tion of gunpowder is generated in varying proportions. It was generated, no doubt, on each day during the three months he had been working, but on none of these previous occasions had there been what one might describe as a lethal dose. There was a lethal dose according to the findings on 27th June, and therefore I consider that the Sheriff-Substitute was justified in coming to the conclusion which he did.

The Court answered the question of law in the affirmative.

Counsel for Appellants—Horne, K.C.—Pringle. Agents—W. & J. Burness, W.S.

Counsel for Respondents — Constable, K.C. — Moncrieff. Agents — Simpson & Marwick, W.S.

Tuesday, May 30.

SECOND DIVISION.

HAY AND OTHERS (OWNERS OF S.S. "THE COUNTESS") *v.* JACKSON & COMPANY (FOR OWNERS OF CARGO ON S.S. "PHŒNICIA").

Ship—Collision—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503, 504—*Limitation of Liability -Petition for Limitation in Scotland when Collision in England, Claimants there, Writs Issued there, and Witnesses there—Competency —Forum non conveniens.*

The owners of "The Countess," registered in Scotland, presented a petition under sections 503 and 504 of the Merchant Shipping Act 1894 for stay of actions and limitation and distribution of liability in respect of a collision in English territorial waters with the "Phœnicia," registered in England. Answers were lodged by the owners of the cargo on board the "Phœnicia," who opposed the petition on the ground of incompetency, and also pleaded *forum non conveniens.* The respondents averred that they and the owners of the "Phœnicia" had issued writs in the English Courts against the petitioners prior to the presentation of the petition, and that the witnesses required in proof of their claim were resident in England. *Held,* the competency being admitted by the respondents, that the plea of *forum non conveniens* fell to be repelled.

The Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) enacts, section 503—"The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say) . . . (*d*) Where any loss or damage is caused to any other vessel or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship; . . . be liable to damages beyond the following amounts; (that is to say) . . . (ii) In respect of loss of or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.' Section 504—'Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session . . . and that Court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other Court in relation to the same matter, and may proceed in such manner, and subject to such regulations, as to making the persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

John Hay and others, the registered owners of s.s. "The Countess," *petitioners,* presented a petition for stay of actions and limitation and distribution of liability. Answers were lodged for Andrew M. Jackson & Company, *respondents,* as representing the owners of the cargo on board the "Phœnicia."

The petitioners averred—"That the petitioners are the registered owners of the steamship 'The Countess.' of Glasgow, which steamer is of the net register tonnage of 234·74 tons, and her engine space is 323·79 tons, making a total tonnage for the purposes of this petition of 558·53 tons. . . . That on or about 4th March 1911, while 'The Countess' was proceeding on a voyage from Granville to Lydney, in the Bristol Channel, she came into collision with the steamship 'Phœnicia,' of Whitby, with the result that both steamers were damaged. No loss of life or personal injury were caused by the said collision. . . . That the said collision occurred, and the resulting damage was occasioned, without the actual fault or privity of the petitioners, and their liability, which is admitted, for damage caused by the said collision is limited to £8 per ton on said 558·53 tons or £4468, 4s. 10d., in respect of damage to vessels, goods, merchandise, or other things, other than damage for loss of life or personal injury.

"That claims have been intimated on behalf of the International Line S.S. Company, Limited, c/o C. Marwood, shipowner, Whitby, the owners of the s.s. 'Phœnicia,' for whom Messrs Thomas Cooper & Company, solicitors, London, act, and by the owners of the cargo on board the 'Phœnicia,' whose names have not yet been disclosed, but for whom Messrs Andrew M. Jackson & Company, solicitors, Hull, are acting, for payment of sums which together amount to considerably in excess of £8 per ton as above mentioned. Other

claims may arise which are at present unknown to the petitioners in respect of said collision for damages otherwise than in respect of loss of life or personal injury."

On 7th April 1911 the Lord Ordinary officiating on the Bills (SKERRINGTON) pronounced the following interlocutor (after ordering intimation and service)—"And appoints all parties having or pretending to have any right or claim on the fund referred to in the petition to lodge answers thereto, if so advised, within fourteen days after such intimations and service; and further, the petitioners having consigned in bank the sum of £4500 sterling, grants an interim order staying all suits or actions pending or which may hereafter be instituted in this or any other Court in relation to the petitioners' liability as owners of the steamship 'The Countess,' in respect of the collision mentioned in the petition."

The respondents averred, *inter alia* — "The respondents are solicitors in Hull, and were instructed to act for the owners of cargo on board the 'Phœnicia,' and on 5th April 1911 they issued a writ in the High Court of Justice, Admiralty Division in London, against 'The Countess' for the damage sustained by the cargo on board the 'Phœnicia,' in consequence of the collision mentioned in the petition. The owners of the 'Phœnicia,' through their solicitors Messrs Thomas Cooper & Company, of 21 Leadenhall Street, London, issued a writ against 'The Countess' on 6th March 1911. By the law of England the issue of a writ submits to the cognisance and jurisdiction of the English Courts the subject-matter of the writ. Accordingly the liability of the petitioners in respect of the collision, which is admitted in the petition, and all questions arising out of same so far as affecting the owners of the 'Phœnicia' and the owners of the cargo on board the 'Phœnicia,' were submitted to the English Courts prior to the date of presenting this petition. . . . The collision occurred within the territorial waters of England. The collision gave rise to a right, on the part of persons sustaining damage by the collision, of an action, *in rem*, against 'The Countess.' In these circumstances the respondents oppose the petition on the ground that the petitioners' application is improperly brought before the Court of Session, and *separatim* that the Court of Session is not a convenient *forum* for the trial of the claims arising out of the collision in question, and for the limitation of the petitioners' liability. . . . With regard to the question of the convenience of the Court of Session as a *forum* for dealing with these claims, the respondents desire to point out that in the event of any competition in regard to the distribution of the limitation fund, the expense of the proof of their claims would fall upon the claimants, and the owners of cargo might be forced to bring witnesses from Bristol and London to Edinburgh in order to prove their claims."

Argued for the petitioners—(1) There was no incompetency in presenting the petition in the Court of Session, even though writs had been issued in England. Even if decree were obtained in the English processes, the value of the claims would still have to be determined in the proceedings under the petition—*Van Eijck & Zoon* v. *Somerville*, July 20, 1906, 8 F. (H.L.) 22, 43 S.L.R. 841. The natural meaning of section 504 of the Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60) was that the owner of a vessel registered in Scotland might apply to the Court of Session. (2) There was nothing in the circumstances to found the plea of *forum non conveniens*. The procedure was analogous to that in a multiplepoinding *per* L.P. Inglis in *Rankine &c.* v. *Rasehen, &c.*, May 19, 1877, 4 R. 725, at p. 728, 14 S.L.R. 476, at p. 477, and the plea of *forum non conveniens* put forward in such a process by a claimant who resided in England would never be sustained.

Argued for the respondents — (1) The natural construction of section 504 was that the application should be made in the Court of the country where the collision occurred, and where the claimants resided. The practice, however, was no doubt against that view. (2) In view of the fact that the only probable claimants were resident in England, and that all the witnesses would have to be brought from England, the Court of Session was not a convenient *forum*.

LORD DUNDAS—This petition is presented by the registered owners of the steamship "The Countess" of Glasgow for stay of actions and limitation and distribution of liability. It appears that on 4th March 1911 "The Countess," whose tonnage is about 558 tons, came into collision in the Bristol Channel with the steamer "Phœnicia," with the result that both steamers were damaged. The petitioners explain that no loss of life or personal injury were caused by the collision; they partially quote section 503 of the Merchant Shipping Act, 1894, and say that the said collision occurred, and the resulting damage was occasioned, without the actual fault or privity of the petitioners, and that their liability, which is admitted, is limited to £8 per ton on the tonnage of the ship, or £4468, 4s. 10d. We were informed from the Bar that due consignation has been made. The petitioners go on to say that claims have been intimated on behalf of the owners of the "Phœnicia," and of the owners of the cargo of the "Phœnicia," for payment of sums considerably in excess *in cumulo* of the amount above stated, and that other claims may arise which are at present unknown to the petitioners in respect of said collision, and then, after quoting section 504 of the Merchant Shipping Act 1894, they pray the Court to stay all suits or actions pending or hereafter to be instituted before us or in any other Court in relation to their liability as owners of the steamship "The Countess" in respect of the said collision, and for limitation and distribution of the amount of their liability.

The petition was presented on the 6th of April, and on the 7th the petitioners obtained—of course upon an *ex parte* state-

ment of the matter—an interlocutor from the Lord Ordinary on the Bills appointing all parties having or pretending to have any right or claim on the fund referred to in the petition to lodge answers thereto, if so advised, within fourteen days, and in respect of the petitioners having consigned the sum of £4500, granting an *interim* order staying all suits or actions pending or which might thereafter be instituted in this or any other Court in relation to their liability in respect of the collision. So far that seems a very plain-sailing matter, and I cannot say that to my mind any serious difficulty has been raised by the answers which have been now lodged on behalf of the owners of the cargo on board the steamship "Phœnicia," and on which we have heard counsel.

The gist of the answers is that the petition is incompetent, or at all events that this is not a convenient *forum* for disposing of the matter, which ought to be disposed of in England. The respondents explain that they are solicitors in Hull, and were instructed to act for the owners of cargo on board the "Phœnicia," and that on 5th April 1911 they issued a writ in the High Court of Justice, Admiralty Division in London, against "The Countess" for the damage sustained by the said cargo in consequence of the collision; and then they say that the owners of the "Phœnicia" through their solicitors, Messrs Thomas Cooper & Co., of 21 Leadenhall Street, London, issued a writ against "The Countess" on 6th March 1911, only a day or two after the collision. Then they say that by the law of England the issue of a writ submits to the cognisance and jurisdiction of the English Courts the subject-matter of the writ. I take it that that must mean the service of a writ, otherwise it is very difficult to agree to the proposition as stated; but I need not trouble to discuss that matter, because Mr Lippe, with his usual moderation and good sense, admitted to us that he could not argue that this petition was not competent. I need not therefore go over the averments in the answers so far as they are directed to the question of competency. The only matter remaining is the argument which Mr Lippe maintained upon the matter of convenience. It seems to me that, the competency of this petition being conceded, the question of convenience hardly arises. The situation is by no means a novel one in these Courts. Witnesses frequently have to come here from England, and, conversely, Scottish witnesses have to go to London. It is not clear to my mind that any inconvenience would arise by keeping the petition in the Scots Court. There may not require to be any proof in the competition either in England or in Scotland, in the courts of law. But however this may be, one would think that in a matter of this sort the parties whose interests are affected will exercise good sense, and consider what is most convenient; and if they should concur in asking the Lord Ordinary to take a certain course as to the manner in which the distribution is to be carried out, one would suppose that the Lord Ordinary would take the course suggested; it might be left to the decision of an average adjuster; or if witnesses have to be examined, they might be examined on commission by consent of parties. Therefore it seems to me that there is no substance in these answers, and the question of convenience really comes to nothing. The terms of the interlocutor can be adjusted; we shall repel the answers, make permanent the *interim* order granted by the Lord Ordinary, and appoint claims to be lodged.

LORD SALVESEN—I am very clearly of the same opinion. It very frequently happens that a collision occurs in waters outside those of the home domicile of the ship, and that in the case of a Scotch ship the only claimants in respect of that collision may be resident in England or elsewhere, and none of them be resident in Scotland. But it does not seem to me that that has any bearing upon the question as to where proceedings of this kind fall to be instituted. In the ordinary case the owner of an English ship will present his application to the High Court of Justice in London, and the owner of a Scotch ship will appeal to the courts of his own country. Having presented his application as a condition of the Court staying actions elsewhere against him, which it is assumed may be brought by jurisdiction being constituted by arrestment, he has to consign the full amount of his possible liability. Once that is done the process is converted into what we in Scotland call a multiplepoinding, and the claimants, wherever they may have their domicile, are invited to come and compete for the fund which is within the exclusive jurisdiction of the Scotch Court. The idea that the Scotch Courts should divest themselves of that jurisdiction by remitting to England the sum which has been deposited with them by a Scotsman is, I think, entirely unheard of, and Mr Lippe produced no authority that could support such a proposition. It would be an entire novelty, I think, that a Scotsman should go to the Court of Admiralty and demand that because he and other Scotsmen were the only claimants on a fund in England, that the English Courts should immediately hand the money over to the Scottish Courts for distribution. I do not see how the Court could divest itself of the jurisdiction with which it is invested by the act of the owner of a fund in raising the action and consigning the money, and taking the analogy of a multiplepoinding I never heard it suggested that this was not a convenient *forum* to try the right to a fund in the possession and under the sole control of the Court here because the claimants to that fund were resident abroad. And therefore I think that the only question that could be raised here was one of competency, not of *forum non conveniens*, and the moment the competency is conceded, as Mr Lippe has conceded it, all the other objections disappear. I quite agree that

any objections on the score of expense may be obviated in the way your Lordship has stated, if the parties desire to minimise expense, but I am very far from thinking that proceedings in this Court would be as expensive as procedure in the Court of Admiralty, which is the only other place where this matter could be determined. Accordingly I have no difficulty in concurring with the views your Lordship has expressed in holding that these answers must be repelled.

LORD GUTHRIE—I agree. Mr Lippe has given up the objection to competency, and therefore the only question that remains is one of convenience. It is not necessary to decide whether a case of this kind might not arise in which the objection of *forum non conveniens* would apply, but in this case the objection is a very weak one on the face of it. The only objection is taken by the owners of the cargo; the owners of the vessel have been served, and they have not appeared to support the views presented by the owners of the cargo. It is not even said there is going to be any competition whatever; it is merely said that in the event of a competition, then certain difficulties, according to the respondents, will arise; and when one looks at the question of expense, in view of the locality of the collision and the residences of the parties and of the witnesses, it would rather appear that costs would be less, certainly not greater, if the case were tried here in Edinburgh instead of in London. Therefore, without deciding that an objection of this kind could in no case be sustained, I concur in thinking that the plea of *forum non conveniens* cannot be sustained in this case.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent.

The Court pronounced an interlocutor limiting the liability as craved in respect of the consignation, making the order staying all suits or actions permanent, repelling the answers, and appointing claims to be lodged within twenty-one days.

Counsel for the Petitioners—Constable, K.C.—J. Stevenson. Agent—Campbell Faill, S.S.C.

Counsel for Respondents—Lippe. Agents—Boyd, Jameson, & Young, W.S.

HOUSE OF LORDS.

Monday, June 26.

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

GLENDINNING *v.* HOPE & COMPANY.

(In the Court of Session, December 9, 1910, 48 S.L.R. 111, and 1911 S.C. 209.)

Stock Exchange—Retention—Lien—Stockbroker's Right to Retain Scrip against Open Accounts.

A stockbroker has a general lien on documents such as transfers coming into his hands in the course of his business and lawfully in his custody, and that even in respect of debts due by a customer to him not arising out of the transaction to which the transfer relates.

This case is reported *ante ut supra.*

The defenders Hope & Company appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—It is not disputed in this case that on the 1st of September 1909 the appellants, on behalf of the respondent and as his brokers, purchased 200 Globe and Phœnix mining shares for a sum, including brokerage and contract stamp and transfer and registration fee, of £865. Neither is it disputed that the respondent, by letter of the 15th of September 1909, repudiated that transaction and refused to carry it out. It is conceded that if the respondent was not entitled thus to put an end to the contract, the appellants were entitled to sell those shares against him and recover any loss they sustained on the re-sale. The plaintiff resold the shares, and in my opinion the whole trial proceeded on the assumption that on that re-sale and by means of it the appellants had lost £50, 2s. That is absolutely plain, and is, I think, found as a fact by the Lord Ordinary. The respondent justified his repudiation of his contract on the ground that he had not merely instructed the appellants, on the 9th of September 1909, to sell these 200 shares for cash and settlement on the 10th of September, the day following, which is undoubted, but that the appellants contracted to do this, *i.e.*, bound themselves to do that which they had, in a letter written on the very same day before the absolute contract to sell is alleged to have been entered into, stated could not be done.

In my opinion there is no proof whatever, of a character to be safely acted upon, that the appellants ever entered into this absolute contract to sell these shares.

The respondent's repudiation of his contract to purchase these 200 shares was consequently unjustifiable, and he is therefore liable to pay to the appellants the amount of the loss so found to have been sustained.