

June 22. 1829. in the situation to support this appeal. The result, upon the whole, is this, that I should recommend to your Lordships to reverse the judgment of the Court of Session in the year 1815, and to declare your concurrence in the judgment pronounced by the Court below, in respect of those several special points, (to which I have adverted), when they considered the question upon the remit from your Lordships' House.

Appellants' Authorities.—Reg. Maj. lib. 2. c. 20.; Spottiswoode, p. 306.; Balf. Prac. p. 163. 200–207.; Maj. Prac. tit. 29. p. 814.; M'Kenzie's Works, vol. ii. p. 487.; 1585, c. 11.; 1597, c. 235.; 1581, c. 101.; Dirl. 146.; Queensberry, March 7. 1816, and Feb. 5. 1818, (F. C.); July 10. 1817, or July 12. 1819, (5. Dow, 293.); Elliott, March 10. 1814, (F. C.), and March 14. 1821, (1. Shaw's Ap. Cases, p. 16.); Baroness Mordaunt, March 2. 1819, (F. C.), and July 5. 1822, (1. Shaw's Ap. Cases, p. 169.); Duke of Gordon, Nov. 22. 1822, (2. Shaw and Dun. No. 31.); Malcolm, June 19. 1823, (2. Shaw and Dun. No. 387.); Stirling, Feb. 20. 1821, (F. C.); Turner, Nov. 17. 1807, (App. voce Tailzie, No. 16.); Sir John Malcolm, Nov. 17. 1807, (App. voce Tailzie, No. 17.); Earl of Wemyss, May 25. 1813, (F. C.)

Respondent's Authorities.—3. Bank. 2. 1.; 2. Ersk. 7. 2.; M'Kenzie's Works, vol. ii. p. 487.; Earl of Elgin, June 13. 1821, (1. Shaw's Ap. Cases, p. 44.); Lockhart, Nov. 25. 1755, (15,404.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—
Solicitors.

No. 33. DOWNE, BELL, and MITCHELL, Appellants.—*Lushington—Murray.*

JOHN PITCAIRN, and Others, Respondents.—*Adam—Jervis.*

Title to Pursue—Partnership—Compensation—Process—Appeal.—1. Circumstances under which the title of the office-bearers of an unincorporated association to pursue, was sustained. 2. A plea of compensation, founded on an alleged disputed claim, repelled, (affirming the judgment of the Court of Session). And, 3. It would seem that an appeal against an interlocutory judgment, taken after the final decision of a cause, although the decree exhausting the cause is not appealed against, is competent.

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2D DIVISION.
Lord Pitmilley.

THE Edinburgh and Leith Shipping Company had for some time employed Alexander Mitchell as their agent at London, in the course of which he received sums of money belonging to them; and, as he alleged, he made advances to and for them. In October 1809, and before any settlement of accounts, the Shipping Company entered into a contract with Downe, Bell, and Mitchell, wharfingers in London, (of which Mitchell was a partner); the general object of which was to secure, for the vessels of the Company, the exclusive use of the wharf on the Thames, belonging to Downe, Bell, and Mitchell, and to con-

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stitute these persons the sole wharfingers and agents of the Shipping Company. The contract was made on the one part by ‘ John Pitcairn, Esq. merchant in Edinburgh, president or chairman of the Society or Company known by and carrying on business at Leith under the firm and title of the Edinburgh and Leith Shipping Company; Archibald M’Kinlay, Esq. haberdasher in Edinburgh, first vice-president of the said Shipping Company; William Gilchrist, Esq. also haberdasher in Edinburgh, second vice-president of said Company; Messrs Robert Ogilvy, Walter Gibson Cassells, James Reoch, and James Fortune, merchants in Leith; and Messrs Robert Scott, apothecary, John White, jeweller, Thomas Miller, glover, Robert Morton, jeweller, Archibald Campbell, brewer, William Fraser, senior, merchant tailor, Alexander Henderson, seedsman, and William Aitchison, jeweller, all of Edinburgh, directors of the said Edinburgh and Leith Shipping Company, or the quorum of them, subscribing for themselves, and for and on behalf of, and as taking burden on them for all and every other person or persons who are at present, or hereafter may be, partners of the said Company, under the authority and by virtue of powers vested in them by their partners.’ And, of the other part, by ‘ Messrs William Downe, William Bell, and Alexander Mitchell, who constitute the Society or Company known by, and carrying on the trade or business of wharfingers at East Smithfield in the county of Middlesex, under the firm and title of Downe, Bell, and Mitchell.’ The endurance was to be for seven years.

By the contract of the Shipping Company, (under which the above officers were constituted), it was declared that they were, ‘ in their respective departments, hereby constituted and appointed commissioners and attornies for all and every other partners and partner of this Company, who, for their respective rights and interests, are hereby bound and obliged to perform, fulfil, and ratify every lawful contract, act, and deed of the said directors, trustees, manager, and agents, in their respective offices and departments, to all intents and purposes whatever.’ The Company was not incorporated.

In 1814, and before the termination of the contract, the Shipping Company, alleging an inability on the part of Downe, Bell, and Mitchell, to perform the contract, refused to proceed with it; and these parties thereupon raised an action of damages before the Court of Session against the Shipping Company. To that action they called as defenders the said ‘ John Pitcairn, Archibald M’Kinlay, Walter Gibson Cassells, James Reoch, Robert Scott, Thomas Miller, Robert Morton, William Fraser,

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‘ senior, and William Aitchison, defenders; and also Robert Liddell, manager at Leith for the said Shipping Company, for themselves, and for and on behalf of, and as taking burden on them for all the other partners of the said Edinburgh and Leith Shipping Company.’ They had previously been described as office-bearers. The Shipping Company then brought an action libelling on the contract of 1809, alleging that Downe, Bell, and Mitchell, had failed to account posterior to 1813, and concluding for count and reckoning from that period. This action was at the instance of ‘ John Pitcairn of Pitcairn, merchant in Edinburgh, president of the Society or Company carrying on business at Leith, under the names and firm of the Edinburgh and Leith Shipping Company, Archibald MacKinlay, merchant in Edinburgh, first vice-president of that Company, William Gilchrist, also merchant in Edinburgh, second vice-president of that Company; and Robert Ogilvie, Walter Gibson Cassells, Thomas Jameson, Thomas Strong, and James Reoch, all merchants in Leith; James Carfrae, Alexander Henderson, John Manderston, John Crombie, Thomas Miller, Alexander Craig, and Peter Hill, all merchants in Edinburgh, directors of the aforesaid Company, and as such having power to institute and carry forth the action underwritten.’ Reference was also made to the contract of the Shipping Company, constituting these persons office-bearers.

In defence it was pleaded, in limine, that as the Shipping Company were not a corporation, they were not entitled to sue by their office-bearers; and on the merits, that no balance was due. The preliminary defence was not insisted in at the debate; and a remit was made to an accountant, who reported that there was a balance due by Downe, Bell, and Mitchell, of L.843. 8s. 3d. Objections were lodged by them to this report, in which they stated, inter alia, that as previous to the contract libelled, one of their number, Mitchell, had acted as wharfinger of the Shipping Company, and that on the transactions with him there was a balance due to him, that balance ought to have been put to their credit, so as to give them the benefit of compensation. To this it was answered, 1st, That there was no action at the instance either of Mitchell or of the Company to constitute such a debt; 2d, That the counter-claim was illiquid and denied; and, 3d, That both on that account, and because there was no mutual concurrence, the plea of compensation was incompetent. Lord Pitmilley approved of the report, and decerned against Downe, Bell, and Mitchell, for the above sum, ‘ under deduction of such sums as may be established to be due to them for commission or freights

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‘ of goods shipped downwards, (being one of the items for which they claimed credit), on which allowed parties to be heard at next calling.’—To this interlocutor the Court, on the 29th January 1824, unanimously adhered.* Thereafter, Lord Mackenzie repelled the claim for commission, and of new decerned for the balance. This judgment was not reclaimed against to the Inner House; but Downe, Bell, and Mitchell, appealed against the interlocutors of Lord Pitmilley and of the Court.

Appellants.—1. The action is incompetent, having been brought by the office-bearers of an unincorporated association.

2. The accountant ought to have taken into consideration the state of accounts previous to the date of the contract; and the plea of compensation, founded on the debt due to Mitchell, ought to have received effect.

Respondents.—1. The appeal is incompetent. It is directed against an interlocutory judgment, which was adhered to unanimously, and no leave to appeal was obtained. The interlocutor contemplates further proceedings, and accordingly such proceedings took place. It was therefore plainly interlocutory.

2. The objection to the title is not well founded. The respondents sue in the capacity both of office-bearers, trustees, or attorneys for the other partners, and for their own private interest. Besides, the appellants are barred from pleading the objection, because they contracted with the respondents in their character of office-bearers, raised an action against them in that capacity, and did not insist in the objection in the Court below.

3. The accountant had nothing to do with the transactions prior to the date of the agreement; and the plea of compensation being rested on a claim which is denied and illiquid, cannot be sustained.

Appellants (in reply).—The objection to the appeal is not well founded. The cause has been exhausted by a final judgment, and an appeal is competent against any of the interlocutors in the cause.

The House of Lords ordered and adjudged, that the interlocutors complained of be affirmed.

LORD CHANCELLOR.—My Lords, There is another case to which I would also call your Lordships' attention, which is the case in which Downe and others are appellants, and Pitcairn and others are respondents; which is an appeal from certain interlocutors of the Lord Ordinary and the Court of Session.

* 2. Shaw and Dunlop, No. 622.

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The facts of the case are these :—The Edinburgh and Leith Shipping Company was established in Edinburgh in the year 1802. At that period Messrs Downe and Company carried on the business of wharfingers in London, and the Edinburgh and Leith Shipping Company addressed their vessels to the wharf of Messrs Downe and Company, having appointed Mr Bell, who was a partner in that house, as their agent, for the purpose of managing their shipping concerns. It was the business of Mr Bell, as such agent, to collect the freights, and do the other business connected with an agency of this description. Mr Bell continued to transact this business till 1807, when, in consequence of some pecuniary embarrassments of an establishment with which he was connected, it was thought proper that he should retire from the agency, and that Mr Mitchell should be appointed to succeed him. Mr Mitchell was at the time a clerk in the house of Messrs Downe and Company. Early in 1809 he became a partner in this house ; and after he became a partner in the house, he still continued to act as agent, up to the month of October in the year 1809 : so that he acted as agent, being a clerk in the house, for the period of two years ; he acted as agent, being a partner in the house, for the period of about nine months. In the month of October, in the year 1809, a new arrangement was come to ;—a formal contract was entered into between the Edinburgh and Leith Shipping Company, and the firm of Messrs Downe, Bell and Mitchell, which was the name that was then given to the firm, consisting of those persons carrying on the business of wharfingers. The object of that contract was to fix, that for a certain time, I think the period of seven years, the vessels of the Edinburgh and Leith Shipping Company should be addressed to the house of Downe, Bell and Mitchell ; and that during the same period the house of Downe, Bell and Mitchell, should act as agents for the Edinburgh and Leith Shipping Company. They accordingly commenced their agency at that period, under this agreement, and they continued that agency up to the month of February in the year 1814. At that period some disputes took place between the Edinburgh and Leith Shipping Company and Messrs Downe, Bell and Mitchell ; and in consequence of these disputes the vessels were withdrawn from their wharf, and were addressed to another wharf, and the agency entirely ceased. Messrs Bell, Downe and Mitchell, in consequence of this alleged breach of contract, instituted some proceedings in the Courts of Scotland against the Edinburgh and Leith Shipping Company ; and the Shipping Company, on their side, instituted in the Court of Scotland a suit of count and reckoning against Messrs Downe, Bell and Mitchell, for the money they had received in their character of agents. This last action is the subject of the present inquiry. When it came before the Lord Ordinary, Lord Pitmilley, he desired that the accounts should be referred to Mr Claud Russell, accountant, to investigate and examine them, and to make a report. Mr Claud Russell investigated those accounts, and the course in which he proceeded was this : He considered that he had nothing to

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do with transactions prior to the commencement of this agreement— he proceeded upon that principle, and made his report accordingly; and he reported that there was a balance of about L. 850 due from the wharfingers to the Shipping Company. Objections were made to the principle upon which that report was framed. It afterwards came under the review of the Lord Ordinary, who confirmed the view of the subject taken by the accountant. The subject was afterwards brought again under the review of the Court of Session, who confirmed the judgment of the Lord Ordinary; and the Court of Session were of opinion that the accountant had proceeded on correct principles. It is against these judgments that this appeal has been preferred to your Lordships' House. The principal object to which I think it necessary to call your Lordships' attention is with respect to the previous account of Mr Mitchell. Mr Mitchell was the agent who immediately preceded the agency of Messrs Downe, Bell and Mitchell. It was stated, and is alleged in these papers, that in that account between Mr Mitchell and the Shipping Company, credit had been given for a sum of L. 450 and upwards for freights, which had never been received by Mr Mitchell. It was contended, therefore, that that sum of L. 450 should be deducted from the balance which had been found due to the Shipping Company from Messrs Downe, Bell and Mitchell. The accountant and the Court below were of opinion, that no such deduction could be made in this case; that this was a suit brought in respect of transactions under a particular contract, commencing at a particular date, between particular parties, and that they had nothing to do with previous transactions between the Shipping Company and Mr Mitchell. On the other hand it was stated, that this account, commenced after the agreement had been entered into, was nothing more than a continuation of the old account, and that they were so blended together that they could not separate the one from the other; and that it would be doing great injustice to the parties, if they were to commence the account in the manner the accountant had commenced it at the period of October 1809. And for the purpose of shewing that the two accounts were blended together, they relied principally on this circumstance: Mr Mitchell, before he had given up the agency, had accepted bills to the amount of L. 2200; he had accepted bills on account of freights that had been received, or were expected to be received, and which bills were drawn upon him by the Shipping Company at Edinburgh: These acceptances, it was said, were paid by Messrs Downe, Bell and Mitchell, some of them, or the greater part of them, falling due after this agreement had been entered into; and it was said that these circumstances united and blended the accounts so together, that it became necessary to investigate the previous account, the account of the agency of Mr Mitchell. But, my Lords, it does not appear to me that the argument is well founded;—those acceptances were made by Mr Mitchell, who was the agent of the Shipping Company, in respect of freight he had received, or which he expected to receive; and being

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But it was further stated, that there was a balance due to Mitchell—a balance of somewhat more than L.100—and that that balance was paid to Mitchell by Downe, Bell and Mitchell. But if so, it does not appear to me that that circumstance at all affects the present question. It was a sum due from the Shipping Company to Mitchell; and if the new agents, Downe, Bell and Mitchell, thought proper to pay that balance, they paid it as the agents of the Shipping Company, and were entitled to reimbursement for that sum as against the Shipping Company; and probably they did receive that sum from the Shipping Company. It does not appear to me, therefore, that there were any circumstances in this case so blending the accounts together, as to render it necessary for the accountant to go back beyond the period when the contract was entered into, namely, the month of October 1809. I am of opinion that he was perfectly correct in the course he pursued in the investigation of these transactions.

But then, my Lords, it was said, that Mitchell being one of the defenders, according to the laws of Scotland, if a sum of money was due to him, though the action was brought against him and two other persons—though a defendant certainly, according to the law of England, would not have been entitled—yet, according to the rule which prevails in Scotland, he was entitled to set off that particular debt against a claim made against him and his partners. Now it does not appear to me necessary to say any thing in respect of that as a general rule,—it is not necessary for me to advert to the authorities which have been cited for the establishment of that rule;—for it is not every claim which can be so set off—for, according to the authorities, the rule applies only to matters of liquidated debt, or matters admitting of immediate or ready liquidation; for if it be a disputed claim,—if, in order to ascertain the amount, litigation and contest will become necessary, they cannot be set off, or made use of for this purpose of compensation, in the Courts of Scotland.

My Lords, without referring to particular authorities in support of this position, I shall advert to a summary of those authorities in Mr Bell's work; and which summary is supported by the authorities themselves. Mr Bell says, 'In compensation the debts must both be liquid, or capable of immediate liquidation. A debt is deemed liquid

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‘ when it is actually due, and the account ascertained “ cum certum an
 ‘ et quantum debeatur.” But if the debt itself be contested, and the
 ‘ creditor has not his proof ready,—or if the amount be disputed, and
 ‘ it depend on a long discussion what is to be adjudged due,—the
 ‘ debtor will not be allowed to avoid payment of what is liquid and
 ‘ due till that litigation be terminated.’ Now no person can advert to
 the circumstances of this case, with respect to the state of this account,
 and not find himself compelled to come to this conclusion, that the
 amount due to Mr Mitchell—supposing any thing to be due to him—
 must of necessity be a subject of contest, and a subject of contest of
 a sufficiently complicated description. In order to ascertain what was
 due to Mr Mitchell, it would be necessary to go through the whole of
 his conduct, and to unravel every part of it ; and there is this circum-
 stance, that though the account of Mr Mitchell ceased in the year
 1809, several years had elapsed before this question was agitated, and
 no claim had been made on the part of Mr Mitchell of any debt, or
 supposed debt, due from the Company to him. Under these circum-
 stances I am of opinion, whatever may be the general principle in
 respect of set-off or compensation in Scotland, that this case comes
 within the exception stated by Mr Bell to the principle by which the
 Courts of Scotland are governed in allowing of compensation, and
 that the Court below were right in coming to the conclusion, that the
 set-off or compensation ought not to be allowed.

My Lords, there were various other objections in point of fact
 made by the accountant,—many claims were preferred which he dis-
 allowed. It is not my intention to trouble your Lordships, by going
 through all the long and complicated details with reference to this
 part of the case. I have read them with great care and attention ; and
 I see no reason to dissent from the conclusion to which the accountant
 came on a consideration of those matters ; which conclusion has been
 supported by the judgment of the Lord Ordinary, and by the subse-
 quent judgment of the Court of Session.

I will state, however, to your Lordships one case, by way of
 example. A claim was made to some amount for a charge for printing
 carmen’s notes and receipts. It was very properly stated, that it
 was the business of the agent, who received a commission, to make out
 those receipts himself ; and that if he chose to get them printed, for
 the purpose of saving trouble to himself, that expense ought to fall
 upon him, and not upon his employers ; but that which is the decisive
 answer to this demand, and most of the others under the same
 circumstances, is, that those wharfingers were in the habit every
 month of sending their account. That account contained, on the one
 side, the particulars of the freights which were due, and on the
 opposite side all the charges to which the wharfingers considered
 themselves entitled, and which they claimed by way of deduction,
 entering into the most minute and detailed particulars. The claim
 to which I have referred would naturally, if intended to have been

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I do not think it necessary to trouble your Lordships farther on this part of the case; but there was one item particularized at the Bar, as decisively calling upon your Lordships to allow this appeal—I mean the charge in respect of interest which the accountant had found due on the sum of L.850, the balance which appeared to remain due. He charged the interest upon that balance from the last day of January, when the agreement was broken off. It turned out, that at that period there were freights outstanding to the amount of upwards of L.1200. The interest was therefore incorrectly charged. The freights were in the course of gradual collection; and the greater part of the freights comprised in that L.1200 were collected in the course of one, two, three, and four months. If, therefore, we were to take an average, and suppose the whole collected in about two or three months, the receipt of some being earlier, and that of others later, it is obvious that the amount charged in the shape of interest would be a very minute and trifling sum, amounting only to a few pounds, and not of itself a subject of such importance as to justify your Lordships in remitting the case on that ground. But, my Lords, there was another observation made, and justly made, at the Bar, which was this, that it appears that these wharfingers, during the period of the transactions in question, had in their hands considerable balances belonging to the Shipping Company, and that if they were charged for interest upon those balances, that would amount to a much larger sum than that complained of. Under these circumstances, I conceive your Lordships will be of opinion, that no injustice has been done to these appellants, and that there is no ground to justify your Lordships in varying the judgment of the Court below. I should therefore, under these circumstances, recommend to your Lordships that this judgment be affirmed.

Appellants' Authorities.—(1.) Blackstone's Com. (Archbald's Ed. 1811.) vol. i. pp. 471-5.; Crawford, June 13. 1761, (1958.); Lawson, July 7. 1810, (F. C.)—(2.) Bogle, July 8. 1793, (2581.); Handyside, Dec. 1. 1812, (F. C.); Scott, June 13. 1809, (F. C.); Russell v. M'Nab, May 26. 1824, (3. Shaw and Dunlop, p. 63.); Salmon, Dec. 17. 1824, (3. Shaw and Dunlop, p. 406.)

Respondents' Authorities.—2. Bell, (128. 619.); 3. Ersk. 4. 16.

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