MARCH 20, 1871.

THOMAS VICKERS, and Another, *Appellants*, *v.* THEODORE HERTZ, *Respondent.*

Sale—Delivery Order—Transfer—Fraud by Factor—Factors Act—*V. having purchased iron from the Carron Company, which the Company were under obligation to deliver to him on demand, on being informed by his agent, C., that purchasers had been found, sent to C. delivery orders signed in these terms: "Please deliver to C. as per order," and addressed to Carron Company. C. acted fraudulently, having no purchasers in view, and took the delivery orders and pledged them for value, and indorsed them to H., and afterwards stopped payment. V., on hearing of C.'s bankruptcy, countermanded the orders.*

HELD (affirming judgment), *That the case was within the Factors Act, and that C. having received an order for the delivery of goods, H. was protected as a mortgagee who had advanced money on such goods.*

The Factors Act is not confined to orders for specific goods, or to factors for sale: an agent entrusted with the document of title, to complete a sale already made, is equally within the Acts.[1]

This was an appeal from a judgment of the First Division of the Court of Session. The action began in the Sheriff Court of Lanarkshire, and concluded, that the defender Hertz should deliver to the pursuer Vickers 800 tons of No. 1 Carron pig iron, and that damages should be recovered for the unlawful possession of the property. In 1856, Mr. Vickers being anxious to sell some parcels of pig iron, employed Campbell Brothers, who were iron merchants in Glasgow, to dispose of them. The parcels had been ordered by Mr. Vickers from the Carron Company, and were to be delivered to him on demand. Messrs. Campbell having sold some of the parcels, and there being about 800 tons still on hand, Mr. Vickers authorized them to sell the same at 67*s.* 6*d.* per ton, and sent the delivery orders, which were in the usual form, authorizing the delivery to Campbell Brothers. Those gentlemen took the delivery orders to Mr. Hertz, who advanced them £2400 on such orders being endorsed to the Carron Company by Messrs. Campbell. The Carron Company placed the iron to the credit of Mr. Hertz, and Messrs. Campbell stopped payment. Since then Mr. Hertz had sold the iron at a loss. Mr. Vickers, in the present action, claimed the iron, or its price, and the profits made on it, on the ground, that Messrs. Campbell had fraudulently disposed of it, and such pledge was invalid. Mr. Hertz, in defence, said he acted *bonâ fide*, and was entitled to sell the iron to reimburse the money advanced on security of the delivery orders. The Court of Session having assoilzied the defender, the pursuer now appealed.

The Lord Advocate (Young), *Brown* Q.C., and *Dicey*, for the appellants.—The interlocutors were wrong. The appellants' contract with the Carron Company was never effectually assigned to the respondent, and therefore the respondent was not entitled to delivery of the iron under that contract for his own use. The contract is to be distinguished from the delivery orders; neither of them refer to any specific iron, and there had been no separation of specific goods down to the bankruptcy of Campbell when the order was stopped. The appellants' claim against the Carron Company was thus a simple contract debt. There is no analogy between this case and that of the transference of goods in the hands of warehouse keepers. The personal right of the purchaser under the contract may be assigned by a proper deed of assignation, but the possession of the goods while in the hands of the seller cannot be affected by any deed or order given by the purchaser in favour of another, without actual delivery. The order to the Carron Company to deliver to Campbell was not an assignment by the law of Scotland, there being no clear intention to transfer the right to the iron—Stair, iii. 1, 4. There was nothing given to Campbell but a naked power or authority to receive and hold for Vickers. A delivery note has not the effect of an assignation—*M'Ewan* v. *Smith*, 6 Bell, Ap. C. 340; *Arbuthnot* v. *Paterson*, M. 14,220. The appellant did not invest Campbell with the ostensible ownership. Mere possession does not imply ownership where the nature of the possession is obscure, and negatives that inference—1 Bell's Com. 250 (5 ed.); nor can it be said, that it was owing to any fault or representation of the appellant, that Campbell fraudulently made use of the goods, and so he is not estopped from now claiming the goods—*Swan* v. *North British Australasian Company*, 2 H. & C. 175. The appellants lost no time in countermanding the order upon the Carron Company

[1] See previous reports, *Pochin* v. *Robinows*; 7 Macph. 622: 41 Sc. Jur. 334. S. C. L. R. 2 Sc. Ap. 113; 9 Macph. H. L. 65; 43 Sc. Jur. 346.

to deliver to Campbell. At common law Campbell could not for his own purposes pledge the goods, for Campbell was not a factor, but only a broker — *Mitchell* v. *Mowat*, M. 4468; *Colquhoun* v. *Findlay*, 15th November 1816, F. C., and *Ede* v. *Findlay*, 15th May 1818, F. C.; 1 Bell's Com. 484; *Kingsford* v. *Merry*, 1 H. & N. 516; nor was this a case under the Factors Acts, 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, 5 and 6 Vict. c. 39, for in order to come within those Acts the agent must be entrusted with the goods for sale—*Heyman* v. *Flewker*, 13 C. B. N. S. 519; *Baines* v. *Swainson*, 4 B. & S. 270; *Fuentes* v. *Montis*, L. R. 3 C. P. 268. Moreover, a delivery order for goods, not specific, is not a document of title within the meaning of the Factors Acts; and the respondent obtained no valid security under the Factors Acts, having had notice of Campbell's want of authority to give such security before receiving possession. Campbell was in the position of one guilty of theft, and could give no title. Therefore on all these grounds, the interlocutors were wrong.

Sir R. Palmer Q.C., and *Jessel* Q.C., for the respondent, were not called upon.

LORD CHANCELLOR HATHERLEY.—My Lords, this is a case of considerable importance to the parties, but, although it has been argued at very great though not improper length, it really lies in an extremely small compass. We have the facts stated in a finding which must be taken as conclusive between the parties, and these facts are not of any great complication. The facts that are found are these: that the appellant was in fact entitled, at the time of the transaction in question, in the months of February and March 1866, to certain iron which the Carron Company was under obligation to deliver to him on demand; that they instructed Campbell Brothers in February and March to make arrangements for the sale of various parcels of this iron, which he was so entitled to ask and obtain on demand from the Carron Company; and that, after several parcels had been sold, Campbell Brothers telegraphed to him on the 26th of March 1866, telling him, that they had now got certain purchasers for the remaining 800 tons, and asking an immediate reply by letter; to which Vickers replied, "I am in receipt of your telegram saying you can place the 800 tons of iron at 67*s.* 6*d.* Will you inform me when they will take delivery and also when payment?" It is further found, that after some more correspondence, Vickers agreed to the proposal for the sale of the 800 tons of iron, being part of the iron which the Carron Company were under obligation to deliver to him on demand, and that on the 28th of March 1866, he enclosed to Campbell Brothers a document in these terms:—"37 *Princes Street, Manchester, March 28th*, 1866.—Carrick and Brockbank to Messrs. the Carron Co.—Please deliver on account of order No. 65, to the order of Thos. Vickers, Esq. of Manchester, 200 tons No. 1 Carron pig iron at Grangemouth or at Grahamstown station as required. (Signed) CARRICK and BROCKBANK;" and it was indorsed on the back "Carron Co.—Please deliver Messrs. Campbell Bros. as per order. THOMAS VICKERS." There was some little discussion as to whether the words "as per order" meant the original order No. 65 referred to in the condescendence, but that, I think, is put beyond doubt. Then it is found, that this document and three others in similar terms were sent by Vickers to Campbell Brothers, in the belief that they were to be used by Campbell Brothers for the purpose of giving delivery to the purchaser of the 800 tons of iron, and that Campbell Brothers, instead of using the documents for the purpose for which they were sent, proposed to Hertz to make them an advance of money on receiving the documents with an indorsation in his favour, but that Hertz refused to make any advance until the documents were stamped, and a place of delivery inserted in each of them by Vickers. Then it is found, that Campbell Brothers accordingly sent the documents back to Vickers that they might be stamped, and a place of delivery inserted in each, and that this having been done, the documents were returned to Campbell Brothers, who then renewed their application to Hertz for an advance of money, and that on the 9th of April 1866 Hertz advanced to Campbell Brothers £600 on receiving from them the order dated 28th of March 1866, endorsed thus: "Please deliver to Theodore Hertz, Esquire, as per order, Campbell Bros." Then it is found, that the respondent Hertz sent the document so endorsed to the Carron Company, and obtained from them a letter of acknowledgment, and an undertaking in the following terms:—"*Carron, 10th April* 1866.—Sir,—We have received your letter of the 9th current, and agreeably to your request have placed the 200 tons of Carron pig iron No. 1, endorsed Thomas Vickers, Esqre., to your credit. For Carron Co. WILLIAM DAWSON, manager." Then it is found, that on the 11th of April the respondent advanced £1200 more to Campbell Brothers, and received in exchange two documents in similar terms to that of the 28th of March, and that he forwarded these documents to the Carron Company, and received from them a letter of acknowledgment as before, stating, that they had placed the iron to his credit for delivery when required. Then it is found, that on the 9th of April the respondent advanced a further sum of £600 to Campbell Brothers, receiving from them a fourth document in similar terms to the former ones, which he forwarded to the Carron Company, and that he received in return a similar letter of acknowledgment and undertaking from the Carron Company. Then it is found, that the transactions between Campbell Brothers and the respondent were entered into by Campbell Brothers fraudulently for the purpose of cheating the appellant and appropriating his property to their own pressing purposes, but that the respondent advanced his money to

Campbell Brothers, and took these documents from them in good faith and in the belief that the iron in question was deliverable by the Carron Company to Campbell Brothers in their own right. Then it is found, that 125 tons of the iron were delivered by the Carron Company to Hertz. It appears, that the fraud of Campbell Brothers was disclosed on their becoming bankrupts, and the question then arose between Vickers, who sent these orders to Campbell Brothers with his endorsement, and Hertz, who received them from Campbell Brothers, and who claims to have the benefit of the produce of the iron in discharge of the debt due to him from Campbell Brothers in respect of the advances so made by him. Now the case was argued at great length and with great ability by the Lord Advocate and Mr. Brown, who was with him. But the Lord Advocate took no notice whatever of that which really seems to me to be the turning point in the case, namely, the Factors Act. He left it to Mr. Brown, in the division of labour between them, to satisfy your Lordships, that Hertz, the lender of the money, had not acquired a title to the iron by virtue of the Factors Act. The learned Judges in Scotland so far justified the Lord Advocate in the course of argument he adopted in that respect, because they did not take into consideration the Factors Act, but they rested their judgment on a different ground, namely, that the documents which had been so placed in the hands of Campbell Brothers by Vickers, had put Campbell Brothers in possession of a right over the iron in question which they were entitled to transmit to others with whom they dealt by an endorsement on the order similar to that which they received from Vickers, and that so Campbell Brothers were enabled to commit the fraud, Hertz *bonâ fide* trusting them as being in possession of that of which they had the symbol to dispose of. The principles which the learned Judges stated were no doubt the broad principles on which the Factors Act was founded, but whether or not, without the assistance of that Act, which was passed to give effect to those principles, Mr. Hertz could have succeeded, might possibly be a question. But the Factors Act disposes conclusively of the whole question.

The Lord Advocate, in his argument on behalf of the appellant, relied mainly on the character of the instrument being such as simply to indicate, that Campbell Brothers were only mandatories of Vickers, for the purpose of obtaining delivery of the iron, of which Vickers was the purchaser. But there was nothing on the face of the document given to Campbell Brothers, shewing it to be simply of that character. The Lord Advocate urged, that it was not a transfer, but simply a document which entitled them to demand delivery of the iron in question from the Carron Company, and by means of which they were, as the agents of Vickers, to dispose of the iron to a purchaser on terms arranged between themselves. He contended, that it did not appear on the face of the note whether they were purchasers or owners, or whether they were agents, or, as he called it, mandatories; and that any party who received this document from Campbell Brothers, seeing it so imperfect and not conclusive on the face of it, would not be entitled to derive any other right from the possession of the instrument than that which Campbell Brothers themselves possessed; and that inasmuch as no higher or greater right was expressed on the face of the instrument, than that which might accompany an order given to a mandatory to obtain the delivery of iron of which Vickers was the purchaser, Hertz could not make a title through Campbell Brothers to the property in question. Further than that, it was argued, that inasmuch as the document was not an order for the delivery of any specific iron, but only an engagement entered into for the delivery of so much iron of which the Carron Company were large manufacturers, it was nothing more than an assignation of a right to demand the iron, no right to the iron itself, but only a right to require the delivery of the iron when the person should be minded to demand the fulfilment of his contract. But I think it is clear, in the state of circumstances we have before us, that Campbell Brothers would be entitled to claim the delivery.

But really the Factors Acts have disposed of the whole question. The Factors Act of the 5 and 6 Vict. required, that justice should be administered between persons trusting each other, as all persons are obliged to trust each other in the course of trade, on this principle, that when one person arms another with a symbol of property, as a means of acquiring the actual possession of the property—a symbol which to all the world is liable to confusion with the actual right of property—he should be the sufferer when a fraud of this kind takes place, rather than the person who gives credit to that which appears to include a right to the property, and is misled by the position in which the person is placed who is trusted by the owner of the property, and by that means is enabled to commit a fraud. Originally it was thought right, that factors, who were entrusted with the right of selling goods for others, if they chose to make sales on their own account, should be dealt with as competent to make a title to the goods. That was extended by the second Act to a power of mortgage, but in each of the first two Acts there was a proviso, that the person who so dealt with the factor must have dealt with him not knowing that he occupied the position of factor, because if he knew that he occupied that position, he was not to be entitled to have the benefit of those Acts.

Then at last came the 5 and 6 Vict. c. 39, by which a person dealing with a factor is protected in the manner there described. How is he protected? It is there enacted, that after the passing of this Act, any agent entrusted with the possession of goods, or of the documents of title to

goods, shall be deemed and taken to be the owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so entrusted. Then we come to the 4th section, which says, "That any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods, or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize either by endorsement, or by delivering the possession of such document to transfer or receive goods thereby represented, shall be deemed and taken to be a document of title within the meaning of this Act."

It appears to me, that these documents come expressly within the terms of that section. They are orders for the delivery of the goods. The document is an authority to Hertz to receive the goods which Vickers has transferred to Campbell Brothers, as his authority to receive the goods on his part. It seems to me to come plainly within the words of the Factors Act as a document on which Hertz advanced his money, and as the result of which he obtained the goods by virtue of it, and that he is therefore protected by the 5 and 6 Victoria in his title to these goods as mortgagee. An argument was pressed by Mr. Brown, that this Act applies all through to actually specified goods, and that it does not apply to a case, where there is a mere contract to make and deliver goods for the benefit of the party to the contract. In the first place, I should doubt very much the application of that argument to the facts before us, because these were goods of the Carron Company deliverable on demand. It is not a case of having goods manufactured specially for the purpose of the contract, for the Carron Company at all times have large quantities of iron at their disposal ready for any demand that may arise, and one of your Lordships put the case of a delivery order for 100 hogsheads of wine or 100 tons of coal in a particular ship. Is it to be said, that because each 100 tons cannot be delivered specifically, the matter would be withdrawn altogether from the operation of the Act? I apprehend, that would be narrowing most materially the operation of this Act, which was intended for the best interests of commerce, and for the benefit of all engaged in trade. I apprehend, that these are plain and distinct delivery orders for so many tons of iron, and that Campbell Brothers appeared to be in full possession of control over these orders for the delivery of so many tons, and that they passed them over by way of mortgage to Hertz, and that consequently they come necessarily within the 4th section of the Act, and I think that the decision of the Court below was right: that decision ought therefore to be affirmed, and the appeal dismissed with costs.

LORD CHELMSFORD.—My Lords, if this case had to be decided independently of the Factors Act, I should have required to hear the learned counsel for the respondent before I came to my decision.

My difficulty throughout the argument has been to understand exactly what was the effect of the endorsement to Campbell Brothers of the delivery orders by the agents of the Carron Company. Those indorsements (with one exception) are in these terms: "Carron Co. Please deliver Messrs. Campbell Bros. as per order." Now the order referred to is—"Please deliver on account of order No. 65 to the order of Thomas Vickers 200 tons of No. 1 Carron pig iron." If the words "as per order" refer to the order of Vickers, to whom or to whose order the iron was to be delivered, then the endorsement restrained the delivery to Campbell Brothers for the account, and on the behalf of Vickers. If this were the case, the endorsements to Hertz by Campbell Brothers would have been a diversion from the object for which the endorsements were made to them. In that case Hertz would have received documents which shewed him the limited right possessed by Campbell Brothers to receive the iron for Vickers, and he could not be regarded as a *bonâ fide* holder of delivery orders transferring to him a right to the delivery of the iron. If, then, with a knowledge of the limited authority given to Campbell Brothers, Hertz used documents which gave him no just ground for believing, that they had any authority to indorse the delivery orders to him, and obtained the iron from the Carron Company, even if the company were excusable for delivering it to him upon the documents, he would be wrongfully possessed of the iron and answerable to the appellants.

But I am disposed to think, that the words "as per order" in the endorsements of the delivery orders to Campbell Brothers do not apply to the order of Vickers, by which the delivery of the iron was to be directed by him, but to the order No. 65, which, although there is no copy of it before us, must have been the original contract with the Carron Company, by which the iron was sold to Vickers. If this is so, then the endorsements to Campbell Brothers as per order would have given them an authority over the contract, and have enabled Hertz, with perfect *bona fides*, to advance his money upon the security of the documents of title, and under these circumstances Hertz would have had a perfect defence to the action of the appellants.

But I entertain no doubt, that Hertz has a complete answer to the action under the Factors Acts by the endorsement of the delivery orders by Campbell Brothers to him.

It was objected, that the delivery orders were not within the Acts, because there were no specific goods to which they were applicable, and because Campbell Brothers were not entrusted with the delivery orders for sale of the goods to which they related. There appears to me to be

no ground for these objections. The orders were for the delivery of specific quantities of iron which had been previously purchased by Vickers, and which he was entitled to have delivered to him on demand. Upon the production of those delivery orders, the quantities of iron mentioned in them must have been forthcoming, and it seems to me to have been perfectly immaterial, whether these quantities had been previously set apart awaiting the demand for delivery, or whether they were on the production of the delivery orders separated from a larger quantity.

With respect to the objection, that Campbell Brothers were not entrusted with the delivery orders, for the purpose of sale of the iron, it appears to me, that it is founded upon the erroneous notion that in order to bring a dealing with a delivery order within the Factors Act, it should be placed in a factor's hands, before any sale of the goods to which it relates has been effected, and in order to enable him to make such sale. But surely if a factor has sold his principal's goods, and the principal sends him the delivery order for the purpose of completing the sale by the delivery of the goods, this may, without doing any violence to language, be called an entrusting of the factor with the delivery order for the sale of the goods. In the present case Vickers was cheated out of the delivery order by Campbell Brothers, but that is not material. He was told, and believed it, that Campbell Brothers had sold his iron, and he sent the orders to them, and so entrusted them with them for the express purpose of carrying out the supposed sale. I agree then with my noble and learned friend on the woolsack that the interlocutor must be affirmed.

LORD WESTBURY.—My Lords, if the attention of your Lordships had been called at the beginning of this argument to the fact, that the question depended on the construction of the Factors Act, a great deal of judicial time would have been usefully saved. There can be no doubt that it lies wholly within the compass of those Statutes.

An ingenious argument was presented to the House by Mr. Brown, which is divisible into two parts. Mr. Brown contended, that any delivery order for goods must specify on the face of it the particular goods included in the order, and that they must be shewn to have a specific existence —to be earmarked as it were for the purpose of the order, and he illustrated that argument by reference to a principle of English law, namely, that a bill of sale or an instrument purporting to be a transfer of goods which shews on the face of it that the goods are not in existence does not amount to an assignment, but amounts only to a contract for future delivery; as, for example, if I purport to transfer a hundred sacks of wheat, the produce of a crop which is now growing, that on the face of it is a transfer of goods not in existence but to come into existence, and it will not have validity by common law as a transfer, but it will only be a contract. Whether that argument be sound in Scotch law, I need not stop to inquire, because it is perfectly clear, that it has no application to the facts before us. The facts as found are simply these: That Vickers had contracted with the Iron Company for the purchase of 800 tons of iron; that he employed Campbell Brothers to sell them; that they informed him, that they were able to effect a sale, and that he accordingly sent to Messrs. Campbell an order directing the immediate delivery of the iron, which must be treated as being duly delivered in pursuance of that order.

Then the second argument of Mr. Brown was this, that the agent, the factor within the meaning of the Act, must be an agent for sale, and that Campbell Brothers did not answer that description, seeing that they had contracted to sell previously to their receiving the delivery order. That argument was founded on some passage that was read, I think, from a judgment of Mr. Justice Willes, who said that the factor mentioned in the Act must be deemed to be a factor for the sale. What is stated in the Act is this, that a factor who is entrusted with the goods, or with a document of title to the goods, shall be authorized to deal with the goods in a particular manner, and then the 4th section goes on to define what is meant by a document of title, and the definition given is one which will include these orders. What we have to inquire, therefore, in the case is, whether the factor was entrusted by the owner with the possession of a document of title entitling the factor to give possession of the goods. That undoubtedly he was. If the words of the Act had been factor for sale, I should have been of opinion, undoubtedly, that that meant one who has contracted to sell, but has not completed the sale, but has received from his principal a document of title in order to complete the sale, and who, as the recipient of that order, is an agent for the sale within the meaning of those words. Those words, however, are not found in the Act, and the question simply is this: Were Campbell Brothers entrusted with the possession of a document of title? Undoubtedly they were, and, therefore, they were authorized to deal with the document in favour of Hertz in the manner they have done.

The only question that remains is, whether Hertz dealt with them *bonâ fide*. At first there seemed to be some possibility of doubt as to that by reason of the form of the indorsement, but upon looking more minutely into the Act, that is proved to be immaterial, for it is perfectly clear, that Campbell Brothers would answer the description of a factor entrusted with a document of title, although not entitling them on the face of it to transfer it by indorsement. The power to deal with the document is a power derived from the enabling clauses in the Act, and does not require for that purpose any particular form of indorsement beyond that which enables them to be designated as persons entrusted with the possession of a document of title.

On every ground, therefore, it must be regretted, that a matter of this kind resting purely on two or three very bad subtleties should have been brought up to your Lordships' bar. I therefore concur that the appeal ought to be dismissed with costs.

LORD COLONSAY.—My Lords, notwithstanding the ingenious criticisms that we have heard on the Factors Act, and the very ingenious arguments rested on these criticisms, I have not been able to arrive at any other conclusion than that to which my noble and learned friends have come. I think that this case comes clearly within the scope of the Factors Act, and that Campbell Brothers were entrusted with a document of title. That being so, on the grounds which have been stated by your Lordships, I can have no doubt in concurring in the judgment proposed. But I may say further, that, on the grounds on which the case was rested in the Court below, I should also have been of opinion that that judgment was well founded. The law of Scotland in regard to this matter had been, previously to the Factors Act, for a considerable time gravitating in that direction, and now that state of the law has been confirmed over the whole kingdom by the Factors Act. It was laid down by Mr. Bell in his Commentaries upon the law, that a factor had the power to pledge his principal's property. Upon every ground, therefore, I think the judgment of the Court below ought to be affirmed, and that the appeal ought to be dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellants' Agents, A. K. Morison, S.S.C.; Simson and Wakeford, Westminster.—*Respondent's Agents*, Hamilton, Kinnear, and Beatson, W.S.; Grahames and Wardlaw, Westminster.

MARCH 20, 1871.

DAVID JAMES SMEATON, *Appellant*, *v.* THE MAGISTRATES AND COUNCIL OF ST. ANDREWS, as Commissioners of Police, *Respondents.*

Police Improvement (Scotland) Act, 1862—Contract with Owner of premises affected by works—Implement—*S., the owner of grounds, through which the Police Commissioners proposed to make a sewer, objected to it and suggested another route, but the Commissioners insisted on their original scheme. S. then made a large claim for compensation, whereupon a negotiation took place which ended in heads of agreement, purporting that the proposal of S. was accepted, subject to a slight alteration, and that a formal deed would be executed. The Commissioners afterwards abandoned this agreement, being advised that it was* ultra vires, *whereon S. raised an action concluding for implement.*

HELD (reversing judgment), *That it was competent for the Commissioners to enter into a binding agreement with individuals whose property was to be affected by the proposed works, and that S. was entitled to have the formal deed executed, but that after it is executed, notices must still be given under the* 394*th and* 395*th sections, and objections of third parties entertained.*[1]

The Police Commissioners of St. Andrews having resolved to make a sewer through the grounds near the appellant's house, which was used as an Academy for young gentlemen, the appellant stated objections to it, and proposed another line passing outside his grounds, and which would serve the same purpose and be less prejudicial to his premises. The Commissioners did not adopt this suggested alteration, and gave the statutory notice to all parties objecting to the line they proposed. Mr. Smeaton, by counsel, urged his objections before the Commissioners, but these were overruled. He then appealed to the Sheriff; who decided in favour of the Commissioners. Mr. Smeaton then made his claim for compensation, which claim was for £3000. At this point a negotiation was entered into between Mr. Smeaton and the Commissioners, and their respective agents and surveyors, and on 12th February 1866, an arrangement, embodied in certain "heads of agreement," was come to, whereby the Commissioners were to execute the sewer in a line pointed out by Mr. Smeaton, and he was to waive all right to compensation, and a formal deed was to be executed, embodying the stipulations and provisions of the agreement, and other necessary formal clauses. At a meeting of the Commissioners to consider Mr. Smeaton's proposed agreement, the Commissioners resolved, by a majority of 14 to 13, to adopt the agreement, subject to a small variation specified. They at the same time gave notice to their contractor not to proceed with the original scheme, and they obtained Mr. Smeaton's assent to the variation suggested. Mr. Smeaton on his part also withdrew his claim to compensation.

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[1] See previous report 7 Macph. 207; 41 Sc. Jur. 132. S. C. L. R. 2 Sc. Ap. 107; 9 Macph. H. L. 24; 43 Sc. Jur. 349.