

Friday, July. 2

## SECOND DIVISION.

[Sheriff of Aberdeen, Kincardine, and Banff.]

## CHALMERS v. PATERSON.

*Sale—Sale of Moveables—Quality of Goods—Inspection—Goods Left in Custody of Seller.*

By a contract for the sale of herrings it was stipulated that they were to be delivered in good condition, clean and well pickled, f.o.b. on buyer's orders. At the time of the sale the herrings in question were inspected on behalf of the buyer by his representative, who was told to satisfy himself as to their quality, and did so. The herrings remained after sale in the custody of the seller awaiting shipment, and were packed in barrels, which were not marked or identified in any way. Some time subsequently the buyer having come to suspect that the quality of the herrings was not in fact satisfactory, intimated that he would not take delivery except at a reduced price, the reason assigned being the inferior quality of the fish. Thereafter he went to the seller's yard where the herrings were, and demanded an inspection for the purpose of seeing "whether they were of the requisite quality and cure." The seller refused to allow any inspection of the herrings to take place, and the buyer in consequence refused to take delivery.

In an action by the seller for payment of the price, *held* that although the buyer having bought after inspection would not have been entitled thereafter to object to the fish on the ground of quality, his right to an inspection was absolute, both for the purpose of seeing that the seller's obligation to keep the herrings well pickled had been fulfilled, and also for the purpose of seeing that the goods proposed to be delivered to him were the goods that he had bought, and that, the seller having refused to allow the buyer to exercise this right, the buyer was entitled to refuse to take delivery.

This was an action brought in the Sheriff Court of Aberdeen, Kincardine, and Banff at Peterhead by David Chalmers, fishcurer, Findochty, against Peter R. Paterson, coal merchant and fishcurer, Fraserburgh, in which decree was craved for the sum of £220, 18s. 8d., being the price of 244 barrels of unbranded mattie herrings sold by the pursuer to the defender. By contract-note which was dated September 19th 1895, it was stipulated that the herrings were "to be delivered in good condition, clean and well pickled, f.o.b. on buyer's order."

The pursuer set forth the contract for the sale of the herrings, and averred, *inter alia*, that they were inspected on the defender's behalf and accepted as in good condition

and otherwise in terms of the contract, but that the defender now refused to implement his contract by taking delivery of and paying for them.

The defender admitted that he refused to take delivery. He averred, *inter alia*—" (Stat. 3) By the terms of the contract, as well as by the usage or custom of trade, well known to the pursuer, and recognised and acted on by him in previous dealings with defender, the defender was entitled to inspect immediately before shipment the various descriptions or kinds of unbranded herrings in barrels tendered to him as in implement of the contract, and in particular the unbranded matties contracted for. Without such inspection it was impossible for the defender to ascertain if the herrings tendered to him were of the proper description or kind which he had purchased, or if the same were, as they were contracted to be when delivered, in good condition, clean and well pickled, and otherwise such as the defender was bound to take delivery of in accordance with the terms of the contract as understood in the trade."

To this averment the pursuer answered— (Ans. 3) Admitted that the defender was entitled to inspect the herrings sold to him before shipment."

The defender also averred (Stat. 5) that he had a vessel ready to load the herrings in question, but that the pursuer refused to allow him to inspect them on that date, and the ship had to sail without them.

It was ultimately admitted that the pursuer refused to allow the defender to inspect the herrings on 30th October 1895.

The pursuer pleaded "due and resting-offing."

The defender pleaded, *inter alia*—" (2) *Separatim*—The pursuer having wrongfully and unjustifiably refused to permit the defender to examine the herrings in question before being shipped, the defender is not now bound to take them, and the present action is not maintainable and is incompetent."

On 4th March 1896 the Sheriff-Substitute (ROBERTSON) issued the following interlocutor:—"Repels defender's second plea-in-law in so far as it refers to the competency of the action: Allows both parties a proof of their averments, and to the pursuer a conjunct probation, and appoints the case to be enrolled that a diet of proof may be fixed."

"*Note*.—"As I understood Mr Milne's argument for the defender, it was to the effect that he was entitled now without any inquiry to have the action dismissed. It is admitted that pursuer refused on 30th October to allow defender to inspect the herrings; it was insisted that delivery must be taken of them without inspection, pursuer averring that defender had already inspected and accepted the herrings, and that no further inspection was by the custom of trade allowed. Defender denies that he had previously inspected the herrings, but even assuming that he had, he argued that this being an unconditional sale of ascertained goods, the property (under the Sale of Goods Act) passed when the bargain was

made; that being so, the herrings were defender's, and pursuer having refused to allow defender to inspect his own herrings, was barred from insisting on defender taking delivery of them. I think defender is wrong here; no doubt the property passed in these herrings, but if pursuer's contention is right defender was bound to take them away, to take delivery of them without pursuer submitting to a further inspection of the herrings in his premises. Of course, as soon as defender had got delivery of the herrings, he could have inspected them and refused them at once if disconform to bargain. I think therefore that the action is not barred, and that there must be inquiry, both probably as to the fact of the first alleged inspection, the custom of trade, and the condition of the herrings."

The defender appealed to the Sheriff (CRAWFORD), but the appeal was withdrawn, and a proof was led, by which the following facts were established:—

On 19th September 1895 the defender, through his buyer George Forbes, purchased from the pursuer a quantity of different classes of herrings, including among them the 244 barrels of "mattie herrings" in dispute in this action. Previously to purchasing the herrings Forbes had been told to satisfy himself as to their quality by inspection, and had done so. A contract or sale-note was written out and signed, and in terms thereof the herrings were to be delivered "in good condition, clean and well pickled, f.o.b., on buyer's orders." Delivery was not to be taken immediately, the time depending upon when a steamer could be arranged for by the defender. Until delivered the herrings remained in the pursuer's custody, and in or beside his premises. They were packed in barrels, and were not specially marked or identified in any way. It was necessary, in order that the herrings should remain in good condition, that they should be regularly attended to, to ascertain if the barrels were in good order, and that none of them had lost their pickle by leakage or otherwise. If this had happened in the case of any barrel it was necessary that the barrel should be at once filled up with pickle, otherwise the herrings in it would become dry, and what is known as "rusty," and would not be in good condition. Until the herrings were delivered, it was the pursuer's duty to see to their condition in this respect, and as he was leaving Aberdeen for the season he entrusted this duty to a neighbouring fishcurer, George Addison junior. The herrings in question remained in or beside the pursuer's premises, and under the charge of Addison, till about the end of October 1895, when the defender sent his employee Forbes to Aberdeen for the purpose of arranging for their shipment.

Forbes came in to Aberdeen accordingly on 26th October and made an examination of some of the herrings. The pursuer got no intimation that Forbes was to look at the herrings on that day, but they could be

seen without the pursuer's leave, as they were outside his yard.

As a result of this examination Forbes on the same day sent the following telegram to the defender:—"Have examined Ledingham's and Chalmers' herrings; find Ledingham's very bad, mostly over-days; Chalmers' fair pars, but good many smaller herrings in them; number of dry barrels in other parcels; must reduce Ledingham's 3s., Chalmers' 1s. 6d."

In consequence of this information the defender on 26th October sent the following telegram to the pursuer:—"My shipper, inspecting your selected matties, finds great many only smalls; refuse take delivery unless reduction 2s. brl.; wire instantly, vessel ready Monday." In answer to this telegram the pursuer sent the following telegram to the defender, dated 28th October—"Only received your Saturday telegram about shipment herrings now. The matties were inspected already, and are perfectly up to sample. Will be Aberdeen one o'clock." Accordingly pursuer came to Aberdeen, where he met the defender, who had come for the purpose of personally inspecting the herrings. The pursuer in the first instance agreed to allow the defender to inspect the herrings, but afterwards changed his mind and refused to allow him to do so on the ground that the defender had already (through his buyer Forbes) inspected the herrings at the time of purchase and was not entitled to a second inspection. Thereupon the defender wrote the following letter dated 30th October 1895 and handed it to the pursuer—"Dear Sir, —With reference to my call at your fishcuring premises to-day for the purpose of inspecting before shipment the unbranded matties bought by me from you, and your refusal to allow me to so inspect, I hereby give you notice that I will wait at your yard for permission to inspect. Failing your granting me permission by 4 p.m. to-night of ascertaining by inspection whether the goods are of the requisite quality and cure, I will hold you refuse to implement the sale, and hold you responsible for freight and other loss. You are at liberty to appoint a party to represent you at the inspection." To this letter the pursuer returned no answer, and accordingly the defender refused to take delivery of the herrings.

On 4th November the pursuer sent the following telegram to the defender—"Your purchase of 244 barrels u.-b. matties waits your instructions shipment. Wordie carters have instructions to delivery."

With reference to his examination of the herrings on 26th October Forbes deponed—"The conclusion I came to about them was that they were in very bad condition. I found that there were a good many small herrings among them and some torn bellies, and that there were one or two barrels of very inferior quality. There was an occasional spent mixed among them, but not many. From the barrels lying the pickle had gone from the herrings, and the herrings had got dry and inclined to get rusty and spoiled."

With reference to his refusal to allow the defender to inspect the matties on 30th October the pursuer deposed—“(Q) Would you have refused to allow him to open the barrels to see if the pickling had been properly done? [Question objected to. Objection repelled.] (Q) Did you refuse to allow him to see into the barrels for any purpose?—(A) I did refuse to allow him to see into the herrings. The reason I refused was that he told me distinctly that unless I gave him £30 or £35 to take delivery of the herrings he would not take them, and when I refused to do that he said ‘I will have the herrings inspected, and unless they are suitable in every way I will not take one of them.’”

It was the defender's intention to have shipped the herrings for export to Riga.

The pursuer admitted in cross-examination that herrings were never inspected except on the ground occupied by the curer or on his premises.

Evidence was led with a view of proving a custom of trade giving a buyer in such circumstances a right to a second examination before shipment, for the purpose of ascertaining whether the herrings offered were conform to contract and answered the description under which they were sold, but it is unnecessary to deal with this branch of the case, as the Court did not base their judgment upon the ground of custom.

Proof was also led with regard to the condition of the fish.

On 6th February 1897 the Sheriff-Substitute issued an interlocutor whereby, after sundry findings in fact to the effect above set forth, he found in law—(1) That the herrings having been inspected at the time of purchase defender was not entitled to a second inspection for the purpose of ascertaining their quality; but (2) that the herrings not having been taken delivery of at the time of purchase defender was in terms of his contract entitled to ascertain by inspection if necessary whether the herrings were in good condition, clean and well pickled at the time of delivery; and (3) under reference to annexed note, that pursuer having refused to allow defender to inspect the herrings when permission was requested to do so on 30th October, defender was not bound to take delivery. He therefore assoilzied defender from the conclusions of the action, and decerned, and found defender entitled to expenses, but modified the same to the extent of finding him entitled to only one-half of the expenses of the proof.

He added the following note:—

*Note.*—[After stating the facts and reviewing the evidence]—“The sole question therefore to my mind is, who was in the wrong as to this matter of inspection on 30th October? I must say that I have found it a question of great difficulty, with a good deal to be said for both sides. I do not think there can be any reasonable doubt that defender was asking more and meant to ask more than he was entitled to. His main object in asking an inspection was to form his own opinion as to whether the herrings answered the description under which they were sold; if he found small

fish or ‘torn bellies,’ or worse still, ‘over-day’s’ fish among them, he would probably claim a reduction or possibly refuse to take delivery. Now, this, as I have already explained, he was not entitled to. But he was entitled to see the fish to ascertain if they were in good condition, clean, and well pickled, and no doubt part of his demand to see them might be referable to this. Pursuer refused to let him see the herrings at all, and his frame of mind in regard to it may be gathered to some extent from his evidence. He is asked, would you have refused to allow Mr Paterson to open the barrels to see if the pickling had been properly done? [Question objected to, and objection repelled.] (Q) Did you refuse to allow him to see into the barrels for any purpose?—(A) ‘I did refuse to allow him to see into the herrings’—and then he goes on to give the reason. I do not lay too much stress on this, because pursuer was a good deal led on into saying it by the way the question was put, and he elsewhere says that if defender had treated him fairly he would have had no objection to his inspecting, but still it is of importance.

“The question just is, whether pursuer was justified in refusing inspection altogether because defender wanted it not only for the purpose for which he was entitled to it, but also and chiefly for a purpose for which he was not entitled to it. As will be seen in the letter dated 30th October, in which defender puts his formal demand, what he asks is an inspection to ascertain if the goods are of the requisite quality and cure; and while he was probably not entitled to this in its strict sense I am disposed to think the words quality and cure might, in the circumstances, be reasonably construed to include the pickling-up which was necessary to deliver the fish in good condition. What pursuer would have said on the day in question it is difficult to say, but in all probability he would not have objected if defender had stated that he only wanted to see the fish to ascertain if they had been attended to. On the other hand, pursuer, if he was sure of his legal position, had nothing to fear from an inspection so long as the fish had been attended to after the sale on the 19th September. An inspection could not have harmed him unless it revealed the fact that the fish were not in good condition in respect they had been neglected after the sale, and his proper course would seem to have been to have replied to the defender agreeing to the inspection, and if he chose making it clear that while so agreeing he only recognised defender's right to inspect for the limited purpose of ascertaining if the fish had been properly treated subsequent to the sale. Unfortunately, however, he did not do so, but took no notice of defender's letter, as I have said, and thus, I am inclined to think, put himself in the wrong.

“I find, therefore, though I confess with some hesitation and also regret, that pursuer took up an unjustifiable position in refusing the inspection asked, and that defender was entitled to throw up the bargain.

“On a large part of the proof defender cannot be regarded as successful. I refer to the proof as to whether there was a first inspection and also to the proof of custom of trade; the proof of the condition of the fish, while I can hardly, in face of my own interlocutor, say it was unnecessary, was, in my opinion, unnecessarily prolonged. For these reasons I propose, while giving defender expenses, only to find him entitled to half the expenses of the proof. As apparently the herrings were eventually sold to the order of the pursuer, the price obtained for them will be in his hands, and that being so defender is entitled to absolvitor.”

The pursuer appealed to the Sheriff, who on 27th March 1897 issued the following interlocutor:—“Affirms the interlocutor appealed against, except in so far as it finds the defender entitled to the expenses of only one-half of the proof: Finds him entitled to the expenses of two-thirds of the proof, and decerns,” &c.

*Note.*—“The pursuer on 19th September 1895 sold to the defender 244 barrels of maties ‘to be delivered in good condition, clean and well pickled, f.o.b., on buyer’s order.’ The main questions in the case are—(1) Whether the herrings were inspected on the defender’s behalf at the time of purchase; (2) what the legal effect of such inspection was; and (3) whether the pursuer was entitled to refuse to allow the defender to inspect the herrings again on 30th October following. On all these points I come to the same conclusion as the Sheriff-Substitute.

“1. On the first point there is a conflict of evidence between the pursuer, his son, and his coopers on the one side, and Forbes, the defender’s buyer, on the other. None of these witnesses were perhaps in a wholly impartial position. But I take it to be proved that Forbes did inspect the herrings fully and completely in a manner similar to that of a Fishery officer, after being told that he must satisfy himself there and then, and that he expressed himself completely satisfied. Further, that that was done on behalf of the defender, that Forbes and his buyer had authority to inspect, and to signify his satisfaction once for all.

“2. I am of opinion that after such an inspection the defender was not entitled at any future time to raise a question as to the quality and value of the herrings. I doubt whether it is proved that such a final inspection at the time of purchase is very common. Apparently herrings are often bought when the barrels are not finally packed and ready for shipment as these were, and at all events the final inspection appears sometimes to take place not at the time of purchase but later before shipment. The effect of the inspection, however, and of what passed between the pursuer and Forbes at the time, does not, as the Sheriff-Substitute observes, depend on the custom of trade. It amounts to an agreement which is quite clear and quite reasonable. No man would allow a succession of inspections after the season was closed and he had left the place, on the footing that at

any one of them the contract of sale might be opened up and fresh bargaining entered into as to the quality of the herrings and the price to be paid for them.

“3. According to custom the herrings remained in the seller’s custody till shipment, he being bound to keep them in good order. Considerable care and attention is required. The barrels may become dry from leakage. In this case they were outside the yard. The bungs were not driven full home, in order to allow of pickle being added when required. According to Addison, some of them, though perhaps not during the period in dispute, were overturned by boys and the pickle ran out. In short, both as to the amount of pickle and the condition of the barrels, which may require repair, regular attention is required, and if it is not given the condition of the herrings may deteriorate and that to a serious extent. It can be ascertained by tapping whether a barrel is full, but it cannot be ascertained without opening whether it has always been kept full. Accordingly it seems reasonable that the buyer should have an opportunity before shipment of seeing that his herrings have been kept by the owner in good condition according to the contract before he accepts delivery of them. He may have other reasons, and I think good reasons, for desiring to see them. The herrings are in the owner’s custody, perhaps among a number of others. In this case they were lying unprotected outside the yard. I think that after the lapse of some weeks between the sale and the shipment he is entitled to see that he is getting what he had bought and inspected, and that without committing himself to any allegation of fraud. That appears to be almost self-evident, and to be, like the point previously discussed, independent of the custom of trade; but, taking the pursuer’s witnesses alone, I hold it to be proved on a fair reading of their evidence as a whole that it is understood that the buyer is entitled to a second inspection before shipment if he demands it. This would be made more plain by quotation, but it is sufficient to refer to the evidence of Hall and Thomson, and also the evidence of J. S. Davidson and Ludwig. It is true that the defender had access to the barrels, which were, except a few, outside the yard, and he could have got the key of the yard. That is the best reason which the pursuer can found upon for his refusal to allow an inspection on 30th October, and I have not overlooked it. But I do not think the defender was bound to supervise the condition of the barrels, and though Forbes seems to have made an inspection, I may say clandestinely, which aroused his suspicions, that did not, in my opinion, disentitle the defender to the formal inspection which he had a right to demand. That brings me to the important contention that the inspection was demanded on a wrong ground. Without quoting the defender’s letter, I think it is plain that he proposed to reopen the questions of quality and price. In that he was wrong. There may have been some excuse. Forbes had apparently

come to suspect that twenty barrels which he had rejected out of another purchase on the morning of 19th September had come to form part of the 244 barrels which he had purchased the same afternoon. On the proof it is not impossible that that was the case, and it may partly account for the not quite satisfactory results of the inspection in March, though that inspection came too late, and like the Sheriff-Substitute I leave it out of view. That might have been a ground for opening up the bargain in quite a different way notwithstanding the inspection if twenty rejected barrels were mixed with the rest, however inadvertently. The person inspecting might not be bound to open every barrel so as to make such a mistake impossible. But in fairness it ought to have been put plainly forward by the defender when he asked for the inspection, and in the argument at the appeal the defender's agent did not found upon it. But the defender's right to an inspection was in my opinion absolute. The pursuer's proper course was to say, inspect by all means, but I can allow no question as to quality or value. By refusing the inspection he took a step which I think, without serious hesitation, is fatal to his case. According to the most probable version of the evidence he agreed more than once, and then withdrew his consent. I doubt whether he would have done so if he had been quite collected at the time. It is unfortunate for him that he should have made such a mistake, and if the shipment had been made within such a time as apparently he had been led to expect, the question might not have arisen. But in my view the mistake was fatal.

"I was urged by the defender's agent to reconsider the question of expenses, which in this case is not unimportant. The defender has all through maintained a separate ground of defence supported by much evidence, and has been unsuccessful. There ought to be some modification. But after carefully measuring the bulk and amount of the proof under each head, and looking to all the facts of the case, I am constrained to make some alteration in the defender's favour, and to allow him the cost of two-thirds of the proof."

The pursuer appealed to the Court of Session.

An argument was presented with reference to the question whether the property in the herrings had passed at the date of the sale in virtue of the Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 17, 18, rule 1, and 62 (1), definition of "specific goods," and (4), counsel for the pursuer maintaining that the property had passed at that date, and that the obligation to keep well pickled was a collateral contract, breach of which might have entitled the defender to damages, but not to reject, and the defender maintaining that the contract was one contract in which it appeared that parties did not intend the property to pass till delivery on the steamer, but it was ultimately conceded by senior counsel on both sides that the decision of

this question did not affect the main issue between the parties, and it was not dealt with by the Court.

Argued for the pursuer—Whether the property passed at the date of the sale or not, the goods sold were inspected when bought, and the defender was not entitled to a second inspection with a view to ascertaining the quality of the fish. Probably he was entitled to an inspection for the purpose of ascertaining whether they had been kept well pickled, but the pursuer was never requested and never refused to allow an inspection for that purpose, or for the purpose of identifying the barrels. The pursuer's position really was—you may inspect as much as you like, but you cannot get out of your bargain. The defender's sole object in demanding an inspection was that he might ascertain the quality of the matties with a view to getting off his bargain, or obtaining a reduction in the price, and he was not entitled to an inspection for that purpose, as the fish had been inspected already, and accepted at the date of the sale. It was unheard of that a buyer should be entitled to reject goods which he had bought because he was not allowed an inspection to which he was not entitled. If the pursuer had consented to an inspection, knowing as he did for what purpose it was desired, he would have had great difficulty afterwards in maintaining that the defender was not entitled to an inspection as regards quality, and to reject the herrings if found on inspection to be inferior. There was no evidence of any breach of contract on the part of the pursuer entitling the defender to rescind the contract. No custom of trade entitling the defender to a second inspection was proved. The case of *Isherwood v. Whitmore*, 1843, 11 M. & W. 347, was not in point, for in that case there had been no previous inspection.

Argued for the defender—(1) It was admitted on record that the defender was entitled to inspect the herrings before shipment; (2) under the contract the pursuer was bound to keep the "matties" well pickled, and the defender was entitled to an inspection before shipment, for the purpose of seeing that this obligation had been fulfilled. This was a material part of the contract between the parties, breach of which would have entitled the defender not merely to damages but to rescind the whole contract—*Turnbull v. McLean & Company*, March 5, 1874, 1 R. 730, per L.J.C. Moncreiff, at p. 738, and Lord Benholme at p. 739. The correspondence did not bear out the contention that the defender did not want an inspection for the purpose of seeing that the pickling had been attended to. The expression "quality and cure" might refer to pickling, as the quality might have been deteriorated by want of pickling. But however this might be, the defender's right to an inspection for this purpose was absolute, and the pursuer had no right to refuse, because he suspected that the defender had some other object in view however illegitimate. (3) At common law the defender was entitled to inspect the goods before taking delivery of

them for the purpose of seeing that what he was getting was what he had bought—*Isherwood v. Whitmore, cit.*; Benjamin on Sale, 704. (4) He was also entitled to an inspection for this purpose before accepting delivery in terms of the Sale of Goods Act 1893, sec. 34 (2). (5) As these goods were to be shipped abroad to a foreign buyer, it was specially essential that the defender should have an inspection before shipment. The only place where the defender could inspect was the pursuer's yard. If the herrings had been shipped without inspection, they would have been held as being finally delivered to the defender—*Morton v. Abercromby*, January 7, 1858, 20 D. 362; and *Cowdenbeath Coal Company, Limited v. Clydesdale Bank, Limited*, June 15, 1895, 22 R. 682. If they had been found not to be the goods which the defender had bought when they were delivered to the foreign buyer, and had been refused by him, it would have been too late then for the defender to reject them—*Pini & Company v. Smith & Company*, June 19, 1895, 22 R. 699. In this view the defender was entitled to an inspection before shipment, even as regards quality, and that whether he would have been entitled to reject the goods as the result of such inspection or not, because as in a question with his buyer he was bound to satisfy himself before shipping the goods abroad that the quality was good, and this was specially so if he had any reason to suspect that the quality was inferior. The pursuer had no right to refuse an inspection which was necessary to keep the defender right with his purchaser abroad. (6) A custom of trade giving a right to a second inspection was proved. The pursuer had no right to refuse the defender an opportunity of inspection to which he was entitled because he thought that the defender would make an illegitimate use of the knowledge resulting from it. In view of the defender's rights under this contract, and also at common law, and especially in view of the serious consequences which might have resulted if the defender had shipped to his foreign buyer without examination, the pursuer's refusal to permit an inspection was a material breach of contract which deprived him of his right to sue for the price of the goods sold.

At advising—

LORD TRAYNER—I think the Sheriff was right. The defender purchased the herrings in question after inspection by his buyer. He could not thereafter object to the quality of what he had bought, or claim any deduction from the contract price, on the ground that they were not unbranded matties, or not so good as he or his buyer had thought they were. But the matties so bought were packed in barrels which were in no way marked or identified; they were to be kept by the pursuer until the defender gave orders for their delivery, and the pursuer contracted to deliver them then in good order. In the meantime they were to be cared for by the pursuer, especially in the matter of seeing as to their being pre-

served in good and sufficient pickle.

In those circumstances the defender was entitled before taking delivery to inspect the matties first, to satisfy himself that the contract were the matties he had bought, and, second, to see that the pursuer had kept them as he was bound to do, and was delivering them in good order, clean and well pickled, in terms of his contract. Such an inspection could not be made at the ship's side, and the defender's demand to inspect the matties in the pursuer's yard was not only within his right but was most reasonable in itself. I am of opinion that the defender was not bound to take without inspection whatever the pursuer pleased to represent as the defender's matties, and that the pursuer's refusal to allow the matties to be inspected entitled the defender to act as he did.

In the course of the discussion a reference was made to the Sale of Goods Act, but as senior counsel for both parties concurred in stating that the provisions of that Act did not affect the question here raised, I have not taken the Sale of Goods Act into consideration in disposing of the case.

LORD LOW—I agree in the judgment which has just been delivered, that the interlocutor of the Sheriff shall be affirmed, and I concur in the grounds of judgment which Lord Trayner has stated. At the same time I think that the dispute has probably arisen out of the position which at one time the defender took up. The telegrams of 26th October passing between Forbes and the defender and the defender and the pursuer show that at that date the defender took up the position that the matties were not of the quality which they had been represented to be, and that he refused to take delivery unless a substantial reduction was made in the price. As the matties had been bought after inspection by the defender's buyer, that was clearly a position which he was not entitled to take up.

Now, it may be that the pursuer believed, and had reason to believe, that the inspection which the defender asked in his letter of 30th October was for the purpose of ascertaining whether there were not, as reported to him by Forbes, a number of small herrings in the barrels, with the intention, if that turned out to be the case, of refusing to take delivery except at a reduced price, and I think that it is not improbable that that was the defender's intention. But I think that the defender's right to an inspection for the purpose stated by Lord Trayner was absolute, and the suspicion that the defender intended to use the inspection for an illegitimate purpose did not justify the pursuer in insisting that he should take delivery without any inspection. Therefore, although I cannot free the defender from blame, I think that the pursuer has in the end put himself entirely in the wrong, and that judgment must go against him.

LORD JUSTICE-CLERK—I concur with both your Lordships. I think there is a great

deal in what Lord Low has said with regard to the defender's conduct. But his right to inspect the herrings before shipment, first, for the purpose of seeing that the herrings proposed to be delivered were the herrings which he had bought; and, second, for the purpose of seeing that they were in good condition and had been kept well pickled, was absolute, and the pursuer was not entitled to refuse him an opportunity of exercising it.

LORD YOUNG and LORD MONCREIFF were absent.

The Court pronounced the following interlocutor:—

“Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the interlocutor appealed against: Therefore of new assoilzie the defender from the conclusions of the action, and decern: Find the defender entitled to expenses in this Court,” &c.

Counsel for the Pursuer and Appellant—Salvesen—W. Brown. Agent—Alex. Ross, S.S.C.

Counsel for the Defender and Respondent—Sol.-Gen. Dickson, Q.C.—Abel. Agent—Wm. Croft Gray, Solicitor.

Tuesday, June 15.

## SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

### CAMPBELL v. BREMNER.

*Superior and Vassal—Building Restrictions—Right of Disponee of Original Vassal to Enforce Building Restriction as regards Other Parts of Lands still in Vassal's Hands—Restrictions already Departed from.*

A portion of ground was feued to A under a building restriction to the effect that one double and one single villa, or three single villas, should be erected thereon; that they were to face to the south-south-east, and that no other buildings except offices for them were to be built on the ground feued. It was provided by the feu-contract that this restriction was to be a real lien and burden on the ground feued in favour of the superior “and the other feuars and disponees of other parts of” the superior's lands, and enforceable by them against A and his disponees. On part of the ground so feued A erected, with consent of the superior, a house facing west, and subsequently disposed this part of the ground to B, who again disposed it to C, both dispositions being granted under burden of the restrictions in the feu-contract “in so far as still subsisting and applicable thereto.” Thereafter the superiority was acquired by D, who discharged the restriction, and A then proceeded to erect a con-

tinuous row of three houses on the part of the ground still remaining in his possession. C brought an action against A to interdict the erection of these houses as in contravention of the feu-contract. It was conceded that if the southmost of the three houses had been built six inches apart from the house next to it there would have been no contravention.

*Held* (1) that C had no interest to enforce the restriction; (2) that he had no title, the restriction being merely a burden upon his lands, and not being intended as a provision in his favour with regard to the rest of the ground feued; and (3)—*per* Lord Young—that he could not now insist on the restriction, part of it having been departed from with consent of the superior and to C's own knowledge before he acquired his own portion of ground.

This was an action of suspension and interdict at the instance of Alexander Campbell, Holmhead House, Cathcart, Glasgow, against John Bremner, measurer in Glasgow, in which the complainer sought interdict against the erection of certain buildings as being disconform to the restrictions contained in a feu-contract applicable in common to the ground upon which it was proposed to erect the buildings in question, and to neighbouring ground upon which a house belonging to the complainer was situated. The disconformity complained of was (1) that the buildings did not face in the direction laid down in the feu-contract; and (2) that they were being built in a continuous row instead of in villas as prescribed.

By feu-contract entered into between James Wilson Stevenson, house factor in Glasgow, and John Bremner, the respondent, dated 7th, and recorded in the Division of the General Register of Sasines for the county of Renfrew, 14th May 1886, James Wilson Stevenson disposed to the respondent, All and Whole a portion of ground containing 5050 square yards or thereby, part of the lands of Holmhead, lying in the parish of Cathcart and county of Renfrew. This portion of ground was disposed under the real liens and burdens, conditions provisions, irritancies, and reservations following, viz. — “The said John Bremner shall erect on the said portion of ground, and have completed and ready for occupation by the term of Whitsunday 1887, one double villa of the value of not less than £1200 sterling, and not later than the term of Whitsunday 1888, one single villa of the value of not less than £600 sterling, or in the option of the said John Bremner, three or more single villas each of the value of not less than £600 sterling, which villas shall be built upon sites and according to plans and specifications to be first submitted to and approved of by the said James Wilson Stevenson, and shall front the road or street forming the south-south-eastern boundary of the portion of ground hereby feued.” . . . “And it is hereby expressly provided and declared that no buildings other than those thereby prescribed