tirely destroyed, a large quantity of it was left uninjured by the fire, and stored in heaps separate from that which was destroyed. Now this portion of the mineral thus left it was the duty of the defenders under the contract to sell—they were not entitled to do as they have done, and enter into a special arrangement with the insurance company as to it, an arrangement by which the whole of the mineral saleable and unsaleable was thrown together and in the slump handed over to the insurance company. Had the saleable and unsaleable portions been kept entirely separate, the remedy of the pursuer would have been clear—for the mineral destroyed he would have had no claim whatever, while for that portion left uninjured the terms of the contract would still have held good. But the defenders have not adhered to the contract. They handed over this perfectly saleable part of the mineral to the insurance company, and by so doing have caused an obscurity in the whole transaction; have rendered it inextricable, and have, I think, entitled the pursuer to claim on the price realised. He may fairly say, I wish to have the profit on the uninjured portion, but am unable, owing to the complicated nature of your arrangement with the Insurance Company, to ascertain what that is, and therefore I will take the price as realised by your arrangement. We are on this ground, I think, entitled to give the pursuer the sum he asks, and accordingly I concur in the result at which your Lordships have arrived.

The Court's interlocutor was as follows:—

"Alter the interlocutor of the Lord Ordinary; find that the pursuer is not entitled to have the proposed amendment added to the Record; find that the pursuer is entitled, under his contract with the defenders, to one-half the amount received from the Insurance Company, in so far as the same exceeded the amount of 50s. per ton; find that the said sum amounts to £3060, 3s. 4d., for which sum of £3060, 3s. 4d. decern in terms of the libel, and for interest thereon at the rate of 5 per cent. from the 31st day of December 1872 until payment; find the pursuer entitled to expenses, except the expenses caused by the proposed amendment, and remit to the Auditor to tax and report.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Young), Q.C., Pattison, and Harper. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders (Respondents)—Solicitor-General (Clark), Q.C., Asher, and Guthrie Smith. Agents—Hill, Reid, & Drummond, W.S.

Friday, January 30.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

M'KERNAN *v.* UNITED OPERATIVE MASONS' ASSOCIATION OF SCOTLAND.

(*Ante*, vol. x., p. 361.)

Trade Union—Benefit to Members—Restraint of Trade—"Trade Union Act 1871," §§ 3 *and* 4.

In an action by a member of a trade union for payment of a sum of money due under the benefit provisions of the Association—*Held*, in terms of Act 34 and 35 Vict. c. 31, that although the purposes of the Association were no longer unlawful, the Court could not entertain an action for enforcing the said benefit provisions.

The summons in this case was raised at the instance of Patrick M'Kernan or M'Kerna or M'Kernon, mason, residing in Greenock, against the United Operative Masons Association of Scotland, and certain individuals, all members of the said Association, and forming for the time being the Central Committee of the said Association, or a majority and quorum thereof, and concluded for the sum of £80, which M'Kerna alleged was due to him by the laws of the Association in consequence of an injury which had caused the loss of his right eye whilst engaged in his occupation as a mason, he being a member of the said Association.

From the condescendence it appeared that the pursuer "is a member of the Greenock Lodge or Branch of the United Operative Masons Association of Scotland. The said Association comprises eighty-three lodges in all, and its affairs are made known through the medium of fortnightly returns published by the Central Committee, who are the executive council of the Association, and are in possession of the funds thereof. These returns are not accessible to the individual members of the various lodges, but only to the trustees of the working and sinking fund of the Association, and to the members of the Central Committee, the office-bearers of the Association, and the secretaries of the various lodges. The defenders are the members of the said Central Committee. The pursuer, on or about 24th January 1862, was following his trade as a mason in the employment of Messrs Currie & Guthrie, builders and joiners in Greenock, and, while engaged in dressing a stone at Messrs M'Nab & Company's, now Messrs Steele & Company's, boiler-shed, Greenock, a spark or blow from his chisel struck the pursuer in the right eye, permanently deprived him of its use, and rendered him unfit for life to follow his trade as a mason. When the pursuer was thus injured he was a member of said Greenock Lodge or Branch of the said United Masons Association of Scotland, and had been a member of said lodge for more than twelve months prior to the date of the accident, and fully entitled to the benefit of the accident provision after-mentioned." The provision referred to is as follows:—"Members disabled for life by any real accident received while following their employment as a mason (and also those specified in law 7, class i., may lay an application before the Society, according to law 7 of this class, and if a majority of those voting on the application consider him entitled he shall receive the sum of eighty pounds sterling." The pursuer further stated that he had made application for payment of this sum of £80 in accordance with the rules of the Association, which nevertheless illegally refused to pay it.

The defenders denied liability. They stated that the pursuer's application had been considered by the Association and refused in accordance with the rules applicable to such cases. They further maintained that the Association, not being incorporated, had no *persona standi in judicio*.

This case came before the Lord Ordinary (ORMIDALE) in October 1873, when his Lordship pronounced the following interlocutor:—

"*Edinburgh, 29th October* 1873.—The Lord Ordinary having heard counsel for the parties on the competency of the action as laid, finds the same to be incompetent, and therefore dismisses the action, and decerns: Finds the defenders entitled to expenses, allows an account thereof to be lodged,

and remits it when lodged to the Auditor to tax and report.

"*Note.*—This is a second action brought by the pursuer to enforce the same claim, and laid upon the same grounds.

"The former action was brought in the Sheriff-Court, where it was dismissed by the Sheriff as incompetent. Thereafter an appeal from the judgment of the Sheriff to this Court was also *simpliciter* dismissed. The decision of this Court is reported in vol. x. of the 'Scottish Law Reporter,' p. 361, and that report throws a good deal of light upon the case as it presents itself in the present action.

"The only substantial difference betwixt the former and the present action is, that in the latter not only the Association but the Central Committee in place of the Local Greenock Lodge, have been called as defenders. In this way one of the grounds of incompetency which appears to have been considered well founded in the former action does not arise in the present. But, in the words of the Lord President in the former case, 'The pursuer's right to receive the sums concluded for depends on—(1st) disablement; (2d) on his making application; and (3d) on a majority voting in his favour. Without the fulfilment of these conditions he cannot get his £80.' After some further explanation the Lord President concluded by saying that he thought not only that the defenders were not answerable, but 'further, a vote having been taken of the whole lodges, and a majority having voted against the claim, I think the jurisdiction of the Court is excluded.'

"This last ground of judgment is applicable to the present as it was to the former action; for it is obvious from the pursuer's own statements in articles 14 and 15 of his condescendence that a vote has been taken on his claim and was adverse to him.

"It is said, however, just as it was said in the former case, that the proceedings connected with the vote on his claim were irregular. But supposing that were so, the Lord Ordinary cannot see how that would render the action, laid as it is, competent in this Court. The alleged irregularities, if committed at all, must have been committed by some particular person or persons; but the wrong-doers, whoever they were, are not called as defenders; for the pursuer does not say that the present defenders were the wrong-doers. Nor does he conclude that he should have another and better opportunity of making good his claim in terms of the rules or laws of the Association upon which he founds.

"And further, it is clear from the rule quoted by the pursuer in article 16 of his condescendence, and from his statement in that article, that it is by arbitration, and not by an action in this Court, his dispute with the Association falls to be determined. He says, no doubt, that he did make application in terms of the rules 'to his lodge at Greenock to have the matter in dispute determined by arbitration;' but that the chairman of that lodge by his wrongous acts and conduct prevented an arbitration being gone into. But this action has not been brought to enforce an arbitration, nor has it been brought to obtain reparation from the chairman of the Greenock Lodge in respect of the wrong alleged to have been done by him. The Greenock Lodge and its chairman have not been made defenders at all.

"For the reasons, and on the grounds now referred to, the Lord Ordinary considers the present equally incompetent as the former action, and he has accordingly dismissed it by an interlocutor expressed in the same terms. He has, however, in the present case seen no sufficient reason for refusing expenses to the defenders."

The pursuer reclaimed and argued—This was a case of contract between the pursuer and the Association, by which the Association was to become liable to pay him a sum of money in case of his sustaining any real injury. He had sustained such injury, and he had therefore a good claim against the society for payment. No doubt the rules of the Association excluded any other jurisdiction, but only so long as the Association acted according to those rules, which was not the case here. This the pursuer wished to be allowed to prove: The clause of arbitration did not exclude the authority of the Court—(*Caledonian Railway* v. *Wemysbury Railway*, 10 Macph. 892). Neither is the plea of no *persona standi in judicio*, on the ground that the Association is not incorporated, well founded—(*Manners* v. *Fairholme*, 10 Macph. 502). No doubt some of the rules of the Association had reference to strikes, but there are also benefit provisions, and to the extent of these provisions this may be considered a friendly society; and by 32 and 33 Vict., cap. 61, societies with rules or agreements in restraint of trade are not, on that account merely, to be considered as established for an illegal purpose, or not to be friendly societies within the meaning of the 42d section of the Friendly Societies Act. What is restraint of trade is to a great extent a politico-economical question, not a legal one.

Pleaded for the defenders—This is an Association in restraint of trade—in fact a trade union; and this is admitted in the preamble to the laws of the Association. The fact that there are certain beneficial provisions in regard to the members in the rules does not take it out of the category of Associations in restraint of trade. All that the Act of 1869 did was to remove the stigma of illegality from such Associations to the extent of enabling them to protect their funds from embezzlement. And though by the Act of 1871 trades unions are no longer to be considered illegal to the effect of rendering their agreement void, yet the 4th section expressly enacts that nothing in the Act is to enable any Court to entertain any legal proceedings instituted for, amongst other things, the breach of any engagement to provide benefits to its members. For the purposes of this action this Association is illegal, and cannot sustain action in a civil Court.

Moreover, by the rules, the decision of the Association in such questions as the present is to be final, and the jurisdiction of the Court is therefore excluded.

Pursuer's Authority—*Manners* v. *Fairholme*, 10 Macph. 520.

Defenders' Authorities—*Hilton* v. *Everesley*, 24 L.J.,Q.B. 353; *Hornby* v. *Close*, 2 L.J.,Q.B. 153; *Farrar* v. *Close*, L.J.,Q.B. 602.

At advising—

Lord Justice-Clerk—This case is certainly one which at first sight, and I rather think in substance, is one of considerable hardship. The pursuer says that he was a member of this Association, under the rules of which, in the event of his meeting with an accident by which he was disabled for life,

he was entitled upon certain procedure to obtain £80 as an indemnity. There are certain rules by which the lodges with which this Association is affiliated are bound to consider such claims and to vote upon them. He says that this was never properly done, and that the apparent majority that voted against his claim, in reality was not ascertained or obtained in terms of the rules. He brought a former action which was found by the First Division not to be directed against the proper parties; and now he has brought this action for the purpose of having the Association of which he is a member ordered to pay him the £80, because the precedure was irregular, and was therefore to be entirely thrown aside. Now it is pleaded, and the Lord Ordinary has sustained the plea, that however true his allegations may be, the contingency on which alone the £80 was to be paid has not yet emerged, because a majority of the lodges have not voted in favour of the claim, and that therefore this action, which requires us to give a decree against the Association, is premature. I do not know that if it were made out clearly that the procedure was entirely contrary to the rules of the Association whether they should have another chance or not, or whether we could proceed at once as if the procedure had been regular, with a different result; that is a matter of difficulty upon which I do not wish to express an opinion, because it has been pleaded to us, in terms of the second plea, "that the Association and its laws being directed to support strikes of workmen and in restraint of trade, the said laws cannot sustain action in a civil Court." And that plea is taken by the Association themselves, who plead at your Lordships' bar that they, being an illegal institution, their agreement with the pursuer was *pactum illicitum*; and certainly the plea is maintained in the strongest possible aspect when it is asserted by the Association whose legality or illegality is in question. But still we must look at it, because if we have no power to entertain this action, of course we need not consider any of its other aspects. The plea as stated, I think, is not well founded in law, because it is not the law of this country as it now stands, that because the laws of the Association were "directed to support strikes of workmen and in restraint of trade, the said laws cannot sustain action in a civil Court." That *was* the law; and the history of the law on that matter is of very considerable interest and importance, and it has attracted a great deal of attention of late years. It was so decided unquestionably in the case of *Hilton* in 1855, in which it was held that an association of masters for the purpose of agreeing that they should be regulated by the votes of the majority as to the terms upon which they should employ and keep their workmen was an illegal association, and not capable of suing an action in a civil Court. Justice Crompton went very fully into the law on that matter, and his is the leading opinion. Justice-Erle—Chief-Justice afterwards, and the author of a most important and useful memorandum on the whole of this matter of combination—took a different view. He did not deny that an association in restraint of trade might be objectionable, but he thought that this particular Association was not in restraint of trade, but in support of trade. Lord Campbell's observations are certainly important. He says:—"I am obliged, therefore, to bring this bond within the category of written instruments which are not avoided by positive statute, and are not so far illegal at common law as that the framing of them is a criminal offence, but which cannot be enforced by action, being considered void as against public policy. I enter upon such considerations with much reluctance and with great apprehension, when I think how different generations of Judges and different Judges of the same generation have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases; and I cannot help thinking that where there is no illegality in bonds or other instruments at common law it would have been better that our Courts of Justice had been required to give effect to them, unless where they are avoided by Act of Parliament. By following a different course the boundary between judge-made law and statute-made law is very difficult to be discovered." And he ends with this:—"I should have been much better pleased if a clear rule had been expressly laid down to me by the Legislature; but being required to form and act upon my own opinion, I am bound to say that I think this bond is contrary to public policy, and that we ought to give judgment for the defendant." Two other cases of importance occurred—one in 1867 and the other in 1869—in which the same matter was raised under very striking circumstances: because the treasurer or collector of one of these associations had defaulted, and the question arose whether there was any power of calling him to account, because, there not being a public prosecutor in England, the private party had to prosecute, and the question arose in both these cases whether the associations were not void, their objects being in restraint of trade. The case of *Hornby* v. *Close* was very analogous to the present, because the rules of the association were, so far as I can judge, almost identical with those in the present case. It was found in *Hornby* and *Close* that the principle of *Hilton's* case must apply. In the case of *Farrer* and *Close* the Court were equally divided, and therefore the appeal was dismissed, the result being the same. But in the meantime a Commission had been sitting for some time to enquire into the whole of this matter, and the result was that the statute of 1871 was passed, which has placed the whole question upon a totally different footing. That which Lord Campbell desired has now, at all events to a certain extent, been done and the Legislature has told us distinctly what, so far as this statute is concerned, is the course that we are bound to follow. The statute 34 and 35 Vict., c. 31, is an Act to amend the law relating to trade unions; and I may first deal with the definition of a trade union. "The term trade union means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." Now the first question is, whether, in order to bring this under the Act at all, this is a trade union in the sense of that definition. I have looked through the rules, and I am perfectly satisfied that if this question had arisen before the statute, the Association must necessarily have been brought under the principle of *Hilton* and within the case of *Hornby and Close*, with

which it seems to be identical. There are specific rules contained here for strikes, and it is clear that the payments which the members of the Association are bound to make are equally applicable to the benefit purposes of the Association or to the proper trade union or strike views of it; and I find this very significant clause, which seems to me conclusive of the whole of that matter, "that a half-yearly revised list be printed showing the names of those who have worked in opposition, on strikes or otherwise, also the names of those who have defrauded the society, with the amount of frauds and fines imposed, and each collector to receive a copy gratuitously." The meaning of that is perfectly plain—that the names of those who have not been obedient to the Association are to be circulated *gratis*. Manifestly if that is done in restraint of trade there can be no question as to what the object or part of the object of the Association is. Therefore I have no doubt that this is a trade union in the sense of the statute. And now let us see how the Legislature deals with trade unions. The second clause provides "that the purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise." And the third clause is—"The purpose of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust,"—which is just as near the negative of the plea that I am now considering as words can make it.—The plea is that the purposes of this association being in restraint of trade, are therefore void or voidable—or rather the agreements made in respect of them are void or voidable. It was put from the bar as *pactum illicitum*. Now it is perfectly clear from the terms of it that the intention and object of the Act was to declare the very reverse of that proposition, and that the purposes of a trade union shall not be unlawful so as to render void or voidable any agreement or trust by reason merely that they are in restraint of trade. But the fourth section goes on to deal with the question—Granting that the agreements or trusts are neither void nor voidable, are they to be enforced in a civil court? And it provides that "nothing in this Act shall enable any Court to entertain any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements;" and one of those enumerated is, "Any agreement for the application of the funds of a trade union to provide benefits to members." Now, I cannot resist the result at which this statute manifestly arrives; and when we see the history of the previous proceedings in the report of the Commission, it is quite clear that it was the intention of the Legislature to arrive at this, that the taint of illegality in respect of the restraint of trade was to be entirely and absolutely removed, but that the question of enforcement in Courts of Law was to be matter of positive statutory enactment; and that one of the things which the trade unions were not to be allowed to enforce in a Court of Law was an agreement to provide benefits to the members contained in the rules of association falling under the definition of the statute. It may be thought, and it is plain that Lord Campbell thought —and it is plain that Chief-Justice Erle thought so too—that there is something not very logical in saying the association is lawful, and the objects of the association, though in restraint of trade, are lawful, but you shall not be allowed to enforce these agreements in a Court of Law. But it is done, and done deliberately—and for this obvious reason, that it was not thought desirable that the purposes of an association of this kind should be specifically enforced by Courts of Law. No doubt it would be a singular thing if Courts of Equity in England were applied to to enforce the provisions of trade unions as to working or not working, or as to the amount of wages or hours of labour which the members might agree upon themselves; and one can quite well see that associations might be perfectly lawful themselves, though having objects which a Court of Law will not enforce. If, for instance, in Dean Swift's time there had been an association to wear nothing that was not of Irish manufacture, that would have been a perfectly legal association, but a Court of Law would not have thought of compelling a man to conduct himself according to its rules, however much he had bound himself to do so. Or, suppose there had been last century an association not to wear hair powder, that was just an illustration of the same thing; or an agreement in these days not to partake of spirituous liquors, or not to enter a public-house. Many persons do bind themselves to very distinct rules to that effect; but these are matters which are purely voluntary, and are nothing but promises; and the real ground why a Court of Law will not interfere is that nobody has a legitimate or legal interest to compel performance of them. The mere interest arising from possible, social, or commercial results is not such an interest as a Court of Law will take notice of to enforce a restraint on the will of the party which has been voluntary on his part. But whether that be a sound or an unsound view of it, here we have the provisions of the statute, and I think we must follow them. The words seem to me quite explicit—that any agreement for the application of the funds of a trade union to provide benefits to members is not to be enforceable in a Court of Law. That this is an action for the purpose of enforcing such an agreement does not admit of doubt. The other parts of the statute bring out very clearly that the Legislature means to do away with the illegality in respect of the restraint of trade, because it provides for the registration of these associations as friendly societies to a certain extent and effect, and thereby gives them a legal incorporation, and the power of legal action for certain purposes. No doubt these benefit purposes, which are meritorious and laudable beyond all question, might have been separated in the legislation from those that went to regulate trade; and such a proposition was made, but I suppose the reason why it was found to be impossible was simply this, that the funds of the Association are so mixed up together for the general purposes of the Association that it was impossible to distinguish as between the one purpose and the other. But these are all speculations, into which, perhaps, I need not have gone. I do not wish to express the slightest opinion as to whether an agreement in restraint of trade is by the common law legal or illegal. That it was so before the statute I do not doubt; but whether this comes under that principle it is not necessary that we should inquire, because we have a statutory rule laid down, and I have not been able to see any answer to the plea in that sense.

The plea is not one of *pactum illicitum*, but it is that this is by statute an action which we are not entitled to entertain.

LORD BENHOLME—I confess that this case has given me a great deal of trouble and uneasiness. It was my wish, if possible, to see a reason for this Court being debarred from sustaining the action, that was satisfactory to my own mind upon its logical foundation. But I think I am bound to obey a statute the policy of which I cannot see. The statute presents some things which on ordinary principles of legislation seem to be inconsistent. It states that these unions from the date of the statute are to held not to be illegal in respect of their imposing a restraint on trade. It defines what is a trade union, and seems to admit that that is an essential part of a combination, for it states that that essential element does not henceforth render them illegal. But it prescribes to us, as a Court of Law, the duty of refraining from entertaining actions in support of a variety of matters, amongst which are the enforcement of benefit to members. It is clear that we are debarred from entertaining this action, although the object of it seems to me in terms of the statute not to be illegal, but on ordinary principles to be benevolent and highly to be commended, and if possible enforced. But whilst I cannot reconcile to my own mind the contradiction that seems to me to been involved, I cannot shut my eyes to the positive enactment which debars us from entertaining such an action. Therefore I think we must sustain the objection to the competency of this action, and throw it out as being beyond our power to entertain.

LORD NEAVES—I concur in the opinions which have been delivered. I think this Act of Parliament requires great consideration, particularly if it is desired to reconcile it to abstract principles; but it speaks so plain a language that we have nothing to do but obey it. I agree that, anterior to this Act, this association would have been an unlawful one, in the sense that it would not have been recognised. The current of decision on that point is plain. It was said that in one sense of the word a strike was not necessarily unlawful. That is to say, if persons were to agree that they would not work except on certain terms, and confined it to so long as they were of that opinion, that would not be an illegal conspiracy to enforce their common opinion. But the law held that an arrangement by parties to affect the labour market in that way, and to enforce it after they had changed their minds and wished to labour, was illegal and improper. But a great hardship arose upon that, and it became a gross scandal, particularly in England, that where a secretary or treasurer of a society of that description embezzled its funds he could not be prosecuted for what was very nearly theft, at all events breach of trust. There were also other legitimate considerations, leading to the appointment of the Commission out of which this legislation rose. The object of the present Act is to take away from these unions the stigma of criminality or illegality in a certain sense; but though it does make them cease to be unlawful, it is provided that nothing contained in it shall entitle certain things to be done that could not be done before. These things are enumerated in the 4th section; and if we could enforce any one of these things, I don't see what should hinder us from enforcing them all; because the direction of the Act against recognising claims for benefits is not more explicit than that about an agreement between the members that they shall not sell their goods, transact business, employ or be employed, except on certain terms, or an agreement about the application of the funds to certain purposes. The things enumerated in that section are forbidden to be enforced, and one of these is providing benefits to members. I think it is plain that while the Legislature did not wish to stigmatise these as illegal or unlawful things, they did not mean to encourage them; but at all events it is plain that under that section we are debarred from enforcing the claim made in this action.

THE LORD JUSTICE-CLERK—Then your Lordships find that, in terms of the Act of Parliament. the claim of the pursuer cannot be enforced in this Court.

MR BALFOUR—I ask additional expenses.

THE LORD JUSTICE-CLERK—I do not think that the plea is one which, although sustained, should be followed with expenses.

Counsel for Pursuer—Brand and M'Kechnie. Agent—T. Lawson, W.S.

Counsel for Defenders—Watson and Balfour. Agents—Rhind & Lindsay, S.S.C.

Saturday, January 31.

SECOND DIVISION.

[Lord Shand, Ordinary.

STIVEN *v.* WATSON.

Damages—Breach of Gratuitous Obligation—Bankruptcy—Preference—Statute, 1696, *c.* 5.

Where A agreed to receive and hold certain goods for behoof of B, to be forwarded by C, and failed to intimate the delivery order of the goods, in consequence of which C got delivery within sixty days of his becoming bankrupt: In an action for damages at the instance of B against A,—*Held* (1) that the transaction did not constitute an illegal preference contrary to the Act 1696, c. 5. (2) That A was liable in damages for breach of obligation.

This was an action at the instance of Edward Baxter Stiven, merchant, Dundee, against Alexander Don Watson, flax-spinner, Fife, for £100 in name of damages, with interest from 19th October 1872. The facts out of which the suit arose were as follows:—On 16th August 1872 the pursuer purchased from Messrs Annan & Co., Fife, 2,000 spindles yarn, to be delivered as he might require, and granted a bill to them for £200 as the price, payable two months after date, which bill was duly returned by the pursuer to the holder to whom it had been indorsed. Annan & Co. delivered part of the yarn, but after 3d September 1872 made no deliveries. On 2d October 1872 Annan & Co. undertook to forward five tons of tow represented by them as their property, and lying in Dundee, to Dairsie Station, and to grant delivery order therefor in favour of the defender or his firm of Alexander Watson & Son, in order that the firm should hold the tow for behoof of the pursuer until delivery by Annan & Co. to the pursuer of the remain-