

same time it is certainly not a proper feudal incident. It is not an ordinary contract. One of the parties to the contract is a railway company, but the deed does not specify in whose favour the obligation is created. If it were a proper feudal incident it would be in favour of the superior, but it is just a general obligation in a feu-charter by a vassal to do certain things which are not properly feudal. Therefore it is difficult to determine the character of the obligation, or who is the creditor in it. Is it such as runs with the lands? Suppose it is, with what lands? with the superiority?—because that may become detached from the property. With the Castle of Crathes?—it would be difficult to say that, because it is not of the nature of a servitude.

It is not an obligation "to me and my general representatives for ever." There would be, to my mind, great difficulty attending the obligation if the general question as regards its validity and extent were to arise. The action before us is so *ex facie* nimious and unreasonable as to excite prejudice against it, so that one has to be on his guard, and see that the exact legal rights of the pursuer, however unreasonable his demands, are satisfied. The pursuer claims that all trains whatever carrying passengers shall stop at Crathes, whether such stoppage be necessary or not. His declarator would be equally good in law, according to his view of his legal right, to have all trains stop there even though no passengers were to get in or out there. When the feu-charter was taken there were five trains apparently running each way daily. Now there are eight passenger trains each way stopping at Crathes. It is a very small place, and it is not suggested that that number is not sufficient for its requirements, and indeed it is manifestly greatly in excess of them, but the pursuer says the number is within his legal rights, and, as it were, his pound of flesh, contained in writing in his bond. I asked why he insisted on the right, and the answer I got was that some of the family coming from London might like to stop the train at Crathes, and therefore it is for that purpose that the pursuer desires the train should stop every night, both ways, at Crathes. Then there is a Sunday train during the Sovereign's residence at Balmoral to carry letters from the seat of Government. The pursuer says it is to stop at Crathes, because it is so nominated in his bond. Then the railway company sends excursion trains in summer to certain places where excursionists like to go, Crathes not being one of them. It is, the pursuer says, nominated in his bond that these trains shall stop there though no excursionists are going there. Indeed, I repeat the action is so nimious and unreasonable—I might almost say scandalous—as to stir up prejudice against the pursuer of it and put the Judge on his guard; and I have mentioned these considerations in order that I may say that I have done my best to guard against that prejudice, and to give the pursuer his legal rights if they are so nominated in his bond, and the law entitles him to them. Without entering, then, into the question of the validity or the extent of the obligation, I am very clearly of opinion, and without any doubt or hesitation at all, that the particular trains sought to be stopped are not within the contract. I cannot commend the conveyancing in this deed, and I

am surprised that the men of business passed such a parenthesis as referred to by Lord M'Laren. It is very bad conveyancing. The clause is a parenthesis no doubt, but the men of business ought to have had in view that this construction might be impressed on it as a means of exacting toll on all trains passing Crathes without stopping, contrary to the true nature of the obligation. I construe the clause as a parenthetical one, and I was impressed with what Lord M'Laren said on that view. It is not the language which would be employed to impose an obligation of the character the pursuer represents it to be—"at which all passenger trains shall regularly stop." What does "regularly" mean? There may be exceptions, but the rule is that the trains shall stop. I should have thought that the rule would be the character of the station and the requirements of the place. But short of that it suggests the question, Are these normal passenger trains? Are the Queen's Messenger and summer excursion trains to be classed as normal trains? I am clearly of opinion, and without any doubt whatever, that they are not. Therefore, on the limited view taken by the Lord Ordinary, I agree with him, and further, I think it not amiss to say that I have great doubts as to the validity and extent of the obligation.

LORD RUTHERFURD CLARK—I am rather inclined to regard the trains in question as passenger trains, and to hold that the obligation extended to them, but I cannot say that I am sorry your Lordships have adopted another view.

The LORD JUSTICE-CLERK and LORD CRAIGHILL were absent.

The Court adhered.

Counsel for Pursuer — Sol.-Gen. Asher, Q. C. — Mackintosh — Begg. — Agents — Baxter & Burnett, W.S.

Counsel for Defenders — J. P. B. Robertson — Jameson — Ferguson. Agents — Gordon, Pringle, Dallas, & Co., W.S.

Friday, December 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER, DONALD, & COMPANY v. BIRRELL,
STENHOUSE, AND COMPANY.

*Shipping Law—Ship—Shipbroker—Commission—
Custom of Trade.*

A broker sued a shipbuilder for 2½ per cent. commission on the price of a ship built by the defender, on the ground that the order having been the result of the introduction of the purchaser by the pursuer, he was entitled to such commission by the custom of trade on the Clyde. *Held*, on a proof, that by the custom of trade the broker was entitled, in the absence of special arrangement, to commission at the rate of 1 per cent., and that the defender had failed to prove that this right had been waived by the pursuer.

This action was raised in the Sheriff Court at Glas-

gow by Walker, Donald, & Company, shipbrokers, 141 Buchanan Street, Glasgow, against Birrell, Stenhouse, & Company, shipbuilders, Dumbarton, for the sum of £545, as commission at the rate of 2½ per cent. on the price of a steamship built by the defenders for Macbeth & Gray, ship-chandlers, Glasgow. The pursuers alleged that they had introduced Macbeth & Gray to the defenders, and were entitled to the commission sued for in respect of their introduction, by their known course of dealing and by the custom of the trade on the Clyde.

The defenders denied the custom, as well as any liability from the course of business of pursuers.

A proof was led as to the custom of trade on the Clyde with regard to brokers' commission, and also of the facts of the case. It was proved by the evidence of several shipbrokers engaged in business in Glasgow, that the custom of trade there was, that when a shipbroker introduced a customer to a shipbuilder, and a contract for the building of a vessel followed from that introduction, commission was due to the broker; that the precise rate of commission was usually made matter of stipulation between the parties (which had not been done in this case); the usual rate was from 1 to 2 per cent., seldom more.

The other material facts were as follows:—
“The pursuers wished to have a steamer built for themselves, and had several meetings with the defenders with that object in view. Subsequent to these interviews in October 1882, Mr Donald, a partner of the pursuers' firm, introduced to the defenders Mr Macbeth of Macbeth & Gray, who was previously unknown to the defenders, and who also wanted a vessel built. There were present at this interview Mr Donald, Mr Macbeth, Mr Birrell, and Mr Stenhouse. Mr Donald deponed that at this meeting he stated that he introduced Mr Macbeth in his capacity of a broker, but the other three persons present had no recollection of his saying this. There was an object in having twosteamers built, because they could be supplied by the builder at a lower rate than if one only was required. There was some conversation at this meeting, but no result. Shortly afterwards there was another interview between the same parties, at which £20,750 was mentioned as the maximum price, which Mr Birrell stated was to be the price clear of commission. Mr Macbeth deponed that he tried to get Mr Birrell either to lower the price or give some commission. (Q) When you asked Mr Birrell to give you a commission, was it for yourself you wanted it?—(A) Yes, of course; I wanted the price reduced to that extent. I was not asking for a commission for the pursuers. (Q) It was you was it who used the word ‘commission’?—(A) I think it is a common phrase to be used. (Q) Was what you meant a discount for yourself—something for your own benefit. —(A) Yes.”

Mr Donald deponed that he did not recollect hearing Mr Birrell say there could be no commission. “He may have said it. I know that I myself never mentioned commission.” The parties could not, however, agree as to the price, and so the negotiations proved abortive. About a month afterwards Mr Macbeth resumed negotiations with the defenders, and on 13th December a contract was concluded between them for the building of a steamer. This vessel was to be

a little larger than the one for him regarding which there had been the previous negotiations, and the price was to be £21,500, less 1½ per cent. for commission or discount, to be paid to Macbeth & Gray themselves. When the contract was entered into, Walker, Donald, & Company claimed commission at 2½ per cent. on the price, which the defenders refused to pay, and hence the present action.

The pursuers pleaded—“(1) The order for the said steamship having been obtained by the defenders through the instrumentality of the pursuers, or at least having been a result from pursuers' introduction of Macbeth & Gray to the defenders, the pursuers are entitled to a commission on the price.”

The Sheriff-Substitute (GUTHRIE) on 30th June 1883 pronounced this interlocutor—“Finds that the defenders made a contract with Messrs Macbeth & Gray in November 1882 for building a steamer at the price of £21,500, less discount at 1½ per cent., which contract was the direct result of the introduction of Messrs Macbeth & Gray to the defenders by the pursuers as brokers: Finds that by custom of trade brokers giving such an introduction are entitled to a commission: Finds that in the circumstances a fair commission is 1 per cent.: Therefore decerns against the defenders in favour of the pursuers for the sum of £212, 6s. 3d. sterling, being commission at that rate, with interest from the date of citation.

The defenders appealed to the Court of Session, and argued—The custom of trade was to make the question of commission matter of agreement. Assuming the custom of trade to be that in the ordinary case the broker who introduces a customer is entitled to commission, if business results, there was here proved an express arrangement that there should be no commission. Further, the business here was not the result of the introduction by the broker, because the negotiations were not continuous. The theory on which a broker is paid a commission is that he acts in the interest of the shipbuilder; but here the broker was negotiating for a vessel for himself, and therefore in bringing a purchaser he had an interest adverse to the defenders, viz., to cheapen the vessel which was to be built for himself. This case was distinguishable from the cases of *Mansell v. Clements* and *Wilkinson v. Alston* (*infra*). There was no case in which the broker has been found entitled to commission unless there had been employment, or unless the introduction had been *simpliciter* accepted—*Moss v. Cuntiffe & Dunlop*, March 20, 1875, 2 R. 657; *White v. Munro, &c.*, July 11, 1876, 3 R. 1011; *Green v. Bartlett*, May 30, 1863, 14 Scott's C.B. Reports, 681, 32 L.J. (N.S.) C.P. 261; *Mansell v. Clements*, L.R. 9, C.F. 139; *Williams v. Aston*, 48 L.J. Q.B. 733.

At advising—

LORD PRESIDENT—The circumstances of this case are somewhat peculiar, for it is not a simple case of an introduction by a broker followed by the purchase and sale of a ship. The case begins not with a simple introduction, but with a somewhat complicated arrangement between the broker who gave the introduction, the customer, and the builder. It was not only the case of a customer in want of a ship who gets a broker to introduce him to a shipbuilder, for in this case both the

customer and the broker wanted ships of the same kind. Therefore the broker entered into negotiations along with the customer for the building of two ships, one of which was to be for the customer and one for himself. They had this object in view in ordering a pair of ships, namely, that the builder could supply them at a much lower rate than if one only was to be built.

Now, I can quite understand that in such a case a special arrangement might have been made to exclude any claim on the part of the broker for commission, and we have here a good deal of evidence of what passed at the meetings between the parties.

The two defenders, Mr Donald the broker, and Mr Macbeth, the customer who was introduced, are both examined as to what occurred, and substantially, I think, they are agreed; they differ in some particulars, but the result is not doubtful. There is a certain amount of obscurity and ambiguity caused by the doubtful use of the word "commission," which is used with a double meaning, as equivalent, first, to discount allowed to the purchaser, and second, to broker's commission on the price. Sometimes it is used in such a manner as to embrace both, and thus there is an appearance of discrepancy which does not really exist.

The substance of what passed at the negotiations was that a price was named as being the lowest which the defenders could charge for the two vessels, and it was then stated very distinctly that there was not included in it any allowance for commission. In that case, if commission was to be charged it would have required to have been added. At first sight it would seem from Macbeth's evidence that the commission then referred to was what he claimed as purchaser, but the result of the whole evidence makes it clear that what the defenders meant was, that the price was so low that they could not afford to take it unless the claims for commission under both heads were abandoned.

That is a fair and reasonable proposal, and if it had been assented to the transaction would have been concluded on the footing of the pursuers not being entitled to commission on the one ship or the other. As to the one vessel, that which would have been built for themselves, I do not see how they could have any claim; for while the builder no doubt pays the broker his commission, he merely adds that to the price which the purchaser pays, and so in the case of the vessel which the pursuers would have purchased, the charge for commission would have come back upon them.

In the case of the other vessel they would, according to the custom of trade, in the absence of special arrangement, have been entitled to commission on the price. But if the transaction had been concluded on the footing I have suggested, there would then have been an abandonment of any claim for commission, and so there would have been no commission due on the price of Macbeth's vessel either.

The negotiations, however, did not have any result, for Macbeth and the pursuers were not satisfied. They thought the price was too high, seeing that there was to be no allowance for discount or commission; they thought the price too high on these conditions, and so the negotiations

proved abortive.

Some time after Macbeth renewed negotiations with the defenders for building such a vessel as was proposed before. It is said that the vessel which was actually built was different, but I think the difference immaterial; the vessel in both cases was a screw steamer, the only difference between the one originally proposed and the one actually built being that the latter was somewhat larger and dearer, the difference in price being £20,750 as against £21,500.

That truly was a renewal of the negotiations as far as Macbeth was concerned, which ended in business between the parties. In these circumstances it is contended that the brokers are entitled to a commission, on the ground that they were the persons who introduced the customer to the defenders, and that according to the usage of trade that gives them a right to claim commission. I am of opinion, with the Sheriff-Substitute, that this claim is well founded, and on this ground, because I think the custom of trade has been clearly proved, and notwithstanding the fact that there has not been actual employment beforehand by the shipbuilder of the broker, yet if the broker brings a customer to a shipbuilder, and the shipbuilder accepts the employment, that entitles the broker to a commission. That is applicable to the circumstances of the present case. The fact of the first negotiations breaking off and being renewed does not affect the broker's right to commission, for commission is due in consequence of the transaction, as if it had taken effect after the first negotiation. It is quite true that the first negotiation was of a peculiar kind, and if it had been brought to a conclusion it would have been on the footing that all claims for commission were to be waived or abandoned. But the proposal of the shipbuilder was not accepted, and it certainly cannot be assumed that such a proposal was renewed and assented to at the later negotiations.

LORD DEAS concurred.

LORD SHAND—Two points are clear in this case: 1st, that the purchasers of the vessel were introduced by the pursuers, as brokers, to the shipbuilders; and 2d, that the result was that the vessel for which this price has been charged was ordered. In the ordinary case it would appear that commission would in these circumstances be due to the broker.

There has been a proof of the practice of the trade led in this case, and we well know from other cases, both here and in England, that the practice is that when the services of a broker are accepted, and business results, a commission is due. Therefore, unless there is something here to take off the effect of the custom, the pursuers are entitled to commission. There are specialties in this case, which have been advanced in argument, and are worthy of serious consideration, to the effect that brokerage is not due. I am of opinion that these circumstances are not sufficient to amount to a waiver by the brokers of their claim.

The first of these specialties is that the broker was present at the first of the two interviews, when he introduced the purchaser of the vessel, and that he was then negotiating, not on behalf of the party introduced, but on his own account.

I do not think, however, that that circumstance would destroy the character in which he came, viz., that of a broker, if he introduced the purchaser to the builder. The second point, which is a very important one, is, that as a result of the conversations at these two meetings, I think it is proved that the builder gave the broker distinctly to understand that if the purchase was concluded at the price then spoken of, there would be no commission, and that the broker does not seem to have objected. It is no doubt true, as has been observed, that the word "commission" was used in a loose sense; primarily, in the sense that there was to be no deviation from the price—no discount; but I think the broker was bound to take it as including his commission, unless he had said that it was to be understood that the builder was to pay it. Therefore if at either of the meetings at which the broker was present business had been transacted, there would have been no commission due unless it had been expressly stipulated for after their conversation. But the result of these negotiations show that the parties did not come to terms; they split upon the price, and so the transaction went off.

The broker never resumed negotiations with regard to his vessel, but his client did, and with this result, that he purchased what was substantially the same object; the ship was of increased dimensions, but that is not material; the price also was a little higher, but that is not material either. The question is whether the waiver by the broker ran on, and is to be held as applicable to the second transaction. I think not, for, as was justly observed by Mr Mackintosh, it was not a case in which the builder said, "Remember, we are negotiating on the footing that there is no commission;" on the contrary, they were negotiating on the footing that there might be commission. I think the waiver by the broker only applied to the negotiations at the two first meetings, when he was to get an advantage in respect of which he waived his right to commission. But there was nothing of this kind in the subsequent dealings. Then the builder took the benefit of the introduction, business resulted, and therefore giving effect to the custom of trade, which has been proved, the builder is liable for the broker's commission.

It may be that it did not occur to the ship-builder that he was incurring this liability, but if that was his view he mistook his own position. As the builder was taking advantage from the broker's introduction, he should have taken care to stipulate for such a price as would lower the broker's commission, or have refused the contract.

There was no question argued as to the rate of commission, and therefore it is not necessary to give any opinion as to the principles upon which the rate should be fixed.

LORD MURE was absent.

The Court pronounced the following interlocutor:—

"Repeat as matters of fact the findings contained in the interlocutor of the Sheriff-Substitute of 30th June last: Refuse the appeal," &c.

Counsel for Pursuers (Respondents)—Mackintosh—Dickson. Agents—Sprot & Wordie, W.S.

Counsel for Defenders (Appellants)—Sol.-Gen. Asher, Q.C.—Pearson. Agents—Hamilton, Kinneir, & Beatson, W.S.

Friday, December 21.

FIRST DIVISION.

[Lord Lee, Ordinary.]

HUNTER v. HUNTER.

Husband and Wife—Divorce for Adultery—Lenocinium—Voluntary Contract of Separation—Provision for Wife.

A man married a prostitute with whom he had been living. During their married life he frequently in the course of quarrels told her in coarse language to go back to her former life. A short time after the marriage he left her, but provided her with ample means of subsistence under a contract of separation into which he entered with her. Two years thereafter she resumed her life as a prostitute and committed adultery, and he then sued for divorce. She pleaded *lenocinium*, founding on his having left her and having recommended her to return to her former life. Held (1) that the fact that he had amply provided for her under the contract of separation proved that his words and conduct were not intended to induce her to live by prostitution, and (2) that the wife's conduct showed that she did not so understand him. The Court therefore *repelled* the plea.

Francis Bell Hunter was upon 5th June 1880 married to Maria M'Guire by interchange of consent *de presenti* before the Sheriff-Substitute of Midlothian. They resided for some months after their marriage at Joppa, where they had cohabited before their marriage.

Mrs Hunter before her marriage had kept a brothel at 11 Leith Street Terrace, Edinburgh, and it was in this house that the parties first met. They had cohabited in this house also before the marriage.

In the end of 1880 Hunter left his wife at Joppa and went to America. After Hunter left this country, arrangements were made by the commissioner in Scotland for him for the adjustment of a deed of separation between him and Mrs Hunter, the principal conditions of which were—(1) the settlement of an annuity upon Mrs Hunter of £70, (2) the handing over to her of the furniture of the house at Joppa, and (3) the redeeming for her from pawn certain articles of her jewellery. These conditions were all carried out on Hunter's behalf by Mr Walker, accountant, Greenock, his factor and commissioner. The amount of the annuity was settled after some negotiation, in which an agent acted for Mrs Hunter. Prior to this contract she had threatened an action of adherence.

In May 1882 Mrs Hunter became tenant of a shop at 64 Sauchiehall Street, Glasgow, as a tobacconist, also tenant and occupant of a dwelling-house