In plain language what he did was this. Having obtained delivery of the cattle—I know not how long before the cheque was granted—he said to the seller of the cattle—"Here is a written order upon A B, who will pay you the money," well knowing that A B would not pay the money. That was a falsehood, but it was not the means by which he either secured delivery of these cattle or obtained credit for £5, 10s. I do not for a moment doubt that the law is as stated in the cases to which we were referred, viz., that if a person obtain goods or money by issuing a cheque, he having no funds in bank and knowing the cheque will not be honoured, he commits a fraud. The essence of that statement lies in the little preposition "by," which is lacking in this indictment. That I think is a fatal flaw.

Therefore I am of opinion that the conviction ought to be suspended and liberation granted.

LORD DUNDAS and LORD GUTHRIE concurred.

The Court quashed the conviction.

Counsel for the Complainer—Cooper, K.C. —Normand. Agents—Allan, Lowson, & Hood, S.S.C.

Counsel for the Respondents—Morton, A.-D. Agent—Sir William S. Haldane, W.S., Crown Agent.

COURT OF SESSION.

Thursday, July 9.

EXTRA DIVISION.

[Sheriff Court at Dundee.

HILL *v.* KING'S THEATRE AND HIPPODROME (DUNDEE), LIMITED, AND OTHERS.

Company—Winding-up—Action without Sanction of Court—Competency—Waiver—Companies (Consolidation) Act 1908 (8 *Edw. VII, cap.* 69), *sec.* 142.

The Companies (Consolidation) Act 1908, section 142, enacts—"When a winding-up order has been made no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose." *Held* that it was competent for a company or its liquidator to waive a plea founded on the above-quoted section, and that in such circumstances it was no part of the duty of the Court to put the section in operation.

The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 142, is quoted *supra in rubric.*

Alexander Ramsay Hill, 5 Southfield, St Andrews, *pursuer*, raised an action in the Sheriff Court at Dundee against (1) the King's Theatre and Hippodrome, Dundee, Limited (in liquidation); (2) John Easson M'Intyre, C.A., the liquidator thereof; (3) William Black, ironmonger, Murraygate, Dundee, and others, trustees for the first mortgage debenture holders; and (4) the said William Black and others, the trustees for the second mortgage debenture holders of the said company, *defenders*, for declarator that he was proprietor of certain debentures in the said company. Only the trustees for the second debenture holders lodged defences.

The Sheriff-Substitute (NEISH) pronounced judgment in favour of the pursuer, and in his *Note* stated—". . . Notice of appearance was lodged for the liquidator, but he lodged no defences, and the only parties who have lodged defences are the trustees for the second debenture holders.

"As regards the liquidator and the company, it is, I think, clear that these parties might have pleaded the provision of secs. 203 and 142 of the Companies (Consolidation) Act, which appear to me to provide in effect that where a winding-up is subject to the supervision of the Court, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.

"At the first hearing no reference was made to this provision, probably because it had not been pleaded. After considering the case I was impressed by the peremptory terms of sec. 142, and it appeared to me that sitting in the Sheriff Court I should be very careful with regard to making any order which might affect a liquidation which is proceeding under the supervision of the Court of Session. Accordingly I put the case out for further hearing on this point. Technically, of course, the liquidator and the company were again not represented at the second hearing, but I can hardly conceive that this question has not come under their notice, looking to the intimate relation between these parties and the trustees for the second debenture holders. They have taken no steps to put forward the plea of bar in this action. I think I must take it therefore that the liquidator and the company have deliberately refrained from raising this plea just as they stated no defence on the merits.

"At the second hearing Mr Little, for the pursuer, referred me to the case of *Sinclair* v. *Thurso Pavement Syndicate Company, Limited.* In that case Sinclair raised an action for interdict against the company, which was in liquidation, and the liquidators without having obtained the leave of the Court. The respondents lodged answers, but prior to the closing of the record lodged a minute withdrawing them and consenting to interdict. The complainer moved for expenses against the company and the liquidators. The respondents contended that there should be no award of expenses in respect that the complainer had raised the action without having obtained the leave of the Court. Lord Kyllachy repelled this contention, holding that the question could not now be considered, the respondents having withdrawn their answers and consented to interdict.

"In the present case, as I have said, no defences have been lodged stating the plea of bar.

"I had at first some doubt whether it might not be *pars judicis* to give effect to the provision of sec. 142, but I have come to the conclusion that Mr Little is right when he says that there is no obligation on the pursuer to incur the expenses of the procedure necessary to obtain the leave of the Court when the company and the liquidator have deliberately abstained from raising the objection.

"Accordingly, so far as the whole of the parties who have not lodged defences are concerned, I think the pursuer is entitled to a substantial part of the decree which he craves, although not to the whole. . . ."

The compearing defenders appealed to the Court of Session, and drew the attention of the Court to the point which, though not pleaded on record, was adverted to by the Sheriff-Substitute in his judgment, namely, that the leave of the Court had not been obtained to allow the action to proceed in terms of the Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 142, and they argued that on that ground the action was incompetent.

Argued for the respondent—The Companies (Consolidation) Act 1908 (8 Edw. VII, cap. 69), sec. 142, was purely in the interest of the company or the liquidator, and if it was waived by them it was not *pars judicis* to give effect to it. In the case of *Sinclair* v. *Thurso Pavement Syndicate, Limited*, October 15, 1903, 11 S.L.T. 364, the Court had by implication given effect to this view. In any event, if the defender were allowed to take that plea now, it could only be allowed on the condition of amending the record and paying all expenses since it had been closed—*Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees*, July 6, 1905, 7 F. 914, 42 S.L.R. 698.

At advising—

LORD DUNDAS—The facts in this case are somewhat complicated in detail, but are sufficiently set forth by the Sheriff-Substitute, and I need not summarise them. The pursuer called as defenders to his action the company, the liquidator, the trustees for the first debenture holders, the trustees for the second debenture holders, and the postponed bondholders, but the only parties who have lodged defences are the trustees for the second debenture holders.

I shall notice at the outset a point which is not pleaded on the record, but which occurred to the Sheriff-Substitute himself and is considered by him in his note. He states that he had some doubt in his own mind whether it might not be *pars judicis* for him to give effect to the provision of section 142 of the Companies (Consolidation) Act 1908, which enacts that where a winding-up order has been made no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose. That is a section which may be pleaded by the company and its liquidator in any proceedings taken against them, and the decision of Lord Kyllachy in the case of *Sinclair* v. *Thurso Pavement Syndicate Company, Limited*, 11 S.L.T. 364, to which we were referred, seems to afford ground for the view that the plea if taken may be afterwards waived by the company or its liquidator. In the present case the company and the liquidator though called as defenders did not appear, and the Sheriff-Substitute came to the conclusion, as I think rightly, that it was no part of his duty in these circumstances to put the section into operation. Still less, I think, is it for us to take any notice of the section now that the case is in this Court. [*His Lordship then dealt with other points with which this report is not concerned.*] I think we should refuse the appeal and affirm the interlocutor of the Sheriff-Substitute.

LORD MACKENZIE and LORD CULLEN concurred in Lord Dundas's judgment.

The Court refused the appeal and affirmed the interlocutor of the Sheriff-Substitute.

Counsel for Appellants—Sandeman, K.C. —Lippe. Agents—Macpherson & Mackay, S.S.C.

Counsel for Respondent—Moncrieff, K.C. —D. P. Fleming. Agents—Simpson & Marwick, W.S.

Friday, July 10.

FIRST DIVISION.

[Sheriff Court at Dundee.

BRITISH MOTOR BODY COMPANY, LIMITED *v.* THOMAS SHAW (DUNDEE), LIMITED.

Process — Counter Claim — Contract — Damages for Late Delivery — Time of Delivery not Specified in Contract—Sale of Goods Act 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2), 29, 53 (1), 59, *and* 62.

A firm of motor body builders supplied a firm of motor engineers with a motor car body under a contract in which the time of delivery was not expressly specified. In an action for the price of the body the defenders stated a counter claim for damages in respect of the pursuers' failure to give delivery within a reasonable time.

Held that a claim for damages for late delivery was a relevant defence to an action for the price, notwithstanding that the contract did not expressly specify the time of delivery.

Dictum of Lord President Inglis in *MacBride* v. *Hamilton & Son*, June 11, 1875, 2 R. 775, 12 S.L.R. 550, to the contrary effect *overruled.*

Johnston v. *Robertson*, March 1, 1861, 23 D. 646, *commented on.*

The British Motor Body Company, Limited, motor body builders, Bannermill Works, Bannermill Road, Aberdeen, *pursuers*, raised an action in the Sheriff Court at Dundee against Thomas Shaw (Dundee),