

Another suggestion which was made on behalf of the reclaimers was that the right conferred upon the crofters was one which in the case of a current lease ought not to take effect at once, and that a reconciliation between the conflicting provisions of the statute was to be found in the view that the order of the Commissioners is not intended to come into operation until the end of the lease. I think the reclaimers must fail in that contention. There is nothing in the statute to that effect, and nothing to show that possession is not to be given it might be for seventeen or eighteen years after the date of the order, that is, ten years after the functions of the Commissioners have expired.

On the whole matter, I think that the argument for the reclaimers ought to be repelled, and that we should adhere to the judgment of the Lord Ordinary.

LORD M'LAREN concurred.

LORD ADAM was absent.

The Court adhered.

Counsel for the Complainers—Graham Murray—Macfarlane. Agents—John C. Brodie & Sons, W.S.

Counsel for the Respondents—Jameson—Orr. Agent—J. D. Macaulay, S.S.C.

Thursday, July 17.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SKINNER & COMPANY v. NEILSON AND OTHERS.

Ship—Contract—Principal and Agent—Commission.

In 1875 a shipbroker contracted with a shipbuilder for a ship, of which when built the shipbroker was to have the management. Each agreed to retain or find purchasers for one-half of the shares of the ship, and the shipbuilder paid to the shipbroker a commission calculated at the rate of $1\frac{1}{4}$ per cent. upon the whole price of the ship, or $2\frac{1}{2}$ upon the price of the share for which he had become responsible. The ship was built under this arrangement, and managed by the shipbroker till his death in 1884. The accounts and documents, including the cost of the vessel and instructing the payment of this commission, were open to inspection of all the shareholders from the first, and the accounts were regularly submitted to a firm of professional accountants in London, who audited them and issued an abstract to the shareholders. The fact that the shipbroker had received this sum of commission was well-known to the accountants, but was not stated by them in their abstracts of accounts issued to the shareholders. No objection was made to the accounts before

1884. In 1886 four of the shareholders, who had in 1877 bought their shares from the shipbuilder, raised an action to recover their respective proportions of the commission paid to the shipbroker, on the ground that he as part-owner with them had acted on their account in the contract for the ship, and was bound to communicate to them the value of any commission he had received from the shipbuilders.

Held (Lord Lee *dub.*) that the contract for the ship was one between the defender and the shipbuilder, that the relation of principal and agent did not exist between the defender and the pursuers, who were to be regarded as subsequent purchasers, that the accounts so dealt with must be taken to be correct, and that the commission did not increase the price of the ship to the pursuers, and the defender assailed.

Walter Montgomerie Neilson, James Neilson, James Wyllie Guild, trustee on the estate of James Morton, and Andrew Maxwell, as four of the shareholders in the steamship "Loudoun Castle," raised this action in the Sheriff Court at Glasgow against Thomas Skinner & Company, shipbrokers, St Vincent Place, Glasgow, for payment of their respective shares of £700, alleged to be a commission wrongfully received by the defenders from Messrs Thomson & Company, builders of the ship, and not communicated to the pursuers as joint adventurers in the transaction.

On 9th December 1875 Messrs Thomson wrote to Thomas Skinner—"After going over the several alterations and additions you require in the specification of new steamer sent you by us, we hereby offer to build the same, according to specification as arranged between us, for the sum of fifty-six thousand pounds, nett, to us," &c. On the same day Mr Skinner wrote to Messrs Thomson accepting the offer, and also upon the same day Messrs Thomson wrote to Mr Skinner—"We agree to pay you a commission of one and a quarter per cent. on the contract price of new steamer." The commission amounted to £700. It appeared from the correspondence that Mr Skinner was to take $\frac{32}{64}$ ths and endeavour to dispose of them among his friends, and that the Messrs Thomson were to take or find purchasers for the remaining $\frac{32}{64}$ ths. The ship was to be ready on 15th January 1877, and on 9th February Messrs Thomson wrote to Skinner & Company—"Dear Sirs—We have yours of yesterday, and now beg to hand herewith the agreement for new steamer signed by our friends for $\frac{32}{64}$ ths. We append address of the parties." The names appended included those of the pursuers. From further correspondence it appeared that all the money to be paid for the ship was sent through Skinner & Company. The ship was built and was afterwards managed by Mr Skinner as ship's husband. Upon 15th June 1877 Morton wrote to Skinner & Company—"I duly received yours of yesterday, stating that the book and vouchers of the 'Dunottar Castle'

were sent me for my docquet, along with 2s. 10d. of stamps for their being sent to London. I have made a cursory examination, and appended my docquet, and sent the two parcels to your address in London. I would suggest that in order to save trouble to yourselves as well as to the several owners the accounts should in future be audited by a professional accountant, to whom a fee, which would be small, should be paid." Skinner & Company on 27th June 1877 wrote to the owners of the "Loudoun Castle"—"We consider it advisable, for the benefit of all, to propose that in future a professional accountant should be appointed in London to audit the accounts, and after this has been done to pay the dividends at once, at the same time sending to each shareholder a lithographed abstract of the accounts similar to the form enclosed, which we think conveys all the information likely to be of interest to the owners. At the same time any owner can at any time have the freest access to the books and vouchers, and we shall be happy on all occasions to give any other information that may be desired. We shall be glad, if you are agreeable to the above proposal, if you will sign the enclosed lithographed form and return it to us." Messrs Broads, Paterson, and May, accountants, London, received the great majority of the owners' votes, and were accordingly selected to act as accountants, and they sent out abstracts of the accounts for the cost of the ship and for the voyages to the owners as arranged. The accounts showed the sum of £700 paid as commission to Skinner & Company by Thomson & Company.

The pursuers averred—"The pursuers have recently learned and aver that the late Mr Skinner, while the shares of the ship were being arranged, stipulated with the builders, without the knowledge or the consent of the pursuers, for payment to himself or his firm of a commission or discount, or other allowance or deduction out of the price of the ship. This agreement was in the circumstances a *pactum illicitum*. It is believed it was in writing, and defenders are called upon to produce it. Pursuers further aver that defenders, in pursuance of this illegal pactum, either did not pay the builders the said price, viz., £56,000 sterling, for the said vessel, or otherwise that they received from the builders deduction, easement, discount, or commission of considerable amount, viz., 1½ per cent. or thereby on the price, viz., £700 sterling more or less from the said price, and they have failed to communicate or pay any portion of the same to their co-owners as they were bound to do. Not known what was submitted to the accountants. Denied that the accountants, if they passed the charge of commission complained of, did so under or in terms of any instructions from pursuers, or that pursuers were in the knowledge that it had been passed. Denied said commission is customary in the trade, or that pursuers knew it to be so."

The defenders averred—"Explained that at the time when Mr Skinner made the con-

tract with Messrs Thomson for the building of the vessel referred to he was a partner of the defenders' firm, and, in accordance with the custom of the shipbroking trade his firm was entitled to a commission of 2½ per cent. on £28,000, the purchase price of the thirty-two shares undertaken by him, which was equivalent to 1½ per cent. on the price of the whole vessel, or £700, and that it was agreed by Messrs Thomson to pay this commission on the transaction, conform to their letter of 9th December 1875, herewith produced. Explained that this commission was one of the ordinary commissions due to the defenders as shipbrokers for the negotiation of the contract by their partner Mr Skinner, and, for his and their trouble in adjusting the specification, was earned before the pursuers had any connection with the vessel, and was disclosed on the face of the vouchers submitted to the accountants who audited the defenders' accounts on behalf and in accordance with the instructions of the shareholders.

The pursuers pleaded—" (1) The defenders having intromitted with the said ship and funds as before mentioned, are bound to count and reckon with pursuers as part owners as craved, and decree should pass against defenders for such sums as may appear on a full accounting to be the balance due and payable to the pursuers."

The defenders pleaded—" (3) The defenders having duly accounted to the pursuers and the other owners for their intromissions, and the pursuers have accepted the accounts after the same had been audited on their behalf and in terms of their instructions, and without objection or reservation drawn the dividends brought out therein as effeiring to their respective shares in the vessel, the defenders are entitled to absolvitor from the conclusions for an accounting. (4) Mr Skinner not having acted for the pursuers in making the contract with the shipbuilders, the pursuers have no claim to share in the commission referred to on record. (5) The defenders not having acted for the pursuers in regard to the making of said contract, are not liable to account to them for any commission received by them in connection therewith. (6) The said commission being one to which, in accordance with custom, the defenders were entitled as shipbrokers, and, *separatim*, having been sanctioned by the auditors for the owners, the pursuers have no claim to any share thereof."

James Thomson deponed—"We were the builders of the 'Loudoun Castle,' the price was £56,000. It was with the late Mr Skinner that I arranged the contract. There was a commission of 1½ per cent. given on the price of the vessel, which amounted to £700. (Q) Did Mr Skinner stipulate for that commission?—(A) He did not stipulate for it at first, but that commission was given ultimately; he asked for it, and I gave it in order to get the contract. I believe shipbrokers usually stipulate for commissions when asking for a price. . . . I handed over to Mr Skinner the letter No. 9/21 of process, in which I say, 'We agree

to pay you a commission of 1½ per cent. on the contract price of new steamer.' We had in previous transactions paid Mr Skinner's firm a commission on steamers that were placed with us. I believe the rate of commission was 2½ per cent. On this occasion the rate was 1½ per cent.; the reason for that was simply that Mr Skinner got only one-half of the stock. I objected at first to any commission, but ultimately I agreed to pay one-half owing to that. . . . Mr James Neilson, Mr Andrew Maxwell, Mr W. M. Neilson, and Mr James Morton became owners in this vessel through us. About the time the contract was made we were in correspondence with them about taking a part of the holding that we were responsible for. We were not in correspondence exactly, but verbally we talked of it."

John Annan, clerk with Broads, Paterson, & May, deponed—"My firm audited the accounts from the building of the vessel down to the time when she was ultimately sold by Messrs Skinner. . . . When I was acting as auditing clerk and taking charge of the audit department I reported the result of my examination to Mr Paterson, one of the partners of the firm. The owners' agreement and the other contract were spoken of to him. . . . I would certainly mention to him this brokerage of 1½ per cent. It was after due consideration by us, as auditors on behalf of the shareholders that that item was approved of. There was no attempt on the part of Messrs Skinner to conceal the fact from us that there was such a brokerage payable. My firm do a large business as auditors in London. They have done a large business in the auditing of ships' accounts. . . . I have large experience of the charges that are made by brokers in connection with ship management, and of the charges that are allowed by their shareholders. I can say from my knowledge that the charges which we allowed here for commissions to Messrs Skinner & Company were the usual and ordinary commissions in such shipbroking business."

John Paterson, a partner of the accountants' firm, deponed—"The question of Messrs Skinner's remuneration was one which was brought prominently under our view in auditing the accounts. I was shown by Mr Annan from time to time documents bearing on the question of their remuneration that he came across in the course of his audit. I believe I was shown the three documents, Nos. 9/10, 9/11, and 9/12, which I see bear on the face of them that Messrs Skinner & Company were getting a commission from the builders at the rate of 1½ per cent. on the price of the vessel. I consider that that was a remuneration that went to Thomas Skinner & Company, and did not fall to be shared with the co-owners. I did not think it necessary that that should be entered in the abstract of accounts that was issued to the shareholders, because if you had deducted it you would have had to add it again."

Upon 26th February 1889 the Sheriff-Substitute (GUTHRIE) pronounced this judgment—"Finds that the defenders have

assumed responsibility for the late partner of their firm, the deceased Thomas Skinner, who acted as managing owner of the 'Loudoun Castle' from her building till she was sold: Finds that the pursuers Walter Montgomerie Neilson, James Neilson, and Andrew Maxwell, were co-owners of the 'Loudoun Castle' to the extent of four sixty-fourths, four sixty-fourths, and two sixty-fourths respectively, and that the pursuer James Wyllie Guild represents Mr Morton, who was owner of four sixty-fourths shares of said ship: Finds that the defenders, or the said Thomas Skinner, received from the builders of the 'Loudoun Castle' a sum of £700 as commission on the building contracts, for which they are bound to account to the pursuers in proportion to their shares: Finds that the defenders duly rendered accounts to the owners of the 'Loudoun Castle' from time to time, and that the pursuers have not established against the defenders any of the other objections stated to the accounting: Therefore decerns against the defenders for £153, 2s. 6d., viz., in favour of each of the pursuers Walter Montgomerie Neilson, James Neilson, and James Wyllie Guild for the sum of £43, 15s., and in favour of the pursuer Andrew Maxwell for the sum of £21, 17s. 6d., and *quoad ultra* assolvies the defenders: Finds no expenses due, and decerns.

"Note— . . . The point is whether the defenders, who were managing owners and ship's husbands of the steamer 'Loudoun Castle,' are bound to account to their co-owners for their respective shares of £700, a sum which they (the defenders) received from the builders as commission on placing the contract. The principle which the pursuer seeks to apply is generally stated in language which is found in Story On Agency, section 211, and repeatedly adopted by subsequent writers and judges, viz., 'That in all cases where a person is either actually or constructively an agent for other persons, all profits or advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers.' The principle has been applied to the case of agents in contracts of sale receiving commissions from the other party, as in *Pender v. Henderson*, *Morrison v. Thompson*, *Gray's Trustees v. Drummond and Reid*, &c. I do not think that the defenders have been successful in their attempt to distinguish this case from those to which I refer. In the first place, it is not proved that the custom of taking commissions in purchasing ships or placing orders for building ships, is so universal as to bring the payment within the category of 'ordinary compensation,' or to raise a presumption that it must have been known to the pursuers.

"Neither is it proved that it was in fact known to the pursuers that the defenders were receiving this commission, which truly enhanced the cost of the ship. Mr Maxwell alone of the pursuers was examined, and he did not know. There was a kind of suggestion in argument that as the

other pursuers were not adduced, it must be assumed that they would not disclaim knowledge. But the defenders might have called these gentlemen if they had desired their evidence; and throughout the case it must be remembered that where one in a fiduciary position takes to himself a benefit from a contract made for his principal, or sells to his constituent what he himself has an interest in, the burden lies on him to prove that he made a full disclosure to the principal of his interest, and did not take advantage of his fiduciary position—*Dunne v. English*, L.R., 18 Eq. 524; *Erlanger v. New Sombrero Phosphorus Company*, 3 App. Ca. 1218.

“Again, the rule in question is not confined to cases in which the relation of agent and principal, or of trustee and beneficiary, or *cestuique* trust, is formally and technically established. It is enough if the party who makes the secret profit be ‘constructively’ an agent. The pursuers were really the parties who contracted with Messrs Thomson for the building of the ‘Loudoun Castle.’ I cannot regard them and the other original owners as being mere sub-purchasers from Mr Skinner and Messrs Thomson, as the defenders ingeniously try to make them. The pursuers paid the instalments of the price to the builders as they fell due through the defenders as their agents. And in the inception of the adventure the defenders and their late partner do not differ materially from promoters of companies in various cases, of which *Huntington Copper Company v. Henderson* may be taken as a sample.

“The commission now in question is not, I humbly think, one of those covered by the fourth article of the working agreement, which bears that the allowance thereby stipulated for management ‘shall be irrespective of the ordinary commissions to the firm of Thomas Skinner & Company as shipbrokers.’ This clause naturally refers to commissions earned in the course of trading with the ship, and not to one for bringing it into existence, or for preparing, as was contended, the building contract and specifications.

“Again, it was maintained that the pursuers are barred from insisting in their present claim by the fact that accounts which shewed the receipt by the defenders of the £700 in question were passed by the accountants who audited Messrs Skinner’s accounts on behalf of the owners. Mr Paterson tells us that he put a certain construction on the owners’ agreement, and therefore passed the charges for commission; but he also says that he did not consider it a charge that properly entered the accounts between the owners and their managers. I think that the latter opinion just confirms the construction which I have put upon the clause about commissions, which differs from Mr Paterson’s construction of it. However that may be, it is hardly a sound contention that an error of judgment on the part of the accountant who audits the books of the managing owner of a ship, whose province mainly, though not exclusively, is to check the

figures and vouchers, bars the co-owners from challenging an illegal charge made against them of which they had no personal knowledge. . . .

“I think that in this litigation success has been so mixed that no expenses ought to be allowed to either party.”

The defenders appealed, and on 22nd August the Sheriff (BERRY) adhered.

The defenders appealed, and argued—The only serious question between the parties was whether Skinner & Company had to repay to the pursuers their proportions of this £700. Skinner contracted with Messrs Thomson that they should build him a ship at the price of £56,000. In order to obtain the money Skinner got certain of his friends to buy 32/64ths of the vessel, and Messrs Thomson agreed to get their friends to buy the remaining 32/64ths. The pursuers were all persons who had bought their shares from Messrs Thomson. It might have been a different case if they had bought them from Skinner. Messrs Thomson agreed to give Skinner a commission in return for the contract, but this commission was not fixed until the price of the vessel had been arranged for. Skinner was not an agent of Messrs Thomson, and did not stand in any fiduciary position to the pursuers, as they had bought through Messrs Thomson. The pursuers required to show before they could recover that the price of the ship had been increased to them by the amount of this commission, but that they had failed to do. There was no concealment of the facts in this case, as the fact that Skinner had received this commission was known to the professional accountant who had been appointed by the shareholders in their own behalf, and it differed therein from the following cases—*Huntington Copper Company v. Henderson*, January 12, 1877, 4 R. 294; *Pender & Company v. Henderson & Company*, July 20, 1864, 2 Macph. 1428. The commission here was what was usual, 1½ per cent. upon the whole, but in this case it was calculated at 2½ upon the half of the ship which was disposed of by Mr Skinner.

The respondent argued—The defenders were bound to repay the £700, because in ordering this ship Skinner had acted for the whole of the joint-adventurers, who were the true owners, and among whom were the four pursuers. It did not matter that at the time of the building of the ship the joint-adventurers had not all bought their shares, because the contract was arranged upon the footing that Skinner was to dispose of one-half of the shares and Messrs Thomson of the other half. What was really wanted by Skinner was to get a ship built of which he was not to be the owner but the manager, and make his profit in that way. He was therefore acting as agent for the persons to whom the ship belonged, and on the well-known principle that an agent was bound to account for all moneys received in his employers’ service he was bound to pay back this sum of £700 which he had wrongfully got. The case was ruled by that of *Henderson*,

quoted *supra*; *Manners v. Raeburn & Veral*, June 6, 1884, 11 R. 899; *Dunne v. English*, L.R., 18 Eq. 524; *Erlanger v. New Sombrero Phosphorus Company*, 3 App. Cas. 1218.

At advising—

LORD YOUNG—This is an action of accounting which was brought in the Sheriff Court in 1886 at the instance of four out of twenty-four proprietors of a ship called the "Loudoun Castle," and it is directed against Thomas Skinner & Company, shipbrokers in Glasgow, with whom the original contract for building the ship was made, and who as shipbrokers managed the ship for some time after she was built. The action has been in Court since 1886, and it terminated in the Sheriff Court by a judgment pronounced on 22nd August 1889. It came before us on appeal in June 1890, and we have now to advise it. It is melancholy to see such an amount of litigation over this matter, especially looking to the Sheriff's judgment, by which he informs us that the only questions argued before him related, in the first place, to a sum of £700 which Skinner & Company had received from the shipbuilder on the contract for building the ship, and, in the second place, to certain insurance brokerages at 12 per cent. which Skinner & Company had received from the underwriters on the ship's assurance. The judgment of the Sheriff finds nothing due to the pursuers under this last head, and as it was given up in the argument before us I may lay that question aside with this observation only, that I concur with the Sheriff-Substitute's view that there is no ground for objection against that part of the accounts.

We have to consider the question whether there is any objection to the accounts with respect to the £700 which was paid by the builders to Skinner & Company. It is not disputed that the accounts produced by Skinner & Company are full and complete accounts, and that this question arises clearly and distinctly on the face of them—that they show that Skinner & Company did receive this sum from the shipbuilders. The question is, whether they are entitled to retain the sum, or are bound to restore it so far as the interests of these four shareholders are concerned. So far as we know, all the other shareholders are quite content. But these four shareholders have prevailed on the Sheriff to sustain their contention whereby each of three of them gets a sum of £42 odds, and the fourth gets a sum of £20. That is the result of this five years' litigation, and what we have now to consider is, whether this objection which the Sheriff has sustained is well founded. I wish here to point out that in the admittedly full and fair accounts which Skinner & Company exhibited from the first, not only for the management of the ship but also for the contract for building her, the fact appears that this sum of £700 was not a random sum, but was calculated as being a commission of 1½ per cent. on the whole vessel, or 2½ upon the price of half of the vessel. The documents instruct-

ing this fact were open to the examination of all the shareholders who cared to look into the matter. There is a letter from Skinner & Company of 27th June 1877, stating that fact and the way in which these accounts came to be submitted to the accountants at all is explained in the evidence. Mr Paterson, a member of a London firm of accountants, explains that the shareholders of Messrs Skinner's vessels desired to have the accounts audited by a professional accountant, and that they had been chosen for the purpose, instead of each shareholder examining the accounts for himself. Now, we have the accounts as audited, and we have it in Paterson's evidence that this sum of £700 was prominently brought under the notice of the accountants. There appears to me to be very strong grounds for the observation that this examination by accountants appointed by the shareholders themselves is equivalent to examination of the accounts by each shareholder, and we must take it that these accounts are correct, although, of course, if it is proved that anything wrong has been done the money must be restored. Now, this payment was received by Messrs Skinner & Company in 1876 or 1877, and although this full disclosure was made, no hint of any objections to the accounts was heard of until after Mr Skinner's death in 1884, and this action is not brought until 1886. I do not think that these are immaterial facts in considering the question whether any wrong has been done, and Skinner & Company have to make any payments to the shareholders.

I desire to preface what I have to say on the law as applicable to this case by saying that I agree with the law as laid down by the Sheriff-Substitute in the quotation he makes from Story on Agency, section 211—"That in all cases where a person is either actually or constructively an agent for other persons, all profits or advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers." And I agree with the Sheriff-Substitute when he says—"Again, the rule in question is not confined to cases in which the relation of agent and principal, or of trustee and beneficiary, or *cestuique* trust, is formally and technically established. It is enough if the party who makes the secret profit be 'constructively' an agent." I only wish to say that if it is a fact that the agency or representative character exists it does not matter what the facts are that prove its existence. If it exists no profit can be made by the agent for himself, but if he takes discount or commission from any person with whom he deals for the principal, he is bound to account to the principal for that commission or discount. I think that is quite settled, and I must not be understood as saying anything against that rule of law.

Now, the facts of the case may be stated in a few words. I think that this contract for building the ship which was made in 1875—before the present pursuers had any-

thing to do with the matter—was made entirely between Skinner & Company as the employers and Messrs Thomson as the employed. I think Skinner & Company were then acting for themselves alone, and binding themselves alone, although I may have to consider later what was the effect of the contract so concluded between these two parties as regards any third party. Now, that contract is contained in three letters which are all dated 9th December 1875, and which were the result of various meetings between the parties. The first of these letters is an offer by the Thomsons to build a new steamer according to specification “for the sum of sixty-six thousand pounds nett to us.” The second contains a simple acceptance by Skinner & Company of that offer, and the third, which is of importance, is by the shipbuilder to Skinner & Company, which says—“We agree to pay you a commission of one and a quarter per cent. on the contract price of new steamer.” Now I think that that was a legal and binding contract, that the Thomsons were bound to build the ship for £56,000, and that they were also bound to allow Skinner & Company their commissions on the price. It appears from other correspondence of about the same date that the following arrangement as to the disposal of the vessel was come to between the parties. The shipbuilders, the Thomsons, were to keep for their own use or to find purchasers for one-half of the vessel, and that Skinner & Company were to keep to themselves or find purchasers for the other half. On 11th December 1875 the Thomsons wrote to Skinner—“In addition to our undertakings in connection with new steamer, we have to say that we are responsible for one-half total stock in same; if we can relieve you of any further portion we will not fail to acquaint you.” And that this was the arrangement entered into between the parties is confirmed by the evidence; and I find by a letter dated 9th February 1876 that the Thomsons had succeeded in getting their half of the ship all taken up by their friends. Upon that date they wrote to Skinner & Company—“We have yours of yesterday, and now beg to hand herewith the agreement for new steamer signed by our friends for 32/64ths.” Their names are then set forth, ten in number, and the present pursuers of this action are four of the friends of Messrs Thomson who agree to take a share of their half of the ship. Now, at this time the contract for building the ship had been completed, and under their arrangement, if Skinner & Company had found purchasers for the other half of the ship they were entitled to get a sum for their trouble. It was explained to us that the Thomsons agreed to allow 2½ per cent. upon half the price of the ship as a fair remuneration for this trouble. Now, that does not seem to me to be an unreasonable or illegal arrangement, or any violation of duty by an agent to his principal. Is it any violation of the rule of fair conduct by an agent to his principal that they should keep this money? I can see none. In my opinion it is not in the least a case of an

agent or servant getting discount or commission from some tradesman employed by his master—and a shipbuilder is only a tradesman on a large scale—and failing to account for it to his master. That is not the character of the transaction at all. The opportunity of raising the present question depends entirely upon the manner upon which the amount of the commission was calculated. It appears to be the usual and customary manner of calculating such things, and the conduct of Skinner & Company is in accordance with that view, because it is quite plain upon the accounts they made up that such a payment had been made, and the accountants had it brought prominently under their notice, and no objection was taken to it as not being a fair payment in the circumstances. I see no pretence here for thinking that this firm committed any fraud upon their principal by taking discount from the shipbuilders, or by taking more than was a fair payment for the amount of trouble they had to take in the business. The price of the ship was to be £56,000, and there would have been no difference if the price had been stated to be £55,300, and a payment of £700 to Skinner & Company for their trouble; £56,000 would have been the price of the ship to subsequent customers, and the pursuers just stand in that position. No objection could have been made to this charge if that had been the way in which it appeared in the accounts, and I do not think that the substance of the thing is altered because the sum is stated to be commission or percentage; it is really the contract between the shipbuilders and Skinner & Company for the sum to be paid to the latter party for their trouble. In these circumstances I am not surprised that the other shareholders in this ship are satisfied with the bargain and make no complaint, and I am not prepared to sustain the objection which has been raised at the instance of these four shareholders.

LORD RUTHERFURD CLARK—I am of the same opinion, and I proceed solely on the ground that it has been proved that this commission was chargeable, and was in fact charged upon the half of the vessel which Messrs Skinner & Company contracted to dispose of, and did not increase the price of the ship to these shareholders, who bought their shares from the shipbuilders.

LORD LEE—I agree that if it had been proved that the commission of £700 had been charged wholly upon the half of the ship which Skinner & Company had agreed to dispose of the pursuers could not successfully object to it, but I am not clear that upon the documentary evidence that was the case.

It is admitted that the contract for building this ship was wholly managed by Skinner & Company for their own purposes. It is also clear that they stipulated for the payment of commission to themselves. I think it is proved on the documentary evidence that this commission was calcu-

lated upon one-half of the price of the ship and not upon the whole price, but I cannot find any evidence that it was exclusively charged upon the half which Skinner contracted to dispose of. I think that the burden of proving that the commission was so charged lay upon the defenders, and that that view is rather inconsistent with some of the documentary evidence. When the matter is first brought up the answer of Skinner & Company is no doubt that the commission was really $2\frac{1}{2}$ per cent. upon the $\frac{32}{64}$ ths, which Mr Skinner took the risk of, although nominally made $1\frac{1}{2}$ per cent. on the whole $\frac{64}{64}$ ths, but it is not stated where that appears in the accounts. I do not think that the accounts do show it, and I do not think that the accountant examined them at all for the purpose of finding out that point. I may say that I do not think that the examination of the accounts is at all conclusive against these shareholders who brought up the matter when they first became aware of it. If it was true that this commission had been charged on the whole ship I think that the Sheriff's judgment would have been right.

LORD JUSTICE-CLERK—There is no matter in connection with mercantile affairs which requires to be more carefully guarded to prevent abuses than that of commissions, given by those who contract to do work to those who are instrumental in placing contracts, where the receivers of the commission are joint-adventurers with others in giving out the contract. They are in such circumstances just the agents of themselves and those associated with them, and subject to rules of law applicable to agents. Therefore in ordinary circumstances any such commission must in equity be dealt with as a discount given by the contractor upon the contract price, and whoever receives it is bound to share it with those who along with him have entered into the contract to which it relates. Any other principle would not only be inequitable in itself, but would be a premium upon underhand and fraudulent dealing.

In one view of it all such commissions go, as the Sheriff-Substitute says, to swell contract price, and thus one of the adventurers who receives a commission may be held to be taking it not from the contractor, but out of the pockets of his co-adventurers. I should be very sorry if by any decision given in this Court any doubt were to be thrown upon a principle of law so sound in itself and so important to all combinations of persons, who require necessarily to employ agents either from their own number or elsewhere to arrange their contracts for them.

I think the decision of the Court is right, and as my opinion is founded upon the same grounds as your Lordships have stated, it would be a waste of time to recapitulate them.

The Court pronounced this interlocutor:—

“The Lords having heard counsel for the parties on the appeal, Recal the interlocutor of the Sheriff-Substitute of 28th

February 1889, and the interlocutor of the Sheriff of 22nd August 1889: Find in fact that the pursuers Walter Montgomerie Neilson, James Neilson, and Andrew Maxwell were co-owners of the ship “Loudoun Castle” to the extent of $\frac{4}{64}$ ths, $\frac{4}{64}$ ths and $\frac{2}{64}$ ths respectively, and that the pursuer James Wylie Guild represents James Morton, who was owner of $\frac{4}{64}$ ths of said ship: Find that Messrs James & George Thomson agreed on 9th December 1875, with the late Thomas Skinner, for whom the defenders have assumed responsibility, to build for him the said ship, and that it was part of Mr Skinner's agreement with Messrs Thomson that he should by himself or his friends take one-half of the shares of the said ship, and that Messrs Thomson by themselves or their friends should take the other half: Find that it was part of the said agreement that Mr Skinner should receive from Messrs Thomson a payment for his trouble amounting to $2\frac{1}{2}$ per cent. on one-half of the sum of £56,000, being the price of the said ship, amounting said payment to £700, and that said agreement was in accordance with the custom of the shipbuilding trade: Find that thereafter the pursuers agreed with Messrs Thomson to take and did take part of the shares in the said ship which Messrs Thomson had agreed to take and dispose of, and that the names of the subscribers which had been obtained by Messrs Thomson, and which included the pursuers, were not communicated to the defenders till 9th February 1876: Find that the price of the said ship was paid to Messrs Thomson through the defenders, who acted as the brokers in superintending the building of the ship and collecting the instalments of the price; that the said sum of £700 was chargeable upon and was in fact charged upon the half of the ship which was subscribed for by the defenders or their friends, and that neither Mr Skinner nor the defenders acted in the transactions above mentioned as agents for the pursuers or any of them, and did not receive the said sum of £700, or any part thereof, as such agents: Find that the defenders duly rendered accounts to the owners of the said ship from time to time, including the pursuers, and that the accounts and vouchers of the said ship were regularly submitted for audit to a firm of accountants on behalf of and in accordance with instructions from the owners, including the pursuers, and that said accounts and vouchers were further open to the inspection of the owners, that the vouchers for the said £700 were laid before the said auditors and passed by them as correct, and that no objection to the entries relating thereto was stated by any of the pursuers until after the death of Mr Skinner on 2nd August 1884: Find that the pursuers

have not established against the defenders any of the other objections stated by them to the said account: Find it not proved that the defenders received an offer of £32,000 sterling for the said ship referred to in condescendence 8, or that the defenders were guilty of any negligence or default in connection with the sale of the said ship: Find in law that the defenders are entitled to absolvitor: Therefore assoilzie the defenders from the whole conclusions of the action, and decern: Find the defenders entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for Appellants—Sir C. Pearson—
Ure Agents—J. W. & J. Mackenzie, W.S.

Counsel for Respondents—Low. Agents
—Macpherson & Mackay, W.S.

Thursday, July 17.

SECOND DIVISION.
STROYAN AND ANOTHER (BLACK'S
EXECUTORS).

*Succession — Heritable and Moveable —
Security by Assignment of Lease — Titles
to Land Consolidation Act 1868 (31 and
32 Vict. c. 101), secs. 3 and 117.*

Held (Lord Rutherford Clark *diss.*)
that a debt secured by an *ex facie*
absolute assignation of a lease qualified
by a back-letter is moveable estate as
regards the succession of the creditor.

Question, whether such an assignation
of a lease is a heritable security under
the Titles to Land Consolidation Act
1868.

The late John Black, farmer in Horsepark
in the parish of Glasserton, Wigtownshire,
and his wife Mrs Elizabeth Murray or Black,
executed a mutual disposition and settle-
ment in 1876, by which they disposed to the
survivor the whole estate, heritable and
moveable, now belonging or which should
belong to both or either of them at the
death of the predeceaser.

In May 1883 they lent £450 upon the
security of the assignation of a lease for
999 years (from Whitsunday 1810), but they
granted the borrower a back-letter upon
the narrative that the assignation although
ex facie absolute was in security for repay-
ment of said loan. They expedite a notarial
instrument in their favour, which was regis-
tered along with the original lease in the
General Register of Sasines in terms of the
Registration of Leases (Scotland) Act 1857.

The said John Black died in 1886 survived
by his wife, who died in 1888.

This special case was presented by John
Stroyan, farmer, Dindinnie, Wigtownshire,
and another, Mrs Black's executors, of the
first part, and William Murray, farmer,
Skate, her nephew and heir-at-law, of the
second part, to have it determined "whether
the said sum of £450 secured by the said *ex
facie* absolute assignation of the foresaid

long lease, qualified by the foresaid back-
letter, forms part of the moveable estate of
the late Mrs Elizabeth Murray or Black,
and as such falls to the first parties as her
executors-nominate: . . . Or, whether the
said £450 is heritable estate of the said Mrs
Elizabeth Murray or Black, and as such
falls to the second party as her heir-at-law
in heritage."

The Titles to Land Consolidation (Scot-
land) Act 1868 (31 and 32 Vict. c. 101), by
sec. 3 provides that "the words 'heritable
security' and 'security' shall each extend to
and include all heritable bonds, bonds and
dispositions in security, bonds of annual
rent, bonds of annuity, and all securities
authorised to be granted by the 7th sec. of
the Act 19 and 20 Vict. c. 91 . . . and all
deeds and conveyances whatsoever, legal as
well as voluntary, which are or may be used
for the purpose of constituting or com-
pleting or transmitting a security over
lands or over the rents and profits thereof
as well as such lands themselves and the
rents and profits thereof, and the sums—
principal, interest, and penalties—secured
by such securities, but shall not include
securities by way of ground annual, whether
redeemable or irredeemable or absolute dis-
positions qualified by back-bonds or letters."
And by sec. 117 it provides that "from and
after the commencement of this Act herit-
able security granted or obtained either
before or after that date shall, in whatever
terms the same may be conceived . . . be
heritable as regards the succession of the
creditor in such security, and the same shall
be moveable as regards the succession of
such creditor, and shall belong after the
death of such creditor to his executors or
representatives *in mobilibus* in the same
manner and to the same extent and effect
as such security would under the law and
practice now in force have belonged to the
heirs of such creditor." . . .

Argued for the first parties—(1) The
security here was not heritable security,
and therefore even before 1868 the sum
which it secured would have gone to the
executors of the creditor. (2) If it was herit-
able security then the Act of 1868 applied.
The second party wished to make it herit-
able security and then to include it among
the exceptions to which the Act of 1868 was
declared not to apply. These exceptions
did not contain *nomination* assignations
of leases, and they were to be read strictly.

Argued for the second party—The secu-
rity here was clearly heritable security.
(1) At common law the money it secured
went to the heir-at-law of the creditor.
The 1868 Act did not apply, for assigna-
tions of leases were not among the heritable
securities dealt with by that Act. (2) If it
was a heritable security in the sense of the
1868 Act it was an absolute disposition
qualified by back-letter and as such among
the exceptions to which the Act was ex-
pressly declared not to apply.

At advising—

LORD YOUNG—The question in this case
arises quite generally and without speciality
or peculiarity in the individual case, but I