

*Held* that a formal resolution to commence business was not necessary to enable the directors to commence business, and make calls to carry it on, they having *de facto* commenced business.

This was an appeal from the Sheriff-court of Lanarkshire, at Glasgow.

The Belfast and Ulster Brewing Company, Limited, incorporated under the Companies Act, 1862, sued William Trimble, yarn-agent, Glasgow, for certain sums, amounting to £180, being the amount of calls due by the defender, as the holder of twenty shares in the pursuers' company.

The defender admitted that he had applied for twenty shares, and subscribed the memorandum and articles of association, but he alleged that he was induced to do so by the fraudulent representations of the secretary to the company, and that the whole scheme was falsely and fraudulently concocted to provide salaries for the secretary and manager. He also maintained certain more technical objections to the validity of the claims made against him, which sufficiently appear from the opinion of the Lord President.

The Sheriff-Substitute (ERSKINE MURRAY), on 3d February 1870, pronounced an interlocutor, in which he found that the defender, having signed the memorandum and articles of association, became, on the registration of the company, as incorporated, a shareholder therein, and therefore liable in payment of all calls properly made on him, and remains such until he shall succeed in obtaining the deletion of his name from the register of shareholders, or the reduction of the documents signed by him, as granted by him on fraud and misrepresentation; but that it falls on the pursuers to prove, as under article 15 of the articles of association, that the name of the defender is still on the register of members of the company as a holder of the number of shares in relation to which these proceedings are taken, and that notices of the respective calls were given in pursuance of the articles of association.

Article 15 provides—"In any proceeding by the company against a shareholder in respect of a call, it shall be sufficient for the company to prove that the name of the person proceeded against is on the register of members of the company, as a holder of the number of shares in relation to which the proceeding is taken, and that notice of such call was given in pursuance of these articles; and proof of the said matters shall be conclusive evidence of the debt, and it shall not be necessary to prove the appointment of the directors who made the call, or that a quorum of directors was present at the meeting of the board at which the call was made, or that the board was duly convened or constituted, or any other matter whatsoever."

After various procedure, the Sheriff-Substitute, on 1st July 1871, found that the pursuers had proved all that was necessary to fix liability on the defender, and decreed against the defender, in terms of the conclusions of the summons. To this interlocutor the Sheriff (GLASSFORD BELL) adhered on 17th February 1872.

The defender appealed.

SCOTT and LANCASTER for him.

SOLICITOR-GENERAL and ASHER, for the pursuers, were not called upon.

At advising—

LORD PRESIDENT—The defender is like many other defenders, sued for payment of calls, anxious to avail himself of every possible objection to the

proceedings of the directors. But I cannot say that he has been successful.

The third plea is the one chiefly insisted on—“(3) The capital of £60,000 not having been subscribed for, and no lawful resolution of the directors to begin business on less having been made and recorded, the directors were not entitled to begin business and make calls to carry it on.” The plea is founded on article 81 of the articles of association, which provides—“The directors may commence the business of the Company as soon as they see fit, notwithstanding the whole of the capital may not be subscribed for or taken.” The fact of the whole of the capital not having been subscribed is therefore not in itself an objection to the directors commencing business. But it is maintained that they are not entitled to commence business unless they have come to a formal resolution to do so. The ground of this contention is that article 93 provides that the directors shall cause minutes to be made of the proceedings of all their meetings. I cannot say that a formal resolution to commence business is required. Article 81 leaves it entirely in the hands of the directors to commence business.

The other objections are directed to the evidence on which the Sheriff proceeded in holding the pursuers' case to be made out, as to the defender being still on the register of shareholders, and as to the calls having been duly made. The register has been kept in accordance with the Act of Parliament: it contains all the necessary particulars. The objection founded on article 133 is certainly the thinnest I ever heard. That article directs that notices are to be sent to shareholders by prepaid letters. It is assumed that the notices of calls were sent and received. But we are asked to suppose that the call notices were not prepaid!

The other Judges concurred.

The Court refused the appeal.

Agents for Pursuers—J. & R. D. Ross, W.S.  
Agent for Defender—John Walls, S.S.C.

Wednesday, July 10.

ROBERTSON, FERGUSON, & CO. v. HUGH  
MARTIN & SONS.

*Process—Competency of Appeal—Sheriff-court Act, 1853 (16 and 17 Vict. c. 80), § 22.*

In a Sheriff-court action the pursuer concluded for £25 of damages for breach of contract, with interest from the date of citation. The Sheriff gave decree for £25. *Held* that an appeal to the Court of Session was competent.

*Sale—Verbal Contract.*

Circumstances in which it was *held* that a completed verbal contract of sale was proved, and that the neglect of the purchaser to answer a subsequent letter by the seller embodying the terms of the contract, and containing a request to acknowledge receipt of the letter, did not cancel the contract.

This was an appeal from the Sheriff-court of Lanarkshire at Airdrie. The pursuers are iron merchants in Glasgow, and the defenders, iron manufacturers at Coatbridge.

The summons concluded for payment of £25, “being loss and damage sustained and incurred by

the pursuers, or which they may yet sustain and incur, by and in consequence of defenders' refusal and failure to implement contract entered into verbally between the pursuers and defenders at Glasgow, on the forenoon of the seventh day of July Eighteen hundred and seventy-one, and also set forth in and confirmed by writing, as per letter subsequently addressed by defenders to pursuers, of the following date and tenor, and here-with produced, viz:—*Coatbridge, 7th July 1871.*—Messrs Robertson, Ferguson, & Company,—Dear Sirs—We have this day sold you fifty tons com. bars at £7, 15s. per ton, F. O. B., Glasgow, less five per cent. discount—usual extras and terms. Please acknowledge receipt of this, and oblige, yours truly, HUGH MARTIN & SONS, per HENRY HIND; by which contract the defenders sold to the pursuers fifty tons common bars, or common bar iron, at the price of seven pounds fifteen shillings sterling per ton, F. O. B. at Glasgow, less five per cent. discount for cash—usual extras and terms; with interest on said sum of twenty-five pounds sterling, at the rate of five per cent. per annum from date of citation to this action till payment, with expenses."

The minute of defence was as follows:—"The defenders' procurator stated that the defence was a denial of the libel, with the explanation that there was no concluded sale between the parties; that the defenders by their letter dated 7th July 1871, narrated in the summons, proposed to conclude a sale, and requested the pursuers to agree thereto by confirming the letter, but the pursuers refused, at least failed, to conclude the proposed transaction, and led the defenders to believe that no transaction had been entered into, or was intended to be so by the pursuers; that the defenders heard nothing of the matter till the 19th August, six weeks after the date of the said letter, by which time the iron had advanced in price ten shillings per ton, on which latter date the pursuers sent to the defenders a specification of certain iron wanted by the pursuers. The 19th August occurred on a Saturday, on which day the defenders' works were closed. On the following Monday the pursuers sent a clerk to the defenders on the subject of the specification. He was informed by the defender that there was no contract between the parties, and that the defenders declined to furnish the iron."

The Sheriff-Substitute (LOGIE) allowed a proof before answer.

"Hugh Martin, junior, defender, sworn, examined for pursuers. I met Mr Robertson in Glasgow on 7th July last. I had a conversation with him about the sale and purchase of iron. Mr Robertson asked our price for iron, and I told him £7, 15s. The usual discount is always understood, but I do not recollect that being mentioned. He just wanted it at £7, 10s. and £7, 12s. 6d., but I said no, that £7, 15s. was our price. He then asked me to enter him for 100 tons at that price. I said I would not give him 100 tons, but I would give him 50. He said very well I'll just take it. We then separated. On going home I instructed my clerk to write the letter, No. 4/1 of process, quoted in the summons."

Mr Robertson, one of the pursuers, gave evidence to the same effect.

The Sheriff-Substitute pronounced the following interlocutor:—

"*Airdrie, 24th November 1871.* . . . Finds that at a meeting in Glasgow, on 7th July last, be-

tween John Robertson, one of the pursuers, and Hugh Martin, junior, one of the defenders, after some communings, the defenders agreed to sell, and the pursuers to purchase, 50 tons common bar iron at £7, 15s. per ton: Finds that Mr Martin, on his return to Coatbridge that day, instructed a clerk to write the letter or sale note of that date, quoted in the summons, and concluding as follows; 'Please acknowledge receipt of this': Finds that in a sale of this kind the seller requires to be furnished by the purchaser with a specification or specifications of the different sizes of iron wanted, so that the sellers are unable to complete the contract, or to manufacture the iron wanted, until the specification has been furnished to them; Finds that the pursuers did not acknowledge receipt of the sale note as requested, and did not forward any specification of the kind of iron wanted, until six weeks thereafter, by which time iron had risen in price 10s. per ton: Finds, in law, that in contracts of this kind time is of the very essence of the bargain, and that the pursuers, by their failure to answer defenders' letter, and to forward specifications of the kind of iron wanted, enabled the defenders to cancel the contract in question if they saw fit: Finds that the defenders having cancelled the bargain, were justified in doing so, and in refusing to manufacture the iron referred to in the specification of 19th August. Therefore sustains the defences, assolizies the defenders from the conclusions of the action: Finds the pursuers liable in expenses." &c.

The pursuers appealed.

The Sheriff (GLASSFORD BELL) pronounced the following interlocutor:—

"*Glasgow, 13th February 1872.* . . . Sustains the appeal, and recalls the interlocutor appealed against: Finds it distinctly proved and admitted, both by the pursuers and defenders, that on 7th July 1871 a contract of sale was verbally concluded between them in Glasgow of 50 tons common bar iron, at the price of £7, 15s. per ton,—the defenders being the sellers, and the pursuers the buyers: Finds it proved that the pursuers, of the same date, entered the transaction in their scrip ledger book, in terms of the excerpt No. 6: Finds that, also of said date, the defenders wrote to the pursuers the letter, No. 4/1, in which they say, 'We have this day sold you 50 tons com. bars, at £7, 15s. per ton, F. O. B. Glasgow, less five per cent. discount, usual extras and terms. Please acknowledge receipt of this, and oblige,' &c.: Finds that the pursuers received said letter, but did not consider it necessary to acknowledge receipt of it, the contract having been already concluded, independent of any writing: Finds it mutually admitted that when such contracts are made for the purchase of bar iron, a specification or specifications fall to be afterwards sent by the purchaser to the seller, of the sizes in which the former wishes the iron made and delivered, and the latter is bound to make and deliver it accordingly: Finds that after the sale in question no further communication took place between the parties till 19th August 1871, when the pursuers sent to the defenders the letter, No. 5/1, with a specification annexed of the sizes to which they wished a portion of the 50 tons made: Finds that after receipt of said letter the defenders intimated to the pursuers, first verbally, and then by the letter of which No. 5/3 is a copy, that they would not deliver the iron, and this on the ground expressed in the said letter, as follows —'We have no contract with you. When we

wrote you on the 7th July, we asked you to confirm the proposed purchase; but you did not do this, you did not communicate with us till 19th current, six weeks after our letter, by which time iron had advanced 10s. per ton; Finds that the same ground is taken up by the defenders in their minute of defence, viz., that 'there was no concluded sale between the parties: that the defenders, by their letter dated 7th July 1871, proposed to conclude a sale, but the pursuers refused, at least failed, to conclude the proposed transaction, and led the defenders to believe that no transaction had been entered into, or was intended to be so by the pursuers;' and the defenders go on to explain that they heard nothing farther of the transaction till the 19th August, by which time the aforesaid advance in price had taken place: Finds that the defence is thus based, not on the delay in sending a specification, but on the assertion that there was no concluded contract in respect of the pursuers' failure to confirm the defenders' letter, No. 4/1; Finds that the minute of defence states erroneously that the pursuers were asked to 'confirm' said letter, they being merely asked, as the letter itself instructs, to acknowledge receipt thereof: Finds that the contract having been completed verbally, was valid and binding without any writing being added, and it was a work of supererogation on the part of the pursuers to send the said letter, and it would have been equally so for the defenders to answer it, the more especially as they had shown their *bona fides* by already entering the transaction in their books, which would have afforded written evidence against themselves had they attempted subsequently to repudiate it: Finds that the question is not raised in the process, whether there was such undue delay on the part of the pursuers in sending a specification as to entitle the defenders to cancel the contract; and it is not proved that there was any such undue delay: Finds that no intimation having been made of any intention to cancel, and no sufficient reason having been established for cancelling, the contract was a subsisting contract at the time it was repudiated by the defenders: Finds that the loss sustained by said pursuers through the non-fulfilment of the contract was the difference between the price at which they had purchased and the higher price, viz., 10s. per ton, at the date of the repudiation, which upon 50 tons amounts to the sum sued for, of £25 sterling, in which sum finds the defenders liable: Finds them also liable in expenses."

The defenders appealed to the Court of Session.

RHIND, for them, was proceeding to open the case, when the Lord President suggested a doubt as to the competency of the appeal, the 22d sect. of the Sheriff-courts Act, 1853, declaring that it shall not be competent to bring under review of the Court of Session any cause not exceeding the value of £25 sterling.

RHIND argued that the conclusion for interest from the date of citation made the appeal competent. A decree in absence, which is the proper test of the value of the cause, would necessarily have carried more than £25—*Mitchell v. Murray*, March 10, 1855, 17 D. 682; *Tennent*, March 3, 1864, 2 Macph. H. of L. 22; *Wilson*, March 6, 1858, 20 D. 764.

At advising—

LORD PRESIDENT—There is a good deal of nicety and subtlety about questions of this kind. It is a great pity that we should not have some plain rule of practice to enable us to say at once whether an

appeal is competent or not. But I fear that is unattainable from the state of the authorities. We must deal with this case, which is certainly different from any which have occurred, on the principles to be gathered from these authorities. One peculiarity of the case, on which the whole question turns, is that the principal sum concluded for is a sum of damages for breach of contract. If nothing more appeared, the cause would not be appealable, the value not exceeding £25. But then the pursuer concludes for interest. If that had been interest accruing from a certain date prior to citation, which could be liquidated and ascertained, the case would be the same as *Mitchell* and *Tennent*. But the interest concluded for is interest from the date of citation. I do not think it would be consistent with good practice if the Sheriff were to find a certain sum of damages due as at the date of citation, with interest to run from that date. There is no precedent for such a course. In every case where interest has been given on a sum of damages it has been interest accruing after the damages have been liquidated by verdict or decree. If the Sheriff had done what he was asked I should have thought it a bad judgment. It being a bad judgment would have been a very good reason for sustaining the defender's appeal, but it would not reduce the sum below £25. On that ground I am inclined to consider this appeal as competent.

LORD DEAS.—My opinion is that the appeal is competent. If you look at the conclusions of the summons, it is an action for more than £25. No doubt it is an action of damages, but even supposing it incompetent to give interest on damages from the date of citation, as to which I do not mean to give an opinion, I do not think that would make the appeal incompetent.

LORD PRESIDENT—To prevent misapprehension I may mention that I did not say that it would be incompetent for the Sheriff to give interest on damages. I think it would be a bad judgment, and against the rules of good practice. I do not say that it would be beyond the jurisdiction of the Sheriff.

LORD ARDMILLAN concurred.

LORD KINLOCH—I think the appeal competent. In regard to interest on damages, I do not think there is any absolute or inflexible rule, though undoubtedly, the general rule in practice is to make interest run from the date of decree or verdict. This being so, I think that it is competent for the pursuer to conclude for interest on damages from whatever date. Whether the Sheriff would be right in giving such interest is another question. It is quite settled that, in order to determine the value of a cause, we are entitled to look at the interest as well as the principal sum concluded for. It may be that the summons does not show on its face the amount of interest, and that therefore recourse must be had to the decree. But there is no such difficulty in the present case. However small the amount of interest which might be found due, it would bring the value of the cause above £25.

The case was then heard on the merits.

RHIND for the appellants.

SHAND and GEBBIE for the respondents.

At advising—

LORD PRESIDENT—This action is laid on a ver-

bal contract, confirmed, as the purchaser says, by a letter written on the same day by the seller to the purchaser. The defence is that there was no concluded sale. The defender says that he, by the letter libelled, proposed to conclude a sale, which the pursuer refused or at least failed to do. Then, when the purchaser asked for performance, he was informed by the defender that there was no contract between the parties. Looking to the evidence of Robertson, one of the pursuers, on the one hand, and of Martin, one of the defenders, on the other hand, it appears impossible to doubt that a verbal contract was entered into on 7th July. The defender's account is, not only in substantial, but in almost every detail, the same as the pursuer's—(*reads evidence of Hugh Martin junior, given above*). If the case had stood upon this evidence alone, I think it would have been conclusive, but the seller writes a letter—(*reads letter of 7th July*). This letter was not answered by the purchaser. He did not comply with the request contained in the letter, and the reason he gives is that he considered the bargain already concluded, and did not think it of the least consequence whether he answered the letter. I confess I agree with him. It might have been as well to have written "All right," but his failure to do so cannot annul the bargain. Certainly it is not the right of the seller, after concluding a verbal bargain, in which there was no stipulation that it should be reduced to writing, afterwards to insist on converting it into a written contract. So that this letter was either a matter of mere surplusage, or an attempt to do what the seller had no right to do. It might be used as a piece of evidence as to the precise terms of the verbal contract, if there was any dispute about them; but there is none.

There remains the question Whether the Sheriff-Substitute's interlocutor is well founded?—He "finds in law that in contracts of this kind time is of the very essence of the bargain, and that the pursuers, by their failure to answer defenders' letter, and to forward specifications of the kind of iron wanted, enabled the defenders to cancel the contract in question if they saw fit; finds that the defenders having cancelled the bargain, were justified in doing so, and in refusing to manufacture the iron referred to in the specification of 19th August." The first objection to this finding is that it sustains a defence not pleaded. The defender says there was no contract to cancel. That objection alone would be sufficient. But further, assuming that there was a contract, I find no ground for holding that the defender did cancel the contract, or that he was justified in doing so. He certainly did not cancel the contract, because he believed there was no contract. But further, on what ground would he have been justified in cancelling it? Because the purchaser did not answer this unnecessary letter, and because he delayed to send a specification? Now, it must be remembered that both parties had an equal right and interest to push on the contract. If the purchasers were delaying to send a specification, it was the duty of the seller to remind them of the contract, and to insist on them sending a specification.

I agree with the Sheriff in the main ground of his judgment, that there was a concluded contract between the parties, and nothing to derogate from that concluded contract.

LORD DEAS—I do not differ from your Lordship, but I regard it as a very narrow question.

LORD ARDMILLAN—I admit that it is a narrow question, but I agree with the Sheriff. It certainly would have been better if the pursuers had answered the defenders' letter, but they might naturally think that in mercantile dealings not to answer a letter is taken to mean acquiescence in its contents.

LORD KINLOCH concurred.

The Court refused the appeal.

Agent for Pursuers—R. P. Stevenson, S.S.C.

Agents for Defenders—Adamson & Gulland, W.S.

Wednesday, July 10.

PITCAIRN v. SMITH.

*Bastard—Proof of Paternity.*

Admission by the defender of intercourse with the pursuer 237 days before the birth of the child, coupled with medical evidence that the child was small, held sufficient to prove the paternity.

In an action of filiation and aliment, the defender admitted intercourse with the pursuer on one occasion, 237 days before the birth of the child, but averred that the pursuer had intercourse with other men corresponding to the time of conception of the child. This averment he failed to prove. On the other hand, there was no proof of previous intercourse by the defender during that year. The medical man who attended the pursuer at the birth of the child was called as a witness for the defender, and deposed that there was nothing to indicate that it was a premature child, although it was a very small child.

The Sheriff-Substitute (LAWRIE) assolizied the defender.

The Sheriff (GLASSFORD BELL), on appeal, found the paternity proved, to which the Court adhered.

Counsel for Pursuer—Guthrie Smith and Lang. Agents—Muir & Fleming, S.S.C.

Counsel for Defender—Millar, Q.C., and M'Kechnie. Agent—James Campbell Irons, S.S.C.

Thursday, July 11.

WILLIAM STEEL AND OTHERS v. COMMISSIONERS OF THE BURGH OF GOUROCK.

*Process — Interdict — Nuisance — Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101).*

Three proprietors within a burgh presented a petition to the Sheriff to interdict the Local Authority of the burgh, acting under the Public Health Act, 1867, from carrying out a system of drainage for the burgh, on which they had determined. The petitioners averred, incidentally, that the intended operations would be injurious to their persons and properties, but their allegations consisted chiefly of statements that the intended system of drainage was a bad one for the interests of the burgh generally. Petition dismissed, as containing no relevant averments to justify the interference of the Sheriff, and as being an attempt to control the resolutions of the Local Authority, contrary to the provisions of the Act.