

is given by the Sheriff, and it extends over four calendar weeks. What was the total amount earned by him? That also may be ascertained from the Sheriff's statement. It amounts to £4, 19s. 2d., which falls I think to be divided by four, and that fourth when multiplied by 156 brings out £193, 7s. 6d. That is the sum which must be deemed to be the deceased's earnings for three years and the amount of compensation to which his dependants are entitled.

This appeal should therefore be sustained and the first question answered in the affirmative. It is unnecessary to answer the second question.

THE LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent.

The Court pronounced the following interlocutor:—

“Answer the first question of law therein stated in the affirmative: Find it unnecessary to answer the second question of law therein stated: Find and declare accordingly: Therefore recal the award of the arbitrator, and remit to him to grant decree for the sum of £193, 7s. 6d., being the amount due in terms of the foregoing decision.”

Counsel for the Appellants—Salvesen, K.C.—Hunter. Agents—W. & J. Burness, W.S.

Counsel for the Claimant and respondent—Wilson, K.C.—Wilton. Agents—Gray & Handyside, S.S.C.

Tuesday, January 21.

FIRST DIVISION.

[Lord Kincairney, Ordinary.]

CLARK & MACDONALD v. SCHULZE.

Agent and Client—Edinburgh Agent—Claim against Country Client—Payment to Country Agent for Edinburgh Agent—Payment Embzzled by Country Agent—Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63), sec. 21.

A country agent, with the authority of a client whom he disclosed, instructed a firm of Edinburgh law-agents to conduct a litigation in the interest of the client. The Edinburgh agents at the suggestion of the country agent wrote to the latter asking a payment to account of their outlays, and the client on receipt of a copy of the letter paid the amount asked to the country agent, who appropriated it to his own purposes and disappeared without having paid it over to the Edinburgh agents. Held that the client was liable to the Edinburgh agents for the full amount of their account, and could not take credit for the payment to account made to the country agent.

Clark & Macdonald, S.S.C., Edinburgh,

brought an action against William Schulze, tweed merchant, Galashiels, in which they concluded for payment of £33, 5s. 7d., being the amount of their business account in conducting an appeal from the Sheriff Court at the instance of the defender against the Burgh of Galashiels.

Schulze maintained that he was entitled to credit for a sum of £20 paid by him to one Peebles, his local law-agent, on behalf of the pursuers, and offered to pay the balance of £13, 5s. 7d. as in full of the pursuers' claim. Peebles was the country agent in the case and had conducted it in the Sheriff Court.

The defender pleaded, *inter alia*—“(1) The pursuers having instructed Mr Peebles, as their agent, to obtain payment for them of the £20 referred to in the defences, and payment thereof having been made by the defender to Mr Peebles on behalf of the pursuers, said sum falls to be credited to the defender in accounting between him and the pursuers.”

Proof was allowed and led.

The facts of the case sufficiently appear from the opinions of the Lord Ordinary (KINCAIRNEY), and of the Court.

The Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63), section 21, is in these terms:—“Agreements between law-agents acting for the same client to share fees or profit shall be lawful, and a law-agent authorised and acting for a client whom he discloses shall incur no liability to any other law-agent employed by him except such as he shall expressly undertake in writing.”

On 26th June 1901 the Lord Ordinary pronounced an interlocutor by which he found that the defender was not entitled to deduct the sum of £20 from the account sued for in respect of the payment of £20 made by him to his agent, John K. Peebles; repelled the defences; and decreed in terms of the conclusion of the summons.

Opinion.—“The amount at stake is only £20, but the case is narrow and relates to important questions, although I think that this case is too special to be of general importance. It arises out of the defalcation of a Mr Peebles, a law-agent in Galashiels, who acted as law-agent for the defender Mr Schulze in a litigation with the Corporation of Galashiels, which was carried by appeal to the Court of Session and lost there, Clark & Macdonald being Mr Schulze's Edinburgh agents employed by Peebles. This action is for payment of their account, amounting to £33, 5s. 7d. The defender has tendered £13, 5s. 7d. He claims credit for £20 as previously paid.

“The facts are very few. On 22nd February 1899 the pursuers wrote to Peebles a letter containing the following paragraph:—‘We think you might now send us a payment of say £20 towards our outlays. We annex a note of these made and to be made. Of course there may be further outlays, but we cannot say what these will be until after the discussion.’

“On 23rd February 1899 Peebles forwarded this letter to the defender, and the defender says that in compliance with the

demand or request he gave to Peebles his cheque, dated 1st March 1899, for £20.

"The cheque is produced indorsed by Peebles, and receipt is acknowledged in an account rendered by Peebles to Schulze in which it is mentioned, the entry being 'received from you to account of outlay, £20,' but the £20 is not credited as a payment to account.

"I think that these documents, with the defender's evidence, instruct that Schulze understood Clark & Macdonald's letter to Peebles to be a demand on him (Schulze) for a payment of £20; and that, in consequence of and in compliance with that demand, he paid £20, not to Clark & Macdonald but to Peebles, by his cheque in order that Peebles should pay it to the pursuers in compliance with their request. I think the payment was appropriated to that purpose, and that Peebles could not without fraud have applied it to the payment of an account due to himself.

"Peebles, however, never made the payment to the pursuers, and now the money cannot be recovered from him, and apparently he has disappeared.

"The facts then are these:—Schulze owed Clark & Macdonald £20, part of their account. He paid that sum to Peebles, but the pursuers never received it. The question is, who bears the loss? Must Schulze pay it a second time, or must Clark & Macdonald lose it?

"There is another fact of considerable importance, viz., that Schulze has never paid Peebles' account. He declined to do so because Peebles mismanaged his case, and he says that Peebles acquiesced in that and never took any steps for recovery of his account. Peebles' account considerably exceeds £20. It may be true that Schulze had a good defence against a claim for payment of this account. At the same time that cannot be taken for granted or assumed on his mere assertion.

"In considering the case the 21st section of the Law-Agents Act of 1873 must be kept in view, the effect of which is that Peebles incurred no liability to Clark & Macdonald.

"The pursuers are suing for an unpaid account, and must prevail unless the defender proves payment, and the question is whether payment to Peebles was payment to Clark & Macdonald. Now Peebles was the defender's country agent and the pursuers' correspondent. It may be that Peebles could not be held to be the defender's general agent to receive or pay money. Yet he was the person through whom in the ordinary course of business the debt due by the defender to the pursuers would be paid. If without any special application Schulze paid money to Peebles in connection with the litigation in order that he might pay it to the pursuers, that would be an employment of Peebles in the ordinary course of his relations with Schulze, and would not, I take it, be a payment to the pursuers unless it reached them. In that case Schulze would suffer the loss arising from the default of his own agent; and I did not understand the defender to dis-

pute that that would be so. He rested his case mainly on the letter by Clark & Macdonald to Peebles of 22nd February. He argued that that letter could not be held to be a request to Peebles to pay the £20 out of his own pocket, seeing that in virtue of section 21 of the Law-Agents Act he was not liable for any part of the account, and he represented the letter to be an authority to Peebles to obtain £20 from Schulze on their behalf, and that it constituted Peebles their agent to receive this sum from Schulze, and was, or when sent to Schulze became, an implied request or authority to Schulze to pay £20 to Peebles on their account and as their agent; so that, as they argue, when Schulze paid the £20 to Peebles he paid it to him not as to his own agent but as to the agent of Clark & Macdonald specially authorised to receive it. This argument, no doubt, was highly ingenious, but I think it pressed the letter of 22nd February too far. It must be remembered that Peebles was the person by whom in the ordinary course of business payment would be made by Schulze to Clark & Macdonald. Schulze had no relations with Clark & Macdonald except through Peebles; and Peebles was the person through whom, and through whom alone, Clark & Macdonald could ask for payment. It is clear that it would have been altogether against custom, and probably against professional etiquette, had they passed over Peebles so long as he could be reached and applied to Schulze directly. Further, the letter was not addressed to Schulze, and Peebles was under no obligation and probably no necessity to send it to him. Clark & Macdonald did not ask Peebles to lay it before Schulze.

"I cannot read it as an authority to Peebles to receive money on their account or as a request to Schulze to pay money to Peebles on their account. It was a request for payment to themselves, not to Peebles. It was no more than what it expresses—a request to Peebles to manage somehow to get the money paid.

"The request might have been complied with in more ways than one. Schulze might merely have authorised Peebles to pay the money and to enter it in his account against him. Had he done so that would not have been payment to Clark & Macdonald; it might or might not have involved loss to Schulze. Or Schulze might, as would have been prudent, have drawn his cheque in favour of Clark & Macdonald, which would have avoided all risk. That would have been the natural way of complying with Clark & Macdonald's request. But when he drew his cheque in favour of Peebles he thereby merely put Peebles in funds to pay Clark & Macdonald, not as their agent but as his. I think, therefore, that the plausible contention of the defender that the £20 should be held as paid to Peebles as the pursuers' agent should not receive effect.

"When the question is put in this form, Who of two innocent parties is to suffer from the default of a third? that is a question which is seldom easy to answer; and no doubt it might have been satisfactory

had the parties agreed to divide the loss.

"It is argued that the loss should fall upon the party who furnished the means of fraud, supposing that there was fraud. It is not easy to say on which side that argument lies, whether against the pursuers, who wrote the letter of 22nd February, or against the defender, who granted a cheque in favour of Peebles instead of a cheque in favour of the pursuers. There might be as much to be said on the one side as on the other. But I cannot but think that there is an equitable consideration, arising from the fact that the defender, taking the law in his own hands, has refused to pay Peebles' account. Peebles has not discharged his account, and *prima facie* he was entitled to payment of it, or part of it. If I should decide in favour of the defender in this case, then the pursuers would undoubtedly lose £20 of their account and the defender might perhaps pay nothing at all. If I should decide against the defender, then the result will be that he will pay the account which he owed to the pursuers and may lose the £20 paid to Peebles, to whom he may possibly have owed a larger account. But I do not rest my judgment on that ground, but on the ground already explained, that payment to Peebles was not payment to Clark & Macdonald."

The defender reclaimed, and argued—Clark & Macdonald were employed by and acted for Peebles, and they looked to him as their principal. Their claim was therefore against him. But if it should be considered that the defender was responsible to Clark & Macdonald under section 21 of the Law-Agents (Scotland) Act 1873, *quoted supra*, then Peebles had been employed by them to collect the money and they must suffer from the fault of their authorised agent.

Argued for the pursuers—The client was clearly responsible under the 21st section of the Law-Agents (Scotland) Act 1873 for the account, and the proper way to intimate it was through his local agent. To have acted otherwise would have been contrary to etiquette and invariable custom.

At advising—

LORD PRESIDENT—This is a peculiar case, and it is happily one of a kind which seldom arises where local agents and Edinburgh agents are employed to do the work of the same client. The first question is whether the relation of agent and client was ever established between Messrs Clark & Macdonald and Mr Schulze. If the fair construction of what took place is that Messrs Clark & Macdonald were not Mr Schulze's agents their claim must fall to the ground. If Schulze was not their client the only other possible client was Mr Peebles, because they must have had some client, and the choice lies between these two. What happened in this case is just what happens in the ordinary case where the services of a local agent and an Edinburgh agent are required. Mr Schulze not being satisfied with a decision in the Sheriff Court desired to bring it under the review of this Court.

It became necessary that some arrangement should be made in regard to an Edinburgh agent, and what took place appears quite clearly from the evidence of Mr Schulze, which, as was to be expected, was very frank and candid. He said—"In the same month of December Mr Peebles told me that Messrs Clark & Macdonald were his Edinburgh correspondents. He said they had a most important Court practice and they did all the business for him. He proposed that they should be instructed to conduct the appeal in my interest." That is cautiously worded, and Mr Schulze does not say that they should be instructed to conduct the appeal "for me." But "in my interest" is not very far from that, and just indicates the reservation which a person who had a particular view of the relations which arose out of the dealings may very well use; but I think it amounts to this, that when the appointment of an Edinburgh agent became necessary Messrs Clark & Macdonald were recommended by Mr Peebles, and that Mr Schulze assented to their being appointed as his agents. A little lower down on the same page passages are quoted from Mr Peebles' account, one under date 29th September 1898—"writing you that I have instructed my Edinburgh agents in this appeal." He does not say "I have instructed these gentlemen to be my agents," but "the gentlemen who are my agents are instructed in this appeal;" and the only reasonable construction of that is that they are instructed for the appellant. It seems to me that any letters which subsequently passed or entries which were subsequently made in the account must be read in the light of that very frank statement of Schulze himself. The next material entry in order of date is in the account against Mr Peebles—"Account, John K. Peebles, Esq., Solicitor, Galashiels, to Messrs Clark & Macdonald, S.S.C., Edinburgh (Appeal—*Wm. Schulze v. Burgh of Galashiels and Another*)." It is quite true that this account is made up as if Peebles was the debtor in it. That is a perfectly just observation which has been made on behalf of Schulze, but I think the statement made on the other side is correct, that if it is not the invariable it is at all events a very usual method for an Edinburgh agent to make out his account to a local agent who has been the means of getting him employed and with whom he will have to settle. The first entry in that account is—"Dec. 26, Attendance with you on your call, taking instructions to act for the appellant and proceed with the appeal." This is what Clark & Macdonald say in their account, and their understanding, as appearing from that, evidently was that they were to act for the appellant, and it will be found, I think, that this view continued. The next documents referred to on both sides are the letters on pages 32 and 33, including Peebles' letter of 26th February to Clark & Macdonald—"I am relying upon you instructing me in good time when we must instruct senior counsel. When writing me, please ask me for a payment of counsel's fees and mention an

amount." This seems to me to be a letter written by a country agent asking information which he could show to the client of both, indicating that the town agent needs an advance for payment of counsel's fees and mentioning the amount, as a client who did not know that outlay was necessary might, unless notified, have said—"I will pay my account at the end of the case." And accordingly it was not unnatural that when Clark & Macdonald required money to carry on the litigation they should mention it, and that Mr Peebles would show that to his client as a warrant for asking money to send to them. This was acted on in accordance with professional usage by Clark & Macdonald. They say—"We think you might send us a payment of say £20 towards our outlays." That seems to me to be an ordinary letter between the town agents and the country agent, but does not contain any suggestion that the country agent is the client of the town agents. There are various other letters which might be referred to, but the effect of the whole evidence appears to me to be that the employment was of an Edinburgh agent through a local agent, but for the client who gave the authority for the employment, and who was therefore placed in the relation of client to the Edinburgh agent as well as to the local agent.

But if that be so, if money was got for the purpose of making a remittance to the Edinburgh agent and was stopped in transit by the local agent, the fraud would be committed upon the client, not upon the Edinburgh agent, and the client must suffer the loss. Of course if the local agent got the money as the representative of and as acting for the Edinburgh agent, it might well be that the loss would fall upon the Edinburgh agent; in other words, he would have to stand the loss if he had armed the country agent with his authority to get the money for him as an agent—I mean as acting for him and not merely as a transmitter. But if the fair conclusion from the whole evidence is, as I think it is, that Mr Schulze had two agents—a town agent and a local agent—nothing would acquit him of the claim of the town agent unless he either had paid to the town agent or to someone who had the town agent's authority to recover the money as his agent, and not merely as transmitting it on behalf of the client. For these reasons it seems to me that the conclusion at which the Lord Ordinary has arrived is perfectly correct and that his judgment should be affirmed.

LORD ADAM—I agree with your lordship and the Lord Ordinary. This is an action brought by Messrs Clark & Macdonald, law-agents, against the defender Schulze for payment of a business account incurred by them as agent for him in a certain litigation. The account amounts to £33, 15s. 2d., and he proposes to deduct from that the sum of £20; and the question is whether he is entitled to deduct this sum of £20 or no. There is no doubt about what that

sum of £20 is, as we see from the terms of a cheque printed at page 31 it was a sum of £20 paid to John K. Peebles by Mr Schulze on 1st March 1899. That being so, the money was sent by Mr Schulze to Mr Peebles by that cheque. Now, as I understand, Mr Peebles has gone off with that money in his pocket; and the question seems to me simply to be, when he disappeared with that money in what capacity and character was he holding it—was it in his possession as agent and acting for Clark & Macdonald, or was he holding it as agent for Mr Schulze? It is quite clear that if it was in Mr Peebles' hands as agent for Mr Schulze it was never paid to Clark & Macdonald, and Schulze is not entitled to deduct the £20 from the amount of their account. On the other hand, if the payment to Peebles by Mr Schulze was payment to Clark & Macdonald, are they entitled to charge for it twice? It seems to me that is the simple position of the case. Now, the position of the parties was this—Mr Peebles was undoubtedly Mr Schulze's local agent, and among other things was his country agent in this particular litigation, and when it became necessary, as I understand, that a town agent should be employed, Clark & Macdonald being the agents whom Peebles usually employed in such matters, on his recommendation were employed by Mr Schulze as his town agents, Mr Peebles being his country agent and in fact the only person who was in direct communication with Mr Schulze.

Now, as the case was going on money was required to carry it on, and on 21st February Mr Peebles writes to Clark & Macdonald the letter which your Lordship has referred to, in which Peebles, not waiting until Clark & Macdonald should ask for any money to meet past and prospective outlays, volunteers this letter, in which he says:—"When writing me, please ask for a payment of counsel's fees and mention an amount." I confess that letter suggests to me that the object of writing it was not that Peebles might get money for the purpose of forwarding it to Clark & Macdonald, but rather it suggests that he wanted money in his pocket in order that he might apply it as he did apply it. That is very likely, for if the money was really wanted for the purposes of the case one would have expected that Clark & Macdonald would have made their wants known, as they were the parties who made the outlay. But that was not the state of the case. This letter was voluntarily written, as Mr Graham Stewart said it was written, by the country agent as an instruction by him apparently acting for Schulze to the town agents in the ordinary conduct of the business—"You will write me to send you money." Messrs Clark & Macdonald take the hint, and in the next letter they write about the business of the case generally, which was certainly written to Peebles as acting for Schulze, and in the middle of it say, "We think you might now send us a payment of say £20 towards our outlays," and then give particulars of how the £20 is made up; and

it was on receiving that letter from Peebles that Schulze sends the cheque of 1st March which has been retained by Peebles. Now I confess I have not the difficulty about this matter that the Lord Ordinary has. I think that the letter of 22nd February asking money was written by Clark & Macdonald to Peebles as agent for Mr Schulze and as country agent in the case and in no other capacity. I think that they just in the ordinary course of business, adopting the suggestion of Peebles, wrote to Peebles to get this money, and in so writing wrote to Peebles as Schulze's agent; and I think Schulze in sending that money by cheque to Peebles sent to him as his agent, depending upon him as his agent to transmit it to Clark & Macdonald.

I think therefore that in logic and law the pursuers are entitled to payment.

LORD M'LAREN—The question as I understand it is this, whether a sum of money sent by a litigant to his agent in the Court of Session through the country agent is a good payment to account, although in point of fact the sum of money never reached the Edinburgh agent. There can, I imagine, be no doubt that in this case Messrs Clark & Macdonald, the Edinburgh agents, were not sub-agents of the country agent Peebles, but that the direct relation of agent and client subsisted between Clark & Macdonald and Mr Schulze. That is the result of the section of the Law-Agents' Act to which we were referred, which says that where the name of the client is disclosed by the country agent the country agent shall not be responsible unless an express contract to the contrary be made. Now there was no express contract in this case, and it follows that Schulze was directly liable to Clark & Macdonald, and that he might have sent payment to them by post without the intervention of the country agent. I confess that when attending to what was said against the Lord Ordinary's interlocutor I was inclined to doubt its validity, on the ground that, as I then apprehended the facts of the case, the payment by a debtor to a creditor made through a channel pointed out by the creditor is a good payment although the money does not reach him. But my impression was completely altered by what Mr Hamilton pointed out in his very lucid opening, that the principle would not apply to a case where the channel of communication referred to is the debtor's own agent, because if a creditor writes to a debtor "Will you instruct your agent," or "Will you instruct your banker to pay me this sum," that is not pointing out a channel of communication which the creditor particularly desires. It is much the same thing as saying "Will you make payment to me in the manner most convenient to yourself." That being so, I think it makes no difference whether the suggestion of payment through an agent was made directly or indirectly. In the present case it was not made directly. I mean Clark & Macdonald did not write directly to Schulze saying "Pay us through your country agent." They wrote through

the country agent "Will you let us have so much," which meant plainly "Will you get your client to send us £20." Now, looking to the fact that Peebles was undoubtedly the agent of Mr Schulze and the person who had introduced Clark & Macdonald into the business, I think that this request was the same in effect as if the letter had been addressed to Schulze himself. It was only sent through the agent as a matter of professional courtesy, and therefore I agree with your Lordship that this was not a case of a creditor prescribing a particular mode of payment, and that it would have been open to Mr Schulze to make the payment by cheque in favour of Clark & Macdonald transmitted either directly or through Mr Peebles. Mr Schulze having preferred to make payment through his agent, I agree that the loss must fall upon him. I am glad to think that the loss will be compensated, because Mr Peebles has not yet got payment of his own account.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Graham Stewart—Hamilton. Agents—Party.

Counsel for the Defender and Reclaimer—Clyde K.C.—M'Lennan. Agent—George Matthewson, S.S.C.

Tuesday, January 21.

SECOND DIVISION.

Sheriff-Substitute at
Glasgow.

COHEN & VAN DER LAAN
v. HART.

Food and Drugs—Margarine—Margarine Register—Inspection by Officer of Board of Agriculture—Refusal to Permit Officer to take Notes from Register—Sale of Food and Drugs Act 1899 (62 and 63 Vict. c. 51), sec. 7.

The Sale of Food and Drugs Act 1899, sec. 7, enacts—“(1) Every occupier of a manufactory of margarine or margarine-cheese and every wholesale dealer in such substances shall keep a register showing the quantity and destination of each consignment of such substances sent out from his manufactory or place of business, and this register shall be open to the inspection of any officer of the Board of Agriculture.” . . . Sub-sec. (3)—“If any such occupier or dealer . . . (b) refuses to produce the register when required to do so by an officer of the Board of Agriculture, . . . he shall be liable” to a fine of £10.

Held that the power of inspection above quoted entitles the officer of the Board of Agriculture to make notes of the contents of the register, and that a dealer who produced his register to the