question. But it may be that the construction of finding is that it is only as to the matters which were particularly before the jury. Therefore although I have expressed these doubts, I do not wish to dissent from the opinions of other judges, I consider that no injustice has been done.

The rule was accordingly discharged.

Agent for Pursuer—James Bruce, W.S.

Agent for Defender—Andrew Scott, W.S.

Thursday, July 4.

THE LONDON AND CALEDONIAN MARINE INSURANCE COMPANY *v.* THE LONDON AND EDINBURGH SHIPPING COMPANY AND THE DUNDEE, PERTH, AND LONDON SHIPPING COMPANY.

Issues—Supplementary and Conjoined Actions—Two Defenders—Competency. A party brought an action, and, in consequence of the defence pleaded, which had the effect of throwing liability upon another party, raised a supplementary action against the latter. The two processes were ultimately conjoined. The pursuer having proposed issues against both parties, held (*dub.* Lord Neaves) that that course, although it necessarily entailed defeat of the pursuer by one or other of the defenders, was competent.

The pursuers are the assignees of the owners of a cargo of jute shipped on board the "Temora," for transmission from London to Dundee, and lost at sea on board that vessel; and they have paid the value of the cargo to the owners. The pursuers first brought an action for the value against the London and Edinburgh Company as owners of the "Temora." A defence having been stated that the Edinburgh Company had not contracted to carry the jute, inasmuch as they had let the vessel on hire to the Dundee Company for the trip, and had nothing to do with the cargo, the pursuers raised a supplementary action against the Dundee Company, which was conjoined with the other. The pursuers proposed issues in identical terms against both sets of defenders. It was objected that, as such issues would be contradictory to each other, they could not be granted.

GIFFORD and SHAND for Pursuers.

D.-F. MONCREIFF, YOUNG, WATSON, and DUNCAN for Defenders.

At advising—

LORD COWAN—I do not think that many observations are required in this case. After giving the case every attention, and also the arguments that were addressed to us, I have arrived at the conclusion that the pursuers are entitled to have the two issues that they propose. In their first action they have started a case which is certainly in itself a very relevant case against the defenders called in that action and they are entitled to have an issue under that record if they think fit. I see no reason why they should not get an issue in that first action, if they choose to take it. Then, in the second action, in consequence of the nature of the defence that is put in to the first action, a defeat of the ends of justice might possibly arise were the two companies not before the same jury; because, in defence to the first action, the Edinburgh Shipping Company state that, in that particular voyage, when the goods of the pursuers were sent for transmission to Dundee, they did not employ their own vessel, but had given their vessel over to the service of another Company. What was to be done about this—for the pursuers were rightly advised in bringing an action against that other Company—in order that they might have both parties in the field, one or other of whom, whatever may be the merit of their respective positions, is certainly responsible for the damage suffered by the pursuers? I think the first action was brought against the Edinburgh Company, as it was that Company that caused the vessel to be borrowed; but the Edinburgh Company said that the Dundee Company are finally responsible, and then the action is brought against that Company. That is the second action, and the Edinburgh Company are called in it for their interest. I think that is the way in which they stand. There are no conclusions in the second action as against the defenders in the first action. The conclusions in the first action are against the defenders in that action, the London and Edinburgh Shipping Company; and the conclusions in the second action are against the Dundee Company simply, the other Company being merely called for their interest. Now, in the second action, just as in the first, I think that a relevant case is laid; and if there is a relevant case, we cannot hold that the pursuers are not entitled to an issue to try the case they have upon record in a relevant form. Then the question arises whether the two issues in these conjoined actions—because the actions have been conjoined after having been resisted by the defenders—the question arises whether the issue in the one action and the issue in the other action are not to go to the same jury, and at the same time how may we express these issues? I can see no difficulty in the way of the Court with regard to this. I fail to have heard any argument or principle against it; I fail to have heard any authority quoted as good against a proposition which ought to be well founded if we look at the justice of the position in which the pursuers are placed, and the justice which the pursuers are entitled to have. I fail to see any authority against that course being taken. But I beg to say, for my own part, that the case of *Cairns* is conclusive as regards the practice of the Court when the justice of the case requires that the pursuer, who has suffered damage, should have a claim against two parties, or against one or other of two parties, who are fighting against each other, which is the party liable. I think it is also consistent with what I remember of the case of *Dickson*. In that case the iron ore from an ironstone pit, which was below a coal-pit, had been brought to the surface, and the result was that some of the burning ore tumbled down into the coal-pit and set it on fire, and a great deal of damage was done. The coal-owners brought an action against the owner of the property, and brought also in the same action the owner of the iron ore—they brought the contractors, and the subcontractors, and various parties. No doubt it was arranged in that case that we should go first of all to issue with one of the parties; but I never heard it disputed that we were entitled to do more; and I do think, if justice required it, we would have been entitled to an issue against one or other of them. That being so, I do not see that these two defenders—who, while they respectively dispute the right of the pursuers to have damages at all, will be fully heard upon that matter—have any reason to complain of this course being followed. If the pursuer is defeated at the very outset of his case, then of course they both get off; but they

are not entitled to have it found which is the party liable for the damage before it is actually proved by the pursuer that damage has been done. I think that is the nature of the case. Let them state their case before a jury, and the party actually liable in the opinion of the jury will be found liable for that damage which is proved to have been suffered by the pursuer, and then the other party will get off, and get off with full expenses, and since the pursuers are willing in this way to peril their proof, and to be liable in expenses to that defender who may succeed upon his issue, I do not see either principle or authority for refusing that course of procedure, or the issues which have been prepared. On these grounds, I think these issues ought to be sent to a jury.

Lord Benholme—I cannot help taking the same view of this question which has been stated by Lord Cowan. It is in some respects a metaphysical subtlety, but I think it resolves into this inquiry. Is the shape in which the pursuer here seeks to attach these two separate sets of defenders such as involves an absurdity in his compound action against them? It has been said, and said strongly, that as the actions were laid they cannot be both liable, and yet the issues state them to be both liable, and hence there is deduced an absurdity in the conjoined actions. Now, I rather think that forms of process are always to be read by the demands of substantial justice; and where a party may be liable to be defeated by the shifting of one defender upon another, in consequence of transactions between themselves, to which he is no party, I think the rules of process and of procedure should follow what substantial justice demands, and not what mere metaphysical subtlety would require. In the present case, applying that rule, it seems quite clear these pursuers trusted to the persons on board this vessel, without being aware or having any means of knowing who was the party that was actually working through these servants. The pursuers thought it was the owners of the vessel—a very natural conclusion; and they raised their first action upon that footing, that the persons to whom these goods were committed for carriage were the *employés* or servants of the owners of the ship. But when they brought their action they were told that that was not their position. 'These persons whom you thought were the servants of the owner were the servants of another Company that had taken our ship on hire; and the responsibility created by the reception of these goods by the people on board was a responsibility that attached to the other Company, and not to us.' Now, that position, I think, entitled the pursuers, ignorant as they had been of the intimate relations between the two Companies, to take the remedy of supposing that this last statement is the correct one, and of bringing an action which no doubt is inconsistent, strictly speaking, with the first action, just to suit the shifting statements of these defenders. Substantial justice, I think, requires that they should be entitled to do so, and could do so by bringing both these issues, inconsistent as you say they are with each other, before the same jury; not that they may affirm both, for that cannot be the result, but that they shall determine which is the true issue. The very circumstance that the same jury have to try these issues is that which secures justice to the pursuers. You bring these apparently inconsistent issues before the same jury, in order that they may say which of them is the correct one; nd I do not see any principle, and certainly I cannot find any practice anywhere, that would constrain us to sacrifice the demands of substantial justice to a theoretical and somewhat metaphysical objection as to the shape of the issues. On these grounds I agree with Lord Cowan that we must have two issues here, and I see no objection to their being given as framed.

Lord Neaves—I must say it is not without some difficulty that I accede to the proposal now made, as I have a strong impression that there is no case in which the very thing we now propose to do has ever been done. I am quite aware that both in this Court and in the other Division it is a very common thing to refuse issues that by parties conjointly, or one or other of them, something has been done; but that is not the case here. This is quite another case; the pursuers desiderate a verdict against both. Now, in my opinion, the pursuers bring a perfectly relevant action against the Leith Company; but the Leith Company then make a statement which the pursuers are not bound to believe or pay the least attention to. But they may believe it; and upon the strength of that they may bring the other action, in which they say, what a great many other people say is true, "I find I am wrong—it is said to be counteracted by other statements—the party has induced me to give way upon that point;' and then they say, that although the vessel is the property of the Leith Company, that is no ground of action for damage done to the goods that were shipped in her, but that the vessel was under hire to the defenders—by which, I suppose, they mean the new defenders—at the time she was lost. Now, I must say that this is inconsistent with the ground of action; and I must say that it does appear to me that there was a little oversight in allowing the one action to be conjoined with the other, for what is the supplementary action? It is contradictory; supplements nothing, but, on the contrary, it contradicts the first action, and he turns it off by saying, 'I am mistaken in my man; it is not you, but this other one;' for just in proportion as it is relevant against the one Company it is not relevant against the other. Now, I am not aware that that has hitherto been recognised in our law. It will suit the convenience of the pursuer—there is no doubt of that; but I do not think it is recognised as a general principle, that if the pursuer inclined he is entitled to bring two defenders in to knock their heads together, and to say, 'Fight it out, and see which of you is in the wrong.' I think that would require a very special case indeed. I think that, seeing the actions have been conjoined, the case is very much changed; but it appears to me that by far the more regular plan would have been to have sisted the first action when the record was raised. I think the other party would have been entitled to say, 'Sist the first action, and let him go on with the second, because he there explains that he brought that first action in consequence of giving credit to a ground of action which was wrong.' But the general principle was not contended for on the other side. It was said that this did not apply to the case of common carriers—the import and object of which I did not very well understand. In that case I may view the language too strictly, but the language used in the last article of that second record appears to me to be a kind of *sermo critici*, which is really the meaning of the party, I presume. You, No. 1, are liable; but if it is true, as you say, that that is not the case, then you, No. 2, are liable.' That is the nature of the case. 'I don't know which of you is

liable. I aver hypothetically and provisionally against both of you, but I do not withdraw the one statement, nor do I support the other.' That is the nature of the case. That being the case, I do not see that we can refuse the issues against both defenders; but at the same time I would advise the pursuer not to trust to his law that the defenders are bound to find out which is the party; for he is bound to make out a case against one or other of them. Holding that view, however, and that justice recommends it, and that the two actions have been conjoined, I have come to the conclusion, though with difficulty, that the issue should be granted.

The LORD JUSTICE-CLERK—I have come to the same conclusion as that which your Lordships have announced. I think the issues are extremely inconsistent; but on the other hand it appears to have been adopted for the purpose of securing substantial justice without a deviation from anything like authority. I quite concur in the observation which Lord Neaves has made, that the case presented here is one in which the party would have been well founded in asking a postponement of the first case until the other should be decided. I think that would have been perhaps more expedient. But that is a matter on which I have no right to express any opinion on the part of the Court. To go with two issues to a jury against defenders, one of whom must infallibly succeed, seems to be a course of proceeding not very likely to answer much purpose, for the party who insists upon it; but as that contention is maintained, and as the proceedings seem to warrant it, I do not find myself justified in refusing to give these issues. There is no doubt that the first action is perfectly relevantly laid; but a statement is made by the defenders in the course of the proceedings which is introduced in the second action by which, no doubt, the defenders in the first are so far relieved. In that action there is an apparent deduction of the state of the fact which if true would lead necessarily to *absolvitor* of the first defenders. However, it is qualified by two considerations—one of which is that as stated in Condescendence II. of the second action, that the information has been derived from the London and Edinburgh Shipping, and it is in consequence of that that the pursuers made their averment. It may be said that there is not here a positive absolute averment, but merely an averment made with reference to a statement made by the opposite party, upon which these parties have brought an action by which this question may be ascertained. Then also it is said that the vessel was under hire, in terms of a contract as to which the party was no information. Now, that is not altogether so precise an averment as that it is impossible to exclude the point under consideration. I think it would have been a better course if the party had taken means to satisfy themselves accurately and precisely as to the nature of the contract, and which they might easily have done by obtaining a diligence to recover it, and thus ascertaining the proper party against whom they had to proceed. They would then have taken another course; but as the case has gone, I do not see how the issues can be refused. There are one or two observations which occur to me on the form of the issues. I understand, in the form as proposed, the words "in breach of said undertaking" are to be introduced.

MR GIFFORD—Yes.

LORD JUSTICE-CLERK—Now, the first parties that are said to be injured are the pursuers, as insurers of the said jute; that is to say, the statement of the separate title from the title that follows, which is that of assignees of the owners thereof. It appears to me to be impossible to do that after apparently recognising the title independently of the assignation; and therefore I should propose that that part should be varied to this effect—"At Dundee, to the loss, injury, and damage of the owners, and of the pursuers as their assignees." It is very awkward to say, "to the injury of the assignees of the owners," the assignation being dated after the date of the loss; and it is impossible to say that the insurers merely, under their contract of insurance, have a right and interest to pursue in a case in which there is no fault averred. This is not an issue in which fault is to be discovered at all. The insurers, of course, would have no title unless in a case of fraud, and therefore I would propose that it should be altered thus—"In breach of their undertaking, the said defenders failed to deliver the said jute, or part thereof, at Dundee, to the loss, injury, and damage of the owners, and of the pursuers as their assignees."

MR GIFFORD—The other issue will be altered in precisely the same terms as your Lordship proposes.

The issues approved of were two, in identical terms against each company—

"Whether, in or about February 1865, the defenders, the London and Edinburgh Shipping Company, received on board the screw steamship "Temora" the various quantities of jute mentioned in the schedule hereunto annexed, and undertook to carry the same from London to Dundee, and to deliver the same at Dundee to the parties entitled thereto? And whether in breach of said undertaking, the said defenders failed to deliver the said jute, or part thereof, at Dundee, to the loss, injury, and damage of the owners and of the pursuers, as their assignees?"

Amount claimed per schedule, £5191, 15s. 4d., with interest at five per cent. from 22d February 1865.

Agent for Pursuers—James Webster, S.S.C.

Agents for Defenders—Horne, Horne, & Lyell, W.S., and M'Ewen & Carment, W.S.

Friday, July 5.

FIRST DIVISION.

MOES, MOLIERE, AND TROMP *v.* LEITH AND AMSTERDAM STEAM SHIPPING COMPANY AND OTHERS.

(*Ante*, vol. iii., page 368).

Ship—Carrier—Damage of Goods—Liability of Owners—Bill of Lading—Onus probandi—*Jury Trial—Special Verdict.* A special verdict, in an action by owners of goods against shipowners, found that the goods had been shipped in good condition at the port of shipment and were delivered in a damaged condition at the port of delivery, owing to breakage, and that there was no evidence to show how the damage had been caused. The bill of lading contained the clause "Not answerable for breakage." Held, on a construction of the bill of lading, that it lay on the pursuers to prove fault on the part of the shipowners, and