

privileged;" and then we have the order of removal. These are the grounds of the decision they have come to, as well as the decision itself, and it appears to me that the Commissioners have acted in strict conformity with their statutory powers.

LORD GIFFORD—I have come to the same conclusion, and would only add a few observations on this matter. As to the question of privilege, this has clearly been held by the Commissioners not a case of privilege, and it is not to be wondered at, for privilege could only have existed in favour of those who had right of salmon-fishing, and the appellants in the present instance had expressly disclaimed any such pretension. They have maintained that their only wish was to be let alone where they were. Well, the Commissioners pronounced an order of removal, and then arises the question of review. The appellants applied to the Commissioners for a Special Case, and that Special Case was duly granted, prepared, and settled by the Commissioners; then it fell to be settled by one of the Judges of the Court, and I happened on this occasion to be the Judge on whom devolved the duty of adjusting the case.

Now, there was, I felt, a difficult question to be settled as to what were the proper functions to be exercised by the Judge in such an adjustment. First of all, there was the difficulty, who is to settle the facts—the Judge or the Commissioners? If the Judge is to do so, he must have the whole of the evidence before him. But the statute makes no provision whatever for recording the evidence. It is no doubt true the proof happened to be taken down at the time by a shorthand writer, but he was not judicially sworn, and his notes are not therefore admissible. Secondly, even suppose the Judge reads this evidence thus taken and considers it, he is applying his mind to that on which the Commissioners arrived at their conclusions of fact, and he becomes at once an Appeal Judge. Now, I find in the statute that the Appeal Court is not the single Judge sitting to settle the Special Case, but your Lordships' Court, and therefore I said I must take my facts from the Commissioners, and I proceeded to settle the case in the sense of seeing that it was in proper form, and that, I humbly conceive, is all that the statute contemplates as the function of the single Judge under the 8th section.

Now, as to the present appeal, we must either get at the whole evidence and have it before us, or we must take it as from the Commissioners. For my part, I can only conclude that these Commissioners who were charged with duties of inquiry, inspection, and so forth, have fulfilled all those duties as to these nets or engines in the present instance. The net, we learn from the Special Case, was of the same construction as an ordinary salmon net, but of smaller dimensions. The Commissioners have come to the conclusion that these nets are really "erected and used" for the purpose of catching salmon. If a net is erected with the best of purposes to catch, we may say for instance, white fish, but does catch salmon, then in the words of the Act it is "used" to catch salmon. I may also observe that the finding of the Commissioners is that these nets were "erected and used" for the illegal purpose, whereas the Act says it shall be a sufficient ground

for inquiry if nets shall have been "erected or used" for that purpose.

In conclusion, I may say that if the findings in fact are to be held as final, there is no law in the case at all. It may be a hard case on these fishermen, but I cannot help thinking that this was what was contemplated and intended by the Legislature.

LORD JUSTICE-CLERK—I wish to add that I do not express any opinion upon the question of how far the functions of the Judge in chambers settling a case such as this extend. The matter may become one of much importance, and I wish to keep the ground clear. There is nothing here to enable us to look behind the case as settled.

The Court pronounced an interlocutor finding that the Commissioners "were entitled to order the nets or engines used by the appellants to be abated or removed," and dismissing the appeal.

Counsel for Appellant—Mair. Agent—W. Officer, S.S.C.

Counsel for Respondents—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Friday, July 18.

## SECOND DIVISION.

[Sheriff of Forfarshire.

### MACKENZIE v. BLAKENEY.

*Agent and Principal—Sale of Shares by Stockbroker—Non-Disclosure by Principal—Commission—Loss on Difference Purchase.*

B instructed M, a broker, to sell through his London correspondents certain bank shares, which proved to be not transferable in this country. B knew this when giving the order, but did not disclose it. The shares were sold, and M in order to give delivery in accordance with the rules of the Stock Exchange had to purchase other shares of the same bank capable of transference. *Held*, in an action at the instance of M against B for payment of the difference of price and for commission, that M was entitled to recover.

Thomas Blakeney, the defender in this action, called with a Mr Ross on the pursuer William Mackenzie, stockbroker, on 6th December 1877, and employed him as a stockbroker to sell 20 shares of the Bank of Victoria and 130 of the National Bank of Australia, through his London correspondents. The shares were sold, but when the time came for delivery, it appeared that they were registered in the Colonial register of the banks, and consequently were not transferable in London, and incapable of passing as delivery on the London Stock Exchange. The rules of that body entitled the buyer in these circumstances, on the defender's failure to deliver, to buy in against the defender or his brokers shares of these banks standing or registered in the London registers, or to insist against the defender or his brokers for delivery of such shares. After an unsuccessful effort to arrange the matter

Mackenzie had to buy shares registered in London, but had to pay for them a larger price than what Blakeney's had been sold for, and he now sued Mackenzie for the difference, for brokerage, for time, and for travelling and personal expenses, &c., incurred in the conduct of the negotiations. The summons concluded for payment of £196, 14s. 6d., and the action was brought in the Sheriff Court of Forfarshire at Dundee.

After a proof, the nature of which sufficiently appears from the terms of the interlocutor and of the opinions of the Court, the Sheriff-Substitute (CHEYNE) gave the pursuer decree for £190, 8s. 6d., being £168, 7s. 6d., the difference in the price plus commission, and the balance being for the other items charged, and on appeal the Sheriff (MARTLAND HERIOT) adhered.

The defender reclaimed.

At advising—

LORD JUSTICE-CLERK—In this case I think that the judgments given by the Sheriff-Substitute and the Sheriff are well founded. The pursuer, we have it in evidence, himself told the defender that he did not know anything about these stocks; at that very time the defender knew of this difficulty or peculiarity as to their transfer, and presumably of their consequent depreciation in value in the London market, even if a sale could be effected. Yet the defender never said one word indicating his knowledge of this fact, but suffered Mr Mackenzie to go on with the matter and to sell the shares. The broker acted according to the orders he received, and the fault lies with the person whose concealment, or whose silence at least, caused the difficulty.

On the matter of expenses, however, I cannot think Mr Mackenzie is entitled to travelling expenses to London, which were incurred really in support of his own claim against the defender, and not in the latter's interest. Again, his personal outlays, time, telegrams, &c., are either covered by brokerage or they fall under the same category as the travelling expenses. With this change I should propose to your Lordships to adhere to the interlocutor reclaimed against.

LORD ORMDALE—I quite concur in the views expressed by your Lordship in the chair. It is important to keep before us the fact that Mr Mackenzie was a young stockbroker commencing business in Dundee, and not likely there to have seen transactions in these particular stocks. But there is besides this a statement by Mr Ross, who introduced the defender to him, that he told Mr Blakeney that he knew nothing of this stock, and would through his London correspondents sell it for him. Now this being so, it appears to me that the silence of the defender was, to say the least of it, remarkable—indeed it was unaccountable when he knew, as we have it in evidence from the correspondence that he did, how matters truly stood and how the shares of these banks were unsaleable on the London Stock Exchange, or at least unsaleable in the usual way and with the ordinary rules as to delivery, transfer, and so forth.

This brings us to another question, whether Mr Mackenzie failed in any way to do his best to save the defender from loss so far as lay in his power? He bought at once, as he was bound to

buy, other and saleable stock it cost more, but he delivered it to the purchaser and closed the transaction, and now he sues for the difference. I think he did all in his power, and I entirely concur with your Lordships in that result, and also as to the matter of the travelling and other expenses.

LORD GIFFORD—I am of the same opinion, and think the Sheriffs are right. Had this action been one brought under the civil law, it would have been one of those termed *actio contraria ex mandato*. Now the question is, did Blakeney authorise and instruct the sale? If so, he must pay, unless Mackenzie gave to his London correspondents different instructions from those which he received from the defender. But he did not do so. As to the fault committed by the pursuer in not sending copies of the certificates to London, if fault there was at all, it was of the nature of a *culpa levissima*, but the fault of Blakeney in concealing his knowledge I should class as *culpa lata*. The expense in going to London must be disallowed as really being a journey undertaken as to a question between a broker and his client.

The Court pronounced this interlocutor—

"Find that the stock in question was not saleable on the London Stock Exchange, being registered in Australia, as the certificates for the same bear: Find that this was well known to the appellant, and was not communicated to the respondent when the order in question was given: Find that the sums for which this action is brought, with the exception of the charges for expenses of a journey to London and for telegrams and postages, amounting to £21, were incurred solely in consequence of the conduct of the appellant: Therefore, and under deduction of the said sum, dismiss the appeal, and affirm the judgment appealed against, and decern: *Quoad ultra* recal the same: Find the respondent entitled to expenses," &c.

Counsel for Pursuer (Respondent)—R. Johnstone. Agents—J. Smith Clark, S.S.C.

Counsel for Defender (Appellant)—Balfour—Darling. Agents—Lindsay, Paterson, & Co., W.S.

Friday, July 18.

## FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—  
(M'EWEN'S CASE)—PETER M'EWEN AND  
OTHERS (M'EWEN'S EXECUTORS) v. THE  
LIQUIDATORS.

*Public Company—Winding-up—Trustees and Executors—Companies Act 1862 (25 and 26 Vict. c. 89), sec. 24—Where Confirmation sent to Company and Executor has resolved not to Sell the Stock, and has drawn Dividends for Several Years.*

The confirmation of certain executors, who were also trustees, was in 1873 sent by their agent to the office of a banking company, stock of which belonged to the executry estate. The bank failed in 1878, and the