COURT OF SESSION.

Thursday, November 12.

FIRST DIVISION.

[Lord Craighill, Ordinary.

RUSSELL *v.* RUSSELL.

Process—Reclaiming Note—31 *and* 32 *Vict., c.* 100. *Held* that when the last day for lodging a reclaiming note under the Court of Session Act of 1868 fell upon a Sunday, it was timeously lodged upon the Monday, the plain intention of the statute in saying that a reclaiming note must be lodged within a certain number of days being to give the reclaimer that full number of days.

Counsel for the Reclaimers and Respondents—Maclean. Agents—J. & R. D. Ross, W.S.

Counsel for the Petitioners—R. V. Campbell. Agents—Morton, Neilson, & Smart, W.S.

Friday, November 13.

FIRST DIVISION.

[Lord Curriehill, Ordinary.

PETITION—DAVID BERWICK AND OTHERS (WALKER'S TRUSTEES).

Trustee—Lease—Remuneration—Special Powers—Petition—Competency.

Trustees were empowered by the deed of appointment "to let said lands and estates on such leases and conditions as they may think proper, and to grant and enter into articles of roup, submissions, conveyances, tacks, and all other writs and deeds as shall be required for fully and effectually executing and carrying out the purposes of the trust." In virtue of these powers the trustees granted a lease of the trust estate. After possessing under the said lease for nine years, the tenant intimated to the trustees that he would be ruined unless he was allowed to renounce the lease. The trustees presented a petition for power to accept the renunciation, which was *dismissed* as incompetent.

This was a petition presented by David Berwick, David Edie, and Walter Walker, the accepting and acting trustees under the trust-disposition and settlement of Walter Walker of Kingask, for power to accept renunciation of a lease which they had granted of the farm of Kingask. Mr Berwick was the only survivor of the original trustees appointed by the trust-deed, and had assumed the orher petitioners Mr Edie and Mr Walker. In the trust-deed the trustees were also appointed tutors and curators.

The following powers were given to the trustees in the trust-deed:—"And I hereby authorise and empower my trustees to let said lands and estates on such leases and conditions as they may think proper, and I empower my trustees to grant and enter into articles of roup, submissions, conveyances, tacks, and all other writs and deeds as shall be required for fully and effectually executing and carrying out the purposes of the trust hereby conferred on them."

In pursuance of these powers, the trustees let the farm at an increased rent in 1865, and the tenant continued to possess under that lease until 1874, when he intimated to the trustees that he could carry on the farm no longer at the increased rent, that he was loosing money every year, and that he would shortly be left without means at all, unless he was allowed to leave the farm, or had a considerably reduced rent.

The trustees were of opinion that the rent was not excessive, but as they otherwise believed the tenant's statement, they presented this petition for power to accept renunciation of the lease.

The Lord Ordinary (CURRIEHILL) reported the case to the First Division.

At advising—

LORD PRESIDENT—I think that this is not an application for special powers by a tutor-nominate, but by trustees. For although the first trustee is also tutor-nominate, the petition is not presented by him in that capacity, but as one of the trustees. In the case of a tutor-nominate the Court has occasionally granted powers when the necessity was very high. But a tutor-nominate has not definite powers given by the father, but powers defined by law. But in the case of trustees under a settlement, the truster himself has settled what the powers of the trustees are, and the Court will not give different or higher powers. In the present case very high powers have been given by the truster, and I do not give any opinion whether under these powers they are entitled to do what they now propose. If they are not entitled to do so under the powers in the deed, then the Court cannot give them the power, and the trustees are not entitled to come and ask us, whether the power is given or not. I think therefore that this petition must be dismissed as incompetent.

LORD DEAS—The petitioners are here as trustees, and in no other capacity. What they want to be empowered to do is an act of management. The question is, whether or not it is expedient for them to accept renunciation of a lease which they granted, because the tenant which they chose cannot make the rent out of the farm. There could be no clearer case for trustees to exercise their own discretion. They might as well come to us for power to accept a certain rent. If we granted this petition, it would just be taking the management of the estate into our own hands. I therefore agree with your Lordship.

LORDS ARDMILLAN and MURE concurred.

Petition dismissed as incompetent.

Counsel for Petitioners — T. B. Johnstone. Agents—Frasers, Stodart, & Mackenzie, W.S.

Friday, November 13.

FIRST DIVISION.

[Lord Young, Ordinary.

CUNNINGHAM *v.* LEE.

Principal and Agent — Stock Exchange—Broker — "Carrying over"—Sale.

A, who was not a stockbroker, purchased stocks in his own name for B, for settlement on a certain day. When settling day arrived, B refused to give A any instructions, so A closed his account with B, "carried over" the stocks to next settling day, and intimated

to B that they had been sold at a certain loss, of which he demanded payment. B did not accede to this demand, and subsequently became bankrupt.—*Held* that A was not entitled to claim upon the sequestrated estate for the loss which he would have sustained if the sale on settling day had been *bona fide*.

This was an appeal by Peter Cunningham, stockbroker, Edinburgh, one of the creditors on the sequestrated estate of James Kirk, grocer and wine merchant, Edinburgh, from the deliverance of Mr Robert Weir, trustee on the bankrupt estate. The deliverance appealed against was one in which the trustee had allowed a claim by Mr Lee, Solicitor before the Supreme Courts of Scotland, to be ranked as a creditor on the sequestrated estate for £1623, 5s., to the amount of £1100.

The following were the circumstances of the case as brought out by the proof, parole and documentary:—

Mr Lee was employed by the bankrupt Kirk to buy and sell stocks for him. These transactions were all in Mr Lee's own name with the London brokers. In October 1873 Mr Lee bought for the bankrupt certain stock, for settlement on 14th November. Mr Lee intimated this purchase to Mr Kirk by the following letter:—

"*Edinburgh*, 29*th Oct.* 1873.

"Dear Sir,—I enclose my account-current with you up to this date, showing a balance in your favour, after you deliver £10,000 British, of £6653, 12s. 11d.

"I yesterday purchased for you in London

£17,000 North British, at 67·16/3,	£11,528	2	6
Commission on £7000 at 1/16, .	4	7	6
2000 Caledonians at 96·8/9 .	1928	15	0
No commission charged,			
100 Eries at 39¼ and 1/ cont, .	888	2	6
50 Erie Preferences at 56 and 1/5, say 56 dollars and 1/3 con., .	633	2	6
	£14,982	10	0

for settlement in London on 14th November current, for which you will hold this to be the contract, as also the contract for the sales made yesterday for you, as stated in the account.—Yours, &c."

Mr Lee had a standing arrangement with his brokers, that if he did not telegraph to the contrary, they should on settling day carry over all his purchases. In view of this arrangement the following letters were written by Lee to Kirk:—

"*Edinburgh*, 12*th Nov.* 1873.

"Dear Sir,—My London brokers, through whom I purchased your £17,000 British, £2000 Caledonian, 100 Eries, and 50 Erie Preferences, for settlement this account, require *me to have written instructions* before they sell for the present account, and purchase for next account. You failed to send me these yesterday, and unless I can telegraph to-day before 12 o'clock they may be sold out. Please to give the bearer written instructions, and call for me before 12 o'clock without fail.—Yours, &c."

"*Edinburgh*, 12*th Nov.* 1873.

"Dear Sir,—I am quite astonished at your not returning to-day as promised. If I do not hear from you to-night, or see you here before 10 o'clock, I will conclude that you are not to fulfil your obligations unless compelled, and act accordingly. I hope that you will see it to be for your interest to do what is right.—Yours, &c."

"*Edinburgh*, 12*th Nov.* 1873.

"Dear Sir,—After you left to-day at about 11 o'clock, I waited anxiously for your promised return before 12 o'clock, so that I might telegraph instructions as to the stock which I purchased for you in London, for settlement on 14th current. As you neither furnished me with the name into which you wished the stock transferred, nor gave me instructions within business hours to-day, the stock was sold in London, and is closed in accordance with the rules of the London Stock Exchange in such cases. The £17,000 North British was sold at 58¾ p. share; the £2000 Caledonians at 92¾; the 50 Erie preferences at 54 dollars p. share; and the 100 Erie ordinary shares at 33¾ p. share. I send you annexed an account-current between us to this date, showing a balance against you of £1619, 9s. 7d., *which please settle to-morrow, as I must remit it to London to-morrow afternoon.* I purchased stocks to the same amount for the next account, but as I had not your instructions, I cannot hold that I purchased them on your account. If, however, you settle up the balance due to-morrow, and give me written instructions, I will invoice a similar amount of stock to you for the new account at the new prices. Let me hear from you to-morrow morning.—Yours, &c.

"*P.S.*—I shall expect you to attend to this matter to-morrow before 12 o'clock."

"*Edinburgh*, 12*th Nov.* 1873.

"Dear Sir,—I sold you to-day in London for settlement there on 14, subject to the rules of the London Stock Exchange.

£17,000 Stock North British Railway Co., at 58¾, . . .	£9987	10	0
2000 Caledonian Co., at 92¾ . .	1855	0	0
50 Erie Preference, at 54 . .	607	10	0
100 Erie ordinary shares, at 33¾ .	759	7	6
—Yours, &c."	£13,209	7	6

"*Edinburgh*, 13*th Nov.* 1873.

"Dear Sir,—I wrote to you last night, and I am this morning in receipt of a note from you in pencil, stating that you have to go to Leith, and that you will not be down till the 10·45 train.

"Had you yesterday acted a fair and honest part, given me instructions to sell your stock purchased through me, and made arrangements as to the balance due to me, I would have been inclined to deal leniently with you, and not to have taken immediate proceedings, though you could not pay in full at once. But I consider that your not coming back yesterday forenoon, after faithfully promising to do so, to give me instructions, and failing to arrange your debt to me, is such treatment that I would do wrong to submit to it for any period of time. Unless, therefore, you *to-morrow* arrange the balance due to me, I will, on Saturday, prepare a summons against you, and for doing so no one who knows the circumstances will blame me.—Yours, &c."

It is thus seen that Lee, on 12th November (called carrying-over day), upon the bankrupt neglecting to give him any instructions, carried over the stocks, which already stood in his name, and claimed from the bankrupt the loss which he would have suffered if they had actually been sold to a third party.

In December Mr Lee finally sold out the stock, not only without loss but with a gain of £400.

The Lord Ordinary (YOUNG) pronounced the following interlocutor:—

"16*th July* 1874.—Lord Young—*Act.* Solicitor-General *et* Mackintosh for Appellant—*Alt.* Marshall *et* Moncreiff for Trustee—*Alt.* Guthrie Smith for Livingstone & Weir—*Alt.* Campbell Smith for J. B. W. Lee.—The Lord Ordinary having considered the Closed Record, proof adduced, and whole proceedings, and thereafter made avizandum with the debate,—Finds that Livingstone & Weir have a right of pledge or security for cash advances, rent, cooperage, and interest on the goods in question, the property of the bankrupt: Finds that the amount of said advances is £2514, 11s. 1d., and that the estate falls to be accredited with £2476, 8s. 9d., as the value of said goods at the date of sequestration, and that Messrs Livingstone & Weir are entitled to be ranked for the balance of their claim, amounting to £760, 13s. 4d.: To that extent recals the deliverance of the trustee, and remits to him to rank them accordingly: Recals the deliverance of the trustee on the claim of J. B. W. Lee: Finds that the said J. B. W. Lee is not entitled to a ranking in the sequestration to any extent, and remits to the trustee to reject the claim *in toto:* Recals the deliverance of the trustee on the claim of David Hunter, in so far as the claim is ranked as a preferable claim: Finds that the said David Hunter is not entitled to be ranked as a preferable creditor, and remits to the trustee to rank the claim as an ordinary claim in the sequestration, and decerns."

His Lordship gave the following opinion upon the claim:—

"I do not think this is a legitimate claim to any extent. Mr Lee's position with reference to the transactions referred to was peculiar. He did not act as a broker, but as a sort of agent, who, while speculating in the share market on his own account through the instrumentality of a broker in London whom he employed, associated others (his clients or customers) in his speculations to such an extent as they desired or was agreed to. The purchases and sales were in his own name, and were made for him by the London broker, his customers or clients being interested through him to the extent agreed on. In October 1873 he was speculating in the purchase of North British Railway stock, and the bankrupt agreed with him to join to the extent of £17,000 of that stock, and a purchase of that amount was on 28th October notified by him to the bankrupt as made on his account, for settlement on 14th November. The account of Lee's purchases, and the extent to which he was speculating for himself, or people other than the bankrupt, does not appear. The market fell, and so this particular speculation was for the time unfortunate. But Lee's broker, in pursuance of general instructions to that effect, on 12th November (called carry-over day), carried over, by an arrangement familiar on the Stock Exchange, all Lee's purchases, including that made on account of the bankrupt, till next settling day, which was on 28th November. On the same day (12th November) Lee applied to the bankrupt to provide him with the means of meeting the loss on his purchase, or arrange for carrying over; and receiving no reply, intimated to him that he was held liable for the loss. The loss is the subject of the claim in the sequestration. But, as already stated, the purchase being in Lee's name, was in fact carried over by his broker, acting on standing instructions. In truth, Lee acted exactly as if the purchase had been, in respect of interest, as it was, ostensibly his own, and carried it over with his other purchases till December, when he finally sold out so far as the bankrupt's purchase (or interest in Lee's purchases) extended, not only without loss, but with a gain of about £400. There were also speculations in other stocks or shares, but these standing in the same position as that in the North British Railway stock, to which I have adverted, were not made the subject of separate argument, and need not be particularly noticed.

"The claim is certainly of an unfavourable character. The transactions were in reality mere gambling for differences, according to the rise or fall of the share market; and I venture to doubt the propriety of this Court aiding a claim in bankruptcy founded on such transactions, and for that purpose considering what would have been the rights and duties of the parties respectively had the purchases been real. Had the bankrupt employed Lee to purchase on his account £17,000 of North British Railway stock for delivery on 14th November, Lee would no doubt have been entitled to demand the price in return for the stock purchased by him on such employment. But the reality being mere speculation, with no intention of receiving any stock, but only of paying or receiving the amount of rise or fall, and Lee having himself carried on the speculation till he terminated it with, fortunately, a gain realised within a few weeks, I cannot allow him a ranking for the loss which would have resulted had it been terminated on 12th or 13th November. It is true that his gain was a fortunate accident, but still it puts him in this position, that he is seeking, not to save himself from loss, but to make a still further gain to the extent of the ranking which he demands. Had he taken up the stock on 14th November, it is not clear that there would have been any loss to the sequestrated estate, for the stock rose in the market. This was the legitimate course if reality of transaction be assumed. Lee very naturally shrank from it as involving too much risk, and preferred to carry over, and so carry on the speculation on his own account. But having taken this course, and made, and not lost, money by it, I am unable to think that he is in a position to demand a ranking on the view that it would have been a losing speculation had it been closed on 12th November, and that the eventual gain is a separate matter, to the whole benefit of which he is entitled *plus* a dividend on the theoretical loss as at 12th November. I quite understand the argument on which the claim is maintained, but it has not overcome my repugnance to follow it to the conclusion contended for. The argument is not illogical, but is, in my opinion, outweighed by the considerations on the other side to which I have adverted.

"I therefore reject this claim.

Mr LEE reclaimed, and argued—When his account with Kirk was closed on 12th November, and the stocks were carried over, the amount to which Kirk was indebted to him was ascertained. The transaction of carrying over was a sale and a re-purchase, which involved very serious obligations on the party carrying-over, and was not a mere holding on by Lee for himself of the stocks which he had formerly held for Kirk. Kirk refused to have anything to do with the matter, and so his

account was closed, and his shares sold at the selling price on 12th November. It did not matter who was the purchaser, whether Lee or a third party, as far as Kirk was concerned. The stocks were sold out on the 12th November, and his liability to Lee ascertained at that date. Lee had a right to sell out—he had no choice but to do so; and the fact that he took the risk of being able to recoup himself by buying the stocks himself, did not alter the fact that he did sell, and that the loss upon that sale was £1600.

Argued for Cunningham:—(1) There was no sale. Here the stocks stood in Lee's name before the carrying over; and a sale in which the *emptor* and *venditor* are the same person is no sale. (2) Even if there was a sale, it was a bad one. Lee acted as Kirk's broker, or, at all events, as his agent; and in either capacity it was illegal for him to buy the stocks. (3) In any case Lee had no claim but for loss which he ultimately suffered; and it was admitted that in the long run he was a considerable gainer.

Authorities—*Brookman* v. *Rothschild*, 1829, 3 Simon's Reports, 153; *Gourley's Trs.* v. *Kerr*, 18 D. 619, and 19 D. 135; Cox on Joint-Stock Companies, pp. 66-67; *Powers* v. *Thomson*, June 10, 1857, 19 D. 803; *Booth* v. *Fielding & Parkinson*, June 21, 1866, 1 Weekly Notes, 245.

At advising—

The Lord President—This question arises out of the sequestration of James Kirk, grocer and wine merchant, Edinburgh, and a claim on the sequestrated estate made by the reclaimer Lee for a balance of upwards of £1600, on an account current between him and Kirk. The account contains a variety of transactions in stocks and shares, for Mr Lee, who is a solicitor in Edinburgh, seems to do a good deal in the way of Stock Exchange business. In 1873 he was empowered by Kirk to carry through a transaction on his behalf, and out of that transaction the present claim has arisen. The particular shares in stocks in question were bought by Lee for Kirk on 29th October 1873. Lee announced this purchase to Kirk in the following terms:—

"Dear Sir,—I enclose my account current with you up to this date, showing a balance in your favour, after you deliver £10,000 British, of £6653, 12s. 11d.

"I yesterday purchased for you in London

£17,000 North British, at 67·16/2,	£11,528	2	6
Commission on £7000 at 1/16, .	4	7	6
2000 Caledonians at 96·8/9 .	1928	15	0
No commission charged,			
100 Eries at 39¼ and 1/ cont, .	888	2	6
50 Erie Preferences at 56 and 1/5, say 56 dollars and 1/3 con., .	632	2	6
	£14,982	10	0

for settlement in London on 14th November current, for which you will hold this to be the contract, as also the contract for the sales made yesterday for you as stated in the account,—Yours, &c."

This was accordingly taken as a contract between Lee and Kirk, and thus Lee bought for Kirk these stocks for settlement on the 14th November following. In short, this was what is called a time bargain, and was thus a speculative bargain. The Lord Ordinary suggests whether this was not a gaming and wagering transaction within the meaning of the Act 8 and 9 Vict., c. 100. But it is settled by the decision in the case of *Foulds* v. *Burn*, 19 D. 803, that a transaction of this sort is neither gaming nor wagering in terms of the statute, nor at common law. Therefore Lee's claim cannot be objected to on these grounds. But there were many other circumstances occurring after this, which it is necessary to examine in order to see exactly what Mr Lee did.

On the 12th of November he wrote Kirk thus—"Dear Sir,—My London brokers, through whom I purchased your £17,000 British, £2000 Caledonians, 100 Eries, and 50 Erie Preferences, for settlement this account, require *me to have written instructions* before they sell for the present account, and purchase for next account. You failed to send me these yesterday, and unless I can telegraph today before 12 o'clock they may be sold out. Please to give the bearer written instructions, and call for me before 12 o'clock without fail.—Yours, &c."

From this it appears that Kirk had conceived the intention, or what Lee understood to be the intention, not to take delivery of the shares on the settling day, the 14th of November, but to carry over till next settling day, and so Lee desired to have written instructions to do so. Kirk however took no notice of Lee's resquest. In this he acted very unreasonably, and placed Lee in a position of considerable embarrassment. The question is, what in these circumstances Lee did, and what he ought to have done? There was a great deal of argument upon the kind of relation which existed between Lee and Kirk. One side maintained that he acted as a broker, and the other that he acted as an agent. I do not think that a decision of this point is absolutely necessary to the settlement of the question before us. But the relation between them was undoubtedly that of principal and agent, and I would be inclined to say that Lee occupied the position of a factor rather than of a broker. Certain distinctions between the offices of broker and factor lead me to this conclusion. Thus, a broker buys and sells not in his own name but in the name of his principal, whereas a factor buys in his own name. Again, a broker has no possession of the subject, no control over it, no power of disposal. The factor has such powers and a consequent lien over the subjects. In these respects Lee was rather a factor than a broker, and it is not necessary more precisely to determine the relation between the two. It is sufficient that Lee was agent.

Now, as already said, Lee was left without instructions. He says that he sold on 12th November, and that is the only matter in dispute on record. The appellant says in the 3d article of his condescendence—"Between 28th October and 12th November 1873 these shares fell considerably in value. On the latter date Mr Lee made entries in the bankrupt's account as if the shares had been then sold on his behalf, and this brought out a deficit on the account corresponding to the fall in the value of the shares. It is for this deficit that he claimed as a creditor in the sequestration. But, in point of fact, the shares were not sold by Mr Lee on 12th November, as indicated in the account produced with his claims. They were retained by him for some weeks till they rose to the price at which they had been purchased, when they were realised without any loss resulting on them at all."

This is a matter of fact which has been cleared up completely by the proof, both parole and

written. On 12th November Lee certainly did write to Kirk that in consequence of having received no instructions the stocks had been sold and the account cleared. But it is obvious that neither were the stocks sold nor the account cleared, for some days after Lee offered to Kirk or his agents, to carry over the shares after all, to next settling day. That offer was not accepted and Lee again sold the shares and so cleared the account. But what Lee calls a sale is a very different thing. What he actually did was in effect to take the shares and the speculation himself, and to claim the loss as upon a sale on settling day. This was not a sale but a speculation on his own account, in the hope that shares would rise before another settling day. It is unnecessary to go into the technical details of this matter, but the result is, that instead of selling the stocks, Lee took them himself, and from that time the shares in the broker's books stood in his name as owner. Was he entitled to do this?

In circumstances of this sort, when a principal will not advance funds or give instructions, either a broker or a factor is entitled to sell, to take the price he receives in order to cover his loss, and to charge his principal for any balance which may remain. But, instead of selling, is the agent, be he broker or factor, entitled to appropriate the subjects to himself? That, also, is very well settled. No agent can buy the property of his principal in any case, except when he is specially authorised to do so. But here there was no authority or consent. Lee obviously took the course which he did in the belief he was entitled to do so. He seems to have acted in perfect good faith, and with great forbearance towards Kirk. But still, upon the question whether he did what he was entitled to do, I am of opinion that he did not. His actings were quite against the settled rule of law.

On that ground Lee's claim falls to be rejected, and it is a matter of indifference what became of the shares after he took them. For he can't say that £1600 are due to him on the sale when he did not sell, but retained. It is however satisfactory to know that the loss which he sustained was ultimately very small or nothing at all.

I am therefore of opinion that we should adhere to the interlocutor of the Lord Ordinary.

Lord Deas—I agree with your Lordship that it is not necessary to determine in what precise character Mr Lee was acting, whether as a broker or not. If he was acting as a broker, however, his position is even more unfavourable than if he was acting as an agent or factor, so it is expedient for the sake of accuracy to see in what precise character he was acting. There are in Scotland associations of undoubted brokers, with certain rules which have been recognised by courts of law as legal and binding. Lee is not a member of any association of that sort. He is a Solicitor before the Supreme Courts,—a well known profession,—and the mere fact that he calls himself a stockbroker does not make him anything else. He is more of a speculator than a stockbroker. His true position, however, is that of a factor or agent employed by a client to buy in his own name. When such purchases are made the client must relieve the agent of the price which he has agreed to pay. If the client does not pay, and gives no instructions, then the agent may keep the shares, taking the risk of loss. I have great doubt if a stockbroker could do that, but I think that an agent who is not a stockbroker can do so. I think that if an agent bought an estate for his client, and the client refused to pay, or to give any instructions whatever, the agent would be entitled to say, "I bought this estate in my own name, and I will take it over as my own purchase." I am not satisfied that that would be a case of buying from oneself. There is a great distinction between the case of an agent buying in the client's name, and buying in his own name. For in the latter case I think there is an implied arrangement that the agent may keep the subject bought if the client will not pay the price. But Mr Lee did something very different. Another course he might have followed was to sell out and charge Kirk for any loss he sustained. He didn't follow this course either. He retained the shares, and ultimately sold them at a profit, and yet he proposes to charge the client with the loss as shown by the market prices on settling-day. He proposes to claim on the bankrupt estate for loss as it would have been if he had sold out on settling-day, on the one hand—and on the other hand he refuses to give credit for the profit which he ultimately obtained. That places him in a very different position than if he had said on settling day that he would take the shares to himself. I think it clear that Lee was not entitled to retain the shares for himself, charge for loss on the estate as it would have been if he had sold, and refuse to allow for profit gained.

I wish, however, to guard myself in this respect, that while I am of opinion that an agent might have kept the shares to himself, I do not think it would have been legal for a stockbroker to do so.

I think that the simple finding of the Lord Ordinary, that Mr Lee is not entitled to rank on the bankrupt estate, is the right finding.

Lord Ardmillan—The question raised in the appeal by the reclaimer Mr Lee is of some importance to the parties in point of amount, and of great importance to the law in principle. It is not necessary to repeat the explanation of the facts out of which the legal question has arisen. Your Lordship has sufficiently explained them. On these facts the Lord Ordinary has decided that Mr Lee is not entitled to be ranked as a creditor in the sequestration of Kirk; and he has accordingly remitted to the trustee to reject Mr Lee's claim. I am of opinion that the decision of the Lord Ordinary is right.

I do not think it important to consider whether Mr Lee acted as a broker or only as an agent or a factor. It appears from the record that Mr Lee considered himself to be acting as a broker, and he alleges that he was employed by Kirk to act for him in the capacity of a broker. He also alleges that the business which he so transacted for Kirk was to be conducted, and was conducted, in accordance with the rules of the London Stock Exchange. But whether it may be considered that he acted as a broker, or not, he certainly acted as agent; and it is clear beyond dispute that the transactions on the London Stock Exchange, out of which this dispute has arisen, were parts of a more extensive speculation by Mr Lee, and were conducted by Mr Lee through the medium of London stock brokers, employed and directed by him, and not employed by, or in any way brought in contact with, Mr Kirk. Lee, as acting for Kirk, had purchased North British stock for Kirk, not as

an investment, but as a speculation, and when the time for taking up and paying for the stock arrived Kirk did not send the money or give instructions, and the London brokers, acting under the direction of Lee, proceeded to dispose of the stock by his orders, and for his benefit. I do not doubt that Lee, on Kirk's failure to remit the funds, was entitled to dispose of the stock in the market. He was entitled to sell the stock to another. Kirk had used him ill in not providing him with funds, or giving him instructions; and a sale by Lee for his protection, if made bona fide to a third party, would not have been otherwise than lawful. But there was no sale to a third party. In point of fact, Mr Lee became himself the purchaser of the stock, and, after a stock-jobbing procedure, called carrying over, had been completed in regard to this stock and other stocks held by Lee, a sale ultimately took place, I think in December, the result of which was not a loss, but a gain to Mr Lee of about £400. The claim now made is for the loss which would have resulted from an actual sale on the 12th or 13th of November, the price at that time having been low. The sum claimed was £1623, 5s.

In any view of the case, I could not sustain this claim. At the close of the whole transaction there was no loss. Mr Lee is not seeking reimbursement of a loss; but, having ultimately been a gainer, he is suing for payment of a sum which would have been lost if the transaction had terminated by sale on Kirk's failure to remit funds on the 12th or 13th of November. That Lee was the purchaser of the shares at that time, and the holder of the shares after that time, is clear, and he having so purchased and so held the shares, I am disposed to agree with the Lord Ordinary in thinking that he is not entitled to demand from Kirk, or his estate, the sum here claimed, which is a theoretical or hypothetical loss as on 12th November. He cannot recover the loss which he avoided, and at the same time keep the gain which he made.

But, separately, and on a broader ground, I fully concur with your Lordship in opinion that Mr Lee being agent for Kirk,—agent in this speculative transaction,—could not lawfully purchase for himself the stock which he sold as agent for Kirk. He represented Kirk, and as Kirk's agent he sold to himself the stock which he held for Kirk. My mind is not disturbed by the Dean of Faculty's ingenious introduction of the "jobbers" on the London Exchange. We have nothing to do with them. They are the mere instruments by which the machinery of stock-jobbing speculation is worked. I am clearly of opinion that he was not entitled so to act as to transfer the shares to himself. It is well settled, both in England and in Scotland, that an agent cannot purchase what he is employed to sell, nor sell what he is employed to purchase. If directed and empowered to sell for his client, he cannot be himself the purchaser. If directed and empowered to purchase for his client, he cannot purchase from himself. On this point it were easy to quote authorities in support of a principle which must commend itself to our minds. One of the most striking cases is that of *Brookman* v. *Rothschild*, 5 Bligh's Reports, new series, p. 165, where the rule was enforced notwithstanding the good faith of the proceeding. I may also mention the case of *Gillett* v. *Peppercorne*, decided by Lord Lungdale, 8 Beaven 78, and the case of *Crowe* v. *Ballard*, 3 Bro., Ch. C., p. 119. See also Sugden on Vendor and Purchaser, vol. 2, p. 887; Addison on Contracts, p. 72.

If, therefore, Lee, being employed to sell certain shares, had purchased these shares for himself, I should have had no doubt that he acted unlawfully, whether he be considered as an agent or as a stock broker.

But if, being agent, he sold as a step in the process of carrying over and thus continuing the speculation, I think he cannot be permitted to separate the carrying over into two parts, the one being a sale by himself as agent to some jobber for himself as an individual, and the next a retransmission or recovery of the shares back from the jobber to himself, to be held on by him to his own ultimate gain, and then to take the date of the sale to himself and sue his employer as for a loss at that date. Such a proceeding by an agent, whether stock broker or not, was in my opinion illegal. It necessarily involved the purchase by himself from his client,—or rather by himself as an individual from himself as an agent,—or purchase which terminated in a resulting gain to himself. Such a transaction is, in my view, contrary to law.

On this separate ground, even more clearly than on the ground stated by the Lord Ordinary, I am of opinion that Mr Lee's claim has been rightly rejected.

When I say that Mr Lee's conduct in this transaction was illegal, I do not mean to impute or suggest any fraud or intentional unfairness on his part. But in these transactions on the Stock Exchange, where such speculation on time bargains, though not gaming and wagering within the meaning of the statute, do certainly tend to gambling, it is essential to protect, and to enforce firmly, the rules of law and equity which regulate the relations between principal and agent. I feel, therefore, no hesitation in rejecting this claim.

Lord Mure—I concur that the interlocutor of the Lord Ordinary should be adhered to, and I think that the reasons given by his Lordship are sufficient.

I agree with your Lordship in the chair that Lee was in a position of such trust towards Kirk that he was prevented from buying the subjects himself. I do not think it material to inquire whether he acted as a broker or as a factor or agent, for in whichever capacity he acted he stood in a confidential position towards Kirk. The rule is laid down in several decisions that in no circumstances can a broker purchase from a party for whom he acts; and the reason is the confidential position in which he stands. On the same ground, I think that Lee was prevented from purchasing the shares which he had already purchased for Kirk.

The Court adhered.

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