

stipend paid to Dumbarton is payable out of the lands embraced in the sub-valuation. I think it is extremely doubtful in respect of what lands the payment was made. Moreover, it has been treated as a use and wont payment, that is to say, a payment which does not depend upon a decree or a locality, or any of the ordinary conditions upon which an allocation of stipend is made—a payment of which the origin is not traceable.

I think it is impossible to infer that there was an intention to abandon the sub-valuation, and I am therefore of opinion that the defences should be repelled and decree granted in terms of the conclusions of the summons.

LORD SHAND, LORD RUTHERFURD CLARK, LORD ADAM, and LORD KINNEAR concurred.

The Court repelled the defences, and granted decree of approbation.

Counsel for Pursuer—Mackintosh—Low. Agents—J. & J. H. Balfour, W.S.

Counsel for Defender—Pearson—Dundas. Agents—Mylne & Campbell, W.S.

Tue 23.

SECOND DIVISION.

[Sheriff of Inverness,
Elgin, and Nairn.]

MORRISON v STATTER AND ANOTHER.

Agent and Principal—Master and Servant—Managing Shepherd Buying Sheep at Market—Authority to Buy.

Sheep were bought in his own name by the head servant on a farm on which the tenant did not reside. He had no right to buy or sell on his master's behalf without express authority, and on the occasion of his purchase he had instructions to buy sheep, but not of the age or at the price of those he bought. *Held* that he had no implied authority from his position on the farm to bind his master for the purchase into which he had entered.

This was an action by Donald Morrison against John Calder and Thomas Statter for damages for breach of a contract to buy certain sheep at a certain price. The defender Calder denied that any such contract had been made. The defender Statter, who was employer of Calder, and for whom the pursuer alleged the purchase was really made, also denied the contract.

Statter was tenant, among other farms, of the farm of Knockie, Invernesshire, and he was at that farm a few times in each year. His evidence as to Calder was that he was his servant at Knockie; that he was a gamekeeper, and also looked after the shepherds and all upon the farm, and made a weekly report to him (Statter); that for any other duties he got special instructions; in particular, that he only bought and sold on special instructions, Statter usually buying himself; that at the time in question he had special instructions to buy, if he could, sheep of a different age and at a much lower price than

those which were the subject of this action, the price of purchase being immaterial, but had no authority to buy the sheep the pursuer alleged him to have bought, or to go to the price he was alleged to have agreed to pay, but that he was "tied to a price."

The pursuer produced a missive of which Calder denied the authenticity, but which was held proved to be his. It was signed by Calder, and bore that he had bought the sheep in question, and at the price sued for. Statter was not mentioned in it. Delivery not being taken, the pursuer had re-sold the sheep by auction, and the action was for £87, 6s. 2d. as damages thereby suffered.

The Sheriff-Substitute (BLAIR) found Calder liable for failure to implement the contract, and that the measure of his liability—*Warrin and Craven v. Forrester*, 30th November 1876, 4 R. 190, *aff.* 5th June 1877, 4 R. (H. of L.) 75—was the difference between the contract price and the market price at the date when delivery was tendered and refused, being £37 in all. He further found that Calder had no authority as Statter's agent to enter into any such contract, that Statter had not consented to or ratified it, and therefore assoltized Statter.

"*Note.*— . . . The pursuer contends that, though the defender Calder was the original party to the contract, he is entitled to demand performance from the defender Statter, in respect that the defender Calder was the authorised agent of the defender Statter, and that the contract was made on behalf of Statter.

"But a contract made by an agent can only bind the principal by force of a previous authority or subsequent ratification, and the burden of proving this authority or ratification lies on the pursuer.

"I think, on the evidence, there can be no doubt that the pursuer has failed to prove that Calder had this authority, or that Mr Statter subsequently ratified the contract entered into between the pursuer and Calder. The power to bind his master to such a contract as this was not within his usual employment, for Mr Statter says he buys his own sheep, and does not allow Calder to buy for him, except under special instructions. If, then, Calder was Mr Statter's agent, Calder was his instrument to make a contract only within the limits of the authority given him, and Mr Statter expressly states that he did not and would not have authorised Calder to make such a contract. The defender Calder also states that he had no authority from Mr Statter to make the contract in question. Now, when a principal could not have authorised the contract, then it is plain that the contract from the beginning can have no operation at all against him. Accordingly, the proper course for the other contracting party is to sue the agent as principal on the contract itself. It is obvious that the contract itself was a contract between the pursuer and the defender Calder, and therefore the defender Calder is liable on the contract itself; but even if it were to be held that he acted as unauthorised agent for another, he would be still liable on an implied warranty of his authority to bind his principal; in short, the professed agent must be treated as principal." . . .

The pursuer appealed, and argued—Calder was in the common position of almost every grievance

Scotland. He had general instructions to buy stock for his master's farm, and the circumstances showed that the pursuer could not have supposed that Calder bought for himself. He was in fact an *institor*—Ersk. Inst. iii, 3, 46, where the illustration of the subject-matter in the text is a farm servant; Bell's Prin. sec. 231. His purchases, then, were binding on his master, for whom he acted as general agent in such matters—*Brady v. Tod*, January 29, 1861, L.R., 9 C.B., N.S. 592, and 30 L.J., C.P. 233. But even assuming that he had received instructions from his master not to go beyond a certain price, that made no difference in the question whether he bound his master as in a question with the seller. Mr Justice Byles in *Meddick v. Marshall*, April 16, 1864, L.R., 16 C.B., N.S. 387, had exactly defined his position on this assumption when he said that such a person although he had transgressed the actual limits of his authority, had "acted within the apparent limits of his authority, where those apparent limits had been sanctioned by his principal." Statter was then liable in the sum sued for.

Statter replied—The sale was neither authorised nor was it within the scope, whether general or special, of Calder's employment. Calder was not a general servant, but had special instructions on each occasion on which he was sent to make such purchases. There was no evidence that it was notour that he had such authority as was alleged by the pursuer. As he had on this occasion transgressed his express instructions, he could not bind his master.

Authority—Story on Agency, sec. 126.

At advising—

Lord Young—The law applicable to the sale in such cases is clear enough, the difficulty being always about the facts to which the law is applied. If an agent has a particular authority or particular instructions given to him, he must act within that authority and those instructions, and cannot bind his principal if he act beyond them. If a general agent is employed generally in his master's affairs, or in a particular department, he shall be assumed to have all the authority necessary to enable him to serve his master as such general agent, either generally or as general agent in the particular department. Mr Smith, in his book on Mercantile Law, after stating these principles, says, p. 122—"The nature of the authority to be inferred, and the sufficiency of the principal's acts to raise the inference, must of course depend on the special circumstances of each case, and generally involve questions fit for the consideration of the jury. There is one instance in which the recognition of a single purchase made by his servant upon credit held to bind the principal to a succeeding one." And then he quotes the one referred to. Now, here Mr Murray says he is unable to prove that there was a special authority given by the principal to the alleged agent to make the contract now sued on, and therefore he relies on the general authority arising from the alleged agent's position and his conduct in that position, which, he says, implies the principal's authority to make the purchase which is the foundation of this suit. The Sheriff is of opinion, and I agree with him, that on this he relies in vain. It is remarkable that the evidence is so

slender on the subject. Apparently Calder was a sort of head-shepherd on the farm, and it does appear that his master occasionally instructed him to buy sheep, but it does not appear to me that anything which is proved about his situation or position as managing shepherd, or as to his previous conduct sanctioned by his master in the way of buying sheep raises any implication of authority for the present transaction. If I were of a different opinion I should have held that his position and conduct sanctioned by his master implied authority to make such a purchase. But I can find nothing of the sort here. Calder was just head shepherd, with some duty of superintendence or management of others in the defender's employment, and his master occasionally sent him to buy sheep with special instructions for the occasion, and if he never intended to send him again to buy sheep, there is nothing to suggest to my mind that it would have been incumbent on his master to put the public on its guard by advertising that he had withdrawn that authority from him. I must say, therefore, I am not surprised at what was done here. I assume that the sale was a perfectly honest one on the pursuer's part, and he thought he was dealing with a man who had authority from his master to buy. There is nothing in which his integrity can be impugned, and I disregard Calder's evidence to the contrary. But assuming everything to be as he states, it is all quite natural. He assumed, he says, that the statement made to him was true; that Calder had authority to make this purchase, but he was not required to part with the sheep, and did not part with them until he had ascertained whether what he had been told was true. He was safe enough, and when he communicated with the master he was informed that his servant had misled him, and that he had no authority to make the purchase. That is not an infrequent case. I think it is the exact case here. The servant had no particular authority to make the purchase, there was no situation and no general course of conduct sanctioned by the master from which authority could be implied.

I therefore think the judgment of the Sheriff is right and should be affirmed.

Lord CRAIGHILL, Lord RUTHERFURD CLARK, and the Lord JUSTICE-CLEEK concurred.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Pursuer—Mackintosh—Graham Murray. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defender Statter—Pearson. Agents—John C. Brodie & Sons, W.S.