the opinion, which he still holds, that it is not for the benefit of the trust estate that the executors should continue to be partners of the said company after the said William Neilson's death, or should enter into litigation with the company on that question, but that it is rather for the benefit of the trust estate that the estate should receive from the company the sum to which the estate is entitled on the footing of William Neilson having ceased to be a partner of the company at his death and of his executors having right to be paid out his interest, all in terms of article 10th of said contract of copartnery, while the other trustees, the said Hugh Neilson and James Neilson, are by the terms of the said trust-disposition and settlement precluded from voting or taking part in the question on which the said other two trustees differ: Find (8) that in these circumstances the pursuer Mrs Neilson, with concurrence of certain of the beneficiaries under the said trust-disposition and settlement, is not entitled to maintain the action at her instance, and dismiss the said action and decern: Further, in the action at the instance of the pursuer Hugh Neilson junior, Find that having regard to the provisions of the said contract of copartnery, and to the fact that the defenders in that action, the remaining partners of the company, desired to continue the business thereof, notwithstanding the notice by him to them of 4th May 1883, and the service of the summons at his instance, the said Hugh Neilson is not entitled to decree in terms of the conclusions of the summons at his instance, to the effect of having the business and the copartnery wound up, and its whole assets realised and divided as concluded for: Further, in respect it is not disputed that the copartnery carried on after 31st May 1882 was a partnership-at-will terminable by notice by any of the partners, dismiss the first conclusion of the said action; assoilzie the defenders from the conclusions thereof; reserving to the said Hugh Neilson his right either under the said notice of 4th May 1883, or any notice he may thereafter give, to have the company dissolved to the effect of his being paid out his interest therein, in terms of the provisions of the said contract of copartnery, and decern: And as regards expenses in the action at the instance of Mrs Neilson, as between the pursuer Mrs Neilson and the Mossend Iron Company, Find no expenses due to or by either party prior to the interlocutor of 7th March last beyond such expenses as have already been found due, but find the Mossend Iron Company entitled to expenses since the date of that interlocutor: Further, find the defender James Thomson entitled to expenses: And in the action at the instance of Hugh Neilson junior, find him liable in expenses to the defenders therein; and remit to the Auditor to tax the accounts of expenses respectively found due herein, and to report."

Counsel for Mrs William Neilson — Pearson — Guthrie. Agents—J. & J. Ross, W.S.

Counsel for the Mossend Iron Company (Reclaimers) — Mackintosh — Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Hugh Neilson junior—Trayner Graham Murray. Agents—H. B. & F. J. Dewar, W.S.

Counsel for William Neilson's Trustees—J. P. B. Robertson—Low. Agents—Morton, Neilson, & Smart, W.S.

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*Friday, December* 19.

## SECOND DIVISION.

[Lord Kinnear, Ordinary.

COMMISSIONERS OF SUPPLY OF FIFESHIRE *v.* MAGISTRATES OF DUNFERMLINE AND OTHERS.

*Burgh — Rating — Assessment — Lunatics (Scotland) Act* 1857 (20 *and* 21 *Vict. c.* 71)—*Militia (Scotland) Act* 1854 (17 *and* 18 *Vict. c.* 106)—*Contagious Diseases Animals Act* 1878 (41 *and* 42 *Vict. c.* 74)—*Prisons Act* 1877 (40 *and* 41 *Vict. c.* 53).

A district, 1000 acres in extent and consisting of villages and farms, lay within the royalty of a burgh, as extended by a local Act, but was beyond the Parliamentary boundary as defined by the Reform Act 1832. *Held* that the commissioners of supply for the county in which the burgh was situated were not entitled to impose assessments on the lands and heritages within this district for the purposes of the Lunatics (Scotland) Act 1857, the Militia (Scotland) Act 1854, or the Contagious Diseases (Animals) Act 1878.

Counsel for Pursuers—J. P. B. Robertson—Gillespie. Agent—William Black, S.S.C.

Counsel for Defenders — Trayner — Shaw. Agents—Morton, Neilson, & Smart, W.S.

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*Friday, December* 19.

## SECOND DIVISION.

[Sheriff of Stirlingshire.

BEESLEY & COMPANY *v.* M'EWEN.

*Sale—Delivery—Risk*—Res perit domino.

B. in Birmingham sold to M. in Stirling a wire-straightening and cutting machine, to be delivered on railway truck at Birmingham. On arrival of the machine at Stirling, M. objected to it as disconform to contract. By arrangement between the parties it was returned to B. to be examined and to have any alterations made upon it which he might find necessary to make it conform to contract, he paying the carriage if it should be found defective. After certain alterations had been made upon it, the machine was again delivered by B. at the railway station at Birmingham. It arrived at Stirling in a broken condition, and M. refused to take delivery of it and intimated his refusal to B. In an action by B. for the price of the

machine, *held*, on consideration of a proof, which established that the machine when placed on the rail at Birmingham on the second occasion was not disconform to contract, that the machine while in transit was the property of M., and at his risk, and that the loss must fall upon him.

D. S. Beesley & Company, engineers, Birmingham, sued Daniel M'Ewen, iron merchant, Stirling, in the Debts Recovery Court for £33, 7s. 6d., being the amount of an account which they alleged to be due them by him.

The note of pleas was as follows:—"On 20th September (1883) the defender gave the pursuers an order for a wire-cutting and straightening machine capable of doing the following work—namely, straightening the wires from the coil, cutting it into exact lengths, varying from 6 to 26 inches long, straightening and cutting all sizes of steel wire from 12 to 7 Birmingham wire gauge; the machine to be self-acting. The price of the machine was to be £32, 10s. The machine was received by the defender, but was found to be defective, and incapable of doing the work contracted for. It was returned to the pursuers, and by them underwent certain alterations, and was then forwarded again to the defender. The machine was tendered to the defender by the railway company in a broken condition, and delivery refused. The defender therefore pleads—The pursuers having failed to send defender a machine, in good condition, capable of doing the work contracted for, the defender is not liable in the price thereof. The pursuer repeats his claim, and states that the contract of sale provided for delivery being given by the goods being put on rail at the railway station at Birmingham; that the goods were delivered at said place in good condition; and that the risk of accident in transit was upon the defender."

The facts as ascertained by proof were the following—In reply to an inquiry from the defender about a machine for straightening and cutting wire in fixed lengths for perambulator wheel spokes, the pursuers wrote to him on 3d September 1883 from Birmingham that they could make the machine required for £150—"All goods delivered on railway truck here; if packed in case, 5 per cent. extra." On the defender writing in answer to this that the price quoted was too high, and that he wanted a machine to straighten and cut to length for £20 or £25, the pursuers offered to make a machine for £25, and after some further correspondence as to the work the machine was to do, an order was on 22d September given by the defender for a machine at the price of £32, 10s. Thereafter the machine was made and despatched by the pursuers, and received by the defender in Stirling in the beginning of December.

On 11th December the defender wrote to the pursuers objecting to the machine as not conform to order, and detailing certain alleged defects. After a good deal of correspondence the pursuers suggested that the machine should be sent back to them to be overhauled, and the defects, if any were found by them, rectified, they paying carriage if the fault were found to be theirs. The machine was thereafter sent back by the pursuers to the defender, and while it was in their works, the defender, happening to be in Birmingham, went to inspect it there. The result of the inspection was that three new rollers were added to the machine. After this had been done the machine was again on 25th February 1884 put on the rail by the pursuers at Birmingham, and arrived at Stirling. It arrived in a broken condition. With regard to the inspection of the machine in Birmingham, Mr D. S. Beesley of the pursuers' firm stated in his evidence that the defender had then expressed himself satisfied with the machine before the addition of these rollers, while the defender stated that when he saw it after that addition he would not have accepted it as it would not do its work. The pursuers' engineer's fitter and an employee of the railway company at Birmingham proved that the machine was in good order when put on the rail there. When apprised by the railway company of the arrival of the machine at Stirling, the defender went and saw it in their hands, after which it was delivered at his premises, and after some days returned to the railway company, and by them tendered to the pursuers, who refused to take it. The defender wrote to the pursuers, saying that he would have nothing further to do with the machine; he had been compelled to make other arrangements, and would not accept delivery of it. To this the pursuers replied that they had delivered the machine according to contract on the railway truck at Birmingham, requesting payment therefor, and suggesting that the pursuers' remedy was against the railway company. They thereafter raised the present action. The amount sued for was made up of £32, 10s. for the machine, and 17s. 6d. for a new set of tools sent with it on the second occasion.

The Sheriff-Substitute (BUNTINE) pronounced this interlocutor—"Finds in fact (1) that the machine, the price of which is sued for, was ordered by defender on 21st September last; (2) that in terms of the bargain between the parties, the defender accepted delivery of said machine in the beginning of the month of December last, on truck at Birmingham; (3) that thereafter defender stated certain objections to the machine, *inter alia*, that there was no 'swift,' and only one set of 'dies,' and that the machine was not conform to order; (4) that the defender, however, at no time intimated his rejection of the machine; (5) but that, on the contrary, in terms of an arrangement contained in the letter from pursuers dated 31st January last, and reply of defender dated 4th February, the machine was returned to the pursuers, to be overhauled by them and rectified if it was found that there was anything the matter with it—the pursuers undertaking to pay the carriage if they should find the fault to be theirs; (6) that thereafter certain alterations were made upon the said machine, and it was returned to the defender; (7) that the pursuers have proved that the said machine was in good order when it was delivered by them to the railway company at Birmingham on 25th February last: (8) Finds in law that in the circumstances above set forth the defender is the owner of the said machine, and that the risk of injury which it might sustain in its journey to and from Birmingham, when it was sent by him for repair, lay upon him, and not upon the pursuers: Therefore decerns against the defender for payment of the sum sued for.

"*Note.*—It appears to the Sheriff-Substitute that it is unnecessary in the circumstances to de-

cide the question whether or not this machine was disconform to contract, because the defender never took advantage of his right to reject and return it, supposing that right to have been open to him. The right to reject goods as disconform to warranty is not a suspensive condition, which delays transference of moveable property. Delivery completes the contract of sale, and thereafter, and indeed from the time of sale, the risk lies with the purchaser.

"The Sheriff-Substitute may only say in conclusion, that in his opinion the acceptance of the new arrangement, whereby the pursuers undertook to rectify the machine, and pay its carriage back and forward if it was found that they had been in fault, operated as a waiver of the defender's right to return the machine as disconform to contract."

The defender appealed to the Sheriff (GLOAG), who pronounced this interlocutor—"Adheres to the interlocutor of the Sheriff-Substitute: Finds further, in point of fact, that the said machine, when delivered to the railway company at Birmingham on 25th February, was so constructed as duly to implement the contract between the pursuers and the defender, &c.

"*Note.*—If it were necessary to decide the point, I should certainly be disposed to hold that the machine when first received by the defender's constituents was not in due implement of the contract, nor such as the defender was bound to accept. . . .

"But, as the Sheriff-Substitute says, the condition of the machine when first sent is not the matter in question, but its condition when it was sent off by the defender the second time.

"Now, it is clear and admitted that at first the place of delivery was the railway station at Birmingham. That was expressly contracted for, and it would, I suppose, have been held to be so had the contract been silent on that point. As a general rule, delivery of goods sold to a general carrier is delivery to the buyer, and he receives and carries the goods as the buyer's agent. Now, when the machine was delivered to the railway company the second time, is there any ground for maintaining that the contract and the position of the parties were so changed that the railway company received the goods as the agents for the pursuers, the sellers, and not as agents for the buyer? I see nothing to indicate such a change of intention. It is said that after the machine was returned to the pursuers, they were in the position of its custodiers, but it is difficult to see how that could affect the case; for if they were, their duties as custodiers must have ceased when they gave up the custody by delivery of the machine to the railway company. Again, it was maintained, that seeing that the pursuers had agreed to pay the carriage of the machine should it be found defective, and seeing that it had been found defective, as appeared from its defects being supplied, and that the pursuers were therefore bound to pay the carriage back to Stirling, the railway company must be held to have acted as agents for them, and not as agents for the defender. But it seems to me that that bargain was perfectly separate, and has no real bearing on the question of ownership or delivery; when a seller agrees to pay carriage, that may be some indication that the goods were to be delivered at the buyer's premises; but it would not be conclusive, and in each case the question where delivery was to be made would depend on the whole circumstances and the whole contract—such seems the law laid down in the case of *Dunlop & Co.* v. *Lambert*, 16th July 1839 (M'Lean & Rob. 633), referred to by the defender's agent. But here I think that the bargain as to payment of carriage had nothing to do with the question of delivery. The Sheriff-Substitute has thought that the property of the goods was with the buyer whenever the machine was delivered for the first time to the railway company, and that it continued to be his property ever after. I say nothing against that view; but it is enough to hold that at least it was delivered when put in the custody of the railway company the second time.

"If that be so, the maxim *res perit domino* must apply if it was such a machine as the pursuers were bound to furnish and the defender bound to accept. If that was not so, and if, on the contrary, it was so defective when delivered the second time that the defender would have been warranted in rejecting it, I think the case would have been different.

[The Sheriff here explained his reasons for holding that the machine on being placed in the hands of the railway company on the second occasion, was such a machine as the pursuers were bound to furnish and the defender to accept.]

"On the whole, I think the pursuers have made out that the machine was completed, and that its defects were supplied, and that it was delivered to the defender at Birmingham railway station, and was thereafter at his risk as the owner of it." . . .

The defender appealed to the Court of Session, and argued—The machine not being conform to contract, the time when in the course of delivery it should have become his property never arrived; or otherwise, if the property had passed to him when the machine was put on the truck at Birmingham, it reverted to the pursuers the moment it was discovered by the defender not to be conform to contract. The risk was to be with the pursuers when they got it back, until they made it conform to contract and delivered it in Stirling. Defender's rejection was timeous. The machine was not of the kind of goods which required to be put into neutral custody if the buyer proposed to reject it—*Caledonian Railway Company* v. *Rankin*, November 1, 1882, 10 R. 63.

The pursuers replied—The property in the machine passed to the defender by delivery at Birmingham on the first occasion, and though the machine was returned to be overhauled the property never ceased to remain with him. And even if it did, by reason of the machine being disconform to contract or for any other reason, property and risk passed again to the defender by the second delivery. His remedy was for damages against the railway company—not refusal to pay the price to the pursuers, who had fulfilled their part of the contract.

At advising—

LORD CRAIGHILL—I take the same view of this case as that on which the Sheriff has proceeded in giving judgment for the pursuer. His note explaining the grounds of decision presents all necessary details, including references to the portions of the proof by which the conclusion of the Sheriff upon the facts of the case are, as he thinks, and as I

think, supported. This being so, all I desire to do on the present occasion is to set forth the results which appear to me to be established. These are—(1) That the machine ordered by the defenders was, according to the terms of the contract, when manufactured, to be put on the rail at the railway station in Birmingham; (2) that the article accordingly was placed on the rail at Birmingham; (3) that it was delivered to the defender at Stirling; (4) that the defender was not satisfied with the machine, because, as he thought, it was in particulars which he specified disconform to contract; (5) that, on the one hand, he did not absolutely reject the article sent, nor, on the other, did the pursuer insist that it had been accepted; (6) that in the end it was agreed that the machine should be returned to Birmingham, that on its return it should be examined, and that if anything should be found defective or imperfect, what was necessary to make the article conformable to contract should be performed, the cost of sending it back to Stirling being to be defrayed by the pursuer; (7) that the machine having been found imperfect, the work necessary to satisfy the contract was performed; (8) that thus finished it was placed on the rail at Birmingham; (9) that it was injured in the course of transit to Stirling; and (10) that when it was offered by the railway company to the defender, he, because the machine was in a broken condition, refused to take delivery. These are the facts according to my reading of the proof, and the question is, whether the machine, when *in transitu* between Birmingham and Stirling, was at the risk of the pursuer or of the defender? In this inquiry the first transmission of the machine to Stirling and its return to Birmingham are material only as suggesting the reason for which the pursuer agreed to pay the cost of the second transmission. The defender had paid that of the first, and if the return to Birmingham was necessary that some imperfection might be remedied, it was reasonable that the cost of carriage to the defender should not be more than it would have been had the machine when first sent been what it was when placed the second time upon the railway. In all other particulars the contract was left untouched. The pursuer remained bound to supply the article ordered, the railway station at Birmingham remained the place of delivery, and from the time when the machine was placed on the rail, it was, according to the common law rule—the contract saying nothing to the contrary—at the risk of the defender, who consequently must, in a question with the pursuer, bear the loss resulting from the injury suffered on the journey, as he was the owner. Had it been shown that the thing put upon the rail, and which was injured *in transitu*, was, from defect or from imperfection in the manufacture, or from any other reason, not the thing which the pursuer was bound to supply and the defender to accept, this rule would have been inapplicable, for by placing on the rail a thing disconform to contract, the property and the risk would have remained with the pursuer, the provision relative to delivery on the rail at Birmingham covering only an article which the defender was bound to accept. But here the proof, as I read it, and as the Sheriff has held, shows that the machine when put on the rail for the journey in the course of which it was injured, was the thing ordered, and the property consequently, by implication of the contract, then passed to the defender. If therefore the loss is to fall on one or other of the parties and not on the railway company, that loss in the circumstances must fall on the defender as owner. *Res perit domino* is the rule by which upon these facts the case is governed.

Lord Rutherfurd Clark—I also think that the Sheriff's judgment should be affirmed.

Lord Justice-Clerk—I concur in the proposed judgment, but on one ground only, and that is, that at the time the machine was inspected by the defender in Birmingham it was found by him to be conform to contract. He accepted the machine as such, and therefore it was sent at his risk. If I were not able to take this view of the evidence I should have great difficulty in deciding the case, for the contract was an English contract, and its incidents and conditions would be governed by the law of England, and it might be a question whether by English law he had a good opportunity of accepting or rejecting the article, but it is needless to go into these nice questions, as the ground I have stated is enough for the decision of the case.

Lord Young was absent.

The Court affirmed the Sheriff's interlocutor.

Counsel for Pursuers—Dickson. Agents—W. & W. Saunders, S.S.C.

Counsel for Defender—Comrie Thomson. Agent—William Duncan, S.S.C.

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*Saturday, December* 20.

## FIRST DIVISION.

### SPECIAL CASE—KILPATRICK AND OTHERS (FORREST'S TRUSTEES).

*Succession—Accretion—Liferent and Fee—Survivors—Whether "Survivor" can mean "Other."*

A testator directed his trustees to realise his whole estate, heritable and moveable, on the death of the longest liver of his wife and certain other annuitants, and to divide the annual proceeds of the residue equally among his nine nephews and nieces and one grandniece, for their liferent alimentary use only; on the death of any one of these beneficiaries an equal share of the residue was to become payable to the children of such deceased equally upon their attaining majority. In the event of any of these beneficiaries dying without leaving children, or in the event of the children dying without issue before attaining majority, "then the share of my said estates which would have otherwise fallen to such children shall accresce and belong to the survivors of the parties before named in liferent, and to their children in fee, all in the same manner as the proper shares of these parties themselves, and which shares and profits thereof accrescing as aforesaid shall be subject to the same restrictions" as the original shares. The testator's widow survived the other annuitants, and five of the beneficiaries