liable on that score. The vessel at first was at a berth where there was shed accommodation, and then she was removed to one where no shedding existed. I think that the point of delivery was when the goods left the hands of the crew. The consignee was then represented by his clerk and his porter, for the shore porter is in such a case really the servant of the consignee, though he may be an official—for he is paid (according, no doubt, to a certain tariff) by the consignee. Further than this, the delivery had for some days been going on, and the Messrs Grimond had been receiving the goods.

All this amounts clearly to delivery, unless a custom to the contrary be proved, and I do not think that the checking spoken to by the witnesses amounts to that; clearly it is not the *punctum temporis* of delivery. The consignees did not choose here to take away all their bales; it is in evidence that there were not less than 16 marks on these bales, and they wanted to keep the same marks together, and to arrange the bales on the quay. This was a matter for the Grimonds' own convenience; it was no business of the carriers; and there is no evidence of custom to show that the ship took charge of the goods in the interval between the putting over side and the checking. The checking took place only on removal from the quay; it had nothing to do with delivery; and in the absence of some contrary custom we must hold putting over the ship's side as delivery.

The Court dismissed the appeal, and affirmed the judgment of the Sheriff, giving the expenses of the appeal to the respondents.

Counsel for Appellants (Defenders)—Dean of Faculty (Watson)—Asher. Agents—Macara & Clark, W.S.

Counsel for Respondents (Pursuers)—Fraser—Jameson. Agent—P. Douglas, L.A.

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*Wednesday, July 5.*

## FIRST DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

## DUDGEON *v.* THOMSON AND DONALDSON.

(*Ante*, p. 384.)

*Process—Breach of Interdict—Proof—Jury Trial.*

*Held* that a petition and complaint for breach of interdict against a firm consisting of two partners, one of whom had been interdicted at the instance of the complainer, was a case for proof before the Court, and was not suitable for jury trial.

*Opinion* (*per* Lord Deas) that as a question of breach of interdict is one of contempt of Court, it is the duty of the Court themselves to decide whether the contempt has been committed.

A petition and complaint for breach of interdict at the instance of Richard Dudgeon, with concurrence of the Lord Advocate, against William Thomson and Benjamin Donaldson, sole partners of the firm of William Thomson & Co., Glasgow, was presented to the First Division of the Court. The interdict which it was alleged had been broken was obtained in 1873 by the complainer against William Thomson, who afterwards went into partnership with the other respondent Donaldson.

In the answers lodged for the latter he maintained that as the interdict had no application to him personally he could not be guilty of a breach thereof or of contempt of Court. After answers had been lodged and counsel heard, the cause was remitted to Lord Rutherfurd-Clark (Ordinary) in terms of the Act of Sederunt 11th July 1828.

The Lord Ordinary thereafter closed the record, and pronounced an interlocutor in which he assigned a diet for the adjustment of issues.

Against that interlocutor the complainer Dudgeon reclaimed, on leave being granted for the purpose.

He argued that in a case of breach of interdict a jury trial was unusual, and referred to the following authorities — *Mackenzie* v. *Mags. of Dingwall*, Feb. 12, 1839, 1 D. 487; *Gray* v. *Petrie*, Feb. 17, 1848, 10 D. 718, and 11 D. 1021; *Menzies* v. *Macdonald*, Feb. 13, 1864, 2 Macph. 652; *M'Neill* v. *Scott*, March 17, 1866, 4 Macph. 608; Act 6 Geo. IV. cap. 120 (Judicature Act), sec. 28; Act 29 and 30 Vict. cap. 112, sec. 4; (Evidence Act 1852).

The respondents argued—The case was fitted for jury trial (1) as being of a quasi-criminal nature; and (2) because the question of Donaldson's liability was one which a jury would best decide.

At advising—

Lord President—I am against a petition and complaint for breach of interdict being tried by a jury, for the two reasons which have been mentioned in support of that view by the counsel for the respondents. The first is, that it will come out in the course of the trial that this is a case of a quasi-penal character, and therefore peculiarly suited for a jury. If that should happen, it would prejudice the mind of the jury in an illegitimate way, such as is not desirable. That is one reason; and the other is, that there is a very difficult question raised here as to the liability of the defender Donaldson as a partner of Thomson, and the question will be, not whether Donaldson has infringed the patent so much as whether he is so involved as to have committed a contempt of Court. That is a question which is particularly well suited for the decision of the Court without the assistance of the jury.

Lord Deas—There is no doubt that a question of breach of interdict is a question of contempt of Court, which cannot be sent to a jury in this case without committing to them to the whole extent our jurisdiction and our duty to ourselves to decide whether the contempt has been committed.

Lord Ardmillan and Lord Mure concurred.

The following interlocutor was pronounced:—

"Recal the interlocutor, and remit to the Lord Ordinary to appoint the cause to be tried before himself without a jury, reserving all questions of expenses."

Counsel for the Complainer (Reclaimer)—Dean of Faculty (Watson)—Balfour—Hunter. Agent—D. Curror, S.S.C.

Counsel for the Respondents—Asher—Jameson. Agents—Auld & Macdonald, W.S.

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*Wednesday, July 5.*

## SECOND DIVISION.

[Lord Craighill, Ordinary.

### ROBERTSON *v.* BROWN AND OTHERS.

(Before the Judges of the Second Division, with Lords Deas, Ardmillan, and Mure).

*Municipal Election*—35 *and* 36 *Vict. c.* 33—*Ballot Act* 1872—*Ballot Paper—Rejection of Votes.*

*Held* (*diss.* Lord Deas) (1) that in conformity with the decision in *Haswell* v. *Stewart*, a ballot paper with a straight line in place of a cross must be rejected; (2) that a cross decidedly to the left of the candidate's name must be rejected.

*Held* (by the Second Division in applying the foregoing judgment) that a mark on the paper which might be presumed to be a badly formed cross, or an attempt to make a cross, was not a sufficient ground for disallowing the vote.

This was an action of reduction and declarator at the instance of William Robertson, baker in Musselburgh, against William Brown, senior bailie of Musselburgh, and the other members of the town council, and against George Laurie and Alexander Adamson, claiming to be respectively provost and councillor of that burgh. The case against Provost Laurie was after a scrutiny abandoned, but as against William Brown and others was insisted in, to the effect that Robertson should be found and declared to have been duly elected a councillor of the burgh of Musselburgh on 2d November 1875. The town council of the said burgh consists of twelve members, of whom four retire annually by rotation. There were at the election in November 1875 seven candidates for the four vacancies, and accordingly a poll took place, the result being declared by the returning-officer, Bailie Brown, as follows:—Charles Smart, 368; John Mackinlay, 279; George Laurie, 240; Alex. Adamson, 231; The Pursuer, 222; Alex. Wilkie, 209; Ro. Dickson, 55. The four highest were declared duly elected and sworn in as councillors. 67 ballot papers were rejected by the returning-officer, some of them as "utterly bad," and some of them because the cross was placed outside the square printed for it on the ballot paper. 23 of these bore the X on the right hand side of the candidate's name, but not in the space—14 for Robertson and 9 for Adamson. 10 bore the X to the left of the candidate's name—6 for Robertson, 9 for Adamson. 2 bore marks which, though not X's, yet were like bad attempts to make an X—these were for Robertson. 1 bore a mark thus 1—it was given for Robertson. 2 bore a line in place of a cross—these were given one to Adamson and one to Robertson.

The questions raised were as to the rejection of these votes, and the pursuer averred in his condescendence that "by the Act the returning-officer is entitled to reject a ballot paper only on one of four grounds, viz.,—(1) Want of official mark on the back of the paper; (2) Votes given to more candidates than the voter is entitled to vote for; (3) Writing or mark (excepting the number on the back) by which the voter could be identified; and (4) Papers which are unmarked or void from uncertainty. The statute does not prescribe that the voter must mark his vote within any space which may be printed on the ballot paper, or that the ballot paper shall not be counted because he may have happened to mark it to the right hand or to the left hand of the squares. The only direction on the matter which is contained in the Act is that set forth in the form for the guidance of the voter which is given in the second schedule. The second paragraph of the said form is in these words—The voter will go into one of the compartments, and with the pencil provided in the compartment place a cross on the right hand side, opposite the name of each candidate for whom he votes, thus X. The ballot papers which were rejected because the cross or mark was outside of the square spaces printed on the ballot paper with a view to their reception, were all of them duly marked opposite the name of each candidate for whom a vote was intended to be given. The not counting of them by the returning-officer was wrongful and illegal, and if they had been duly counted, the pursuer, who by the declaration of the poll, as made by Bailie Brown, had only nine votes fewer than Alexander Adamson, would have been found to be (as in fact he was) among the four of the seven candidates who truly obtained the most votes at the poll. . . . . Other papers which were rejected not on the ground of the position of the X were illegally so rejected."

The pursuer pleaded—"1. It is not a good ground in law for rejecting and not counting the votes upon a ballot paper that the voter, while marking his vote opposite to, and on the right hand side of, the name of a candidate for whom he votes, should not have put the mark within a square which happens to be printed on the ballot paper with a view to its reception. 2. The said 67 ballot papers having been rejected and not counted, wrongfully and illegally, and the votes validly given on them having been such that, had the papers been duly counted, it would have appeared that the pursuer was elected as a councillor of Musselburgh, decree should be pronounced as concluded for. (3) The pursuer is entitled to decree in respect that on a proper computation of the votes validly given at the said election he was duly elected to be a councillor of the burgh of Musselburgh."

The defender (Adamson) pleaded—"1. The proceedings at the election of councillors at Musselburgh being in all respects in conformity with the Ballot Act, the defender ought to be assoilzied from the conclusions of the action. (2) At all events, the defender Alexander Adamson having, in any view, obtained more votes at the poll than either the pursuer or the other defender George Laurie, the present defender ought to be assoilzied."

On 27th January 1876 the Lord Ordinary (CRAIGHILL) ordered the transmission of the ballot and other papers by the Town Clerk of