Tuesday, July 4.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

VALERY *v.* SCOTT.

Contract—Foreign—Stamp.

Held (1) that a contract between a Scotchman and a Frenchman, made in France, which did not set forth a specific place of performance, but was admittedly based on a prior contract signed at the same time, and to be performed in Scotland, was a Scotch contract; and (2) that the Court could not entertain the objection that by the law of France the contract was void in respect it was not stamped.

The pursuer in this action was Le Comte Joseph Valery, one of the Senators of France, and sole director-in-chief of the firm of Valery Freres et Fils, shipowners, Marseilles and Paris, and the defender was John Scott, a partner of the firm of Scott & Company, shipbuilders in Greenock. The conclusion of the summons was for payment of the sum of £4864, 2s. 11d. with interest, being the amount of a claim by the pursuer upon a contract entered into between him and the defender.

On 28th July 1870 Valery Freres et Fils and Scott & Company entered into and executed in duplicate in Paris a contract in the French language, whereby Scott & Company undertook to build for Valery Freres et Fils eight new iron screw packet-boats for the mail service and the carriage of passengers and goods.

The pursuer averred (Cond. 3)—"Simultaneously with entering into the said contract the defender undertook and agreed to pay to the pursuer commission at the rate of two per cent. upon the amount of the said contract, and at the same time with the execution of the said contract the defender wrote and signed and delivered to the pursuer a letter or obligation in the French language, of which the following is a copy and accurate translation:—

'*Paris, the* 27 *July* 1870.

'Monsieur Joseph Valery—As has been agreed between us, I engage myself to give to you two per cent. upon the amount of the contract for the eight new packet-boats for which I have signed a contract to-day.—Yours truly,

JOHN SCOTT.'

Such a commission is according to usage paid by shipbuilders upon obtaining a contract for building a ship or ships to the person through whom the contract is obtained, and the contract above mentioned was obtained by the defenders' firm through the pursuer. The averment in answer as to the law of France is denied. The said letter or obligation does not require a stamp according to the *lex loci solutionis*, which alone is applicable. And even if the matter of the stamp fell to be regulated by the law of France, the document could according to that law be stamped at any time before judgment was obtained by the holder thereof."

The vessels were eventually completed and delivered, but the defender declined "to pay the commission, amounting to £4864, 2s. 11d. upon the whole price paid to him, viz., £243,208. This action was accordingly brought.

In his answers to Cond. 3 (quoted above) the defender stated—"The said letter is not duly stamped, and according to the law of France, where said letter was written and granted, it is essential that the said letter should be stamped in order to make it valid or binding as an obligation." His plea was—"The said letter falls to be considered and construed according to the law of France, where the same was made and granted, and by said law the said letter imposes no binding obligation upon the defender, but is null and void in respect it is not duly stamped."

There was a further defence upon the merits, to which it is not necessary to allude here.

The Lord Ordinary pronounced an interlocutor repelling the defender's plea, and appointing the case to be put to the roll for further procedure.

His Lordship's note was—"The contract, though made in France, was to be performed in Scotland, where the defender was domiciled. Hence any question raised as to its validity is in the opinion of the Lord Ordinary to be determined by the law of Scotland—See Story's Conflict of Laws, sec. 280."

The defender reclaimed, and *inter alia* argued—This case was outwith the law laid down in Story's Conflict of Laws, sec. 280. It lacked a specific place of performance, and that altered the rule. Apart from the first contract, it was not clear that this one was to be performed in Scotland. It differed from the first inasmuch as it was not between the same parties.

Authorities quoted—Story on the Conflict of Laws, secs. 280 and 282; Addison on Contracts, (5th ed.) pp. 178 and 1082; *Albion Fire and Life Insurance Co.* v. *Mills*, 3 Wilson and Shaw's App. 218; Burge's Comms. iii. 757; *Doun* v. *Lippmann*, May 26, 1837, 2 Shaw and Maclean, 682; *Stewart* v. *Gelot*, July 19, 1871, 9 Macph. 1057; *Royal Bank* v. *Scott, Smith, Stein & Co.*, January 20, 1873, 17 F.C. 90; Thomson on Bills, (Wilson's ed.) p. 85; *Clements* v. *Macaulay*, March 16, 1866, 4 Macph. 583; *Bristow* v. *Sequeville*, May 7, 1850, 5 Exch. (Welsly, Hurlstone, and Gordon) 275; *Holman* v. *Johnston*, 1 Cowp. 343; *James* v. *Catherwood*, 3 Dowling and Rylands, 190; *Wilson* v. *Vysar*, 4 Taunt. 288; *Alves* v. *Hodgson*, 7 Durnford and East. 241; Erskine's Insts. iii. 2, 39; *Warrender* v. *Warrender*, 9 Bligh's N. R. 110.

At advising—

LORD PRESIDENT—I am of opinion that the contract contained in the letter addressed to the pursuer by the defender in this case is a Scotch contract. We have heard a great deal about the place of making the contract on the one side of the bar, and on the other about the place where it was to be performed. These points are both to be taken into consideration in determining the nationality of a contract, but the latter is always of more importance than the former. The place of making may be a matter of indifference. For instance—Two parties resident in Paris make a contract which is concerned with moveable goods situated in Scotland, and in such a case it could not be said that the fact of the contract being signed in Paris was of any moment. That is an example for the purpose of shewing how unimportant such a circumstance may be. The place of performance can never be unimportant, as it

is evident that for many important purposes it regulates the law affecting the interests under the contract.

It appears to me that in all its qualities and circumstances this is a Scotch contract. That one of the contracting parties is a Frenchman is of no consequence. The party who had to perform it was a Scotchman whose place of business is in Scotland. It has an indissoluble connection with another contract which was also Scotch, and but for which this second would never have come into existence. The first related to the building of ships in the defender's yards in Greenock, and the second stipulated that two per cent. commission was to be ascertained and paid to the present pursuer upon the price of the vessels. Scott was not to be found anywhere except in Greenock. It was there he was domiciled and resided and carried on his business. No place could be contemplated as the place of this contract except Greenock.

A great deal of misunderstanding has been created by the way in which many authors on foreign law have written upon this subject. The *locus* of a contract according to them appears to be the place where it is reduced to writing and signed, whereas what is really meant is locality as ascertained from the nature of the contract itself, and what is to be done under it when it is to be executed. The Civil law is similar to what I have just stated—"A party is to be held as contracting in that place where he undertakes to perform the contract;" that is, the place of the contract is the place of its performance.

Indeed, it seems to me that this case will not admit of serious argument. The two parties happened to be in Paris at the time of signing. That was a mere accident; at anyrate it was not an incident of the contract. Of course the idea of a Scotch contract requiring a French stamp to make it admissible is out of the question, and I think the judgment of the Lord Ordinary should be affirmed.

Lord Deas—This contract was objected to as the case was first presented to us, not merely to the extent of its not being evidence, but it was said it was null and void, and that the law of the place where it was made must be the law for determining that question. That plea was supported by a plausible argument, and it made no matter for that purpose whether the contract were Scotch or French. The plausibility was further supported by conflicting opinions of judges and jurists upon the points which were cited to us. I was rather disposed to think that we might have an inquiry before answer, to ascertain how far the pursuer's averments of the nullity of the contract were correct.

But the moment it was found necessary to go beyond that and to say that this was a French contract, the plea of the defenders entirely failed. This is clearly a Scotch contract; and that being so an inquiry would be useless.

Lord Ardmillan—I do not think it is necessary to go further here than to say that this is a Scotch contract.

There is, I think, some looseness of language in many of the authorities upon the branch of international law which was argued before us. The *lex loci contractus* is in many instances interpreted to be the place where the contract was written, but that is more accurately termed the *lex loci actus*. The *lex loci contractus* is more truly the law of the place where the contract is intended to be fulfilled.

Lord Mure—I have come to the same conclusion. If this letter, which constitutes the contract, had been an undertaking to pay standing by itself, I should have had some hesitation—looking to Erskine and the other authorities—in holding this to be a Scotch contract. But having regard to the previous contract, and to the fact that the one before us was executed on the same day with that and is referred to as being so signed, I have no difficulty in holding this to be a Scotch contract. That being so, I think the contention of the defender fails.

Lord President—I forgot to advert to a passage in Erskine (iii. 2, 40) which lays down a very important doctrine, and one that is frequently given effect to regarding the solemnities of deeds. A deed may be good and valid here if signed in a foreign country according to our statutory forms or according to the form of the country where it is written, but it does not follow if the second course is followed that it is a foreign deed. It may be a Scotch deed or a Scotch contract, and the two cases of the *Master of Salton* and *Muquet La Pine* which are quoted by Erskine are merely cases where effect was allowed to be given to deeds as if made according to Scotch law because they happened to have been executed in a foreign country. This doctrine of law, as quoted in Erskine, was given effect to in the case of *Purvis' Trustees*, March 23, 1861, 23 D. 823.

Lord Deas—I ought to add that I come to the same conclusion in this case upon the footing that there is no reference to the previous contract.

The Court adhered.

Counsel for Pursuer (Respondent)—Balfour—Asher—J. P. B. Robertson. Agents—John Wright & Johnston, Solicitors.

Counsel for Defender (Reclaimer)—Dean of Faculty (Watson)—Trayner. Agents—Mason & Smith, S.S.C.

Tuesday, July 4.

SECOND DIVISION.

[Sheriff of Forfarshire.

BRITISH SHIPOWNERS COMPANY *v.*

J. & A. D. GRIMOND.

Contract of Affreightment—Injury to Goods—Damages—Delivery—Punctum temporis.

750 bales of jute were shipped to the port of D. On arrival the consignees' clerk took delivery for three or four days over the ship's side, but on the 5th day at noon a heavy shower came on, and 91 bales were damaged. None of these bales were removed from the quay for about a week, when they were placed in the consignees' warehouse. The consignees claimed damages for their loss on the 91 bales, and led evidence