Counsel for Pursuer—Mr Millar and Mr J. C. Smith. Agent—Mr James Hatton, W.S.

Counsel for Defenders—Mr Fraser, Mr Scott, and Mr William N. M'Laren. Agent—Mr James Barton, S.S.C.

In December 1861 a lease of a shop in Nelson Street had been granted by the late Mrs Hatton to the defender John Clay, who is an ironmonger, for seven years, from Whitsunday 1862. This lease contained a clause excluding assignees and sub-tenants. On 3d September 1863, Mrs Hatton, with concurrence of her husband, raised an action of removing against the defenders. The grounds of the action are set forth in the 11th and 12th articles of the pursuer's condescendence as follows:—"On or about 6th June 1863 the remainder of the stock of ironmongery goods in the shop in Nelson Street was removed by Clay to another ironmongery shop occupied by him in Pitt Street; and about the same time the furniture belonging to Miss M'Luckie was brought into the shop and room adjoining the same, and the window of the shop, which had been previously stocked with ironmongery goods, was filled with gloves, ribbons, and other articles connected with her calling, which is that of a cleaner of gloves and ribbons. From the time she took possession of said shop, early in June, down to the execution of the summons in the present action, a period of more than three months, the shop was in the entire and sole possession of Miss M'Luckie." The summons concluded in the following manner:—"And our said Lords ought and should farther decern and ordain the said Jane M'Luckie, as assignee to said lease, or as tenant and sub-tenant in said subjects, holding and possessing the same under the authority of the said John Clay, in whatever manner she may pretend to do so, to cease from occupying the said subjects, and to flit and remove," &c.

It was maintained by the defenders that the action is irrelevant, because the conclusions are applicable only to a sub-lease, or an assignation to a lease, whereas it is nowhere averred in the condescendence that Clay had either sublet the premises to Miss M'Luckie or had granted to her an assignation to his lease. Lord Ormidale, of consent of both parties, granted a proof before answer. A voluminous proof having been led, his Lordship found for the pursuer, holding that the arrangement between the defenders, and their acts consequent thereon, amounted to a cession by the defender Clay of the shop and premises to the defender M'Luckie, and were adopted by them as a collusive device to defeat the conditions of the lease excluding sub-tenants and assignees.

The defenders having reclaimed, the Court held that the summons concluded that Miss M'Luckie should be decerned to remove, not only as assignee or sub-tenant, but also "in whatever manner she may pretend to possess the premises under the authority of the said John Clay;" that such a conclusion applied not only to an assignation of the lease or to a sub-lease, but to any form of possession which Miss M'Luckie may have held of the premises; that though nothing was said in the condescendence about Clay having sub-let the premises or granted an assignation to the principal lease, yet it was averred that Clay had left the premises with his goods and that Miss M'Luckie had come in with hers; and that the summons was therefore relevant. The Court then appointed parties to be heard on the proof, but before the debate had proceeded further the defenders consented to the Lord Ordinary's interlocutor being adhered to on the pursuer agreeing to accept a sum of £20 in name of expenses.

## GALLETLY, HANKEY, AND SEWELL *v.* LAW.

*Process—Jury Trial—17 and 18 Vict c.* 34. Warrant to cite witnesses resident in England to give evidence at a jury trial *refused*, but commission to examine them in London *granted.*

Counsel for Pursuers—Mr Shand.

Counsel for Defenders—Mr W. M. Thomson.

A motion was to-day disposed of in this case, made by the defenders on the authority of the 1st and 2nd sections of the Act 17 and 18 Vic., c. 34, asking a warrant from the Court to cite certain witnesses, owners of vessels in London, to give evidence at a jury trial, to be held in Edinburgh during the ensuing jury sittings. The pursuers are brokers in London, and they bring the action against the defender, who is sole owner of the ship Indian Empire, concluding for their commission as brokers employed to freight the defender's ship, and for certain disbursements which they allege they were obliged to make to certain parties whose goods they had freighted to the Indian Empire, but were unable to carry by reason of the ship being taken out of their hands. The claim is resisted on the ground that the pursuers mismanaged their contract by taking lower rates of freight than other owners of ships were receiving at the time in the dock in which the Indian Empire lay.

The defenders propose to make out this defence through these owners of ships, and they asked a warrant to cite them for the trial which is to take place on Tuesday. They contend that this not being a case of skilled evidence, and therefore not a matter of opinion, but a question of fact, it does not fall within the judgment of the Court in Macniven *v.* Turner, where the Court refused to compel skilled witnesses to attend. The Court refused the motion, on the ground, that although the evidence referred to by the defenders might be the best evidence, it was not the only evidence, because the rate of freight at the time libelled was a general fact in the knowledge of several persons, and therefore there was not sufficient urgency authorising the Court to exercise their discretion in favour of the defenders. The Court, however, granted commission and diligence to the defenders to examine the witnesses in London.

## DAVIDSON *v.* LAWRIE.

*Remuneration of Services—Commission—Shipbroker.*

Defences to an action by a broker for commission on the sale of a ship, which (diss. Lord Benholme) repelled.

Counsel for the Advocator—The Solicitor-General, Mr Clark, and Mr Balfour. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S.

Counsel for the Respondent—The Lord Advocate and Mr Shand. Agents—Messrs Adamson & Gulland, W.S.

This is an advocation from the Sheriff Court of Lanarkshire. The action is at the instance of Alexander Bartleman Davidson, master mariner, lately residing in Glasgow, now master of the steamer Georgiana, of Liverpool, and is directed against James Gray Lawrie, shipbuilder, Whiteinch, Partick. The summons concludes for £375, which the pursuer says was the stipulated and agreed upon commission at the rate of 2½ per cent., between him and the defender on the sum of £15,000, being the price of a ship which the pursuer says he was the means of selling for the defender to Mr George Wigg, merchant, Liverpool. The pursuer brought about an interview between the defender and Mr Wigg, and ultimately a bargain was made. On 15th November 1862 a formal contract was executed between Mr Wigg and the defender, whereby he agreed, for the sum of £15,000 and £18,000 respectively, to build two steamers for Mr Wigg. Any question as to the second steamer is withdrawn in this process. Previous to the execution of this formal contract and during the communings that were going on between Mr Wigg, the pursuer, and the defender, the defender addressed the following letter to the pursuer:—

"Glasgow, 11th October 1862.

"Captain Davidson — Dear Sir, I could deliver my ship 212:0 × 25:0 and 1510 in 2½ months from date of order, with engines for 12 knots; and my price would be £15,000 cash; or I could deliver in 3

months, with engines for 14 knots; and my price would be £18,500; both prices being subject to 2½ per cent. commission."

The pursuer mainly relies upon this letter. The defender resists the pursuer's claim on the following grounds:—(1.) Because the letter, on the assumption that it was written to the pursuer as an intending contractor *on his own account*, contained an offer which was not accepted. (2.) Because, on the assumption that the letter was written to the pursuer *as Mr Wigg's servant*, he was not entitled to found upon it to any effect. (3.) Because, as Mr Wigg did not accept the offer in the letter, no obligation under it arose. And (4.) because the defender did not thereby oblige himself to pay commission. Some alterations of details by which the vessel's speed was increased, on the defender's letter to the pursuer, were embodied in the contract of the 15th of November.

The Sheriff-Substitute (Strathearn) found that under the letter of 11th October the commission was earned when the pursuer procured a customer who gave the order, the alterations of details being subjects privative to the principals themselves. The case was not pronounced upon by the Sheriff, the appealing days having expired before the defender's agent discovered that the Sheriff-Substitute's interlocutor had been pronounced. After hearing parties, the Sheriff-Substitute had had the process at avizandum for five months. The Sheriff held that the appealing days having expired he had no power or discretion under the Sheriff Court Act to extend the time prescribed for lodging an appeal, or to allow an appeal to be received after an interlocutor has become final in any circumstances. His Lordship accordingly held the interlocutor of the Sheriff-Substitute final.

The defender advocated, and to-day the Court adhered to the Sheriff-Substitute's interlocutor.

Lord BENHOLME dissented on the ground that the agreement to pay commission on the 11th of October was departed from in the subsequent stipulation and concluded contract of the 15th November, and that the pursuer not being a professional broker, could not claim commission except under a special agreement.

---

*Friday, Dec. 22.*

---

## FIRST DIVISION.

### BREADALBANE SUCCESSION CASE.

### CAMPBELL *v.* CAMPBELL.

Counsel for Respondent—The Solicitor-General, Mr Clark, Mr Adam, and Mr Berry. Agents—Messrs Adam, Kirk, & Robertson, W.S.

Counsel for Advocator — The Lord Advocate, Mr Patton, Mr Fraser, and Mr Gifford. Agent—Mr Henry Buchan, S.S.C.

This case was on the roll to-day for an order. The Lord President stated that the Court had given a great deal of consideration to the case, and had held several consultations in regard to it. It involved many questions of great nicety which created great difficulty; and the Court thought that, looking to the magnitude of the questions and also of the stake, it was desirable to have the case argued in writing. The Court were not without hope that they might yet receive additional assistance from the bar, and besides the case was plainly one which would not terminate in this Court; and as it would require to be argued in writing before the House of Lords, the written argument, if now given in, will be useful here as well as there. Cases were therefore ordered to be lodged by the 5th of January. The Solicitor-General, for the Respondent, mentioned that the time proposed was too short for the preparation of such a case as he would like to see submitted to the Court; but the Court thought that if exclusive attention was given, it could be easily done; and besides the party who was not in possession was willing to undertake to have his paper ready within the time proposed.

### CROW *v.* FOWLIE.

*Proof — Reference to Oath.* A party who on reference to oath deponed *non memini*, in regard to a *proprium factum* of a recent date, held as confessed, and oath found affirmative of the reference.

Counsel for Suspender—Mr F. W. Clark. Agent —Mr L. Mackersy, W.S.

Counsel for Respondent — Mr J. F. M'Lennan. Agents—Messrs Fergusson & Junner, W.S.

This was a suspension by George Hume Crow, builder, Pitt Street, Edinburgh, of a charge on a promissory note for £7, 17s., which had been given to him by George Smith Fowlie, agent, Nicolson Square, Edinburgh. The promissory note had been granted in part payment of a composition upon a debt due by Daniel M'Farlane, grocer, Hanover Street, Edinburgh, and it was signed by the principal debtor and by his brother Thomas M'Farlane, and the suspender, as cautioners. The ground of suspension was that the note had been paid by Daniel M'Farlane, and it was not disputed that certain payments had been made by him, but it was alleged that these were made in payment of a separate debt due to the respondent on open account. The suspender attempted to prove his case by the writ of the respondent, but in this he failed, and Lord Ormidale refused the suspension, and the Court adhered. The suspender thereupon referred the whole cause to the respondent's oath. The reference was sustained and the oath taken. Parties were thereafter heard on the import thereof, and to-day the Court held that the oath was affirmative of the reference. The charge was therefore suspended, with expenses.

Lord CURRIEHILL, who delivered the leading judgment, said—The suspender's averment is that the payments he alleges were made and accepted as payments of this specific debt. The respondent depones generally that they were not, but in answer to the most of the specific questions put to him, his general answer is, "I don't recollect." This cannot be said to be an admission of the suspender's averments, and in that sense the oath is certainly not affirmative of the reference. But, on the other hand, when a party says he does not recollect in a reference to his oath, there is a distinction betwixt a thing which he cannot be expected to recollect and a thing which is a *factum proprium* and of recent date, so recent that he might reasonably be expected to remember it. In the latter case the circumstance is regarded as a refusal to depone. The party does not incur the pains of perjury, but he is held confessed as one who declines to answer. This is a well-known principle in the law of evidence. "Such negative oath when it is emitted upon a recent fact, of which the swearer cannot, from the circumstances of the case, be presumed ignorant, is considered as a concealing or dissembling of the truth." (Ersk. 4, 2, 14.) The question is, does this case fall under that rule or not? That the matter was *factum proprium* there can be no doubt. But was it of so recent a date that the charger could not reasonably be expected to remember it? I don't think he was in that position. The facts all occurred since March 1864, and the oath was emitted in November 1865. Therefore they were matters which it would be unreasonable to suppose he could have forgotten. That is enough for the decision. But it may be observed that not only were the facts recent, but during the intervening period, they were brought under the charger's notice in the record, in which they were most specifically detailed, and in which answers were judicially made for him, and of course under his instructions.

The other Judges concurred.