WATSON and MACLEAN for them.

SHAND (SOLICITOR-GENERAL with him) in answer.

At advising—

LORD JUSTICE-CLERK—It is proved that a cask of whisky cannot be safely kept unless examined from time to time, and therefore there is no doubt that a duty lies on the storekeepers, and that that duty must be discharged efficiently. It is not necessary to say that that depends on the custom of trade. I think it is implied in the contract itself. The cask having burst, that lays the *onus* on the storekeepers, and the question is, whether the defenders have proved that they used reasonable care? I don't think the affirmative of that proposition has been proved. The cause of the cask's bursting was the rust of the hoops and consequent decay. The cask had been in the warehouse for nine years and had been examined two years before. Decay from rust is a known risk and a certain risk. That circumstance, that there were symptoms indicative of decay, taken along with the length of time the goods had been stored in defender's premises, was enough to have put them on their guard. On the two grounds,—(1) of the indications of weakness of the cask brought home to the defender's knowledge, and (2) its examination not proved to have been sufficient, I am of opinion that the defenders must be held liable. But I cannot concur in the findings of the Sheriff.

LORD COWAN concurred, pointing out that there was no doubt whatever as to the leading principles of law applicable to the case. Reference had been quite unnecessarily made to English authorities, for the doctrine was clearly laid down by Professor Bell in his Commentaries.

LORD BENHOLME—This is not a tight interlocutor, but on the whole I concur. We do not gather much from the authorities as to the nature of the diligence that is required from storekeepers. No doubt the custom of trade may be a guide, although that is not as it has been stated by the Sheriff. The evidence does not show that the custom of trade requires a regular cooper on the premises, or the periodical services of a cooper. I rather think with Mr Maclean, that that is a general duty of the warehousemen, but only that has not been shown to have been duly performed. I am hardly prepared to say that, if the defenders had extended their examination so as to look all round the cask, they would have been liable. That is all, I take it, that the custom of trade requires; but then that was not done. It is said that if they had looked underneath the cask, no defect would have been found. But that is a mere speculation and is not to be assumed.

LORD NEAVES—I am of the same opinion. There is no doubt about the law; and due care means reasonable diligence, such as people show in their own affairs. There are two questions—(1) Was there a duty on the storekeepers? (2) What was it? The duty is certainly not an obligation of insurance, but it is certainly just as little that of merely reporting to the owners when damage has been done. The duty of storekeepers is that of due inspection, and so to inform themselves as to be able to report to the owners as to the approach of danger. Is it proved that there was that inspection that ought to have been made? The length of time during which the cask had been stored, was a material circumstance rendering the examination more careful. I cannot say it is proved that the examination was in the circumstances sufficient.

Judgment of the Sheriff therefore in substance adhered to.

Agents for Appellants — Millar, Allardice, & Robson, W.S.

Agents for Respondents—J. & R. D. Ross, W.S.

Friday, January 7.

FIRST DIVISION.

LLOYD'S EXECUTORS *v.* WRIGHT.

Agent—Bad Debts—Brokerage—Commission—Dividends—Guarantee — Lot Money—Price—Profit. The traveller for a company was by contract allowed 25 per cent. on the gross profits of the sales of tea and coffee he effected; and he guaranteed them against loss by bad debts to the extent of two shillings in the pound. *Held* (1) that his commission was on the difference between the price he sold the goods at and their selling price in the London market when he received instructions to sell; (2) that in estimating the amount of the buying price brokerage and lot-money were to be included; (3) that he was entitled to commission on the bad debts; and (4) that under his guarantee he was liable on the gross amount of the bad debts without deduction of the dividends the company received on them, but that the company could not enforce it so as to obtain more than twenty shillings in the pound.

In this case the Rev. Maurice Lloyd and the Rev. John Lloyd, Montgomery, Wales, as executors of the deceased David Lloyd, wholesale grocer and tea dealer, No. 18 Rood Lane, London, sued Robert Pringle Wright, Commission-agent, for the sum of £1055, 7s. 4d., under deduction of whatever commission should be found due to him; or else to exhibit a particular account of his intromissions as traveller or agent for the late David Lloyd during his engagement, which lasted from November 1855 to 6th May 1859. The defender effected numerous sales of tea and coffee for Mr Lloyd and the balance thereon remaining in his hands amounted to £941, 12s. 2d. without reduction of whatever commission was due to him. The pursuers averred that the bad debts incurred by the defender amounted to £1137, 11s. 10d.; and that by the usage of the trade he was liable in 10 per cent. thereon, viz., £113, 15s. 2d. The defender refused a sum of £654, 3s. 3d. offered by the pursuers in 1859 as his commission on the sales effected by him. He asserted that his engagement was embodied in a letter by him to David Lloyd and Company on 5th November 1855, and challenged production of this letter. The letter was not produced; but it was alleged to have been in the following terms:—"*London, 5th November* 1855.—Messrs D. Lloyd and Company.—Gentlemen, In reference to our conversation, I engage to sell your tea and coffee on commission in Scotland on the terms you named, viz.—I am to be furnished with the cost price or value of all tea and coffee, and to receive as remuneration 25 per cent. of the gross profit. At the same time, I guarantee you against loss by bad debts to the extent of two shillings in the pound

on the gross amount of such bad debts. As a guarantee for my intromissions, I find you sufficient security for two hundred and fifty pounds sterling (£250), and have the policy of assurance on my life for £500 indorsed over to your name in the books of the Assurance Company." He averred that by it he was to be allowed 25 per cent. on the difference between the gross purchasing and the gross selling prices. The defenders, on the other hand, maintained that the per centage was to be allowed on the difference between the price at which he sold the goods and the price at which the goods were selling in the London market when they instructed him to sell; and that in estimating the cost price, brokerage and lot money were to be included.

The Lord Ordinary (ORMIDALE) on 5th April 1869 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof—Finds, as matters of fact, in regard to the two points sent to probation, —viz., the footing on which the defender's commission is to be calculated, and how the bad debts arising on the sales effected by him are to be dealt with in the present accounting—(1) That according to the agreement of parties under which the defender acted for David Lloyd and Company, he was to be entitled to a commission of 25 per cent. on the gross profit on all goods sold by him for Lloyd and Company, said profit to be calculated with reference to the cost price or value of said goods to Lloyd and Company when purchased by them, and not with reference to their price or value in the London market at the time when they were invoiced and sent to the defender for sale by him; (2) that in bringing out said cost price or value there falls to be included the brokerage and lot money paid by David Lloyd and Company on the purchases by them of said goods; (3) that in ascertaining the amount of the gross profits on which the defender's commission falls to be calculated, the bad debts arising on the defender's sales are not to be deducted; and (4) that, on the other hand, the defender falls to be debited with 10 per cent. on the balance of bad debts arising on his sales, after deducting the dividends thereon received by Lloyd and Company: With these findings, appoints the case to be enrolled, in order that they may be applied, and an interlocutor pronounced in conformity therewith disposing of the conclusions of the summons, including the conclusion for expenses of process.

"*Note.*—By a former interlocutor of 27th February 1869, to which, and the relative note, reference is now made, the Lord Ordinary disposed of all the questions in this case, except those relating to the 'defender's commission' and to 'bad debts.' These two questions have now also been disposed of by the findings pronounced in the preceding interlocutor. As the application of these findings involves matter of figures, the Lord Ordinary has thought it better to leave it to the parties to adjust the precise results—which they will, it is presumed, have no difficulty in doing—than to incur any risk of error by attempting it himself. The Lord Ordinary has also been desirous that the parties should have an opportunity of being heard on the question of expenses, now that all the points involved in the merits of the dispute between them have been determined.

"In regard to the defender's commission, the chief question which has risen was whether the gross profit on his sales was to be calculated with reference to the cost price or value of the goods as at the time when they were purchased by Lloyd and Company, or according to their market value in London when they were sent or invoiced to the defender for sale. The pursuers maintained the latter view, and appealed in support of it to the custom or usage of trade in such matters; but the proof cannot be held to shew that there is any established custom or usage of trade on the subject. It shews, on the contrary, that this is a matter which depends upon special agreement. So far, however, as the proof goes, the Lord Ordinary thinks it supports the finding he has pronounced, to the effect that 'cost price or value' must have reference to the price or value of the goods as and at the time when purchased by Lloyd and Company, and not to their market value when sent by them to the defender. Reference on this point may, in particular, be made to the pursuers' own witness Mr Crewdson. That gentleman's testimony also makes it clear that if the defender is to be debited with 10 per cent. on the bad debts, his commission must be calculated on the gross profits of all his sales. It would be inconsistent with equity, and what the Lord Ordinary must hold to have been the understanding of parties, to subject the defender in liability to the extent of 10 per cent. on the bad debts, and at the same time not to allow him any commission on the sales, which may, through no fault of his, have resulted in these bad debts.

"On the other hand, the Lord Ordinary has, although not without some difficulty, come to think that in estimating the cost price or value of the goods as and at the time they were purchased by Lloyd and Company, brokerage and lot money must be included, as these are charges which, according to the proof, are necessary and unavoidable in effecting purchases of such goods in London. To the purchaser, therefore, brokerage and lot money do really form part of the cost price or value. But if brokerage and lot money are to be added to the cost price or value of the goods, as was strenuously contended for by the pursuers, and as has been allowed by the Lord Ordinary, it is difficult to understand how, consistently therewith, cost price or value could be held to mean the assumed value in the London market at the time when the goods were invoiced and sent to the defender for sale, for there could be no brokerage or lot money paid on such assumed value.

"In regard to the 'bad debts' question, the Lord Ordinary has been unable to see how he could have determined otherwise than he has done. Certain dividends are proved to have been received by Lloyd and Company from the estates of parties to whom the defender sold their goods, and who afterwards became bankrupt or insolvent; and it has been also proved that beyond these dividends nothing more is likely to be received. The balance, therefore, on such debts may fairly enough be dealt with as bad; but the Lord Ordinary cannot see any principle for holding that the whole sum originally owing by a purchaser who afterwards becomes insolvent should be dealt with as a bad debt, notwithstanding that he may have paid, perhaps without much delay, 19s. 6d. in the pound; and yet this would be one of the results which might follow were the contention of the pursuers on the point given effect to."

The pursuers reclaimed.

N. C. CAMPBELL and BLACK for them.

SHAND and RUTHERFORD in answer.

At advising—

The LORD PRESIDENT held that the defender's commission of 25 per cent. was to be calculated on the difference between the price actually obtained and the cost price or value in the London market at the time when the goods were sent to the defender. The evidence, especially that of Mr Crewdson, clearly pointed to this as the true construction of the agreement. The defender himself, during the subsistence of the contract, never objected to the prices furnished to him as being calculated on a wrong principle. Moreover, the construction for which he now contended, that the profit was to be calculated with reference to the price paid by Lloyd & Co. would have the effect of making the traveller a joint speculator with the house, and might be worked in a manner most unfavourable to him. The house might have a large quantity of goods bought at a high price; and if this construction was the true one, they might throw the burden of getting rid of them on the traveller, who would be obliged to give his services without possibility of remuneration. He agreed with the Lord Ordinary's opinion that, in bringing out the "cost price or value," there should be included brokerage and lot money. He also agreed with the Lord Ordinary's opinion that in ascertaining the whole amount of the gross profits on which the defender's commission was to be calculated, bad debts ought not to be deducted. The defender's commission was for his time and trouble in effecting the sale. No doubt if this part of the agreement stood alone the traveller might be induced to effect sales with very little regard to the sufficiency of the purchaser; but an effectual check was put upon him by the stipulation that he was to be liable for the bad debts he incurred to the extent of 10 per cent. The defender, however, ought to be debited with 10 per cent. on the gross bad debts, without deducting any dividend received by Lloyd & Co., but with this proviso, that in no case were Lloyd & Co. to operate payment of more than 20s. per pound of their debts. This followed from the very nature of a guarantee, which this was. The creditor was entitled to come against one who has guaranteed a debt in full or in part to the full extent to which he is liable, with this limitation, that he cannot operate payment of more than the debt due to him. But within this limit any dividend paid by the debtor was a gain to the creditor, and not to the obligant and guaranteer.

LORD DEAS was absent.

LORD ARDMILLAN concurred. It was quite plain that brokerage and lottage must be treated as part of the buying price. They were burdens on it, and diminished the profit made by the partners of the company themselves. It would be most unjust to the defender to fix the selling price as he asked to have it fixed. Lloyd & Co. made large speculations in tea. They bought large quantities and kept them up. But if the price of tea fell, then the company had perhaps to sell at a loss, and therefore, just in proportion as the defender was assiduous in effecting sales for his employers would he be successful in increasing his own liabilities. It was therefore clear that the only just way both to him and them, was to fix the cost price of the goods at the price they were selling at at the time in the London market. But it would not do to deduct the price in the sales effected by the defender that turned out to be bad sales, because he might have effected the sales with the utmost care, and this would make him unduly responsible. It would mix him up in the business almost as if he were a partner. But, on the other hand, there was a check on rash sales made by him. It was his interest to effect as many sales as possible, for on them he was to have a commission; but then, to insure his carefulness, he was bound to pay 10 per cent. of his bad sales. The contract under which he was liable to this extent was just a guarantee to his employers to that extent, but no further. They could not make him pay more than 20s. in the pound, but up to this sum they could. From it, however, the dividends received by the Messrs Lloyd were not to be deducted. The guarantee was not of that nature. It was absolute as far as it went.

LORD KINLOCH—There are several points which have been brought before us for decision.

1. The first of these regards the mode of estimating the 25 per cent. commission payable to the defender as agent or traveller for Messrs Lloyd & Co. This was admittedly payable on the gross profits. And in the abstract such profits are undoubtedly to be estimated with reference to the actual cost price; for it is on the actual expenditure of this price that profit and loss arises. But the pursuers allege that, according both to contract and usage of trade, this only held good where the teas were sent for sale by Lloyd & Co. to the defender immediately after they had themselves purchased them in the wholesale market; and that where they had kept them sometime on hand, on speculation, the price taken as the cost price was the price in the wholesale market at the time the teas were sent to the defender for sale.

I am of opinion that the pursuers have made out their allegation; and that on this point the Lord Ordinary's interlocutor is erroneous.

I think the contract of the parties must be held by us to be contained in the letter of 5th November 1855, addressed by the defender to Messrs Lloyds, and of which an *ex facie* copy has been produced, made by the defender with his own hand. The defender has somewhat strangely evaded admitting the accuracy of this copy; but he says in his evidence that "it embodied the substance of the letter which I gave to Mr Lloyd." This letter bears—"I am to be furnished with the cost price or value of all tea and coffee, and to receive as remuneration 25 per cent. of the gross profits." The phrase "cost price or value" fairly imports an alternative, in which actual cost was not intended; and, in either case, the defender was to be "furnished" with the price by the employers; that is to say, was to be informed of it at the time the teas were sent. It is established, as I think, conclusively, that during the period the defender was in the service of Messrs Lloyds, he was regularly furnished with a note of prices, of which a part represented the actual cost, being where the teas were sent immediately after being purchased in London, and another part referred to teas which had been kept some time on hand, as to which the prices furnished were the wholesale market prices at the time of the teas being sent. I think the evidence sufficiently shows that the defender was aware of this at the time; and he never made any complaint or protest on this head during his service; but transacted throughout on the footing of this being the correct course. His conduct in this respect I think goes far to shut him up to the

meaning put by the pursuers on the contract, and to exclude him from maintaining that the actual cost price was intended in any other case except that in which the teas were sent immediately after purchase.

But I consider it further sufficiently proved, that what the pursuers aver was the mode of dealing practised and understood in the trade. And I think that any other mode of dealing would have been unfair and unreasonable, particularly as regarded the interests of the agent himself. Where teas were sent for sale in Scotland immediately after being bought in the wholesale market in London, the actual cost price was of course the proper element to be regarded; there was in fact no other to take into view. But where teas were kept up on speculation, perhaps for several months, it might have been exceedingly unfair to the agent to take tho actual cost months previously as the price on which to calculate the profits; for that might have been so far above the market price at the time, as to leave no profit on which commission was leviable. It would have just been to make the agent a participator in the speculation of the principal. The fair course to the agent was to take the wholesale market price of the day, and estimate as profit all above this which the agent could produce on a sale. This I think was to deal according to the natural and legitimate course of trade, unaffected by speculative operations; and so I think the trade dealt. There was no injury thereby inflicted on the agent; for if the cost price of the day was sometimes above, it was also sometimes below the actual cost price weeks or months previous; and the one excess balanced the other. As I have already said, it was in truth the only mode of dealing which was thoroughly fair to the agent.

It was also, as appears to me, the only mode of dealing which was in accordance with the general character of the transactions. The prices to be furnished to the agent were the prices which were to guide his sales; in other words, to constitute the *minimum* below which he was not to sell. It would have been wholly absurd to furnish the actual prices weeks or months before, which, in a market so extremely sensitive and liable to such fluctuations as that of tea, would have only misled and not guided. Clearly it was the prices in the wholesale market at the time which were alone to be regarded in the sales, and therefore those which were to be furnished to the agent. But it was the prices so furnished that I think were to be the basis of settlement between the employers and agent. Having these distinctly before him, the agent knew what he was about; and not only was rightly guided in his sales, but was made fully aware of what remuneration he was earning; and was enabled to deduct from his recoveries the exact amount of commission due to him. It would have been entirely different had the agent's commission depended, not on the prices furnished, but on a search into the books of the employers, in order to find out the actual cost prices, of which, till this search was made, the agent could have no knowledge. I think nothing like this can be reasonably supposed to have been intended.

I am therefore of opinion that on this first point the interlocutor of the Lord Ordinary should be altered, and that the Court should find that the 25 per cent. commission on the gross profits must be calculated with reference to the prices furnished by Messrs Lloyds to the defender at the time of his instructing him to sell the teas. It is not said that Messrs Lloyds acted otherwise than with perfect good faith, or stated any other sums than what truly represented the prices in the wholesale market at the time. Their own interest in the sales to be made by the defender was sufficient to exclude any over-statement, which would just have prevented such sales.

2. On the second point disposed of by his interlocutor, I agree with the Lord Ordinary in thinking that brokerage and lottage must be added in bringing out the cost price. These were part of the cost of the article, in both cases equally.

3. I also agree with the Lord Ordinary in thinking that the commission is chargeable on the whole teas sold, without deduction of those on which a bad debt was made. The commission was on the sale, and the apparent profits which the sale exhibited, and for the trouble connected therewith; and it could not be reasonably affected by the fact that sometime afterwards the buyers became unable to pay the whole of the price. Nor was the right to the commission to be suspended till it was discovered whether 20s. in the pound would be recovered. The agent was liable to a certain charge or forfeit in the case of bad debts, and his chargeability in this respect goes far, in my view, to infer that his entire commission was not forfeited in that case.

4. In regard to the last point before us, which refers to this charge in the case of bad debts, there is no dispute that in such a case the agent was bound to pay 10 per cent., or 2s. in the pound on the amount of the bad debt. But the Lord Ordinary has found that this is only 10 per cent on the balance remaining after deduction of the dividend received. I cannot agree with this finding. I think the charge was 10 per cent. or 2s. per pound on the whole amount of the sale. In other words, I hold the agent to have guaranteed 2s. per pound of all the sales made by him. The employer, however, was not to receive more than 20s. in the pound in whole. Anything more than this could never have been intended. But under this limitation, and up to this amount, I think the guarantee of 10 per cent. of the whole debt stood good. Nothing else than this could, I think, be in the contemplation of the parties. And it is just what the defender undertook in the letter of 5th November 1855, when he said, "I guarantee you against loss by bad debts to the extent of 2s. in the pound on the gross amount of such bad debts."

Agent for Pursuers—W. B. Hay, S.S.C.
Agents for Defender—Grant & Innes, W.S.

Friday, January 7.

MACKENZIE *v.* M'DOUGALL AND OTHERS.

Agreement — Executor — Intromissions — Testament.

Under the testament of her husband a widow obtained certain provisions, and was named executor. On his death she took out probate, and entered upon possession of his estates. Disputes having arisen, she and the beneficiaries under her husband's will, in 1830, entered into an agreement whereby, on the narrative of a desire to prevent litigation, and to carry out the testator's intention, they stipulated what were to be rights of parties. The last beneficiary now sought an account from the