process must move the Court for leave to lodge it before printing it.

Mrs Alice Stanley Peake or Grierson reclaimed against an interlocutor of the Lord Ordinary (Skerrington) dismissing an action of damages at her instance against Charles Ernest Mitchell. In the Inner House prints were boxed to the Court containing letters between the agents which had not been lodged in process.

In his opinion disposing of the case LORD SALVESEN observed—In the Inner House various prints were boxed to the Court containing some correspondence which had passed between the agents for the parties, partly before and partly after the action was raised. It appeared in the end that none of the correspondence was in process, that there was no admission of its genuineness, and it was said by the defender to be incomplete. In these circumstances it was entirely irregular to print and box the various appendices which contain it. It cannot be too clearly understood by the profession that no documents must be printed for the Inner House which have not been lodged in process, and it is the duty of the clerk to refuse to receive into the process any print of documents which are not already in process. If there has been an error in failing to lodge some documents on which parties intended to found, a motion must be made to the Court for leave to lodge it in process. So firmly has this rule been fixed in our practice that the Court is entitled to assume that any appendix which is boxed to it will contain only documents which are in process.

In the circumstances above narrated I think it is the duty of the Court to refuse to look at the correspondence.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

LORD ARDWALL was absent.

LORD DUNDAS was sitting in the Extra Division.

Counsel for Pursuer and Reclaimer—Wilson, K.C.—Armit. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender and Respondent—Blackburn, K.C.—Hamilton. Agents—Carmichael & Miller, W.S.

HOUSE OF LORDS.

Friday, December 1.

(Before the Lord Chancellor (Loreburn), Lord Alverstone, Lord Atkinson, and Lord Shaw.)

LAIRD & SON *v.* BANK OF SCOTLAND AND OTHERS.

(In the Court of Session, June 15, 1910, 47 S.L.R 794, and 1910 S.C. 1095.)

Right in Security—Transfer of Property—Appropriation of Goods.

Circumstances in which their Lordships *held, following* the judgment of the Lord Ordinary who had taken a proof, that certain logs of timber lying in a store had been sufficiently identified and appropriated as belonging to a transferee so as to transfer the property to him.

The case is reported *ante ut supra.*

Messrs Price & Pierce, Limited, claimants and reclaimers, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—This case in some respects comes before the House in a most unsatisfactory way. The inquiry as to facts, which was certainly long enough to fill a thick volume, nevertheless was on two crucial points—the only two points of fact which in their Lordships' view really signify—left in a somewhat vague way.

It is quite unnecessary to recite this oft-repeated story, because the inferences to be drawn as regards the greater part of what took place seem not to be in the least difficult, and there does not seem to be any substantial difference of opinion among the learned Judges in the Courts below, and I therefore shall not at all attempt to recapitulate the incidents of these transactions.

There are really two questions, and very short ones, which settle this case. The first question is in regard to the portion of 1166 logs, and the attendant portion the 416 logs, whether in regard to the 1166 logs they were marked F 17, and so marked before the 10th April. Now if they were so marked, then Mr Fraser (who was a perfectly honest man, against whom not the smallest imputations can be made or have been made at the Bar of your Lordships' House), who entered into this transaction honestly and took security and gave undoubtedly full value for it, held these logs through the warehouseman who held them for him, and the timber which was to be appropriated to his delivery order was identified and specifically allotted to him. The question then is, Was that mark F 17 put upon those logs so as to distinguish them before the 10th April? It was certainly the opinion of the Lord Ordinary that that had been done. It was the opinion of the Inner House that that had

been done, and it would take a very strong case upon a simple question of fact like that to induce your Lordships to differ from the opinion in point of fact of both of the tribunals from which the appeal comes here. My own view—if it is worth anything, not having seen the witnesses—is in accordance with that of the Lord Ordinary. I think that did take place; but I am sure we cannot displace the view that was taken by both Courts. That being so, it disposes of the 1166 logs and of the 416 logs which stand on the same footing, or at all events are dependent upon the decision with regard to the larger number. That is the first question.

Now the second question is in regard to the 200 logs and the 100 logs, whether in this case there was in favour of the Bank of Scotland an appropriation by putting the letters "B. of S." opposite to the particular logs in the book which has been produced before your Lordships.

Now here again the evidence is most unsatisfactory. It is extremely meagre. Great allowance of course has to be made for the multitude of points which arise in the course of a trial, especially a trial like this with so many issues; but at the same time, if I had been hearing this case, unless there was something in the course of the case or the particular examination which led me to that conclusion, I do not think I should have been satisfied as to the contention advanced by Mr Campbell upon the evidence that he gave. The Lord Ordinary came to the conclusion as follows—"There is a single passage in the evidence of Mr Campbell which is relied upon as establishing that the goods were identified in such a way that the particular logs belonging to the bank could at any moment be picked out of the ponds and delivered to them. Mr Campbell's evidence is, however, not satisfactory as to the exact date when the initials "B. of S." were put opposite the particular logs in the scantling books, and everything depends upon whether this was done before 11th April." It must be remembered that the real ambiguity in what Mr Campbell says depends upon what books he is referring to in his answer; and inasmuch as the Lord Ordinary had before him all the books, they must have been passed up to him, and presumably were passed up to him, or were at the moment identified by him as the documents that were being referred to. It seems to me that that is an additional reason for refusing to depart from the opinion of the Lord Ordinary upon this question of simple fact.

I know that the Inner House has expressed a different opinion. I admit it is extremely difficult, and it was certainly never intended that a Court of Appeal should have to decide matters of this kind upon such insufficient and unsatisfactory testimony, but I think the only course that I can advise your Lordships to take is upon that point also to adhere to the opinion of the Lord Ordinary. He had the best opportunity of coming to a conclusion of fact.

I shall therefore accordingly move that your Lordships should agree with the Lord Ordinary, and to that extent vary the judgment of the Inner House as regards the 200 and the 100 logs.

LORD ALVERSTONE—I so entirely concur in the motion which his Lordship has made from the Woolsack that I propose to add very little indeed. But I do wish to make a few observations out of deference to the extremely able argument which we have heard from the counsel for the appellants, Mr Buckmaster.

With regard to the position of Mr Fraser, I do not think it can be seriously disputed upon this record that he is an innocent party, and I think that where an innocent party has obtained an advance from the bank, in respect of which he is undoubtedly liable and for which they have held him liable, and where he has transferred to the persons who wanted the money all the money he received in cash from the bank, it would require a very strong case indeed to suggest that he was in any way affected by any of the previous transactions which had happened between the bank and Messrs Buchanan & French. It must be remembered upon this evidence, it is practically certain, that things having come to a dead stop as between the bank and Messrs Buchanan & French on the 19th February, this is a specific and special transaction for a special loan in regard to this cargo by this ship, which is carried out by the arrangement which was made on the 12th March by one of the Frasers, his brother being in London. Therefore it seems to me quite impossible in any way to impute any defect in Fraser's title because some question might have arisen had there not been the intervention of a third party.

A number of other questions have been raised in the argument to which, as the Lord Chancellor has already said, it is not necessary to refer. I wish to make a very few observations upon the argument urged by Mr Buckmaster with reference to the suggestion that F 17 cannot have been really put upon the 1166 logs and the 416 logs. There is no question at all as to what Mr Campbell said. It is quite clear. Having got the letter saying, "Kindly mark this cargo 17 F. and let me have copies of the scantling in course, keeping the 10-inch wood and the average timber separate," he says in terms—"I carried out the instructions given in that letter; that only applied to the portion of the cargo that was Mr Fraser's portion." That is absolutely distinct. It may be insufficient, but it is distinct and positive testimony with regard to this fact. Mr Buckmaster criticises that evidence by saying that Fraser had some interest in the rest of the cargo. He was going to be allowed to sell it. Now that appears to me to be a very insufficient argument, when you find that in this passage which I have just read he speaks of it as being put only upon the portion of cargo that was Mr Fraser's portion. The ownership of the cargo by Fraser (if it was his) might

require a special mark to be put in order to identify it and keep it separate. The selling of other portions would not necessitate any mark being put on that cargo which would identify it as being Fraser's. But when we come to consider for a few moments the correspondence on which Mr Buckmaster has relied so strongly, I submit to your Lordships that it does not warrant anyone in discrediting the positive statement made by Mr Campbell. It is quite true that in the letter of the 18th March Mr Fraser had said—"Kindly mark this cargo 17 F"; but of course it is quite possible that that might be understood by anybody receiving it as meaning—"Kindly mark this cargo in so far as it belongs to me." It is not conclusive. It still might be Fraser's cargo which was in that ship.

Now if you come to look at the other contemporary documents it seems to me there is good reason for supposing that Mr Campbell was right when he said he so understood it. On the 5th April there are two letters, both of which seem to me to bear out that construction. Messrs Laird & Son (they are Mr Campbell's masters) write on the 5th April 1907—"Dear Sir—Mr Ross of D. & W. Henderson & Co., Ltd., inspected your sawn pitch-pine 17 F to-day." Then on the next day, the 6th April, Messrs Laird & Son write—"Messrs Anderson & Henderson's inspector examined your sawn pitch-pine, 17 F, to-day." It seems to me that assuming he was speaking of the whole cargo, the letter would much more probably have been this—"These gentlemen inspected the pitch-pine cargo in such and such a ship." It seems to me those observations show—I will not say conclusively, because it would not be fair to Mr Buckmaster's argument to say conclusively—but they point strongly in the direction of there having been a parcel of goods which was shown to these people, and not the whole cargo.

Now the letter of the 11th June is equally distinct. It has been obliged to be argued on the part of the appellants that that letter was a mistake, and that that letter was not in accordance with previous letters. But be that as it may, writing about two different parts of the same cargo, Messrs Laird & Son say—"You instructed us to mark your portion of the cargo 17 F, and Messrs Buchanan & French, Limited, wished their portion marked 30 F." There were two portions of this cargo. There was a portion which belonged to Mr Fraser, and there was a portion which belonged to other people, among them being Messrs Buchanan & French, and therefore the fact mentioned only a few weeks after the transaction had taken place, that a portion had been marked 30 F, strongly confirms the view that they had, in accordance with their understanding of the instructions, put the mark 17 F on some portion, and it is agreed that, if properly marked 17 F, they ought to have marked the 1166 logs and the 416 logs.

Therefore for these reasons I entirely concur in the motion the Lord Chancellor has made, and the reasons his Lordship has given in dealing with the first part of the case.

Now with regard to the 300 logs, I confess if I had had myself to deal with these documents, I should have been rather inclined to think that the right view had been taken by the Court of Session; but I fully recognise the force of the arguments which the Lord Chancellor has used for preferring to adhere to the judgment on fact of the Lord Ordinary who saw and heard the witnesses and had the documents before him; and I think it may well have been that the reason why this matter has not been more distinctly and clearly gone into is because a number of further questions were raised; and if I might, against my own opinion, if I may say so, or against the tendency of my own opinion, read two further passages following on the passage that was read from the Woolsack just now by the Lord Chancellor, there are certainly two reasons which the Lord Ordinary gives which are strong in support of his view, and seem to me to be warranted by the evidence. "Further, it is certain that he"—that is, Campbell or Laird & Son—"was not asked by the bank, as he was by Fraser, to set aside particular logs in respect of these two delivery orders"—therefore that would show there was a difference, or might be a difference, in the actual course of business as between the large parcel and those two parcels, the 200 and the 100. Then the Lord Ordinary proceeds—"Nor is there any evidence that he communicated before the 11th April what logs he proposed to apply to the orders, or that the bank assented to such proposal." That shows that the Lord Ordinary did consider the matter very carefully, and I entirely agree with him, if I may be allowed to say so, that the evidence that there was this marking of the logs with regard to the larger parcel is far stronger than the evidence that the scantling books, or whatever the proper name may be, had been made up with regard to this smaller parcel before the 11th April. But although, as I have said, had I had to consider these documents without the advantage of the judgment of the Lord Ordinary, I am not satisfied in my own mind that I should have come to the conclusion that the transactions of marking and scantling had not taken place long before the 12th April, I do not intend and I do not wish at all to differ from the motion the Lord Chancellor has made with regard to this part of the judgment. I only indicated this because I thought it right to say that while I see very good reasons for following the Lord Ordinary on both grounds, it does not appear to me to be so clear with regard to the smaller parcel as it does with regard to the first parcel. I entirely concur in the motion the Lord Chancellor has made.

LORD ATKINSON—I only wish to join in expressing my regret that in trying the two issues of fact which after this long argument have been evolved, namely,

whether this mark of 17 F was placed upon this timber before a certain date, or the other mark "B. of S." was placed on the remaining portions before a certain date, those matters were not pursued to the end, so that a satisfactory conclusion might have been arrived at on each of those issues of fact. I am far from saying that many of the things which Mr Buckmaster in his very able argument called attention to did not furnish ample ground for a severe and searching cross-examination of Mr Campbell; but the misfortune is that he was never cross-examined upon them. So far from that, it would appear to me, reading the evidence, that his evidence upon that point was more or less accepted during the course of the trial, because I find that all the cross-examination is simply directed to this. He is asked at what particular date he placed these marks upon the timber, and he says he does not remember the date, and there the thing ends. If it were desired to apply for an adjournment, or to get an opportunity of producing witnesses to confute him, or to draw his attention to the documents that were subsequently discovered, I cannot understand why that course was not taken, except upon the basis which I have already indicated, namely, that his evidence was practically accepted as the truth.

Now that being so, despite the able argument which Mr Buckmaster has addressed to your Lordships, how is it possible for us here to say: "Oh, his evidence is not worthy of credit; it is unreliable, owing to his faulty recollection of what took place two years before the action came to proof." Therefore I think your Lordships are driven back to accept the findings of the man who saw the witnesses, and before whom the trial was conducted.

The same remark applies to the second point. It is quite obvious that the witness when cross-examined referred to a number of books which I suppose were on the Bench. We are engaged in a speculation now as to which of the books he meant to refer to, and we, who are sitting here and who have got none of the books, are asked to come to a conclusion different from what the learned Judge came to who had all the books before him, and an opportunity of deciding to which of them the witness referred. I think it is impossible to ask a Court of final appeal, or indeed any court of appeal, to do anything of the kind; and therefore much as I respect the Judges of the Court of Session, I think that they had no, as it appears to me, conclusive reason for rejecting the conclusion to which the Lord Ordinary had come on this second point also. Therefore it appears to me that the only really plain course for your Lordships to take is that indicated by my noble and learned friend on the Woolsack, namely, to accept the findings of fact of the man who saw the witnesses and had these things before him, and to act upon those findings of fact.

LORD SHAW—I have no doubt as to the judgment to be pronounced with regard to the 1166 logs in this case. I had at one time considerable doubt as to the other parcels of 200 and the 100 logs respectively, but my doubt has been resolved on the lines referred to by my noble and learned friend who has just spoken.

As the argument developed, the point came to be so narrow as this, that when one witness is in the box and makes reference to a certain book, and when the Lord Ordinary forms a conclusion as to whether his evidence is upon the whole satisfactory in proving an issue of fact, then at the Bar of this House a question is to be raised as to what was really the book to which that witness referred. I find myself totally disabled from conceiving the idea that at least in the mind of the Lord Ordinary it was not quite plain to which book both counsel and Judge, as well as the witness, were referring. The books were referred to by the witness in the presence of the Judge, and the documents were there also.

I cannot under those circumstances see any justification, so far as my own mind is concerned, for accepting the view of the Inner House in preference to that of the Lord Ordinary, whose judgment of date 20th July 1909 appears to me to be upon all points correct.

Their Lordships varied the interlocutor appealed against, so far as regarded the 200 and 100 logs, by restoring that of the Lord Ordinary.

Counsel for Appellants — Buckmaster, K.C., M.P.—MacRobert. Agents—Cowan & Stewart, W.S., Edinburgh—Lawrance, Webster, Messer, & Nicholls, London.

Counsel for the Respondents, the Bank of Scotland — Clyde, K.C. — Hon. Wm. Watson. Agents—Tods, Murray, & Jamieson, W.S., Edinburgh — Ashurst, Morris, Crisp, & Company, London.

Counsel for the Respondent, G. L. Fraser — Sandeman. Agents — Maclay, Murray, & Spens, Glasgow — J. & J. Ross, W.S., Edinburgh—Thomas Cooper & Company, London.

Tuesday, December 12.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, Lord Gorell, and Lord Shaw.)

LAWRIE *v.* BANKNOCK COAL COMPANY, LIMITED.

(In the Court of Session, March 17, 1911, 48 S.L.R. 629, and 1911 S.C. 817.)

Process — Sheriff — Removal to Court of Session for Jury Trial—Competency—Action of Damages by Father of Deceased Workman against Son's Employers — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *secs.* 13 *and* 14 — *Sheriff Courts (Scotland) Act* 1907 (7 *Edw. VII, cap.* 51), *secs.* 30 *and* 52.