

such an award on the merits, even though the reasons for it were before us. I think, therefore, that the interlocutor of the Lord Ordinary should be recalled.

LORD SHAND concurred.

LORD ADAM—I am entirely of the same opinion. In substance the pursuer's objections come to this, that the referee has awarded too much. It is not suggested that he has given damages for anything not included within the scope of the reference, and that being the state of matters, I quite agree with your Lordships that we cannot send the case back to the arbiter upon an alleged error in judgment. That being the true nature of the objections, the reasons for his findings, even if supplied by the arbiter, would not in any way aid the pursuers' case.

The LORD PRESIDENT and LORD DEAS were absent.

The Court recalled the interlocutor reclaimed against, repelled the objections, and remitted to the Lord Ordinary to proceed in the cause.

Counsel for Pursuers (Respondents)—R. Johnstone—Darling. Agent—H. W. Cornillon, S.S.C.

Counsel for Defender (Reclaimer)—Trayner—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Tuesday, February 3.

SECOND DIVISION.

[Sheriff of the Lothians.]

GRAHAM v. TAIT.

Sale—Principal and Agent—Title to Sue—Agent under General Mandate who has Accounted to the Mandant for Price.

A farm-steward sued for the price of an ox, alleging that he had sold it on behalf of his employer, and that he had accounted to him for the price. He produced no assignation to the debt from the employer. *Held* that he had a title to sue.

Thomas Graham, farm bailiff at Howick, in Northumberland, sued George Tait, butcher at East Linton, in the Sheriff Court at Haddington, for payment of £30, as the price of a bullock which belonged to the Earl of Haddington, and which the pursuer alleged that he, while in the Earl's service as farm-bailiff at Tynninghame, had, on 12th February 1883, sold and delivered to the defender. He alleged that the defender had not paid the price of the bullock, but that he (pursuer) had paid and accounted to the Earl for it.

The defender denied having bought or received delivery of the bullock in question. He averred—"If the pursuer has accounted for and paid the £30 in question to the said Earl, such was a gratuitous act on his part. In any view, he was under no obligation to do so, so far as the defender was concerned. He stood and stands in no relation whatever towards the defender as creditor in said £30 or otherwise."

The pursuer pleaded that the sum sued for was due and resting-owing to him by the defender.

The defender stated the following preliminary pleas:—" (1) No title to sue. (2) The only party who can competently sue the present action is the Earl of Haddington; in any view, his Lordship must be a party thereto, or the pursuer is bound to produce a valid assignation by the former to the alleged debt, and sue thereon. The action ought, therefore, to be dismissed, and the defender found entitled to his expenses."

The Sheriff-Substitute (SHIRREFF) sustained these pleas and dismissed the action.

"*Note.*—The whole case of the pursuer is founded on the statement that the ox, the price of which is sued for, was sold by him only as the servant of the owner. That he has accounted to the owner for the price does not entitle him to sue the defender unless the owner's right has been assigned, of which there is no averment. The Sheriff-Substitute thinks, therefore, that this petition falls to be dismissed."

The Sheriff (DAVIDSON), on appeal, adhered.

The pursuer appealed to the Court of Session. There was laid before the Court an acknowledgment by Lord Haddington's factor, dated subsequently to the Sheriff's judgment, and stating that on 7th May 1884 the pursuer had accounted for £30 as the price of a bullock sold on 12th February 1883, and alleged to have been bought by and delivered to the defender.

The pursuer argued—He would have averred a title to sue founded on a general authority to sell from the Earl if the Sheriff had given an opportunity of amending his record, which he did not do. He was selling as agent under a general mandate for a disclosed principal, and such agent had a title to sue. The defender could suffer no prejudice in having the question tried with him. He could give a valid discharge.

The defender replied—The relation of creditor and debtor did not exist between him and the pursuer. The proper creditor, on the pursuer's own statement, was the pursuer's employer. Pursuer as bailiff had only a power of management; he had no special mandate conferring power to sue for debts due to his employer. In any case, what mandate he had fell on his leaving the service. The alleged settlement of accounts between the pursuer and his employer conferred no title to sue. A power to sell implied power to receive payment, and a servant selling for his master was bound to account, but should he account without having received payment he did not acquire a right to sue for the price in his own name.

At advising—

LORD YOUNG—I think we should simply recal the Sheriff's interlocutor and remit to him to proceed with the cause, repelling the first and second preliminary pleas for the defender which the Sheriff has sustained.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court recalled the interlocutor, repelled the pleas above stated, and dismissed the action.

Counsel for Pursuer (Appellant)—Darling—W. C. Smith. Agents—Purves & Wakelin, S.S.C.

Counsel for Defender (Respondent)—Rhind—Young. Agents—Charles & George Robb, Solicitors.