

that of a substitute to her, having a *spes successionis* but no *jus crediti*. The substitution is one which the institute may defeat either gratuitously or onerously. Mrs Craig died in 1826. After that, Dr Buchanan and Miss Craig stood in the position of debtor and creditor. Had Miss Craig never uplifted the money, or made a settlement, and died in Dr Buchanan's lifetime, he would have taken as substitute. But before Dr Buchanan's death nearly all the money had been paid. To that extent the substitution was evacuated. There remained about £150, but of this sum Miss Craig got payment after Dr Buchanan's death, and by so doing she defeated the substitution even as to this balance. Therefore the substitution had ended from that time. Even if it had not, she made a settlement carrying her right to other parties, which would of itself have defeated the substitution, if not defeated previously. On both of these grounds I hold that the substitution was at an end during Miss Craig's life, and I therefore think the interlocutor is well founded.

**LORD DEAS**—I am of opinion, with your Lordship, that this is not a question of vesting or not vesting in Dr Buchanan, and, therefore, that the interlocutor of the Lord Ordinary cannot be adhered to on the ground on which it is put by his Lordship. But I farther think that the result at which he has arrived is sound. The right of Dr Buchanan, such as it was, vested at once. It was a conditional right to a certain sum in a certain event. I don't think that, after this money was paid in the way it was, and Miss Craig having made the settlement she did, although Dr Buchanan had survived, he could have claimed it any more than his assignees can. I doubt if Dr Buchanan could have claimed it although it had not been paid at all, because the condition in the deed is that it is to be paid at the first term of Whitsunday or Martinmas after the testator's death. That is the time when it ought to have been paid, and according to a general rule of law, what ought to be done is held as being done. I am not able to see that the mere accident of the subject being paid would have made any difference. One construction might be put on the clause, that it was to be applicable only if Miss Craig died in the lifetime of the testator, and but for the word *return*, that might have been a natural enough construction. But taking it the other way, that it was to return to Buchanan if she died without issue, it is impossible to read in it any higher right than that if she died without disposing of it it was to go to Dr Buchanan. She had the power to spend it all if she chose, and it is impossible to construe the clause as preventing her from disposing of the money by testament.

**LORD ARDMILLAN** concurred.

Agents for Pursuers—Hill, Reid, & Drummond, W.S.

Agents for Defenders—A. & A. Campbell, W.S.

## OUTER HOUSE.

(Before Lord Barcaple.)

**THORBURN V. SHAW AND THOMSON.**

*Agreement—Sale—Concealment—Fraudulent Combination and Conspiracy to raise price—Representation by Broker—Disclosure of Principals—Relevancy—Issues.* Question raised (but not de-

ecided, the case being settled out of Court) as to relevancy of defence in action on sale, that the seller had, by combination with others, raised the price of the article sold, and had induced the defender to buy by falsely representing that the price was a fair market price, and fraudulently concealing the existence of the combination.

The pursuer sued in the Sheriff-court of Lanarkshire on a contract for the sale, in three lots, of 11,000 tons of Scotch pig iron. Of that quantity, warrants for 6000 tons had been duly delivered to the defenders, and paid for by them, but before delivery of the remainder became due, the defenders wrote to the pursuer, demanding a disclosure of his principals, which demand was refused by him. The defenders again wrote to the pursuer that, in consequence of his refusal, they declared the contract cancelled, to which the pursuer replied, persisting in his refusal, and declining to hold the contract cancelled. This action was then raised.

The sum sued for, viz., £6691, 16s. 10d., was the difference between the price at which the iron had been bought by the defenders, and that at which, after they refused to implement the contract, it was sold by the pursuer in the market.

The defence was, that before the said 5000 tons of iron fell to be delivered the defenders ascertained that, prior to the pursuer making the contract with them, he and a number of others had entered into a secret, illegal, and fraudulent combination and conspiracy to raise the price of Scotch pig iron by publishing false representations, and making fictitious sales among its own members; that by these means the price of iron was so raised; and that, when this had been accomplished, the pursuer, while representing that he was a broker acting for *bona fide* ordinary sellers, but in reality acting on behalf of the combination and in furtherance of their purposes, made the contract in question with the defenders.

It was also pleaded in defence that the pursuer having refused to disclose his principals, the defenders were entitled, in the circumstances, to cancel the contract.

The Sheriff, after hearing parties, before further answer, allowed both parties a proof *pro ut de jure* of their respective averments.

The pursuer advocated.

The following issue and counter-issues were proposed:—

Issue proposed by pursuer:—

“Whether, on or about the 17th day of April 1866, the pursuer entered into a contract with the defenders, whereby the defenders purchased from the pursuer three several quantities of Scotch pig iron, known in the market as ‘G. M. B., 3-5ths No. 1, and 2-5ths No. 3.’ viz., 1000 tons, at the price of 80s. sterling per ton, payable in Glasgow on or before 20th April 1866; 5000 tons, at the price of 77s. 6d. sterling per ton, payable in Glasgow on or before 17th May 1866; and 5000 tons, at the price of 77s. 6d. sterling per ton, payable in Glasgow on the 22d May 1866—the said prices being payable to the pursuer in net cash against storekeeper's warrants for the iron: And whether, after the said contract had been in part implemented by delivery of storekeeper's warrants for the first two quantities of iron above-mentioned, and payment of the price thereof, the defenders, in breach of said contract, refused to take delivery of storekeeper's

warrants for the remaining 5000 tons of pig iron, of the description above-mentioned, tendered to them by or on behalf of the pursuer, on or about 22d May 1866, and to pay the price thereof, to the loss, injury, and damage of the pursuer?"

Damages claimed £6691, 16s. 10d., with interest thereon at 5 per cent, from 29th May 1866.

Counter-issues proposed by defenders:—

- "1. Whether the pursuer and others, for the purposes of their own profit, entered into a secret combination to raise, and did raise, the price of iron greatly beyond a fair market price; and whether, while the price of iron was so raised, the pursuer, acting for the parties to the foresaid combination, induced the defenders to enter into the foresaid contract by falsely representing that the price therein stipulated was a fair market price?"
- "2. Whether, in entering into the foresaid contract, the pursuer represented to the defenders that he was acting as a broker, and whether he induced the defenders to enter into the said contract by fraudulently concealing the existence of the foresaid combination?"
- "3. Whether, in entering into the said contract, the pursuer represented that he acted as a broker; whether he refused to disclose his principals to defenders; and, whether the defenders, in consequence of such refusal, cancelled the said contract?"

The Lord Ordinary (BARCAPLE) reported the case with the following note:—

"The issue for the pursuer is not objected to; but he objects to the relevancy of the entire case for the defenders as it is disclosed in the issues which they propose to take.

1. In the first of these issues the defenders propose to prove agency on the part of the pursuer for the parties to the alleged combination set forth by them on record. As thus put, the ground of defence set forth in the first issue seems to be substantially the same as if it were stated directly against the parties to the combination as sellers of the iron, and pursuers of an action for breach of the contract. If the pursuer, who takes in this action the position of seller, and sues in his own name for breach of the contract, shall be proved to have acted in the sale as agent for the parties to the combination as the vendors, he would appear to be liable to any defence that could be stated effectually against his principals on the ground of the illegal or fraudulent nature of the combination. The question is, whether the alleged combination, and the mode in which it was carried out by the sale to the defenders, involve such elements of illegality or fraud as will constitute a good defence against an action for failure to implement the contract?"

"The defenders plead that the contract 'having been made by the pursuer in pursuance of a fraudulent and illegal scheme, which was *contra bonos mores*, he is not entitled to any remedy at law;' and that 'the circumstances narrated amount to a conspiracy to defraud, and all transactions entered into in pursuance thereof are illegal, and no action can be maintained in reference to these transactions by any one who was a party to the conspiracy.' (2d and 3d Pleas in Law for Defenders—Sheriff-court Record.) It appears to the Lord Ordinary that the ground of action now under consideration is very clearly and accurately stated in

these pleas. It is quite possible that a sale may be made in pursuance of a scheme or combination of such a kind that the law will refuse to aid in giving it effect by sustaining an action on the contract, and that although there may be no sufficient ground on fraud, or otherwise, in the sale itself, for setting it aside. But, looking to the averments as to the nature and objects of the alleged combination, the Lord Ordinary does not think that there is any recognised principle of public policy or morality which will warrant a court of law to refuse action on a contract of sale merely because it was entered into in pursuance of that combination, and for effecting its object. It is conceivable that the alleged scheme for operating upon the iron market might have been carried out by a single extensive capitalist, or by a public company, if the fact of the transactions being all on account of one party was not divulged. All dealers in time bargains must be aware that they are liable to the risk of the market being affected at the date, or during the currency, of their transactions, by the operations of other dealers, entered into, it may be, for the purpose of producing that effect. In the existing state of the law such operations are not illegal. They do not necessarily depend for their effect upon a number of separate dealers acting in concert in carrying them out, and it does not appear that this last circumstance can have the effect of giving to them an illegal character, which would not otherwise attach to them. The magnitude of these operations at a particular time is the most material circumstance affecting them. But this is altogether a matter of degree, which can afford no definite ground for holding them to be illegal. It may be regretted that such a combination, if it exists, should receive even indirect aid from the law, but great injustice might be done on the other side, and a door opened to much improper litigation, if buyers and sellers were allowed to dispute the validity of their contracts on the allegation that they were entered into with parties to operations for affecting the market, the existence of which, to some extent, may always be surmised.

"It is part of the issue that the pursuer induced the defenders to enter into the contract by a false representation that the price was a fair market price. But the Lord Ordinary does not think that this can give relevancy to the issue if the defenders' pleas in regard to the nature of the combination are not well founded.

"On the whole, the Lord Ordinary thinks that the first issue, and the defenders' averments in support of it, are not relevant.

"2. In the second issue the defenders offer to prove that the pursuer represented that he was acting as a broker, and fraudulently concealed the existence of the combination. As matter of form, it would seem that, in order to enable the defenders to take this as a separate issue, the existence and nature of the combination should be set forth in it in the same way as in the first issue, and also the pursuer's knowledge of its existence and nature.

"As the Lord Ordinary understands this issue, the ground of defence which it is to establish is, that the pursuer, by holding himself out as broker, entitled them to rely upon his informing them of any peculiar circumstance materially affecting the transaction, such as the existence of the combination. Though the position and duties of agent and broker are different, there is nothing to prevent a broker also acting as agent; and the Lord Ordinary is not disposed to think that a pur-

chaser is entitled to assume, without inquiry, that the broker with whom he transacts is not agent for the seller; more especially where, as in this case, the broker comes to him to ask him to buy. A broker is, undoubtedly, held to act for both parties, but that is merely in making the contract; and he is not, as broker, under any duty to advise either of them in regard to it. It is a different question, whether, if he has information of a fact materially affecting the safety of one of the parties in entering into the bargain, he is not bound to divulge it? If, in the present case, the question were, whether the pursuer, acting *bona fide* as a broker for third parties, but happening to know of the alleged combination, was bound to inform the defenders of its existence, the Lord Ordinary would hold that he was under no such obligation. As the issue is framed, that seems to be the only question in regard to it, and the Lord Ordinary is therefore of opinion that the defenders are not entitled to such an issue.

"The difficulty with which the Lord Ordinary has been chiefly impressed in regard to the two first issues is, whether a combination of the facts which they separately contain would not afford a relevant defence against the action? These facts are the existence of a combination for the purpose, and having the effect alleged—the pursuer's agency for the parties to the combination, his representation that he acted as broker, and his inducing the defenders to enter into the contract, by the false representation that the price was a fair market price, and the fraudulent concealment of the existence of the combination. One material change resulting from this mode of putting the defenders' case would be, that the pursuer, while representing that he acted as broker, would be neither acting in that capacity nor as agent for an indifferent third party, but as agent for the parties to the alleged combination, the existence and effect of which are the facts which he is alleged to have concealed and misrepresented.

"The Lord Ordinary is the less disposed to express a decided opinion in regard to an issue which should embody all or most of these elements, as, from the way in which the issues are framed, this view of the defenders' case was not the subject of special argument. The great difficulty which he feels in taking a distinction between it and those views of the case with which he has already dealt in considering the issues as they stand is, that he does not think a buyer is entitled to trust that the broker with whom he transacts is not also agent for the seller, and that concealment of the existence of the combination by persons engaged in it, if he had bought direct from them, would not have afforded a good defence against this action. But he feels it to be a question deserving of serious consideration, whether persons in that situation are entitled to avail themselves of the apparently neutral character of a professed broker, through whom they sell, but who is truly their agent, to evade suspicion and inquiry, and thus conceal facts materially affecting the safety of the buyer in entering into the contract. But, while he thinks this the most serious form of the case stated by the defenders on record, he is inclined, for the reasons explained in considering the issues as framed, to hold that it is not relevant.

"3. He does not think that the defenders are entitled to the third issue. While there was no ground to complain that the contract, which, by its terms, was made with the pursuer himself, was

not implemented, it does not appear that the defenders were entitled to cancel it merely because the pursuer refused to disclose his principal. It might have been otherwise if no bought and sold notes had passed, and the defenders, having bought through the pursuer as a broker, on the understanding that he represented other parties as sellers, had refused to recognise a contract with the pursuer on his own account. But that is a question on which it is unnecessary to enter in the circumstances of this case, and on which the Lord Ordinary expresses no opinion."

YOUNG and SHAND for pursuer.

CLARK and BRAND for defenders.

The Court heard argument on the relevancy, but no judgment was pronounced, the case, after being continued for farther argument, being settled out of Court.

Agent for Pursuer—John Ross, S.S.C.

Agent for Defenders—A. Kirk Mackie, S.S.C.

Friday, February 28.

## SECOND DIVISION.

WATT v. THOMSON AND OTHERS.

*Reparation—Process Caption—Judicial Act—Privilege—Malice—Satisfying the Production.* A Sheriff-substitute having, in the usual way, signed a process caption on an application by the clerk,—*Held*, in an action of damages at the instance of an agent who was imprisoned under it, (1) that the Act having been taken in the course of proceedings which had been initiated before the Sheriff, it was judicial, and was therefore privileged; (2) that there was no relevant allegation of malice defeating the privilege.

In an action of damages at the instance of the same party against the Sheriff-clerk, who applied for the process caption,—*held* that the plea of privilege was not so obvious as in the case of the Sheriff to entitle him *in limine* to refuse to satisfy the production, and case remitted to the Lord Ordinary to make up a record.

This was an action of reduction and damages at the instance of Mr John Watt, advocate, Aberdeen, against Sheriff Thomson, substitute there, and the Sheriff-clerk and Sheriff-clerk-depute. In his condescendence the pursuer makes the following statements:—On or about the 19th day of March 1867, the pursuer, who is an advocate practising in Aberdeen, in his character of an advocate and procurator in the Sheriff-court of the county of Aberdeen, prepared a petition to the Sheriff of Aberdeenshire, at the instance of Mrs Jane Mackie or Mouat, residing in Aberdeen, relict of the deceased Alexander Mouat, china and rag merchant, Aberdeen, as representing Alexander Mouat, the eldest son of the said deceased Alexander Mouat, against Alexander Edmond, advocate in Aberdeen, trustee on the sequestrated estate of the said deceased Alexander Mouat. In the prayer of the petition interdict was sought to prohibit the said Alexander Edmond from advertising for sale the bathing-houses and others forming the bathing establishment on the sea-beach of Aberdeen. The pursuer and his client had been informed that such advertisement was intended to be inserted in the *Aberdeen Journal* of the following day; and as the pursuer's client claimed the property of the bathing-