

The Sheriff-Substitute (GALBRAITH) pronounced the following interlocutor:—

"Glasgow, 4th July 1872.—Having heard parties' procurators, Finds that this action is raised for an account of the defenders' intrusions with the price of £2000 of the stock of the Caledonian Railway, said to have been sold by them about the 6th July 1870, on the order of James Henderson junior, broker in Dundee, acting, as is libelled, as accountant for the pursuer, proprietor of said stock: Finds it pled in defence, in substance, that the defenders know nothing about the pursuer, and dealt alone with Mr Henderson in the stockbroking transactions, and that they, having had no contract with the pursuer, and having a claim against Henderson, are not bound to account to the pursuer. Finds, upon the proof, on the import of which there is little difference between the parties, and in law, that the defenders' contention is sound: Therefore assolzies the defenders from the conclusions of the summons; finds the pursuer is liable to them in expenses; appoints an account thereof to be given in, and when lodged, Remits the same to the Auditor of Court to tax and report, and decerns.

"Note.—The Sheriff-Substitute having taken evidence and heard parties' procurators, is of opinion that, as above stated, the defenders' view of the case is correct. It does not appear that Matthews had any communication at all with Auld & Guild, and it does appear that they had money transactions with Mr Henderson, and so long as it is not disclosed to the defenders that Mr Henderson was acting for Matthews, the defenders cannot be held as acting for the pursuer."

The pursuer appealed, and the Sheriff pronounced the following interlocutor:—

"Glasgow, 31st July 1872.—Having heard parties' procurators on the pursuer's appeal, and considered the proof, productions, and whole process, including in particular the joint minute of admissions, No. 17, Finds, in point of fact, that the party, James Henderson junior, who transacted with the defenders for the sale of the stock in question, did so as agent or broker for the pursuer, Henderson, being a stockbroker in Dundee, and known to the defenders as such, and although he did not disclose the name of his principal in said sale, he nevertheless expressly mentioned in his letters to the defenders of date 2d and 6th July 1870, of which there are admittedly correct copies in No. 6/5, that he was not selling the stock on his own account, but for 'a client'; Finds that in his examination as a witness *in causa* the defender Auld depones, 'previous to this transaction we had a large number of transactions with Henderson, some of these were genuine transactions for clients, and others were quite different, but we always supposed that he was acting for clients, or we wouldn't have dealt with him at all. He did not, however, give the names of his clients. It is very unusual for stockbrokers to give the names of their clients:' Finds, in point of law, that on the one hand if a factor or broker sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he has on the factor or broker against the demand for the goods or their price made by the principal; but that, on the other hand, if a person buys goods of another whom he knows to be acting as agent, though he does not know who the principal is, he cannot set off a debt due to him by such agent in an action by the prin-

cipal for the price of the goods. (See in confirmation of this doctrine the English cases of *Simenza and Others*, Feb. 27, 1865, Law Journal, vol. xxxiv, Common Pleas, p. 161; and *Maans*, Feb. 11, 1801, East. Reports, vol. i, p. 334; and the Scotch cases of *Fleming*, June 29, 1832, and *Lavaggi*, Jan. 11, 1872.) Finds that it follows, that in the circumstances of this case above stated, the pursuer, as Henderson's principal, has a sufficient title to insist, and that the defenders cannot compensate or set off the debt due to him by any general balance resting-owing to them by Henderson: Therefore sustains the appeal; recalls the interlocutor appealed against, and, in terms of article 5 of said joint minute, Finds the defenders liable to the pursuer in the sum of £83, 13s. sterling, with interest, as libelled: Finds them also liable in expenses; allows an account thereof to be lodged, and remits the same to the Auditor of Court to tax and report, and decerns."

The defender appealed to the Court of Session, and argued—(1) that no principal having been disclosed by Henderson, Auld & Guild were entitled to assume he acted for himself in the transaction, and to set off against the demand by the pursuer for payment of the balance their claim against Henderson; (2) Assuming that a principal was disclosed, the nature of the transaction was such as to justify retention.

Cases cited—*Simenza*, 34 L. J., C. Pleas, 161; *Lavaggi*, 10 Macph. 312, Jan. 11, 1872; *Fleming*, 10 S. 739.

At advising—

LORD JUSTICE-CLERK—I am for adhering to the Sheriff's judgment. I think the case of a stockbroker is the strongest possible for the application of the general rule; as his business is to deal for principals, and the rules of the exchange do not supersede the ordinary rules of law.

The other Judges concurred.

The Court adhered.

Counsel for Pursuer—Hall and Solicitor-General. Agents—J. & R. D. Ross, W. S.

Counsel for Defenders—Balfour. Agents—Webster & Will, S.S.C.

Thursday, February 20.

## SECOND DIVISION.

[Lord Ormisdale, Ordinary

Laurie v. LLOYD & COMPANY.

Agreement—Construction.

Terms of agreement held to constitute A the traveller of B C & Co., and to entitle him to one-third of the profits on each transaction effected by him.

In the month of January 1871 John Laurie, the pursuer in this suit, was in the employment of Messrs Lloyd & Company, tea merchants, London,—the defenders—as a traveller. The agreement under which he entered into their employment was reduced to writing on May 8, 1871, and was in the following terms:—

"Gentlemen,—In consideration of your employing me as traveller to sell tea for you in Edinburgh, Leith, Glasgow, and other places, as may be agreed upon, I hereby agree to fulfil all the duties of such

traveller with punctuality and fidelity, and to accept as commission for my selling the tea, and for money incurred or paid by me for travelling and other expenses, one-third part of the difference between the price quoted by you to me from time to time as the value of the tea, adding the charge for lot money, brokerage, and other expenses, and the money obtained by the sale of the tea.

"And I further agree, that, should I at any time wish to leave your employ, to give you one month's notice of my intention of so doing, and to receive the same term of notice from you to leave your employment.

"All money to be collected by you.

"This agreement dates from the 2d January 1871.—Yours obediently, JOHN LAURIE.

"Witness to the signature of John Laurie.

"STEWART HILLHOUSE, witness."

In accordance with this agreement the pursuer entered on the discharge of his duties as the defenders' traveller, and obtained orders for tea to a large amount. These orders were forwarded to the defenders, who themselves judged of the responsibility of the parties giving the orders, and either executed them or declined to execute them as they thought proper. The pursuer continued in their employment for some time, but on 7th December last the defenders gave the pursuer a month's notice of their intention to dispense with his services. The pursuer's engagement with the defender thus terminated on 7th January current.

The pursuer stated that the sales made by the defenders through orders obtained by him amounted to the sum of £10,350, 16s. 1d., and the profit thereon, according to the agreement, is £710, 4s. The proportion, being one-third thereof, falling to the pursuer as commission, amounts to £236, 14s. 8d.; but to account of this sum he has received from the defenders only the sum of £90, which left a balance due by them to him of £146, 14s. 8d. at the date of the termination of the agreement.

The summons concluded for payment of £146, 14s. 8d., as the balance due by the defenders under the agreement. The defenders' plea in law was—"The defenders having already paid to the pursuer the whole commission at present due to him, and being ready and willing to pay to him any additional commission that may become due in terms of the agreement founded on, they are entitled to absolvitor, with expenses." And they founded upon various letters from the pursuer to show that the parties understood the agreement to mean that the pursuer was to bear any loss arising from bad debts; and as a *quasi* partner was to get the third of the *cumulo* profits, any loss arising from bad debts being deducted. On 14th June 1871, in answer to a letter from the pursuer, the defenders wrote him in the following terms:—

"London, E.C., June 14, 1871.

"Mr John Laurie,

"Dear Sir,—In reply to your letters of the 13th inst., I will look into your account. I feel certain that there is nothing due to you, as the loss on L. Roxburgh & Co.'s account will be large.

"I expect to find that you have overdrawn your commission a/c.—Yours, &c.

DAVID LLOYD & Co.  
S. MESSITER."

In answer to which the pursuer wrote in the following terms:—

"Glasgow, 15th June 1871.

"Mr Messiter,

"Dear Sir,—I have yours. Let me have a statement of accounts from you at as early a day as you can conveniently do so, and I think you need not deduct all my portion of Roxburgh's bad debt off at once.—Yours, &c. JOHN LAURIE."

On 7th July 1871 the defenders wrote the pursuer:—

"London, E.C., July 7, 1871.

"Mr John Laurie, Glasgow,

"Dear Sir,—In reply to your letter of the 3d inst., I send herewith a pro-forma account, which shows that if £5726, 14s. 0d. is paid, £77, 3s. 8d. will be the amount of your commission to 30th June. You ought not to ask for money before it is due; however, we enclose a cheque for a further sum of £20.—Yours truly,

DAVID LLOYD & Co.  
S. MESSITER."

The Lord Ordinary pronounced the following interlocutor:—

"Edinburgh, 24th July 1872.—The Lord Ordinary having heard counsel for the parties, and considered the agreement and proceedings, including the proof,—Finds that the pursuer has failed to prove that the sum libelled, or any part thereof, is due to him by the defenders; Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses; allows an account thereof to be lodged, and remits it, when lodged, to the Auditor to tax and report.

"Note.—Whether the agreement made with the defenders by the pursuer, as a traveller, of the sale of their teas, was, or was not, a hard or disadvantageous one for him, is not the question now in dispute. With that question the Lord Ordinary has nothing to do. What he has to decide is, whether any, and if any what, sum is due by the defenders to the pursuer under the agreement No. 81 of process, the terms of which are accurately stated in the first article of the condescence.

"The parties having differed, not only as to whether any, or if any what, sum was owing to the pursuer, but also as to the true meaning of the agreement, and especially as to the meaning of the expression in it 'money obtained' in the sale of tea, a proof was allowed, and has been adduced by them.

"On considering that proof, the Lord Ordinary has had no difficulty in assoilzieving the defenders.

"The meaning of the expression 'money obtained' is *prima facie* with the defenders. The Lord Ordinary thinks that, in absence of all evidence in the actings or conduct of the parties to the contrary, it must be taken to mean money actually received or recovered by the defenders, and could not, as contended by the pursuer, be merely held to mean accounts incurred and due to them, although payment of these accounts should never be received or recovered. But any ambiguity that could be supposed to be attached to the expression must, the Lord Ordinary thinks, be held to be satisfactorily cleared up and removed by the actings and conduct and statements of the parties themselves under the agreement. Thus, in their letter to the pursuer of 23d February 1871 (No. 515 of process), being in the second month of the business transaction, they say, 'We enclose particulars of sales made by you from 10th to the 31st

January, which shows that £27, 0s. 11d. will fall due to you for commission, if the amount of sales £1160, 14s. 2d. is paid.' And in his letter to the defenders of 9th February 1871 (No. 82 of process), the pursuer expressly says that by the agreement he was to have 'one-third of the profits;' and it scarcely required to be admitted by him, although it was so in his examination as a witness, that there could be no profit on bad debts, or on anything but accounts payment of which had been actually received or recovered. Then again, in their letters to the pursuer of 12th June 1871, the statement in which was not repudiated or objected to by him in any way, they say, 'There is nothing due to you, as the loss on Roxburgh & Company's account will be larger,' that is, than any claim he could otherwise have had on other transactions. So far, indeed, from repudiating or objecting to the defenders' statement in the letter just referred to, the pursuer, on 5th June 1871 (No. 85 of process), wrote them for a state of accounts, and added 'I think you need not deduct all my portion of Roxburgh's bad debt off at once.' On 7th July 1871, the defenders did transmit to the pursuer, in a letter of that date (No. 517 of process), a tentative, or, as they term it, a *pro forma* account, showing, as they stated, 'that if £5726, 14s. is paid, £77, 3s. 8d. will be the amount of your commission to 30th June;' and in the same letter the pursuer added, 'You ought not to ask for money before it is due.' The Lord Ordinary does not see how it is possible to reconcile these letters, and the statements which they contain, with the interpretation of the agreement now attempted to be fixed upon it by the pursuer, or with any other interpretation of it than that contended for by the defenders, and if so, it is clear on the proof that no sum whatever is due to the pursuer.

"In the course of the debate it was suggested on the part of the pursuer that each transaction of sale of tea made by him should, in the matter of accounts, and in ascertaining whether any commission is or is not due to him, be looked at separately and independently. But in answer to this it is sufficient to say that the parties did not correspond or act under the agreement upon any such footing, and besides, that is not the footing on which the pursuer labors or maintains his action, as very plainly appears from his condescendence, and particularly the third article thereof.

"The Lord Ordinary has only further to explain, that the 'commission sheets' which the pursuer, towards the end of his evidence, says he was to send to his agent in order to be produced, have been produced, but after examination the Lord Ordinary cannot discover anything in them that can be held to affect favourably for the pursuer the views he has above expressed. They appear to the Lord Ordinary to be adverse to him rather than otherwise."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—I am clear it was not the meaning of the agreement that the traveller was to have a commission on all sales effected. The next question comes to be, Whether he was entitled to one-third of the profits on each transaction, or one-third of the ultimate profits on an indefinite series of transactions?

On the whole, I think the former is the true view. On the construction of the agreement, which

was made out during the pursuer's employment by the defenders, I am clear (1) the pursuer was not a partner, because he had no control over the actings of the defenders, who retained the right of accepting or rejecting the orders. (2) He did not guarantee sales as a *del credere* commissioner; he was a traveller—a servant employed to sell tea, and he was to have one-third of the profits as remuneration, in respect of which he was to pay his whole travelling expenses. Now, was it aggregate profit on the whole transaction, or individual profit on each transaction? I think it was not the former, because (1) no period of settlement was fixed; and (2) one bad debt might have swept away all the profits of the pursuer, which cannot reasonably be supposed to have been the meaning of the parties. It is said the acting of parties show that the former was intended, and certain correspondence is referred to. Now, the defenders objected to inquiry as to communings between the pursuer's brother and them previous to the date of the agreement. It is difficult to construe the letters on the latter footing; but, on the whole, I do not think they should prevent the pursuer recurring to the real meaning of the agreement. He was unwilling to quarrel with his employers—this was the first bad debt—and the expression may mean that he was willing to bear part of the loss incurred. I think, on the whole matter, that the pursuer is entitled to one-third of the profit made on each transaction during the period of his employment.

LORD COWAN—If it was intended that no payment was to be made to the pursuer unless profit arose on the ultimate result of the accounts slumped *en masse*, it should have been clearly expressed. I think it is conclusive against that view that no term of payment is specified, and that the pursuer had no control over the open accounts, and was not even to collect the money.

LORD BENHOLME concurred.

LORD NEAVES—I think the construction your Lordships propose is reasonable, and consistent with the position of parties and the terms of the agreement, which is the principal document. According to the defenders the pursuer never earned a shilling which might not have been swept away by a single bad debt. As to the letters, if the agreement bears this construction, and is to rule, I can find nothing in them so explicit as to alter the contract.

Counsel for Pursuer—Balfour. Agent—James Buchanan, W.S.

Counsel for Defender—Guthrie Smith and Blair. Agent—W. B. Hay, W.S.

Friday, February 21.

## FIRST DIVISION.

SPECIAL CASE—DYMOCK'S TRUSTEES AND OTHERS.

Disposition—Vesting—Residue.

A testator directed his trustees to pay to A the yearly interest or produce of the sum of £6000, and, in the event of A predeceasing her husband B, to pay the yearly produce to him,