

posing of it also as their own. They may not now repudiate the contract between them and Dunnett, and if they cannot do that, it is plain they could not insist in an action for damages founded on the assumption that the contract was one induced by fraudulent means, and one from the consequences of which they are entitled to be relieved. Neither the case of *Lumsden* nor the case of *Leslie* appear to me to be in conflict with the views which I have expressed, and indeed there is not, so far as I know, any case in which a title to sue in circumstances like those which here occurred has been put forward, or at all events sustained by the Court, at the instance of an individual partner of a dissolved company.

On the whole matter, my opinion is that this reclaiming-note ought to be refused, and the judgment of the Lord Ordinary sustained.

LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor:—

“Recal the said interlocutor in so far as it finds the complainers entitled to expenses, subject to modification: *Quoad ultra* adhere thereto; find the complainers entitled to the expenses in the whole cause.”

Counsel for the Reclaimer—Gloag—J. A. Reid. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the Respondent—Jameson—Younger. Agents—J. & J. Ross, W.S.

Thursday, December 8.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

HAY & KYD v. CALEDONIAN RAILWAY COMPANY.

Carrier—Delivery to Person other than Consignee—Breach of Contract—Condonation.

A firm of auctioneers sold some cattle to a customer, to whom in the usual course of their dealings they gave a week's credit, and booked them to be conveyed by a railway company to the buyer. The account-sale bore that the sale was for cash, and the buyer was at the time in debt to the sellers for previous transactions. This debt was considerably reduced the day after the sale, but the sellers determined not to deliver the cattle in question without payment. They accordingly, upon the same day, cancelled the invoice, and re-booked the cattle to the same destination, but sent one of their servants to take possession of them. A telegram was at the same time sent by the officials of the railway company to the place of destination with instructions that delivery was on no account to be made to the buyer's servant. The railway company disregarded these instructions, and delivered the cattle to the buyer's servant. The auctioneers' servant met the buyer the same day that he had got the cattle, and it was arranged that the latter should meet the former later in the day, and make payment to him. The auctioneers' servant did not assent to the

buyer selling the cattle, nor had he authority to give such consent. The buyer sold the cattle, and failed to pay anything to the auctioneers. The latter then raised an action of damages against the railway company for breach of contract and wrongous delivery. Held (1) that the sellers were entitled as undivested owners to retain the cattle in order to secure the balance due to them by the buyer on previous transactions; (2) that the railway company had been guilty of a breach of contract in disregarding the sellers' instructions as to the delivery of the cattle; (3) that this breach of contract had not been condoned by the actings of the sellers' agent; and therefore (4) that the railway company were liable for the price of the cattle.

In this action Messrs Hay & Kyd, live stock salesmen, Victoria Auction Hall, Perth, sued the Caledonian Railway Company for the sum of £281, 7s. 6d. as damages for breach of contract in respect of their failure to deliver to the pursuers' order at Glasgow fifteen cattle which they had given to the company at Perth to be carried to Glasgow.

The facts of the case were as follows:—

On 15th November 1886 the pursuers sold the cattle to James Peebles, a cattle-dealer at Cargill, at the price of £275, 15s., as contained in the former's account of purchases for that day, and in which it was stated that the terms of the sales were cash. The cattle were sent in charge of a drover in the employment of the pursuers to the Caledonian Railway Station at Perth, and by him booked to be conveyed in trucks by the railway company to Glasgow, and there delivered to Peebles, £3, 4s. being paid for the carriage. There was an agreement in force between the pursuers and Peebles, who was one of their regular customers, as regarded the settlement of their weekly transactions. The sales were on Mondays every week, and Peebles settled on the following Tuesday for the cattle bought the previous week. He was not, however, in the habit of paying for the cattle sold on the previous day. At the date of the sale in question he was in arrear to the extent of between £500 and £600, and as the pursuers were anxious to be secured in this debt, and in the price of the cattle, they sent one of their servants, J. A. Hunter, to Perth Station to meet Peebles, and to get as large a payment as he could, but not to take cheques. Peebles offered to pay £300 by giving a cheque for £120, his own cheque for £25, both payable in Glasgow, and the balance in cash. This was a payment to account of the balance due, not payment of the price of the cattle. J. A. Hunter took the cheques, and immediately afterwards went to Glasgow to see about them. Before leaving, J. A. Hunter saw the pursuers' cashier, and the footing upon which the matter was left was that the cashier was to take the pursuers' instructions in regard to the cattle. When J. A. Hunter left he did not know whether the cattle were to be assigned to Peebles or himself. The pursuers being dissatisfied with the payment, had the old way-bill or invoice cancelled and a new one made out, in which the cattle were consigned to J. A. Hunter instead of to Peebles. A telegram was then sent from the defenders' traffic manager at Perth to Glasgow, where it was received

by a man named Sreanon, the head porter in charge at night at St Rollox—"Two waggons, 15 cattle, St Roll., from here consigned John A. Hunter, are from Hay & Kyd. Take care you do not deliver to Hunter, Peebles' man." This was communicated by Sreanon to Thomson, the porter on duty after six o'clock in the morning, who received the cattle. A telegram was also sent by the defenders' cashier to J. A. Hunter, intimating that the cattle had been consigned to him. J. A. Hunter did not receive this telegram until some time after his arrival in Glasgow. On receiving it he proceeded to the station, and found that Alexander Hunter, who was in Peebles' employment, had meanwhile taken possession of the cattle at the station, and refused to give them up. J. A. Hunter subsequently met Peebles, with the cattle, in the market, and stipulated that at the ordinary hour of closing business, or the time when he was going to return to Perth, Peebles should meet him at the station and pay him as much money as he could. It was not proved that J. A. Hunter consented to Peebles selling the cattle, or that he had any authority to give such consent. Peebles sold the cattle, but made no payment to the pursuers. The sum sued for was the price of the cattle and expenses of their carriage, keep, &c.

The pursuers averred that the terms of the sale were cash on delivery, and as Peebles failed to implement those terms, they declined to give him delivery. They further averred that the defenders had, regardless of their express instructions, and in violation of the contract of carriage, delivered the goods to Peebles. The defenders, in reply, stated that their servant followed the cattle to the market after they had been forcibly taken away by Alexander Hunter, and that they would have recovered them from Peebles but for Peebles meeting there with J. A. Hunter, the pursuers' representative, and obtaining the latter's authority to sell the cattle.

The pursuers pleaded—“(1) The defenders having wrongously and illegally delivered the said cattle to the said James Peebles, in the circumstances condescended on, they are liable to the pursuers in damages as concluded for. (3) The defenders having failed to implement their contract with the pursuers by failing to deliver the said cattle to the pursuers as they undertook to do, they are liable to the pursuers for the loss resulting therefrom, as concluded for.”

The defenders pleaded—“(1) The defenders having been prevented from recovering the cattle from Peebles before they were sold by the pursuers, through their representative Mr John A. Hunter having authorised Peebles to sell them, the present action should have been brought against Peebles, and not against the defenders, who are in the circumstances entitled to absolvitor. (2) At all events, the pursuers having found the cattle in the possession of Peebles before they were sold, ought to have recovered the cattle from him, or enabled the defenders to do so. (3) The pursuers having authorised the sale of the cattle by Peebles, took him as their debtor for the price, and the defenders should be assoilzied.”

A proof was led, in which the above-mentioned facts were established.

The Lord Ordinary (M'LAREN), on 13th July

1837, pronounced this interlocutor—"Finds that the defenders in the matter complained of committed a technical breach of contract, but that the pursuers sustained no damage, because the defenders delivered the goods to the person to whom the pursuers were under obligation to make delivery: Finds in these circumstances that it is unnecessary to decern for nominal damages: Finds that the action was not brought to try any question of right except the right to recover damages; and accordingly finds no expenses due to or by either party.

“*Opinion.*—In this case the pursuers Hay & Kyd, who are auctioneers and cattle salesmen at Perth, sue the Caledonian Railway Company for breach of contract of carriage, in respect of their failure to deliver to the pursuers' order at Glasgow fifteen cattle which they had given to the company at Perth to be carried to Glasgow. And it appears that the explanation of this mistake on the part of the company is, that the cattle were sold in accordance with the special arrangement to James Peebles, who intended again to sell them in the Glasgow market, but that for reasons which they considered satisfactory Hay & Kyd on the day of the sale had taken upon them to refuse delivery, and had instructed the Caledonian Railway Company to deliver to their servant John A. Hunter at Glasgow, instead of to Peebles.

“Three questions arise upon the evidence—(*First*) Whether the Caledonian Railway Company committed a breach of the contract of carriage; (*secondly*) on the question of damages, whether Peebles had a right to delivery of the cattle; and (*thirdly*) supposing he had not the right to the delivery of the cattle, whether John A. Hunter, the pursuers' representative in Glasgow, had subsequently assented to the delivery to Peebles, and had thereby bound his employers, or liberated the company from any claim of this nature.

“On the first point my opinion is quite clear. I think the company, through the oversight of their servant Thomson, have committed a breach of the contract of carriage. It had been originally intended that the cattle should be consigned to Peebles, and they were actually booked to him, but in consequence of the resolution of the pursuers, to which I have referred, that was altered before the carriage was commenced—before the goods were *in transitu*—and a new way-bill or invoice was made out, in which the goods were consigned to J. A. Hunter, the senders' representative. A telegram was sent to Glasgow, and was received at Glasgow by Sreanon, the head porter in charge at night at St Rollox, and its contents were by him communicated to Thomson, who was on duty after six o'clock in the morning, and who received the cattle. It seems that Thomson had not been fully informed of the contents of the telegram, but had been told not to deliver to Alexander Hunter, who was Peebles' representative, and he perfectly understood that. He knew Alexander Hunter, and when Alexander Hunter came for the cattle he told him he had instructions not to deliver; but he afterwards consented—I think that is the fair import of his statement—to Alexander Hunter carrying off the stock. So that the company have, through their servants, in full knowledge of the facts, delivered to the wrong person.

"The next question is, whether Peebles had not the right to delivery of these cattle? The terms of settlement between him and Hay & Kyd, with whom he was a regular customer, were these—Their sales were on Mondays every week, and Peebles settled on the following day before getting delivery of the cattle. But he did not pay for the cattle sold on the previous day, but settled up his bill for the purchase effected prior to that date. That was the regular agreement between them, although to a certain extent he had been allowed to fall into arrear. Now, it is not very clearly made out who was the person who was in the habit of regularly receiving payment from Peebles, but on this occasion it was Mr John A. Hunter who received payment, and he did so under express instructions from Mr Kyd, who told him what he was to say and how he was to settle. There is nothing to show that this was exceptional, and I must take it that there is enough to show that John A. Hunter was the authorised or accredited agent of Messrs Hay & Kyd for settling up with Peebles on the Tuesday weekly settlements. No doubt upon this occasion Messrs Hay & Kyd, who had been in the habit of taking cheques, had become alarmed, and had told Hunter to get as much as he could from Peebles, but not to take cheques. However, what was offered was a cheque for a large sum, and I suppose from a person in good credit, for it was paid next day—£120—his own cheque for £25, and the balance in cash. Hunter, making what he thought the best bargain for his employers, and I cannot doubt acting very judiciously, took the cheque, and immediately reported it to his employers, assuming that when they knew all the circumstances they would be willing to assent to what he had done. But he certainly does not say that he informed Peebles that there was any doubt about this cheque being taken in payment, and I think in consequence of what passed between Peebles and Hunter, who I take to be the accredited servant of Hay & Kyd in that matter, Peebles had the right to expect that the cattle were now his property—that not only was the contract of sale complete, but that there was constructive delivery to him, and that he had a right to send these cattle on to Glasgow. If it is a question whether there was constructive delivery, at all events Peebles had the right to the specific cattle, and the right to have them sent on to him or his order at Glasgow. Now, that being the case, I fail to see how Messrs Hay & Kyd have sustained any damage, because the company only delivered to the person who was entitled to receive delivery. If the company had acted upon the telegram sent by Hay & Kyd, and the cattle had been impounded *in transitu*, I think that in an action—a multiplepounding, for instance—relating to these cattle it would have been found that the company were bound to make delivery to Peebles, and were not entitled in a question with Peebles to act upon the telegram sent to Glasgow. In these circumstances it appears to me that though there has been a technical breach of contract, yet, as Peebles was entitled to the cattle, Hay & Kyd can only recover nominal damages.

"That being so, I do not need to consider or determine whether Hunter had assented to Peebles selling the cattle. I think Hunter's

view was that Peebles had already got delivery of the cattle, and would not give them up, and that he really tried to do his best for all concerned in stipulating that at the ordinary hour of closing business, or the time when he was going to return to Perth, Peebles should meet him at the railway station and pay him as much money as he could furnish out of the proceeds of the sale. I am not satisfied that he meant in any way to ratify the delivery of the cattle to Peebles. He had no authority from his employers to do so, as far as we know, and I am not satisfied that this was his meaning. But it is not necessary, I take it, to go further into that question.

"The result of my consideration of the question is, that I shall find that the company have failed to make delivery in terms of their contract, but are only liable in nominal damages, and therefore it will be unnecessary to dispose of the conclusions of the action except the conclusion for expenses."

The pursuers reclaimed, and argued—(1) They were quite entitled, in order to secure the balance due to them by Peebles on previous transactions, to retain the cattle in their hands till they were either paid in full or some adequate security was given them—*Melrose v. Hastie*, March 7, 1851, 13 D. 880; *Robertson's Trustees v. Baird*, July 15, 1852, 14 D. 1010; *Black v. Incorporation of Bakers, Glasgow, &c.*, Dec. 13, 1867, 6 Macph. 136. (2) When they did so, there had been no delivery to Peebles, either actual or constructive, and they were still undivested owners of the cattle.—*M'Leod & Co. v. Harrison*, Dec. 7, 1880, 8 R. 827. (3) The defenders were guilty of breach of contract in delivering the cattle to Peebles' representative, and this breach was not condoned by anything done by J. A. Hunter, who did all in his power to get the defenders to fulfil their obligation to his constituents. Indeed, he had no power to release the defenders from their obligation.—*Sanquer v. London and South-Western Railway Company*, May 1, 1885, Scott's Rep. 16 C. B. 163. (4) This action was properly raised against the defenders, and not against Peebles. When once breach of contract was proved, then the pursuers were entitled to go against the primary debtor.—*Mayne on Damages*, p. 285. Possibly, however, the defenders were entitled to relief from Peebles if they could prove their averments.

The defenders replied—The pursuers were not entitled to succeed, for (1) delivery had been made to the true owner, or to the person entitled to delivery. The contract was one of sale in accordance with previous dealings, and not a ready-money one. Peebles was to get credit for a week if he satisfied the pursuers with reference to previous transactions. This was followed by delivery, the cattle being marked and given to the railway company to be trucked. Peebles paid £300 out of the £600 due by him, and was therefore accepted as the purchaser on his own terms. (2) The damages were created in consequence of the pursuers' own actings, but for which the defenders might have reclaimed the cattle. J. A. Hunter, the accredited agent of the pursuers, appeared on the scene, and gave his sanction to the arrangement. (3) In any view, the pursuers were bound to exhaust Peebles first on their own account.

At advising—

LORD YOUNG—This is an action of damages for breach of contract directed against the Caledonian Railway Company, and we have to decide it as in a concluded cause with the judgment of the Lord Ordinary upon the proof.

The action is of a very simple character, the ground of it being that the railway company delivered goods, which they got from the pursuers to carry and deliver to John Hunter, to Alexander Hunter, the servant of a man of the name of Peebles, and that the pursuers were by this undoubted breach of the contract, if the facts are so, deprived of the cattle, to their loss and damage to the extent of their value. A simpler case of an action of damages for breach of contract is not even conceivable.

The defence to the action—and so far as I can find upon the record the only defence—is, that this breach of contract was condoned by the pursuers—that is to say, that they ratified what the defenders had done in breach of their contract, and so are precluded from complaining and asking damages. What they say upon the record is, that “the cattle were consigned in the name of John A. Hunter, but Peebles’ man, A. Hunter, was at the station awaiting the arrival of the cattle, and maintained with the defenders’ servant in charge of the cattle that the cattle were consigned to him, and that they belonged to Peebles. On the defenders’ servant refusing to give Peebles’ man, Hunter, delivery of the cattle, he, assisted by another man unknown to the defenders, proceeded to take forcible delivery of the cattle, and left the defenders’ premises with them. The defenders’ servant immediately followed the cattle to the market, and would have recovered them from Peebles but for Peebles meeting there with John A. Hunter, the pursuers’ representative, and obtaining his authority to sell the cattle, as explained in answer to condensation 5.” I find no other defence in this record. Force is alleged. That is probably an exaggeration, but it is distinctly alleged that, contrary to the will of the defenders, the cattle were removed by Peebles, or his servant authorised by him, and that they would have obtained redress against this irregular conduct, and got the cattle back into their possession so that they might perform their contract with the pursuers, but for the interposition of the pursuers’ servant, who condoned what had been done, ratified it, and so precluded his masters from suing them for compensation. The pleas-in-law for the defenders are all founded upon this—[*His Lordship here reads the pleas-in-law for the defenders.*] These are all the pleas, and I cannot therefore regard the defence to this action as any other than condonation—ratification of what had been done in admitted violation of the contract, by which ratification the defenders were prevented from having that undone which had been done, viz., getting the cattle back from the wrong person so that they might perform their contract, and if so, the action is excluded altogether. That was the issue that went to trial. It is therefore, I must say, with some surprise that I read this interlocutor of the Lord Ordinary—“Finds that the defenders in the matter complained of committed a technical breach of contract, but that the pursuers sus-

tained no damage, because the defenders delivered the goods to the person to whom the pursuers were under obligation to make delivery.” There is no suggestion upon the record that the pursuers were under any obligation to make delivery to Peebles. No such case is raised by the averments or by the pleas. The averments and the pleas are to the effect that Peebles was not entitled to delivery, and that his servant got delivery by force, and that the action is excluded only because of the interposed condonation which prevented the Caledonian Railway Company from getting them back. Upon the only defence which is stated on record the Lord Ordinary expresses in his note an opinion adverse to the defenders. He says—“I do not need to consider or determine whether Hunter had assented to Peebles selling the cattle,” but really that was the only defence to the action, and the only question in issue. The Lord Ordinary says—“I think Hunter’s view was that Peebles had already got delivery of the cattle and would not give them up, and that he really tried to do his best for all concerned in stipulating that at the ordinary hour of closing business, or the time when he was going to return to Perth, Peebles should meet him at the railway station and pay him as much money as he could furnish out of the proceeds of the sale. I am not satisfied that he meant in any way to ratify the delivery of the cattle to Peebles. He had no authority from his employers to do so as far as we know, and I am not satisfied that this was his meaning. But it is not necessary, I take it, to go further into that question.” Now, I agree in the Lord Ordinary’s views upon the facts, and I shall advert to that afterwards, but this is the notice which he takes of the only defence to the action founded upon in the record, and the only issue which went to trial. The Lord Ordinary’s view is, that upon the true facts of the case, as presented by the evidence, Peebles was entitled to the cattle, and that he would have got them from the pursuers without payment, so that they would have suffered precisely the same loss by Peebles recovering the cattle from them as they did through the defenders’ breach of contract—in short, that the breach of contract led to no damage at all. It would have been at least satisfactory to have had that in issue, and the evidence directed to it if that was the defence. But it was not the defence, and was not in issue, and the evidence was not directed to that. Upon the facts on the evidence directed to the other question, the Lord Ordinary has arrived at the conclusion that Peebles was entitled to delivery of the cattle from the pursuers without payment, and that having his right satisfied only through the medium of the defenders’ breach of contract there was no damage done—that it was a mere technical breach of contract, whatever that may mean. I suppose that the Lord Ordinary means that it was a breach of contract attended with no damage. I should have doubted the relevancy of such a defence if it had been stated. The pursuers were the undivested proprietors of the cattle, and had them in their possession and custody, and put them into the hands of the railway company upon a contract with them to deliver to their servant, and the railway company, had they stated such a defence, would have

been substantially pleading—"Peebles could by a proper legal process have put you out of the position of being proprietor in possession of these cattle, and recovered them from you without payment of the price, and we shall assume that he would, and that therefore you have suffered no damage by a breach of contract. We will put ourselves in his position in order to try the question whether he would have recovered them out of your possession without payment or not." I should have doubted the relevancy of that defence, but I do not need to pursue that topic, because I am clearly of opinion that Peebles was not entitled to obtain delivery of the cattle.

We have had no direct evidence as to the terms of the sale. The question is not put distinctly to any witness, What were the terms of the sale?—either of this particular sale or of the sales generally at this auction mart—and we can only collect it from materials which occur to one in the case. I say the question is not put distinctly to any witness, but it is stated upon record that the terms of all these sales at the auction mart were cash on delivery, and in the bill which was recovered from Peebles of this particular sale, which is set forth in the print of documents we have, as is usual in such accounts rendered by an auctioneer, it says, "terms of sales cash." I should rather think it is invariable that the terms of all auction sales are cash on delivery, and in the absence of any evidence to the contrary I think the Court would assume that in any case. The pursuers here sell by auction at an auction mart. The cattle which they sell are sometimes their own property, and sometimes those of customers who send them in for sale. I suppose the cattle here were their own property, but it would not signify in the case that they were the property of the customer, for the familiar rule in respect to auctioneers' liability is, that they should be liable to the customers for the price of the goods if they give delivery of them without receiving payment. If they receive payment, they must of course hand it over to the customer under deduction of their own charges, and if they deliver the goods to the successful bidders without receiving payment, they are liable. Therefore when these cattle were sold at the auction mart—that is to say, knocked down to Peebles—the sale was cash on delivery—terms cash—and the bidder was by no means entitled to receive delivery without payment of the money. But it is said there was a course of dealing here, and that that made all the sales to Peebles at the auction mart, when the articles were knocked down to him, sales according to a course of dealing, that being a week's credit. I could not assent to that for a moment. Nothing is more familiar than that people in good credit and position, whom the auctioneer can trust, get delivery of the goods without payment, and a note is sent afterwards, but that does not prevent the auctioneer, upon any occasion he pleases, from saying—"We have been giving you goods on former occasions habitually without receiving the money, but the terms of sale are cash, and I decline now to give you goods without payment of the money." He is absolutely entitled to do that. Although you have for years been getting goods on credit, that will not make credit a term of the contract—the contract being terms cash—

which the auctioneer can enforce when he sees fit with reason or without reason. In the present case it would occur to me, upon the evidence incidentally taken, although it was not a matter that went to trial, that in this case there was very good reason, Peebles having fallen behind; he had not paid up the purchases he had made the week before. He was £600 in debt at that time for past purchases which he had failed to pay, and when these cattle were knocked down to him delivery was refused. Delivery was not given, and no court in the world would, in my opinion, have ordered delivery to him without payment of the cash in these circumstances, the auctioneer being able to say—"You have fallen into arrear, you are so many hundred pounds in my debt, and I won't give you the cattle;" no court in the world would have ordered delivery by the auctioneer without payment of the price. Of course auctioneers are very willing to keep on good terms with customers, and to give them more or less indulgence, and accordingly there was communication with Peebles, and he was asked to reduce the debt which he was already owing by having got into arrears, and so breaking the custom of weekly payments. Peebles pays over £300, partly in cheques and partly in cash, and that reduced his old debt by that amount. He was then owing the balance remaining after that payment, but it was a considerable balance—something approaching £300—and if he got delivery of the cattle, amounting in value to £275, without payment, the balance would have been brought up to the old sum of £600, or between £500 and £600—the exact figures do not signify materially—and accordingly they did not deliver the cattle to him, and I am clearly of opinion that they were not bound to deliver the cattle to him. Therefore that view of the Lord Ordinary entirely fails upon the law applicable to the truth of the matter as we collect it from the evidence which was led upon another issue altogether. But it was said to us in argument, and it appears also to have been urged before the Lord Ordinary, although there is no such case upon the record, that there had been delivery to the Caledonian Railway Company for Peebles, as the cattle were addressed and booked to him, and that the change of the address in booking was illegal. Upon that point I think it sufficient to say there is no such case before us, but I agree with the Lord Ordinary there too. He says in his note—"It had been originally intended that the cattle should be consigned to Peebles, and they were actually booked to him; but in consequence of the resolution of the pursuers to which I have referred"—that is, that they should not give him delivery—"that was altered before the carriage was commenced—before the goods were *in transitu*, and a new way-bill or invoice was made out, in which the goods were consigned to J. A. Hunter, the senders' representative. A telegram was sent to Glasgow, and was received at Glasgow by Sreenon, the head porter in charge at night at St Rollox, and its contents were by him communicated to Thomson, who was on duty after six o'clock in the morning, and who received the cattle. It seems that Thomson had not been fully informed of the contents of the telegram, but had been told not to deliver to Alexander Hunter, who was Peebles' representative, and he perfectly understood that." Now, I cannot for

a moment think it would have been open to the railway company to plead that they had not these goods upon the contract to carry them and deliver them to John Hunter; they suggest nothing of the kind here, and I do not think it would have been open to them to do it. It is quite true that the drover who booked the cattle said they were for Peebles, and that they were booked by the drover to Peebles, but he is followed—almost accompanied—by a superior servant of the company, who says—“Oh no! they are not to be booked to Peebles; they are to be booked to John Hunter.” That was done, and that was the contract upon which the Caledonian Railway Company carried the goods and had them in their possession, when they were forcibly or improperly deprived of their possession in the manner in which they allege. I must therefore, with the Lord Ordinary, reject this ground of defence also. It is not on record, and it is not consistent with the law as applicable to the facts of the case.

I think that exhausts the whole matter, except the only point in issue which has been treated in the manner I have stated. Upon that matter I have already said that I agree with the Lord Ordinary, to the effect that John Hunter the pursuers' servant was sent to Glasgow to take possession of the cattle, they being consigned to him, and to sell them in the market at Glasgow and bring the price home to his employers, but that he had no authority to condone, to ratify, or forgive any breach of contract by the railway company, and did not do so. He had no authority to do it, if he had done it, but he did not do it. On that matter I have stated that I agree with the Lord Ordinary. I do not see very well what Hunter could have done except what he did. He did say to Peebles, who had got the cattle, that if he took the money back with him to his employers he thought it would have been all right—and no doubt it would have been—but to say that that would imply a condonation of the railway company's breach of contract is, I agree with the Lord Ordinary in thinking, entirely out of the question. There was a point in one of the English cases where a railway company had a contract. The company delivered the goods to the wrong party, and the servant of the owner, who sued the railway company for breach of contract, had been in communication with the party who improperly received delivery. He said—“If you pay the price it will be all right enough; it is the price we want, and if that is paid it will be all right;” and I rather think in that case part of the price was received. That is not condonation; it is not ratification of the breach of contract. What, then, is the result? More than a year has now elapsed, and the pursuers are without their cattle and without the price. But for this breach of contract, Hunter would have got the cattle, and sold them in the market in Glasgow as he was sent to do. In consequence of the breach of contract, the cattle are removed from the pursuers' possession, and put into the possession of Peebles, who turns them into money; and now at the distance of a year not one farthing of the price is paid. The railway company have recourse against Peebles no doubt, if the facts be proved as they aver upon record; they have recourse against Peebles if he is good

for anything.

I am therefore of opinion that the Lord Ordinary's judgment ought to be recalled, and that the breach of contract complained of ought to be affirmed, and that the damages ought to be assessed at the sum concluded for, which is the price at which the cattle were sold to Peebles.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

“Find that the defenders wrongfully, and in breach of their contract with the pursuers, delivered the cattle referred to on record to James Peebles, to the loss, injury, and damage of the pursuers: Repel the defences: Assess the damages at £275, 15s.: Ordain the defenders to make payment of that sum to the pursuers, with interest thereon,” &c.

Counsel for Reclaimers—Darling—Chisholm. Agent—David Milne, S.S.C.

Counsel for Respondents—Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Thursday, December 8.

FIRST DIVISION.

[Police Commissioners of
Dundee.

THOMSON v. DUNDEE POLICE COMMISSIONERS.

Delegation—Delegatus non potest delegare—Statutory Commissioners—Dundee Police and Improvement Act 1882 (45 and 46 Vict. c. cxxxv.), sec. 28 (e)—General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), sec. 63.

Held, in a case where police commissioners had delegated certain of their duties to a committee of their number, in terms of section 63 of the General Police Act of 1862, that this committee could not delegate their duties to a sub-committee.

This was an appeal by Thomas Thomson against a deliverance of the Dundee Police Commissioners, by which they disapproved of certain plans and sections submitted to them by the appellant with a view to the erection of new buildings in Dundee.

The Dundee Police and Improvement Consolidation Act 1882, by sections 121 and 122, requires persons intending to erect new buildings to submit plans and sections thereof to the police commissioners for approval, and prohibits the commencement of any new building until the plans and sections thereof, with or without modifications, have been previously approved of by the commissioners.

Section 28 (e) of the Act incorporates section 63 of the General Police Act of 1862, which is in these terms—“The commissioners shall have power to form committees of their number, either with directions to report to the commis-