

Saturday, November 29.

FIRST DIVISION.

[Lord Anderson, Ordinary.]

EISEN v. M. M'CABE, LIMITED.

Contract—Pacta illicita—War—Emergency Legislation—Contracting for Sale of Timber—Timber Control Order 1918.

The Timber Control Order 1918 provides—Part I, section 2—“ . . . No person shall . . . (b) Sell or enter into any contract for the sale of any such timber [i.e., timber imported into the United Kingdom] except to the holder of a permit granted by or on behalf of the Controller, and then only in accordance with the terms and conditions specified in such permit.”

Timber imported into the United Kingdom was the subject of a contract between two parties, the first of whom agreed to sell, and the second of whom agreed to purchase, a certain quantity lying at Glasgow, at a certain price, subject to the condition that the buyers obtained a permit to purchase from the Timber Controller. The second parties had not a permit at the date of the contract. In an action of damages by the first party against the second parties for breach of contract, the first party alleged that the second parties had refused to give to the Controller certain information required by him and as a result had failed to obtain a permit. The first party pleaded that the contract in question was a *pactum illicitum* as being forbidden by the Timber Control Order. *Held* (rev. Lord Anderson, Ordinary) that the contract in question was a contract of sale subject to a condition, and though conditional it was nevertheless a contract of sale to a person without a permit, forbidden by the Timber Control Order, and action *dismissed*.

Lewis Eisen, timber merchant, 61 Minerva Street, London, *pursuer*, brought an action against M. M'Cabe, Limited, timber merchants, Troon, *defenders*, concluding for £1025, 15s. in name of damages for breach of contract.

The parties *averred*—“(Cond. 2) On 22nd October 1918 Messrs Cant & Kemp, timber brokers of 52 St Enoch's Square, Glasgow, acting as agents for the pursuer on the one hand and the defenders on the other hand, entered into an agreement to sell as follows, viz.—Messrs Cant & Kemp, as agents for the pursuer, agreed to sell and the defenders agreed to purchase, a quantity of cypress lying in store in Glasgow consisting of 1892 planks cypress *ex s.s.* 'War Heather' marked E.P. 20 and 21, measuring 2564 $\frac{1}{2}$ cubic feet, and the price was 19s. 6d. per foot cube, subject to the following conditions, viz.—(1) That the buyers obtained a permit to purchase from the Timber Controller; (2) that four weeks' free rent should be allowed to the buyers

from the date of the permit, if incurred; (3) that fire insurance for this period should be for seller's account; and (4) that payment should be made by cash in Glasgow in one month from date of permit, less 2 $\frac{1}{2}$ per cent. discount. With reference to the answer the Timber Control Order 1918 is referred to for its terms. Admitted that the said Order was in force at the date of the contract aforesaid, and that paragraph 2 of Part I thereof applies to the timber in question. *Quoad ultra* denied, under reference to condescence 3. (*Ans.* 2) Denied. Explained that on 18th October 1918 the defenders inquired of Messrs Cant & Kemp (who acted as agents for the selling brokers, Messrs Charles Leary & Company) as to the price required for certain cypress timber. Negotiations ensued regarding the timber mentioned in the condescence, but it was explained by Messrs Cant & Kemp, and was also in the knowledge of the defenders, that having regard to the terms of the Timber Control Order 1918, made by the Board of Trade under the Defence of the Realm Regulations, no sale of the said timber to the defenders could be concluded and no contract for such sale could be entered into unless and until the defenders should be in possession of a permit granted by the timber controller in terms of the said Order; and further, that no such sale could be concluded and no such contract entered into except in accordance with the terms and conditions which should be specified in such permit. In the course of the said negotiations the defenders informed Messrs Cant & Kemp that they did not desire to acquire the said timber unless they could obtain it without any delay, as they wished only to meet immediate requirements and were not prepared to stock the timber in view of the uncertain condition of the timber market. The defenders further informed Messrs Cant & Kemp that there might be difficulty in obtaining the requisite permit as they had not theretofore applied for permits for hardwood, but Messrs Cant and Kemp stated that if the defenders would hand to them their application for a permit they (Messrs Cant & Kemp) would forward it to the Timber Permit Office through the London brokers in the proposed transaction, Messrs Charles Leary & Company, and that if the application were presented in this way they considered that a permit would be obtained without trouble and quickly. On this understanding the defenders filled up the form of application for a permit after mentioned. Reference is made to the Timber Control Order 1918, and in particular to part I thereof, which relates to timber grown outside the United Kingdom, and paragraph 2 thereof, which is in the following terms:—“Except as provided in paragraph 15 hereof (which does not apply to the present circumstances), no person shall—(a) Buy or enter into any contract for the purchase of any timber imported into the United Kingdom except under and in accordance with the terms and conditions of a permit granted by or on

behalf of the controller. (b) Sell or enter into any contract for the sale of any such timber except to the holder of a permit granted by or on behalf of the controller, and then only in accordance with the terms and conditions specified in such permit.' Paragraph 2 of part 1 of the Timber Control Order 1918 applied to the timber mentioned in the condescendence, and the said Control Order was in force at the date at which the said timber is alleged to have been sold to the defenders. At the date founded on by the pursuer the defenders did not hold any permit granted by or on behalf of the Timber Controller enabling them to buy or enter into any contract for the purchase of the timber in question, and no such permit has ever been received by them. These facts have all along been well known to the pursuer. Large supplies of timber were required for direct Government purposes during the War, and the quantities available were so deficient in amount that it was necessary in the public interest and for the defence of the realm to impose the restrictions contained in The Timber Control Order 1918, which further contained provisions making infringements of this Order summary offences against the Defence of the Realm Regulations. (Cond. 3) It was an implied term of this contract, in order that the agreement to sell might be carried into effect, that within a reasonable time the buyers would take all the proper, usual, and necessary steps to obtain a permit from the Timber Controller, and, in particular, that they would furnish to the Timber Controller any necessary or reasonable information or particulars as to their business or transactions which the Controller in considering their application might require them to furnish under the Timber Control Order 1918, section 17, or otherwise. (Ans. 3) Reference is made to the Timber Control Order 1918, paragraph 17, for its terms. *Quoad ultra* denied. (Cond. 4) On or about [24th] October an application for a permit was completed by the defenders and duly forwarded to the Timber Controller. On or about 28th October the application was returned to the defenders with a request for certain necessary or reasonable particulars with regard to the stocks of cypress held by the defenders and their approximate consumption of this wood. The pursuer believes and avers that information on these points was generally required by the Timber Controller before permits were issued for quantities over 1000 cubic feet, and that the required information was usually supplied by applicants without demur. It is further believed and averred that the defenders had no cypress in stock at the time, and that in any case they were able to supply the information required as aforesaid without any difficulty or delay. The application for a permit is referred to for its terms. *Quoad ultra* the averments in answer so far as not coinciding herewith are denied. (Ans. 4) Admitted that as stated in answer 2 an application for a permit was completed by the defenders and was forwarded to the Timber Controller.

Explained that as arranged the said application was handed by the defenders to Messrs Cant & Kemp on 24th October, and they passed it to Messrs Charles Leary & Company, who are believed to have presented it to the Timber Controller. The defenders, as Messrs Cant & Kemp were aware, had no intention of proceeding further in the matter unless they received a permit without any delay. They did not so receive a permit, but on 30th October they received from the Timber Controller a request for certain further information as to their application. Having regard to the delay which had then occurred, and to the further delay which must necessarily occur before any permit, if obtainable, could have been received by the defenders, they decided to take no further action in the matter. Moreover, they did not in any event desire to furnish the Timber Controller with the further information for which he asked, and which was additional to the information called for by the form of application for a permit. The practice of the Timber Controller and of applicants in relation to the further information in question are not known and not admitted to be as stated in the condescendence. *Quoad ultra* the averments under answer are denied in so far as not coinciding herewith. (Cond. 5) Upon the conclusion of hostilities on 11th November 1918 there was a heavy fall in the price of cypress and other classes of timber. On 16th November the defenders intimated to their brokers Messrs Cant & Kemp that they had not obtained a permit, and on 20th November they wrote to Messrs Cant & Kemp repudiating the contract as follows:— '20th November 1918. Messrs Cant & Kemp, Glasgow. Dear Sirs—*Cypress*. We have your letter of yesterday. We duly applied to the timber controller as you know for a permit and our application therefor was returned for further information. This information we do not see it is necessary to give and we are not to give it, and the matter so far as we are concerned is at an end accordingly.—Yours faithfully, M. M' CABE, Secy.'

After further correspondence, in which Messrs Cant & Kemp urged the defenders to furnish the desired information, and pointed out as was the fact, that the disclosure of the particulars could not in any way injure the defenders, the defenders on 23rd November replied as follows:— '23rd November 1918. Messrs Cant & Kemp, Glasgow. Dear Sirs—We have your letter of yesterday. If you will permit us to say so, the question as to whether the information is or is not to be given is one for us to decide, and we are not, as already stated, to give it. The timber was sold to us subject to our getting a permit. We have not obtained the permit and the sale is off accordingly.—Yours faithfully, M. M' CABE, Secy.'

The defenders in refusing as they did to supply the information required by the Timber Controller as aforesaid acted in breach of their contractual duty to the pursuer, unreasonably and in bad faith. The defenders by their wilful failure to supply the information prevented the granting of the permit.

They unwarrantably repudiated their contract with the pursuer, having themselves failed to comply with an implied term thereof, upon the fulfilment of which the contract necessarily depended. (Ans. 5) Admitted that on 16th November the defenders intimated to Messrs Cant & Kemp (as was the fact) that they had not obtained a permit. Explained that no permit to purchase the wood in question was ever obtained by the defenders. The correspondence founded on is referred to for its terms. *Quoad ultra* denied in so far as not coinciding herewith. (Cond. 6) The pursuer, desiring to minimise the loss incurred through the defenders' said unwarranted repudiation of the contract, placed the timber in the hands of three well-known firms of brokers, but notwithstanding their efforts the only offer which could be obtained was from a Liverpool firm at the price of 11s. 6d. per cubic foot. The pursuer sues for the difference between the contract price and the said price of 11s. 6d., which represents the current market price at the time of the repudiation of the contract. (Ans. 6) Not known and not admitted. The market price for this timber at 20th November was not less than at the date of the alleged sale."

The pursuer *pleaded, inter alia*—"1. The defenders having failed in breach of their contractual duty to the pursuer, unreasonably and in bad faith, to comply with an implied term of their contract with the pursuer, upon the fulfilment of which the contract depended, and having unwarrantably repudiated the contract as condescended on, are bound to compensate the pursuer for the loss thereby incurred by him."

The defenders *pleaded, inter alia*—"1. The pursuer's averments being irrelevant the action should be dismissed. 2. The alleged contract founded on by the pursuer being in the circumstances a bargain which was illegal and contrary to public policy, no damages are recoverable thereunder, and the defenders should accordingly be assolized."

On 18th July 1919 the Lord Ordinary (ANDERSON) repelled the first and second pleas-in-law for the defenders, and before further answer allowed the parties a proof *habili modo* of their averments on record and the pursuer a conjunct probation.

Opinion.—"On 22nd October 1918 the pursuer and defenders entered into a written agreement as to the sale by the pursuer to the defenders of a quantity of cypress wood which was in store in Glasgow. The terms of said agreement are set out in condescendence 2.

"One of the conditions of the agreement was that the buyers obtained a permit to purchase from the Timber Controller. At the time when the said agreement was entered into there was in force the Timber Control Order 1918, which related to timber grown outside the United Kingdom. Paragraph 2 of said Order is quoted in answer 2. By that paragraph it is enacted (b) that no person shall 'sell or enter into any contract for the sale of any such timber (i.e., timber imported into the United Kingdom) except to the holder of a permit granted by or on

behalf of the Controller, and then only in accordance with the terms and conditions specified in such permit."

"On 23rd or 24th October an application for a permit was completed by the defenders and duly forwarded to the Timber Controller. On 28th October the application was returned to the defenders, with a request by the Controller for certain information. The defenders aver that they 'did not . . . desire to furnish the Timber Controller with the further information for which he asked.'

"Upon the conclusion of hostilities on 11th November 1918 there was a heavy fall in the price of timber.

"On 20th November 1918 the defenders repudiated the said agreement by their letter of that date, which is set forth in condescendence 5.

"The pursuer thereupon, in order to minimise loss and damage, sold the cypress for the best price he could obtain. This was 11s. 6d. per cubic foot, the price set forth in the foresaid agreement being 19s. 6d.

"The pursuer now sues the defenders for damages for breach of contract, the amount claimed, £1025, 15s., being the difference between the price agreed upon and that obtained by the subsequent sale of the cypress.

"The contractual duty which the defenders are said to have failed to discharge is that which the pursuer avers was implied in the stipulation as to obtaining a permit. That implied condition was (as explained in such cases as *Stewart*, 16 R. 421, 26 S.L.R. 338, 17 R. (H.L.) 1, 27 S.L.R. 386; *Batt*, 1917, 2 K.B. 679; and *Sutcliffe*, 23 Com. Ca. 216) that the defenders should 'do their best' to obtain a permit from the Timber Controller. Instead of doing their best to secure said permit, the defenders, according to pursuer's averments, did their best to prevent it from being granted by refusing to answer the questions addressed to them by the Timber Controller. The pursuer avers that the information sought for was generally required by the Controller before permits were granted, and was usually supplied by applicants without demur. The pursuer suggests that the defenders would have been in no wise prejudiced by giving said information, that they ought to have given it, and were in breach of an implied condition of said agreement in having failed to do so.

"The defenders, on the other hand, maintain that they were justified in refusing to give the Timber Controller the information which he desired.

"It is plain that inquiry is necessary to determine whether or not the defenders' said refusal was reasonable.

"The defenders' main defence to the action, however, is that which is embodied in their second plea-in-law, wherein it is pleaded that the contract founded on by the pursuer being illegal and contrary to public policy, no damages are recoverable thereunder, and the defenders should be assolized.

"A defence of 'contrary to public policy' is not regarded with favour by a court o

law, and I shall declare void the agreement which the defenders deliberately entered into only if I am clearly compelled to do so. The argument supporting this plea-in-law submitted by the defenders' counsel may be quite shortly stated. The pursuer, it was stated, claims damages for breach of contract. What contract? A contract of sale. But a contract of sale where no permit has been obtained is struck at by the Timber Control Order. There was here no permit, and therefore there was no legal contract, and so no right of action of damages exists. There can be no implied condition (said to be broken) of a non-existent contract. The obtaining of a permit is the necessary prerequisite of any contract of sale of timber.

"This reasoning seems to me to be fallacious in respect that it confuses the contract which the Order prohibits with the agreement which is founded on. What is prohibited by the Order is the entering into an unconditional or absolute contract of sale without a permit. The agreement founded on was not such a contract; it was a conditional contract of sale—the suspensive condition being that a permit should be obtained. In other words, it was an agreement to bring about a concluded contract of sale. Is such an agreement prohibited, directly or impliedly, by the Order? There is no direct prohibition of the agreement, and I am unable to hold that it is prohibited by implication. There is a presumption in this country in favour of freedom of contract, and therefore the Order must be construed strictly. It is noteworthy that the Legislature where it is designed to prohibit such an agreement as the parties entered into does not leave its intention a matter of doubt. Thus in the Timber Control Order of 1918, Part I, section 1 (War Material Supplies Manual, 2nd ed., p. 419), it is provided that no person in the United Kingdom shall buy, sell, etc., or enter into any transaction or negotiation in relation to the sale, purchase, or transport of any timber outside the United Kingdom except under a permit. Again, under the Defence of the Realm Regulations, as to War Material Supplies Orders, section 30a (Manual p. 12), it is provided that no person shall, without a permit, (a) Buy, sell, or deal in; (b) Offer or invite an offer or propose to buy, sell or deal in; or (c) Enter into negotiations for the sale or purchase of or other dealing in . . . war material.

"Under either of these regulations the agreement entered into between the parties would probably have been struck at, but in my opinion it is not made illegal by the entirely different language of the section founded on in defence.

"I am therefore of opinion that the defenders' second plea-in-law must be repelled.

"The defenders' counsel argued further that the pursuer's averments were irrelevant. It was maintained that the pursuer was bound, in order to present a relevant case, to aver that a permit would have been obtained had the defenders supplied the information called for by the Timber Controller. I am of opinion that the pursuer

was not bound to make this suggested averment, nor indeed could he honestly have done so. What the pursuer complains of is that the defenders' failure to supply the desiderated information prevented the grant of a permit from being even considered by the Controller. In the absence of the information called for, the possibility of a permit being obtained was negatived, and for this the defenders were responsible if they acted unreasonably in refusing to answer the Controller's queries.

"I am therefore of opinion that the pursuer's averments are relevant.

"The pursuer's counsel took exception to that part of the defence whereby it is maintained that it was a term of the agreement that the defenders should obtain the permit 'without any delay' on two grounds—(1) because that phrase is meaningless, or, at all events, of no definite signification; and (2) because it is incompetent to add a term to a concluded agreement, and there is double incompetency if attempt is made to do this, in the case of a written contract, by parole testimony. These points, however, will more properly arise for decision at the proof, and an allowance of proof before further answer and *habili modo* will duly reserve them.

"Finally I make these observations on the question of amount of damages. The sum sued for by the pursuer represents the difference between contract price and market price subsequent to the alleged breach. In the case of breach of an agreement such as is founded on, this method of assessing damages, which is that usually adopted in the case of a concluded contract, will not necessarily be followed. The sum sued for will probably be the basis of an estimate of any sum due as damages, but not necessarily their measure. An allowance must obviously be made in respect of the contingency that the permit might have been refused even if the information called for had been supplied."

The defenders reclaimed, and argued—The action was for damages for breach of contract. The contract averred was concluded on 22nd October 1918. It was a sale, and the buyers were persons who had not a permit from the Timber Controller at that date. It was therefore a transaction directly prohibited by the Timber Control Order 1918, Part I, paragraph 2 (b), which was in operation at that date. Further, if it was not a sale it was a contract for the sale of timber, and was equally prohibited. Consequently the transaction being illegal there could be no question of implied terms, *e.g.*, that the buyers would do their best to get a permit. Even if it was a contract subject to a suspensive condition the contract never became operative, because the condition was never purified, and there was no averment that the ability to purify the condition was entirely in the power of the defenders, and that they had prevented the purification of the condition. *In re Anglo-Russian Merchant Traders, Limited, and John Butt & Company (London), Limited*, [1917] 2 K.B. 679, was distinguished, for in that case the contract was legal at its date. Orders such

as the present must be enforced though the result might be inequitable—*Brightman & Company, Limited v. Tate*, [1919] 1 K.B. 463, per M'Cardie, J., at p. 467. Such permits as were involved in the present case were personal and could not be sold—*Trevalion & Company v. Blanche & Company*, [1919] 56 S.L.R. 567—so that the defenders could have obtained a permit only from the Timber Controller.

Argued for the pursuer (respondent)—The Order of 1918 was a penal Order, and further, it imposed restrictions on freedom of contract. It must be strictly construed in favour of the liberty of the subject—Maxwell on the Interpretation of Statutes (5th ed.), p. 426 *et seq.* The language of Part I, section 1, of the Order was different from that of Part I, section 2, *e.g.*, section 1 prohibited negotiation. It was therefore to be presumed that section 2 did not prohibit those things expressly prohibited by section 1 but omitted from section 2. Section 1 was not in force at the date of the present contract. The object of those regulations was to secure that persons with a prior claim in the public interest should be able to secure supplies of timber. That object could be effected by prohibiting sale except to the holder of a permit, for permits were not alienable. The present contract was a conditional or provisional contract to the effect that if the buyer never got a permit the whole transaction flew off. It simply gave an option to purchase. Property would not pass until a permit was obtained. Such a contract obliged the defenders to do their best to obtain a permit. This was the business meaning of the contract—*The "Moorcock,"* 1889, 14 P.D. 64, per Bowen, L.J., at p. 68; *Batt's case (cit.)*, per Reading, C.J., at p. 685; *Kennedy v. Stewart*, 1889, 16 R. 421, per Lord Trayner at p. 426, 26 S.L.R. 338. Such a contract did not infringe the spirit of the Order, neither did it infringe the letter if the provision in question were read in contrast to section 1. If so, the defenders were in breach, for they had failed to give to the Controller the information required by him. They were bound to give such information as a preliminary to obtaining a permit (section 17).

LORD PRESIDENT—As ultimately presented to us this case turns upon the question whether or not there was a concluded contract of sale of a certain quantity of timber at a specified price made between the pursuers and the defenders on the 22nd October 1918. If there was a concluded contract of sale effected upon that date it is not denied that it is an illegal contract, because it is struck at by the Timber Control Order 1918, then in operation, which has the same force as a statutory enactment.

Now I cannot doubt, upon the statements made in the second article of the condescendence, that there was a contract made by which the pursuer agreed to sell and the defenders agreed to purchase a quantity of cypress wood, then stored in Glasgow, at a certain price subject to a number of conditions, one of which was that the buyers of the timber should obtain a permit to purchase from the Timber Controller.

If there was a contract of sale subject to a condition, it appears to me that it was none the less a contract of sale that it was conditional and that the condition has not yet been fulfilled, because the Order on which the defenders found is explicit to the effect that no person shall enter into any contract of sale of timber except to a person who holds a permit granted by the Controller at the date when the contract was made. Confessedly the defenders held no such permit.

It is said, no doubt, that the property in the timber would not pass and delivery would not be given until the defenders came armed with the permit from the Controller. That may be so, but none the less the Order strikes at the contract of sale, and if a contract of sale was effected, then it is an illegal contract even if subject to a condition.

Now the difference between my view and that taken by the Lord Ordinary when he holds—I know not for what reason—that the Order strikes at an unconditional contract of sale and not at a conditional contract, is that the Order makes no such distinction. It strikes at all contracts of sale whatever the conditions may be. If that be so, then the pursuer here is confessedly not entitled to succeed, because the defenders are not holders of a permit and were not so at the date when the contract was made. For that simple reason I am of opinion that we ought to recal the interlocutor of the Lord Ordinary and dismiss this action.

LORD MACKENZIE—I think that the case must be decided upon the short ground upon which your Lordship has put it.

The Order prohibits any person from selling or entering into any contract of sale of any timber in the United Kingdom except to the holder of a permit granted by or on behalf of the Timber Controller; and I am unable to see that a conditional sale is not a sale, and it is admitted that at the date when the conditional contract was entered into on 22nd October 1918 the buyer was not the holder of a permit. Therefore I think the contract is struck at by the Order, and that accordingly the Lord Ordinary has come to a wrong conclusion.

LORD SKERRINGTON—If I could have come to the conclusion that the terms of this Order were ambiguous—in other words, that there were two constructions either of which was reasonably possible—I should have thought that there was force in the argument addressed to us by the respondents' counsel to the effect that we ought to prefer that construction which presses less heavily upon the public in the way of penalties and of interference with trade. I am, however, of opinion that there is no ambiguity in the Order and there is only one admissible construction. Accordingly I agree with your Lordships that the action fails.

LORD CULLEN—I agree. I think the meaning of the Order was that an intending buyer of timber should obtain a permit first before he proceeded to buy. Here the buyer

took the opposite course of buying first without a permit, which I think the Order prohibited.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for the Pursuer (Respondent)—Wilson, K.C.—Cooper. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defenders (Reclaimers)—Sandeman, K.C.—Robertson. Agents—Simpson & Marwick, W.S.

Friday, November 28.

FIRST DIVISION.

[Lord Sands, Ordinary.]

MURPHY v. SMITH AND ANOTHER.

Process—Contract—Tender—Locus pœnitentiæ—Acceptance of Tender of Lump Sum to Several Pursuers.

A mother as an individual and as tutrix of her six children sued for damages, stating that her husband had been injured by the fault of the defenders. The summons and issue each contained separate sums as being the damages claimed by the pursuer in her individual capacity and as tutrix for each child. Pending the hearing on a motion to vary issues, the defenders tendered £150 in full of the conclusions of the summons. The agents for the pursuer thereafter wrote to the defenders' agents—“We have been instructed to accept the defenders' tender of £150 and expenses, and we shall be obliged if you will send us a draft of the joint minute for disposing of the action.” The pursuer thereafter denied that she had ever authorised her agents to accept the tender, and further, that if the letter referred to was held as an acceptance of the tender on her behalf the contract was incomplete, and she was entitled to rescind until a joint minute had been adjusted apportioning the lump sum. *Held* that the action had not been settled; *per* the Lord President and Lord Skerrington, in respect that the settlement was necessarily incomplete, and could be rescinded from, until the apportionment of the £150 amongst the several persons interested in it had been agreed upon; *per* Lord Mackenzie and Lord Cullen, in respect that it was *ultra vires* of the pursuer to settle for a lump sum distinct claims on behalf of herself and each of her children.

Mrs Alice M'Gill or Murphy, widow of William Joseph Murphy, as his widow and as tutrix and administratrix-in-law of Agnes Laughlin Murphy, William Murphy, Mary Murphy, Charles Murphy, and Francis Murphy, their pupil children, *pursuer*, brought an action against David Smith and Edwin Heath Smith, *defenders*, concluding for payment of (first) £750 to the pursuer as widow aforesaid, (second) to the pursuer as

tutrix and administratrix foresaid of the following sums—£90 for Agnes Laughlin Murphy, £105 for William Murphy, £150 for Mary Murphy, £200 for Charles Murphy, and £250 for Francis Murphy, in name of damages in respect of the death of William Joseph Murphy alleged to have been caused by the negligence of the defenders or one or other of them.

On 22nd November 1918 the Lord Ordinary (SANDS) approved of an issue.

On 29th November 1918 the defenders lodged and boxed a motion to vary the issue, which was sent to the summer roll.

On 20th January 1919 the defenders lodged the following *minute of tender*—“Forbes for the defenders, and under reservation of all their rights and pleas, hereby tenders the sum of £150 sterling, with expenses of process, in full of the conclusions of the action.—In respect whereof, (Sgd.) JAS. WRIGHT FORBES.”

Thereafter the following *letters* were sent by the pursuer's agents to the defenders' agents:—

“15 Stafford Street,

Edinburgh, 24th Jan. 1919.

“Messrs Menzies, Bruce-Low, & Thomson, W.S., 23 York Place, Edinburgh.

“Dear Sirs—*Murphy v. Smith.*

We have been instructed to accept the defenders' tender of £150 and expenses, and we shall be obliged if you will send us a draft of the joint minute for disposing of the action at your early convenience.—Yours faithfully,

RAINY & CAMERON.”

“15 Stafford Street,

Edinburgh, 19th Feb. 1919.

“Messrs Menzies, Bruce-Low, & Thomson, W.S., 23 York Place, Edinburgh.

“Dear Sirs—*Murphy v. Smith.*

We duly received your letter of 14th inst. We regret the delay in writing you definitely with reference to this matter, but you will understand that we desired to give Mrs Murphy every opportunity of reconsidering her position. It now appears that she insists on repudiating the instructions which she gave us to accept your tender, and in these circumstances we are unable to continue to act for her. We have written to her to-day to this effect, and we must give you similar notice.—Yours faithfully,

RAINY & CAMERON.”

Thereafter the defenders lodged a note in which they *averred*—[On 23rd January 1919] “the pursuer accompanied by her brother-in-law attended in consultation with her senior and junior counsel and her agents, when the tender was fully discussed and considered. Later in the same day she went with her brother-in-law to her agents' office, when she finally determined to accept the defenders' tender and instructed her agents to do so”; and referred to the letters above quoted.

The pursuer lodged answers, in which she *averred*—“The defenders' said tender was considered by the pursuer at a meeting with her then agents Messrs Rainy & Cameron, W.S., Edinburgh, on 23rd January 1919. After considerable discussion the pursuer informed her said agents that she required further time to consider the defenders' tender, as the sum was totally inade-