mentioned; and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers, for account of owners of goods, any claims for shortage, or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned." In the argument maintained on this clause the pursuers assumed that they had failed to prove that the damage which resulted in caking had not taken place before delivery to the steamer; but they maintained that the clause laid upon the ship's agents the duty of discovering all damage that had previously occurred and of notifying same to the inland carriers, and that their failure to do so transferred to the ship the responsibility which would otherwise have lain on the inland carrier. They connected this clause with clauses 3 and 11 in the part of the through bill of lading applicable to the inland carrier, and they said that on the terms of these clauses the failure of the ship's agent to notify damage sustained by the goods prior to delivery to the ship prevented them from making good their claim against the inland carrier, and so made the shipowner responsible on the ground that through his breach of contract they had been deprived of their right of compensation. I confess that I have every difficulty in construing the particular clause founded on. It provides that the steamer is to "promptly present to inland carriers, for account of owners of goods, any claim for shortage, or loss, or damage." At first sight that suggests merely the handing on of a claim which has already been made up; and it was admitted that it could scarcely throw upon the ship the duty of making up a claim for loss which could not be accurately done without knowledge of the extent of the damage, the value of the goods damaged, and the like. If, for instance, the flour had been put in barrels as it used to be, and had been wetted during the inland journey, it would be quite impossible for the shipowner after the barrels had dried to know whether any injury had been sustained to the goods; and yet on one construction of the clause their failure to do so would imply a breach of contract. Accordingly the pursuers were driven to construe this clause as meaning that the shipowner was to notify to the inland carrier in his receipts the number of packages which bore external marks of having been injured, such external examination being consistent with loading in the customary rapid manner. In so construing the clause the pursuers are, I think, taking a considerable liberty with the language, and they were in any case constrained to admit that they could not well maintain that the ship ought to have notified as damaged the thousand bags which were only discovered to be caked at Glasgow, after they had been twice handled with the special object of detecting caking. But at best I think the clause can only mean that the shipowner shall take reasonable care to ascertain, by such examination as is compatible with the ordinary rapid loading of similar cargo, what packages appear to bear marks of external damages. I find in the proof nothing to suggest that such reasonable care was not exercised. A competent checker was provided on each barge, and a great many more bags were notified as having received external damage than ultimately proved to be in fact damaged. But further, even if there had been a failure in this respect, I do not see how the pursuers could succeed in obtaining damages for the alleged breach of contract unless they first showed that but for the breach they would have been indemnified by the inland carrier. Now one of the exceptions applicable to the inland carriers is that they are not to be responsible for loss or damage arising by wet; and in the face of this exception it would have been necessary for the pursuers to prove that although damaged by wet the flour would not have been so damaged but for the fault of one or other of the inland carriers. No such proof is forthcoming in the case, and I am therefore of opinion that this clause does not afford sufficient alternative ground upon which we could hold the defenders liable.

On the whole matter, therefore, I have come to be of opinion that the Lord Ordinary's interlocutor must be recalled, and that the defenders are entitled to be assoilzied from the conclusions of the action.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

LORD DUNDAS, who was present at the advising, was absent at the hearing.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for the Pursuers (Respondents)—Sandeman, K.C.—D. P. Fleming. Agents—Gill & Pringle, W.S.

Counsel for the Defenders (Reclaimers)—Morison, K.C.—C. H. Brown. Agents—Webster, Will, & Company, W.S.

Thursday, March 16.

SECOND DIVISION.

[Lord Skerrington, Ordinary

STUART *v.* POTTER, CHOATE, & PRENTICE AND OTHERS.

Contract—Constitution of Contract—Letter Affording Evidence of Pre-existing Contract, but not Constituting Contract—Document in re mercatoria.

A firm of New York stockbrokers, having acquired an interest in a syndicate which had been formed to underwrite an issue of bonds, disposed of a participation therein to a London stockbroker. 13,000 dollars of this participation were ultimately acquired by a Scottish insurance company; 95 per cent. of the price was paid to the London broker. At the request of

the latter the New York firm on 15th February 1907 enclosed to him the following letter addressed to the insurance company:—"Dear Sirs,—We beg to advise you that we are holding for your account an interest of 13,000 dols. in the Louisville and Nashville, Atlanta, Knoxville and Cincinnati Division, 4 per cent. bond syndicate, on account of which 95 per cent. has been paid." This letter was sent on to the company. The London broker thereafter became bankrupt, leaving a debtor balance between him and the New York firm, who claimed to hold the 13,000 dols. as security therefor.

An action having been brought by the assignee of the insurance company against the New York firm for delivery of the bonds, the latter maintained that their obligation to deliver the bonds to the company was created by the letter of 15th February 1907, that the validity and effect of the letter fell to be determined by the law of New York, and that it was invalid and ineffectual thereunder because not under seal and expressing no consideration.

Held that the letter did not constitute the contract between the defenders and the insurance company, but was evidence which showed that they had agreed to accept the company as creditors in place of the London broker under the antecedent contract between the latter and them.

Opinions (*per* Lords Salvesen and Ardwall), on the assumption that the construction of the letter fell to be determined by the law of Scotland, that it was a document *in re mercatoria* and was valid *per se* to establish an obligation against the defenders to account in terms thereof to the insurance company, although neither holograph nor tested.

Proof—Foreign Law—Allowance of Proof—Averment of Foreign Law—Relevancy of Averment.

A firm of New York stockbrokers wrote the following letter to a Scottish insurance company:—"Dear Sirs,—We beg to advise you that we are holding for your account an interest of 13,000 dols. in the Louisville and Nashville, Atlanta, Knoxville and Cincinnati Division, 4 per cent. bond syndicate, on account of which 95 per cent. has been paid." The assignee of the insurance company having brought an action against the New York firm for delivery of the bonds above mentioned, the latter made this averment—"The said letter is not under seal and does not express that the defenders received any consideration for the same. Upon these grounds the said letter is invalid according to the law of the State of New York." The Lord Ordinary allowed a proof of this averment.

Opinion (*per* Lord Salvesen) that in order to entitle a party to proof on a question of foreign law he must make distinct and pointed averments as to the alleged difference between the foreign law and the law of Scotland, and that accordingly the above averment was irrelevant and should not have been remitted to probation.

Personal Bar—Prejudice—Loss of Chance of Recovery—Possible Alteration of Circumstances Sufficient to Raise Plea of Bar.

Opinion (*per* Lord Salvesen) that where a person proved that he had been lulled into security by the representation of another, and had thereby lost a chance of recovering money from a third party, it was not necessary for him, in order to raise the plea of personal bar against the person making the representation, to show that in point of fact he would have been able to recover the money.

Horatius Stuart, S.S.C., Edinburgh, as assignee of the Scottish Metropolitan Life Assurance Company, Limited, Edinburgh, brought an action against Potter, Choate, & Prentice, bankers and stockbrokers, New York, and against W. D. Fisher, sometime stockbroker in Dundee and London, and E. L. Bennett, C.A., London, as trustee in bankruptcy of the last-named, for any interest they might have, for delivery by the first-named defenders to him of twelve 4 per cent. gold bonds for the sum of 1000 dollars each of the Louisville and Nashville Railroad Company (Atlanta, Knoxville and Cincinnati Division), or alternatively for payment of (first) £1889, 14s. 3d., and (second) £671, 17s. 11d.

This *narrative* of the *facts* out of which the action arose is taken from the opinion of the Lord Ordinary (Skerrington)—"Messrs J. P. Morgan & Company of New York having purchased from the Louisville and Nashville Railroad Company 10,000,000 dols. of their 4 per cent. bonds (Atlanta, Knoxville, and Cincinnati Division) at the price of 97½, they wrote on 20th February 1906 to the compearing defenders, Potter, Choate, & Prentice, bankers, New York, stating that they were forming an underwriting syndicate for these bonds at 98½, and offering the said defenders an interest of 200,000 dols. bonds therein. They added—'We are to act as syndicate managers, and to have the sole direction and management of the syndicate. Payments for the bonds are to be made when and as called for by us, and the bonds are to be held subject to our control for purposes of sale. We shall make no charge to the syndicate for our services; but all expenses, including commissions allowed to brokers, are to be charged to the syndicate.' The defenders accepted this offer, and on 21st February they cabled to W. D. Fisher, a London stockbroker, offering him a participation of 50,000 dols. in this syndicate at 98⅝. Fisher, partly through an agent in New York and partly by cable, purchased from the said defenders three participations of 25,000 dols., 13,000 dols., and 12,000 dols.—in all 50,000 dols. Before doing so he had agreed with the pursuer, Mr Stuart, that

the latter would take two participations of 25,000 dols. and 13,000 dols. respectively, and he had disposed of the remaining 12,000 dols. to Messrs Zuluetta of London. The pursuer in his turn had contracted with two Edinburgh insurance companies—the Century Insurance Company, Limited, and the Scottish Metropolitan Life Assurance Company, Limited—that the former should take the participation of 25,000 dols. and the latter the participation of 13,000 dols. The price payable by the pursuer was 98⅛, and the price payable to him by the insurance companies was 99.

"The syndicate was dissolved in June 1907, and the defenders received from Messrs Morgan the bonds and cash proportionate to their interest of 200,000 dols. Only a small proportion of the bonds had been sold. The pursuer, as assignee of the Scottish Metropolitan Company, sues the defenders for delivery of twelve bonds of 1000 dols. each and for payment of £73, 16s., being the bonds and cash proportionate to the company's holding of 13,000 dols. The whole difficulty has arisen from the bankruptcy of Fisher, who disappeared on or about 4th March 1907 with a debtor balance on the account between him and the defenders. He and his trustee have been cited as defenders, but neither has lodged defences. The Scottish Metropolitan Company duly paid to Mr Stuart, and he in his turn paid to Fisher the first call of 70 per cent. on their participation of 13,000 dols., and the second call of 25 per cent. As Mr Stuart was ultimately unable to deliver to his clients, the Scottish Metropolitan Company, the securities which he had contracted to give them, he repaid the company their advances and took an assignation of any claims they might have against the defenders. . . . . .

"When the Scottish Metropolitan Company paid Mr Stuart the first call of £1884, on 18th April 1906, they asked him to send the syndicate managers' receipt in due course. Mr Fisher had on the previous day cabled to the defenders for the receipts, and had received a reply that it was impossible to send the receipts as they must remain in New York. The defenders in the same cable offered to finance the transaction for Mr Fisher on a 20 per cent. margin. Fisher accepted this offer, and at the same time he exacted payment from the pursuer of the calls payable on the participations of 25,000 dols. and 13,000 dols. If I am right in thinking that Fisher contracted independently with the defenders on the one side and with the pursuer on the other, there was nothing improper in this arrangement even so far as Fisher was concerned. From the point of view of the defenders the offer was, I think, a natural one, seeing that they could not give Fisher any receipt upon which he could raise money in the London market. The Scottish Metropolitan Company did not press their request for a receipt, and I do not think that from first to last they were really seriously uneasy on the subject. They had confidence in Mr Stuart, and as events proved their confidence was justified. On 31st January 1907 the pursuer wrote a strong letter to Fisher pressing him to procure at least a letter from the parties in whose names the participations stood certifying as to the extent of the interest held by the two insurance companies. On the following day Fisher cabled to the defenders to send a letter certifying that they held an interest of 25,000 dols. on account of the Century Insurance Company, and requesting them to draw upon him for the amount required to preserve the margin. On 5th February the defenders wrote Fisher enclosing a letter addressed to the said company and intimating that they had drawn on him at three days' sight for £5146. On 14th February Fisher sent this letter to the pursuer, who gave it to the company. In May 1906 the defenders had, at Fisher's request, sent a similar letter direct to Messrs Zuluetta regarding their 12,000 dols. holding. In both these cases the letters were delivered before the relative drafts by the defenders on Fisher had been honoured. On 14th February Fisher cabled the defenders to draw on him against 13,000 dols. in the Syndicate, and to send a letter attesting that they held this interest on behalf of the Scottish Metropolitan Company. On 15th February the defenders wrote such a letter and enclosed it to Fisher. On 28th February he sent this letter to the pursuer in Edinburgh, and on 1st March the pursuer sent it to the Scottish Metropolitan Company. The relative draft by the defenders on Fisher was presented for payment on Saturday 2nd March, and on Monday 4th March, and was dishonoured and protested. Though the exact date of Fisher's disappearance was not proved, it was stated that he disappeared on 4th March. The letter is as follows—'The Scottish Metropolitan Life Assurance Company, 25 St Andrew Square, Edinburgh, Scotland.—Dear Sirs—We beg to advise you that we are holding for your account an interest of 13,000 dollars in the Louisville and Nashville, Atlanta, Knoxville, and Cincinnati Division 4 per cent. Bond Syndicate, on account of which 95 per cent. has been paid.—Yours very truly, Potter, Choate, & Prentice.'"

The pursuer pleaded, *inter alia*—"(1) The defenders Potter, Choate, & Prentice being the holders for the account of the Scottish Metropolitan Life Assurance Company, Limited, of the said interest in the said bond syndicate which is now represented by the bonds and cash, of which delivery and payment is concluded for, the pursuer as assignee of the said company is entitled to decree as craved. (2) Alternatively the defenders Potter, Choate, & Prentice as holders foresaid are liable to make payment to the pursuer as assignee foresaid of the several sums specified in the alternative conclusions of the summons, and decree in terms thereof should be pronounced as craved, with expenses. (3) In the circumstances condescended on the defenders are barred *personali exceptione* from maintaining that they are entitled to retain the said bonds."

The defenders averred, *inter alia*—"(Stat. 4) The contract between the defenders and Mr Fisher in reference to the said participation was entered into in New York . . . and the validity and effect of it, and of the said letter of 15th February 1907, fall to be determined according to the law of the State of New York. . . . The said letter is not under seal, and does not express that the defenders received any consideration for the same. Upon these grounds the said letter is invalid and ineffectual according to the law of the State of New York. . . ."

The defenders pleaded, *inter alia*—"(4) There having been no contract between the said Assurance Company and the defenders, and the said letter of 15th February 1907 being by the law applicable to the case invalid and ineffectual because not under seal and expressing no consideration for the granting thereof, it cannot receive any effect. (5) The defenders being entitled to hold the securities sued for until payment of all debts due to them by Mr William D. Fisher are entitled to absolvitor."

On 12th February 1910 the Lord Ordinary (SKERRINGTON), a proof having been taken, pronounced this interlocutor—"The Lord Ordinary, on the motion of the counsel for the pursuer, allows him to amend the record as proposed at the bar, opens up the record in order that said amendments may be made, and the same having been made, of new closes the record, and having considered the cause sustains the fourth plea-in-law stated for the defenders, assoilzies them from the conclusions of the summons, and decerns," &c.

Opinion. — [*After the narrative above given*]—"The contracts between the five parties . . . viz., Messrs Morgan, the defenders, Fisher, the pursuer, and the Scottish Metropolitan Company, were all constituted by telegram or letter, and on reading these documents it is clear that there was no privity of contract except between the parties who contracted directly or indirectly with each other. It is true that in wiring and writing to Fisher the pursuer stated that the participation of 13,000 dols. was for the Scottish Metropolitan Company, but he had no authority to make any contract between that company and Fisher, and the company throughout refused to recognise Fisher as their debtor. It is also true that the pursuer deponed that he looked upon Fisher as the agent of the defenders, but no such agency has been proved, or in my opinion existed. The important point is that there was no privity of contract between the pursuer's assignors the Scottish Metropolitan Company, and the defenders Potter, Choate, & Prentice. Accordingly I do not think that the pursuer's case would have been arguable if it had not been that on 15th February 1907 the defenders signed a letter in favour of the Scottish Metropolitan Company. It is really on this letter that the action is laid. In his able argument, however, the pursuer's counsel maintained that apart from this letter the company had a good claim against the defenders. He referred to the correspondence as showing that the defenders must have known that Fisher was acting on behalf of clients, and he referred to the evidence given on commission by Mr Potter as showing that Mr Potter refused to depone that, according to his belief, Fisher was contracting on his own account. If it could have been demonstrated that there was a contract between the Scottish Metropolitan Company and the defenders (Mr Stuart and Fisher being merely agents), the defenders could not, on the principles explained in the case of *Cooke* v. *Eshilby*, 1887, 12 A.C. 271, have founded on Fisher's indebtedness to themselves as a defence against a claim by the Scottish Metropolitan Company for delivery of the bonds and cash proportionate to their participation of 13,000 dols. But in the absence of such a contract the question does not arise. The pursuer's counsel founded his argument on the case of *National Bank of Scotland* v. *Dickie's Trustees*, 1895, 22 R. 740, which seems to me to have no application. In that case the question was whether the admitted owners of certain stocks were or were not affected by certain security rights expressly or impliedly given to a bank by a stockbroker employed by the owners. Here at the date of the contract the defenders had in their possession no securities which the Scottish Metropolitan Company could claim as their property. There was simply a contract obligation on the defenders to account for certain bonds and cash when received, and the creditor in this obligation was Fisher and no one else. It cannot, I think, be maintained that (apart from the letter) the bonds received by the defenders in June 1907 were the property of the Scottish Metropolitan Company. . . .

"The defenders' first defence is that Fisher was not authorised to deliver this letter to the Scottish Metropolitan Company until the draft for £1700 had been met. They did not expressly impose any such condition on Fisher, and I see no reason for implying it. The next defence is that the validity and effect of the letter must be determined according to the law of the State of New York, and that it is invalid and ineffectual because not under seal and expressing no consideration.

"If the facts stated in the letter are assumed to be true they import an obligation on the defenders, just as an I O U imports an obligation to repay. The resulting or implied obligation in the present case was that the defenders should at the dissolution of the syndicate account for any bonds or cash received in respect of the Scottish Metropolitan Company's interest, and that in the meanwhile they should continue to hold the said interest on behalf of the company, and should give due notice of any calls, and should otherwise protect the company's interest in the syndicate. These obligations fell to be performed in the State of New York, and as the letter was signed there, I am of opinion that its validity and effect as an obligatory instrument depend on the law of that State.

The pursuer's counsel argued that the law of Scotland applied. Even if that were so I should hold that the letter is not a writ *in re mercatoria*, and that as it is not holograph it is not *per se* valid. The pursuer does not aver *rei interventus*. Further, he does not allege that the letter *per se* creates any obligation according to the law of New York. These considerations are probably enough for the disposal of the case, but as each of the parties examined two experts on American law, and as the pursuer's counsel argued that the defenders were personally barred from denying the truth of the facts stated in the letter, I shall refer shortly to these two matters.

"As regards the American law applicable to the case, the experts on both sides practically assumed without giving any particular reason that the letter *per se* was worthless as creating any obligation on the defenders unless the latter could be held to be 'estopped' from disputing the statements in the letter. Mr Fuller, the pursuer's leading expert, deponed in so many words that the defenders could not be held liable except on the ground of estoppel. The experts assumed no doubt, what everybody knows, that, according to the principles of English law, a unilateral and gratuitous engagement is invalid if not under seal. It was suggested to them that the letter might be regarded as an 'agreement' within the meaning of a certain statute, but they were unanimous in rejecting this suggestion.

"The defenders have no averments on record as to the American law of 'estoppel,' but nevertheless voluminous evidence was led on the subject. I was not referred to anything in the evidence which suggested that the American law as to the particular kind of 'estoppel' referred to by the witnesses differed in any way from the Scots law of personal bar, as explained by Lord Kinnear in *Mitchell* v. *Heys & Sons*, 1894, 21 R. 600, p. 611.

"Personal bar is a question of fact, but the pursuer has no averments on the subject though he has a plea of bar. On the evidence it appears clearly enough that the pursuer's assignors did not alter their position in any way in consequence of the receipt of the letter of 15th February. If the pursuer had been suing in his own right, and if the facts had been wholly different, it might have appeared that he was lulled into security by the letter and so lost a chance of recovering his money from Fisher. In the actual circumstances there is no room for this suggestion. Another suggestion was that if the letter had not been received on 1st March the Scottish Metropolitan Company might have appealed to Messrs Morgan. I cannot take this suggestion seriously. There was ample time in any case to appeal to Messrs Morgan between March and June 1907, but Messrs Morgan, though the managers of the syndicate, were not the arbiters as between all persons interested in it. They were bound to account and pay to the defenders in terms of their contract unless legal proceedings were instituted to restrain them.

"The pursuer's counsel founded in his speech upon the fact that the defenders had made an entry in their account with Fisher which apparently ear-marked an interest of 13,000 dols. in the syndicate as belonging to the Scottish Metropolitan Company. This marking does not seem to me to carry matters any further than the letter itself. It and the letter would have been valuable and almost conclusive as evidence if the pursuer had relevantly alleged an antecedent contract between the Scottish Metropolitan Company and the defenders; and of course no question of American law would have arisen if the pursuer had simply proposed to use the letter as evidence of an antecedent contract. It is plain, however, from the pleadings and from the correspondence that no such contract was alleged by the pursuer or existed in fact.

"I accordingly assoilzie the defenders. I should have mentioned that, as a last resort, the pursuer's counsel asked me to find that his client was entitled to succeed on condition that he paid the amount of the draft for £1700, the dishonour of which by Fisher gave rise to the whole difficulty, but I do not see any legal ground for doing so."

The pursuer reclaimed, and argued—The contract between the pursuer and defenders fell to be determined by Scots law. The letter of 15th February 1907 did not constitute the obligation. There was a pre-existing obligation on the defenders to deliver to Fisher, which he could transfer. Fisher had so done. This letter was evidence of the pre-existing obligation. The Lord Ordinary had not distinguished between the original contract and the letter, which was merely an acknowledgment that the defenders had substituted the insurance company for Fisher as regards the 13,000 dols. interest in the syndicate. There was a vital distinction between the constitution of the obligation and the change of the creditor therein. The question was accordingly to be judged of by Scots law, for the *lex fori* regulated the admission of evidence—*Don* v. *Lippmann*, May 26, 1837, 2 Sh. & M'L. 682 (Lord Brougham at 726); *Yates* v. *Thomson*, 1835, 3 Cl. & Finn. 544 (Lord Brougham at 587); Dickson on Evidence, para. 1003. The Lord Ordinary had held that the letter was not a writ *in re mercatoria*, and that accordingly it was invalid as neither holograph or tested. This question only arose if it were held that the letter *per se* constituted the obligation. The transaction was in essence an ordinary mercantile arrangement. The rule with regard to documents *in re mercatoria* was an exception introduced as regards obligations that must be formally constituted in writing, *e.g.*, cautionary obligations. The defenders must in the first place show that the obligation in question was one that would need to be constituted formally apart from the exception as to documents *in re mercatoria*.

This was really a trust, and an acknowledgment of a trust might be proved by any writing under the hand of the trustee, however informal—*Paterson* v. *Paterson*, November 30, 1897, 25 R. 144 (Lord Kyllachy at 175), 35 S.L.R. 150; *Thomson* v. *Lindsay*, October 28, 1873, 1 R. 65, 11 S.L.R. 12; Dickson on Evidence, para. 585. A deposit-receipt had been held to afford evidence of trust—*National Bank of Scotland* v. *Mackie's Trustees*, July 25, 1905, 13 S.L.T. 383. The letter was an acknowledgment that the defenders held the bonds in trust for the insurance company. It was not the practice of banks to give holograph or tested receipts for money or scrip. *Connal & Company* v. *Daunt & Company and Others*, July 18, 1868, 5 S.L.R. 694, was also referred to. Moreover it was for the defenders to show that there was want of consideration within the meaning of the law of New York. They had not done that. In the case of a unilateral obligation written in one country and to be observed in another, the criterion as to what law should be applied was the intention of the parties—*Lloyd* v. *Guibert and Others*, 1865, L.R., 1 Q.B. 115 (Willes (J.) at 119 and 122); *Corbett, &c.* v. *Waddell, &c.*, November 13, 1879, 7 R. 200, 17 S.L.R. 106; *Hamlyn & Company* v. *Talisker Distillery*, May 10, 1894, 21 R. (H.L.) 21, 31 S.L.R. 642. The parties intended this letter to be judged by Scots law. In judging of intention here the following two points were to be considered—(1) The letter was to be delivered and held in Scotland, (2) in case of doubt there was a presumption that if a document was valid in one country and invalid in another it should be judged by the law by which it was valid—*in re Missouri Steamship Company*, 42 Ch. D. 321 (Chitty (J.) 326, Fry (L.J.) 331 and 341, Lord Chancellor Halsbury at 337). As regarded the two objections under the New York law—the want of a seal and the absence of expression of consideration—the former was an objection to the formal validity, and the latter to the substantial validity. With reference to the formal validity, all instruments executed abroad (except conveyances of land), according to the solemnities of the place of execution, must receive the same effect as if executed in Scotland—Dickson on Evidence, para. 997. A contract deficient in the solemnities required by the *lex loci actus* would not be sustained in Scotland, although it satisfied the Scots forms, unless it was to take effect here—Dickson on Evidence, para. 998. But the present contract was to take effect in Scotland. That being so, it was good if made according to forms prescribed here, or according to the forms of the country where it was executed—*Valery* v. *Scott*, July 4, 1876, 3 R. 965, 13 S.L.R. 622; *Taylor* v. *Scott*, July 16, 1847, 9 D. 1504 (Lord Fullarton, 1508); Guthrie's Savigny (2nd ed.), 224; Nelson, Private International Law, 257. As regarded the objection to the substantial validity, *i.e.*, want of consideration, that depended on the *lex loci contractus*, which itself, as above observed, depended primarily on the intention of parties.

Argued for defenders—There was no privity of contract between the insurance company and the defenders. The pursuer must found on the letter of 15th February 1907. The letter was not evidence of a pre-existing obligation. The pursuer could not find an obligation on the defenders to deliver bonds to the insurance company apart from the letter. The letter constituted the contract. No obligation between the insurance company and the defenders existed till the date of the letter. The letter, moreover, was sent to Fisher on the implied condition that he would not deliver it till he met the draft of £1700. It was sent to the insurance company without the defenders' authority and in fraud of the above condition. If Fisher or his assignee had been suing on the original obligation the defenders would have been able to avail themselves of equities against Fisher. The question whether the letter was a document *in re mercatoria* arose on the two following assumptions—(1) that the letter *per se* constituted the obligation, and (2) that its validity fell to be determined by Scots law. The Lord Ordinary was right in his view that if the law of Scotland applied the letter was not a document *in re mercatoria*—Erskine, iii, 2, 24; Bell's Comm., i, 324. But on the hypothesis that the letter constituted the obligation (as it did) its meaning and construction clearly fell to be determined by the *lex loci contractus, i.e.*, the law of New York—Westlake, Private International Law (4th ed.), pp. 271 and 272. It was a unilateral document written by parties domiciled in New York, and it was to be carried out there. It was not to be presumed that the writers of the letter intended foreign law to apply to it. New York was both the place of execution and solution. The letter was invalid and ineffectual by the law of New York except as regards estoppel or bar, because it was not under seal and expressed no consideration for the granting thereof. The cases quoted by the pursuer, *e.g.*, *in re Missouri Steamship Company* (*cit. sup.*) and *Hamlyn & Company* v. *Talisker Company* (*cit. sup.*), were cases of contract and not unilateral obligation—see *Shedlock* v. *Hannay*, January 30, 1891, 18 R. 663, 28 S.L.R. 560. There could really be little dispute between the parties as to the international law applicable. Moreover, the evidence of the American lawyers showed clearly that the letter was ineffectual to constitute an obligation. It might have been different if the defenders had actually had bonds in their possession. But there were not existing bonds in the hands of the defenders. The pursuer had only the right to get an accounting from Morgan & Company. As regarded estoppel, the pursuer must prove that the insurance company did something or refrained from doing something on the faith of the letter, and that they thereby suffered detriment. Here there was no alteration of circumstances. It might be that the insurance company was "put to rest" by the receipt

of the letter. That was not sufficient. They must show as matter of fact (it was a question of fact and not of law) that they had been damaged by being put to rest, and they had not been able to do that —*Mitchell* v. *Heys & Sons*, February 27, 1894, 21 R. 600 (Lord Kinnear at 610 on the general doctrine of bar), 31 S.L.R. 485; *Simm* v. *Anglo-American Telegraph Company*, 1879, 5 Q.B.D. 188 (Brett (L.J.) at 111; *Mayor, &c., of Kingston-upon-Hull v. Harding*, [1892] 2 Q.B. 494 (Bowen (L.J.) at 506; *Foster* v. *Tyne, &c., Docks Company*, 1893, 63 L.J. (Q.B.) 50 (Collins (J.) at 55).

At advising—

LORD SALVESEN—In this case the Lord Ordinary has narrated with great accuracy the facts out of which the action has arisen, and as they are really not in controversy, what we have to consider is the application of the law to these facts. Had the defenders been Scottish bankers, it does not appear to me that there could have been any stateable defence to the pursuer's demands. It is no doubt true that if Fisher's bankruptcy had arisen prior to the delivery of the letter of 15th February it might have been difficult for the pursuer, as assignee of the Scottish Metropolitan Insurance Company, to have maintained that the defenders were not entitled to retain the interest in the syndicate, for which the latter had paid Fisher, in security of Fisher's other obligations to them. But once that letter was delivered, with the banker's authority—express or implied—it would seem to be almost too clear for argument that the defenders had unconditionally agreed to accept the Scottish Metropolitan Insurance Company as creditors in the obligation which they had undertaken to Fisher; and that they could not thereafter refuse to implement their obligation to the pursuer on the ground of Fisher's indebtedness to them. Accordingly the leading defence, and that which appears to have been exclusively founded on in the correspondence, is to the effect that Fisher was not authorised to deliver the letter until the draft for £1700—which they sent him for acceptance along with the letter—had been met. It would have been very easy for the defenders to have so limited Fisher's authority when sending him the letter, but they did not do so; and I agree with the Lord Ordinary that there is no ground whatever for implying such a limitation. It is no doubt true that the defenders anticipated that Fisher would not merely accept the draft but would meet it; but I do not think they themselves intended that he should delay delivering the letter until the draft matured and had been duly met. In other words, they were content to trust to Fisher's credit, and to relinquish their right to retain the 13,000 dollar share in the syndicate as a security for his indebtedness. It was scarcely disputed that if the draft had been at thirty days, instead of at three days' sight, this would have been the legal result of the delivery to the insurance company of the letter in question. If so, it can make no difference that the draft sent was actually at three days' sight, and that only a few days intervened between the receipt of the letter by the insurance company and the declared insolvency of Fisher. The defenders say that to have imposed such a condition upon Fisher as that he should not deliver the letter until the draft was met would have been tantamount to a suggestion "that he should not commit a fraudulent act." I am quite unable to appreciate this view. If the defenders had no confidence in Fisher's financial standing, or if they wished to keep themselves absolutely safe, it would have been the merest matter of business, in sending the letter to Fisher, to have directed him not to deliver it until, say, after an interval of seven days, by which time the draft would have matured; and if the draft had not been met they might then have instructed that it should not be delivered. Mr Choate says that the reason why the letter was sent to Fisher direct instead of to the insurance company was that they did not care to entrust them with the letter until the draft which they had drawn on Fisher had been met, and that Fisher knew that he had no right to deliver the letter until the draft had been paid. (This, I may note in passing, implies that the delivery would have been effectual to transfer the 13,000 dollar interest to the insurance company.) There is, however, nothing in their letter of the kind, and I have no hesitation in reaching the conclusion that Fisher was entitled to deliver the letter to the insurance company whenever he received it, just as he had done in the case of the Century Company. Indeed, in the similar case of Zuluetta the letter of acknowledgment was sent direct to them, although at the same time a letter was written to Fisher that in order to adjust his account with the defenders they were drawing upon him at sight for £1712, 9s. 11d., very much the same sum for which they gave him credit when they enclosed the letter in favour of the insurance company for transmission to them. The two transactions are indeed upon exactly the same footing, except for the circumstance that Fisher met the draft in May 1906, and that he failed to meet the corresponding draft in March of the following year.

In these circumstances I confess to feeling surprised that the Lord Ordinary should have held that, even if the matter fell to be determined according to Scots law, the letter of 15th February 1907 could not have been founded on to establish an obligation against the defenders to account for any bonds or cash received in respect of the insurance company's interest in the syndicate. He does so on the ground that the letter is not a writ *in re mercatoria*, and that as it is not holograph it is not *per se* valid. He quotes no authority in support of this view, and none was referred to at the Bar beyond a reference to the institutional writers, whose opinions do not in terms apply to the document in question. For my own part, I do not entertain the

slightest doubt that a letter by a bank with which a customer had deposited bonds, written at the request of that customer and addressed to a third party, to the effect that the bank held the bonds for account of the third party, is a writ *in re mercatoria*, and that, even if the letter had expressed what is only implied, an obligation to deliver the bonds to the third party when called on. The contention that such a letter, to have any binding effect on the bank, must be signed by the leading officials in presence of witnesses appears to me to be untenable. An acknowledgment of a trust may according to our law be proved by any writing under the hand of the trustee, however informal, and the legal relation which was constituted by the delivery of the letter of acknowledgment to the insurance company was, I take it, substantially that of a trustee to the beneficiary in the trust. I have assumed, for simplicity of illustration, that the banker was holding actual scrip, whereas the defenders here held merely an interest in the syndicate to the extent of the sum specified in their letter. In the present case there seems to be no substantial distinction between these two cases, for no difficulty arose with the holder of the bonds, and while technically the obligation of the defenders as trustees was to account for the bonds or cash when received, it was through them only that the obligation could be made effectual. The moment, therefore, that the bonds came into their hands—as they did very soon thereafter, in exchange for the receipts which they held from Messrs Morgan—it was their plain duty, in terms of their letter of acknowledgment, to have passed them on to the pursuer's cedents. If the question therefore fell to be determined by Scots law, I can find no ground on which the defenders could resist the pursuer's demands.

It was contended, however, that the contract between the defenders and Fisher, and the validity and effect of it, and of the letter of 15th February 1907, fall to be determined according to the law of the State of New York; and the Lord Ordinary, although it was unnecessary for his decision, has sustained this view, and has further held that, according to the law of that country the letter cannot receive effect. Now foreign law is a question of fact, and in order that a question of foreign law may competently be remitted to probation, distinct and pointed averments must be made as to the alleged difference between the foreign law and the law of Scotland. The only averment on this head is in article 4 of the defenders' statement of facts, and is expressed in two sentences in these terms—"The said letter is not under seal and does not express that the defenders received any consideration for the same. Upon these grounds, the said letter is invalid according to the law of the State of New York." For my own part I do not think that averment as it stands ought to have been remitted to probation at all. It appears from the letter itself that it is not executed under seal, and that it does not express that the defenders received any consideration for it. No proof, therefore, of the facts was required; and to say that this letter is invalid and ineffectual by the law of a foreign country does not afford any information as to the peculiarities of that law. As the evidence, however, of American lawyers was taken without objection, it may be necessary to examine it, and to consider how far it can be held to support the vague averment to which I have referred.

As might be expected from the general character of the averment remitted to proof, the evidence of the experts is rather of the nature of opinions as to the liability of the defenders had they been sued in the State of New York on the facts assumed by the witnesses, than an exposition of the principles of the American law applicable to documents not under seal and not expressing any consideration. The whole of Mr Winthrop's examination-in-chief is of this description, and is, in my opinion, mostly irrelevant. As an illustration I shall only quote a single sentence. He says—"It seems to me that Fisher's insolvency having intervened before any effectual delivery of the letter of Potter, Choate, & Prentice to the assurance company, there was never any delivery, actual or constructive, of the interest in the syndicate participation to the assurance company." This evidence proceeds on an assumption as to the delivery of the letter which I have already held to be erroneous. If the fact were as Mr Winthrop assumes it to be, I apprehend the same result would have followed according to the principles of Scots law. The same observation applies to the evidence of Mr Yule, who was examined on similar lines. In the cross-examination, however, of Mr Winthrop he is asked—"(Q) Assuming that said letter is valid and effectual in all other respects, would the fact that said letter is not under seal render it invalid and ineffectual according to the law of the State of New York?—(A) I find it difficult to answer that question directly. Under certain circumstances it seems to me that that letter would have been effectual for certain purposes, or that such a letter even though not under seal would be valid and effectual for certain purposes; as, for instance, if there had been an estoppel." And later on he says—"I think that if there had been an actual delivery of such a letter, and the subject-matter of such a letter had been property *in esse*, and capable of immediate delivery, that the letter might have operated as constructive delivery of that property—a delivery of that property to the Scottish company and an abandonment by the defenders of their lien." When a question similar to that I have first quoted is put to Mr Gale with regard to the letter, his answer is—"That would depend, in my mind, altogether perhaps upon the purpose or upon the connection with respect to which it is invalid or ineffectual. I find it impossible to answer your question as a matter of law.

I can say that the paper would be effectual for many purposes, perhaps for the purpose involved in this suit, it need not be under seal, in my judgment." This evidence certainly does not support the defenders' averment as to the law of the State of New York. On the contrary, I read it as indicating that the law of that State is not materially different from the law of Scotland. There is further evidence by the same witnesses to the effect that if the letter can be treated as evidence of a contract there is nothing in the fact of its not being under seal or expressed for consideration which would make it inadmissible; although in a question of this kind the *lex fori* and not the *lex obligationis* would rule. The same view is developed by Mr Fuller, an American lawyer examined for the pursuer, who also dealt at great length with the American doctrine of estoppel—which, as the Lord Ordinary remarks, does not appear to be very different from our own. None of these witnesses supports the conclusion at which the Lord Ordinary has arrived, which is to the effect that the letter, although intended to operate, when duly delivered, as a transfer of Fisher's right in the syndicate, to the extent of 13,000 dols., to the insurance company, is just so much waste paper according to American law, and cannot be founded upon for any purpose, unless, perhaps, as the foundation of a plea of estoppel. It would be strange if that were so, seeing that the original obligation of Messrs Morgan was contained in a letter of the same kind authenticated simply by the signature of the firm, and that the evidence of the defenders themselves clearly implies that if the letter had been duly delivered to the insurance company with their authority, they would have regarded it as effectual to transfer Fisher's right to participate in the syndicate to the insurance company. Thus, when Mr Choate was asked, "(Q) Why did you not object to sending the letter to Zuluetta & Company direct?" he answered—"(A) Because at that time the market conditions were very good, and Fisher's account had such a margin that even had the draft been dishonoured, our loss would have been very slight." Now this answer implies that after the letter was sent to Zuluetta, although Fisher had dishonoured his draft, the defenders would have held themselves bound to account to the recipients for the interest in the syndicate which they had acknowledged that they held for their account; yet, if the present contention is well-founded, they would have been equally entitled in law to disregard the letter and to apply this interest to meet Fisher's indebtedness.

The Lord Ordinary seems to have assumed that the letter was in the nature of a gratuitous obligation, and this assumption is at the root of all his reasoning on the subject. I do not find that he gets any support for this view from the American lawyers examined, nor do I think the assumption is warranted by the facts. Before the letter was delivered to the insurance company the defenders had a duty to account to Fisher for the interest in the syndicate to which it referred, and when, at Fisher's request, they granted and delivered the letter to the insurance company, they were discharged of their obligation to account to Fisher, and became impliedly bound to account to the insurance company instead. It is difficult to understand how such a transaction can be treated as one without consideration. Part consideration they had already received, and for the remainder they were content to take Fisher's acceptance for £1700. It is nothing to the purpose that that acceptance was dishonoured by Fisher, for they have an undoubted claim for the amount. If, however, the view now presented is well-founded, although Fisher had honoured the draft for £1700, and had subsequently become indebted to them on other transactions, before they accounted to the insurance company, they might equally have pleaded the invalidity of the letter, and retained the interest to meet this subsequent indebtedness, for if the delivery of the letter did not operate as a transfer to the person to whom it was delivered, the interest in the syndicate still remained the property of Fisher and could be lawfully retained as security for his debts. This is sufficient to show that the plea now taken is really not consistent with ordinary fair dealing in commercial matters. It would imply that the defenders—who must be assumed to know the law of the State of New York where they reside—deliberately signed and delivered documents which they knew would be treated by the recipients as implying an obligation in their favour, when all the time the defenders knew that these documents had no legal validity.

With regard to the doctrine of "estoppel," or, as we should call it, "bar," all the American witnesses are agreed that if the insurance company acted, or refrained from acting, on the faith of the letter, the defenders would be estopped from denying the truth of the representations which it contained. Now it is conclusively proved that the insurance company when they received the letter were perfectly satisfied with it as implying an obligation directly undertaken by the defenders to them. The Lord Ordinary says that it appears clear enough that the pursuer's assignors did not alter their position in any way in consequence of the receipt of the letter; and that there is no room for the suggestion that they, or the pursuer in his own right, lost the chance of recovering the money from Fisher because he or they were lulled into security by the letter. I cannot concur in this view. Had Fisher failed to deliver the letter—as he had promised to do—the pursuer, or his cedents, had at least the chance, for a few days before he actually absconded, of recovering the money from him. It does not appear to me that they need prove any more so as to raise the plea of bar. The receipt of the letter satisfied both the pursuer and his cedents that they need take no further steps in the matter, and it is not necessary

for them to show that, in point of fact, they would have recovered from Fisher had they not been lulled into security by its receipt. They were deprived of a chance which they would otherwise have had of bringing personal pressure to bear on Fisher, and that appears to me to be enough.

In the view I have taken it is unnecessary to refer to the entries in the defenders' books. All these are consistent only with the view that in the case of each of the three parties to whom they sent letters acknowledging that they held an interest in the syndicate on their behalf, they ear-marked that interest as belonging to these parties, and in each case they drew on Fisher for amounts which were calculated on the footing that their margin of security had been lessened by the withdrawal of these interests from his account.

On the whole matter, therefore, I have come clearly to the conclusion that the Lord Ordinary's interlocutor must be recalled, and that the pursuer is entitled to the decree which he seeks, for no question has been raised as to the amount sued for in the event of the defenders' third and fourth pleas being repelled.

LORD ARDWALL — This case arises out of the proceedings of a syndicate which was formed for the purpose of floating 10,000,000 dollars of 4 per cent bonds of the Louisville & Nashville Railroad Company. This amount was purchased by Messrs J. P. Morgan & Co. of New York, and they proceeded to place various parcels of these bonds and of the interests of the syndicate which they represented among their financial clients. Among others they wrote to the defenders Potter, Choate, & Prentice offering them an interest of 200,000 dollar bonds. The defenders accepted this offer and on 21st February they cabled to W. D. Fisher, a London financial agent, offering him a participation of 50,000 dollars in the syndicate.

I here pause for the purpose of remarking that the defenders must have had in contemplation that Mr Fisher did not intend to keep these for himself, but being merely a financial stockbroker, that he intended to place them with customers or clients of his own on this side of the Atlantic. Fisher, after arranging with the pursuer Mr Stuart that the latter would take two participations of 25,000 and 13,000 dollars respectively, and having disposed of the remaining 12,000 dollars to Messrs Zuluetta of London, purchased through the defenders 50,000 dollars in this syndicate at 98§. The pursuer in his turn had contracted with two Edinburgh insurance companies, the Century Insurance Company, Limited, and the Scottish Metropolitan Life Assurance Company, Limited, that the former should take the participation of 25,000 dollars and the latter the participation of 13,000 dollars, he making a commission on the sale. It is with this lot of 13,000 dollars that the present action is concerned. With regard to the 25,000 and the 12,000 dollars the defenders granted letters of precisely the same character as that founded on by the pursuer to the ultimate purchasers of these lots to the effect that they held these amounts for them, and no question has arisen regarding these lots.

The Scottish Metropolitan Life Assurance Company, Limited, having claimed and received from the pursuer the amount of their loss, he now brings this action against the defenders for his own relief.

After the purchase of the 13,000 dollar shares by the Scottish Metropolitan Insurance Company, various payments of calls were made by that company through Stuart and Fisher to the defenders, amounting in all to 95 per cent. of the amount due on the 13,000 dollars interest in the syndicate.

So far as the various contracts of sale of the 13,000 dollars interest in the syndicate were concerned, it is manifest that there was no privity of contract between the Scottish Metropolitan Assurance Company or the pursuer and the defenders, and up to the time of the letter of 15th February 1907 being written the defenders held these 13,000 dollars on account of Mr Fisher, but of course it was perfectly well known to the defenders that Mr Fisher had placed these and other lots with his clients who were the persons who had paid the calls made from time to time by the syndicate. The Metropolitan Assurance Company having been called upon by their Auditor to produce scrip to vouch this 13,000 dollars in the syndicate, they applied to Mr Fisher and he to Potter, Choate, & Prentice, to procure certificates of the said bonds. This, however, could not be done owing to the terms of the syndicate contract under which Potter, Choate, & Prentice were bound to hold the certificates till the syndicate was wound up and matters settled with J. P. Morgan & Company. The defenders, however offered to send, and did send, the letter of February 15th 1907, which is printed in the record, and which is in these terms— "Dear Sirs, — We beg to advise you that we are holding for your account an interest of 13,000 dollars in the Louisville and Nashville, Atlanta, Knoxville, and Cincinnatti Division 4 per cent Bond Syndicate, on account of which 95 per cent has been paid."

Now it appears to me that a good deal of confusion has been caused in the argument and the decision of this case by this letter being viewed as a contract between the Scottish Metropolitan Life Assurance Company and Potter, Choate, & Prentice, and that too a contract which required in order to its validity by American law an express consideration and a signature under seal. I think this is an altogether misleading view of that document. The contract for the purchase of the 13,000 dols. interest in the syndicate being part of a total interest of 50,000 dols., had been completed between Fisher and the defenders, and the defenders held that amount on Fisher's account. This letter is nothing more than an acknowledgment that the defenders had substituted the Scottish Metropolitan Life Assurance Company, Limited, for Fisher as regarded these 13,000 dols. interest in

the syndicate, and that thenceforth they held that interest for the assurance company. No consideration was needed for such a document. The consideration for the interest had already been paid by Fisher, and the defenders, knowing as they must have done that he required to place this interest with clients of his own, were quite prepared to set aside this 13,000 dols. and hold them for his clients—indeed I think Fisher might have insisted on their doing so. To my mind the transaction is very little, if at all, different from the case where a person had deposited 13,000 dols. of gold bonds with his banker and held a receipt for them, and thereafter instructed his bankers that he had sold them to another person, B, and told them to send B an acknowledgment that they now held these bonds for him. I do not think it is proved that by American law such a document as the letter in question required either the consideration expressed or to be executed under seal. One of the experts in American law, Mr Paul Fuller, comes very near what in my opinion is the correct view of the matter when he says regarding the letter—"In my opinion this paper is no contract, but the evidence of a completed transaction, to wit, a delivery to Potter, Choate, & Prentice of Louisville and Nashville bonds for account of the assurance company, and their acknowledgment that the bonds have been paid for and are held for the account of the company."

It appears to me that the averment of foreign law in statement 4 of the defences is irrelevant. It mixes up two things, the original contract between the defenders and Mr Fisher and the letter of 15th February. The contract between the defenders and Mr Fisher is not questioned, and it put Mr Fisher in the position of requesting the defenders to hold any part of his share in the syndicate he pleased for a person to whom he had sold it; and accordingly we find that from that time onward the defenders entered this share of 13,000 dols. in their books as appropriated to the Scottish Metropolitan Life Assurance Company, Limited. I cannot see that there is any evidence that the law of New York is different from the law of this country as to the validity of such a document.

I may further add, that I am of opinion that according to the law of Scotland the document in question was *in re mercatoria*, being an ordinary commercial document, and did not require to be either holograph or tested, and it does not appear that the law of New York is otherwise, the defenders having given effect to similar letters in the case of the Century Insurance Company and Zuluetta & Company.

The only difficulty in my opinion is with regard to the draft for £1700 which was sent by the defender to Fisher at the same time that they sent the letter above quoted to the Metropolitan Assurance Company. But this matter as well as the other points in the case have been so satisfactorily dealt with by my brother Lord Salvesen that I have nothing to add to what he has said.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

"Recal the . . . interlocutor reclaimed against: Sustain the first plea-in-law for the pursuer: Ordain the defenders to deliver to the pursuer twelve first general mortgage of 4 per cent. gold bonds for the sum of 1000 dols. each of the Louisville and Nashville Railroad Company (Atlanta, Knoxville, and Cincinnati Division), dated the 1st day of May 1905 and maturing the 1st day of May 1955, with half-yearly coupons (or the equivalent in cash in respect of past due coupons) for the interest due on each bond as at and from 1st November 1906, until the maturity of the said bonds, and to pay to the pursuer the sum of £73, 16s. sterling, with interest thereon at the rate of £5 per cent. per annum from 13th June 1907 until payment, being the amount of the securities and funds now held by the defenders and belonging to the pursuer as assignee of the Scottish Metropolitan Life Assurance Company, Limited, and that within six weeks from the date hereof, under certification that if they fail to deliver the said bonds and make the said payment with the said person, decree will be pronounced in terms of the alternative petitory conclusions of the summons, and remit the same to the Lord Ordinary to proceed," &c.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—Constable, K.C.—Pitman. Agents—Simpson & Marwick, W.S.

Counsel for the Defenders (Respondents)—Chree—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 17.

FIRST DIVISION.

GOVERNORS OF LADY BURNETT'S SCHOOL, PETITIONERS.

School—Education (Scotland) Act 1872 (35 *and* 36 *Vict. cap.* 62) *secs.* 37 *and* 47—*Sale of School to School Board—Power of School Board to Accept and Administer a Bursary Fund.*

The trustees under a scheme which had been settled under the Educational Endowments Act 1882, and contained a clause giving power to the Court to alter the provisions of the scheme with the consent of the Scotch Education Department, finding it impossible to efficiently carry on the school in accordance with the requirements of the Scotch Code and the regulations laid down by the Education Department as conditions of earning the Government grant, presented, with the assent of the