

upon the matter. Not only does it there appear that interest on the advances did enter into the calculation upon which the Company adjusted the annuity transaction, but it is expressly set forth that the annuity payable for twenty-five years is a proportionate repayment of the loan, with interest, at £4, 10s. This perfectly corresponds to the provision in the lease for payment of interest at the rate exacted by the Company.

"The only other point with which the Lord Ordinary thinks he can at present deal, is the demand of the pursuer to have the reports and certificates of the Inspector of the Inclosure Commissioners held to be final and conclusive in all questions between the pursuer and defender. The clause in the lease distinctly contemplates a transaction with a Land Improvement Company, from which advances for making the improvements are to be obtained. These advances can only be got upon the reports and certificates of the inspector. Such a transaction, when completed, involves obligations to the Company which are made a burden upon the land. It must be supposed that both parties were aware of these incidents of the proposed transaction, and that the defender had them in view when he became bound to pay interest on the advances which were to be so obtained. The Lord Ordinary is not prepared to hold that, in these circumstances, the reports and certificates of the inspector are not of very material weight, and may not create strong presumptions in favour of the pursuer; but he does not think that the precise effect to which they are entitled can be settled *a priori*. On the other hand, he has no hesitation in now finding that they are not final and conclusive to the effect of altogether shutting out the defender from a proof that any part of the alleged works or expenditure have not been made, or that the works are not such as to entitle the pursuer to claim interest in respect of them under the lease. He gives no opinion at present as to how far negative proof, such as the want of vouchers, may avail the defender as to any of these matters.

"The parties will be prepared to suggest at the next calling in what form the investigation shall be made."

The pursuer reclaimed.

SOLICITOR-GENERAL and JOHN MARSHALL, for him, offered proof of usage with reference to contracts like the present, to the effect that an obligation to pay the interest exacted by an improvement company is held to mean the annual payment exacted by such company though made up as above described.

LORD ADVOCATE and BLACK in answer.

The Court adhered to the Lord Ordinary's judgment on both points. They held that the draft minute, being a mere draft, was not of the class of documents which could be validated *rei interventu*; and that, at all events, there had been no *rei interventus* here in point of fact. That left the question to be determined upon the terms of the lease, and upon the lease it was impossible to say that there was any further obligation than to pay interest in the ordinary sense of that term. A proof of usage on such a matter could not be allowed, as that would be in effect an admission of proof to control the meaning of language which was unambiguous and well understood. Parties were appointed to be further heard upon the last finding of the Lord Ordinary's interlocutor.

Agent for the Pursuer—G. C. Sinclair, W.S.

Agent for the Defender—D. Forsyth, S.S.C.

Thursday, December 10.

SMEATON v. POLICE COMMISSIONERS OF ST ANDREWS.

*Corporation—Minutes of Board—Agreement—Memorandum—Resolution—Locus Pœnitentiæ—Rei interventus.* Circumstances in which held that heads of agreement which had been assented to by a body of Police Commissioners, by a resolution adopting them with the view to the amicable settlement of a litigation in which they were involved, was not a concluded agreement excluding *locus pœnitentiæ* so long as the settlement was not carried out, no sufficient *rei interventus* having been proved to have taken place.

The defenders in the present action are the Commissioners of Police for the Burgh of St Andrews, acting under the General Police Improvement Act. In the course of draining the city of St Andrews they thought it necessary to propose to carry one of their main drains through the pursuer's lands of Abbeypark. In 1865 he sought to interdict them from entering upon his said lands; and on 17th May 1865 the First Division, affirming this interlocutor, held that they had no jurisdiction to interfere with the defenders' drainage plans. The pursuer then appealed against the defenders' resolution to pass through his lands to the Sheriff of Fife. On 7th October 1865 the Sheriff-Substitute (TAYLOR) confirmed the defenders' resolution, and dismissed the pursuer's appeal. The pursuer then claimed £3325 of compensation for the sewer passing through his grounds; the defenders tendered £400. On 12th February 1866 the defenders met in the forenoon to take measures for carrying out the resolution, which the Sheriff had confirmed. The meeting was adjourned to seven o'clock in the evening. At this adjourned meeting a memorandum of proposed heads of agreement, which had been signed by Mr Smeaton's agent as containing terms of settlement to which he was "agreeable," was read by the clerk of the defenders; and it was moved and seconded that the said heads of agreement should be adopted as the "basis of an amicable settlement," and the motion was carried by a majority of 14 to 13, over a counter-motion to adhere to resolution which the Sheriff had compromised. The heads of agreement provided in substance, on the one hand, that the defenders should abandon the line of main drain of which the Sheriff had approved, and execute another line of drain about forty yards further from Mr Smeaton's house, and along the banks of the Kinness burn; and, on the other hand, that Mr Smeaton should give up his claim of damages, and pay about £200 to meet the extra expense of constructing the deviation sewer. The defenders afterwards doubted their powers to enter into this agreement, and at their next meeting, on 3d February, they resolved to depart from it. Thereupon Mr Smeaton raised the present action to compel them to execute a deed of agreement in writing, and to prevent them executing any drainage operations whatever on his lands other than those conceded in the heads of agreement. Lord Jerviswoode formerly held that the Sheriff's judgment as to the line of drain was final and conclusive; but on 20th March 1867 his interlocutor was reversed, and a diligence granted to recover documents. The result of the diligence is a print of documents filling 169 pages. Lord Jerviswoode, on considera-

tion of the documents, held that the heads of agreement, and the resolution of the defenders to adopt them as the basis of settlement, constituted a concluded and binding agreement as against the defenders, and that it was not *ultra vires* on their part to enter into it. The defenders asked leave to reclaim. They reclaimed.

COOK and J. C. SMITH for them.

DEAN OF FACULTY and BALFOUR in answer.

At advising—

LORD COWAN did not think it necessary to decide the very general question whether a resolution of Police Commissioners adopting a certain agreement, and authorising a formal agreement to be executed, was or was not irrevocable. It might fairly be held that, under their statute, the defenders had the power of reconsidering their resolutions in such a matter till a formal agreement was actually executed. But here the memorandum of agreement submitted to and approved of by the meeting in question was not a document which adoption could make into a concluded agreement. It contained merely certain proposals as a "basis for settlement," and as such only was it approved of. That being the case, there was *locus penitentiae* till the settlement was carried out, unless there was *rei interventus*, and no sufficient *rei interventus* appeared to have taken place. The defenders, no doubt, had done certain things on the footing that the agreement was to receive effect; but these were unimportant, and did not affect the pursuer; and the only thing which the pursuer had done was to withdraw his notice for jury trial, which there was nothing to prevent his renewing.

LORD NEAVES said this case was of great importance to the parties, but, if possible, of still greater importance to the public, in so far as it involved the question how the final acts of a public deliberative body are to be ascertained and authenticated. It is to be remembered, as matter of general principle, that a public body like the defenders do not in their deliberations deal with their own interests (except in a very slight way, perhaps, as ratemakers), but they deal with the interests of others of whom they are representatives, and of whose interests they are trustees; and it is necessary, for the interests of the public who are absent, that their representatives should do nothing without due notice, and should not be bound by resolutions that are not deliberately arrived at after the fullest opportunity for consideration and objection by all concerned. Public bodies, town councils, and the like, are notoriously prone to what are called "jobs," which may be, though nowadays they seldom are, transactions for their individual interest, or for the interest of some friend whom they are inclined to oblige. In such bodies, private interest and prudence are wanting. A corporation has been said to have no conscience: it cannot blush, and is not likely to be deterred from a course of conduct by feelings of shame. It consists of an aggregate of wills, and in some respects resembles those vermicular bodies which, according to physiologists, are a series of individuals linked together with a separate individuality and a separate will in every ring, and in which there is a voting among the rings as to whether they shall go forward by the head or backward by the tail, the majority of rings, of course, determining the direction of progress. A corporation that meets to deliberate is in the same legal position as a man who retires into his study to deliberate with himself. The public know better what the cor-

poration is deliberating about, for speeches are made and votes taken, and it is the fashion now for the reporters of the press to be present. But these votes and resolutions do not bind them any more than the resolution of the individual man in his private room, nor does the recording of a vote in their minutes bind them any more than a private memorandum by an individual entered in his notebook. A minute of a public body is not a contract, it is only a record of a fact. Some public bodies—the Edinburgh Town Council for one—were in the habit of reviewing their resolutions by a process of motion for disapproving of the minutes. Custom might be in favour of such a practice; but it is contrary to sound principle, seeing that the minutes ought to be a simple record of the business that has been done, and that, except as a record of fact, they have no validity. Applying these general doctrines to the present case, he had no hesitation in agreeing with Lord Cowan, and he was confirmed in his opinion by the specialities of the present case. The document founded on by the pursuer came before the defenders at an adjourned after-dinner meeting as a mere proposal. It is a long document, requiring a good deal of consideration to understand it. The defenders, in their after-dinner meeting, called without notice, approved of the pursuer's proposal as the "basis of an agreement" by the narrowest possible majority, and at their next meeting (having deliberated and taken advice in the meantime) they resolved to depart from their previous resolution, which was, or ought to have been, a private resolution. He held that they were entitled to depart from that resolution; that it did not form an inchoate contract which *rei interventus* could validate; and, further, that there was no *rei interventus* on the part of the defenders. The pursuer withdrew his notice of jury trial at Mr Grace's request; but that request was made without any authority from the defenders that he could discover. Mr Grace was the clerk of the defenders, but he had no power to alter their position; and, even if he had, the withdrawing of a notice of jury trial, which might be renewed at any time, could never be held to amount to *rei interventus*. The result of the judgment would instruct parties contracting with public bodies to trust to nothing short of written agreements deliberately and finally resolved upon after due notice to all concerned.

LORD MURE concurred both as to the general principles which had been announced and as to the clear evidence of a completeness contained in the "heads of agreement" themselves. He was further of opinion, on the authority of the case of *Ogilvy*, January 5, 1700, and other old decisions, that even when private parties have arranged to reduce the terms of their bargain to writing there is *locus penitentiae* until the written contract is executed, and that this principle applies *a fortiori* to public bodies. He further thought that nothing done by Mr Grace without the defenders' instructions was binding on them, and that, consequently, the whole superstructure of *rei interventus*, which in argument had been rested upon his acts, must fall.

The LORD JUSTICE-CLERK was absent in the Judiciary Court and LORD BENHOLME in the Registration Court when the case was heard. Their Lordships gave no opinion.

Agents for the Pursuer—Maclachlan, Ivory, & Rodger, W.S.

Agents for the Defenders—Maitland & Lyon, W.S.