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disturbed. The Court are of opinion that this has not been sufficiently taken into consideration by the jury, perhaps from its not having been so pointedly stated to them as it might have been. We think it has not received all the consideration which it ought to have done, and, therefore, that a new trial ought to be granted.

July 1828.

The case was again set down for trial, but the parties settled it by a compromise.

Robertson and A. M'Neil, for the Pursuers.
Jeffrey, Cockburn, and Maitland, for the Defenders.
 (Agents, *James Bridges, w. s. & J. H. Lothian, w. s.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828.
 March 14.

SHERIFF *v.* STEIN'S ASSIGNEES.


Circumstances in which a merchant in London was found entitled to commission and *del credere* commission.

AN action of count and reckoning to recover the balance of the price of a certain quantity of whisky transmitted to the defender.

DEFENCE.—The defender rendered an account to the person in the management of

Stein's affairs, who granted a discharge for the balance, and did not object to the charge for commission made by the defender.

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ISSUES.

“ It being admitted that the company carry-
“ ing on business as distillers at Canonmills un-
“ der the firm of John Stein, delivered to James
“ Sheriff one hundred puncheons of whisky,
“ upon the conditions stated in a letter, dated
“ Canonmills, 20th February 1812; and that
“ upon the conditions also stated in the said
“ letter, bills to the amount of L. 6417, 9s.,
“ drawn by the said firm of John Stein upon
“ James Sheriff, were accepted by the said
“ James Sheriff, and that new bills were granted
“ for the said sum.

“ It being also admitted that the said com-
“ pany of John Stein became bankrupt on the
“ 22d day of July 1812, before the said new
“ bills became due, and that the said whisky
“ was, during the month of August 1812, sold
“ by the said James Sheriff for the sum of
“ L. 7235, 0s. 6d.

“ It being also admitted that the sum of
“ L. 6417, 9s. a part of the produce of the
“ said price, was applied in payment of the said
“ new bills.

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“ It being also admitted that James Sheriff
 “ retained the sum of L. 180, 17s. 6d. as com-
 “ mission on the sale of the said whisky, and
 “ the sum of L. 108, 10s. 6d. as *del credere*
 “ commission for guaranteeing the said price of
 “ L. 7235, 0s. 6d.

“ Whether the said James Sheriff was en-
 “ titled to retain, as commission on the said
 “ sales, the said sum of L. 180, 17s. 6d. or
 “ any other sum ?

“ Whether the said James Sheriff took bills
 “ for the said sum of L. 7235, 0s. 6d. and was,
 “ or is entitled to retain, as *del credere* com-
 “ mission on the said bills for L. 7235, 0s. 6d.
 “ the said sum of L. 108, 10s. 6d, or any other
 “ sum ?”

Rutherford, for the pursuer.—In this case it has been laid on us to show, that by the usage of trade we are entitled to retain the commission mentioned in the issue. An agent is entitled to commission when he takes charge of selling goods, and interposes his mercantile credit. Taking the original letter and the usage of trade, we are clearly entitled to commission on the sale ; and sale on credit being necessary, we are also entitled to *del credere* commission. On the 6th of August, Mr Stein executed a

trust in favour of Mr Gibson-Craig and another, and the English commission was not issued till the 8th, and could not affect the settlement made with the trustees.

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When a power of attorney granted to Mr Gibson, by those at one time in the management of Stein's affairs, was tendered in evidence,


Forsyth and Cockburn object, There is no proof of the commission under which this was granted.

Jeffrey.—It is the title on which the other party raised their action, and they cannot object to it.

LORD CHIEF COMMISSIONER.—It certainly struck me that there was no proof of the commission under which these powers were granted; and were the original cause here, I would have no hesitation in saying, that this power of attorney was not to go to the jury without proof of the authority by which it was granted. But this is not a case in that situation; and I shall feel extremely distressed, if I have to turn parties round, in order that the case may be again tried when they have got evidence of this commission. The position of this case is, that the defenders here are the pursuers of the original accounting, in which a contest arises as to the

A condescen-
dence being or-
dered in the
Court of Session
on the usage of
trade, and the
case remitted to
the Jury Court,
incompetent, on
a general issue,
to give in evi-
dence an alleged
act of homologa-
tion by an autho-
rized party as
conclusive of the
cause.


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right to ordinary and *del credere* commission. These are the two questions to be tried ; and though the remit from the Court of Session is general, it must be controlled by the previous judgments in the cause. Lord Pitmilley originally, and then the Second Division decide, that no commission is due ; but on a petition against this judgment, the questions now before us are raised, and the Court order a condescendence and answers. The case is sifted with the view of preparing the issue, and certain admissions are made ; but there is no admission of this commission. It is also important that there is no order who shall be pursuer ; and in the original action, the pursuers had to make out their right to recover the balance. This is a case sent to this Court in order to inform the Court of Session on two points ; and we having made the original defenders the pursuers, they are not prepared with this evidence, which they probably would have been, if originally pursuers. Had this been a case in England sent by the Lord Chancellor, the first part of his order would have been, that the commission should be admitted, and this question could not have arisen. Is it fit, then, that this Court should be called on to turn a party round, when, according to justice, it ought to go on, and

when the defender knows, and has for seven years acted on the assumption, that this commission exists? As it appears to me at present, we cannot enforce such a rule in such circumstances.


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Cockburn.—They are pursuers in this branch of the case, which is of the nature of a counter-claim. This is not a power of attorney granted by us; and we deny that there was any authority to grant such a power. If they will meet us fairly on the usage, which is truly the point here, this question does not arise; but they bring this forward to get at a settlement said to have been made with Mr Gibson; and if that settlement is good, the case could not have been here. Admitting this will turn us round on a point which was not sent, while rejecting it will not turn them round on the only question which was sent. This brings to a point the utility of the general issue, which is most important, if the parties are kept strictly to the facts in the condescendence and answers, but if not, the general issue becomes a mere trap, and most inconvenient for obtaining justice.

Jeffrey.—We admit that all the points, except the right to recover the commission, is set-

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tled. The question at present is simply whether we are entitled to see the commission under which the other party acts ; and it is not denied that there was a commission in favour of the persons who granted the power of attorney. We deny that the only question is the usage ; it is the right to retain the commission ; and we say, that what we now produce along with the other evidence bears on that point. We admit what is stated from the record, but the *whole* cause is sent here.

LORD CHIEF COMMISSIONER.—I shall in this case follow a course a little different from what is usual, and we shall consult together before giving our decision.* But before doing so, I wish to be sure that I understand the purpose for which this is offered. As I understood Mr Rutherford, he said he was not to confine the evidence to the usage, but to strengthen it by evidence of transactions by authorized parties. Is it meant to make a separate point of this as an act of homologation by an authorized party ? If it is, this differs from usage, and I think ought to have been objected to at the time it was

* Their Lordships retired for this purpose.

stated ; but I wish to know to what extent this is to be used, without saying what effect it may have on our decision.

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Rutherford.—I stated it, and hold it to be a complete and separate ground, which by itself settles the case ; but also as bearing on the other points, and as evidence of the usage.

LORD CHIEF COMMISSIONER.—This is one of the cases in which a Court necessarily feels a considerable degree of anxiety ; and since we retired, we have gone repeatedly through the condescendence to see what it contains, and have compared it with the opening for the pursuer, and the proceedings in the Court of Session and in this Court. The issue is quite general ; and the question here rests on the condescendence and answers, as they came from the Court of Session.

The proposition of the pursuer is, that under the issue he is entitled to try whether this is not settled by this claim having been made against, and sustained by an authorized attorney of an authorized party. In looking into the condescendence and answers, there is no averment that can apply to this transaction with Mr Gibson, though it was before the


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Court of Session in the other parts of the case. This is a question of law arising out of the documents, which they might have decided, and which it is to be presumed they have already decided, or may yet decide on consideration of the documents; and what we do here does not prejudice the question, how far that transaction settles the case.


The evidence now offered is to establish this transaction, and there are various points both of form and substance. In form, there is a want of evidence of the original authority from which the authority to Mr Gibson flowed, and that could not be got without a commission to examine witnesses in England; but it would be wrong to stop it on this point of form. But the objection in substance is more material. Suppose he had a power of attorney, and acted on it, is that within the question which we are to try? There are only two articles in the condescence and answers which have any tendency to enlarge the question, but they do not affect it, as they each refer specifically to the usage as fixing the amount of the commission to which he is entitled. On more full consideration I am satisfied that we must exclude all question as to anything beyond the practice. The practice of trade in respect to

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commission is the only question which we are to try; and if we were to try the actings of Mr Gibson, that is a question which the Court of Session had power and the materials to try, and therefore would not have sent it to a jury. If they have doubts as to any fact on that part of the case, they may still send an issue upon it, and it will then be brought to an end in this Court. But if we allow it at present it will have the prejudicial effect of construing a general issue, so as to admit evidence under it of matter not contained in the condescence and answers; and I have always stated, when my attention has been drawn to it, that, though the issue is general, the averments to be proved must be made with precision in the condescence and answers to secure against surprise, and the evidence should not be extended to matter not averred. This is what constitutes the advantage in pleading which we enjoy over England, that here each party must state articulately the nature of their case; and in the present instance the averments are most articulate. I should therefore be wrong if I adhered to my original opinion; for even if the commission were here, and showed that there was authority for the power of attorney, we could not admit evidence of acts by Mr Gib-

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son. I wish the Court of Session had pronounced a more articulate interlocutor; but if we are wrong they will correct us, and I court a Bill of Exceptions. On this record we cannot admit evidence of Mr Gibson's acts as concluding this cause.

But competent to prove the authority under which that party acted as a circumstance in the case.

It was then suggested that the evidence should be admitted to show who was in the ostensible management of the estate, and that the pursuer must be allowed to prove the facts and circumstances under which the power was granted. This was opposed by the defender, on the ground that it was subverting the meaning of the Court of Session in sending the case, which was merely to try the usage, and that to it alone the evidence must apply.

LORD CHIEF COMMISSIONER.—There is great difficulty in giving an abstract rule; but when the party brings forward distinctly what he means to prove in a particular instance, we shall then tell him whether we think it competent under this record; but at present it appears that you are bound to make out a general practice applicable to this particular branch of trade. Before deciding how Mr Gibson's acts are to be proved, you must show how they bear upon this question. The opinion I deliver-

ed was restricted to the rejection of them as conclusive of the case ; but I am ready to admit them as applicable to the case of usage. The pursuer may prove the *res gestæ*, but he must prove them by legal evidence. The difficulty of the case lies here, that they are entitled to prove the *res gestæ*. They say the power of attorney is part of that proof ; but it is objected that this is not sufficient to sanction its admission. I am averse to turning parties round on a matter of form ; and I shall be glad if there is any other evidence by which it can be made out independent of the power of attorney ; but if there is not I must admit it. The simple way to dispose of the case is to admit his acting, to consent to withdraw a juror, and allow the Court of Session to dispose of the case.

This proposal was objected to by the pursuer.

When Mr Gibson-Craig was called as a witness, it was objected that he was a party, and reference was made to Lord Fife's case. On the other side reference was made to the case of *Watson v. Hamilton*.

LORD CHIEF COMMISSIONER.—It may happen that obstructions arise which are difficult to be got the better of ; and this case has taken a

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1 Mur. Rep. 126
and 138.

3 Mur. Rep.
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course which scarcely any one has done ; and should the same course be followed throughout, I shall not have bodily strength to sit to the conclusion of the case. During the thirteen years I have presided here, and devoted, I may say, my whole time and attention to this Court, and I trust not uselessly, there has no similar case occurred ; and I wish to impress on the minds of those who practise here, that it is only by a united effort that trial by jury can be brought to perfection in this country. It is fortunate that I now address myself to persons so well acquainted with the practice here, and who know what has been done and remains to be done.

As this difficulty could not have arisen had the issues remained as originally drawn, the difficulty will be obviated by returning to them, and considering this as a report to the Court of Session. From what has been decided, it ought to be the object of parties now to go into the evidence of the usage, and that the jury should find for the pursuer or defender, according to the proof of the usage.

In proving usage of trade as applicable to a particular case, the general usage

Jeffrey.—If the purpose is to prevent the jury from finding any thing but the practice of trade, I admit that after this decision I cannot

object ; but if it is intended to prevent me from proving the facts and circumstances, of course I cannot acquiesce.

Cockburn.—We are most anxious to try the general usage of trade, and not the acts of one gentleman ; and as the admissions in the issues bring out the facts, the party ought to put the letter into the hands of the witnesses, and ask whether, under such an agreement, the party is, by the usage of trade, entitled to such a commission ?

LORD CHIEF COMMISSIONER.—Putting myself in the situation of the Judges in the Court of Session, and holding that the question is, how my judgment is to be satisfied that all the facts of the case are before me—that I wish information on the usage as to common and *del credere* commission—the proper way, I should think, was to go into proof of the usage in the abstract or general case, and, if necessary, to apply it to the case in question. If the general usage is sufficient to give the information required, then it is unnecessary to go farther. I am therefore of opinion, that the party ought to go into the evidence of usage in the first instance, and if it is not sufficient, then the Court may say what is to be done.

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should first be proved, and then its application to the particular case.

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LORD CRINGLETIE.—This, it appears to me, may be got at, and ought to be got at. Suppose Mr Gibson's transaction out of the question, is not the usage the same? and if the jury find that there is no usage, what is there to hold them bound by the transaction with Mr Gibson?

In a question on the usage of trade as to payment of commission, is it competent to prove that the charge was admitted by the person in the management of a bankrupt estate?

A witness was called, and a question asked, What is the practice when an account is sent to and settled by the person in the ostensible management of a bankrupt estate?


Cockburn.—I object, That this is indirectly getting into the actings of Mr Gibson.

Jeffrey.—I only ask a verdict on the usage as applicable to this case; but to prove this I must prove that Mr Gibson required an account of the sales, and got it, and corresponded on the subject. If they object to Mr Gibson being called on the ground of his being a party, I can show authority for calling him.

LORD CHIEF COMMISSIONER.—It occurs to the Court that there is a great body of evidence as to the usage of trade, and this is met by offering evidence of particular facts. We hold the case to be one of usage, and that a return is to be made to the Court of Session on that


point. Every thing else is before the Court of Session—the account—the date of the commission—whether Mr Gibson had full authority to act. All these arise out of the documents before the Court of Session. They may not be absolutely excluded from the proof here; but much the most correct course is to let it go to the Jury on the fact of usage unencumbered with any thing else, unless any point is raised by the defender as to the authority, in which case you may establish the facts. This ought to be held as a question of usage applicable to the facts of the case.

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Cockburn, in opening for the defenders, said, The question here is the principle on which the case is to be settled; and from what has been decided, you are bound to hold that “entitled” in the issue means entitled by the usage of trade. You must take usage in the sense in which it is expounded by lawyers, and must not take the opinion of the witnesses, but the facts from which their opinion is drawn. The usage must be consistent with the common law, must be uniform, and can only apply to similar cases, and cannot be transferred from cases of consignment to a case of pledge. In the present instance the case of the pursuer depends

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on confounding them. When goods are consigned, a sale is the object from the first, and the commission is due for the trouble of watching the market, and the *del credere* is due to the consignee for guaranteeing the price. But in this, which is a case of pledge, there is no one of the requisites to entitle the party to the commission. The goods were merely deposited in security, and were sold for the benefit of the pledgee. It is said the Court found that bankruptcy entitled the party to sell; but they did not find that they were entitled to sell on commission. The verdict in this case will decide a very large sum.

As to *del credere* commission there is no evidence that they guaranteed the bills.

Jeffrey.—We were ready to prove this, but were not allowed.


LORD CHIEF COMMISSIONER.—There is no doubt a consignee is bound to guarantee by the general law, and in this case the party acted as consignee or pledgee, and his name appeared on the bills.

(*To the Jury.*)—The Court have been very anxious in this case, and from the attention you have paid to it, I am sure you feel equally anxious to get at the justice of this case. In the early part of the day a proposi-


tion was maintained which has, on the suggestion of the Court, been abandoned with candour, and any impression made by the statement of it must be banished from your minds, and the case considered simply on the pure evidence applied to the issue and the letter. It were vain to state to you the effect of what has been done by the Court, as, if it was wrong the other Court will correct it. If it is right it may regulate other cases, but if it is wrong it can only affect this case, as the other Court will correct it if we have misunderstood their intention in sending the case; and in this way it can only affect the few hundred pounds here in dispute, not the larger sums to which allusion was made.

The issues are general; but the question to be tried is the practice and usage of trade, and you will return a verdict applicable to this confined view of the case, by finding for the pursuer or defender. How the usage is to be affected by the letter will afford matter for observation. We hold the sale to have been good, but that the Court wished information as to the usage and practice, and on this there has been a body of evidence of considerable importance as applicable to the commission, which is of two different characters.

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The first is the commission due for the care, management, and sale of the goods, and has nothing to do with responsibility for the price. The other is different, and is the sum due to indemnify the commission agent for the risk he runs, where he is responsible for the price if the purchaser fails, and is due by the general law in the cases which have been stated. Here the case is rather different; but still had Stein remained solvent, Sheriff must have remained responsible for the price. The question is put, Whether he took bills? and if you are satisfied that he did so, and that the usage is made out as applicable to this case, he is then entitled to this commission also. It is said, however, that the usage proved does not apply here, as the power to sell was conditional; but he was entitled to sell if Stein did not retire his bills, and as Stein was bankrupt, it is clear that he could not retire them. Can it therefore be said, that Sheriff did wrong in taking advantage of a good market? He had a right to sell if Stein did not retire the bills, and as Stein became bankrupt before they became due, he could not retire them; therefore, the unfavourable turn in Stein's affairs brought Sheriff into a situation in which he had a right to sell; and if the usage is made out to your satisfaction

on the evidence, then he is entitled to the *del credere* commission.

It is said the commission would have been mentioned in the letter if it had been intended ; but if the commission is due by law and usage, then it was unnecessary to mention it. If you are satisfied that he was in a fair situation to sell, then the evidence of usage applies in substance, though not in terms, to this transaction.

The case has been left to you on the evidence for the pursuer, and observations for the defender ; and I assent most entirely to what was quoted from Mr Bell, which is consistent and rational ; and there is no doubt that the usage and practice is not matter of opinion, but fact. Some of the evidence in this case was mere opinion ; but there was evidence of a different description. The witnesses were credible and well informed, and gave evidence generally as to the usage at various places ; and if that is not controlled by the observations on the other side, you will, I have no doubt, hold it made out. If I have put the proper construction on the instrument, then the period had arrived at which it was fair to sell ; and you are to say whether, according to the evidence of the usage, he was entitled to the commission, but you are not to fix the amount.

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Verdict—For the pursuer two and a-half per cent. of sale commission, and one and a-half per cent. *del credere* commission.

Jeffrey, Rutherford, and Napier, for the Pursuer.

Forsyth, Cockburn, and Sandford, for the Defenders.

(Agents, *Walker, Richardson, & Melville, w. s.* and *Daniel Fisher.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828.
March 28.

BROWN v. CUTHILL, &c.

Finding that a law-agent having wrongfully misrepresented the security to be given by his client, was personally liable for money lent.

AN action against law-agents to recover L.1700 lent to their client, on the ground that they misrepresented the nature of the security granted.

DEFENCE.—The defenders gave the description of the property which they got from their client, and did not act corruptly. There is no evidence that the pursuer was deceived, or that he has sustained, or will sustain, any loss.

ISSUES.

“ It being admitted that on the 27th day