struction; there was no undue loading of the floor. In the circumstances no rent was due.

Authorities—*Sauer* v. *Bilton*, 1878, L.R. 7 Ch. Div. 815; *Manchester Bonded Warehouse Company* v. *Can*, 1880, L.R. 5 Com. Pl. Div. 507.

Argued for pursuer—The warehouse was of ordinary construction. No warranty of sufficiency was given. The warehouse was grossly overloaded and unequally packed. There was undue and unreasonable use of the warehouse.

At advising—

LORD PRESIDENT—This is an action for the recovery of rent for premises let by the pursuer to the defenders, under missives dated 26th February 1884, at a rent of £60, from 26th February to 28th November of that year.

The missives contain no statement by the pursuer of the nature of a warranty, but it was a fact known to the pursuer that the defenders were flax and jute merchants, and the pursuer therefore must presumably have known the use to which the warehouse would be put.

The defenders took possession of the warehouse and filled the lower floors with jute; they stored no flax in the building at all, but in the upper flat they put 1797 bales of jute, weighing about 321 tons.

The case on the evidence comes therefore to be this, whether this was an unreasonable load for the upper floor of this building to carry?

Now, this is a pure question of fact, and there is no law in the matter. The Sheriff-Substitute and Sheriff are both agreed that there was in the circumstances an unreasonable use of the premises let, and as I entirely concur in their judgments I do not consider it necessary to enter into any analysis of the evidence.

I am therefore for refusing this appeal.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

The Court refused the appeal.

Counsel for Pursuer (Respondent)—Sol.-Gen. Asher, Q.C. — Mackintosh. Agent — J. Smith Clark, S.S.C.

Counsel for Defenders (Appellants) — Lord Adv. Balfour, Q.C.—H. Johnston. Agents—Morton, Neilson, & Smart, W.S.

Wednesday, January 21.

SECOND DIVISION.

HERSKIND AND OTHERS (OWNERS OF "HILDA") *v.* HENDERSON AND OTHERS (OWNERS OF "AUSTRALIA"), *et e contra.*

(*Ante*, p. 70, November 7, 1884.)

Process — Expenses — Expense of Commission Abroad.

In taxing the account of a party successful in an action arising out of a collision at sea, the Auditor allowed a charge of £60 as the fee to a British Consul abroad and other expenses in taking the evidence of one witness on a commission which had been obtained by the successful party. The unsuccessful party objected to the report, but the Court *refused* to disturb the decision of the Auditor.

In this case (reported *supra*, p. 70, November 7, 1884) the owners of the "Hilda" were successful, and were found entitled to damages and to the expenses of the process. The usual remit was made to the Auditor, who taxed the amount of expenses at £448, 16s. 8d. (including the £60 hereafter referred to), but reserved a question for the determination of the Court as to the extent of the defenders' liability for the expense of the examination by commission of one of the pursuers' witnesses named Salvatore Farrugia, a Maltese pilot at Port Said, which amounted to £60, 6s. There were seventy-five interrogations, and the report of the commissioner, the British Consul at Port Said, extended to fifteen pages of print. The time occupied in the examination was stated at three and a-half days, and the commissioner's charge (including 5s. 6d. for postages) was stated at £37, being at the rate of £10, 10s. per day. The clerk's fee was charged at £11, being at the rate of £3, 3s. per day, and the allowance to witness (including hotel and travelling expenses) amounted to £12, 5s. At the audit the defenders' agent objected to the expense of the commission as excessive, and the pursuers' agent, while concurring in this view, stated that he had no alternative except payment of the charge or loss of the evidence. The pursuers' agent also stated that he had been in correspondence with the Foreign Office on the subject, and had received a letter reporting that the explanations given by the commissioner appeared quite satisfactory to Lord Granville. A portion of the examination was conducted in Italian, the commissioner acting as interpreter, and the Auditor, while considering that this to some extent explained the length of the time occupied, could not help concurring with the agents as regards the rate of fees for the commissioner and clerk as unusually high, and the time occupied as excessive, assuming the days to have been ordinary business days. Practically, there was no check on the expense of commissions executed abroad, but the question remained, by whom was any excess of charge to be borne? In the present case the Auditor had not felt at liberty to disallow any part of the expenses incurred.

Counsel for the owners of the "Australia" argued—The ordinary rule that the losing party must pay the expenses of process could not be applied in this special case. The expenses in this commission, so far as in excess of what was reasonable, must be borne by the pursuers, whose duty it most clearly was, when they found how high the commissioner's charges were to be, to have come to the Court and asked for the appointment of a new commissioner.

Counsel for the owners of the "Hilda" stated that it was a rule of the Suez Canal Company that their pilots should only appear for examination before a Consul or an official of the Commissioners.

At advising—

LORD YOUNG—I do not think we can do anything except approve of the Auditor's report. The Court cannot well give any general instruction. Such a case as this is not of frequent

occurrence. In such cases the Auditor acts on his own judgment, which is always excellent.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court approved of the Auditor's report.

Counsel for Owners of "Hilda"—Thorburn. Agents—Snody & Asher, S.S.C.

Counsel for Owners of "Australia"—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, January 21.

SECOND DIVISION.

[Sheriff of Caithness.

TROTTER *v.* SPENCE.

Deposit-Receipt—Joint Property—Proof—Presumption.

Money lay in bank in the names of two brothers on deposit-receipts, payable to either of them or the survivor. On the death of one the survivor uplifted the money in the receipts, and deposited it in his own name. In a question as to the ownership of it he maintained that it consisted of his own earnings in business, and was his own property. *Held* that the presumption from the receipts was that each brother was owner of half the sum contained in them, and that on the evidence this presumption had not been redargued.

These were two conjoined actions of accounting at the instance of Mrs Margaret Spence or Trotter, residing in Thurso, against her brother John Spence junior, as executor or vitious intromitter with the estate and effects of (1) their mother, and (2) George Spence, their brother. There were other issues raised in the actions as originally laid, but these were eventually departed from.

John Spence senior, father of the parties, was a shopkeeper, innkeeper, and farmer at Dunnet, in Caithness. He died in 1853, survived by his widow and by two sons George and John, the defender, and by six daughters, including the pursuer. By his will he left his heritage to his sons, subject to his widow's liferent, and his whole moveable estate to his widow, whom he appointed executrix. After his death his widow continued to carry on the three businesses in which he had been engaged. In doing so she was assisted principally by her younger son George, and to some extent by John, the defender, until George's death in 1878, after which she was assisted by John till her own death in 1881. The lease of the farm was taken, shortly after the death of John Spence senior, in the joint names of Mrs Spence, John, and George.

The defender John Spence junior was salvage-agent for Lloyds at Dunnet, and along the shores of the Pentland Firth, as well as for several underwriters' associations. He also dealt in sheep and timber, and was engaged in lobster-fishing.

In the first action—that against the defender as executor and intromitter with his mother's estate—the pursuer claimed to succeed to one-sixth share of her mother's moveable estate as one of the next-of-kin along with her sisters; and in the second action she claimed to succeed to one-sixth share of George's moveable estate on the same ground. In answer to the first action the defender averred that he had already accounted to the pursuer for her share of their mother's estate, and had offered to pay her the amount of her share thereof due to her on the accounting. In the second action—that relating to George's estate—the pursuer averred, *inter alia*, that a sum of money amounting to £4026, which at George's death lay deposited in bank on deposit-receipt in the names of the two brothers, payable to either or the survivor, belonged solely to George. This the defender John denied, averring that none of the money deposited in their joint names belonged to George, but that the whole of it belonged to himself, and consisted of his earnings as Lloyds' agent, and as a trader in sheep, and in other ways. The disposal of this sum of £4026 came to be the main point in the case.

In carrying on business after the death of John Spence senior no regular books were kept by any member of the family, and the only materials for tracing and separating the personal estate of the defender John Spence, George Spence, and Mrs Spence respectively were very vague and indefinite. It was shown that no other than these three persons contributed to the accumulation of the moneys in question in the actions, the daughters of the family having all married early. It was also shown that while the defender John had undoubtedly made a considerable independent income, George had no sources of income apart from his interest in the joint industries of the family. As to the probability of the joint industries having been profitable there was a conflict of evidence, some witnesses declaring that they were undoubtedly lucrative, while the bank-agent at whose office the ordinary current accounts for the farm and inn were kept was impressed to the contrary by a course of accommodation bills which was maintained for many years between Mrs Spence and her son George.

The evidence obtained from the bank accounts—current and deposit-receipts—was also equivocal.

It appeared that there were numerous current accounts. The defender had a current account with the Commercial Bank at Thurso, and another at a later date at Castletown. George had (1) a current account with the Commercial Bank at Thurso, on which there was due at the date of his death the sum of £80, 7s. 6d. It was proved that the transactions in this account were connected with the shop and inn; (2) George had another account with the same bank, called "No. 2 Account," on which there was due to him at his death the sum of £41, 16s. 7d.; and (3) he had also a current account at Castletown, on which there was due by him at his death the sum of £30. It was shown that the second account ended at the date when the third began, and that they in succession contained the ordinary transactions relating to the farm. The balance due to George on these three accounts was thus £92, 4s. 1d. This balance was subsequently reduced by a transaction in Mrs Spence's lifetime, but there was no evidence that the defender had ever interfered with those accounts, and he was relieved by