

situated. That involved a consideration counter to mere *pro rata* apportionment. Yet the reply may conceivably be that a particular house or station, situated in the severed area, would not have been required if the severed area had not at the date of erection, been part of the county, and that the property in such house or station is of no use to the area severed except as an asset to realise. But all such questions are for the Sheriff as arbiter. And I think therefore that the case should be sent back to him, not with a mere yea or nay to his question, but with findings or instructions.

LORD MACKENZIE gave no opinion, his Lordship not having heard the case.

The Court refused to answer the question of law as stated in the case, remitted the cause to the Sheriff as arbiter to allow parties to readjust their pleadings and to proceed as accords, and found no expenses due to or by either party in respect of the stated case.

Counsel for the County Council of Midlothian (Pursuers)—Wilson, K.C.—Pitman. Agent—James A. B. Horn, S.S.C.

Counsel for the Burgh of Musselburgh (Defenders)—Cooper, K.C.—D. P. Fleming. Agents—W. & W. Saunders, S.S.C.

Tuesday, December 20.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

WESTER MOFFAT COLLIERY COMPANY, LIMITED *v.* A. JEFFREY & COMPANY.

*Principal and Agent—Party Ordering Goods through Agent—Liability to Principal for Price.*

The M. Colliery Company, Limited, which had been incorporated on 2nd March 1908 to acquire the business of a firm, the M Colliery Company, brought an action in September 1908 against J. & Company for the price of certain parcels of coal which they had sold them in March, April, and May 1908, through the agency of F. J. & Company maintained that they had not dealt with the pursuers nor ordered from them the goods the price of which was sued for. They admitted that they had got delivery of the coals in question, but maintained that in the purchase thereof they had dealt with F as a principal, and not as the pursuer's agent. It was proved that prior to February 1908 the defenders had bought coals from F., which he had obtained from the M. Colliery Company, of which firm he was a partner; that F. had bought coal from the defenders; that in the months of March, April, and May 1908 the

defenders continued to order coals from F. The defenders' witnesses deponed that F had represented to them that the course of dealing which had prevailed between him and the defenders prior to the incorporation of the company was being continued, and that the defenders had ordered the coal from him with the object of wiping out the balance due by him to them. It was not proved that F had any authority from the pursuers to make such representation. On the contrary, it appeared that the pursuers posted to the defenders invoices in their own name for the coal, that they rendered them accounts therefor, that they wrote them letters demanding payment, and that neither the invoices nor accounts were repudiated by the defenders so far as the pursuers were concerned. There was, moreover, no evidence to show that F. had acquired the property in the coals in question from the pursuers, and sold them again to the defenders, or that the pursuers ever claimed the price from F.

*Held* that the defenders, having in the circumstances set forth bought the coals from the pursuers, were liable to them in the price thereof.

The Wester Moffat Colliery Company, Limited, brought an action in the Sheriff Court at Glasgow against A. Jeffrey & Company, coal merchants, Glasgow, for payment of the sum of £53, 7s. 11d., being the price of certain coals "sold and delivered by the pursuers to the defenders" during the months of March, April, and May 1908. They averred that Messrs William Forbes & Company, coal merchants, Glasgow, had acted as their agents in the sale of the coals to the defenders. The defenders averred that the goods in question had been ordered by them from Messrs Forbes & Company as principals, and that they had not dealt with the pursuers.

The Sheriff-Substitute (BOYD) allowed a proof, which disclosed that prior to March 1908 there had been a series of transactions between the defenders and William Forbes & Company, of which firm William Forbes was the sole partner. On these transactions Forbes & Company were due the defenders £71, 1s. 1d. The coal which Forbes & Company supplied to the defenders was procured from the Wester Moffat Colliery Company, of which Forbes was also a partner. In February 1908 the Wester Moffat Colliery Company was wound up, and its business transferred to the Wester Moffat Colliery Company, Limited, which was incorporated on 2nd March 1908. William Forbes owned 1000 shares in the new company, or about one-eighth of the share capital. The defenders were aware of the formation of the new company. In March, April, and May 1908 the defenders continued to order coals from Forbes, though they did not supply him with any after February. The invoices sent to the defenders prior to 2nd March were, *mutatis mutandis*, in the same terms

as the following one, dated 16th January 1908:—

"THE WESTER MOFFAT COLLIERY COMPANY,  
128 Bath Street,  
Glasgow, 16th Jany. 1908.

"Messrs A. Jeffrey & Co.,  
45 Hope Street.

"Receive from William Forbes & Co.

Waggon Nos.	Best House.	C.
31242	7	16
15347	7	19
—		15

To Shettleston  
Co-o. Socy."

Subsequent to the date of incorporation the invoices bore that the consignees received the coal from "the Wester Moffat Colliery Company," or from "the Wester Moffat Colliery Company, Limited." Four invoices, dated 29th February 1908—two days before the incorporation—bore, "Receive from the Wester Moffat Colliery Company." Andrew Jeffrey, sole partner of the defenders' firm, deposed that in February 1908 he had an interview with Forbes, when the latter informed him of the formation of the limited company, and that the advice notes would in the future come from the colliery direct, but the business was to continue as before between the defender and Forbes until the balance was wiped out. In April 1908 the pursuers sent the defenders an account. James Craig, the defender's managing clerk, deposed that he interviewed Mr Forbes thereanent, and that the latter said a mistake had been made, and that the account was to be charged in the usual way to wipe off the contra account. Mr Jeffrey deposed that Forbes made a similar statement to him at a subsequent interview. The defenders continued to order coal from Forbes & Company, and the invoices still came direct from the colliery. Forbes' evidence was to the effect that he had acted as agent for the pursuers by transmitting the defenders' orders to them, that these orders were executed by the colliery company, which had no claim against him. Towards the end of May the pursuers again wrote the defenders asking for payment, and payment not having been made, the present action was raised in September.

On 20th December 1909 the Sheriff-Substitute (BOYD) pronounced this interlocutor—"Finds that William Forbes was a partner in the Wester Moffat Colliery and owner of the business of William Forbes & Company, coal merchants, Glasgow; that he consigned coal from this colliery to the defenders, who are coal merchants in Glasgow, as a principal, and in February 1908 the defenders were creditors of William Forbes & Company for a sum of £70, 1s. 1d. on contra account; that in March, April, and May of 1908 the defenders continued to order the same coal from William Forbes & Company to the amount of £53, 7s. 11d: Finds that the defenders ordered this coal from William Forbes & Company as principals in diminution of the existing contra account, and not as agents for the pursuers: Therefore assolvies the defenders from the

conclusions of the action; and decerns," &c. On 12th February 1910 the Sheriff (GARDNER MILLAR) adhered.

The pursuers appealed, and argued—(1) The contract in this case was between the pursuers and defenders, though the order went through Forbes. The defenders' contention that they made their contract with Forbes as principal was in flat contradiction to all the documentary evidence in the case, and to Forbes' own evidence. The invoices gave the defenders ample indication that it was the pursuers who were supplying them with the coals. It was well-established law that when a party was dealing with an agent he was not entitled to set off against the demand of the principal for payment a debt due to him by the agent—*Liddell v. Young*, March 10, 1852, 14 D. 647. The defenders said nothing to the pursuers when they received the invoices and accounts. Accordingly they were now precluded from maintaining that they were purchasers from Forbes and not the pursuers—*Cornish v. Abington*, 1859, 4 H. & N. 549. The defenders had notice who were sellers of the coal, and notice had been held to include means of knowledge to which the party wilfully shuts his eyes—*Nelson v. The Easdale Slate Quarries Co., Limited*, [1910] 1 S.L.T. 21 (Lord Salvesen at p. 24). (2) In any event, if the contract was made by Forbes & Company, it was made by them as agents for the pursuers. When an agent sold in his own name for an undisclosed principal, the buyer could not set off a debt due by the agent to him against the principal's claim for the price, unless he had been induced by the principal to believe that the agent was selling on his own account—*Cooke v. Eshelby*, 12 App. Cas. 271.

Argued for the defenders (respondents)—There was no doubt that prior to the incorporation of the company on 2nd March 1908 the contracts were between Forbes as principal and the defenders. The defenders gave Forbes the order and got the coals from him. The mere fact that after 2nd March Forbes got them from an incorporated company, and not from a firm as before, made no difference to the defenders. The invoices simply told the defenders that the coals were consigned to their customers by the Wester Moffat Colliery Company. It did not matter to the defenders where Forbes got the coal. The raising of the present action was the first intimation the defenders had as to the change of their creditor.

LORD ARDWALL—We have heard an able argument in this case, but it seems to me to be a very simple one. What is sued for is the price of certain quantities of coal alleged to have been sold by the Wester Moffat Colliery Company, Limited, to Jeffrey & Company, coal merchants, Glasgow. It is not denied by the defenders that these coals were ordered, but they say they were ordered from or through William Forbes & Company. I shall revert presently to the effect that that may have upon the case. But, first of all, the coals were ordered. In the next

place, there is no doubt that they were delivered, and they were delivered under invoices which were addressed to the customers of Jeffrey & Company, and which bore this—“Received from the Wester Moffat Colliery Company.” But the invoices, though addressed *in gremio* of the invoice, as I have said, to these people were directed through the Post Office to Messrs Jeffrey & Company, 45 Hope Street, Glasgow. The defenders accordingly got distinct notice from these invoices that they were alleged to have received from the Wester Moffat Colliery Company, and from no other person, the goods mentioned in these invoices. Now the goods were delivered and the accounts were rendered, and there the pursuers' case ends. It seems to me quite a satisfactory one so far as it goes. We shall come to the defenders' case presently. We have got to this—the goods were ordered, they were delivered, the invoices were sent to the defenders as the goods were dispatched, the accounts therefor were duly rendered, the invoices and accounts were never repudiated or called in question by the defenders so far as the pursuers were concerned, and the price of these goods has not been paid.

Now what is the defence to this very simple case as one would suppose it to be? The defence is that a certain William Forbes & Company, whom I shall call Mr Forbes because he was the only partner, had before the incorporation of the Wester Moffat Colliery Company, Limited, certain dealings with the defenders; and it is said by the defenders that the same course of dealing continued after the incorporation of the company; that they were entitled to suppose that it was Forbes who was delivering the coal to them, and that it was Forbes who was their creditor for the price of the coal and not the limited company at all. Now what right had they to think that? It is said that they had no notice of any change in the position of matters. Plainly that cannot be accepted. In the first place, it is admitted that they knew of the incorporation of the company on the 2nd of March 1908. That meant the creation of a new legal *persona*. In the next place—and it is a most significant fact—instead of the invoice cards bearing “Receive from William Forbes & Company,” they bore after the incorporation of the company, “Receive from the Wester Moffat Colliery Company.”

The only fact put forward by way of detracting from the effect of this change in the business is that the four invoices immediately preceding the formation of the company, which were dated 29th February 1908, two days before the incorporation of the company, also bore, “Receive from the Wester Moffat Colliery Company.” How that happens I do not know, but very likely it was because they had now put out these new invoice cards, printed in view of the incorporation of the company. But I do not think the fact that two days before the incorporation of the company there was a change in the invoices

can really detract from the effect of the fact that there was a change after the incorporation of the company such as I have mentioned. On the contrary, I think it might well have shown and warned the defenders that now they were to regard the company as the persons from whom they were to receive the coal and to whom they were to be liable. Accordingly I think that the defenders had perfectly fair notice that matters were not to be in the same position as they were before.

In this state of matters they took the invoice and the accounts and said nothing about them. That would have been a very strong point against them, as they admit; but they say in excuse—“Oh! when these accounts were rendered we at once went to Forbes to get an explanation from him, and he told us that it did not matter, that it was all right, and that things were just as they were before”; and they go the length of saying that Forbes told them that they might go on taking the coals from the Wester Moffat Colliery Company, Limited, until they squared the old account which was due by Forbes to them for transactions totally unconnected with this company at all.

Now that is the story they tell. What does it matter? I shall assume on this part of the case that Forbes did assure them of that, that Forbes did tell them that things were exactly as they were before, and that they would be entitled to set off his account to them against this claim for the coal. How does that in any way affect the Wester Moffat Colliery Company, Limited? They gave Forbes no authority to make any such representation, and the course of dealing that prevailed before they came into existence could not affect them. Therefore I am totally unable to see how all this coming and going with Forbes, which the Sheriffs both apparently lay great stress upon, and on which apparently they consider the case turns, has anything to do with the relation of debtor and creditor between the pursuers and the defenders. Forbes had no authority to make any such representation, and the defenders had no business to accept his verbal assurances in the face of the distinct claim intimated to them by the terms of the invoices and accounts rendered month by month.

Now if they were not entitled to rely on anything that Forbes said, and if, looking at it from the pursuers' point of view, Forbes had no authority from them to represent that he had bought the coal, I think there is an end of the case. But I would further point out this. We have not any of Forbes' books produced. There is not a tittle of evidence in the case to show that he had ever purchased the coals in question from the Wester Moffat Colliery Company, Limited and sold them again to the defenders, which was apparently the former course of dealing. And there is certainly not a tittle of evidence to show that the Wester Moffat Colliery Company ever claimed this money from

Forbes. That being so, I really cannot see what the defence is. I think there is practically no defence.

In regard to the authorities quoted at the debate, I do not think that they need be referred to at any length. This case is exceedingly like the case of *Cornish v. Abington*, 1859, 4 H. & N. 549, quoted to us by the pursuers, and is, I think, ruled by that case. Even if the Sheriffs were held to be right with regard to the rest of the case, this question would be practically decided by the case of *Cooke v. Eshelby*, 12 App. Cas. 271, in which it was held that where an agent had acted for an undisclosed principal, and the undisclosed principal came forward and claimed the price of the goods sold through the agent, the buyer was not entitled to set off a personal debt due from the agent to him against the claim of the principal, unless in making the contract he was induced by the contract of the principal to believe that the agent was selling on his own account. I do not think, however, that it is necessary to consider that case, because I hold that the claim for the price of these goods is clearly established and that the defence of a former course of dealing between Forbes and the defenders is entirely worthless.

LORD SALVESEN—The most favourable way in which this case can be presented for the defenders is that they dealt with William Forbes & Company as principals, and in the hope and belief that they would be entitled to set against the old account due to them by William Forbes & Company the price of the coals which they had ordered from them. Even on that view, however, when it appears that the goods in question were delivered by a company to whom Forbes had transmitted the order, and that Forbes never acquired a property in these goods at all, I cannot see how the true owners and sellers of the goods can be prevented from coming forward and suing for the price because of an unfounded belief that existed in the minds of the defenders with regard to the capacity in which William Forbes & Company transacted the business.

If the defenders had been able to show, not merely that they transacted with Forbes on the footing that he was a principal, but that he was in fact a principal and had acquired the property of the goods which they purchased, they would of course have had a totally different case. But there is no suggestion by Forbes, whom they examined as a witness, that he had ever acquired the property of these goods by purchase or otherwise from the Colliery Company. On the contrary, his evidence is to the effect that he acted substantially as agent by transmitting the orders which he received from the defenders to the Colliery Company, that these orders were executed by the Colliery Company, and that the Colliery Company had no claim against him for the price. In these circumstances it appears to me that the contention of the defenders that they are entitled to retain the price of the goods

supplied to them by the Colliery Company for a debt of William Forbes & Company, contracted before the Colliery Company ever came into existence as a legal entity, is absolutely untenable; and that the Colliery Company have done nothing to bar themselves from the ordinary rights that a supplier of goods has as against the person who receives them to recover the contract price. I have accordingly no difficulty in agreeing with the judgment which Lord Ardwall has proposed.

I may say that I do not think it necessary, in the view I have taken of the case, to consider the effect of the notice contained in the invoices and accounts delivered to the defenders except for this purpose, that it shows that the Colliery Company consistently acted upon the footing that they were the sellers to the defenders, and that they treated the transaction from beginning to end as one with which Forbes had no connection otherwise than as the person who transmitted to them the orders from the defenders.

LORD JUSTICE-CLERK—I am of the same opinion. The case is remarkable in this, that whatever view you take of it—and your Lordships have looked at it from different points of view—it necessarily leads to the same result. This new Colliery Company at a certain stage of the proceedings, where Forbes had been supplying coals to the defenders, came as a new Colliery Company to have dealings with these defenders? What have they done to put them in the position that they are not entitled to get the price of the coals which upon the face of the proceedings they sold to the defenders and to nobody else. They issued their own invoices to the party whom Forbes informed them the goods were going to, and they sent the invoices to the defenders, who received and kept them without remark. They then sent the account and asked for payment. What is the course taken by the defenders? They took no notice of the account. They say they did that because Forbes had told them it was all a mistake and they might tear up the account, and they never troubled their heads about it at all. They got a series of letters from the Colliery Company asking them to pay up, but to none of these letters did they send any answer, nor did they go to the office of the Colliery Company and endeavour to clear the matter up. They passed the whole matter by in silence. I do not think the Colliery Company have in their proceedings done anything tending to give a right to the defenders to maintain the pleas which they now maintain.

The counsel for the defenders did not attempt to controvert the law as laid down in the cases quoted for the pursuers. I have carefully noted the words used in the case of *Cooke v. Eshelby*, 12 App. Cas. 271, as regards what a buyer must show when he refuses to pay the price of goods to the principal to whom undoubtedly the goods belong up to the moment when they came into his possession. In that

case it was held that the buyer must have been induced by the conduct of the principal to believe, and did believe, that the agent—that is, the person through whom he got the goods—was selling on his own account. I can see nothing in this case going the least way towards establishing that position. Therefore I agree entirely in all your Lordships have said, and am clearly of opinion that the judgment of the Sheriff must be recalled and decree given to the pursuers with expenses.

The Court pronounced this interlocutor—

“Sustain the appeal, and recal the said interlocutors appealed against: Find in fact (1) that the pursuers sold and delivered to the defenders the goods specified in the accounts sued on, and that on the dates and at the prices therein specified; and (2) that the defenders are still due the amount thereof: Find in law that the defenders are liable to the pursuers for the amount claimed by them: Therefore repel the defenders’ pleas-in-law, and decern against them for payment to the pursuers of the sum of £53, 7s. 11d., with interest thereon at 5 per cent. per annum from date of citation.”

Counsel for Pursuers (Appellants)—Mori-son, K.C.—MacRobert. Agents—Graham Miller & Brodie, W.S.

Counsel for Defenders (Reclaimers)—Sandeman, K.C.—Lippe. Agents—Dove, Lockhart, & Smart, S.S.C.

Thursday, January 19.

## SECOND DIVISION.

[Sheriff Court at Edinburgh.]

GARRIOCH v. GLASS.

Process—Appeal—Expenses—Appeal on Question of Expenses merely.

A brought an action in the Sheriff Court against B to recover £75 of principal and £75 described as bonuses. B tendered the £75 of principal with expenses to the date of tender. The tender having been refused, a proof having been allowed and taken, and an appeal to the Sheriff from his Substitute heard, A held a decree for the £75 of principal with interest from the date of citation, and, with some slight exception, the expenses. B, the defender, appealed to the Court of Session, accepting the Sheriff’s judgment on the merits, but objecting to the allowance of the expenses so far as subsequent to the interlocutor allowing proof. He maintained that A should bear the whole expenses of the proof.

The Court entertained the appeal, although it was only concerned with expenses, on the ground that the allowance of expenses was clearly unjust, and found the pursuer liable in the expenses of the proof.

Alexander Garrioch, manufacturer, 31 Blackfriars Street, Edinburgh, brought an action in the Sheriff Court at Edinburgh against J. M. Glass, solicitor, 86 George Street, Edinburgh. He claimed “payment of the sum of £150 for cash advances and bonuses thereon,” and craved the Court “to decern against the defender for payment of the sum of £150, with interest thereon at the rate of £5 per centum per annum from the date of citation to follow hereon till payment.” The £150 was to the extent of £75 made up of three sums of £30, £30, and £15, which the pursuer averred that he had advanced to the defender on behalf of Mr James L. Addie, Glasgow, and to the extent of £75 of bonuses of equal amount on the said sums. He founded his claim upon three letters, which were in the following terms:—

“86 George Street,

Edinburgh, 1st July 1907.

“Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of thirty pounds sterling, which is to be repaid with a bonus of thirty pounds when the business of the South Wales Colliery transference takes place, which is expected by the end of the month of July current or early in August. I hereby guarantee the repayment of the above sum to the extent of thirty pounds sterling.

“J. M. GLASS.”

“86 George Street,

Edinburgh, 24th August 1907.

“Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of thirty pounds sterling, which sum is to be repaid with a bonus of thirty pounds when the business of the South Wales Colliery transference takes place, which is expected by the end of about three weeks hence. I hereby guarantee the repayment of the above sum of thirty pounds sterling.

J. M. GLASS.”

“86 George Street,

Edinburgh, 15th November 1907.

“Received from Mr Alexander Garrioch on behalf of Mr James L. Addie of Glasgow the sum of fifteen pounds sterling, which sum is to be repaid with a bonus of fifteen pounds when the business of the Sans Lucas Company business is completed, which is expected to take place towards the end of the current month. I hereby guarantee the repayment of the sum of fifteen pounds.

“J. M. GLASS.”

On record the defender averred that he had all along been willing to implement the guarantee undertaken by him in the letters, and tendered the principal sum advanced by the pursuer with expenses of process to date. This offer not having been accepted, the Sheriff-Substitute (GUY) on 22nd October 1909 allowed parties a proof of their averments. The facts of the case as established by the proof are sufficiently disclosed in the interlocutor and note of the Sheriff-Principal, *infra*.

By interlocutor dated 24th February 1910 the Sheriff-Substitute granted decree against the defender for payment of (1) £30, with interest from 1st July 1907 till payment; (2) £30 with interest from 24th August 1907 till payment; and (3) £15 with