wrong, is diametrically opposed to that of the Lord Ordinary. I differ from his judgment and I differ from his reasons. I think this was a useful obligation, and that by subsequent arrangement between the same parties, it was terminable, and the obligation rendered it impossible. I therefore think the defenders should be assoilzied with expenses.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur. There is only one point on which I wish to guard myself, and that is this, that I do not differ from the Lord Ordinary in the opinion he expresses as to the application of the law of mutual gable.

LORD JUSTICE-CLERK—I am of the same opinion as Lord Young. On one matter which has not been noticed I should like to say a few words. I quite agree with your Lordships that no obligation was on the Caledonian Company at any time to bank up to the wall. The only thing which could have suggested that possibility has not been noticed, and I shall notice it for the purpose of getting it out of the way. The price to be paid in the event of the Caledonian Company banking up was to be at once ascertained. I think that was for a very obvious reason. I do not think this was a case of one-half of the price of the wall being paid by the Caledonian Company even when they did bank up, because the wall was of a different quality on either side, and the very fact that the payment of the Caledonian Company was dependent on an event that might not take place for a long time made it highly desirable that the price should be made known at once in order that there should be no dispute later in the event of the Caledonian Company using it.

I have tried to take the case on the only possibilities that could be, and they are three as regards the position of the Caledonian Company at the time the wall was built, viz., either that the North British Company owned the whole wall, or they owned their own half on their own ground, or they were owners mutually with the Caledonian Company. If they owned the whole wall then the payment they could demand from the Caledonian Company when the Caledonian Company banked up their ground would have been for the use of the wall built by and belonging to them the North British Company. They could not, in my opinion, when they became owners of the ground, by operations done by themselves, set up a claim against the Caledonian Company, from whom they bought it for a sum of money which they (Caledonian Company) only undertook to pay so soon as for their own use they should have banked up the ground on the opposite side of the wall, which now belongs to the North British Company alone. Then take the second case. If the North British Company owned only half of the wall on their own side, then on their purchasing ground from the Caledonian Company on which the other half of the wall stood, they became proprietors of the half of the wall which stood on the Caledonian ground, and it is to be understood that the previous position of the Caledonian Company is to be taken into consideration in the adjustment of the price. When lands are disponed, undoubtedly walls such as this pass with the ground in the disposition, and if the North British Company were purchasers of land upon which was part of a wall belonging to the Caledonian Company, they entered into a contract by which it was impossible for the Caledonian Company by itself, or by its cedents, to make that use of the wall upon the occurrence of which alone any sum was to be paid to the North British Company. Then take the third case, that the North British Company owned the wall mutually with the Caledonian Company, a case that does not seem to be different from the case last supposed, and I concur with Lord Young about the mutual gable. Such proprietary right in the wall as the Caledonian Company possessed the North British Company by contract took from the Caledonian Company, and so the Caledonian became the sellers. Use by the Caledonian Company of a mutual wall will not cease until it becomes the property solely of the other party, in this case the North British Company. Constructive use by the Caledonian Company seems to be out of the question.

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

Counsel for Pursuers and Respondents—D.-F. Balfour, Q.C.—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders and Reclaimers—R. Johnstone—Dundas. Agents—Hope, Mann, & Kirk, W.S.

Thursday, June 5.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

KELLY *v.* STATE LINE STEAMSHIP COMPANY, LIMITED.

Reparation—Quay — Thoroughfare — Obvious Risk—Primary Purpose of Quay for Loading and Unloading.

A man while unnecessarily passing among materials lying upon a quay where loading operations were going on, fell and sustained certain injuries. It was not clear how the accident occurred, but he averred that those engaged in loading were in fault in leaving the materials there, and he sued them for damages accordingly.

Held that the quay was properly occupied by the materials at the time, that the pursuer had run an obvious risk in going where he did, and that he

had failed to prove fault on the part of the defenders.

Observed that the primary purpose of a quay is for loading and unloading vessels, and that those who unnecessarily use it as a thoroughfare must take account of the work going on.

William Kelly, 73 George Street, Mile-End, Glasgow, brought an action in the Sheriff Court at Glasgow against the State Line Steamship Company, Limited, for £200 as damages for injuries sustained by him by the defenders' fault while he was passing along a quay where the defenders' steamship "State of Pennsylvania" was being loaded with stones and steel billets.

About 6 p.m. on 14th August 1889 the quay was occupied by stones and steel billets, which were being put on board the steamship in alternate loads. The billets were hoisted on board in two large buckets with handles, which weighed nearly a hundredweight each, and were kept rigid and upright by means of catches, which when released allowed the bucket to upset. These buckets were standing upon the quay while the stones were being shipped, one of them at least with its handle erect, although during the night and at meal hours the handles were lowered on to the ground. There was a passage about 3 feet wide between the billets and the edge of the quay. There was also a kind of passage through the middle of them, the use of which, however, involved some danger. There was a free passage at the back of the sheds. The pursuer, who was returning from an adjoining berth, and was not there on business, chose the passage through the billets, and as he passed the bucket with the upright handle he and the handle of the bucket fell simultaneously, and he sustained certain injuries. It was not clear what had caused the handle to fall, and whether he was struck by the handle or not. He alleged that he was, and that the cause of the accident was the faulty condition of the catch, which he had unwittingly released in his passage. He further averred that it was the defenders' duty to have seen that their machinery and plant was left on the quay breast in a sufficient and proper condition for the safety of the public using it.

After a proof the Sheriff-Substitute (LEES) found that the pursuer had not proved that his injuries were due to any fault of the defenders, and assoilzied them accordingly. In his note he expressed his opinion that the statement by the pursuer that the handle fell upon him was untrue, and commented very strongly upon the unsatisfactory character of the pursuer's case.

The pursuer appealed to the Second Division of the Court of Session, and argued — That the quay was a public thoroughfare, and should be kept free from danger for those passing along it, and that the defenders were in fault in not keeping the passage clear, in having the billets there, in having a defective bucket, and in allowing the handle to remain upright while the bucket was not in use—*Dakers* v. *Tharsis Sulphur and Copper Company, Limited, and Charles Tennant & Company, Limited*, December 21, 1889, 27 S.L.R. 230.

The defenders argued—The case of *Dakers* was quite different. There the injured man was on his way to his ship, and the quay had been left in a dangerous condition and unlighted after working hours. Here the pursuer had no need to go that way at all. He might have chosen the street behind the sheds, or at least the safer passage by the edge of the quay. If he chose to climb over the billets, he did so at his own risk. The quay was being used for its legitimate and primary object of loading. The materials and the buckets properly occupied the quay at that time, and were a source of danger to no one who did not himself make them so.

At advising—

LORD JUSTICE-CLERK—I do not think we have grounds here for altering the judgment of the Sheriff-Substitute. This quay was occupied with work going on which necessarily involved risk to passers by. It was quite plain to anyone approaching that such work was going on, and that the quay was occupied by materials and by appliances used in connection with these materials. In these circumstances the position of such a person necessarily is, that if he chooses to pass along he must take reasonable care for his own safety, and not go within reach of the danger if there is a means of avoiding it. He has still less reason for complaint if he fails to take advantage of a safer path provided and chooses the more dangerous passage. I do not think that those working at this vessel had any reason to suppose that persons coming along would use the passage which led right into the middle of the apparatus and the goods lying on the quay. In the first place, no person needed to come there at all. There was ample room outside the shed altogether. But in the second place, I am satisfied upon the evidence that if any person coming there had looked after his own safety he would have chosen the passage, some 3 or 4 feet wide, along the edge of the quay. The fact would seem to be that the pursuer, choosing the way he did, had to climb over the billets, though not perhaps over the whole pile, and that in doing so he fell and met with this accident. How the accident exactly occurred, or how he sustained his injuries, I am at a loss to understand. But it is not necessary to determine that. The pursuer had no need to be there, and must take the consequences of his own carelessness.

LORD YOUNG—I also am of opinion that we should not disturb the judgment of the Sheriff-Substitute. I think the quay where this accident occurred was legitimately occupied by these materials. Traffic was going on when this accident happened just as traffic goes on along a street. The business of the quay is primarily for the loading and unloading of vessels. It is not a store for goods to lie in. People may use it for the purpose of passage if they choose, but they must have regard to the nature of the

place, and take account of the traffic. The import of the evidence is that this accident occurred to the pursuer when he was unnecessarily clambering over goods which were legitimately there at the time, and in the proper use of the quay. He might have avoided the place altogether. I do not say he was bound to do so, but if he chose to clamber over these goods rather than to take the street outside, or the passage along the quay edge, he took a great and obvious risk upon himself. I do not think, looking to the whole circumstances of the case, that it has been established that the defenders were guilty of such fault or negligent carelessness as to contribute to the accident which the pursuer brought upon himself.

LORD RUTHERFURD CLARK concurred.

LORD LEE—I concur in the view that the Sheriff-Substitute's judgment should not be interfered with except on clear grounds. My only difficulty is that the Sheriff has dealt with the evidence and expressed his opinions in a manner which does not inspire one with confidence in the result at which he has arrived. I concur, however, with Lord Young in thinking that the defenders were legitimately in occupation of this portion of the quay for the primary purpose of loading this vessel, and on the question, whether the handle fell through their fault, I am against the pursuer, who has, I think, failed to establish his case.

The Court pronounced this interlocutor:—

"Find that on the occasion libelled the wharf mentioned in the record, appropriated to the use of the defenders, was occupied by them in loading a ship with billets of steel, which were piled up on the quay: Find that the pursuer did not require to pass along the said quay, but could have, equally conveniently, gone by a different route: Find that, if he did pass along the quay, he did not require to pass over or close to the pile of billets: Find that he passed over the billets: Find that he did so at his own risk, and that the injury sustained by him in doing so is not attributable to any fault or negligence on the part of the defenders: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against: Of new assoilzie the defenders, . . . and decern."

Counsel for the Pursuer and Appellant—Young—Irvine. Agent—W. A. Hyslop, W.S.

Counsel for the Defenders and Respondents—Jameson—Dickson. Agents—J. & J. Ross, W.S.

Friday, June 6.

SECOND DIVISION.

[Lord Trayner, Ordinary.

HOPE *v.* CROOKSTON BROTHERS.

Arbitration—Award—Informal Proceedings—Intention of Parties—Goods Disconform to Contract—Right to Damages although Goods not Rejected as Disconform to Contract.

A merchant in Liverpool contracted to buy 1000 tons of hay of a prescribed quality from a certain firm at £4 per ton. 200 tons were delivered and paid for. Disputes arose as to the quality not being conform to contract, as to the obligation of the merchant to take the undelivered portion, and as to claims of damages. The parties agreed to "submit all matters in dispute" to two arbiters named, or their umpire, and to abide by their decision. An award of £350 signed by the two arbiters and their umpire was issued in favour of the merchant, who sued the firm for that sum in implement of the award, and alternatively as the amount of the damage he had sustained. It was proved that arbitration had been conducted in an informal manner, that the arbiters had made inquiries separately, had adopted the opinions of others as to the quality of the hay, had been in communication with the parties who had nominated them respectively, and had consulted the umpire without devolving upon him, but that such informal arbitrations were usual at Liverpool. The amount of the award had apparently been arrived at by taking the difference per ton between the £4 contracted for and the market price of the hay at the date of the arbitration. The hay had never been returned as disconform to contract. The Lord Ordinary was of opinion that the proceedings had been grossly irregular, and assoilzied the defenders, but the Court *held* that the proceedings in the arbitration as carried out had been just such as were usual in similar mercantile arbitrations, and such as the parties had contemplated, and gave decree for the pursuer accordingly.

John Wilson Hope, merchant, 3 Rumford Street, Liverpool, upon 26th September 1888 entered into a contract with Messrs Crookston Brothers, 19 Wellington Street, Glasgow, for the purchase of Algerian hay.

The contract note was in the following terms—"I have this day sold for you the following goods:—About one thousand (1000) tons Algerian hay in bales at £4 per ton for shipment in about equal monthly quantities between October and January next on cost freight and insurance terms per steamer to Liverpool. Quality to be fair average of shipments per 'Rufford' and 'Werneth Halls,' and only sound dry hay to be shipped—weight guaranteed over Dock