

to state any opinion now which might prevent me hereafter having a different view. On the one hand, it may be said that the calls are part of the purchase for which they are responsible, and the responsibility must be made good at the instance of the company; while, on the other hand, it may be said that any shareholder who is in a position to aver, as the pursuer does, and is in a position to prove, as he says he is, that he was induced to become a member of the company at all, is entitled, irrespective of the company, to reparation in damages for the loss so sustained. I think a great deal can be said in support of the latter view. Even if a going company had raised such an action and failed, that would not hinder any individual shareholder from averring and proving, if he could, that but for the falsehood and fraud which he undertakes to prove he would never have been connected with the company. But the question of loss by the pursuer is only a question of greater or less loss upon the calls which were paid when he joined the company, and as the case is clear upon the question of the debenture debts, I would suggest, without indicating a conclusive opinion on the other matters, that we should recal the Lord Ordinary's interlocutor and remit the case back to him for probation. Then everything will be open. The respondents may not succeed in proving his averments of falsehood and fraud. If he does, the question will then be, whether the loss was attributable to the fraud practised on him and the others whom as assignee he represents?

LORD CRAIGHILL—I am entirely of the same opinion, and would add only this, that the present case is one in which the company is now, and has long been, in course of liquidation. Further, there is no controversy as to Mitchell having been induced to become a shareholder through the complainer's representations, or any other individual member of the company. In many cases it is conceivable that in such circumstances an individual member might desire to separate himself from the company and take an independent position, and say, that "Whatever may be thought, still there has been fraud exercised by which I have suffered, and I am entitled to damages." But I do not go into that. I entirely agree with the views your Lordship has expressed, and in the interlocutor which your Lordship proposes.

LORD RUTHERFURD CLARK—I also concur in the course which your Lordship proposes, and I agree that we should reserve our opinion entirely on the question whether the pursuer can recover damages which may possibly be recovered by the company. There is no question with respect to the debenture debts, because the damage the party suffered by these is his damage and not the company's. With respect to the other damage, I confess I have very considerable doubt whether there is a case against the defender at all. On that, however, I do not want to say anything more than to reserve my opinion, because it is quite plain that on one part of the case there must be a proof, and that on the other proof also may be required.

The LORD JUSTICE-CLERK was absent.

The Court recalled the Lord Ordinary's inter-

locutor, and remitted the case to him with instructions to allow the parties a proof of their respective averments, reserving all questions of expenses.

Counsel for Complainer—Mackintosh—Jameson. Agents—J. & J. Ross, W.S.

Counsel for Respondents—J. A. Reid. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, January 7.

SECOND DIVISION.

[Lord Lee, Ordinary.]

HEIMAN v. HARDIE & COMPANY.

Sale—Agreements and Contracts—Gaming Transaction—Wagering on Rise and Fall of Market.

A in Berlin and B in Leith had a series of transactions in the form of contracts of purchase and sale of wheat, in which each occupied the position sometimes of buyer and sometimes of seller. Each transaction was constituted by letter from the party in the position of buyer to the party in the position of seller, intimating that the former had bought from the latter so much wheat, to be delivered on every occasion in Berlin within a specified period. No delivery was ever made, and the practice of both parties throughout was to balance accounts by compensating orders. After a continuance of transactions on this footing for some months, B repudiated two transactions in which A had intimated purchase from him, and refused to give a compensating order or to make delivery. With the exception of these two transactions the quantity of wheat sold and bought by each party was exactly the same. A sued B for the amount of loss caused him by A's repudiation of these alleged sales, debiting him with the difference between the contract price in the two sales and the average price obtained for wheat on the last day for delivery. *Held* that it was to be inferred from the whole dealings of the parties with each other that these transactions were, in the intention of the parties, not in reality contracts of purchase and sale, but were merely colourable contracts of the nature of gaming transactions or wagers on the market price of wheat, and therefore could not be enforced.

During the year 1882 Julius Heiman, merchant in Berlin, carrying on business under the style or firm of A. Heiman, and Robert Hardie & Company, merchants, Leith, had a course of transactions with each other under the form of contracts for the purchase and sale of wheat. In these transactions sometimes one of the parties and sometimes the other occupied the position respectively of buyer and seller. In the first of these transactions, made on 28th February of that year, Heiman took the place of seller, and Hardie & Company of buyers. It was constituted by the following writing:—"Dear Sir,—We beg to confirm herewith that we have bought from you to-day through Mr V. Böttcher, according to all

terms, conditions, and usances in the wheat contracts of the Berlin Sworn Brokers, Six thousand centners of good, sound, yellow wheat, namely, 4000 ctrs. at the price of Two hundred and ten marks and a-half for 1000 kilos, and 2000 ctrs. at the price of Two hundred and eleven marks for 1000 kilos, at seller's option, for delivery during September-October 1882, free at Berlin. On this transaction we pay to you a commission of two per cent. for purchase and sale, besides the usual brokerage of 150 marks. Any difference arising out of this transaction is to be settled by the Landgericht of Berlin.—ROB. HARDIE & Co."

The first transaction in which Hardie & Company took the place of sellers and Heiman of buyer was made on 5th August by the following writing:—"Dear Sirs,—In consequence of your order received to-day by Mr V. Böttcher, I beg to confirm herewith that I have bought of you, according to all terms, conditions, and usances in the wheat contracts of the Berlin Sworn Brokers, Four thousand centners of good, sound, yellow wheat, at the price of Two hundred and three marks for 1000 kilos, free at Berlin, for delivery during September-October 1882, at seller's option, in compensation of the same quantity of wheat sold to you the 28th February 1882. Any dispute arising out of this transaction is to be settled by the Landgericht of Berlin. Please take notice hereof, and send me confirmation by return of post.—A. HEIMAN."

From 28th February to 7th October the parties had in all twenty-three of these transactions with each other, constituted by writings similar in form to the above, and made through the agency of Böttcher, who was a commission agent in Berlin, as middleman. In fourteen of these Heiman was the seller, and sold to Hardie & Co. 84,000 centners of wheat in all. In the remaining nine Hardie & Co. were the sellers, and sold to Heiman 116,000 centners in all. No delivery of wheat was ever made by either party, each having it in his power, according to the understanding between them, to give compensating orders. The parties never came into personal contact with each other, all communications being carried on by correspondence either directly or through Böttcher.

On 18th October 1883 Heiman raised this action against Hardie & Company for payment of £2213, 7s. 6d., as the balance due to him by the defenders on these transactions, including commission. He averred that the transactions were for the purchase and sale of wheat to be delivered and received in Berlin, and that the sellers were bound in each case to make effectual delivery of the wheat sold within the stipulated period on receiving the price agreed on between the parties. He further averred—" (Cond. 4) On 28th August and 7th October 1882 the defenders sold to the pursuer 32,000 centners of good sound yellow wheat, 20,000 centners at the price of 188 marks, and 12,000 at the price of 174½ marks per 1000 kilos, free at Berlin, for delivery during April-May 1883, at sellers' option. These contracts were made according to all the terms, conditions, and usances in the wheat contracts of the Berlin Sworn Brokers above referred to, sec. 12 of which provides (sub-sec. b) that in the event of non-fulfilment of contract the party in breach shall at once pay over in cash to the party claiming fulfilment the difference between the price contracted for and the average price obtained for

wheat on the last day on which delivery could competently be made under the contract. The defenders failed to implement the said contracts, and they accordingly became subject to the penalty stipulated in said section 12. On the 31st of May, the last day upon which delivery of said 32,000 centners could competently be made by the defenders under their contract with the pursuer, the average price of wheat was 199.25 marks per 20 centners, which on the amounts sold by the defenders amounts to 318,800 marks. The defenders are, however, entitled to credit in their contra-account, in terms of said section 12, for the price at which they sold the said wheat, and this is allowed for in the deductions specified in Cond. 5. To the two sums of 771,350 marks [the price of the 84,000 centners sold by him to defenders] and 318,800 marks there falls to be added the pursuer's commission as agreed on between the parties, viz., 10,901.50 M. These three sums together amount to M. 1,101,051.50." He also stated (Cond. 5) that the total price of the wheat sold by the defenders to him was M. 1,056,784, on deduction of which from the above sum of M. 1,101,051.50 there remained a balance in his favour of M. 44,267.50, or in English money, £2213, 7s. 6d., being the sum sued for.

The defenders averred that it was quite well understood, and was matter of agreement between the parties, that no delivery of wheat was to be made under any of the contracts, and that in point of fact the pursuer had no wheat to deliver. With regard to the two contracts descended on by the pursuer, of 28th August and 7th October, they stated that they had previously requested the pursuer to render his account sales for the prior transactions, and that on his refusing to do so they had timeously and duly informed him that they would not hold themselves bound on these two contracts, and that the pursuer did not purchase and take delivery of any wheat against these contracts, and consequently did not suffer any damage through the defenders' non-delivery.

Having obtained leave to amend his record, the pursuer afterwards added the following averment—" (Cond. 7) The said sum due to the pursuer is not a gaming debt according to the law of Prussia, and the pursuer is entitled by that law to sue for and recover the same from the defenders. There was no stipulation betwixt the pursuer and defenders that neither of the parties would demand delivery by the seller of the goods sold by him or the acceptance by the purchaser of the goods bought by him."

The pursuer pleaded—" (1) The defenders having wrongously failed to implement the said contracts with the pursuer, are liable to him in the damages thereby stipulated. (3) The sum sued for being justly due and resting-owing by the defenders to the pursuer, the pursuer is entitled to decree as concluded for, with expenses. (4) *Separatim*, the said contracts fall to be governed by the law of Prussia, and the same being valid and legal according to said law, the pursuer is entitled to decree in terms of the conclusions."

The defenders pleaded—" (1) The defenders not being indebted to the pursuer in the sum sued for, are entitled to be absolved from the conclusions of the summons, with expenses. (2) The pursuer not having sustained any loss or

damage through the non-delivery of the wheat which was the subject of the transactions between the parties, the defenders should be assozied from the conclusions of the summons, with expenses. (3) The said contracts or transactions are null and void, in respect that they are merely wagers on the market, and thus gaming contracts. (4) The question raised falling to be decided by the law of Scotland, the averments as to the law of Prussia are irrelevant, and ought not to be inquired into. (5) *Separatim*, the averments as to the law of Prussia are irrelevant."

The account lodged in process by the pursuer, after calculating the various quantities in the fourteen sales by him separately, and the price of each amounting in total to 84,000 ctrs. at M. 771,350, as stated in his condescendence, contained the following addendum—"As you have not delivered the 32,000 ctrs. wheat p. April / May 1883, sold to me the 28th August 1882 and 7th October 1882, § 12 comes in application according to the wheat contracts of the Berlin Sworn Brokers, and therefore as price for fulfilment the officially fixed average price of wheat p. May of this day, viz., 19,925 M. p. 20 ctrs., therefore 32,000 ctrs., M. 318,800."

The M. 318,800 thus debited to defenders in respect of those two sales, with 10,901.50 of commission and the price of the 84,000 centners, made up the sum of M. 1,101,051.50, as above detailed in the pursuer's condescendence.

The account then tabulated in like manner the sales made by the defenders to the pursuer, including the two in dispute of 28th August and 7th October, amounting in all to 116,000 ctrs., at the price of M. 1,070,400, which with M. 13,604 of commission and brokerage made a total of M. 1,056,796, leaving the balance sued for (less M. 12 of expenses) M. 44,267.50 or £2213, 7s. 6d.

The account lodged by the defenders, on the other hand, by leaving out these two sales by them to the pursuer of 28th August and 7th October, brought out a balance in their favour of £574.

The amount of commission and brokerage on the transactions was not in dispute between the parties. It was two per cent., of which one per cent. went to Heiman, three-eighths to Hardie & Co., and the remaining five-eighths to Böttcher.

The following translation of section 12 of the conditions of the wheat contracts of the Berlin Sworn Brokers was put in evidence—"The non-fulfilment of this contract from other reasons than those mentioned in section 11 does not entitle the party willing to fulfil the contract to withdraw, but entitles him only in his option, (a) To sell or otherwise to purchase the contracted quantity of wheat through a sworn broker, at latest on the next week-day after the last term day, which also can be done on the last term day, besides to claim the allowance of the difference between the contract price and the realised lower sale price, respectively [*sic*] the higher paid purchase price; or (b), To make on the non-fulfilling party a claim for his interests, arising from the difference between the contract price and the officially fixed average price at the day of tender respectively on the last week-day of the delivery 'term.'"

The Lord Ordinary having allowed a proof, it appeared that the pursuer was a grain merchant who dealt in grain, spirits, and rape-oil. He had

no warehouses of his own, but was in use to rent such for storing grain as he needed them. He stated that there was no agreement between himself and the defenders that there should be no delivery of wheat, nor, so far as he was aware, was there any between Böttcher and the defenders, at least he gave no authority to Böttcher to make any. "(Q) Under your contracts did you consider yourself obliged to take counter-sales in compensation?—(A) I have done it, but I was not obliged to do so. (Q) If Hardie had called upon you to make delivery of the wheat, did you consider yourself bound under your contracts to make delivery?—(A) Yes. (Q) Could you have given delivery if necessary?—(A) Yes; I had wheat on hand during 1882 which would have enabled me to give delivery? (Q) Up till 31st May 1883 did you expect that Hardie would send an order to purchase in compensation of the 32,000 centners which he was bound to deliver to you?—(A) Either he had to deliver, or he was bound to give an order to purchase in compensation." He did not at any time offer delivery to the defenders of any of the 84,000 centners stated in his account to have been sold by him to them. When the last day of delivery was drawing to a close he instructed Böttcher to make a demand for delivery of the 32,000 centners in dispute. On 31st May he made the demand under section 12, sub-section (b), of the rules of the Berlin Sworn Brokers appended to his account quoted above. "I did not make such a claim on other occasions, because the other transactions had been squared by compensating. The items under the heading 'You sold to me' amount to 116,000 centners. (Q) Did you ever ask delivery specifically of any?—(A) No; the delivery or compensation was understood. (Q) Then compensation and delivery are the same thing?—(A) No. (Q) What is the difference?—(A) In compensating the article is always understood to be delivered, only there are exceptions in cases where persons stand out for it. If Hardie had compensated the 32,000 centners mentioned for the April-May contract 1883, then I would have sold to him 116,000 centners in all, and the quantities would have been squared. The only difference then would be the difference on the rise or fall of the market. (Q) And that difference depends on time bargains?—(A) No. (Q) What, then, is meaning of delivery September-October, and so on?—(A) The meaning is from 1st September till the end of October. When a compensation takes place, the party against whom the market goes is charged with the difference. I knew nothing at all about Mr Hardie. I never inquired when buying grain from him whether he had grain or not. I supposed he would be in possession of it. (Q) Have you ever heard of a Leith merchant exporting wheat from Leith to Berlin?—(A) It was not necessary; he could export it from some other place to Berlin. (Q) Was that what you thought when you entered into those contracts?—(A) I cannot remember just now. (Q) Does it not come to this, that you did not care whether Hardie had wheat or not?—(A) No, it does not come to that. (Q) Did you want the wheat from Leith?—(A) It was all the same to me from which place the wheat came so long as I got it delivered in Berlin. (Q) Then you did expect it?—(A) Yes, to be sure. I can make preparations for the reception of 116,000 centners in a few days. (Q) What preparations had you made?—(A) . . . I had no need to make

preparations beforehand; I had money and warehouses at my disposal. I had made no preparations." He had had similar transactions with another person in Leith—a Mr Menzies—to whom he never gave delivery of grain or demanded it from him. These were compensation contracts also.

Robert Hardie, sole partner of the defenders' firm, stated in his evidence—"I never wanted delivery of the wheat in question. I never took or gave delivery. In the case of wheat sold to me, I re-sold at the term of closing or before that if the market suited me. I had my option to close at any time. In completing these contracts I never did anything but pay or receive the difference."

On 31st October 1882 Hardie & Co. wrote to Böttcher—"We have never received a/c sales of our Sept.-Oct. wheat, and now it is the end of the month we would be obliged by your having these sent us at once." And on 7th November they wrote direct to Heiman to the same effect, who replied on 10th November—"I shall transmit you a/c sales about your total engagements with me as soon as the transactions still open will be closed." Again on 12th November he wrote to Böttcher—"You will please to communicate to Messrs Robert Hardie & Co. and Mr Thomas Menzies that I am not induced to deviate from the management hitherto established with us regarding account sales. As soon as both contractors have settled their April-May contracts with me, there is no more any hindrance to give account sales." In consequence of this refusal the defenders in December thereafter intimated their repudiation of the contracts of 28th August and 7th September, to sell 32,000 centners to the pursuer for delivery in April and May 1883.

The evidence was taken on commission of Dr Heinrich Sobernheim, a solicitor in the Royal County Court there, as to the law of Prussia relative to the enforcement of gaming debts. The import of it is stated by the Lord Ordinary.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the debate and whole cause, Finds that in the transactions libelled, and according to the course of dealing established between the parties, it was no part of the arrangement that any wheat should be delivered or received, it being within the power of either party to avoid the delivery or receipt of the goods nominally sold by giving at any time during the currency of the transaction a compensating order: Finds that the said transactions were not contracts for the actual sale and delivery of wheat, but were merely bargains for differences according to the rise and fall of the wheat market in Berlin, and were of the nature of wagers upon the state of the market: Finds it not proved that according to the law of Prussia such bargains are enforceable by action: Therefore assolvies the defenders from the conclusions of the action, and decerns, &c.

"*Opinion.*—The pursuer is a merchant in Berlin, and the defenders are commission-merchants in Leith. In the year 1882 there were various transactions between the pursuer and defenders in the form of contracts for the purchase and sale of wheat to be delivered in Berlin. In fourteen of these transactions the pursuer occupied the position of seller, and the total quantity sold by him amounted to 84,000 centners. In nine the defenders appear as sellers, and the total

quantity sold by them is 116,000 centners; but this includes two sales on 28th August and 7th October, for delivery in April and May 1883, which the defenders maintain were lawfully repudiated on account of the pursuer's refusal to settle accounts upon the other transactions when closed on 7th October by the compensating sale, No. 9 of the account, in the record. Apart from these two sales by the defenders, it appears that the quantity purchased by the pursuer was precisely the same as that sold by him, viz., 84,000 centners, and the balance on the accounts would be considerably in favour of the defenders, whose account is printed. The sum sued for is a balance arising upon the alleged non-fulfilment by the defenders of these two contracts, and it is brought out by debiting the defenders with the difference between the contract price in these two sales and the average price obtained for wheat on the last day for delivery under the contract, viz., 31st May 1883. This is in terms of the 12th section of the conditions and usances of the Berlin Sworn Brokers, and the contracts all purport to be made according to these conditions and usances.

"In defence it is alleged that timeous notice was given of the defenders' refusal to go on with the two contracts upon which the balance claimed arises, and that no damage was suffered by the pursuer. It is also alleged that the whole contracts were gaming contracts, there having been no real sales of, or contracts to deliver wheat, but merely bargains for differences.

"Upon the first point, my opinion is that the defenders, on the assumption that the contracts were real contracts, and not merely contracts by way of wagering, have established no defence. I think that the pursuer's refusal to settle upon the contracts for October and November until the result of the transactions for April and May should be seen was not such as entitled the defenders to refuse to fulfil their contracts for these months. It may, however, justify the defenders in pleading, as they have done, that the contracts were gaming contracts.

"As to this plea, it is maintained by the pursuer that the nature of the contract must be ascertained by the Prussian law, as the law of the place where the contracts were to be performed; and I see no reason to doubt that if the contracts were real contracts for the sale and delivery of real wheat, they must be construed according to the law which obtains at Berlin. For they are all made with express reference to performance in Berlin, and stipulate that 'any dispute arising out of this transaction is to be settled by the Landgericht of Berlin' (see authorities in Tudor's Leading Cases, p. 263).

"But the defenders' allegation is that the contracts were not real, but merely colourable, and that neither party intended that the goods should be delivered, but merely to pay the differences. If this be the truth of the case, I think it would be vain to appeal to the law of Prussia on the question whether the transactions were of the nature of gaming or wagering. For the contracts being only colourable do not afford the necessary material for determining, according to any law, the true nature of the transactions.

"It is material, however, to observe, that according to the evidence (not always intelligibly translated) of Dr Sobernheim, the only difference

between the Prussian law and the law of this country is that while the law of Scotland (and apparently that of England also—Addison on contracts, 3rd edition, p. 209) makes it a jury question whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity, the Prussian law does not exclude action upon contracts for differences, unless the contracting parties at the time of closing the transaction have concurrently declared and agreed that the right to demand or make delivery should be excluded, and that their obligations shall be confined solely to the payment of differences. But the Prussian law, like the law of this country, does not allow actions for gambling debts; and answer 4 by the witness shows that a 'real difference business' cannot be the ground of a suit at law. The question whether a particular transaction or series of transactions is really difference business seems to me to be a question of fact; and I know of no authority for determining that question otherwise than according to the truth and substance of the arrangement between the parties. No doubt the written contracts must govern, and are not to be contradicted by parole evidence in any particular which is regulated by them, unless upon an allegation of fraud. As, however, these contract notes do not profess to regulate everything, and refer to the conditions and usances in the wheat contracts of the Berlin Sworn Brokers, I apprehend that it is competent to look to the course of dealings and correspondence for the purpose of ascertaining the arrangements of the parties as to matters which are left open to arrangement, and I think it is also competent to receive parole evidence upon the question whether the contracts of sale were merely colourable.

"Upon the question of fact thus raised I consider that the evidence shows very clearly that delivery of the wheat which was nominally bought and sold was not in the view of either party, and that the truth and substance of their dealings was that differences merely should be paid. I think that the evidence of Mr Heiman, and his conduct in refusing to settle the October and November contracts until the transactions for April and May should be closed, is itself sufficient proof of this. But the contract notes also afford material corroboration of the same view. They show that, according to the practice of both parties, each had it in his power at any time during the currency of a transaction to give a compensating order. Heiman's letter to Hardie affords an illustration of this. The first portion of it bears that 'in consequence of your order received through Mr V. Bötcher,' he (Mr Heiman) had bought of Hardie, according to all terms, conditions, and usances in the wheat contracts of the Berlin Sworn Brokers, 20,000 centners of wheat for delivery during April and May 1883, at seller's option, 'in compensation of the same quantity of wheat sold to you the 16th and 23rd August.' These sales were nominally for delivery at the same time; and in turning to the conditions observed by the Berlin Sworn Brokers, it appears that non-fulfilment of such contracts, according to their terms, and from other causes than inability to fulfil them, is a thing contemplated, and that in such a case it is within the right of the party willing to fulfil the contract to claim the difference between the contract price and the

officially-fixed average price on the last week-day of the delivery term. This is what the pursuer claims in the present case. He does not claim to be entitled to delivery of the wheat, or allege any real damage for non-delivery. The only right he alleges is a right to a difference. I think that his whole conduct shows that it was nothing but a difference business that he was doing with the defenders, and that the contract-notes, in so far as they relate to the delivery of wheat, were merely nominal. Had they been real contracts of sale, to be fulfilled according to their terms, it is plain that the pursuer never could have claimed to await the result of the April and May contracts before rendering account sales for the wheat to be delivered in October and November. His letters of 10th November and 12th December prove that he regarded the whole transactions as one course of dealings, and can only be described in my opinion as gaming for differences. Heiman's claim to await the result of the whole game is intelligible upon this view, but not if each contract is to be regarded as a *bona fide* contract of sale to be executed according to its terms.

"I am therefore of opinion that the present action cannot be maintained. It is distinguishable from the cases of *Foulds v. Thomson*, June 10, 1857, 19 D. 803, and *Thacker v. Hardy*, 4 Q.B. Div. 685. The question there was with a broker employed by one of the speculators, and claiming indemnity from him on the ground of employment. Here the question arises directly between the two speculators, one of whom is seeking to enforce the gaming contracts. The opinions of the judges in *Foulds'* case show that one ground of judgment was, that there was 'no evidence that the contracts were contracts for payment of differences only' (*per* Lord Wood). They also show that had that fact been proved, the contract would have been held to be a contract by way of wagering (*per* Lord Justice-Clerk). The case of *Newton v. Cribbes* [Feb. 9, 1884, 11 R. 554] turned on a different point, but the law, as stated in Addison on Contracts (3rd edition, p. 209), and which I think not different from the common law of Scotland, was not questioned in the opinions of the Judges. It is expressly assented to by Lord Young in the case of *Risk v. Auld and Guild*, 8 R. 734, and in my view the facts of this case bring it within the rule, and not within the qualifying passage referred to by the Lord Justice-Clerk.

"With regard to the claims for commission, if I am right in holding that the transactions between the pursuer and defenders were gaming transactions, I think it impossible to sustain, as between the principal parties, any claim for commission upon them."

The pursuer reclaimed, and argued—The contracts as made by him were *bona fide* contracts of sale and purchase, and that might be the case though the defenders regarded them as wager contracts. The Lord Ordinary was in error in thinking that the contracts showed it was in the power of either party at any time to give a compensatory order which the other was obliged to accept instead of delivery. He was entitled on the face of the contracts to insist on implementation of the contract by delivery if he preferred it. There was no evidence of any bargain between the parties other than sale, for they never came into personal contact, and the contracts must be taken

as they stood on the writings produced. The rights of the parties throughout were those of buyer and seller, and were not interfered with by the practice of the parties not enforcing them. They were inherent in the contracts, and could be enforced by either party at any time, even against the will of the other. The contract as written was not to be affected by the dealings or the habits of the parties. The fact that one or even both of them were speculators could not affect the rights of either as soon as he chose to fall back on its actual terms. Nothing short of a distinct agreement that no delivery was to be made could affect the right. If the documents founded on *ex facie* instructed a real contract, it was for the party alleging a mere colourable contract to prove an agreement to that effect, and not only had no such agreement been shown, but its absence had been clearly proved. *Foulds v. Thomson* and *Thacker v. Hardy*, cited by the Lord Ordinary, did not apply, for they were between broker and principal, not between two principals as here. Further, as a matter of public policy it was not for the Court to discourage buying and selling on the Stock Exchange, unless the transaction were unmistakably shown to be contrary to public policy. (2) These contracts were Prussian contracts, having Prussia as *locus solutionis*; therefore on that ground, and by the express stipulation of parties, they ought to be judged by the law of Prussia, which was shown not to be unfavourable to what might be regarded as a gaming contract in Scotland. It was for the *lex loci* to determine what the agreement of parties was, and then, in order to ascertain its legal effect, the *locus solutionis* must be regarded.

The defender replied—No doubt the writings between the parties here *ex facie* used the language applicable to *bona fide* contracts of sale and purchase, but their interpretation must be controlled by the actual dealing of the parties. On this point the evidence was all one way. It was clear that what the parties intended never was sale and purchase with delivery, but merely settling of differences. That being the result of the evidence, the law applicable to the case was clear, and was that applied by the Lord Ordinary contained in the cases cited by him, and stated in Addison on Contracts, 8th ed., p. 1157, and Benjamin on Sales, 3d ed., p. 529.

At advising—

LORD YOUNG—This is an action of damages at the instance of a Mr Heiman, a merchant in Berlin, against Hardie & Company, merchants in Leith, for breach of contract. Two contracts are alleged, entered into in August and October 1882 for the purchase and sale of 32,000 centners of wheat, and the ground of action is that Hardie broke the contracts by failing to deliver the wheat, and is therefore liable in the consequences stipulated in the contract itself, namely, the rise in wheat over the contract price at the time of delivery. The defence which we have to consider, and the only defence which the Lord Ordinary has dealt with, is, that these contracts were colourable contracts only, and that the real contract between the parties being wagering or gambling on the differences on the market price of the wheat, ought not to be enforced.

The law of the matter is, I think, not doubtful.

It is stated distinctly from the authorities in Mr Addison's book on Contracts, and also in Mr Benjamin's book on Sales, in the passages referred to by the learned counsel. *Prima facie*, no doubt, the contract is to be taken to be what it appears, that is, a contract of purchase and sale, but it may be shown to be other than it appears—that is to say, the apparent contract may be shown to be only colourable, the reality of the bargain between the parties being a wager on differences, and if that is shown, the law which forbids the Court to aid either party in enforcing a mere wagering bargain would apply.

The Lord Ordinary is of opinion, on the evidence, that the alleged contracts of sale were merely colourable, and were in reality wagers on differences in the price of wheat. And therefore taking the law to be clear, the question for us to determine is, whether there is evidence to justify the Lord Ordinary's conclusion in point of fact. If there is, then we would not be warranted in interfering with his judgment; if there is not, we should have to reverse it as contrary to the evidence or not reasonably supported by it. Now, there is a great deal certainly in the observation made more than once by Mr Salvesen, and distinctly repeated by Mr Robertson, that the parties to these contracts never met, and that there is no direct evidence of any bargain between them contrary to or in any respect at variance with the contract of purchase and sale contained in the letters between the parties. I think there is a great deal of force in that observation. But the parties had a great many transactions and some correspondence, and the Lord Ordinary's opinion is in point of fact founded on their conduct in the transactions which they had with each other, and not on their correspondence. The transactions between them were in their terms limited to buying and selling wheat, and each bought and sold the same quantity, irrespective of the contracts which are in dispute. The Lord Ordinary states the result of the evidence on this point almost in a sentence. He says—"In the year 1882 there were various transactions between the pursuer and defenders in the form of contracts for the purchase and sale of wheat to be delivered in Berlin. In fourteen of these transactions the pursuer occupied the position of seller, and the total quantity sold by him amounted to 84,000 centners. In nine the defenders appear as sellers, and the total quantity sold by them is 116,000 centners; but this includes two sales on 28th August and 7th October, for delivery in April and May 1883, which the defenders maintain were lawfully repudiated on account of the pursuer's refusal to settle accounts upon the other transactions when closed on 7th October by the compensating sale. Apart from these two sales by the defenders, it appears that the quantity purchased by the pursuer was precisely the same as that sold by him, viz., 84,000 centners, and the balance on the accounts would be considerably in favour of the defenders." He thus includes the two sales immediately in dispute, which the defender maintains were lawfully repudiated. Apart from these two sales by the defenders, it appears that the quantity purchased by the pursuer was precisely the same as that sold by him, namely, 84,000 centners. The balance on the account will be considerably in favour of the defenders. Now, I think it is a

pregnant fact that the quantity sold and the quantity bought by each party is exactly the same, laying aside these sales which are disputed, and the parties were charged respectively with the difference on the market price at the period of delivery. Heiman himself puts it thus. He is asked—"What is the difference [between compensation and delivery]?—(A) In compensating the article is always understood to be delivered, only there are exceptions in cases where persons stand out for it. If Hardie had compensated the 32,000 centners mentioned for the April-May contract 1883, then I would have sold to him 116,000 centners in all and the quantities would have been squared. The only difference then would be the difference on the rise or fall of the market. (Q) And that difference depends on time bargains?—(A) No. (Q) What then is the meaning of delivery September-October, and so on?—(A) The meaning is from 1st September till the end of October. When a compensation takes place, the party against whom the market goes is charged with the difference." Thus in all these transactions the party against whom the bargain went was charged with the difference, and the difference was against Heiman to the extent of £500 or £600 except in those two contracts which we are now considering. In these the market was against Hardie. I do not know anything about his reasons for repudiating these two contracts—the Lord Ordinary does not enter upon them. But the market went against him as to these, and what we are asked to do is to adjust the account for differences between these two dealers, and discern for the balance of—the market having gone against one or other of them—£2000 in the one case and something like £600 in the other.

Now, it is very difficult—without referring to the correspondence—to resist the conclusion that these parties were engaged with each other in bargains depending for gain or loss to either of them upon which of them the market should go against at the time—whichever the market happened to go against the most frequently or to the greatest extent having to bear the most loss. That is not perhaps the form of the contract, but that was the nature of the dealings between the parties, and the Lord Ordinary has been satisfied with that as showing that what they did was what they meant—that there should be pure loss or pure gain to one or the other according as the market went one way or the other. That is what the Lord Ordinary thinks. I cannot say the case is abundantly clear, but I do say that there is reasonable evidence to support his view, and nothing to satisfy me that it is wrong. That being so, the logical result must be, that, as far as my own judgment goes, I must decline to interfere with it, and therefore, as the verdict is against the pursuer, I must apply the law, which is clear, to the facts, and the result is what the Lord Ordinary has determined.

LORD CRAIGHILL concurred.

LORD RUTHERFURD CLARK—I confess I have very considerable doubts about the propriety of the judgment proposed by your Lordships. At the same time I do not think it is necessary for me to say much. My doubts are on the point whether there is any evidence to show that the

transactions between these parties were really colourable transactions, and not real sales as they appear from the correspondence between the parties to be. The difficulty I have in finding any evidence on that point arises from this, that the parties never met, and that therefore there could not have been any understanding between them except what is expressed in the letters, so that we cannot suppose there was any private agreement between them which is not expressed in the letters. And if I look at the writings which we have I cannot think any inference is to be drawn that they had agreed on the one side and on the other that this contract was not to be treated as a contract of sale, but that they were to abandon the rights of buyer on the one hand, and of seller on the other, and to transact only on the footing of settling differences. It may be that your Lordships have taken the right view of the case, but I cannot get rid of my doubts whether there is evidence to support the conclusion to which you have come.

The LORD JUSTICE-CLERK was absent.

The Court adhered.

Counsel for Pursuer (Reclaimer)—J. P. B. Robertson—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defenders (Respondents)—M. Kecknie—Hay. Agent—William Lowson, Solicitor.

Wednesday, January 7.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BASTOW (RICARDO'S TRUSTEE) v. DILL,
WILSON, & MUIRHEAD.

Process—Multiplepoining—Arrestment of Bill—Double Distress.

Arrestments were used in the hands of the holders of a bill and cheque, whilst delivery was demanded by the person who alleged he was owner. *Held* that in these circumstances the holders were justified in raising a multiplepoining, and therefore entitled to their expenses.

Observations (per Lord Shand) on Mitchell v. Strachan, Nov. 18, 1869, 8 Macph. 154.

This was an action of multiplepoining in the Sheriff Court at Glasgow, in which Dill, Wilson, & Muirhead, writers in Glasgow, were the pursuers and real raisers. The fund *in medio* condescended on was (1) a bill for £266, 5s., dated 26th July 1883, drawn by Joseph Ricardo & Company upon and accepted by Robert Park; and (2) a cheque, dated 26th July 1883, for £166, 5s., drawn by Robert Park, payable to Joseph Ricardo & Co. or bearer.

These documents were sent to the pursuers by Joseph Ricardo & Company in August and September 1883 respectively, with instructions to recover payment.

In October and November 1883 arrestments, purporting to attach bills and cheques, were used in their hands by William Simpson and J. S. Black. F. S. Bastow, as trustee on the sequestrated estates of Ricardo & Company, thereafter called on