

fall under the words of the 5th section of this statute? I think it is very difficult to construe the enactment as applicable only to the case where a party is cited as a witness for the opposite party. He may be adduced without being cited, and it is common enough for a party who is to be examined as a witness for the opposite party to appear without citation at all.

I entirely agree with what I understand to be the opinion of your Lordship in the chair, that the decision of the question before us must depend upon circumstances. There must not only be an opportunity for an examination of the witness to whose oath it is proposed to refer, but the opportunity must have been taken advantage of. These points are in this case clear enough, and questions were put to the witness in cross-examination precisely upon the matter in dispute. There is no doubt that he was examined upon the whole matter of fact at issue, which is now proposed to be made the subject of a reference. It is very difficult to say he was not "called and examined" in the sense of the statute.

But apart from the construction of the statute, I think these circumstances go very deeply into the question whether this reference is to be allowed or not? It is a matter for the discretion of the Court in a limited sense, whether, if a witness has once been examined rightly, it is not a gross abuse of the law to subject him to a second examination. Supposing this proceeding is not incompetent, it will fall under that category. It is an attempt to evade the provisions of the statute by putting again to the pursuer the precise question which he had formerly answered in cross-examination when in the box as a witness for himself, and as such the proposal is an abuse. If there be any doubt that this is incompetent under the statute, I agree with your Lordship that on other grounds it cannot be allowed.

LORD MURE—I take the same view with your Lordship in the chair, that the words of the statute do not reach the present case.

But apart from that, it has always been a fixed rule that it is within the discretion of the Court to allow a reference or not. I am of opinion that this is a case in which we should not allow it. The defender has availed himself of an opportunity to examine his opponent upon the whole cause, and he has put distinct questions to him upon it. The right of a party to refer a cause depends (as fully explained in the words of Lord Moncrieff, *Adam v. MacLachlan*, Jan. 29, 1847, 9 D. 576) "on this plain principle of equity, that if the party making allegations of fact necessary for the support of an action or the defence against it, will not himself, when duly required by his opponent judicially, swear to the truth of his averments if within his knowledge, it would be against justice and good conscience to allow him to proceed to take any judgment on the assumption of the truth of such averments." That is the principle on which the Court has always proceeded in allowing references to oath. In this case the pursuer has judicially deposed to every question put to him upon the facts averred, and on that ground I am of opinion that the Court in the exercise of its discretion should not allow this reference.

LORD ARDMILLAN was absent.

The Court refused to sustain the reference to oath.

Counsel for Pursuer—Campbell Smith. Agent—D. Turner, Solicitor-at-law.

Counsel for Defender—Fraser—Strachan. Agents—Magregor & Ross, S.S.C.

Tuesday, July 11.

SECOND DIVISION.

[Sheriff of Lanarkshire.

WHITE v. MUNRO AND OTHERS.

Agent and Principal—Ship—Ship-broker—Commission.

A broker sued a shipowner for commission on the price of a ship sold by the defender, on the ground that the order had been obtained through the pursuer's introduction and recommendation. *Held (dis.* the Lord Justice-Clerk) that in the circumstances the pursuer had failed to show that the order was the direct result of his intervention, and consequently that he was not entitled to commission.

This was an action raised in the Sheriff Court of Lanarkshire by John White, ship and insurance broker, London, against Richard Munro, merchant, Glasgow, and others, owners of the steamship "Europe." The summons concluded for decerniture against the defenders for £450, "being commission at the customary rate of 2½ per centum upon the purchase price of the steamship 'Europe,' which belonged to and was sold by the defenders to Messieurs Matheson & Company, merchants and ship owners in London, in or about the month of March 1874, at the price of £18,000 sterling, and which sale was negotiated through the pursuer in his capacity of ship broker; or otherwise the said sum of £450, or such lesser sum as shall be fixed in the course of the process, as a reasonable commission or remuneration to the pursuer for the services rendered by him in introducing the buyers, Messieurs Matheson & Company, to the defenders, in the month of August 1873, and recommending the said steamer to them as suitable for their purposes, and which introduction and recommendation, and the negotiations which supervened thereon during the months of August, September, and October 1873, conduced to the ultimate purchase of the said steamer by Messieurs Matheson & Company."

The circumstances under which the claim was made by the pursuer were as follows:—In August 1873 White was endeavouring to negotiate the purchase of a steamer for Matheson & Company, who wished to purchase one for some friends in China. On 29th August White wrote to the Munro's firm as follows:—"Messrs Matheson & Co. of this city are desirous of purchasing a spar-deck steamer. I have named 'Europe' to them as likely to suit; and as they have a representative at present in the neighbourhood of Glasgow, he will probably call at your address, which I have

handed to his firm. In the event of business, which I trust will result, please reserve my commission, and oblige yours, &c." Munro acknowledged receipt of this letter, and a correspondence followed, the result of which was, that after obtaining full information as to the "Europe," White, on behalf of Matheson & Company, arranged an inspection of the ship with the firm of Mories, Munro, & Company on the defenders' behalf. An inspection by Captain Crockett took place; the report given by him was not favourable, and the Mathesons declined to purchase the vessel—a result duly communicated to Mories, Munro, & Company by White in a letter dated 7th October 1873, as follows:—"The inspector has seen 'Europe,' and does not write a good report of her bottom, so my friends must decline her. I regret this after all our negotiations and his making the journey to Antwerp." Thereafter, on 6th November 1873, letters were written from Shanghai, the first being from Jardine, Matheson, & Company to Matheson & Company as follows:—"It will be of interest to you to know that Captain Bolton is at present here in communication with the manager of the Chinese Company; and we think it likely that in the course of a week or two he will be authorised to proceed home with full powers to build or purchase with your assistance one or more boats, of such character as may be decided upon. On this topic we shall probably have to address you fully at an early date." And the second from Captain Bolton to Mr Peter Denny—"I have just time before the mail closes to send you a line saying I hope to be on my way home by the next French mail, leaving here a week hence, to see after the building of two steamers for the China Merchants Company, concerning which Mr Tongking Sing has already written you. His instructions are to the effect of getting estimates from various builders. The same to be wired to him for decision." Captain Bolton accordingly came home, and in January 1874 had an interview with Mr Denny at Dumbarton. Mr Denny recommended the steamer "Europe" as one which he himself knew. Subsequently Captain Bolton saw Matheson & Company, and learned the bad report of the "Europe" given by Captain Crockett after his inspection, and also saw the pursuer on the subject. Denny however assured Captain Bolton that the report was erroneous, and ultimately a sale was effected subject to an inspection by Captain Bolton and Denny's manager, which took place and proved satisfactory. This was in March 1874. No commission was paid to Denny, who refused any remuneration, wishing, it appeared, to aid as far as possible the family of a deceased partner of Munro, Mories, & Company, then in difficulties. On 20th March the pursuer wrote as follows to the defenders:—"I learn from Messrs Matheson & Co. they have purchased your ss. 'Europe,' which vessel you may remember I wrote you I had proposed to these gentlemen, and I gave you their names. I beg therefore to request you will favour me with cheque for £450, being my commission of 2½ per cent. on purchase-money."

The defenders refused to recognise the claim, whereupon the present action was raised.

The pursuer pleaded—"1. The defenders

having had notice that the pursuer was dealing with them on the footing of being paid a commission if business resulted, and the steamer having been sold through his intervention as broker, are liable to him in the commission claimed. 2. In any event, the defenders having had such notice, and the pursuer's services in introducing a purchaser and recommending the steamer to them having benefited them, the pursuer is entitled to a reasonable remuneration."

The defenders pleaded—"1. The defenders not having dealt with the pursuer on any footing in the negotiation and sale of the steamer, and the same not having been sold through his intervention as broker, they are not liable to him in any commission on the price, either by introducing a purchaser to them or otherwise. 2. The pursuer not having rendered any services to the defenders in connection with the sale of said steamer, they are not liable to him in any remuneration whatever."

On 16th October 1875 the Sheriff-Substitute (CLARK) pronounced an interlocutor finding for the pursuer, and decerning against the defenders for £450, with expenses.

The note appended to this judgment was as follows:—

"It would seem that in August 1873 the pursuer, a ship broker in London, undertook to negotiate the purchase of a steamship for Matheson & Company, also of London, who at the time required such a vessel for correspondents in China. Towards the end of that month he put himself in communication with the defenders, or those whom they represent, for the sale of the 'Europe,' as likely to suit the intending purchasers. In his letter he is careful to introduce a clause to the effect that in the event of business resulting they would please to reserve his commission.

"The defenders upon this entered into correspondence with the pursuer at considerable length, giving all the particulars required by the intending purchasers, and on inspection of the 'Europe,' which then lay at Antwerp, the purchase was ultimately arranged and carried out by one Crockett on behalf of the latter. The part taken by the pursuer in this matter was very considerable, as will appear from the productions 9/13 and 10/9, &c., now in process. He acted, indeed, throughout as middleman. The report, however, given by Crockett was unfavourable, and the intending purchaser declined at that time to proceed farther in the matter. At length, after some interval, one Captain Bolton arrived in England from Messrs Matheson & Company's correspondents in China, to represent them through the said Matheson & Company in the purchasing and building of steamers. He proceeded to Scotland, and met among other persons Mr Denny of Dumbarton, who recommended the 'Europe' as well suited for the purpose, and to be had cheap. Bolton upon this called upon Matheson & Company, and they, well aware that it was the same vessel that had been already introduced to their notice by the pursuer, and had been thereafter inspected and rejected by them, referred Bolton to the pursuer. Bolton accordingly waited on him, and after an interview with him, inspected the

vessel, and the result was that she was sold by the defenders to Matheson & Company for £18,000.

"These are the main facts of the case; and it is in these circumstances that the pursuer claims his brokerage or commission on the sale.

"Now the law in such cases, though perhaps at an early period somewhat ambiguous, may now, it is conceived, be stated as follows:—When a broker first introduces two principals to each other, and that introduction eventuates in a purchase and sale, he earns his commission. Nor does it matter whether he works out the business, or whether the principals complete it without his assistance. See as to this, *Green v. Bartlett*, 1863, 14 *Scott's Reports*, p. 684; *Dalton v. Irvine*, 1830, 4 *Carrington and Payne's Reports*, p. 289; *Willison v. Martin*, 1837, 8 *Carrington and Payne*, p. 1; *Cunard, &c. v. Van Oppen*, 1859, 1 *Foster and Finlayson*, p. 716; *Gibson v. Crich*, 1862, 31 *Law Journal*, p. 304.

"In the present case it is plain that the sellers and purchasers were originally brought together by the pursuer, and that for a time he acted as the sole middleman or mutual agent for the parties. That the negotiations for a time broke down was no fault of his. At length the same vessel was bought and sold by the same parties through the intervention, no doubt, of a friend of one of them, who disclaims all claim for remuneration; yet even in this last negotiation the pursuer was also engaged, and probably contributed in no small degree to its success. To hold that in such circumstances he is not entitled to remuneration would be to reverse alike the custom of trade and the rule of law. The case seems much stronger than many in which such custom and rule have been given effect to; and, indeed, if any other view were to prevail it is difficult to see how brokers could claim remuneration at all, inasmuch as it is only when their introductions result in sales that they are allowed any remuneration. It may further be noticed that in the present case the pursuer did not let the matter rest on the mere law or trade custom, but specially stipulated with the defenders at the very outset of the introduction that if a sale resulted he should claim commission.

"About the amount there can be little doubt. From the evidence in process it would seem that 2½ per cent. is the ordinary rate in the case of steamers."

On 23th January 1876 the Sheriff-Depute (Drokson) adhered to this judgment *simpliciter*.

The defenders appealed to the Court of Session, and argued—The negotiation in which White took part closed without any result save a bad report, which put an end to it. Months after, Captain Bolton was sent by the China Merchant Company to buy a new steamer, and he wrote home to Denny. Denny advised him to buy the "Europe," but Matheson & Company said she would not do. Then Denny over-persuaded Bolton, and he bought her. White had nothing to do with all this. The sale took place rather in spite of than in consequence of his action. The purchase and the prior negotiations were entirely disconnected. [LORD JUSTICE-CLERK—It is very important to show that the ship was placed in Denny's hands direct from the owners]. The Sheriffs both take the position that the early

negotiation though broken off was renewed. That is not so. It is not for recommendation that commission is due; it is for the introduction of the purchaser to the seller. Now, it was Denny who introduced Bolton to the defenders, not White (*Moss v. Cunliffe & Dunlop*). The question in such cases always comes to be, whether business results from the introduction (*Green v. Barclay*). There must be the relation of cause and effect between the sale and the agency. Suppose no one had ever come at all, could White then be said to have earned his commission? Manifestly not. He was unable to effect the sale. He tried and failed, as his own letters show.

Argued for the pursuer (respondent)—If a broker is to be paid by the result of the sale, it must necessarily follow that the parties cannot by meeting together and arranging matters defeat the broker's right to commission after he has once been employed (*Inchbald v. The Neilgherry Tea Co.*) If the principal even acts for himself he cannot throw over the broker. The introduction is what is paid for (*Mansell v. Clements*). The real point we maintain here is, that White was never out of the negotiation at all, even the second time. They came back to him and resumed the thread of the business and bought the ship. (*Burnett v. Bouch*).

Reclaimer's Authorities—*Moss v. Cunliffe & Dunlop*, March 20, 1875, 2 R. 657; *Green v. Bartlett*, 1863, 32 L. J., C. P. 261, and Erle, C.-J. there.

Respondent's Authorities—*Inchbald v. Neilgherry Tea Co.*, 34 L. J., C.-P. 16, and Erle, C.-J. there; *Mansell v. Clements*, Jan. 1874, 9 L. R., C. P. 139; *Willison v. Martin*, 1837, 8 Car. and Payne 1; *Burnett v. Bouch*, 9 Car. and Payne 120.

At advising—

LORD NEAVES—I have bestowed great care on the consideration of this case, but we are placed at a material disadvantage in judging of the facts from the circumstance of the evidence being unaided by what must have been the very valuable testimony of Captain Bolton.

The action is founded upon an alleged custom as to the commission allowed to ship brokers for an introduction, and the mode of allowing it. There are no decisions in this country to serve as precedents, and accordingly there are only English authorities and a sort of proof more or less of custom in Scotland to guide the Court. However, it may be assumed that such a custom exists, although perhaps the allegations on record are not quite so exact as to amount to that. The pursuer alleges that throughout he was acting for Messrs Matheson & Company. Now, the existence of such a custom as this must have some limit, and I am unable to think that a broker's commission is due if no sale takes place. The difficulty, however, here is, whether the sale under the circumstances was or was not due to the intervention of the broker—not perhaps by his direct action, but partly induced by his indirect exertions. Now, the circumstances of importance here are the examination of the "Europe" by Captain Crockett, and his adverse report, with the resulting letter from the pursuer to the defenders. [*His Lordship read the letter of 7th October 1873*]. It occurs to me that

this letter, written by the pursuer as an agent, though he was a broker, was a termination of the whole negotiation; the entire import is that of a concluded transaction—that is to say, of one quite broken off. White acted as the introducer, and has now become the channel of complete declination. “My friends must decline”—these are his words. Now, one peculiarity of this custom is that it is intended to prevent persons from using the services of a ship broker so far, and then throwing him over, thus depriving him of the commission which he was *in cursu* of earning. This is a valuable custom, and the broker is entitled in such an event to interpose and say, “the custom will not permit you to throw me aside; my commission must be paid.” But I cannot find that the custom holds good if after the parties have been brought together no business results, as the broker’s friend, the intending purchaser, declines to buy the vessel. It cannot be so, and I think it is not only competent, but that it is intended by the custom, that the persons who wish to sell should go, without any breach of commercial honour, and try some one else. Surely it cannot be maintained that this custom ties a man for ever *qua* the vessel in question to that broker to whom he has first spoken. The question comes to be—Was Denny entitled (supposing he claimed it) to a commission on the transaction which he carried through, or was White entitled to it, having failed to carry out his intended sale? I cannot doubt the result in a competition for the brokerage; and the fact that Denny did not in this instance take or seek any commission, but merely acted as a friend, does not affect his right to it. What Denny did, and what indeed Denny had to do, was to counteract what had been done by White, and he succeeded in convincing the parties and in getting the ship sold. The custom must be treated as a reasonable one. If authorities were to be found to maintain the opposite view to what I have indicated, it might be another matter, but no case has been quoted which I can see in that light. There was, I think, a complete end to the first attempt at business, and that is enough to decide the case. It is true, certainly, that Captain Bolton went to speak to White, but all that White said, according to his own account of the interview, was that Crockett had given a bad report. Then subsequently, under Denny’s advice, Bolton threw over Crockett’s report and bought the vessel. I cannot see that the pursuer conduced to that sale; on the contrary, under his auspices a sale had been shipwrecked. There seems no reason why that man of all others should be allowed to come in and claim brokerage who had only acted against in place of for the sale of the vessel.

LORD ORMDALE—I have no doubt of the right in law to commission in these cases if the facts are sufficient to sustain that right. Actions of this nature in Scotland are very rare; but the subject was fully considered about a year ago in *Moss v. Cunliffe & Dunlop*. The question, it seems to me, is very well raised by the pursuer himself in his first letter of August 29th 1873—“In event of business . . . please reserve my commission.” That can only mean, in the event of business resulting from my introduc-

tion. The question accordingly becomes one of fact alone. To take the most favourable view of the pursuer’s case, it amounts to this—“Combining what I did in 1873 and what I did in 1874, the sale must be held to have been the result of my introduction.” Had White been able to establish that from the evidence, I am not prepared to say he would not have been entitled to decree, but as it is I think he failed to make the facts. It cannot be said that there were any results from the negotiations in 1873. The question as to the connection of them with the 1874 transaction is on the evidence a narrow one, but I cannot find the link required. Had negotiations been resumed, commission would have been due. But this was not so. Captain Bolton writes from China to Denny to say he is coming to buy a vessel or get one built. When he arrived, armed with plenary powers from his principals, he goes at once in January 1874 to Dumbarton, knowing at that time nothing whatever of the previous transaction. The new negotiation began with the letter of January 13, 1874, and the defenders did not know that Captain Bolton was negotiating a purchase for the same parties for whom Matheson and Company had previously been acting. Then as things go on, White writes that this is the same vessel that Crockett rejected. The only effect produced by White was to create some doubt in Bolton’s mind. On his return to London from Dumbarton, Bolton did certainly call on White, and this would seem suspicious: but the only evidence we have as to what passed is the pursuer’s own uncorroborated statement, and he himself admits that he knew no more of the “Europe” than he did at the date of Crockett’s report, and further says that there is nothing in that report that could not be cured. On this slender ground he founds a revival of the negotiations. I cannot adopt that view.

I am far from saying that the pursuer would have had no claim if there was evidence of any attempt to cut him out after fairly earning his commission, and to employ another broker; but there is nothing of the kind, and the whole evidence is clear of any signs of such an unfairness of design. In the event of Denny having been regularly employed as a broker, can it be doubted, in a competition with White for the brokerage, that the former would have been found entitled to it? I cannot think so.

LORD GIFFORD—This is an action by a ship broker in London against the owners and sellers of the steamship “Europe,” to recover commission claimed by the pursuer on the price of the ship received by the defenders, the vendors.

The pursuer Mr White never was employed by the defenders, the owners of the ship, but it seems to be the custom that when a ship broker is employed by a party who desires to purchase a ship, and where under that employment the ship broker succeeds in finding a suitable vessel for his client, and where a purchase of it is concluded, the broker demands and receives his commission, not from his own client, the purchaser, but from the vendors of the ship, to whom he has introduced the purchasers, this introduction or the ship broker’s agency having been the means of effecting the sale.

I cannot say that this custom, about which,

however, there was no dispute at the bar, is one entirely to be approved and commended. I should think it would be much more healthy and wholesome in such a trade that a broker should look for his remuneration to his own employer, and that his commission, at whatever rate it may be fixed, should be expressly charged as such, and not wrapped up and included, as seems to be the practice, in the price of the vessel. It is always best that everything should wear its own name, and that the truth of each transaction should distinctly appear. The custom in question practically leads to this, that the vendor simply adds to his minimum price the commission which he knows he will have to pay to the purchaser's broker, and possibly if this is distinctly known and universally understood it may not lead to any serious mischief, though I confess I could wish that the custom were otherwise.

In the present case, in Mr White's first letter to the owners of the "Europe," in which he informs them that Messrs Matheson & Company are desirous of purchasing a steamer, and that he has named the "Europe" as a likely ship, he concludes thus—"In the event of business, which I trust will result, please reserve my commission,"—that is, add to the net price which you are willing to accept my commission, which we see otherwise was 2½ per cent.

So far there is no dispute between the parties, and if the "Europe" had been sold to the pursuer's clients Messrs Matheson in consequence of the pursuer's introduction, that is, in consequence of the pursuer having suggested the "Europe" to Messrs Matheson as a likely ship, it is not disputed that the defenders, the vendors of the "Europe," would have had to pay the pursuer his commission. And most justly so, for if the transaction had gone on in its expected course the vendors would have added to their own price, that is, to the net price which they were to receive, 2½ per cent., for the very purpose of paying it over to the pursuer as the purchaser's broker.

But the real question in the present case is one of fact—Did the ultimate sale of the "Europe" by the defenders take place in consequence of the pursuer's introduction? that is, in consequence of the pursuer as Messrs Matheson's broker having introduced the defenders to them, or in consequence of the pursuers having suggested the "Europe" as a ship likely to suit, or in consequence of anything whatever done by the pursuer as a ship broker, or as an intermediary of any kind. To use the pursuer's own language in his very first letter—Did "business result" from the pursuer's brokerage or from anything that the pursuer had done or might do, in which case only, as the pursuer himself says, the defenders are to reserve, that is, add on to their price, the pursuer's commission. If the ultimate sale did not result from the pursuer's brokerage or agency, but was entirely and exclusively due to something else with which the pursuer had no concern whatever; if the pursuer's agency was absolutely terminated and at an end, it may be by the pursuer's own act, by his dissuading from the purchase and substituting some other vessel; if new negotiations had to be opened after a lapse of time, and by another broker who took different views from

the pursuer or gave different advice; and if the ultimate purchase resulted from a change of circumstances and a new intervention in no way attributable to the pursuer; if, in short, to use the words of Chief-Justice Erle, the pursuer is in no sense the *causa causans* of the sale—then, whatever claim he may have against his own clients for abortive work done, it is difficult to see how he can have any claim upon the vendors, who never employed him, who were not his clients, and who have taken nothing whatever—it may be only injury and prejudice by his intervention.

Of course, if there was anything like *mala fides* on the part of anybody, either vendor or purchaser; if there was any attempt to defeat or cut out the pursuer from a justly-earned commission; if there were even grounds for suspecting collusion, or the possibility that the parties were combining to throw over the pursuer, the case would be very different. But it was admitted on all hands that in the present case there was not the faintest colour for such an imputation—that all parties to the present suit have acted throughout in *optima fide* and with perfect honour and fairness, as indeed might be expected from their high standing and reputation, and whatever be the result of the pursuer's claim, whether he succeed or fail, it will not be on the ground of any unfairness or impropriety imputable to any of the parties.

Now then, what resulted from the introduction effected by the pursuer—that is, from his introducing Messrs Matheson to the owners of the "Europe," and suggesting the "Europe" as likely to suit Messrs Matheson's views. Particulars of the "Europe" were furnished by the pursuer. Negotiations were opened, and some correspondence took place. A survey was resolved upon when the vessel should arrive at Antwerp, and apparently through the pursuer's arrangement a Captain Crockett was sent to Antwerp to survey and inspect the vessel. Captain Crockett reached Antwerp on 6th October 1873, and apparently made his inspection and report the same day. The report gives various particulars, and apparently suggests various faults or defects of the "Europe," and he concludes in these words—"Above all, judging from the state of her bottom, would have nothing to do with her." No doubt he adds, "her boilers and engines are reported as very good," but these he had not inspected or got inspected by any one; and I cannot help drawing the conclusion that he did not go on with such inspection because in his opinion the state of the vessel's bottom was conclusive against her. He "would have nothing to do with her." Captain Crockett's report was communicated to Messrs Matheson, and apparently through them to the pursuer Mr White, and next day the pursuer writes to the defenders or their authors:—"Dear Sirs,—The inspector has seen 'Europe,' and does not write a good report of her bottom, so my friends must decline her. I regret this after all our negotiations and his making the journey to Antwerp."

Pausing here for a moment, I think nothing can be clearer than that at this point the negotiation was, at least for the time—and I say no more at present—completely closed, and closed in perfect good faith. We have it under the pursuer's own

hand, "my friends must decline" the vessel, and he gives the reason, the unfavourable report of the inspector. The matter is shut—the vessel went suit—the Mathesons are to look elsewhere; and there at least for the present the matter closes. No doubt it might have been re-opened—the pursuer himself might have suggested that some further inquiry should be made instead of acting at once on Captain Crockett's report, or the owners of the "Europe" might have remonstrated against Captain Crockett's report, or challenged its correctness, or tabled a counter report, or insisted that the ship's bottom was faultless, or in any other way continued, or even after a considerable interval resumed, the negotiations. If this had happened, or if anything approaching to this had happened, I am clear that the original introduction would still subsist, and if business ultimately resulted the pursuer's commission would be due.

Nothing whatever of this kind took place. The pursuer's own letter absolutely closed the negotiation. All parties acquiesced therein. Nobody whispered that Captain Crockett might have been mistaken, and so far as Messrs Matheson were concerned, the "Europe" passed out of their market. Their constituents in China might still require a vessel, but the "Europe" would not do—she had been tried and found wanting.

It was suggested that the "Europe" had been declined, not because she was unsuitable, but because the same day (7th October 1873) Messrs Matheson had got a telegram from China, dated 7th, which is read as instructions not to buy at all till further orders. We have not the letters referred to in the telegram, but I do not see any ground for the suggestion that this telegram was the true cause of the rejection of the "Europe." It certainly was not the assigned cause, which Mr White states quite expressly, and it is hardly suggested that Messrs Matheson would instruct their broker to give a reason different from the true one. It is not shown that the private telegrams to Messrs Matheson were communicated to Mr White, at least at the time when he in the best of faith intimated the rejection of the "Europe," and its reason to the defenders. In short, I hardly think the pursuer himself would deliberately suggest that the rejection was not a real and *bona fide* rejection, but only an ostensible and pretended one. One thing is clear—it was a perfectly clear and conclusive rejection so far as the defenders were concerned, and they acquiesced in it as such. They did not further press, or press at all, the "Europe" on the attention of Messrs Matheson as proposed purchasers.

After this nothing whatever happened so far as the "Europe" is concerned till 13th January 1874—a period of upwards of three months. Of course the "Europe" was still in the market, and so far as those interested in her were concerned purchasers were being sought for, but the owners never thought of Messrs Matheson under the pursuer's introduction. Messrs Matheson had examined and finally rejected her, and the owners had never heard, and probably never thought, either of them or of the pursuer since that rejection. It is, no doubt, also true that the Chinese constituents of Messrs Matheson were still in want of steamers, and their wants had not yet been supplied; but of this the owners of the "Europe" knew nothing, and probably cared

nothing, seeing that the "Europe" would not do. The China Company were looking after other sellers than the defenders, and the defenders must find other purchasers than Messrs Matheson; and so the matter stood for more than three months.

In the meantime, and in January 1874, the China Company, instead of continuing to employ Messrs Matheson of London to find a ship by means of a broker (and the pursuer had been the broker whom Messrs Matheson of London had selected), send home from China their own agent Captain Bolton to buy or build steamers. The Shanghai letter advising Captain Bolton's mission to Messrs Matheson (6th November 1873) bears that "Captain Bolton has full powers to build or purchase with your assistance one or more boats of such character as may be decided upon." These were his powers, and he came to Messrs Matheson thus accredited. It is said Captain Bolton had no power to conclude a purchase, and that the expression "full powers" only meant that he was to inquire and assist Messrs Matheson, who after all were to be the only purchasers. I confess I can hardly read the expression "full powers to build or purchase" in so limited a sense, and I incline to think that the words "with your assistance" mean that Messrs Matheson, as the London correspondents of Messrs Jardine & Company of Shanghai, are to find the funds, while Captain Bolton, as the man of skill on whom Jardine & Company relied, is to choose, fix, and approve the vessel. But however this may be, Captain Bolton had certainly full powers by himself alone, and without the intervention of Messrs Matheson, to search for, discover, or find out suitable vessels, examine them, and ultimately approve them or select them as fit for his constituents' purposes and accordingly he actually did so without the assistance or intervention of Messrs Matheson. No doubt he was in communication with Messrs Matheson, but it was not on their advice or instructions, but of his own accord, and acting for his Chinese constituents that he came down to the Clyde in January to look for steamers, or if he could not find them, to select builders to construct new ones.

Now, what resulted from Captain Bolton's search in the Clyde? It is not pretended that Captain Bolton was sent by the pursuer or had ever heard of him. It clearly appears from Captain Bolton's letters that before coming to the Clyde he had never heard of the "Europe," and I think it may be taken that he came down to the Clyde free and unfettered to choose a steamer wherever she might be found. In the course of his search, and among others, Captain Bolton called upon Mr Denny, ship-broker, Dumbarton, not in virtue of any introduction from the pursuer or even the Messrs Matheson, but as appears from Captain Bolton's own letter of 6th November preceding, in consequence of instructions from Mr Tonking Sing of China, who it appears had also written to Mr Denny on the subject, and to whom, that is to Tonking Sing, estimates were to be wired for decision. Captain Bolton's first meeting with Mr Denny was on 13th January 1874, when Mr Denny in his capacity of ship-broker and as a skilled person acquainted with Clyde shipping went into the matter and ascertained all Captain Bolton's requirements for second-hand ships. The result was that after

full communication and consultation Mr Denny, the Dumbarton ship-broker, to use his own words, "stated to Captain Bolton that a ship had been placed in my hands for sale which I considered in every way well adapted for the purpose. This ship I stated was the "Europe," belonging to Mories, Munro, & Company." Now observe, Denny was an independent ship-broker, who had never heard of the present pursuer in connection with the "Europe." Bolton was an accredited agent direct from China, with full powers to effect, or at least to negotiate, a purchase. In the ordinary course of business, and without the pursuer having anything whatever to do with it, Denny and Bolton came together. Denny is a ship-broker who has been directly employed by the owners of the "Europe" to try to sell their ship, and in ordinary circumstances if he sells her he will get his commission from his own clients, the present defenders. The seller of the ship always pays commission to the broker who effects or causes the sale. No doubt it is true that in the present case Denny happened to be a personal friend of the owners, and from considerations of friendship and a regard to the circumstances of the family of a deceased partner who were owners of two-thirds he had agreed to act gratuitously, that is, to waive his claim for commission against the vendors—that is, to make them a present of his commission. But this does not in the least alter the case so far as regards the present pursuer. Denny in any question with the pursuer must be taken as an independent broker, earning and entitled to his commission, and it is very startling to be told, taking the facts even so far as I have now gone, that Denny will never be entitled to earn or to receive any commission even if he succeeds in selling the "Europe" to Captain Bolton acting for his Chinese constituents, because more than three months before, the pursuer Mr White, a broker 500 miles away, of whom he never heard, had named the "Europe" to Messrs Matheson, who after a regular survey had definitely and conclusively rejected her, of all which proceedings neither Captain Bolton nor Mr Denny knew anything whatever.

It is suggested that Mr Denny was not a broker and had no power to sell without his constituents, the present defenders, and it is said that it does not appear when or how long before the 13th January the defenders had put the "Europe" "into Denny's hands for sale." But surely it cannot be doubted that Denny was a ship-broker—that he was acting purely and solely as such; and as to his powers, why Munro, the surviving partner of the defenders' firm, was specially brought to the consultations with Captain Bolton, and gave on the spot, if he had not done it before, full authority for the sale. If the present action had been at Denny's instance to get his commission from the defenders they could not for a moment have denied his authority. It can make no difference whatever that Denny, instead of charging commission in the ordinary way, is generously waiving it in favour of his personal friends. Nay, the circumstance tells the other way, for it is in evidence, and undisputed in point of fact, that the vendors in fixing the price had specially in view the fact that Denny was to charge no commission, and therefore that the price stipulated would not be subject to any deduction. In short, if Denny had charged commission the defenders,

to use the pursuer's phrase, would have "reserved it," that is, they would have added it on, or as much of it as they could obtain, to the price demanded, or otherwise have declined to sell for a lesser sum.

The arrangement between Captain Bolton, Denny, and the defenders was of course conditional. The ship was at sea, and was to be inspected and surveyed on arrival. This was part of the bargain, and besides it had to be wired to China for approval, but if everything was favourable the parties were agreed both as to price and subject, and this result, with all particulars, Captain Bolton announces to Messrs Matheson of London, by his letter of that same evening (13th January 1874). It is only on receipt of this letter that an obstacle arises—for it is really an obstacle, and a very serious obstacle, to the proposed sale. Messrs Matheson at once say to Captain Bolton—"Why this, 'Europe' that you have found out, and which you think so suitable and propose to buy, is the very vessel which we, acting on Captain Crockett's report, finally rejected more than three months ago. This will never do. We send you Captain Crockett's report." It is as if they had added—and for any sake don't buy the "Europe." Of course this objection led to inquiries—Denny was consulted, and he said, "I don't consider Captain Crockett an authority. I recommend a better survey from a more trustworthy person. Buy upon your own survey, and never mind Captain Crockett." And Denny succeeded in his view. He persuaded Captain Bolton, and the Mathesons too, to throw Captain Crockett's report overboard, to take a new and independent surveyor, and instead of following Captain Crockett's advice and have nothing to do with the "Europe," to buy her on the terms proposed at the meeting of 13th January, before Captain Crockett was heard of. And Mr Denny was successful in his efforts. He carried through the sale in spite of Captain Crockett and notwithstanding the pursuer's declination, for although it is perfectly true that the present pursuer was not to blame for Captain Crockett's unfavourable report, it is not the less true that he acted upon that report, and for himself and his constituents rejected the ship.

And now, when a new bargain is completed with new and independent initiation, after new and independent negotiation, through a new broker and new surveyors, who have succeeded, it may be with difficulty, in overcoming the obstacles which the pursuer quite innocently but not less really was the means of interposing when the pursuer's failure and resignation of the enterprise has been followed by a new inception and a successful completion of the enterprise by stronger hands and under better auspices—is it to be said that Denny, the successful negotiator is to hand over his commission to the pursuer, of whom he never heard, and who did nothing but fail, and, however innocently or honourably, rear up an obstacle in Denny's way. I cannot help thinking this is the real question. Suppose the defenders had "reserved" and were ready to pay the commission, and that the pursuer and Denny were competing for it—Which of them is entitled thereto? By which of them has the sale been brought about? Who is the efficient or real cause thereof? The answer to my mind is not doubtful. To Denny, and to Denny alone, of

these competing brokers, is the sale due. To use the words of Chief-Justice Erle, Denny alone is the *causa causans* of the sale, and if I must give a name to the pursuer, it certainly would not be *causa causans*, but rather *impedimentum obstans*. If Denny chooses to hand over his commission as a present to his friends, that is surely no reason for the pursuer claiming it, especially as the price has been fixed on the footing that Mr Denny would waive his commission. I am therefore for recalling the Sheriffs' judgments and assolzieing the defenders.

LOLD JUSTICE-CLERK—I differ from the judgment your Lordships propose, and I agree with the result arrived at by both the Sheriffs in the Court below. I attach more than usual weight to the views of these learned Judges in the present case, because it is one which depends entirely on mercantile custom and usages, with which their position in a great commercial centre makes them necessarily familiar. I am also impressed by the evidence which has been led in regard to the understanding of merchants in this matter, which cannot be regarded as mere opinions by unskilled witnesses on matters of legal right, but is the indication and outcome of the custom on which alone the case depends, and which no man of sense in practical affairs would disregard. Still, I should not have thought it necessary to enter a formal dissent had I differed only on matters of fact or evidence. But I do not see my way to the result at which your Lordships have arrived without appearing to give my assent to some legal propositions which I think erroneous, and which may hereafter be mislaid.

There lay at the root of much of the arguments addressed to us, both in this case and in the former case of *Moss*, a notion that a claim of this nature was not of a character legitimately professional, and that it ought to be judged of strictly, if not viewed with suspicion. There also seemed to prevail an idea that if such a claim could be put forward by a broker, a similar demand could be made by any friend or acquaintance or stranger who might happen to give useful information, on similar topics. But such views proceed on a want of familiarity with the kind of transaction in hand. The pursuer follows an occupation which has sprung up from the exigencies of our immense commercial concerns. He makes it his business to know in the ship-building trade which of the builders or merchants are desirous of finding customers or purchasers, and which are desirous of purchasing or giving orders. These of course are constantly varying, and it is found convenient for those who are largely occupied to have recourse to such middlemen instead of looking out for themselves. The sole business of such brokers is to find a possible customer for the seller, and a possible seller for the merchant; just as a man who keeps a register for servants informs his customers who they are who wish to be engaged, and who the employers are who are anxious to engage. With the after negotiations and contract the broker has no concern, nor has he any responsibility in regard to them. If the principals come to one and business ensues, he has his commission from the seller on the first transaction if there be no special transaction in view, and on the special transaction if there be one in view.

If nothing ensues he has no claim. In all this there is nothing but an ordinary contract of employment for a particular service, resting, like a great many such contracts, on a well-defined usage, and limited and qualified by the custom on which it rests. A great authority—Chief-Justice Erle—whom every jurist must respect, said in one of the cases in a claim of this kind, that the broker's introduction must be the *causa causans* of the ultimate transaction. I agree that there must be the relation of antecedent and consequent between them, and that an incidental or indirect result will not be sufficient. But this remark has, I think, been misapplied. In accurate language an introduction of one person to another with a view to a contract never can be said to be the *causa causans* of the contract; its causes lie elsewhere. It is enough in such a claim that the introduction produces negotiation, and that negotiation is followed by a concluded contract.

All this is not directly disputed; but the main consideration, which I think has been rather lost sight of in the present case, and on which my dissent proceeds, is, that the broker undertakes introduction only, not negotiation. When the principals or those who act for them are once brought together, the commission is earned if business ensue. The negotiation may undergo numberless vicissitudes, and may be terminated and resumed many times, as such negotiations frequently are, without in any degree affecting the claim of the broker if the principals come to one at last. The intending purchaser may take all manner of opinions as to the merits of the vessel recommended to him, and the intending seller may inquire as to the price he should demand, or the solvency of the customer, or any other particulars. The seller may decline the transaction to-day because the money offered is too little; but he may take it to-morrow. Captain Crockett may advise the purchaser one day that the vessel is unsuitable, and the purchaser may terminate the negotiation; but the next day Mr Denny may tell him that the vessel is a good one, and he may on that ground resume the negotiation. The purchaser may decline the bargain through Mr Matheson in October; he may resume it through Captain Bolton in January. All these things and their causes, proximate or remote, do not affect the broker's claim in any way. His part was done when he informed the parties of their respective desires; and the only further question in which he is interested is, Does the negotiation ultimately terminate in a purchase?

Now, how does the present case stand? Shortly stated, thus—Gardner, Matheson & Company of Shanghai wanted a steamer for a Chinese constituent, and authorised their correspondents, Matheson & Company of London, to purchase one. Matheson & Company in September 1874 applied to the pursuer White, a known broker, and he informed the defenders, Munro & Company, that he knew a customer who might purchase their steamer "Europe," and the parties accordingly commenced a negotiation for a purchase. In January 1875 the negotiation terminated in a sale, and Jardine, Matheson, & Company purchased, through Matheson & Company of London, this same steamer "Europe" from Munro & Company for their Chinese constituent.

The pursuer applied for his commission from the seller, and was refused, on the ground that although the negotiation had terminated in a sale, and both parties had received what they wanted, yet at one time the negotiation had been broken off because Captain Crockett thought and reported unfavourably of the vessel; and that it was only afterwards resumed when it was found that Mr Denny of Dumbarton thought favourably of it. I am at a loss to see what relevancy there is in this statement. That the negotiation was commenced, broken off, resumed, and carried to a conclusion between the same parties is certain. The grounds which induced the parties to alter their minds can be of no consequence. The only thing of importance is the result.

In this view the episode of Captain Bolton's mission and his communications with the defenders and Denny are immaterial. Bolton was only, as Matheson was, the representative of the original party to the negotiation, Jardine, Matheson & Company of Shanghai; and his part in the transaction only explains how it came that the negotiation which was broken off in October was resumed in January. It is said, perhaps truly, that when Bolton first met Munro and Denny at Dumbarton he knew nothing of the former proceedings in regard to this vessel. Munro certainly took care not to mention them; and what Bolton's own knowledge was we cannot tell, because he is not called, neither is his absence accounted for. But it seems of no moment if it be so, because the parties were precisely the same, the subject of negotiation the same, and the object of it the same; and when this was discovered, Munro and Jardine's house stood in relation to each other as regarded this transaction just as they had done in October previously.

All this seems irrelevant to the main question; and I should have thought it so even if the pursuer had taken no part in any of the negotiations for the purchase, which, as I have said, did not enter into the service by which his commission was earned. In point of fact he did much more—he employed Crockett to report on the vessel, and communicated the result to the defender. But these things he did at Matheson's desire, on account of Jardine's house. It was no part of his action as broker; and can have no more effect on his claim than if Jardine had done them himself. It is not of much consequence to the case, but it is plain that on the 7th of October Matheson's mandate was recalled or suspended, and that was probably not without its influence in stopping the negotiation with Munro at that time. But when Matheson heard from Bolton that he was again on the track of the "Europe," he did what any sensible man would have done in the circumstances, and sent Bolton at once to White, the broker. The pursuer accordingly took the matter up where he had left it three months before. He had all the information regarding the former inquiry, he had over eight meetings on the subject with Bolton, and at last it was resolved to have the vessel into a graving dock and have her thoroughly examined. The result of that inquiry was that Matheson of London wrote the final offer to purchase the vessel to Munro & Company. There was no bargain, nor was there the semblance of a bargain until then. Munro was as free to decline the offer as Matheson was to make it. Munro accepted it, and thus the ne-

gotiation terminated in a sale between Munro of Greenock and Jardine's house of Shanghai, of the vessel in regard to which the introduction which commenced the negotiation had been given. I think the pursuer has well earned his commission, and that Munro had no more reason for refusing it in January 1875 than he would have had in October 1874.

The Court pronounced this interlocutor:—

"Find, in point of fact, that the sale which was ultimately effected by the defenders and appellants of the steamship "Europe," was not a consequence of the introduction by the pursuer and respondent, or of anything done by him: Find that the pursuer's introduction and agency did not conduce to the ultimate sale as libelled by the pursuer: And find, in point of law, that the pursuer is not entitled to charge commission against the defenders: Therefore sustain the appeal, recall the judgment appealed against, and assolvie the defenders from the summons, and decern: Find the defenders entitled to expenses in both Courts, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer (Respondent)—Balfour—Mackintosh. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for Defenders (Appellants)—Dean of Faculty (Watson)—R. V. Campbell. Agents—Webster & Will, S.S.C.

Friday, July 14.

FIRST DIVISION.

[Lord Young, Ordinary.]

THE SCOTTISH WIDOWS' FUND v. BUIST AND OTHERS.

Insurance—Warranty—Fraud—Assignee—Assignatus utitur—jure auctoris—Latent Conditions.

In an action of reduction of a policy of insurance, brought by the Insurance Company against onerous assignees of the assured,—held that allegations of breach of warranty and fraud on the part of the assured were relevant against the assignees.

Process—Jury—Proof.

In an action of reduction of a policy of insurance, brought by an Insurance Company against onerous assignees of the assured, on the ground of breach of warranty and fraud of the latter—held that the most expedient way of trying the case was by proof before the Lord Ordinary without a jury, important legal principles being involved which it would be difficult for a jury to follow, and in regard to some of which there might be a natural prejudice in the minds of a jury.

On 5th August 1871 George Moir, cattle dealer, made a proposal to the Scottish Widows' Fund and Life Assurance Society for a policy of assurance on his own life for the sum of £1000. The proposal consisted of certain printed queries and answers thereto filled in by Mr Moir, and of