the question, and taking that side of the question, and taking upon themselves the responsibilities attached to the arrestment of the goods of Macdonald, they retained these goods, and kept them back from the party who really claimed on behalf of the true owner. Now it is quite in vain to say that a warrant to arrest one man's goods shall be held, by reason of some suspicion on the part of the person in whose hands the arrestment is used, to be a sufficient excuse, or any legal ground of detention, to detain the goods of another man. Therefore it does not appear to me

that we can by possibility adhere to the judgment of the Sheriff, in which he finds that the refusal to deliver these goods upon the application made by Rennie was justifiable in point of law; and, assuming that the defenders were liable in a direct action under this summons, and assuming that the question is rightly raised as to the question of the liability, upon the footing of the Act fixing the liability upon the Company, I do not see how there can be a defence for their detention of goods which were not the goods of Macdonald, but which were the goods of another man, in virtue of an arrestment used for the simple purpose of attaching Macdonald's goods.

The second question, however, comes to be this, whether, assuming that the Great North of Scotland Company, through their good's agent, acted wrongously in refusing to re-address these goods, there is a legal responsibility attaching to the Highland Railway Company in respect of that refusal? We have upon that subject a very careful analysis of the authorities, so far as they can be held to bear upon the question, in the very able note of the Sheriff-substitute, who has bestowed great care and diligence, and shown much ability I think in the disposal of this case. We have also had a very learned argument upon the subject from the Bar; and although the case certainly has not apparently occurred before in the exact circumstances in which it is presented for our consideration, and is therefore a novel question in law, I am of opinion that, upon a proper consideration of the nature of the duties devolving upon carriers in entering into such a contract as was entered into in this case, there is a responsibility attaching to the Highland Railway Company in virtue of the act done by those parties, who in that matter I still consider to have been their agents. The view which is presented on the side of the Highland Railway Company is this:—that the contract was in fact terminated by the arrival of the goods at Aberdeen, and the tender of delivery made of them—that they had thereby fulfilled the whole contract, which was for the carriage of the goods between the two points, and that the delivery of the goods, or the tender of delivery equivalent to delivery in this case, terminated their duties and liabilities under the contract. That proposition, I think, is not capable of being maintained in law. I do not think the obligation of the carrier terminates by the mere offer to deliver at the terminal point at which the address upon the goods directs them to be given. I think there is, incident to that contract, necessarily something more than a mere tender of delivery, and the result of its being held for a moment that that would exhaust and completely implement all the duties imposed upon the carrier by the contract would be this—that the carrier might then throw down these goods at the door of the warehouse of the party to whom they were addressed, and leave them to shift for themselves or to do anything that might occur. It is quite plain that, incidental to the taking of these goods, there is an implied obligation upon the party, upon such a case occurring as the present, to have the goods put in such a situation that they may be at the disposal of the consigner, and at the same time they were, in my opinion, bound to give him a notice that the goods were in the situation of refused goods. They were bound to give an opportunity to the party of directing how they should be disposed of; and, if they were in that situation, really the act of the Company here is almost destructive of the pleas which they maintain. They were bound, I think, either to have re-directed the goods or resent the goods to the party who sent them, if that should be the nature of the instruction given. They ask for direction in this case—the Highland Company does—because they tell the party directly that these rags have been refused, and they ask direction as to the disposal of them. Now, in the ordinary case, and in the absence of the specialty about the arrestment, which I conceive to be a bad one, there should be no doubt about the result. What is their undertaking? Is it not an undertaking to dispose of these goods according to the direction they receive from the sender? I think so; and if so, then they, as the carriers of these goods, and under the responsibility which attaches to them according to their own view of the nature of the contract, undertake that that direction shall be given effect to. Now, in the meantime the application by Rennie is made, and peremptorily rejected. It occurs to me, in these circumstances, that the parties, in the mode in which they dealt with this matter, were responsible for their refusal. The very implied undertaking which this note contains—and it is the implied undertaking which naturally results from the nature of the contract—compels them not merely to take the custody of the goods until the party shall be certiorated as to the matter, but further to put them into such custody, and in such direction, as will enable that party to give effectual direction upon the subject. I do not think they were entitled to put them into a warehouse, or to make the deposit in such a way as to preclude their own power of giving effect to the intimation as to re-address or re-sending which might be given by the party to whom the goods belonged. In this case they took them in custody themselves, and put them into their own warehouse, and there could therefore be no difficulty on that head. But, at all events, it appears to me that, until that matter was cleared up, they were in the position of being bound to hold the goods, and bound to hold them in such a situation that the matter might be disposed of according to the direction of the sender of the goods. This is not a solitary kind of case. There are many other cases in which a similar contingency might happen. There might be an obliteration in the address, or an ambiguity in it, so as to prevent the possibility of delivery. There might be a removal of the trader to whom the goods were consigned. There might be a bankruptcy, and the trader might refuse to receive them in consequence of the act of bankruptcy having taken place between the time of the despatch and the time of the delivery. In all such cases, it appears to me to be quite clear that the parties who have undertaken the carriage have impliedly undertaken to see that, in the event of any such contingency intervening, there shall be due care taken, and that there shall be an opportunity given of a re-address or a re-direction. It does not occur to me that that portion of the Sheriff-substitute's note is perhaps exactly expressive of the law, in so far as the necessity of giving time for the purposes of arrangement is concerned. I think it is quite possible that a rejection—a peremptory and absolute rejection, leaving no room for any communication or any successful result—might leave them in the position of being liable to re-send the goods, or to take steps about them, without waiting for an opportunity of settlement;

but that is not important. I think they were bound, taking these goods into their warehouse, to wait the direction of the party, as the parties charged with the carriage of these goods, and that they were responsible for that; and under that impression, it appears to me that the Great North of Scotland Company were in the matter the agents for the Highland Railway Company at the time when the application was made for the re-direction of the goods; and of course acting as such agents, and not in any different or special character—the contract of carriage not being so completely implemented as to terminate all the obligations incident to it—the judgment of the Sheriff-subsitute, which I propose should be affirmed, is well founded.

LORD COWAN—For the reasons your Lordship has stated, and having regard to the state of the proof in the cause, I concur in thinking that the interlocutor of the Sheriff, which has been more immediately brought before us in this appeal, cannot be adhered to. I think the Sheriff has taken an erroneous view of the import of the facts that appear in the evidence; and I do not think the argument which the defender addressed to us in support of his defence was at all directed to uphold the interlocutor of the Sheriff. His findings in point of fact, upon which he proceeds to alter the judgment of the Sheriff-substitute, do not at all satisfy my mind that they lead to the conclusion at which his Lordship has arrived, because he finds, amongst other things, "that at the time when the said John Wright (that is, the North of Scotland Railway Company at Aberdeen) refused to deliver the rags as aforesaid, he was not acquainted with the said Fraser Rennie; that the said Fraser Rennie had no right of property in the rags, but the same belonged to the pursuer as his property; that no claim for delivery of the rags were made by Fraser Rennie in the name or on account of the pursuer as the owner thereof;" and then he goes on to support his view on these facts by referring to the arrestment. Now, I do not think that any one of these facts is at all supported by the proof, or support the legal inference at which his Lordship has arrived—but quite the contrary. Rennie was the consigner. Rennie was entitled to demand delivery of the goods at Aberdeen; and if Mr Wright in his great anxiety to do right, doubted whether Rennie was the right person or not, all he had to do was to send for the consignee, and have the matter cleared up. And then, as regards the arrestment, that again depends upon different grounds, to which I shall refer in the sequel. Therefore, putting aside the Sheriff's judgment, which I think is not well founded either in law or in fact, we come to consider on whom lay the responsibility; and the difficulty and interest of the case lay altogether in that argument so ably addressed to us by Mr Lancaster and Mr Asher on the question—whether the contract of carriage (because I so put it) had come to an end when these goods were offered delivery of to Rennie the consigner? Had the contract of carriage come to a close at that time?—that is, upon the 6th of September, because I hold that the written evidence conclusively establishes that the first demand for these goods was made on 6th September, and the arrestment was not used, according to the written evidence, until the 7th September. Now that the North of Scotland Railway Company, although not the direct receivers of the goods at Inverness, but having received them from the Highland Railway Company, the defenders here, at an intermediate place, and taken them along to the place of destination, must be responsible for every injury arising to the goods, and for all the responsibilities of a carrier, just as much as if they had been the original receivers at Inverness,—is a proposition, I apprehend, which cannot be controverted by the authorities which have been referred to by the Sheriff-substitute in his note, and which I think were admitted to be well founded in the course of this discussion. That being the case, the question just reverts to where I put it at first, viz.—Whether the Act of Wright, in refusing delivery at the time delivery was demanded by the consignee at Aberdeen, was an act done incident to the contract of carriage which still subsisted, and the responsibilities of which still necessarily attached to the original receiver of the goods? Now, what really did occur? Upon the 6th of September, in consequence of a communication that Mowatt had made to the consigner at Inverness, Rennie goes up to Aberdeen and goes to the Railway Company. Mowatt meanwhile had refused to take delivery of one of the carts of these rags. Rennie goes and sees Wright; and what passed between these two is spoken to perfectly consistently, and I think, perfectly in corroboration of each other by the two witnesses Rennie and Wright, because I think it conclusively established that Wright had refused these goods to Rennie. He said he would not deliver them to him "at any rate." That is, because of the arrestment having been used, and that was upon the 7th. Wright says, "Rennie asked for the rags, which he said were his. I told him that they had been offered to Mowatt and refused; and that, since that, they had been arrested, and that I would not give them up to him at any rate." Whether he had the true Rennie, the real Simon Pure or not, he would not give them to him, although he had an offer of the price of the carriage. Now, what does Wright do? He immediately, upon the 6th of September, intimates to Inverness that these goods are refused by the consignee, because he says he knows nothing about them—(*reads* Wright's note to Sturrock). Then comes the communication made by Sturrock, acting for the Highland Railway Company, the defenders, to Mowatt, recognising that the act of the Aberdeen Company was truly an act done by them as their agents, and as in the course of the contract of carriage still subsisting—(*reads* Sturrock's note). Now, taking these documents, I apprehend it is as clear as daylight that they were understood to have passed between these parties as the carrier on the one hand, not having yet got quit of his responsibilities as carrier, and the consigner on the other, who was still the owner of the goods, in respect of the refusal of the consignee to receive them. That is the position of the case when it is stated that an arrestment was used in the hands of the Railway Company. Now that arrestment did not contain any specification of these particular rags. It was an arrestment in general terms of all goods in the hands of the Railway Company that belonged to a man of the name of M'Donald. Of course I do not mean to say that, had it been a specific arrestment of these goods, the case that has been referred to would not have been an authority for saying that Wright was quite right in refusing delivery, but that was not the nature of this arrestment. It was an arrestment in general terms of all goods belonging to M'Donald, and these rags did not belong to

M'Donald. Then what does this gentleman do in his anxiety to keep quit of responsibility? In place of bringing a multiplepoinding, which he might have done, or taking some steps judicially to put himself into the right, while the parties interested would be allowed to compete for their respective rights, he actually undertakes to fight the battle himself, and takes up the cudgels; and when a demand is made for a delivery judicially, he insists that he is right, and refuses to give them up. I do not mean to say that the Company might not have been placed in a very different situation had they deposited these goods in a separate warehouse, upon being refused by the consignee, and intimated that to the party who had sent them, guarding themselves against competing with those who had an interest in the goods, and that they might not then have been freed from liability; but I go entirely upon this, that at the time these occurrences took place the contract of carriage had not come to an end, and that the responsibilities of that contract had not been removed from the Aberdeen Company, as coming in room of the Highland Railway Company by delivery of the goods, or by depositing them in some safe place previous to delivery.

LORD BENHOLME—I have listened with great satisfaction to the opinion which your Lordship has pronounced in this case, and as I am quite of the same opinion I do not wish to repeat it.

LORD NEAVES—I concur.

LORD JUSTICE-CLERK—We shall substantially repeat the findings of the Sheriff-substitute's interlocutor with some variation, and find the pursuer entitled to expenses in both Courts.

Agents for the Appellant—Murdoch, Boyd, & Co., W.S.

Agents for the Respondents—H. & A. Inglis, W.S.

Friday, June 25.

FIRST DIVISION.

HUNTER *v.* LORD ADVOCATE AND OTHERS.

Property—Bounding Title—Foreshore—Possession—Superior and Vassal—Feu-rights—Barony—Sea-flood. A superior feued out portions of his estate lying along a navigable river at a place where the sea ebbed and flowed, describing the subjects as bounded by the sea-flood on the south, and as conveyed with all his rights and interest in the lands. He did not set out his own boundary seaward. *Held* that the whole right of the superior, sea-ward, was conveyed to the vassal, and that the superior could not lay claim to reclaimed land lying between the feus and the sea.

David Hunter of Blackness brought this action against the Commissioners of her Majesty's Woods and Forests, and against Kay's Trustees and others, proprietors of certain subjects feued out by the pursuer's predecessors, lying to the south of the Magdalen Yard Road of Dundee, and extending along the north bank of the Tay, for declarator that a certain piece of foreshore lying *ex adverso* of the defenders' property belonged exclusively to the pursuer as proprietor of Blackness. He averred exclusive immemorial possession. The first named defenders disclaimed all interest in the action. The other defenders relied on their titles, in which the feus were described as bounded on the south by the sea-flood, and on possession. After a proof, the Lord Ordinary (JERVISWOODE), relying mostly on the possession, assoilzied the defenders.

The pursuer reclaimed.

CLARK and BALFOUR for pursuer.

IVORY for Lord Advocate.

Solicitor-General, (YOUNG, Q.C.,) and THOMS for Kay's Trustees.

GIFFORD and MACKINTOSH for Barrie.

At advising—

LORD PRESIDENT—The pursuer of this action, Mr Hunter of Blackness, sets himself out in his summons as being proprietor of and infeft in the lands and barony of Blackness, situated near Dundee; and in the first and second articles of his condescendence he represents himself as being proprietor of a barony. He says in the beginning of the second article that the "lands, barony and estate of Blackness are situated near Dundee, and extend for about a mile along the north bank of the river Tay, which is there a navigable river, in which the sea ebbs and flows, and which forms the boundary of the said lands, barony and estate." Mr Hunter alleges further in the articles of his condescendence, beginning with condescendence 4, and ending with article 7, that he or his predecessors feued out certain portions of the estate of Blackness to the predecessors of the defenders; but it is not alleged in any of these articles that the portions of the estate of Blackness feued out are within the barony of Blackness. In his summons he speaks of the lands and barony of Blackness only in describing his title. In his condescendence he speaks of an estate of Blackness, in addition to the lands and barony; and in speaking of the portions of ground which are feued out, he speaks of the estate of Blackness alone, purposely excluding the name of the barony. Thus, in the 4th article he says:—"By contract of feu dated the 21st day of February 1767, Alexander Hunter of Blackness, now deceased, sold and in feu-farm disponed to Frederick Dederickson, merchant in Dundee, and his heirs and assignees, 'all and haill these six acres of land, being part of the estate of Blackness, bounded'" so and so. In the 5th article he says that, on the 26th of September 1767, by contract of feu between the late Alexander Hunter and Thomas Mitchell, there was "sold and in feu-farm disponed 6 acres, being part of the estate of Blackness;" and in the 6th article, "By feu-contract between the late David Hunter of Blackness and William Sturrock, dated in 1789, there was feued out these parts and portions of the estate of Blackness then possessed by Alexander Miller and Thomas Halket." And in the 7th article he says —"The several subjects above described are contiguous to each other and form that portion of the estate of Blackness which lies between the property of the Kirk Fabric of Dundee on the east, and the Magdalene Yard, &c., on the other side." Now, I cannot read these articles of the condescendence without understanding that Mr Hunter declines to allege, and purposely abstains from alleging, that the lands held in feu by the defenders form or ever formed any part of the barony of Blackness There is some evidence upon that subject of a conflicting kind, not very easily followed, but clearly establishing this, that the estate of Blackness is not all within the barony. And therefore I am not prepared to hold that these lands held by the de-