—R. M. & J. M. YELLOWLEES, *Solicitors*, 64 Murray Place, Stirling, *Agents*'; and to hold that thereafter intimation has been fully given in terms of the Bankruptcy (Scotland) Act 1913, and in particular section 44 and Schedule B thereof; and to authorise the Sheriff of Stirling, Dumbarton, and Clackmannan, upon proof of such notice having been duly inserted, to proceed in the sequestration as if the notice required by the said Bankruptcy Act, and in particular section 44 and Schedule B thereof, had been correctly given on the 23rd May 1922, or to do further or otherwise in the premises as to your Lordships shall seem proper."

Counsel for the petitioner in the Single Bills moved the Court to grant the prayer of the petition. He referred to *Murray*, 1906, 8 F. 957, 43 S.L.R. 686.

The opinion of the Court (the LORD PRESIDENT, LORDS MACKENZIE, SKERRINGTON, and CULLEN) was delivered by

LORD PRESIDENT—I think, in view of the precedent afforded by the case of *Murray* (8 F. 957), we may grant the relief asked for, but it must be on the same condition as was imposed in the case of *Somerville & Company* (7 F. 651), namely, that the expenses of the petition and of the procedure connected therewith will not be allowed against the estate.

The Court pronounced this interlocutor—

"... Authorise the petitioner to insert in the *Edinburgh* and *London Gazettes*, within six days from this date, a notice in the terms set forth in the prayer of the petition: Authorise the Sheriff of Stirling, Dumbarton, and Clackmannan, upon proof of such notice having been duly inserted, to proceed in the sequestration as if the notice required by the Bankruptcy Act, and in particular section 44 and Schedule B thereof, had been correctly given on the 23rd May 1922, and decern: Find that the expenses of and incidental to the petition shall form no part of the expenses of said sequestration or be chargeable therein."

Counsel for the Petitioners — Maclean. Agents—Shield & Purvis, S.S.C.

Friday, June 23.

SECOND DIVISION.

[Lord Sands, Ordinary.

JAMES SCOTT & SONS, LIMITED *v.* R. & N. DEL SEL AND ANOTHER.

Contract — Frustration of Contract—Arbitration—Contract to Ship Jute—Order in Council Prohibiting Export of Jute — Suspension or Termination of Contract—Application of Arbitration Clause.

A firm of jute merchants contracted to ship a specified number of bales of jute from Calcutta to Buenos Ayres. The contract contained, *inter alia*, the following provisions:—"Any delay in shipment caused by fire, strike, breakages, or accidents, and/or war, and/or civil strife, and/or any other unforeseen circumstances, and/or pestilence amongst the workmen engaged in connection with the manufacture, and/or shipment of the goods of this contract, to be excepted, and the quantity short produced in consequence thereof to be deducted from the quantity named in this contract, or delivered soon as possible thereafter, buyers having the option of refusing it after time. Sellers must notify buyers within six days of such delay. Should the vessel by which freight has been engaged be commandeered or delayed by the Government, sellers shall not be responsible for any late shipment or other consequences arising therefrom, and the goods shall be sent forward as early as possible. . . ." It also contained an arbitration clause in the following terms:—"Any dispute that may arise under this contract to be settled by arbitration in Dundee, and in the event of a dispute as to quality a fair number of intact bales as may be required by the arbitrators to be sent by buyers to Dundee, and if required by sellers a further fair number of intact bales are to be returned to Calcutta at sellers' expense." Before all the bales of jute had been shipped, further export of jute from India to the Argentine was prohibited by an Order in Council of the Governor-General of India. A dispute having arisen between the parties as to whether the contract was rendered void and unenforceable *quoad* the balance of the bales of jute, *held* that the question fell to be determined by arbitration, the dispute being one that had arisen under the contract.

James Scott & Sons, Limited, merchants and manufacturers, Dundee, *pursuers*, brought an action against R. & N. Del Sel, merchants, Buenos Ayres, Rosario, and Dundee, and also against Thomas Agnew, solicitor, Dundee, *defenders*, in which the conclusions were for declarator "that the said Thomas Agnew as oversman appointed by the Sheriff-Substitute of Forfarshire at Dundee in the submissions contained in twenty-seven contracts entered into betwen the pursuers and defenders, the said R. & N. Del Sel, for the sale of hessian cloth and other jute goods by the pursuers to the said defenders, *videlicet*, two contracts dated 19th February, four contracts dated 22nd February, four contracts dated 5th March, five contracts dated 9th March, eight contracts dated 12th March, and four contracts dated 21st March, all in the year 1917, and under which arbiters were appointed respectively by the said defenders and by the pursuers under protest conform to a letter from the said defenders to the pursuers dated 8th, and a letter from the pursuers to the said defenders dated 20th, both days of March 1918, has no jurisdiction to determine whether said contracts were in consequence of the embargo or prohibition of exporting jute goods from India to the Argentine imposed by the

Indian Government on or about 24th August 1917 in so far as regarded the balance of the 2800 bales sold for shipment to the said defenders during July and August 1917, but not shipped during these months, amounting said balance to 1875 bales, rendered void and not enforceable by the pursuers and the said defenders, or otherwise were rendered voidable at the option of the pursuers, and became void on their exercise of said option and ceased to be enforceable by the said defenders against the pursuers, and whether the pursuers were accordingly discharged of all obligation to ship and to deliver to the said defenders the said 1875 bales, or to pay damage in respect of their consequent failure to ship and deliver said 1875 bales, and further and in any event that the said Thomas Agnew as oversman foresaid has no jurisdiction to assess damage alleged to be due by the pursuers to the said defenders in respect of their failure to ship and deliver said 1875 bales of jute goods; and it ought and should be found and declared by decree of our said Lords that in consequence of said embargo or prohibition by the Indian Government the twenty-seven contracts before referred to, in so far as regards the balance of 2800 bales of jute goods thereby sold by the pursuers to the said defenders for shipment to the said defenders during July and August 1917, but not shipped during these months, amounting said balance to 1875 bales, became void or otherwise became voidable in the option of the pursuers, and were by them declared void, and that the said contracts to the extent aforesaid ceased to be and now are not enforceable at the instance of the said defenders against the pursuers; and for interdict against the said Thomas Agnew from determining the said question as to the effect of the embargo or prohibition by the Indian Government, and from proceeding to assess and determine the amount of damage alleged to be due by the pursuers to the said defenders in respect of their failure to ship and deliver said 1875 bales."

The following narrative is taken from the opinion of Lord Ormidale *infra*:—"The pursuers are jute merchants in Dundee. The defenders are merchants at Buenos Ayres, Rosario, and Dundee. By contracts dated in February and March 1917, entered into by the pursuers' branch at Calcutta and the defenders' house at Buenos Ayres the pursuers agreed to sell to the defenders certain jute goods and provided for shipment from Calcutta to Buenos Ayres in July, August, and September 1917. The contracts between the parties contained, *inter alia*, the following provisions:—[*Quoted supra in rubric.*]. At the dates when the contracts were entered into there was no restriction on the export of manufactured jute goods from India to the Argentine. On 12th May, however, the Governor-General of India by Order in Council prohibited such export to all destinations other than the United Kingdom except under a licence granted by the chief customs officer at the place of export. The pursuers aver that they obtained the necessary licences and had made all the necessary arrangements to ship the goods contracted for on the only two vessels fixed to leave Calcutta for the Argentine during July and August, but that these vessels were commandeered by the British Government, and that they then arranged to ship by the 'Amatonga,' the only vessel thereafter available during these months, as much of the jute as the vessel would receive on board, viz., 925 bales, which left a balance of 1875 bales of the shipment for the months of July and August unexecuted. On 24th August the collector of customs issued an intimation that 'the export of jute goods from India to the Argentine is prohibited. This Order will be enforced immediately after the sailing of the "Amatonga" now in port. It will not be possible for me to give any consideration to future commitments in the case of any later steamer proposing to load for the Argentine.' In reply to inquiries the pursuers were informed by the India Office that 'no licences are being granted at present for the export of jute goods from India to the Argentine. The embargo was imposed at the request of the Foreign Office, and this office is unable to say when it is likely to be removed.' The pursuers then took up the position that in consequence of the embargo the implement of the contracts for shipment of jute in July and August became then and there impossible, and so informed the defenders. The latter, on the other hand, declined to accept this view, insisted on delivery, and finally with the object of getting fulfilment of the contracts, nominated an arbiter, and called upon the pursuers to do the same. A dispute they said had arisen under the contract, and in terms of the contract that dispute fell to be settled by arbitration. The pursuers, under protest and under reservation of the right to decline to proceed with the arbitration, thereupon also nominated an arbiter, and an oversman having thereafter been appointed by the Court a record was made up in the arbitration. The arbiters having differed in opinion devolved the submission on the oversman, who having considered the whole cause with reference to his jurisdiction found, *inter alia*, '(3) that the arbitrations as contemplated embrace the dispute between the parties whether respondents were bound to deliver the said 1875 bales.' The pursuers then raised the present action to have it declared, *inter alia*, that the oversman had no jurisdiction to determine whether the contracts were in consequence of the embargo or prohibition of exporting goods from India to the Argentine rendered void and not enforceable, and for interdict against him from proceeding to determine the question."

The pursuers pleaded, *inter alia*—"1 The question whether the pursuers were bound to deliver the 1875 bales referred to in the first item of the defenders' claim in the arbitration not being a question comprehended in the terms of the submission by the parties, the pursuers are entitled to decree of interdict as concluded for. 2. *The said contracts, including the reference clauses therein contained, having quoad the said balance of July and August goods*

been brought to an end by (a) the said embargo or (b) the uncertainty as to the possibility of export of goods to the Argentine thereby occasioned, and consequent frustration of the contracts, or (c) the pursuers' cancellation of the said contracts, the said Thomas Agnew has no jurisdiction to entertain the defenders' claims, and the pursuers are entitled to decree of declarator and interdict accordingly." [Plea 2 was added by way of amendment in terms of the interlocutor of 25th June 1921 *infra.*]

The defenders pleaded *inter alia*—"5. *The arbitration clause contained in the said contracts not having been brought to an end either by the said prohibition or by the suspension of the granting of licences or by the pursuers' attempt to cancel the contracts, or for any other reason, the same is binding upon the parties and enforceable according to its legal import.*" [Plea 5 was added by way of amendment in terms of the interlocutor of 25th June 1921 *infra.*]

On 13th November 1920 the Lord Ordinary (SANDS) repelled the pursuers' first plea-in-law.

Opinion.—"In this action the pursuers seek to obtain a judicial interpretation of a contract between them and the defenders, and to restrain the oversman in an arbitration between them from proceeding to adjudicate upon it. Under contracts between the parties the pursuers were bound to ship certain consignments of jute goods from Calcutta to Buenos Ayres in July and August 1917. Timeous shipment was prevented by Government interposition, and the question between the parties is whether under the contract there was a continuing obligation to ship these goods when the Government embargo was removed, or whether on the other hand there was, as regards the contracts for the shipments in question, such a frustration as released the defenders altogether from the obligation to deliver. The contracts are not altogether easy of interpretation, but although I heard considerable argument upon them I do not think it necessary or desirable in the view I take to attempt to construe the provisions as regards delivery and delay.

"One of the terms of the contracts is that 'any dispute that may arise under this contract to be settled by arbitration in Dundee.' It might perhaps seem surprising that a firm in the Argentine should subject themselves to arbitration in Dundee about goods which were to be shipped from Calcutta to Buenos Ayres, but Dundee is the centre of the jute market, and there is a well-established system of arbitration there. An arbitration has been begun between the parties at Dundee, the institution of which gave rise to proceedings in the Sheriff Court and in this Court, but although that arbitration was allowed to proceed the pursuers do not appear to have done anything to prejudice the pleas which they now advance. They maintain that the dispute upon which they desire judgment in the present action is not covered by the words of the arbitration clause—'Any dispute that may arise under this contract.' They maintain in the first place that the interpretation of the contract contended for by the defenders leads directly to a claim of damages, and that an arbiter has no power to assess and award damages unless that matter has been expressly remitted to him by the arbitration clause. Although the defenders did not formally abandon the point, they conceded that there is authority which is binding upon me that arbiters cannot assess or award damages under a general clause of reference in a contract. If there has been a breach of contract the amount of damages thereby suffered is certainly one of the questions arising out of the contract, but by a rule peculiar to the law of Scotland it is not so treated under a reference clause which does not contain an express reference of that matter. Whilst, however, I go with the pursuer so far, I cannot go as far as to hold that when the interpretation of a contract is referred to arbitration this provision is nullified whenever interpretation in a certain way will infer a claim of damages.

"The pursuers, however, further maintain that the question of frustration is not within the contract but lies altogether outside it, and that accordingly the question of whether they are released by frustration is not a matter which they are bound to refer to arbitration as being a question arising under the contract. A number of recent cases upon this branch of the law were cited. The Court of last resort has undoubtedly in the cases which have arisen since the outbreak of the war carried the doctrine of frustration by the occurrence of the unforeseen further than seems reminiscent of the *Boyd & Forrest* litigations. But the learned Lords have always been most careful to disclaim the idea of release from fulfilment of a contract through change of circumstances otherwise than by giving effect to an express or implied condition of the contract itself. Mr Chree argued that this is a pious fiction—a fiction because it does not correspond with anything that was in the minds of parties at the time—pious because it seeks to do homage to a very sacred legal principle—the sanctity of contract. I confess I have some sympathy with Mr Chree. It does seem to me somewhat far fetched to hold that the non-occurrence of some event which was not within the contemplation or even the imagination of the parties was an implied term of the contract. The Campanile at Venice fell a few years ago after standing for many centuries. One can figure the case of an artist who had entered into a contract to make a painting of the Campanile. That his contract should be treated as frustrated by the collapse of the Campanile is a reasonable view, but it seems somewhat far fetched to suggest that this is so because it was an implied condition of the contract that the Campanile should remain standing instead of simply putting it upon the supervening impossibility of fulfilment. No doubt this theory has been developed to square with the rule of the English common law in regard to supervening impossibility. A tiger has escaped from a travelling menagerie. The milk-girl fails to deliver the milk. Possibly the milkman may be

exonerated from any breach of contract, but even so it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract. But though I sympathise with Mr Chree's difficulty I am unable to adopt his reasoning. His contention is this. We must accept it from the House of Lords that the contract may be treated as frustrated in respect of the failure of an implied condition of the contract. But as this is a legal fiction we must not carry it to its logical consequences. We may attribute the frustration to the non-fulfilment of an implied term of the contract, but we are not to treat the ascertainment of whether there is such an implied term as a question of interpretation of the contract. I think, however, on the contrary, that the doctrine of implied term of the contract must be given its logical consequence, and that if contracts are to be held as frustrated in virtue of the failure of an implied term, the question whether there is such an implied term is a question arising under the contract.

"A third contention for the pursuers I understood to be this. Even though the question is in terms one arising under the contract, if it raises the issue whether the obligations of the contract any longer subsist, then that is not a question arising under the contract in the sense of a clause of reference; in other words that a clause of reference is not applicable where a decision in a certain way would be not merely interpretative but resolutive of the contract. I am unable, however, to accept this view and I do not think that there is any authority in support of it.

"I shall accordingly repel the first plea-in-law for the pursuers, continue the cause, and grant leave to reclaim."

The pursuers reclaimed, and on 25th June 1921 the Second Division pronounced this interlocutor — "Recal said interlocutor: Open up the record in the action: Allow same to be amended in terms of the minute of amendments and answers thereto, and the said amendments having been added of new close the record: Appoint pursuers to reprint the record embodying said amendments; and remit the cause back to the Lord Ordinary. . . ."

The Lord Ordinary having resumed consideration of the cause, on 15th March 1922 repelled the first and second pleas-in-law for pursuers and sustained the fifth plea-in-law for the defenders.

Opinion.—"In this case I dealt with one of the pursuers' pleas, and my judgment was submitted to review in the Inner House. There my interlocutor having been recalled *in hoc statu* the pursuers made extensive amendments of their pleadings, and the case was remitted back to me. When the case came before me again it was matter of agreement by counsel upon both sides that it was difficult to submit any argument that was not covered by my former judgment. Only one point was raised, not as having been altogether overlooked before, but as having not been sufficiently emphasised. The pursuers contended that the contract having, as they averred, been rendered impossible of fulfilment, the whole contract, including the arbitration clause, was at an end. This clause, they maintained, being ancillary could not stand upon its own legs. I was referred to the following cases:—*Municipal Council of Johannesburg* v. *D. Stewart & Company* (1902) *Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20; Hudson's Building Contracts (4th ed.), vol. ii, p. 414, reporting *Kennedy* v. *Mayor of Barrow-in-Furness* (1909); *Sanderson & Son* v. *Armour & Company*, 1921 S.C. 18, 58 S.L.R. 355; *Scott* v. *Gerrard*, 1916 S.C. 793, 53 S.L.R. 642. Where in the course of the execution of a contract containing a general arbitration clause one of the parties fails to fulfil certain parts of it for reasons which he proposes to justify, the other party is entitled to invoke the arbitration clause to have the validity of these reasons adjudicated upon. I am unable to hold that it makes a fundamental difference if what the party fails to perform and the non-performance of which he proposes to justify happens to be all that remains to be done to complete the execution of the contract, and that accordingly in such circumstances the other party cannot invoke the arbitration clause. An illustration which occurs to me is that of a contract for the purchase of heritage. If there were an arbitration clause wide enough to cover a dispute as to title, I think that the purchaser could not successfully avoid the reference by pleading that he had cancelled the whole contract as being impossible of performance owing to the inability of the seller to give him a satisfactory title.

"I shall accordingly repel the first and second pleas-in-law for the pursuers, sustain the fifth plea-in-law for the defenders, continue the cause, and grant leave to reclaim. [*His Lordship then dealt with the question of expenses.*]"

The pursuers reclaimed, and argued—(1) The contract was frustrated because a *vis major* had prevented the pursuers from fulfilling it—*Sanderson & Son* v. *Armour & Company*, 1921 S.C. 18, 58 S.L.R. 355, *affd.* (1922) 59 S.L.R. 268, *per* Lord President Clyde at 1921 S.C. 25 and 26, 58 S.L.R. 360 and 361, and Lord Shaw at 59 S.L.R. 274; *M'Master & Company* v. *Cox*, *M'Ewan & Company*, 1921 S.C. (H.L.) 24, 58 S.L.R. 70, *per* Lord Dunedin at 1921 S.C. (H.L.) 28, 58 S.L.R. 72, and Lord Shaw at 1921 S.C. (H.L.) 30, 58 S.L.R. 73; *Bank Line, Limited* v. *Arthur Capel & Company*, [1919] A.C. 435, *per* Lord Finlay, L.C., at 441, 442, and 443, Lord Shaw at 449 and 450, Lord Sumner at 451, 454, and 455, and Lord Wrenbury at 462; *Metropolitan Water Board* v. *Dick, Kerr, & Company*, [1918] A.C. 119, *per* Lord Finlay, L.C., at 125 and 126, Lord Dunedin at 128, and Lord Parmoor at 140; *Anglo-Russian Merchant Traders and John Batt & Company (London), in re*, [1917] 2 K.B. 679, *per* Viscount Reading, C.-J., at 686 and 688; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited*, [1916] 2

A.C. 397, *per* Earl Loreburn at 403 and Viscount Haldane at 407; *Horlock* v. *Beal*, [1916] 1 A.C. 486, *per* Lord Atkinson at 496 and 502, Lord Shaw at 513, and Lord Wrenbury at 525; *Andrew Millar & Company, Limited* v. *Taylor & Company, Limited*, [1916] 1 K.B. 402; *Jackson* v. *Union Marine Insurance Company*, (1873) L.R., 8 C.P. 572, *affd.* (1874) L.R., 10 C.P. 125, *per* Brett, J., at L.R. 8 C.P. 581, and Bramwell, B., at L.R., 10 C.P. 143 and 145; *Baily* v. *De Crespigny*, (1869) L.R., 4 Q.B. 180, *per* Hannen, J., at 185; *Esposito* v. *Bowden*, (1857) 7 E. &. B. 763, *per* Willes, J., at 784. (2) The question in the present case was not one for the arbiter. The question was as to whether or not the contract still stood, and the dispute between the parties did not fall within the category of "any dispute that may arise under this contract." The dispute that had arisen was not a dispute under the contract. It had been brought about by the occurrence of an event which was never in the contemplation of the parties—*Mackay & Son* v. *Leven Police Commissioners*, (1893) 20 R. 1093, 30 S.L.R. 919, *per* Lord Adam at 20 R. 1101, 30 S.L.R. 923; *M'Alpine* v. *Lanarkshire and Ayrshire Railway Company*, (1889) 17 R. 113, 27 S.L.R. 81, *per* Lord President Inglis at 17 R. 121, 27 S.L.R. 84; *Hogg* v. *Corporation of Belfast*, [1919] 2 I.R. 305, *per* Madden, J., at 312; *Lawson* v. *Wallasey Local Board*, (1883) L.R., 11 Q.B.D. 229. The arbitration clause in *Municipal Council of Johannesburg* v. *D. Stewart & Company*, (1902) *Limited*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20, was treated as executorial. (See Lord Dunedin in *Sanderson & Son* v. *Armour & Company*, *cit.*, at 59 S.L.R. 273.) *Moore* v. *M'Cosh*, (1903) 5 F. 946, 40 S.L.R. 691, was also referred to.

Argued for the respondents—The dispute that had arisen between the parties was a dispute which they had agreed to refer to arbitration. The decisions in the frustration cases were based upon the assumption of an implied condition in the contract. In the present case the question of frustration was a question under the contract, because it was necessary to examine the contract to ascertain whether there was an implied condition in it, and therefore the question was one for the arbiter—*Sanderson & Son* v. *Armour & Company* (*cit.*), *per* Lord Dunedin at 59 S.L.R. 272; *James Nimmo & Company, Limited* v. *North British Railway Company and Another* ((H.L.), 12th March 1919, not reported); *Bank Line, Limited* v. *Arthur Capel & Company* (*cit.*), *per* Lord Sumner at pp. 455 and 456; *Metropolitan Water Board* v. *Dick, Kerr, & Company* (*cit.*), *per* Lord Dunedin at pp. 128 and 129; *F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company, Limited* (*cit.*), *per* Lord Parker at p. 422 and Earl Loreburn at p. 404; *North British Railway Company* v. *Newburgh and North Fife Railway Company*, 1911 S.C. 710, 48 S.L.R. 450, *per* Lord President (Dunedin) at 1911 S.C. 718 and 719, 48 S.L.R. 454; *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826, *per* Blackburn, J., at pp. 833 and 839; *Hogg* v. *Corporation of Belfast* (*cit.*) was a case under Irish law, and under that law as under English law the Court had a discretionary power to retain for its own determination questions of law. In that case the Court merely decided to exercise its discretion (see Kenny, J., at p. 315), but under Scots law the Court had no such discretionary power. *Municipal Council of Johannesburg* v. *D. Stewart & Company*, (1902) *Limited* (*cit.*), was really an English case, because in that case it was a term of the contract that English law was to be applied. (2) Although an arbiter could not assess the quantum of damage unless the question of the quantum had been specially referred to him, nevertheless he could decide questions of liability for damage—*Aberdeen Railway Company* v. *Blaikie Brothers*, (1851) 13 D. 527, (1852) 15 D. (H.L.) 20, 24 S.J. 537, (1854) 16 D. 470 (see 24 S.J. at pp. 538 and 539, and 16 D. 470). A fear that the arbiter might exceed his jurisdiction was not a good reason for depriving him of it—*North British Railway Company* v. *Newburgh and North Fife Railway Company* (*cit.*), *per* Lord President (Dunedin) at 1911 S.C. 720, 48 S.L.R. 454.

At advising—

LORD JUSTICE-CLERK—By the contracts in question it was, *inter alia*, provided—"Any dispute that may arise under this contract to be settled by arbitration in Dundee."

The pursuers contend that by what is called an "embargo or prohibition of exporting jute goods from India to the Argentine, imposed by the Indian Government on or about 24th August 1917," the arbitration provided for under the contract, which is an arbitration by two arbiters and an oversman, does not confer jurisdiction to determine whether the contracts between the pursuers and defenders were rendered void or voidable in the pursuers' option as regards 1875 bales which in terms of the contract should have been shipped in July and August 1917, and that the oversman has no jurisdiction to assess damage alleged to be due by the pursuers to the defenders in respect of their failure to ship these 1875 bales.

In my opinion the controversy between the parties is a dispute which has arisen under the contract. The subject which is referred to arbitration is—"Any dispute that may arise under the contract." It is provided by the contract that "any delay in shipment caused by fire, strike, breakages, or accidents, and/or war and/or civil strife and/or any other unforeseen circumstances are to be excepted," and the quantity short produced in consequence thereof is to be deducted from the contract quantity or delivered soon as possible thereafter, buyers having the option of refusing it after time, and the effect of this will fall to be considered by the oversman. Provision is also made for late shipment due to the vessel by which freight has been engaged being commandeered or delayed by the Government, and for late shipment from any cause other than the above mentioned.

In my opinion the controversy depends primarily on the construction of the afore-

said arbitration clause, and falls, in the first instance at least, within the jurisdiction of the arbiters and oversman. The words "any dispute that may arise under the contract" are in themselves very comprehensive. The contracts were entered into in 1917 while the war was in progress, and the parties contemplated that Government action might interfere with the due implement of the contracts. In my view the disputes which have arisen cannot be held to be excluded from the scope of the arbitration.

In the case of *James Nimmo & Company, Limited* v. *North British Railway Company*, decided by the House of Lords on 12th March 1919, to which we were referred, and copies of the judgments in which were handed to us, the Lord Chancellor said this —"I take the view that if parties choose to bind themselves unconditionally to an arbitration clause they may be assumed not indeed to predict with particularity what legislation will be passed, but to anticipate that some legislation will be passed, even that that legislation may affect the subject of agreement and still to prefer an arbitrator to a law court. What is important in these matters is to examine the language of the clause which provides for the arbitration in order to see whether that clause in its own terms contains limitations. I find no such limitations here."

We have no clause dealing with supervening legislation here, but in my opinion the passage I have just quoted applies with as much force to the Orders of the Government of India which prohibited the due shipment of the jute here in question.

The Lord Ordinary has only dealt with the first and second pleas for the pursuers and the fifth plea for the defenders, and the argument before us proceeded on the footing that the arbitration was a Scottish arbitration. While I find myself in practical agreement with the Lord Ordinary, it would, I think, be desirable to have a formal finding as to the arbitration proceeding. [*His Lordship then indicated the lines on which an interlocutor should be framed.*]

LORD ORMIDALE—[*After narrative quoted supra*]—I concur in the conclusion at which your Lordship has arrived. The arbitration will now proceed, and as it would be out of place to express any opinion on questions which will fall to be determined by the arbiter I propose to add very little.

The pursuers' contention that the result of the Indian Government's intervention was to render the export of goods not only impossible but illegal, and that accordingly the contracts, including the reference clause, were brought to an end, was supported by the citation of many authorities. But in all the cases to which we were referred the answer to the question whether the contract was frustrated or not depended on two considerations—(first) the terms of the particular contract itself, express or implied, and (second) the facts and circumstances which were alleged to have brought it to an end. The cases have a more direct bearing perhaps on the second rather than on the first of these considerations, but in all of them the terms of the contract are first considered, and it could not well be otherwise, for the foundation of the doctrine that a party may be discharged from his contract obligations is always, in the absence of an express term, an implied term of the contract itself. In *Metropolitan Water Board* v. *Dick, Kerr, & Company* ([1918] A.C. 119) Lord Dunedin (at p. 127) says—"Earl Loreburn points out that in all cases it must be said that there is an implied term of the contract which excuses the party in the circumstances from performing the contract"; and then continues—"It is, in my opinion, the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted." Whether on an examination of the contracts in question it is necessary to invoke the aid of an implied term, or whether the contracts themselves do not contain express terms which may help to solve the difficulty that has arisen may be an open question. As to this I express no opinion. However that may be, the present parties are, it seems to me, clearly in dispute as to the meaning and effect of the contracts. It is necessary therefore, in my opinion, that the agreements must *ante omnia* be considered and construed, and unless the reference clauses are to receive the limited application which the pursuers ascribe to them—unless, in other words, the present dispute is not in the sense of the clauses a dispute under the contracts—their construction must be determined by the tribunal selected by the parties, viz., the arbiter. It matters not that the question submitted may be a delicate and difficult question of law. "If," as Lord Dunedin says in *North British Railway Company* v. *Newburgh and North Fife Railway Company* (1911 S.C., at p. 719, 48 S.L.R. 454), "the parties here have contracted themselves out of the jurisdiction of the Court, according to the law of Scotland we cannot help ourselves, and the tribunal they have elected is the tribunal to which they must go."

In my opinion the matter in dispute does fall within the clause of reference. In expression this clause is so wide and universal as to give it a place in the "ample variety" of arbitration clause which includes every form of dispute—*Sanderson & Son* v. *Armour & Company*, 59 S.L.R. at 272—and does not set up merely an executory arbitration. Again, while the dispute may ultimately involve a matter of damages, it very clearly is not merely a question of the assessment of damages, and I agree with the Lord Ordinary that when a dispute under a contract is referred to arbitration such a provision is not nullified because its interpretation in a particular way will infer a claim of damages.

LORD HUNTER—[*After referring to the material clauses of the contracts, and narrating the circumstances in which the present action was brought*]—A number of cases bearing upon the doctrine of frustration of contracts were cited to us, among them being *Tamplin Steamship Company*,

[1916] 2 A.C. 397; *Dick, Kerr, & Company,* [1918] A.C. 119; and the *Bank Line, Limited,* [1919] A.C. 435. In *Tamplin's* case Lord Loreburn (at p. 403) said, after referring to *Horlock* ([1916] 1 A.C. 486) and previous decisions—"An examination of those decisions confirms me in the view that when our courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved." In that case a tank steamer had been chartered on time charter, dated 1912, for sixty months at a fixed sum per month for the use and hire of the vessel. There was an exception of arrests and restraints of princes. After the outbreak of war, when the charter-party had about three years to run, the steamer was requisitioned by the Admiralty. It was held that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract, and that the requisition did not determine or suspend the contract. Lord Parker (at p. 422) said—"In considering the question arising on this appeal it is, I think, important to bear in mind the principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which renders its performance impossible, or otherwise frustrates the objects which the parties to the contract have in view. This principle is one of contract law, depending upon some term or condition to be implied in the contract itself, and not on something entirely *dehors* the contract which brings the contract to an end." His Lordship held that the requisitioning of the steamship by His Majesty's Government was a case of "restraint of princes" within the meaning of a clause of the charter-party, and that there was therefore in view of the nature of the venture contemplated by the contract no room for implying a condition leading to the termination of the contract on the requisitioning. In *Dick, Kerr, & Company* a notice was issued by the Ministry of Munitions in February 1916 in exercise of the powers conferred by the Defence of the Realm Acts and Regulations requiring certain contractors to cease work on their contract. It was held in consequence of this Act that the contract had ceased to be operative. Lord Dunedin said (at p. 130)—"On the whole matter I think that the action of the Government, which is forced on the contractor as a *vis major*, has by its consequences made the contract, if resumed, a work under different conditions from those of the work when interrupted." In *Bank Line, Limited,* where a steamer that was the subject of a time charter was requisitioned before delivery under the contract, it was held that the contract was frustrated. Lord Sumner in that case (at p. 457) said—"The principle of frustration is rendered difficult by some uncertainty as to the tests to be used. In what terms ought the circumstances to be defined which lead to the dissolution of the contract, and who is to apply them, the judge or the jury?" At a later part of his opinion he says—"Ultimately the frustration of an adventure depends on the facts of each case, but it is no easy matter so to direct a jury as that they will neither ask themselves what the actual parties thought of at the date of the contract, nor dispose of the case by saying that it would be unreasonable to find a verdict for the claimant, nor be governed only by their notion of what is fair between man and man, nor be left in impenetrable doubt as to what the legal direction means."

The decisions and opinions to which I have referred may appear to have a more direct bearing upon whether or not a case of frustration has been established than upon the preliminary question whether that matter has to be determined by arbitration or by a court of law. I have cited them, however, as showing that a question of frustration like that raised by the pursuers cannot be determined independent of the contract and the facts of the case having a bearing upon the interpretation of the contract. In that view the only question is whether the clause of reference is of so ample a character as to remit to the selected tribunal all questions of dispute, or is of a special and limited character embracing only questions such as those of quality and timeous delivery arising during the currency of the contract. I see no reason for reading the arbitration clause in the limited sense suggested.

The question whether the contracts between the pursuers and the defenders were frustrated by Order in Council issued by the Governor-General of India releasing each party from further implement of obligations imposed upon them appears to me to depend upon the construction of the contract in the light of the established facts. I think therefore that a question under the contract has arisen, and that the pursuers are not entitled to the declarator which they ask as to want of jurisdiction on the part of the oversman. As a question as to the arbiter's right to assess damages may subsequently arise there will be no harm in sisting procedure, and any interlocutor pronounced by us should avoid any appearance of favouring any of the views on the merits presented by parties. Everything on the merits is left to the arbiters.

I should notice the case of *James Nimmo & Company, Limited* v. *North British Railway Company,* decided by the House of Lords on 12th March 1919, which does not appear in any of the authorised reports. In that case there was an agreement between parties as to thirled waggons, and a clause of reference to an arbiter as to any dispute about the intent or meaning of the agreement. Subsequent legislation dealt with demurrage claims for detention of waggons by traders. It was held that the Railway Company was not debarred from appealing to arbitration by the circumstance that the claim was affected by subsequent legislation. The Lord Chancellor said—"He (counsel) says that the question, if there be a question, between the parties has arisen from

supervening legislation which has given to the appellants a right to make a claim which was not in the contemplation of the parties at the date of the agreement, and he adds that the parties never intended to submit that claim to arbitration. I think I understand that submission, though I am quite unable to assent to it. It amounts in fact to this, that where parties choose to bind themselves by an arbitration clause, that clause will cease to have operative effect if later legislation modifies the situation of the parties in a manner which they did not contemplate at the time they entered into the arbitration clause. The contention must go that length or else in my judgment it is meaningless. This contention cannot in my judgment be sustained. I take the view that if parties choose to bind themselves unconditionally to an arbitration clause, they may be assumed, not indeed to predict with particularity what legislation will be passed, but to anticipate that some legislation will be passed, even that that legislation may affect the subject of agreement, and still to prefer an arbitration to a law court."

The result of my view is that I am in agreement with the opinions of the Lord Ordinary and your Lordships, and also as to the form of interlocutor proposed.

The Court pronounced this interlocutor—

"... Recal the said interlocutor [of 23rd June 1922]: Find that the dispute between the parties as to whether the pursuers were bound to deliver the 1875 bales short-delivered of the bales sold by them for shipment during July and August 1917 falls to be determined by arbitration: Therefore repel the first and second pleas-in-law for the pursuers and *quoad ultra* sist the action in the meantime. . . ."

Counsel for the Reclaimers (Pursuers)—Chree, K.C.—Candlish Henderson, K.C.—Mackintosh. Agents — Morton, Smart, Macdonald, & Prosser, W.S.

Counsel for the Respondents (Defenders)—Gentles, K.C.—A. R. Brown. Agents—Aitken, Methuen, & Aikman, W.S.

Saturday, June 24.

SECOND DIVISION.

[Lord Anderson, Ordinary.

GRIFFIN *v.* DIVERS AND SHERRY.

Reparation — Slander — Innuendo — Statement that Licence-holder had Signed Requisition for Poll under Temperance (Scotland) Act 1913 (3 *and* 4 *Geo. V, cap.* 33)*—Hypocrisy and Treachery towards Licensed Trade.*

The licence-holders in a city, in anticipation of a poll being taken under the Temperance (Scotland) Act 1913, formed an association for the purpose of protecting the interests of the licensed trade. In an action of damages for slander brought by one licence-holder against another the pursuer averred that he had joined with his colleagues in the trade in organising opposition to the taking of a poll and had pledged himself not to sign a requisition form, and sought an issue as to whether the defender had falsely and calumniously stated that he (the pursuer) had signed a requisition form in favour of a poll, thereby representing "that the pursuer was a hypocrite, and was acting deceitfully and treacherously towards his colleagues in the licensed trade." The defender pleaded that the action was irrelevant. The Court (*rev.* the judgment of Lord Ordinary) *allowed* the issue, *holding* that in view of the averments of the pursuer the case could not be disposed of without inquiry.

Slander—Innuendo—Accusation of Hypocritical and Treacherous Conduct—Privilege—Malice—Sufficiency of Averments of Malice — Knowledge that Statement is Untrue.

The licence-holders in a city, in anticipation of a poll being taken under the Temperance (Scotland) Act 1913 (3 and 4 Geo. V, cap. 33), formed an association for the purpose of protecting the interests of the licensed trade. One of the licence-holders brought an action of damages for slander against two other licence-holders, in which he averred that at a meeting of a ward committee of the Local Veto Defence Association the defenders, acting in concert and with the design of injuring him and holding him up to public odium and contempt, falsely, calumniously, and maliciously stated that he had signed a requisition form in favour of a poll, thereby representing that the pursuer was a hypocrite and was acting deceitfully and treacherously towards his colleagues in the licensing trade. The defenders averred that the information on which they proceeded had come from the pursuer himself. This the pursuer denied. *Held* that the occasion was privileged, but that malice had been relevantly averred, and issue *allowed*.

Observed, per Lord Hunter—"I cannot imagine any better case of malice than