

Sept. 7, 1831.

injurious in both states of the river: And, with this declaration, it is ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby affirmed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, to proceed farther therein as shall be consistent with this judgment, and as shall be just.

Appellants' Authorities. — 3 Ersk. 9, 13; Glasgow Waterworks, Dec. 20, 1814; Colville, May 27, 1817; Charity v. Riddel, July 5, 1808.

Respondents' Authorities.—Stat. 1477, c. 73, 1489, c. 14; Scott, July 16, 1742 (14,264); Grant, Jan. 17, 1777; Supp. Vol. v. 447; Fraser, March 4, 1766 (10,742.)

RICHARDSON and CONNELL,—SPOTTISWOODE and ROBERTSON,
—Solicitors.

No. 31.

JOHN CALDER, Appellant.—*Lushington.*

GEORGE AITCHISON and Co., Respondents.—*John Campbell—Sandford.*

Proof—Cautioner.—When a party bound himself “to guarantee an agent for four per cent. for commission and guarantee,”—held (affirming the judgment of the Court of Session), first, that this merely imported an obligation to guarantee the payment of the price for which goods sent to the agent should be sold, and not for his faithful conduct; and, second, that evidence of mercantile men was inadmissible to prove, that in practice the words comprehended an obligation to the latter effect.

Sept. 10, 1831.

1ST DIVISION.
Jury Court.

CALDER, a merchant in Leith, raised an action in the Court of Session against George Aitchison and Co., also merchants there, setting forth, that in the month of September 1820 he consigned to them 700 barrels crown-brand white herrings, for the purpose of being forwarded to and sold by their agents at Königsberg; the said George Aitchison and Co. being to receive four per cent. on the amount sales of said consignment, for commission and guarantee.

“That the pursuer, as well as the said George Aitchison and Company, considered said herrings to be worth at least 23s. per barrel, which was the sum at which they were insured: That in terms of their agreement, the said George Aitchison

Sept. 10, 1831.

“ and Company made an advance to the pursuer on said consign-
 “ ment of 16s. per barrel, being about two thirds of the esti-
 “ mated value, by payment of 60*l.* sterling in cash, and a bill for
 “ 500*l.* at three months’ date: That said herrings were shipped
 “ at Fraserburgh on board the *Chance of Largo*, Smith
 “ master, in the beginning of October 1820, and the vessel
 “ proceeded on her voyage on or about the 7th of that month:
 “ That the first communication the pursuer received from
 “ Aitchison and Company, after the herrings were shipped, was
 “ on 1st December following, when he was informed by them
 “ that, according to advices they had received from their agents
 “ at Konigsberg, the prices of herrings were very much depressed
 “ in that market: That in consequence of this communication
 “ the pursuer immediately addressed a letter to Aitchison and
 “ Company in these terms:—‘*Leith, 1st December 1820.—*
 “ *Sirs, I have yours, informing me of the low state of the*
 “ *herring market at Konigsberg. I have to beg the favour of*
 “ *you not to allow any of my cargo to be sold under twenty-*
 “ *eight florins per barrel. I am of opinion that the*
 “ *Messrs. Borthwicks are reducing their prices in order to*
 “ *run the herrings in other hands out of the market, so that*
 “ *they may get the whole of it to themselves, and they will*
 “ *improve in the spring. Your attention to this will oblige,*
 “ *&c.:* That on receipt of said letter, Aitchison and Company
 “ sent their clerk to the pursuer to inform him that they would
 “ agree to its terms, provided he would grant them his accept-
 “ ance for 500*l.* at three months, to enable them to hold the
 “ herrings till the markets reached the specified price, and to
 “ prevent them from being losers in the transaction: That the
 “ pursuer, on the 2d day of December 1820, accordingly,
 “ granted his acceptance to the said *George Aitchison and*
 “ *Company*, payable at three months, for 500*l.*, which was
 “ agreed to be renewed should the markets not have attained
 “ the price put upon the herrings by the pursuer at the time
 “ it fell due: That in violation of said understanding and agree-
 “ ment, the said *George Aitchison and Company*, without
 “ informing or consulting the pursuer, first wrote to their agents
 “ at Konigsberg to dispose of the herrings on arrival at the
 “ best price the market would afford, and afterwards, on the
 “ 21st day of October 1820, to dispose of the herrings, pro-

Sept. 10, 1831. “ vided they could nett about 18s. per barrel for them: That
 “ said herrings, according to account sales furnished to the pur-
 “ suer, were, without his knowledge or authority, sold at a
 “ mere trifle: That had the said George Aitchison and Com-
 “ pany acted properly, the pursuer would have obtained full
 “ value for his goods, because herrings rose at Konigsberg in
 “ spring to a price which afforded 29s. per barrel, after paying
 “ all expenses.”

He therefore concluded for 915*l.* 3*s.* 1*d.*, or such other sum as the herrings would have brought had they not been improperly sold.

In defence, Aitchison and Co. pleaded—first, that they and their agent had acted in terms of the agreement, and the herrings had been sold at the best price which could be obtained in the market; and, second, that according to mercantile practice they had a right to dispose of them as they judged best for repayment of their advances. An issue was then sent to a jury in these terms:—

“ It being admitted, that in the month of September 1820
 “ the pursuer consigned to the defenders, in terms of a letter
 “ from the pursuer, to the defenders, dated 12th September
 “ 1820, 700 barrels crown-brand white herrings, for the purpose
 “ of being forwarded to Konigsberg, and there sold,—Whether
 “ the defenders failed to perform their duty as commission
 “ agents, in regard to the disposal of the said herrings, to the
 “ loss, injury, and damage of the pursuer?”

The jury returned this verdict,—

“ Find for the pursuer, and assess the damages at the dif-
 “ ference between the net sum realized and the net price of
 “ eighteen shillings per barrel on each barrel consigned, free
 “ of all charges at Leith.”

A new trial was thereafter granted on payment of costs by Aitchison and Co., and the same issue sent to a special jury.*

The case was tried before the Lord President and the Lord Chief Commissioner; and, among other evidence, Calder gave in the following letters as constituting the agreement between the parties:—“ Messrs. George Aitchison and Co.—Gentlemen, I

* A special jury in Scotland is not a jury of merchants.

Sept. 10, 1831.

“ beg to consign to you 550 barrels white herrings, which I
 “ request you will get forwarded to Konigsberg, and to be sold
 “ there on arrival by your agent, at the best price the market
 “ will afford ; and I hereby also authorize you to freight the brig
 “ Chance of Largo, Captain Thomas Smith, to carry said cargo,
 “ at the rate of 3s. per barrel in full. I have to request that
 “ you will order the same to be insured at 21s. per barrel, say
 “ 577*l.* 10s. sterling on the whole, it being understood that you
 “ are to advance me at the rate of 16s. per barrel on the quan-
 “ tity shipped, agreeably to what your Mr. Aitchison mentioned ;
 “ and farther, that you are to guarantee your agent at Konigs-
 “ berg, on being paid at the rate of four per cent. for commis-
 “ sion and guarantee.” (Signed) “ John Calder. P. S.—In-
 “ sure at 23s. instead of 21s.” (Signed) “ J. C.”—“ Mr. John
 “ Calder, Leith. Sir,—We have yours of this date, consigning
 “ to us 550 barrels white herrings, to be forwarded to Konigs-
 “ berg, and to be there sold on your account by our agent ;
 “ also authorizing us to freight the brig Chance to carry the
 “ same, at the rate of 3s. sterling per barrel in full, and to get
 “ them insured at the value of 21s. per barrel, on condition of
 “ our advancing you 16s. sterling per barrel on the quantity
 “ shipped, and guaranteeing our agent at Konigsberg, and for
 “ which we are to receive four per cent. on the amount of sales
 “ for commission and guarantee. To this we hereby agree.
 “ (Signed) P. pro Geo. Aitchison and Co. Thos. A. Shand.
 “ P. S.—Your advances will be paid on handing us bill of lading
 “ indorsed.”

In reference to these documents (as stated in the bill of excep-
 tions), “ the counsel for the pursuer, in further maintenance of
 “ the said issue, did propose, and offer to give in evidence, by
 “ William Connal, an extensive commission agent in the city of
 “ Glasgow, and by other merchants of extensive dealings and
 “ well acquainted with the usage of trade, what they understood
 “ to be the effect and import of the undertaking in the said mis-
 “ sives or letters of the 12th September 1820, given in evidence
 “ as aforesaid, in which the defenders stipulated to guarantee
 “ their agent at Konigsberg, upon condition of being paid at the
 “ rate of four per cent. for commission and guarantee ; and that
 “ the guarantee contained in said letters is understood by mer-
 “ chants to amount to an engagement, upon the part of the persons

Sept. 10, 1831. “ so undertaking, to be responsible that their said agent should
“ act in conformity to the instructions he received, and that they
“ were responsible for his deviating from those instructions, or
“ committing any breach of his duty as agent, in selling the goods
“ consigned at a lower price than he was directed, or below the
“ market price at the time, or in a manner injurious to the
“ owner of said cargo. Whereupon the defender’s counsel,
“ learned in the law, objected that the evidence of merchants to
“ prove their understanding of the obligation undertaken for the
“ agent in a foreign country, by those missives, is not admissible;
“ that the construction of the letters was a question of law for the
“ Court, and that it is incompetent to ask any merchants or
“ other witnesses what their understanding of the meaning of the
“ letters is; and the said Lord President and Lord Chief Com-
“ missioner did then and there declare it to be their opinion,
“ that such evidence of merchants was inadmissible. Where-
“ upon the counsel for the said pursuer did then and there insist
“ before the said Lord President and Lord Chief Commissioner,
“ that the said several matters so proposed to be given in evidence
“ by the counsel for the pursuer were admissible, and ought to
“ have been received, and did tender their exceptions to the
“ opinion so given by the said Judges. The counsel for the pur-
“ suer here closed their case; and the counsel for the defenders
“ did then insist that the Court should direct the jury to find a
“ verdict for the defenders; and did contend, that in sound con-
“ struction of said letters of 12th September 1820, the defenders
“ did not incur an obligation to guarantee their agent at Konigs-
“ berg, as contended for on the part of the pursuer; but the
“ undertaking or guarantee is no more than what is known in
“ law as an obligation del credere, that is to say, an obligation
“ to make good the sum or sums for which the goods might be
“ sold; and that no farther obligation was undertaken on the
“ part of the defenders, on account of their agent, other than that
“ they should employ a person of ordinary skill and good cha-
“ racter. But the counsel for the pursuer did contend that the
“ defenders were bound by law, and by their special undertaking
“ by their said letter-missive, to indemnify the pursuer for the
“ loss he had sustained by the misconduct of the defenders’ agent
“ at Konigsberg; and that the jury ought to be directed to find
“ a verdict for the pursuer, and to assess the damages. But the

“ said Judges did give it as their opinion, that the letter-missive Sept. 10, 1831.
 “ did not in law, nor according to the true meaning of the said
 “ letter, create any obligation on the defenders, other than that
 “ which was contended for by their counsel as aforesaid ; and the
 “ said Judges did accordingly direct the jury to find a verdict for
 “ the defenders, and the jury did then and there deliver their
 “ verdict for the defenders. Whereupon the counsel for the
 “ pursuer did tender their exception to the said direction, and
 “ did insist,—1st, that the jury ought to have been directed to
 “ take into their consideration the missives and other evidence
 “ laid before them, and that the construction of the terms thereof,
 “ being such as are in use amongst merchants, should have been
 “ left to the jury to find according to their understanding of the
 “ same ; and if they were of opinion that damage had arisen
 “ from the defenders’ agent having failed to obey his instructions,
 “ or perform the other duties for which the defenders, according
 “ to the understanding of merchants, had made themselves re-
 “ sponsible, they should assess damage, and find a verdict for the
 “ pursuer ; 2d, that if the Court did not leave the construction
 “ of the terms used to the jury, they ought to have directed, that
 “ the obligation undertaken by the defenders was not by law
 “ merely of the nature of a del credere commission upon sales
 “ made by the agent, but amounted to a guarantee of the conduct
 “ of the agent generally, and, being for a valuable consideration,
 “ made the person undertaking the said guarantee liable to
 “ answer that the agent should obey the instructions sent him,
 “ and perform his duty in other respects ; and that if they were
 “ of opinion that it had been proved that the defenders’ agents
 “ had not obeyed their instructions or performed their duty,
 “ they ought to assess the damages, and find a verdict for the
 “ pursuer.”

The jury having found for the defenders, the pursuer tendered a bill of exceptions. The Court (28th June 1831) disallowed it, assoilzied the defenders, and found them entitled to expenses.*

Calder appealed.

* 9 Shaw and Dunlop, 777.

Sept. 10, 1831.

When his counsel opened the case,

The *Lord Chancellor* observed,—Can you say that a witness is to be examined upon the construction of an instrument, and put in the place of the Judge and the jury? It would have been very doubtful whether he ought to have given you the usage of the trade to explain so plain a letter as this; it is a guarantee of payment; it is the solvency that is guaranteed. I think it is a short case indeed.

Dr. Lushington.—If that is your Lordship's impression, it would be in vain for me to trouble you further.

Lord Chancellor.—Yes; it is a plain *del credere*. You and Mr. Campbell must be both aware, that in mercantile cases—not in other cases—the learned Judges have regretted they have gone so far as putting a letter into the hands of a witness, and saying, What does it mean? The appeal must be dismissed, and with 100*l.* costs. Really the Jury Court will become a nuisance, if parties are to bring bills of exception like this. I never saw words more strongly importing *del credere*.

The House of Lords ordered and adjudged, That the appeal be dismissed, and the interlocutor complained of affirmed, with 100*l.* costs.

Appellant's Authorities.—Lucas v. Groning, 7 Taunton, 164; Smith v. Blandy, 1 Ryan & Moodie, 260; Philips' Law of Evidence, vol. i. 566; Bell's Principles of the Law of Scotland, 127; Thornton v. Royal Exchange Assurance Co., Peak, 25; 1 Vesey, 459; Doe v. Martin, 4 T. R. 66; Hood v. Cochrane, Jan. 1818, (F. C.)

SYDNEY S. BELL—RICHARDSON and CONNELL,—Solicitors.

No. 32.

JAMES SCOTT (Lord ELIBANK'S Trustee), Appellant.—

Mr. Serjeant Spankie—Mr. Rutherford.

JOHN ALLNUTT, Respondent.—*Mr. Hayes.*

Heritable and Moveable—Foreign.—Where part of an entailed estate was sold for redemption of the land tax, and the surplus price lodged in bank, and thereafter lent out on heritable security by the statutory trustees, and the heir apparent under the entail, during the life of the heir in possession, for onerous causes, executed in England an assignation in the English form of his right to draw the