

it may be said, would be justified by the policy of the enactment, but certainly not by its letter; and therefore, as I think, the suggestion cannot be entertained. Proprietors are at liberty to follow their own course unless there be a limitation of their powers, and they are not bound so to order their arrangements as to bring their proceedings within the operation of the statute. On the contrary, they may, if they can, take down and rebuild at such times as they think most convenient for themselves, and neither the suspicion nor even an admission that they so act in order to keep themselves outside the statute will, if its terms are inapplicable, subject them to its operations.

Entertaining these views, though as to this last I cannot say that I have a confident opinion, I am obliged to differ from the opinion of Lord Young, and from that which I understand to be the opinion of the Court.

**LORD RUTHERFURD CLARK**—I agree with Lord Young.

**LORD JUSTICE-CLERK**—I agree with Lord Young. The only difficulty which has arisen in my mind is the question whether the provisions of the statute apply to corner houses, and no doubt there is something that can be said on both sides of that question. I cannot say I have any doubt about it. I am of opinion that the Magistrates have acted with strictly reasonable care, and I do not think that the interest of this pursuer in the ground in question is more than can be met by the compensation directed to be paid by the statute.

The Court adhered.

Counsel for Pursuer—Solicitor-General (Asher, Q.C.)—Pearson—Dickson. Agents—Smith & Mason, S.S.C.

Counsel for Defenders—R. V. Campbell—M'Kechnie. Agents—Archibald & Cunningham, W.S.

Thursday, December 13.

## SECOND DIVISION.

[Lord Lee, Ordinary.]

**SCOTT & NEILL v. SMITH & COMPANY.**

*Sale—Retention—Factor's Lien—Set-off.*

Barley sold by a merchant on account of and as agent for D, a disclosed foreign principal, was objected to by the purchasers as not equal to sample, and pending a reference as to its quality, the purchasers, under an arrangement with the seller that they should sell the barley for behoof of whom it might concern, sold part of it. It was found in the reference that they were entitled to reject the barley, and the price they had paid was repaid them by the seller. They claimed to retain the price of the barley sold by them under the arrangement to meet a claim of damage against D, the foreign shipper, maintaining that the sale they had made under the arrangement was on his account. *Held* that the seller having, as D's

factor, advanced the amount of the price by his repayment of it to the purchasers, had a lien over the barley therefor; that the sale of part of it was under his (the seller's) authority, and that the claim of retention by the purchasers could not receive effect against him.

This was an action for £46, 3s. 5d. at the instance of Scott & Neill, corn merchants in Leith, against J. B. Smith & Company, also corn merchants there. The facts of the case were summarised by the Lord Ordinary in his note as follows:—"The pursuers, as agents and for account of F. M. Duhne, of Hamburg, sold to the defenders 800 quarters of new Saale barley, guaranteed sweet and free from smell on arrival in Leith, at 37s. 6d. per quarter, payment by London bankers' acceptance at three months from date of bills of lading against shipping documents. It appears that in compliance with Duhne's instructions the buyers' and bankers' names were communicated to him on 18th January, and that on 22d and 23d January the barley was shipped partly per steamer 'Prague,' and partly by steamer 'Cumberland,' Mr Duhne drawing upon the defenders for the amount of the invoice, which was forwarded to the pursuers for them.

"On the arrival of the barley at Leith it was objected to as not conform to guarantee, and upon a reference to arbiters the defenders were found entitled to reject it. This was on 2d February. On 3d February the defenders returned the bills of lading to the pursuers, and the pursuers gave to them their cheque for £1432, 17s. 8d., 'in repayment of the amount of Mr Duhne's invoice.'

"Before the arrival of the barley the defenders had resold it to Messrs Younger & Company at 39s. 6d. per quarter, payable at three months, and on arrival it had been likewise rejected by them as not conform to sample.

"Pending the arbitration between the pursuers and defenders it was arranged that the defenders should, for the benefit of whom it might concern, endeavour to get offers from brewers for the barley, and on 2d February they received from the pursuers the letter No. 14 [*infra*], agreeing that any steps taken by them in disposing of the barley, 'with our consent,' should not prejudice their position in any way.

"Having got an offer for a sample from Messrs John Aitchison & Company, the defenders, under this letter, delivered to them 9 quarters on Saturday morning [3d February], before handing over the bill of lading; and on Monday, 5th, a further quantity of 16 quarters was got by them for Aitchison & Company under a delivery-order granted by the pursuers to the defenders.

"For the price of the quantity so disposed of the defenders on 7th February rendered to the pursuers the account sales [*infra*], amounting to £46, 3s. 5d., and at the same time, or the day before, they rendered to Mr Duhne through the pursuers, the account, bringing out as loss sustained through non-fulfilment of the contract £45, 13s. 2d., and for arbiters' fees paid £3, 3s.—in all, £48, 16s. 2d.

"The latter document was returned by the pursuers in an envelope bearing the words, 'Don't waste any more good paper.' The former was returned with the letter quoted in the defenders' statement [*infra*], in which the pursuers maintain

that the 25 quarters had been sold for their account, and not for account of Mr Duhne, and they demand payment of the £46, 3s. 5d.

"The present action is raised to enforce this claim, and it is met by the pleas—(1) That the pursuers having acted solely as Duhne's agents, have no title to sue for the price of the barley sold to Aitchison & Company; and (2) that the defenders having sold the barley for Duhne, have a lien over the price for their counter claim of damages."

The letter above referred to as No. 14 was as follows:—"Leith, 2d February 1883. — Messrs J. B. Smith & Co., Leith. Dear Sirs,—We beg to intimate to you that any steps you may take in disposing of the barley p. 'Prague' and 'Cumberland,' with our consent, will not prejudice your position in any way.—Yours truly, SCOTT & NEILL."

The account sales referred to were headed:—"Account sales of 25 quarters of Saale barley, sold for account of F. M. Th. Duhne, Esq., Hamburg, through Messrs Scott & Neill, Leith."

The pursuers' letter referred to by the Lord Ordinary as quoted in the defenders' statement was as follows:—"12th February 1883.—From Scott & Neill, Leith. To Messrs J. B. Smith & Co., Leith. We return your a/c. sales of 25 qrs. barley. You have not sold any barley for account of Mr Duhne, of Hamburg; you sold the barley for our account, and we will thank you for a cheque for amount of the enclosed invoice, otherwise we shall send Messrs Aitchison invoice ourselves."

The Lord Ordinary (L<sup>rd</sup>) repelled the defences, and decerned against the defenders in terms of the conclusions of the summons.

"Note.—[After the narrative above quoted]—Apart from the transaction by which they made the sale to Aitchison & Company of this 25 quarters of barley, I apprehend that the right of the defenders was to reject the barley, and to refuse payment or claim repayment of the price, and to constitute their claim of damages against Duhne as the disclosed principal in the contract of sale. Had their claim to reject the barley and to be relieved of the price been at once admitted by the pursuers, as Duhne's agents, their claim of damages could not in my opinion have been pleaded against the pursuers' lien upon the goods in security of their advances on behalf of the principal, for the right of the pursuers, as factors for Duhne, if they had admitted the rejection and advanced money on his account, was to hold the goods in security of their advances, and they could have made their lien effectual, not only against the goods themselves, but against the price of any portion which might have been sold—Bell's Comm. ii. (5th ed.), 116; Addison on Contracts (5th ed.), p. 59; Tudor's L.C. 676. If the 25 quarters had been accepted by the defenders under an agreement with the pursuers, as Duhne's agents, that this should not prejudice their claim to reject the goods generally, I see no reason to doubt that the pursuers would have had a good title to require payment of the price, and upon the authorities neither Duhne, nor anyone in his right, could have deprived them of this right without settling the balance upon their account.

"Now, as the case stands, the only difference is that the defenders have made the sale to Aitchi-

son & Company upon the authority of a letter from the pursuers, which guarantees them against being prejudiced in their position by the steps they took with their consent. I do not think that letter can have the effect of putting the defenders in a better position than they would have occupied had their rejection of the goods been accepted. In so far as their acting upon it made them liable for the freight of the cargo per 'Prague,' I think they are entitled to be relieved. But I cannot see that it should entitle them to plead their claim of damages against Duhne as a set-off against the price of the goods upon which the pursuers, as Duhne's agents, have a preferable claim; still less do I see that it enables them to dispute the title of Duhne's agents to require payment of the price of the goods upon which, as against Duhne, they had a right of lien.

"My view is that this 25 quarters of barley was sold upon the authority and responsibility of the pursuers; that Duhne could not have prevented their recovering the price, and holding it, by virtue of their right of lien in lieu of the barley; and that the defenders, by the transaction embodied in the letter No. 14 of process, acquired no right to constitute themselves agents for Duhne to the effect of setting off their claim of damages against the price which they received.

"On the whole, although I was much impressed by the ingenuity of the argument in support of the defenders' pleas, I think that the pursuers, upon relieving the defenders of the claim of freight which they have incurred by presenting the bills of lading, are entitled to decree. I shall therefore give a finding to this effect, leaving the defenders to constitute their claim of damages against Duhne, and to make it effectual according to law."

The defenders reclaimed, and argued—The barley and bills of lading were delivered to them for the purpose of selling on account of Duhne and as his agents. They had therefore a lien over the price for which they sold it for any claim they might have against him. The pursuers never had any right of property in the cargo, but acted merely as agents of Duhne in passing the goods to them, and had no title to sue them, and the defender therefore came in their place as Duhne's agents—Bell's Comm. ii. (7th ed.), 109 and 111.

The pursuers replied—The defenders received authority from them to sell the goods, and were bound to account to them for the price. The defenders acted as their agents, and not Duhne's—Addison on Contracts (8th ed.), p. 62.

At advising—

LORD JUSTICE-CLERK—After having heard all that has been said in this case I am quite satisfied that the Lord Ordinary is right in his judgment—that is to say, that when the pursuers took up these shipping documents, and paid up the amount of the invoice to the defenders, they became masters of the goods till they were made safe, and their advances were received from their principal. The defenders pleaded that they have a lien over the price of the goods sold by them in respect of their claim against Duhne. But any claim of damages they may have against Duhne in respect of the original cargo not being conform to contract is not a claim which can be set-off against the claim of the pur-

suers under their agreement with them. I therefore think the defenders have no title to retain the price against the pursuers' claim, and that the Lord Ordinary's judgment should be affirmed.

LORDS YOUNG, CRAIGHILL, and RUTHERFURD  
CLARK concurred.

The Court adhered.

Counsel for Pursuers (Respondents)—J. P. B. Robertson—Young. Agent—Thomas Dowie, S.S.C.

Counsel for Defenders (Reclaimers)—Trayner—Armour. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Friday, December 14.

## FIRST DIVISION.

[Lord Adam, Ordinary.]

AYR ROAD TRUSTEES v. W. & T. ADAMS AND  
OTHERS.

*Executory Contract—Contract for Bridge—Work to be done to Satisfaction of Engineer—Acceptance—Defect subsequently Discovered—Settlement of Accounts Final.*

Road trustees entered into a contract for the erection of a bridge, by which it was provided that the contractors should execute the work to the satisfaction of the engineer employed by the trustees. The works were to be carried on under the immediate superintendence of a resident inspector to be appointed by the engineer, and the contract price was to be paid in instalments by the engineer's certificate. The inspector was in fact selected and employed by the trustees, and was present at the execution of the work. The contractors did not personally superintend the work, but were represented by an agent appointed by themselves. The contractors were taken bound to maintain the bridge for one year from the completion of the contract, and on the expiry of this period the final payment was made to them on the certificate of the engineer. The accounts upon which the settlement proceeded were made up by the engineer from information supplied to him by the inspector. In April 1881, after the year of maintenance had expired, defects were discovered in the bridge, and in July 1882 the trustees raised an action against the contractors on the ground that the foundations of the bridge had not been excavated to the contract depth, that concrete had been used as a foundation for some of the piers instead of ashlar, and that the concrete was of inferior quality. The conclusions of the action were (1) for repayment of money paid for materials not supplied and work not done; (2) for the expense of remedial and protection works rendered necessary by defects in the defenders' work; and (3) for damages for breach of contract. *Held* that as the pursuers had made the resident inspector their servant, and as he, in the full knowledge of what had occurred, had furnished the

engineer with the information for making up the accounts which the engineer had certified as correct, and on which the final settlement had proceeded, and looking to the fact that there had been no fraud on the part of the contractors, or representations by them conducing to the settlement of accounts between the parties, the pursuers were not entitled after the lapse of three years to open up these accounts.

### *Process—Proof—Evidence.*

*Held* that where there are two or more defenders in an action, evidence brought out by any one defender in cross-examination is available to or may be used against any other defender.

Circumstances in which *held* that the manner in which a case had been conducted showed that the understanding of parties had been that the evidence-in-chief led for one defender was to be used by or against the other.

The Ayr Bridge Act 1877 provided for the removal of the bridge across the river Ayr, at Ayr, known as the New Bridge of Ayr, and the erection of a new one. Under this Act the Road Trustees for the district of Ayr were entrusted with the duty of having the necessary works executed.

Messrs Blyth & Cunningham, civil engineers, Edinburgh, on the employment and instruction of the Road Trustees, prepared the Parliamentary plans required for the obtaining of this Act, and after the Act was passed they were employed by the trustees to prepare the drawings, specifications, and schedules of measurement required for the removal of the former bridge and the erection of the new bridge, and to superintend the removal and erection. Messrs Blyth & Cunningham accordingly prepared the drawings, specifications, and schedules of measurement, and issued the same. The Road Trustees accepted the tender for the work of Messrs W. & T. Adams, contractors, Callander, and thereafter a contract was entered into between the Road Trustees and Messrs Adams, dated 5th, 10th, and 20th October 1877. By this contract Messrs Adams bound and obliged themselves to execute and complete the whole work, and to provide and supply all the materials required in the work, and that in a good and sufficient workmanlike manner, conform to drawings, specifications, and schedules of measurements prepared by Messrs Blyth & Cunningham, and signed as relative to the contract, and that to the entire satisfaction of George Cunningham, whom failing Edward Blyth, or of any other engineer to be appointed by the Road Trustees. The works were to be finished by 1st March 1879, the price to be £13,015, 19s. 6d., "under deduction of 10 per cent. upon each instalment, which shall be retained until the whole works are certified by the engineer as complete, and shall then be paid, without interest, within a month from the date of said certificate, under deduction of such sum as the engineer shall fix as a reasonable sum to be retained in security for the maintenance of the works during the period before mentioned, on the expiry of which, when the terms of the contract as to maintenance have been complied with, the balance shall be paid without interest."

The specification incorporated with the contract contained the following clauses:—"Ex-