Friday, November 7.

SECOND DIVISION.

[Sheriff of Renfrewshire.

CALEDONIAN RAILWAY COMPANY *v.* HARRISON & COMPANY.

Agreements and Contracts—Carriage—Mistake in Delivery of Goods—Liability of Third Parties to whom such Delivery is made—Where Counter-Claim pleaded.

C. & Co. sent certain axles to G., advising the railway company there thus—"1 Truck old waggon axles to our order at G. Please deliver to B. & Co., or their order." B. & Co. thereafter wrote to the railway company—"On arrival of axles from C. & Co. to our order please forward to H. & Co." The railway company delivered to H. & Co. accordingly, but without receiving the delivery-order, which B. & Co. never obtained from C. & Co. B. & Co. failed, and the railway company having been obliged to pay the price of the axles to C. & Co., then raised an action for restitution, or otherwise for their price, together with the cost of carriage, against H. & Co., who pleaded that they were not in safety to pay to the railway company without B. & Co. becoming parties to the action; and further, that they had a claim against B. & Co. in respect of a contract to supply axles, which had been only partially implemented by the delivery of those in dispute. *Held* that H. & Co. were liable in repayment of the price without the necessity of the railway company raising a multiplepoinding or otherwise bringing B. & Co. into Court, H. & Co. not being able to show that they would suffer prejudice thereby.

On 29th August 1878 Carruthers & Company, iron merchants, Newcastle-on-Tyne, consigned to themselves at Greenock 6 tons 11 cwt. of old waggon axles, in terms of the following memorandum to the agent of the Caledonian Railway at Greenock—"1 truck N.E. 3054 old waggon axles from Tyne Dock, N.E., to our order at *Greenock*. Please deliver to Messrs Banks & Stewart, of 30 Hope Street, Glasgow, or their order."

On the 3d September Banks & Stewart, Glasgow, sent the following post-card to the railway company—"On arrival of axles from Carruthers and Co., Newcastle-on-Tyne, to our order, please forward to Messrs John Harrison & Co., iron merchants, Greenock." The railway company accordingly delivered the axles to Harrison & Co., but without receiving the delivery-order.

Banks & Stewart shortly afterwards suspended payment, and the railway company having been obliged to pay to Carruthers & Co. the price of the axles which they had wrongly delivered to Harrison & Co., raised this action in the Sheriff Court of Renfrewshire at Greenock against Harrison & Co., for re-delivery of the axles, or alternatively for the sum of £37, 0s. 2d., being their price, together with the cost of carriage to Greenock.

The defenders pleaded—"(1) No title to sue. (2) No privity of contract between the pursuers and defenders. (3) The pursuers' statements are irrelevant and insufficient to support the prayer of the petition. (4) The defenders not having purchased the axles in question from the pursuers, are not liable to them in the price thereof. (5) In any event, the action should be sisted, to enable the defenders to raise a process of multiplepoinding."

In their statement of facts the defenders averred that Banks & Stewart had contracted to deliver to them a much larger quantity of axles than had actually been sent, and that "on receiving delivery of the whole of said axles the defenders are prepared to implement their part of the contract by granting a bill to Banks & Stewart at three months' date for the price thereof" (which was in terms of the contract), "under deduction of such sum as they may be enabled to instruct as the loss they may have sustained through their failure timeously to deliver the said axles."

The purport of the proof will be found in the opinions of the Court *infra*.

It appeared that the delivery-order had been transmitted by Carruthers & Co. to a bank, to be given to Banks & Stewart only on payment of the price, and that it had never been so given.

The Sheriff-Substitute (SMITH) assoilzied the defenders; and to this judgment the Sheriff (FRASER) adhered, adding this note—

"*Note.*—It is with some regret that the Sheriff cannot under this process do justice between the parties. The action is brought against the defenders for the return of goods which they bought in the open market, or for the payment of the price thereof to the pursuers, with whom the defenders never contracted. The defenders knew nothing whatever of Carruthers & Co., but dealt solely with Banks & Stewart, and obtained delivery in the regular course of business of the axle-iron. The pursuers plead that in respect the defenders obtained delivery upon an order from persons who had no power to give it, and on which the pursuers ought not to have acted, the defenders are not entitled to keep the articles so obtained or the price. But here there comes in a new equity in favour of the defenders. It is hard, no doubt, that the pursuers should suffer from an innocent mistake, but it would be harder still if the defenders should be made to suffer through this mistake, which they would do if they were obliged to deliver up goods obtained from Banks & Stewart when they have counter-claims against them which have not been liquidated.

"On 3d September 1878 Carruthers & Co. wrote to Banks & Stewart:—'We have advised Greenock people as to delivery of axles, and the advice was to hold to our order at Greenock.' The pursuers had no right to deliver up these goods without seeing the written order of Carruthers & Co., and their attention ought to have been awakened to their position by the terms of the order passed on them by Banks & Stewart on 3d September 1878, which is in the following terms:—'On arrival of axles from Carruthers & Co., Newcastle-on-Tyne, *to our order*, please forward to Messrs John Harrison & Co., iron merchants, Greenock.' No such order ever was passed or delivered to Banks & Stewart. The delivery-order, which was attached to the cash-order, having been returned when the cash-order was dishonoured, it is clear that the railway company had no defence against a claim by

Carruthers & Co., and that they acted wisely in settling.

"But then comes the question—To whom is the price of the axles of which Harrison & Co. obtained delivery to be paid? It still remains in their hands, and according to Mr Harrison's evidence, he had and has no counter-claim against Banks & Stewart, except a claim of damages for non-delivery to his firm of Harrison & Co. of the balance of axle-iron which Banks & Stewart had contracted to deliver to them. Whether this is a well-founded claim or not the Sheriff cannot tell; and it could not have been and was not inquired into in this process. It is quite plain that if this claim of damages is less than the sum sued for in this process, the balance must be paid over either to Banks & Stewart or to the railway company; and it is unfortunate that these matters cannot be decided once for all in this process. If the railway company mean to insist upon their claims, their course is to raise an action against Banks & Stewart, and to arrest the money in Harrison & Co.'s hands; for the railway company by paying the price to Carruthers & Co. have come into their place and in their right. In the multiplepoinding that will then be raised Harrison & Co. will have the opportunity of establishing their claim of damages and handing over the balance to the party entitled to it. It is very unfortunate that this course had not been adopted at the first, and that a multiplepoinding was only seriously thought of after the present action had arrived at its final stage upon a concluded proof.

"In finding that the pursuers have not a direct action against the defenders for return of the goods or the payment of the price, the Sheriff does not mean to question in any way that a suspensive condition prevents the property passing to the vendee even although possession has been obtained. The suspensive conditions are of various kinds. They are enumerated by Professor Bell in his separate work, 'Inquiries into the Contract of Sale of Goods and Merchandise,' p. 110, and he lays down a rule in regard to them thus:—'The effect of a suspending condition in a sale is, that while the event is still undetermined, the sale is pendent, and neither in England is the property passed nor in Scotland is the risk altered.' The case of *Brandt* v. *Dickson*, 18th January 1876, 3 R. 375, shows that the sale is made under a suspensive condition where it is stipulated that a bill or cash shall be given or paid upon delivery, and although delivery be obtained this will not debar the vendor from demanding restitution of the goods against the vendee or his general creditors if the condition be not implemented. But granting all this, it is a different question whether restitution can be enforced against a third party who has specially bought the goods from the vendee, who in his turn had obtained possession of them without fraud. In such a case the equity is all upon the side of the third party who has purchased from the vendee; and undoubtedly the third party in this case, viz., the defenders, would have stood in a better position if their refusal to pay the price of the goods to the pursuers, who came in right of Carruthers & Co., had rested upon the ground that they had already paid Banks & Stewart, instead of resting upon an unliquidated claim of damages. Still the claim must be dealt with according to the same principle that would be applicable if the defenders had stood in the more favourable position of having paid the price.

"That Banks & Stewart obtained possession of the goods so as to enable them to give delivery to the defenders is the conclusion to be drawn from the evidence. Carruthers says that he suspected the solvency of Banks & Stewart immediately after his firm had despatched their goods. But Banks himself, at the time he sent the order to the pursuers to make delivery to the defenders, did not think himself insolvent, and had no design to obtain delivery of the goods fraudulently and without an intention of making payment. According to his evidence he demanded delivery from the pursuers as soon as he received the invoice, and in so doing he says that he acted according to his practice in all the transactions he had with Carruthers & Co. There is not, indeed, in any of the numerous letters and telegrams passing between Carruthers & Co. and Banks & Stewart any distinct intimation to the effect that the latter were not to obtain delivery till they honoured the cash-order for the part of the iron that was sent. There is no such distinct intimation made to Banks & Stewart as was made to the railway company, that delivery was only to be given upon a special written order from Carruthers; and therefore in taking delivery it must be held that Banks & Stewart obtained it upon such a title as enabled them to give right to an onerous third party, from whom restitution could not be demanded upon the ground that a suspensive condition of the sale had not been implemented."

The pursuers appealed to the Court of Session.

At advising—

Lord Justice-Clerk—I have no doubt at all as to the ultimate result of this case, but I do not think it is as free from difficulty as a case of misapprehension as to identity would have been. The Caledonian Railway thinking that they were entitled to deliver to the order of Banks & Stewart, which clearly by their instructions they were not, handed these axles over to Harrison & Co. upon Banks & Stewart's order in part implement of a previous contract of theirs. Now, it is plain that if Harrison & Co. had been asked to return the axles at once they could not have resisted the demand. The only question is, whether specific restoration is now impossible? In other words, Has any damage been suffered by Harrison & Co.? For if there has, they, as the parties innocent of the mistake, cannot be made to suffer. But I have searched in vain in the record and in the proof for any specification of damage. It may be quite true that Harrison & Co. went into the market to get other goods, but that was owing to the fault of Banks & Stewart not fulfilling their contract, and was not due to the partial delivery of the axles. Harrison & Co. have not been able to show any direct loss now, or any probable and contingent loss in the future, which is due to the mistake made by the Caledonian Railway. I can see no reason why justice should not be done between the parties; and therefore I cannot concur with the Sheriff as to the difficulty which he feels in the form of process. He does not seem to think that the railway company are not entitled to the price. He only says that the question must be raised in the form of a multiplepoinding. I do not think so. I think that the

matter may be settled in this form of action. Therefore, differing as I do from the Sheriff on the question of process, and holding that the defenders have not shown any prejudice arising from the mistake of the railway company, and further, even if the company are under an obligation to prove that there was no prejudice, that they have discharged this *onus*, I am of opinion that the interlocutor cannot be sustained.

Lord Gifford concurred.

Lord Young—This action originated in the Sheriff Court about a year ago, and concludes against the defenders for the restitution of about six tons of axle-iron said to have been delivered to the defenders by mistake, or otherwise for the price of these axles, together with the cost of carriage from Newcastle to Greenock.

With reference to the alternative conclusion, I had in my own mind some doubts as to whether the cost of carriage ought to be included in the sum sued for, but these doubts, which were not adverted to by the parties themselves in argument, were set at rest by the consideration that the cost of carriage of any article from the place of production must presumably add to its value, unless the contrary be averred and proved.

The Sheriff, on a technical consideration, with which I confess I have no sympathy, advises a new action. He says—"If the railway company mean to insist upon their claims, their course is to raise an action against Banks & Stewart, and to arrest the money in Harrison & Co.'s hands; for the railway company by paying the price to Carruthers & Co. have come in their place and are in their right. In the multiplepoinding that will then be raised Harrison & Co. will have the opportunity of establishing their claim of damages, and handing over the balance to the party entitled to it." I am happy to be able to concur with your Lordships in thinking that justice may be done without further litigation.

The case is a clear one. That the railway company delivered by mistake is plain. They had neither authority nor right to do so. But the mistake was one of those which do occur. The wrong party gets possession of the goods under a mistake. The railway company are then called on, and acknowledge their blunder, and pay the price of the goods to Carruthers & Co., against whose instructions they gave delivery. Having thus paid the money, they call upon Harrison & Co. either to restore the iron, which they ought never to have got, or to pay the price. I pointed out that it would be an answer to this demand, but the only answer, that Harrison & Co. had been prejudiced by the mistake, to which they were in no way parties; and cases may be figured in which they would be so prejudiced. It is of course essential that the mistake itself should be the cause of the prejudice—that is to say, that the person made to pay will be in a worse position by paying than if he had never got delivery at all. But when that is the case it would obviously be unjust to make him pay. The Sheriff proceeds on this principle, but misapplies it. He says—"The pursuers plead that in respect the defenders obtained delivery upon an order from persons who had no power to give it, and on which the pursuers ought not to have acted, the defenders are not entitled to keep the articles so obtained or the price. But here there comes in a new equity in favour of the defenders. It is hard, no doubt, that the pursuers should suffer from an innocent mistake, but it would be harder still if the defenders should be made to suffer through this mistake, which they would do if they were obliged to deliver up goods obtained from Banks & Stewart when they have counter-claims against them which have not been liquidated." But their counter-claims do not arise through the mistake. They existed independently of the mistake, and would have been precisely the same had the mistake never been made, only they would then have been larger in amount, for the fact of their having obtained the axles in question reduced the claim for non-implement of the contract *pro tanto*, and Mr Harrison explained that he had no claim except for the balance of axles undelivered. Thus it is too clear for argument that their claims are in no way connected with the mistake. And except this claim of damage for non-implement of the contract, no other ground of claim is suggested either in the record or the proof. It was suggested in argument, however, that the axles as delivered were of an inferior quality to those contracted for, and consequently that the sum sued for was excessive. But I entirely concur that a mere suggestion in the course of debate is no answer to such a claim as the present. I am therefore for recalling the interlocutor of the Sheriff.

The Court pronounced the following interlocutor:—

"Find that the goods libelled were delivered to the defenders by the pursuers without authority from, and contrary to the instructions of, Carruthers & Company, by whom they had been transmitted: Find that Banks & Company directed the pursuers to deliver the same to the defenders, but that they had no right to the goods and no power to direct delivery: Find that the pursuers have paid to the true owners the price of the goods so delivered, and are now entitled to restitution of the same, or the price thereof, unless the defenders would be prejudiced thereby: Find that the defenders have neither averred nor proved such prejudice: Therefore sustain the appeal; recal the judgment of the Sheriff appealed from; find the defenders liable in payment to the pursuers of £32, 15s., being the price or value of the iron in dispute, at the rate of £5 per ton, with the sum of £4, 5s. 2d., being the carriage thereof from Newcastle to Greenock; and decern for payment of said sums, amounting together to £37, 0s. 2d., with interest at 5 per cent. from 6th September 1878: Find the pursuers entitled to expenses in both Courts," &c.

Counsel for Pursuers (Appellants)—Lord Advocate (Watson)—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defenders (Respondents)—Balfour—Rhind. Agent—Adam Shiell, S.S.C.