1862, 4 Irv. 143) had fairly settled that an English conviction of theft was equivalent to a Scotch conviction; and it would be absurd to hold that this rule was inapplicable wherever the particular species of theft was dealt with by statute. The whole criminal law of either country might be codified, but that would not alter the nature of the crimes dealt with.

The Court repelled the objection.

(Before Lord Ardmillan.)

H. M. ADVOCATE *v.* JOSEPH KIDD AND OTHERS.

Indictment—Locus. The *locus* charged in a case of theft was specified to be the store or premises in or near George Street, Glasgow, occupied by a certain firm. It was proved that the firm had two stores, connected by a private covered way—one in George Street, the other in a parallel street about 200 yards distant from George Street, and that the theft was actually committed in the latter store. Objection, that the *locus* charged was different from the *locus* proved, *repelled*, on the ground that the premises were really contiguous.

HER MAJESTY'S ADVOCATE *v.* HOWISON.

Interpreter—Admissibility of Evidence. A witness who had such an impediment in speech as to be totally unintelligible to the jury, *allowed* to be examined by a sworn interpreter who professed to understand his articulation.

Francis Melville (principal witness) had such an impediment in speech as to be totally unintelligible to the jury. The witness could not express himself by means of the deaf and dumb alphabet. His landlady, however, one of the witnesses for the prosecution, professed to understand his inarticulate mode of expression. She was then called to interpret. The ordinary oath having been administered to her—

M'Kechnie, for the panel, objected to any evidence being taken in this way. The proposed evidence is communicable only through the medium of the landlady, an uneducated woman, whose skill in interpreting, if it exists at all, is peculiar to herself. There are no means of checking the correctness of her interpretation. The witness expresses himself in no known language, nor in any manner so as to be understood by anyone but his landlady. It is not the case of a foreign language, which can competently be interpreted; nor that of a dumb person, whose evidence is tested by a known method, or given by gestures which all men understand more or less. The case goes beyond all these, and there is no authority for admitting the evidence.

Asher (A.-D.), in reply—The evidence of deaf and dumb persons (through the medium of the deaf and dumb alphabet and an interpreter thereof) is now held admissible. So also is the evidence of persons who can speak no language known to the Court, in which case an interpreter is interposed. This case stands on the same footing. The evidence should be admitted for what it is worth.

Lord Ardmillan — The point raised is in some respects a novel one. In both classes of cases referred to by the Advocate-Depute there is some recognised medium of communication. The present case differs in respect of there being no recognised medium. However, the law will never shut out evidence if it can be got credibly. The case of *Montgomery* (25th September 1855, 2 Irvine, 222), in which evidence was admitted through an interpreter, though not an officer of a deaf and dumb institution, rules the case.

His Lordship accordingly repelled the objection, leaving the credibility of the evidence as communicated open to comment to the jury.

COURT OF SESSION.

Thursday, November 2.

SECOND DIVISION.

VERDIN BROTHERS *v.* ROBERTSON.

Sale—Postal Telegram — Mistake — Responsibility. Held that the sender of a postal telegram was not responsible for loss caused by the mistake committed in the transmission of the message by the telegraph clerk, who was a Government official, and not a private messenger.

The appellants sued the respondent for the price of a quantity of salt alleged to have been sold by them to him, and of which he had refused to take delivery in the following circumstances, as detailed by the Sheriff-Substitute, viz.:—"On the 1st September last the defender ordered a message to be despatched by telegraph to the pursuers in these terms—'Send on immediately fifteen twenty tons salt invoice in my name, cash terms.' That the said message, as delivered to the pursuers, was in these terms—'Send on rail immediately fifteen twenty tons salt Morice in morning name, cash terms.' That during the previous part of the herring fishing season the defender had sent several orders for salt to the pursuers by telegraph, and that such orders contained the name of the herring curer to whom in each instance the salt was to be sent. That on receipt of the telegram in question the pursuers despatched the salt libelled, addressed 'Morice, Peterhead,' and sent invoice thereof to the same address. That on 14th September the pursuers wrote to the defender that delivery had not been taken of the salt. That on 15th September the pursuers received back the invoice they had sent addressed to 'Morice, Peterhead,' through the dead-letter office. That there was no such person as 'Morice, Peterhead.' That it was thereafter sold under judicial warrant."

The Sheriff-Substitute (Comrie Thomson) found that the defender was liable for the loss which had arisen in consequence of the mistake in the telegram. He remarked in his note—"The point raised in this case has been felt to be very perplexing. A mistake occurred in a telegraphic message, through the fault of neither of the parties—but it led to loss. On whom is the loss to fall? The Sheriff-Substitute is of opinion that it must fall on the person who selected the telegraph as the means of conveying his order. In doing so he took the risk of the errors to which such a mode of communication is liable. He did not repeat his order in writing, and he did not take advantage of the

provision by which 'telegrams may be repeated at the request of the sender, if he desires to adopt this extra security against risk of error, by being sent back from the office at which they are received to the office from which they are forwarded.' Further, the defender was advised by the pursuers' letter of 1st September 'that they had received his order, and that they would push it forward as soon as possible.' But he allowed nearly a fortnight to elapse without receiving the goods, and without making any inquiry. It was urged with much force on behalf of the defender that the message, as received by the pursuers, was unintelligible, and that they were therefore bound to have abstained from executing it until its obscurity had been cleared up. But although the principle involved in that argument is probably sound, yet looking to the usual stenographic way in which telegrams are written, especially by commercial men, and to the facts that the message in question contained all that was necessary for the execution of an order—quantity, time of delivery, and consignee's name, and that in the defender's previous orders a consignee's name had always been given, —it is thought that the message was not so unintelligible, or *ex facie* so blundered, as to impose upon the receiver of it the duty of making further inquiry before executing it.

"The view that has been given effect to in the interlocutor seems to derive some sanction from the rule established in the English Courts, that an action is not maintainable against a private telegraph company by the receiver of a telegram for a mistake in it which has occasioned him damage. The right of action is in the sender, the obligation to use due care and skill in the transmission of a message arising *ex contractu*, to which the receiver is not privy—*Playford* v. *United Kingdom Electric Telegraph Company*, July 3, 1869, 4 L. R., Q. B., 706."

The defender appealed to the Sheriff (GUTHRIE SMITH), who pronounced this interlocutor and note:—"Sustains the appeal; recalls the interlocutor appealed against; finds that on 1st September last the defender transmitted from Peterhead a telegram to the defenders in the following terms—'Send on immediately fifteen twenty tons salt invoice in my name, cash terms.' That on the same day said telegram was received by the defenders in Liverpool, but through a mistake of the officials of the post-office was expressed as follows—'Send on rail immediately fifteen twenty tons salt Morice in morning name, cash terms.' That on said 1st September the pursuers wrote to the defender—'We have received your message, with order for fifteen twenty tons fishing salt, our price delivered at Peterhead is 36s. 6d. per ton nett. We shall push it forward as soon as possible.' That in conformity with the telegram, as received, the pursuers, on the 2d September, despatched by rail to 'Morice, Peterhead,' 8 tons 18 cwt. salt, and on 5th September 9 tons 11 cwt. 2 qrs., and at the same time forwarded invoices thereof to the same address; finds that as no such person as Morice, Peterhead, could be found, the said invoices were returned to the pursuers through the dead-letter office on 15th September, and said salt was not delivered to the defender; finds that the defender having thereafter refused delivery of the salt, in respect it was too late for the purpose required, it was sold under judicial warrant; finds, in these circumstances, in point of law, that as the post-office authorities are only agents to transmit messages in the terms in which the senders deliver them, there was no contract between the pursuers and the defender for the purchase of the salt forwarded to the above address, and the defender is not indebted to the pursuers in the sums sued for; therefore assoilzies the defenders from the conclusions of the action; finds the pursuers liable in expenses; allows an account to be given in, and remits the same, when lodged, to the Auditor for taxation, and decerns.

"*Note.*—The only question in this case is who is responsible for a mistake made by a telegraph clerk in the transmission of a message. A person is in general responsible for his messenger, because it is his own fault if he employs one who makes a mistake. But as regards telegraphic messages, the public has now no choice, for by the Act 32 and 33 Vict. c. 73, the Postmaster-General has the exclusive privilege of transmitting telegrams within the United Kingdom, and it is well settled that although he and his subordinates are each liable for their own personal negligence, he is not liable for the neglect or default of the officers employed in the department. That being so, on what principle should the risk of mistakes be thrown on the sender of the message—mistakes which he does nothing to occasion, and which apparently he can do nothing to prevent? The transmission of telegrams having ceased to become a matter of private enterprise, and being one of the duties performed by the State, the principle of the maxim *qui facit per alium facit per se* has no application, and as, when the telegraph is used, both sender and receiver are equally cognisant of the risks incident to the medium of communication, there is nothing in the relation of the parties implying a warranty on the part of the sender that his message would be accurately transcribed and faithfully transmitted by the public official who undertakes the duty, and over whom the sender cannot possibly exercise any control. It is, however, unnecessary to argue the question as one of principle, because in the recent case of *Henkel* v. *Pape*, Nov. 10, 1870, L. R. C. Ex. 7, it was decided by the Court of Exchequer that the sender of a message incurs no responsibility for any mistakes which may be made in the passage from him to the receiver, and as the circumstances of that case were precisely analogous to the present, the Sheriff conceives that the precedent ought to be followed. The legal position of the parties then is this—The pursuers must prove their contract. The defender instructed the post-office authorities to carry a message to Liverpool on certain terms, but that message was never delivered, and another was substituted in its place, which the defender never authorised. There is therefore no contract between the parties, such as the pursuers put forward in their summons, and consequently the defender must be assoilzied with expenses."

The pursuers appealed.

ASHER for them.

The LORD ADVOCATE and SHAND in answer.

The Court dismissed the appeal, adhering to the judgment of the Sheriff.

Agent for Pursuers—A. Morison, S.S.C.

Agents for Defender—Morton, Whitehead, & Greig, W.S.