misled him, with the result of inducing him not to demand delivery.

Had the sale been one for ready-money, I do not think that the defender did anything but what he was entitled and bound to do consistently with all his rights reserved by the original contract and resulting from his continued possession. The want of an acknowledgment of the intimation was immaterial, and the assignation being intimated, he was bound to hold for and deliver to the assignee on the same terms as he had held for and was bound to deliver to the cedent.

This, however, was a sale on credit, one consequence of which was that the seller was bound to deliver the goods sold when demanded within the period of credit although the price remained unpaid. There is not much authority in our law on this subject, and no light, in my opinion, can be obtained on it from English cases. By the law of England, if the property of the thing sold has not passed to the vendee, a sub-vendee has no higher right than the original purchaser. Such cases occur where the goods sold require identification or separation or the like. From this it would follow, that as with us the property only passes on delivery, an assignee cannot acquire a higher right. But in regard to an ordinary sale the English analogy necessarily fails; because when the contract of sale is completed the property of the subject of the sale passes to the vendee, and the whole fabric of case law which has been built up on this head rests entirely on this foundation. The right of the seller is not a right of property, but merely a lien over the property of another, which is held to be waived or to revive under varying circumstances, but always on the assumption that the property has passed to the vendee or his assignee or sub-vendee. Mr Benjamin in his book on Sale has these remarks—"When the goods have not yet left the actual possession of the vendor, he has at common law at least a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose that after a bargain in which the lien has been unequivocally waived, the buyer for his convenience or any other motive has left the goods in the custody of the vendor until the credit has expired, and has then made default in payment or has become insolvent before the credit has expired, what are the vendor's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*—a right that might perhaps be termed a stoppage *ante transitum?* The true nature and extent of the vendor's rights in this intermediate state of things have not yet perhaps been in all cases precisely defined, but they have been considered by the Courts under such a variety of circumstances that in practice there is now but little difficulty in advising on cases as they arise." But the rules thus established—and some of them are technical enough—proceed on the initial assumption that the unpaid vendor's right is one of lien, and the vendee's right one of property, and the result is reached generally by inquiring whether the seller is or is not stopped or personally barred from using his lien.

We have no materials in our different and as I think simpler system in which these rules can be specifically applied. The rights of the parties are exactly the converse. The seller remains proprietor. The purchaser is only creditor for delivery. There is no lien of any kind vested in any of the parties, and these principles of waiver, lien, and personal bar seem entirely inapplicable and inextricable.

This interlocutor was pronounced—

"Adhere to the interlocutor reclaimed against: Find the defenders liable to the pursuer in damages; of consent assess the same at £569, 13s. 7d., and decern against the defenders for payment to the pursuer of that sum, with interest thereon from the 19th day of March 1880 till paid: Find the pursuer entitled to expenses in the whole cause," &c.

Counsel for Pursuer—Guthrie Smith—Young. Agents—Macgregors & Ross, S.S.C.

Counsel for Defenders—D. F. Kinnear, Q.C.—Mackay. Agent—Adam Shiell, S.S.C.

Thursday, March 17.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

AINSLIE *v.* MURRAY AND ANOTHER.

Foreign—Contracts—Locus solutionis.

The parties to an action in the Scotch Courts agreed as a compromise of the action that certain property in Rangoon belonging to the first party should be sold and the proceeds handed to the agent of the second parties in satisfaction *pro tanto* of a sum of £4250, and that any deficiency should be paid by the first party. The property was sold and the price paid in rupees. In an action for payment of a deficiency the defenders pleaded that the amount of the deficiency must be calculated on the footing of the value of the rupee in Rangoon. *Held* that the pursuer was entitled to payment at the full equivalent of the sum in English currency, and that the sum realised in rupees must be estimated according to the current rate of exchange.

Opinions per Lord President and Lord Mure that Scotland was the *locus solutionis* of the contract.

Opinions contra per Lord Deas and Lord Shand.

The pursuer of this action was John Dodds Ainslie, who at one time carried on business at

Rangoon under the firm of Murray, Ainslie, & Co., and was now a partner of the firm of Ainslie, Warren, & Co., Rangoon, but resident in Glasgow. The defender James Murray was proprietor of Callands, in the county of Peebles, and resided there, and John Mackie Murray was his son, who was at one time in business at Rangoon, but now resided in Edinburgh.

In an action raised in the Court of Session in 1878 by the pursuer's firm against the defenders this agreement of compromise was entered into upon the narration that certain claims had been made upon both sides against the other—"(First) The second parties [the defenders] shall grant a power or powers of attorney to each and either of Messrs Ainslie, Warren, & Company of Rangoon, and Alexander Dixon Warren, merchant there, partner of that firm, to realise by public sale or otherwise, to the best advantage, the whole properties in Rangoon belonging to the second parties or either of them: (Second) The proceeds of sale of the said properties, to the extent of Four thousand two hundred and fifty pounds, are to be paid to and retained by the said Ainslie, Warren, & Company on behalf of the first parties [the pursuers] in satisfaction and discharge of their claims; any surplus above that sum is to be accounted for and paid to the said James Murray; and in the event of the said properties not realising the said sum of Four thousand two hundred and fifty pounds, then the deficiency shall be made up and paid by the second parties, jointly and severally, to the first parties: (Third) Failing payment being made to the said first parties of the said sum of Four thousand two hundred and fifty pounds within one year from the date hereof, any right which the first parties may have to payment of the whole sums sued for and interest will in their option revive, and if this option is exercised, then the second parties' objections thereto will also revive: (Fourth) All claims on the first parties at the instance of the second parties are hereby discharged, subject, however, to the declaration that if the first parties proceed with the said action then this discharge shall not be effectual, and the said claims shall revive: The rents of the said properties in Rangoon down to this date shall belong to the first parties, and shall be paid to or retained by Messrs Ainslie, Warren, & Company on their behalf, over and above the said sum of Four thousand two hundred and fifty pounds: From and after this date the said rents shall belong to the said James Murray: (Fifth) Upon payment to the first parties of the said sum of Four thousand two hundred and fifty pounds, . . . their whole claims will be discharged."

A power of attorney was executed in terms of the agreement, and the property was realised by Ainslie, Warren, & Co. The amount of sales and of rents collected, as stated in the accounts which were rendered, was Rs. 32,099, 15s. 6d. At 1s. 8d. per rupee, which was the value at the current rate of exchange in this country, that sum amounted to £2675 sterling. The defenders contended that the value of each rupee recovered under the power of attorney fell to be taken at 2s., its value in Rangoon.

This action was brought for payment of the balance of the £4250 due to the pursuers, the defenders pleading in answer that—"(1) The minute of agreement betwixt the parties having stipulated that the price of the properties sold under the power of attorney should be paid to or retained by the pursuer's firm of Ainslie, Warren, & Company, merchants in Rangoon, the defenders are entitled to have the value of each rupee so recovered estimated as at the value of 2s., its value in Rangoon."

The Lord Ordinary decerned against the defenders, who reclaimed.

Argued for them—The agreement dealt with real property situated in Rangoon. There was nothing said about sending the money to England. The *locus solutionis* was Rangoon—*Campbell* v. *Hannay*, Feb. 15, 1809, F.C.; *Scott* v. *Bevan*, 1831, 2 Barn. and Adolph. 78; Chittey on Contracts, 93; Story's Conflict of Laws, secs. 271a, 272; Savigny's Conflict of Laws (Guthrie's ed.), sec. 374, p. 245; Bar's Private International Law, sec. 70, p. 253; Thomson on Bills (Wilson's ed.), 439; *Cary* v. *Courtenay*, 1869, 4 American Reps. 559; Parsons on Bills, i., 664; *Don* v. *Lippman*, May 26, 1837 (H. of L.) 2 Shaw and Maclean, 682; *Valery* v. *Scott*, July 4, 1876, 3 R. 965.

Argued for pursuers—They had bargained to be paid in English money, and were entitled to get it. This was a Scotch debt being sued for in a Scotch Court. It was not the same case as that of a bill being granted payable in India—*Wallis* v. *Brightwell*, 1722, 2 Peere Williams, 88; *Lansdowne* v. *Lansdowne*, 1820, 2 Bligh's (H. of L.) Reps. 60.

At advising—

Lord President—The sum here sued for is said to be due under an agreement between the pursuers and defenders which was concluded for the purpose of settling a previous action of accounting between these parties. The sum agreed to be paid was £4250, and it was also a part of the arrangement that to provide that sum or a portion of it certain house property was to be sold in Rangoon.

It is stated that a power of attorney having been sent out to Rangoon the property was brought to sale, and the amount of the sales and the amount of rents realised the sum of Rs. 32,099: 15: 6. "This sum," the pursuers state, "at 1s. 8d. per rupee—which is the current rate of exchange—amounts to £2675 sterling."

The defenders' explanation is that they have always been willing to settle with the pursuers upon the footing of the rupee being estimated as of the value of 2s., which is its value in Rangoon. The ground upon which the defenders maintain that contention is, that under the contract the *locus solutionis* was India. I do not think it rests upon any other basis than that. So that a question is raised upon the construction and effect of the contract between the parties, what is the *locus solutionis?* If it be not India the defenders are wrong.

Although at first sight I had an impression that as regards the proceeds of the sale at Rangoon the contract was one which fell to be performed in India, I am now satisfied upon a review of the clauses of the contract that Scotland is the place of performance. The contract is a settlement of a compromise of an action in this Court, and the subject-matter of it is that for a discharge of their liabilities the defenders shall pay a sum of £4250. If that sum be not

paid within a year, it is stipulated that the former claims shall revive, and may be again insisted in; but if it be paid within a year, then the defenders are to be entitled to a discharge, and all imputations made against them upon record are to be withdrawn. There is a further point which I think is ancillary or subsidiary. It consists in the stipulation that the defenders shall give a power of attorney to the pursuers' agents in Rangoon to bring certain properties to sale, to realise these, and impute them *pro tanto* in payment of the sum in question. It is contemplated that the properties may sell for a sum large enough to meet the whole debt, but that it may also fall short of it. But in either event the condition is that the sum in question is to be paid within a year from the date of the agreement.

The settlement of the account under that agreement must be in Scotland, and consequently Scotland is the *locus solutionis*.

Lord Deas—If I were satisfied that the *locus solutionis* of this contract was in Scotland, I should agree with your Lordship. But it appears to me that on the face of it the *locus solutionis* is in Rangoon, and consequently that the law of Rangoon must apply. I think this agreement is in substance and effect the same thing as if a bill payable in Rangoon had been granted for the sum mentioned. The authorities, I think, go to show that a bill payable in Rangoon would be paid in rupees according to the value current at Rangoon. Although I am not at this moment prepared to go into the authorities, I have always understood since I had occasion to examine them, as discussed in the case of *Don* v. *Lippman* (H. of L.), 2 S. and M. 732, that a bill payable in a foreign country fell to be met in the currency of that country. I cannot distinguish between that case and the present, and I think the law laid down there is applicable.

I may say that the case of *Glyn* v. *Johnston*, June 8, 1830, 8 S. 889, was considered to raise a question of what belonged to the law regulating the nature of the debt itself and what to that regulating the remedy. The Court held that the kind of evidence admissible fell to be determined by the law of England. That judgment followed upon a hearing in presence. Lord Craigie dissented from the judgment, but from the remarks made upon that case by Lord Brougham in deciding *Don* v. *Lippman* it appeared that Lord Craigie had been right in the view which he had taken.

Lord Mure—I agree with your Lordship in the Chair that the interlocutor of the Lord Ordinary should be adhered to. I think that we are dealing with a Scotch contract, and that the pursuers are entitled to be paid in Scotch currency. The contract was made in Scotland. Both parties were in Scotland so far as regarded the settlement of the questions at issue between them in the Scotch Courts. Provision is made in the agreement for a revival of the claims. Where that is done in Scotland with reference to an action depending in the Scotch Courts, one would think that the *locus solutionis* was in Scotland. If nothing had been said about Rangoon, it is quite plain that Scotland would have been the *locus solutionis*. But the provisions as to realising the properties in Rangoon are said to make Rangoon the place of payment. By the second clause of the contract a power is given to sell certain properties in Rangoon, the proceeds of which are to be paid to and retained by certain parties there on the pursuers' behalf. In the event of the properties not realising the £4250, the deficiency is to be made up by the defenders. Supposing the proceeds had not realised the required sum, it is quite clear that they would require to have been paid in the current coin of this country. I cannot hold that Rangoon is the *locus solutionis* of this contract.

Lord Shand—In the view which I take of this case it is quite immaterial what place is the true *locus solutionis*, for I think that the judgment must be the same in either case. But I agree with Lord Deas that the place of payment of the proceeds of the Rangoon property is Rangoon, and the place of payment of the balance is this country. So that the pursuers are entitled to payment of the full equivalent in Rangoon money to the English currency, otherwise the defenders will get an advantage in the settlement to which they are not entitled.

The Court adhered.

Counsel for Pursuer — Gloag — M'Kechnie. Agents—J. & R. A. Robertson, S.S.C.

Counsel for Defenders — J. Burnet — R. V. Campbell. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, March 18.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

EARL OF ZETLAND *v.* HISLOP AND OTHERS.

Feu-Contract—Condition—Interest.

The superior of certain heritable subjects in a sea-port village entered into feu-contracts with certain feuars, there being a condition in each case that it should not be lawful for the vassal "to sell or retail any kind of malt or spirituous liquors, or to keep victualling or eating-houses, without the written consent of the superior." Several years after, when the village had become a burgh with important shipping interests, the superior raised an action of interdict to enforce this condition against the singular successors of the original feuars (who had obtained licenses in the Justice of Peace Court to keep public-houses). *Held* that, on the authority of the case of *Coutts* v. *Tailors of Aberdeen*, 13 S. 226, *aff.* 1 Rob. App. 307, the superior had, in the altered circumstances of the burgh, lost any such interest as would entitle him to prevail, and interdict *refused*.

Opinion per Lords Young and Craighill to the effect that such a condition would be effectual in the case of a long lease as distinguished from a feu-contract such as the present.

At the beginning of this century Thomas Lord