

two adjoining parishes of Kirkpatrick-Fleming and Dornock, which are proposed to be mutilated. They say that, in the interests of their parishioners, they think the erection inexpedient. We have also the land owners raising the same opposition. Now we must bear in mind that if the erection is to be effectual, the people in the district will have to resort to the church. People are entitled to go to their parish church without any payment, whereas, if they go to the new church, they will have to pay seat-rents. Where people live far from their parish church this consideration might appear paltry and of no importance; but where they reside near their parish church, there is no necessity for their incurring pecuniary cost. I cannot bring myself to any other conclusion than that the proposed erection is one which the Court should reject.

LORDS BENHOLME, ARDMILLAN, JERVISWOODE, and MACKENZIE concurred.

Counsel for Petitioners—Lee. Agents—Menzies and Coventry, W.S.

Counsel for Sir John H. Maxwell—Duncan. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Ministers of Dornock and Kirkpatrick-Fleming—Millar, Q.C., and Moncrieff. Agents—Morton, Neilson, and Smart, W.S.

COURT OF SESSION.

Wednesday, February 19.

SECOND DIVISION.

[Sheriff of Lanarkshire.]

MATTHEWS v. AULD & GUILD.

Agent and Principal—Compensation.

Circumstances held sufficient to certiorate A B, who sold certain railway stock, that C, the party employing them, acted as an agent merely, though the name of the principal was not disclosed,—so as to exclude a claim of compensation by A B against C, in an action for payment of the price of the stock at the instance of the principal.

The summons in this suit, at the instance of G. D. Matthews, merchant, Dundee, against Auld & Guild, stockbrokers in Glasgow, concluded for production of a full account of the intromissions of the defenders with the price of £2000 of stock of the Caledonian Railway Company, received by the defenders for said amount of stock on the order of James Henderson junior, broker in Dundee, acting as agent for the pursuer, proprietor of said stock, the certificates of which were received by the defenders from the Commercial Bank of Scotland at Glasgow, on the pursuer's order, and for payment of the balance on said account (£83, 13s.) with interest.

It appeared from the proof that on the 2d day of July 1870 the pursuer employed James Henderson junior, then a stockbroker in Dundee, to sell said stock in Glasgow, and to buy in exchange 160 new £10 shares of the Caledonian Railway. Henderson was not a member of the Glasgow Stock Exchange, and he, as agent for the pursuer, employed the defenders, who are members of said Exchange, to carry out the pursuer's instructions. In pursuance of said employment the defenders,

on 6th July 1870, sold the £2000 of the stock of the Caledonian Railway Company at £77, 10s. per £100, and on the same day they bought 160 £10 new shares in the said Railway at £2, 15s. per share. The sale and purchase were made for settlement on the following account-day, viz., the 15th day of July 1870. On the 12th of July 1870 the said James Henderson instructed the defenders to purchase an additional 100 new £10 shares in the said Railway Company, and he informed them that 40 of these were to be in further exchange for the £2000 stock belonging to the pursuer. The defenders on the same day purchased 100 new £10 shares, as instructed, at £2, 15s. per share, for settlement on said 15th day of July 1870. In terms of instructions given by the pursuer, and conveyed to the defenders through Henderson, they got, by authority from the pursuer, from the Commercial Bank of Scotland, the certificates of the said £2000 of the stock of the Caledonian Railway Company, together with a transfer of said stock, in exchange for which they handed to the bank, on the pursuer's account, receipts for 200 new £10 shares, and paid £910 of calls on said 200 shares. The price paid for, and the calls on said 200 shares, did not exhaust the amount received."

The following letters, amongst others, passed between Henderson and Auld & Guild, with reference to the transaction:—

"Dundee, 2d July 1870.

I have 2000 Caledonian Ordinary Stock to exchange into new shares, provided you can get the difference, equal to 77 for old, and 54/ for new, i.e., if you get $\frac{1}{2}$ more for old, you can give 6d. more for new if necessary. If only $\frac{1}{2}$ less for old you can sell, if the new can be got at 6d. less. Buy only 160 new shares, however, as my client has taken up the 40 shares he had in sight.—

JAS. HENDERSON JR.

Glasgow, 4th July 1870.

Dear Sir,—We have your favour of Saturday. Your order to sell £2000 Stock Caledonian Railway, and to buy 160 £10 shares at £77 and 54/, or relative prices respectively, shall have our attention. It could not be done to-day.—

AULD & GUILD.

Dundee, 6th July 1870.

I hope you have to-day succeeded in exchanging Caledonian Stock as desired. I had a call from my client desiring to know whether the conversion had been effected.—JAS. HENDERSON, JR."

James Henderson ultimately absconded, and was sequestered. On 29th July 1870 his transactions through the defenders showed a balance at his debit amounting to £3152, 10s. 11d.

The plea in law for the pursuer was—"The defenders having sold the stock referred to, which belonged to the pursuer, on his employment, and having uplifted and intromitted with the price thereof, are bound to hold just count, reckoning, and payment, as concluded for."

The pleas in law for defenders were—" (1) The defenders having sold the stock referred to, and having uplifted and intromitted with the price thereof, on the order and employment of James Henderson, he or his trustee are alone entitled to demand count and reckoning with the defenders. (2) There being no privity of contract between the parties, the pursuer cannot hold the defenders liable for any balance due on the transactions in question."

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