

TENNANT q.q. HOME v. SUTHERLAND.

[10th December, 1829.]

1 & 2. *Commission—what rate chargeable by Mercantile Agent, and when.*

3 & 4. *Exchange—what rate of—chargeable, and when.*

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Home,
v.
Sutherland.

In deciding this case, which was an action of accounting, between the plaintiff, a merchant in London, who had employed the defendant as his agent here, to recover debts due to him in this colony, the *Court*, after the examination of a great many of the principal merchants, in Cape Town, *held*,

1st. That no established usage, by which the rate of commission, to be charged by Cape merchants, for the recovery of money in this colony, for constituents out of the colony, is invariably regulated or fixed, has been proved to exist.

Therefore, that the Court must fix the rate, to be charged in this case, according to what appears, to be a fair remuneration, for the labour, bestowed by the defendant, in recovering the money, which he succeeded in recovering, for the plaintiff.

The *Court held*, that to be a fair remuneration for such labour, which respectable merchants, have, in the course of their business, been in the habit of charging, and their constituents, of allowing to them, in similar cases.

The *Court held*, that the result of the evidence, of the different witnesses, showed, that $2\frac{1}{2}$ per cent., is the rate of commission, usually charged, where the agent has little or nothing to do, except receive the money, from his constituent's debtor; and that 5 per cent., is the rate, usually charged, where the recovery of the money, has been attended with much trouble, either in adjusting the amount, or in procuring payment.

The *Court held*, it had been proved, that the regulations of the Commercial Exchange, in Cape Town, as to charging 5 per cent., have never been received, or acted on, as a rule in such cases.

2d. The *Court held*, that in the general case, the rule is, that it is the recovery of the money, that founds the claim for commission, and that when nothing is recovered, no commission is due. But the *Court held*, that this rule, strictly applies only, where the agent is not interrupted, in the course of recovering the money, by his constituent, and that there may be cases, in which the agent, will be entitled to insist, on being allowed to finish the transaction, or else to charge some commission, for what he has already done. Suppose a case in which, after much trouble, and legal proceedings, an agent

had obtained from his constituent's debtor, a bill for the amount of the debt, which perhaps, although not a liquid, and immediately negotiable instrument, is one, which there is reason to presume, will be paid when due, and on the amount of which, if the agency were not withdrawn, the agent, after receiving payment of it, and handing over the money, to his constituent, would be entitled, to charge 5 per cent., and that the constituent, under these circumstances, chooses to change his agent, and to direct this bill, to be handed over by the original agent, to the new one, who will necessarily have nothing to do, but ask for and receive payment, of the bill when due, and will be entitled to charge only $2\frac{1}{2}$ per cent. Unless a commission of $2\frac{1}{2}$ per cent., is allowed to the original agent, on the withdrawal of the agency, the constituent would enjoy the result, of the agent's trouble and labour, without paying for it, and the agent, would receive no remuneration, for that trouble and labour, by means of which alone, the debt has been recovered. In such cases, the *Court held*, that the agent, must either be allowed to retain the bill, finish the transaction, by receiving payment of it, and paying over the amount to the constituent, and charge the full commission of 5 per cent., or be entitled to claim and recover $2\frac{1}{2}$ commission, on delivering over this bill.

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The *Court held*, that where, when the agency is withdrawn, the agent is in possession of liquid negotiable documents of debt, obtained by him from his constituent's debtor, he is entitled to insist, that the constituent, shall either take those documents as cash, and pay him the full commission, which he would be entitled to, on paying that particular amount in cash, and close the transaction,—or shall allow the agent, to retain the documents, and finish the transaction, by converting them into cash, and paying it over to the constituent, charging his full commission thereon.

But where, when the agency is withdrawn, the agent is in possession of documents, obtained by him from the constituent's debtor, whether with or without trouble, but which, owing to the debtor's insolvency, embarrassment, or other circumstances, there is reason to believe, will prove worthless, or at least, of the ultimate payment of which, there is only a very doubtful prospect,—the *Court held*, that the agent cannot insist, on the constituent's taking them over as cash, and that, whether he may be entitled to insist, on returning those documents, in order to attempt to make something of them, and charge commission on the proceeds thereof, when recovered;—or is bound, to give them up, with or without a reservation, for a claim for commission, on the proceeds, in the event of their ultimately producing anything,—he is not entitled, to retain as commission, in respect of those documents,

Tennaut q.q. or on the debt, on account of which he obtained them, any
 Home part of the funds of his constituent, which he may have in his
 Sutherland. possession, even although, he should offer security to refund
 such commission, in the event of nothing being recovered on
 those documents, within a certain time.

3d. The *Court held*, that it had been proved, to be the established usage of the colony, for the agent, to charge his constituent, with the rate of exchange, payable within this colony at the time, for Treasury Bills, on all sums, received by the agent here, in the currency of this colony, the amount of which, is tendered in London, in sterling money to the constituent, at a period, as early, as the Treasury Bills could have been negotiated by the constituent, without reference to the particular mode of remittance, by which the agent has made the remittance;—that the usage is consistent with the general usage of merchants, at places east of the Cape, and with equitable principles.

4th. The *Court held*, that it had been proved to be the usage of merchants here, to charge 1 per cent., on all sums, received by them in cash here, and remitted by bills to their constituents in England, and that this was a fair charge, for the agent's trouble, in negotiating the bill transaction.

On these principles the *Court decided* the various questions, at issue, between the parties in this case.

IN RE INSOLVENT ESTATE OF DE VILLIERS.

DE VILLIERS *v.* CAUVIN AND SEQUESTRATOR.

[12th January, 1830.]

Rehabilitation,—what effect of, on previous property, not disposed of by Distribution Account. “Curia,” by majority, awarded it to the Creditors.

In Re Insol- De Villiers surrendered his estate in 1822, and, *inter alia*,
 vent estate gave up a schepenkennis, due to him by Hoffman. At the
 of De Villiers. time, the scheme of distribution, of De Villiers' estate, was
 De Villiers made out, this bond was not due; but before De Villiers was
v. rehabilitated, Hoffman had also surrendered his estate, and a
 Cauvin and claim had been entered on his estate, in respect of this bond.
 Sequestrator. In 1824, the scheme of distribution, of De Villiers' estate, was
 confirmed. In 1826, De Villiers, by the consent of his creditors,
 was rehabilitated, and the sequestrator handed over to him,
 all the documents, connected with his estate, and outstanding
 debts, and, *inter alia*, this bond. In the scheme of distribution,
 of Hoffman's estate, £112 was unexpectedly awarded in