

[16th July 1839.]

(Appeal from the Court of Session, Scotland.)

WILLIAM DUNLOP and Company, Appellants. <sup>1</sup>

No. 22.

[*Sir William Follett.*]

GEORGE ANTHONY LAMBERT and others, Respondents.

[*Attorney General (Campbell)—James Anderson.*]

*Carrier—Contract—Risk.*—In an action by consignors for value of a puncheon of whiskey thrown overboard, and lost, against ship owners, who by bill of lading acknowledged the shipment of the goods in good order and condition, “to be delivered in the like good order at Newcastle,” dangers and accidents of the sea excepted, and which bill of lading the consignors transmitted to the consignee, with an invoice of the price, including the amount of freight and of the insurance paid by consignors, and charged against the consignee,—the consignors libelled a contract by the ship owners to deliver the goods at Newcastle, and also an agreement by the consignors to be answerable to the consignee for the safe delivery of the goods. The judge at the trial directed the jury in point of law, “That as it appeared that the pursuers at the time of furnishing the spirits in question had sent an invoice thereof to the purchaser, bearing that the same had been insured, and that the freight thereof and insurance were charged against the said purchaser in the invoice, the pursuers were not entitled in law or interest to recover the value of the said puncheon from the defendants:”—Held (reversing interlocutor of the Court of

<sup>1</sup> 15 D., B., & M., 884. 1232.

Session, which disallowed an exception to said direction,) that said direction was in point of law not correct in the mode in which it left the case with the jury,—in respect that it withdrew from their consideration the fact whether the goods had been delivered to the carriers on the risk of the consignors or of the consignee, and the question whether there was a special contract between the consignors and consignee sufficient to enable the consignors to recover in the action.

1ST DIVISION.  


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 Lord Ordinary  
 Fullerton.  


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ON the 31st of August 1833 the appellants, who are wholesale spirit merchants, sent to the agents at Leith of the respondents, who are ship owners, a puncheon of spirits, to be carried to the purchaser, Mathew Robson, near Newcastle, and a bill of lading was granted by the respondents agents to the appellants in these terms:—

<p>“ Mr. Mathew Robson,          “ Collier Row, by Hough-          “ ton-le-Spring, W.D.          “ No. 1369, 105 gs. care          “ of Mr. Lattimer, New-          “ castle.</p>	<p>Shipped by William Dunlop &amp;          Co., in good order and condition,          in and upon the good ship Ardin-          caple, whereof Macleod is master          for the present voyage, and now lying in the port of          Leith, and bound for Newcastle, one puncheon of          spirits, bung-full, with excise permit, being marked          and numbered as in the margin, and to be delivered          in the like good order, and well conditioned, at the          foresaid port of Newcastle, (all and every other          dangers and accidents of the seas, rivers, and navi-          gation, of whatsoever nature and kind, excepted,) unto          Mr. Mathew Robson, Collier Row, by Houston-le-          Spring, or to his assigns, freight for the said goods          being paid by William Dunlop &amp; Co. at primage and          To be taken out in average accustomed. In witness          running days after ship's whereof the master or purser of          arrival, or to pay the said ship hath affirmed to two          guineas per day demur-          rage.</p>
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“ bills of lading, all of this tenor and date, one of  
 “ which being accomplished, the other to stand void.  
 “ Dated in Leith, 31st August 1833.  
 “ (Signed) *Laing and Sword, Agents.*”

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The appellants transmitted to Robson, along with the bill of lading, an invoice, and a letter (in part), in the following words :—

“ Mr. Mathew Robson,                      Edinburgh, 31st August 1833.

“ Bo<sup>t</sup> of William Dunlop & Co.

“ Rectified British    One puncheon maltaqua,  
 “ Spirits and Com-    fine quality, W.D.&J.B.,  
 pounds.

“ No. 1369,—105 g. 11 O. P. are

“ 116 gs. p. 12s. 9d.                      -                      -                      £73 19 0

“ To freight paid to Newcastle, 10s. ;

“ insurance,  $\frac{1}{2}$  per cent.                      -                      -                      0 18 0

“ Puncheon with spirits not to be re-

“ turned                      -                      -                      -                      1 0 0

—————  
 £75 17 0  
 =

“ Mr. Mat. Robson,                      Edinburgh, 31st August 1833.

“ We hope the above will reach you in time and  
 “ give satisfaction. We reckon the quality very fine,  
 “ and we trust this will be the introduction to many  
 “ good transactions between us both. For amount, we  
 “ enclose our draft at three months, payable in London,  
 “ which please return us accepted and domiciled on  
 “ approval of the shipment. The spirits will be in  
 “ Newcastle on Monday morning if all is well, and  
 “ your farther orders will very much oblige yours  
 “ respectfully,                                      *Wm. Dunlop & Co.*”

In the manifest of the cargo of the *Ardincaple*, there was the following entry :—“ Consignee, Mathew Robson; residence, Newcastle; goods, marks, &c., one puncheon

DUNLOP & Co. “ whiskey, freight paid, 10s.; amount total invoice,  
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The goods having been lost, and not delivered, the appellants brought an action against the respondents for the value thereof; and (by their amended summons) libelled, “ that upon the 31st day of August last the pursuers shipped on board the steam ship or vessel called “ the Ardincaple of Newcastle, then lying at the port “ of Leith, and bound for Newcastle, one puncheon of “ spirits, bung-full, with excise permit, marked W. D., “ No. 1369, 105 gs.; addressed to Mr. Mathew Robson, “ Collier Row, by Houstoun-le-Spring, care of Mr. Lat- “ timer, Newcastle, to be delivered in good order and “ well-conditioned, at the aforesaid port of Newcastle, “ as addressed, conform to memorandum, receipt, or “ bill of lading granted by Messrs. Laing and Sword, “ agents at Leith for the owners of the said steam ship “ or vessel, bearing date the said 31st day of August “ last, and acknowledging that the freight for the said “ goods was paid, to be produced in process, and here “ referred to, and held as repeated brevitatis causa; the “ pursuers at the same time having undertaken by their “ agreement, and being answerable to the said Mathew “ Robson for the safe delivery of the said puncheon;” and the conclusion was for payment of the value of the goods to the appellants.

The respondents, among other defences, objected to the title or interest of the appellants to sue for and recover the amount (the said defence being designated preliminary). The Lord Ordinary pronounced the following interlocutor, disposing of the preliminary character of the said defence :—

“ 20th June 1835.—Lord Fullerton. Having heard

“ parties procurators, finds that the averments of the  
 “ pursuers are relevant to support their title and interest  
 “ to insist in the present action, and therefore repels the  
 “ preliminary defences as urged in bar of further proce-  
 “ dure in the action, and appoints issues to be prepared  
 “ in common form upon the matter in dispute.”

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The cause then went to trial on the following issues :

“ 1. Whether on or about the 31st day of August  
 “ 1833 the pursuers shipped a puncheon of spirits on  
 “ board the Ardincaple of Newcastle, a vessel belonging  
 “ to the defenders, for the purpose of being conveyed to  
 “ Newcastle, and delivered to Mathew Robson, Collier  
 “ Row, Houghton-le-Spring, care of Mr. Lattimer,  
 “ Newcastle? And 2. Whether the defenders wrong-  
 “ fully failed to deliver the said puncheon to the said  
 “ Mathew Robson, and are indebted and resting owing  
 “ to the pursuers in the sum of 75*l.* 17*s.* or any part  
 “ thereof, with interest thereon, as the value of the said  
 “ puncheon of spirits.”

The case came on for trial before the Lord President and a jury, on 21st March 1837. The appellants, among other evidence, adduced the deposition of Robson, who stated that he believed that the loss of the said puncheon was sustained by Messrs. Dunlop.

The respondents led no proof, and admitted the shipment, the loss and non-delivery, and amount of the claim, as stated.

The judge directed the jury that “ the pursuers  
 “ appeared to be entitled to a verdict upon the first  
 “ issue, and that the only question in dispute related to  
 “ the second issue; and did direct the said jury in point  
 “ of law, that as it appeared that the pursuers, at the  
 “ time of furnishing the puncheon of spirits in question,

DUNLOP & Co. “ has sent an invoice thereof to Mathew Robson, the  
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 and others. “ and that the freight thereof and insurance were  
 ——— “ charged against the said Mathew Robson in the said  
 16th July 1839. “ invoice, the pursuers were not entitled in law or  
 ——— “ interest to recover the value of the said puncheon  
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The appellants took an exception to this direction. The jury then returned the following verdict:—“ We  
 “ find, on the first issue, that the defenders (respondents)  
 “ were liable for the loss of the puncheon of whiskey,  
 “ their servants having placed it on deck, without  
 “ authority from the shippers.

“ We therefore find, on the second issue, that the  
 “ defenders (respondents) wrongfully failed to deliver  
 “ the puncheon to Mathew Robson; they not having  
 “ stowed it in the hold, as they were bound to do, pre-  
 “ vented his recourse on the underwriters.

“ On the last point of the second issue, we find that  
 “ the defenders (respondents) are not liable to the pur-  
 “ suers (appellants) for the value of the spirits, because  
 “ they were not, at the time of the loss, the rightful  
 “ owners of the goods in question, their invoice shewing  
 “ that their right in the whiskey ceased at the time of  
 “ shipment.”

The bill of exceptions was afterwards heard before the court, (along with a separate motion by the appellants for a new trial), the pursuers maintaining for argument in support of their exception,—1st, that the respondents plea was excluded by the previous interlocutor of the Lord Ordinary; and 2d, that the objection was not well founded in itself.

The court pronounced the following interlocutor,

disallowing the bill of exceptions, and refusing to grant a new trial:—"Edinburgh, 30th June 1837.—  
 "The Lords, after hearing counsel for the parties, dis-  
 "allow the bill of exceptions in this case; refuse the  
 "motion for a rule to shew cause why a new trial should  
 "not be granted; Find the defenders (respondents)  
 "entitled to expenses since the date of trial; appoint an  
 "account thereof to be given in, and remit the same to  
 "the auditor to be taxed and to report."

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Judgment of  
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The court subsequently pronounced judgment, and awarded expenses, by the following interlocutor:—

Judgment of  
Court,  
6th July 1837.

"Edinburgh, 6th July 1837.—The Lords having heard  
 "parties on the motion of the defenders (respondents),  
 "apply the verdict, assoilzie the defenders, find expenses  
 "due, subject to modification, appoint an account thereof  
 "to be given in, and remit the same to the auditor to  
 "be taxed and to report."

Dunlop and Co. appealed.

It has become unnecessary to repeat the arguments adduced, and authorities founded on, by the appellants and respondents respectively, in so far as they bear upon the judgment, the same having been fully explained by the Lord Chancellor in moving the judgment of the House of Lords.

LORD CHANCELLOR.—My Lords, this case of Dunlop & Co. v. Lambert is an appeal from an interlocutor of the Court of Session disallowing a bill of exceptions taken to the direction of the Lord President on the trial of an issue between the parties in the cause. The case arose out of the firm of Dunlop & Co. having sent a

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puncheon of spirits to their correspondent at Newcastle shipped on board a steam vessel. It appears that the steam vessel in its passage was overtaken by violent storms, and the puncheon of spirits not having been taken below, but left on the deck, it became necessary for the safety of the vessel to throw it overboard. An action was brought by the consignors, Dunlop & Co., against the owners of the vessel, to recover the value of the puncheon of spirits so lost.

The summons stated the case in these terms:—“ That  
“ upon the 31st day of August the pursuers shipped  
“ on board the steam vessel, then lying at Leith, one  
“ puncheon of spirits, bung-full, with excise permit,  
“ marked W. D., No. 1369, 105 gallons, addressed to  
“ Mr. Mathew Robson, Collier Row, by Houghton-le-  
“ Spring, care of Mr. Lattimer, Newcastle, to be  
“ delivered in good order and well-conditioned at the  
“ aforesaid port of Newcastle, as addressed, conform to  
“ memorandum, receipt, or bills of lading granted by  
“ Messrs. Laing and Sword; agents at Leith for the  
“ owners of the said steam ship or vessel, bearing date  
“ the said 31st day of August last, and acknowledging  
“ that the freight for the said goods were paid, to be  
“ produced in process and here referred to; the  
“ pursuers at the same time having undertaken by  
“ their agreement, and being answerable to the said  
“ Mathew Robson for the safe delivery of the said  
“ puncheon.”

My Lords, in the progress of the cause certain issues were directed, which issues were in these terms:  
“ First, Whether on or about the 31st day of August  
“ 1833 the pursuers shipped a puncheon of spirits  
“ on board the Ardincaple, a vessel belonging to



“ the defenders, for the purpose of being conveyed  
 “ to Newcastle, and delivered to Mathew Robson,  
 “ Collier Row, Houghton-le-Spring, care of Mr. Lat-  
 “ timer, Newcastle? And, secondly, whether the defen-  
 “ ders wrongfully failed to deliver the said puncheon  
 “ to the said Mathew Robson, and are indebted and  
 “ resting owing to the pursuers in the sum of 75*l.* 17*s.*  
 “ or any part thereof, with interest thereon, as the  
 “ value of the said puncheon of spirits?”

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One question raised upon the appeal was, how far the liability of the defenders to the pursuers was put in issue by the mode in which these issues were directed, it being stated that it had been made a matter of defence that the pursuers were not the right parties, and that that question was not intended to be included in the trial of the issue; certainly, that point was raised upon the pleadings, and I apprehend it is equally clear that the point was left open upon the issues. The second issue was, “ Whether the defenders wrongfully  
 “ failed to deliver the said puncheon to the said  
 “ Mathew Robson, and are indebted and resting owing  
 “ to the pursuers in the sum of 75*l.* 17*s.* or any part  
 “ thereof.” It is quite obvious that if it was not intended to leave that question of the legal liability open it would not have been laid in those terms; it would have been sufficient to direct a trial of the first issue, whether the pursuers had shipped a puncheon of spirits on board the vessel, and whether it was lost by the defenders having wrongfully failed to deliver the said puncheon of spirits; but the latter part of it, whether the defenders were indebted and resting owing to the pursuers in the sum of 75*l.* 17*s.* or any part thereof, with interest thereon, as the value of the said

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puncheon of spirits, necessarily involves the question, whether the liability belonged to the pursuers or to the person to whom the spirits had been consigned.

My Lords, at the trial the deposition of Robson, the consignee, was adduced; it stated "that he gave a bill for 75*l.* 17*s.*, the value of the spirits. The bill was renewed in consequence of another puncheon being sent a month later; that deponent desired Mr. Dunlop to insure the same, and to charge the expenses of that and the freight and the invoice to deponent; that the said puncheon was to be safely delivered on the quay at Newcastle before deponent was to consider it his property; deponent has not received a farthing for the loss." Then he states "that he made an affidavit that the puncheon was ordered from Messrs. Dunlop, and lost at sea; that deponent got a letter from Newcastle from the agents of the Ardincaple there, stating that he had to make an affidavit before a magistrate that the puncheon that was lost was his." There is also in evidence the fact that the bill of lading was in these terms: "Shipped by William Dunlop & Co., in good order and condition, in and upon the good ship Ardincaple, whereof M'Leod is master for the present voyage, and now lying in the port of Leith and bound for Newcastle, one puncheon of spirits, bung-full, with excise permit, being marked and numbered as in the margin, and to be delivered in the like good order and well-conditioned at the aforesaid port of Newcastle, (all and every other dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, excepted,) unto Mr. Mathew Robson, Collier Row, by Houghton-le-Spring, or to his assigns, freight for the said goods

“ being paid by William Dunlop and Co. at primage  
 “ and average accustomed.”

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The invoice stated the property in these terms: “ One  
 “ puncheon of spirits,” giving the description, “ 73*l.* 19*s.*;  
 “ to freight paid to Newcastle, 10*s.*, insurance, half per  
 “ cent., 18*s.*; puncheon itself, 1*l.*; making 75*l.* 17*s.*”

That was accompanied by a letter written by Dunlop &  
 Co. to Robson, in these terms: “ Owing to our young  
 “ friend John Dunlop having met with a rather serious  
 “ accident by a fall from or a crush by a gig, in the  
 “ country, where he is still, not being in a state to be  
 “ removed for a day or two, the above has been too  
 “ long in being forwarded, as your friend's letter was  
 “ locked up in his desk, and we did not know till last  
 “ night by a note from him that it was to be forwarded  
 “ at all; we hope it will reach you in time and give  
 “ satisfaction; we reckon the quality very fine, and we  
 “ trust this will be the introduction to many good  
 “ transactions between us both; for amount we enclose  
 “ our draft at three months payable in London;” the  
 draft being 75*l.* 17*s.*; and in the manifest of the cargo  
 entered “ Consignee, Mathew Robson; one puncheon  
 “ whiskey, freight paid, 10*s.*; letter written, 8th October;  
 “ 75*l.* 17*s.*”

My Lords, on the trial of these issues before the Lord  
 President, Robson's deposition on oath, which had been  
 taken under a commission, was, along with other evi-  
 dence, submitted to the jury; after which the Lord  
 President directed the jury in these terms: “ The Lord  
 “ President observed that under the admissions made  
 “ by the defenders counsel the pursuers appeared to be  
 “ entitled to a verdict upon the first issue, and that the  
 “ only question in dispute related to the second issue;

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“ did direct the said jury, in point of law, that as it  
 “ appeared that the pursuers, at the time of furnishing  
 “ the puncheon of spirits in question, had sent an invoice  
 “ thereof to Mathew Robson, the purchaser, bearing  
 “ that the same had been insured, and that the freight  
 “ thereof and insurance were charged against the said  
 “ Mathew Robson in the said invoice, the pursuers  
 “ were not entitled in law or interest to recover the  
 “ value of the said puncheon from the defenders.” The  
 pursuers excepted to that direction, and it was brought  
 under the consideration of the First Division of the Court  
 of Session; and the judges in that division, by a ma-  
 jority<sup>1</sup>, (one<sup>2</sup> of the judges being of a different opinion,)  
 approved of the summing up and direction of the Lord  
 President, disallowed the bill of exceptions, and the  
 direction of the Lord President therefore was affirmed,  
 and the new trial refused. From that judgment an  
 appeal has been brought to your Lordships house; and  
 the question is,—whether, in point of law, that summing  
 up and direction of the Lord President is maintainable,  
 namely, whether it be law in Scotland,—the law of  
 Scotland being in this respect the same as the law of  
 this country,—in a question between a carrier and  
 the person to whom the carrier is responsible, in the  
 event of property being lost, whether it be true in law,  
 that the sending an invoice to the consignee, by which  
 it appeared that the property had been insured and the  
 freight paid by the consignor, and the amount charged  
 by the consignor to the consignee, deprived the con-  
 signor of the power of suing, and of an interest or right  
 to recover the value of the property. My Lords, it is

<sup>1</sup> Lords President, Gillies, and M'Kenzie.<sup>2</sup> Lord Corehouse.

perfectly true, generally speaking, without regard to any special circumstances which may arise, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is the risk of the consignee. If a party directs property to be sent by a particular carrier no doubt he becomes his agent, and the decisions go to this,—that if, without designating the particular carrier, he directs that it shall be sent in the ordinary course, the delivery by the consignor to the carrier relieves him from all responsibility, and the delivery to the carrier is considered as a delivery to the consignee.

On reference, however, to the authorities it will be found that although that is the general inference, and where nothing particular passes, that it is universally true, it is capable of variations. If a particular contract be proved between the consignor and the consignee,—and it does not follow that the circumstance of the freight and the insurance being paid by the one or the other is to be considered a conclusive evidence of the ownership,—as notwithstanding the ordinary rule, of course there may be special contracts;—where the party undertaking to consign undertakes to deliver at a particular place, and if he undertakes to deliver at a particular place, the property, till it reaches that place, and is delivered according to the contract, is at the risk of the person consigning; so although the consignor may follow the directions of the consignee, and deliver the property to be conveyed, either by a particular carrier or in the ordinary course of business, still the consignor may make such a contract with the carrier as will make the carrier liable to him. There are, therefore, an infinite variety of circumstances which may occur in which the ordinary rule will turn out not to be the rule to regulate

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the parties. But the Lord President laid down that the jury must take it as a rule, admitting of no exception, that because the consignee was charged with the freight and insurance, that was not only a circumstance to be taken into consideration by the jury, but was, in point of fact, a circumstance that withdrew from the consideration of the jury the question of what was the particular transaction between the parties, for his Lordship says he directed the jury in point of law that the consignor was not, under such circumstances, entitled to recover. That circumstance, and that circumstance alone, was sufficient to shut out any contract from the case; and the jury did accordingly find a verdict for the defenders on that particular issue, negating the right of the pursuers to recover the value of the property in question.

My Lords, a reference to the authorities cited in the argument shows that no such rule of law exists, and that that circumstance is not conclusive. That is the only circumstance your Lordships have to consider. The Lord President directed the jury that that fact was conclusive,—so conclusive as to withdraw from their consideration other circumstances which might have been material to be considered, for instance, how far Robson's evidence was evidence which they ought to believe. In order to show how utterly impossible it is that that rule should be conclusive, your Lordships will permit me to observe that where a person desirous of having goods sent to him orders them from a distance, he necessarily must have added to the price not only the expense of the carriage but the risk of the carriage, for the owner of the goods will not deliver those goods at Newcastle at the same price at which he would deliver them at Edinburgh; there is the market price or the

shop price, the price which the vendor of the goods expects to receive, and which, at all events, he expects to receive; if any person comes to his warehouse at Edinburgh, and purchases goods, he charges the price of course at which he is willing to sell his goods, but if the party buying lives at a distance, there must be, in addition to the price of the goods, the price of the carriage,—that must be paid by somebody,—and there must also be the insurance if the party is to be protected against loss; so that it comes to the same thing, both to the consignor and the consignee, whether the consignor sells at the shop price, leaving the consignee to pay the freight and insurance, or whether the consignor sells at the shop price with the addition of the expense of the freight and insurance. In both cases the same sum will be paid by the party receiving the goods; and the vendor of the goods will have to receive the same sum of money as the price of the article he sells. Now, all that the invoice proves is, that the sum total to be paid by the consignee was the shop price, 73*l.* 19*s.*, and the cost of the freight and insurance.

My Lords, this does not rest on general principles only, for it has been the subject of several adjudicated cases. I would again call your Lordships attention to the summons, which states two grounds: first, the special contract with the carrier, by which he agreed to deliver at Newcastle; and then it states the fact, that, as between the consignors and the consignee, the consignors were under an undertaking to deliver the spirits at Newcastle. If the latter fact had been proved there could not have been any question that the consignee had nothing to do with the goods until they arrived at Newcastle, and were actually delivered to him there; and if

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that contract existed it ought to have been admitted to proof. Possibly it might not have been proved to the satisfaction of the jury, but it appears that the Lord President withdrew that question from the jury, and did not leave it to them to say whether Robson was to be believed or not, but finding on the invoice that the consignors had paid the freight and insurance, and charged them to Robson, the consignee, who no doubt was the person on whom those charges must ultimately fall, as in one way or other they must be added to the price of the goods before he could see what they had cost him, his Lordship directed the jury in point of law that they must find for the defenders.

My Lords, in order to prove that notwithstanding the ordinary right of the consignee to bring an action against the carrier for the loss of the goods he has undertaken to convey,—that notwithstanding that being the general rule, the right of action and the liability may be varied by special contract entered into between the consignor and the consignee, and that the payment of insurance by the one or the other is not conclusive evidence, I would refer to three or four cases in which that doctrine is very clearly established.

The first case in point of date, my Lords, is *Davis and Jordan v. James*, in 5 *Burrow*, 2680, in which the statement was that the vendors the manufacturers had delivered goods to a carrier, who undertook to carry for a certain price, and to deliver at a certain time. The action was brought, in consequence of the goods being lost, by the consignor, and it was contended that the consignee was the party who ought to bring the action. Lord Mansfield says, “there was neither law nor conscience in the objection. The vesting of the property may differ ac-



“ cording to the circumstances of cases, but it does not  
 “ enter into the present question. This is an action upon  
 “ the agreement between the plaintiffs and the carrier;  
 “ the plaintiffs were to pay him, therefore the action  
 “ is properly brought by the persons who agreed with  
 “ him and were to pay him.” In this case there is no  
 doubt that the consignors were the persons to pay. The  
 bill of lading itself states that Dunlop & Co., the con-  
 signors, had paid, and the contract was that they should  
 deliver the goods at Newcastle.

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My Lords, the next case in point of date is the  
 case of Moore v. Wilson, 1 Term Reports, 659; the  
 action was by the consignor; the declaration stated,  
 that the defendant undertook to carry the goods “ for a  
 “ certain hire and reward, to be paid by the plaintiff,”  
 which the defendant's counsel contended did not prove the  
 declaration. That agreed with the view of Mr. Justice  
 Buller, who nonsuited the plaintiff, whereupon a motion  
 for a new trial was made, and Mr. Justice Buller said he  
 had mistaken the law, for “ that whatever might be the  
 “ contract between the vendor and the vendee, the  
 “ agreement for the carriage was between the carrier  
 “ and the vendor, the latter of whom was by law liable.”

A case was referred to, Dawes v. Peck, in 8 Term  
 Reports, 330, in support of the law as laid down by the  
 Lord President. In that case the consignee had directed  
 the goods to be sent by a particular carrier; and the  
 court, holding that the consignor, by delivering the  
 goods to the carrier so designated, had parted with the  
 property, held that he could not maintain an action.

The same doctrine was laid down in another case,  
 where there was a mere delivery to a carrier without any  
 particular contract between either the consignor and

DUNLOP & Co. the consignee, or between the consignor and the  
 v. carrier. In *Dulton v. Solomons*, in 3 *Bosanquet and*  
 LAMBERT Puller, at page 584, Lord Alvanley, C. J., says, “ if a  
 and others. “ tradesman order goods to be sent by a carrier, though  
 16th July 1839. “ he does not name any particular carrier, the moment  
 Ld. Chancellor’s “ the goods are delivered to the carrier it operates as a  
 Speech. “ delivery to the purchaser ;—the whole property imme-  
 “ diately vests in him, he alone can bring an action  
 “ for any injury done to the goods,” which, no doubt, is  
 the rule in those cases where there are no particular cir-  
 cumstances proved, or any particular contract in evidence  
 between the plaintiff and defendant. In *Sergeant v. Mor-*  
*ris*, in 3 *Barnewell and Alderson*, 277, goods being ship-  
 ped, under a contract to deliver them in the consignor’s  
 name to the consignee, and it appearing that they were  
 at the consignor’s risk, it was held that the consignor  
 might sue although the consignee had insured the goods.  
 That is exactly the converse ; ordinarily speaking, the  
 consignee would be the person to bring the action ; there  
 the consignor brought the action, and it was held that  
 he was right in bringing the action, because he undertook  
 by contract that he would deliver the goods to the  
 consignee at a particular place, but the consignee had  
 insured. Now here, according to the Lord President,  
 that fact would have been put aside, and the party  
 insuring would have been the party to bring the action,  
 but the reverse was held in that case, and though the  
 consignee had insured, it was held that the consignor was  
 the right person to bring the action.

In *Brown v. Hodgson*, in 2 *Campbell’s Nisi Prius*  
*Cases*, page 36, the bill of lading stated that the goods  
 were shipped by order and on account of the consignee ;  
 Lord Ellenborough held that the consignor could not in

that case bring an action, because upon the evidence it appeared that he had nothing to do with them ; the bill of lading stated the contract with the carrier to deliver the goods at a certain place to the consignee, and stated that the goods had been shipped for and on account of the consignee. The production of that letter, unexplained by any other evidence, was considered by Lord Ellenborough conclusive that the consignor had parted with all the property in the goods, and that the consignee alone could bring an action.

But in the same volume, 2 Campbell's Nisi Prius Cases, page 639, in *King v. Meredith*, where the action was by the consignor against the consignee, for the price of the goods lost in the carriage, it appeared that the consignor was to pay the carriage, and it was objected that the goods were therefore at his risk, so that he could not maintain an action against the consignee. It was said he could not maintain the action because his paying the carriage was conclusive that the goods were at his risk. Mr. Justice Lawrence says, "The mode in which the carrier was to be paid makes no difference. The moment the spirits were delivered to him the property vested in the defendant ; the plaintiffs, by paying the carrier, did not become insurers of the spirits while in the hands of the carrier." There, again, is a fact which, according to the law as laid down by the Lord President, would have been conclusive, but in that case the court assumed that the right might be in one party, where the other party had paid the freight.

There is a case very strongly applicable to the present, the case of *Joseph v. Knox*, in 3 Campbell's Nisi Prius Cases, 320 ; that was an action against the owner of a ship, on a bill of lading signed by the master,

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for not carrying goods from London to Surinam. The bill of lading stated that the goods were shipped by the plaintiffs, that they were to be delivered in Surinam to Levy Davids or his assignees, and that the freight was paid in London. The goods consisted chiefly of butter, which the plaintiffs had received from merchants at Amsterdam to be forwarded to Levy Davids in Surinam, and which, in answer to a bill in equity, they swore they believed to be his property. For the defendant it was insisted that this action could not be maintained by Joseph & Co., who had no interest in the goods; they were merely the conduit through which the goods were to be transmitted from the merchants at Amsterdam to Davids at Surinam. The property being in Davids, the consignee, he alone was injured by the nondelivery of the goods, and he alone could sue to recover their value. It has often been decided that an action against a common carrier for the loss of goods must be brought by the purchaser, who ought to receive them, and not by the vendor, who had delivered them to the carrier. There the vendor delivers them merely as the agent of the purchaser, and on that ground can maintain no action respecting them. Lord Ellenborough laid down this as the law:—"I am of opinion that this action well  
 " lies; there is a privity of contract established between  
 " these parties by means of the bill of lading. That  
 " states that the goods were shipped by the plaintiffs,  
 " and that the freight of them was paid by the plain-  
 " tiffs in London; to the plaintiffs, therefore, from  
 " whom the consideration moves, and to whom the  
 " promise is made, the defendant is liable for the non-  
 " delivery of the goods. After such a bill of lading

“ has been signed by his agent he cannot say to the  
 “ shippers they have no interest in the goods, and are  
 “ not demnified by his breach of contract. I think the  
 “ plaintiffs are entitled to recover the value of the goods,  
 “ and they will hold the sum recovered as trustees for  
 “ the real owner.”

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The same question arose between other parties in a similar case<sup>1</sup>, and Lord Ellenborough again laid down the same doctrine.

These authorities, therefore, my Lords, established these propositions: that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the consignee is the proper person to bring the action against the carrier if they should be lost; yet the consignor may have a right to sue if he made a special contract with the carrier, and the carrier has agreed to take the goods from the consignor and to deliver them to any particular person at a particular place, which special contract supersedes the necessity of showing ownership in the goods; and by authority of the case of *Davis v. James*<sup>2</sup>, and the last case of *Joseph v. Knox*<sup>3</sup>, that the consignor is enabled to maintain an action, though the goods may be the goods of the consignee.

But the authorities also go to this: that although ordinarily speaking the consignee would be the party to bring the action, yet that the consignor also is entitled where there is a contract to deliver at a particular place, if the risk is in the consignor; and therefore the circumstance of the paying freight or the paying insurance, though it is a circumstance to be taken into consideration, as it is not conclusive on the question

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<sup>1</sup> *Van Omeron v. Dowick*, 3 Camp. 322.

<sup>2</sup> 5 Burr. 2680.

<sup>3</sup> 3 Camp. 320.

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of property, so it is not conclusive of the right to sue. The Lord President laid down that, in his opinion, it was conclusive, and therefore he shut out the proof of the fact. I think, therefore, that there are two objections to the mode in which the Lord President left the case to the jury; namely, that he withdrew from their consideration that which ought to have been submitted to their consideration,—I mean the fact whether the goods had been delivered to the carrier on the risk of the consignors or of the consignee; and the question whether there was a special contract between the consignors and the consignee, which in its circumstances would have been sufficient to enable the pursuers to recover in the action. It is not necessary for your Lordships to inquire in what form that ought to be left to the jury, the questions on the bill of exceptions being whether the direction of the judge was in point of law correct. I am of opinion that it was not correct in the mode in which it was left to the jury, and that your Lordships ought to reverse the interlocutor disallowing the bill of exceptions, and direct that a new trial be granted.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with directions to allow the bill of exceptions, and to grant a new trial, and to determine all questions of expenses between the parties in the said Court of Session, and to proceed otherwise in the said cause as shall be just, and consistent with this judgment.

DEANS and DUNLOP — JOHNSTON and FARQUHAR,  
 Solicitors.