Friday, January 25.

FIRST DIVISION.

[Lord Low, Ordinary.

MENZIES *v.* M'LENNAN & URQUHART.

Principal and Agent — Commission on Sale — Contract — Construction — When Commission Earned—Quantum meruit.

A firm of brewers promised their law-agent 1½ per cent. commission "on your obtaining for us the price arranged for brewery (viz., £32,000), but on the distinct understanding . . . that in the event of there being no sale you are to have no account against us." The agent found a purchaser, and with his clients' approval completed an agreement with him for a sale at the price demanded.

Subsequently the sellers entered into a more formal agreement with the purchaser, which contained the new condition that a sum of £5000, which the purchaser was bound to deposit towards the price before a certain date, should be forfeited to the vendors "in full satisfaction of all causes of action" if he failed to pay the remainder within a fixed period. He did not pay, and the £5000 was forfeited.

In an action by the law-agent against the sellers, the Court (*altering* judgment of Lord Low, who held that the agent was only entitled to remuneration *quantum meruit*) gave decree for commission at the agreed-on rate, *holding* that the pursuer had earned the same by the completion of the contract of sale.

In March 1894 Mr Robert Menzies, S.S.C., Edinburgh, and the firm of Menzies, Bruce-Low, & Thomson, W.S., of which he was a partner, brought an action against M'Lennan & Urquhart, brewers, Dalkeith, for payment of £480, being commission at the rate of 1½ per cent. upon £32,000, or alternatively as remuneration for his services upon the principle of *quantum meruit*.

The circumstances giving rise to the action were as follows—Upon 29th May 1889 Mr Alexander M'Lennan, the senior partner of the defenders' firm, wrote in name of the firm to Mr Menzies in the following terms:—"With reference to the conversation between our Mr M'Lennan and you on the 24th inst., we are willing, on your obtaining for us the price arranged for brewery (viz., £32,000), to pay you a commission of 1½ per cent., but on the distinct understanding that the profits of the business are not to be advertised or in any other way published, and that in the event of there being no sale you are to have no account against us." Mr Menzies acknowledged this letter as being "perfectly satisfactory," and thereafter entered into negotiations with a Mr Alfred Beal in London, who in July 1889 undertook to purchase the brewery at the price of £35,000, and sent a formal minute of agreement to Mr Menzies, which was communicated to the defenders. Upon 23rd July Mr Menzies received the following letter from Mr M'Lennan:—"On behalf of my firm of Messrs M'Lennan & Urquhart, brewers, and myself and partners thereof, I hereby authorise you to sign a minute of agreement for sale of our brewery to Mr Alfred Beal of Regent Street, London, on the understanding that the price to be paid to us is £32,000 sterling for everything except stock-in-trade and book-debts, which are to be taken at valuation and paid for extra. I have perused the agreement mentioned, a copy of which is to be sent to me." The following docquet was afterwards appended to the letter by the two other partners:—"We homologate the above letter. . . . We also homologate the arrangement made by our senior as to commission to be paid to you on the sale." After receiving the letter of 23rd July Mr Menzies signed the minute of agreement.

By the fourth article of the minute it was provided—"The vendor undertakes to prove that the nett profits of the brewery for the last four years have been on the average not less than £5400 per annum, and that the business has been established over forty years." In article 5 the purchaser agreed to deposit £1000 in bank in the joint names of himself and the vendor, which was to be repaid in the event of the vendor failing to implement the undertaking in article 4. If the vendor implemented that undertaking a more formal agreement was to be entered into, and the purchaser was to deposit a further sum of £4000 on 2nd September. If he failed to complete the transaction and pay the purchase price before October 1st, these two sums were to be forfeited to the vendor.

The evidence required by the fourth article of the agreement was duly furnished, and on 22nd August the more formal agreement was executed.

The latter agreement was one between the defenders themselves and Mr Beal. The price stipulated was £35,000, and such sum as should be fixed by valuation as the price of the stock-in-trade and book-debts. Mr Beal had deposited £1000 in bank under the agreement with Mr Menzies, and by the formal agreement he became bound within six days to deposit a further sum of £4000 "as part of the purchase price." The balance of the price was to be paid on or before 31st October 1889.

The eighth article of the agreement was in the following terms:—"If the purchaser shall fail to pay the balance of the said purchase money on or before the 31st day of October 1889, the said two deposits of £1000 and £4000 shall be forfeited to the vendors in full satisfaction of all causes of action."

Mr Beal failed to carry through the purchase and pay the balance of the price at the time stipulated, and the defenders claimed from him, and after a litigation obtained payment of the £5000.

The defenders pleaded—"(2) The pursuers not having obtained for the defenders the price arranged for their brewery, and not having effected a sale of the same, they have no right to the commission sued for."

Upon 10th November 1894 the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds that, in the circumstances set forth in the record, the terms of the letter of 29th May 1889 by the defenders to the pursuer Robert Menzies do not bar the pursuers from claiming remuneration for the services rendered by the said Robert Menzies to the defenders in negotiating a sale of the brewery, and that the pursuers are entitled to said remuneration *quantum meruerunt:* With these findings appoints the cause to be enrolled for further procedure: Reserves the question of expenses, and grants leave to reclaim.

"*Opinion.*—[*After narrating the facts*]—I am of opinion that the pursuer cannot claim commission. Reading the words of the letter of 29th May 1889, 'on your obtaining for us the price arranged,' in their ordinary and natural sense, they seem to me to mean that the commission was to be payable if, and only if, the price arranged was actually obtained. Therefore as the price has not actually been obtained the commission cannot be claimed.

"It does not, however, necessarily follow that the pursuer is not entitled to remuneration. That depends upon whether the special contract excludes such a claim in the circumstances which have actually occurred. The question seems to me to be one of difficulty, but after the best consideration which I have been able to give it, I am of opinion that all claim to remuneration is not excluded.

The first question is, What is the true construction of the letter of 29th May 1889? That letter appears to me to be open to construction, because the phraseology used in the first part of the letter is different from that employed in the second part. In the first part of the letter it is said that the commission is to be paid 'on your obtaining for us the price,' while in the second part of the letter it is stipulated that the pursuer is to have 'no account' against the defenders 'in the event of there being no sale.' I think that it must be conceded that the words 'no account against us,' are equivalent to 'no claim against us for commission or otherwise,' but the question remains, 'What is the meaning of the words 'in the event of there being no sale?'

"It is clear that if there had been merely abortive negotiations for a sale the pursuer could have claimed nothing, and I also think that the same result would have followed if a contract of sale had been completed, but the purchaser had turned out to be unable either to implement the contract or to pay damages for breach of contract. If, on the other hand, a contract of sale had been concluded but not implemented, and the defenders had claimed and obtained damages for breach of contract, a delicate question would have arisen. I am not prepared to say that in that case the pursuer would have been cut off from all claim for remuneration. But it seems to me that as events have turned out the pursuer is in a more favourable position than he would have been in such a case.

"In the final contract, which was entered into between Beal and the defenders themselves, the latter agreed that if the balance of the price was not paid at the stipulated time the £5000 which had been deposited should be forfeited to them 'in full satisfaction of all causes of action.' By that stipulation the defenders barred themselves from demanding specific implement of the contract of sale which the pursuer had arranged on their behalf, and bound themselves to take the deposited £5000 in lieu of implement.

"Beal did fail to implement the contract, and the defenders have obtained payment of the deposited £5000. Beal refused to recognise the defenders' right to the £5000—or at all events to the whole sum—and the rights of the parties were determined by the Court in the case of *The Commercial Bank* v. *Beal*, November 7, 1890, 18 R. 80. In that case Beal pleaded that the provision in the agreement as to the forfeiture of the £5000 was either (1) a penalty clause, in which case the defenders could only claim such damages as they had actually sustained, or (2) a clause fixing the amount of liquidate damages, in which case the amount was exorbitant. The defenders on the other hand contended that the £5000 was part of the price which had been paid, and which was, by express agreement, forfeited in the event which had happened. Lord Trayner held that the stipulation was one for liquidate damages, and that the amount was not exorbitant. He accordingly gave decree for the defenders. The Second Division affirmed the result at which Lord Trayner had arrived, but on a different ground, holding that the provision in the agreement was in no sense a stipulation for penalty or liquidate damages, but an express contract that the portion of the price which had been deposited should be forfeited.

"The case therefore stands thus. By the exertions of the pursuer a contract for the purchase of the brewery by Beal was concluded; the defenders agreed that if Beal failed to implement the contract they were not to sue for specific implement or for damages, but were to accept forfeiture of the £5000 of the price which had been deposited in full of all claims; and finally the defenders have obtained payment of the £5000.

"That is a position of matters which in my opinion could not have been and was not in the contemplation of the parties when they entered into the agreement embodied in the letter of 29th May 1889.

"It is true that the 'price arranged' has not been obtained by the defenders, but it is also true that there was a sale in the sense of a completed contract, and that the defenders (while retaining the brewery) have received payment of £5000 of the price arranged.

"I am therefore of opinion that the event is one which was not contemplated or provided for in the agreement of 29th May, and that therefore that agreement does not bar the pursuer from claiming *quantum meruit.*

"I have been unable to find any authority

in the law of Scotland bearing upon this case, but in England there are numerous decisions upon kindred questions, from which rules of law applicable to the present case may be deduced. All the authorities are collected in Smith's leading cases under the report given of the case of *Cutter* v. *Powell*, vol. ii., p. 1.

"It is clearly established that where there is a special contract for definite remuneration for certain services, if and when they have been rendered, there can be no claim for remuneration unless the services contracted for have been fully rendered. The case of *Cutter* v. *Powell* is a strong example of that rule.

"There are however various exceptions to the rule; the first of which is stated by Mr Smith (p. 26), as follows:—'It consists of cases in which something has been done under a special contract, but not in strict accordance with the terms of the contract. In such a case the party cannot receive the remuneration stipulated for in the contract because he has not done that which was to be the consideration for it. Still, if the other party have derived any benefit from his labour, it would be unjust to allow him to retain that without paying anything. The law therefore implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth.'

"Again, Mr Smith (p. 34) says—'Before leaving the first exception' (that stated above) 'to the general rule . . . it may be well to notice a large class of decisions forming only an apparent exception; that is to say, cases in which the special contract being unperformed a new contract has been implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance.' Mr Smith, however, goes on (p. 35) to say—'It must further be observed that when a special contract has been only partly performed, the mere fact that the part performance has been beneficial is not enough to render the party benefited by it liable to pay for this advantage; it must be shewn that he has taken the benefit of the part performance under circumstances sufficient to raise an implied promise to pay for the work done notwithstanding the non-performance of the special contract.'

"It seems to me that the present case falls within the 'apparent exception' from the general rule referred to by Mr Smith in the last two passages which I have quoted.

"The defenders agreed to give up their right to sue for specific performance upon condition that if the contract was not performed the portion of the price deposited should be forfeited. That was an arrangement different from the ordinary course of the transaction contemplated in the agreement of 29th May 1889, and the making and carrying out of that arrangement seem to me to constitute circumstances sufficient to raise an implied promise to pay a commensurate remuneration, notwithstanding the non-performance of the special contract.

"But the defenders contended that they had not been benefited at all by work done on their employment by the pursuer. What they aver upon record is that they are not *lucrati* by receipt of the £5000, because they have suffered loss to a greater amount by the disturbance and interruption to their business caused by the attempt to sell the brewery. Of course, in the absence of proof, I must assume that statement to be true. But it does not at all follow that the defenders have not been benefited by the pursuer's services in the sense of the rule of law to which I have referred. Loss through disturbance and interruption of business was, I imagine, a necessary incident of the brewery being offered for sale, and would have been equally incurred if the negotiations with Beal had been broken off before the final contract was signed, or if a sale had been made to a person who turned out to be unable either to pay the price or damages. Therefore the result of the pursuer's services having been, that, although the defenders have not obtained the stipulated price, they still retain the brewery, and have put £5000 into their pocket, these services have in my judgment been beneficial to them.

"I am therefore of opinion that in the circumstances Mr Menzies is entitled to a reasonable remuneration for his services."

The defenders reclaimed, and argued—The pursuer here was not a commission agent, but a law-agent who had made an express contract with them. If the price stipulated for, viz., £32,000 was "obtained," then 1½ per cent. commission was to be paid; if not obtained the pursuer was to have no claim. That was the plain meaning of the contract, and £32,000 not having been obtained no commission was due. The pursuer was entitled to commission or nothing. There was no room for any question of *quantum meruit*. No minor contract such as remuneration for services could be spelt out of this definite and explicit contract — *Bull* v. *Price*, 1831, 7 Bing. 237; *Peacock* v. *Freeman*, May 12, 1888, 4 Times Law Rep. 541; *Martin* v. *Tucker*, July 27, 1885, 1 Times Law Rep. 655; *Barnett* v. *Isaacson*, June 24, 1888, 4 Times Law Rep. 645; and cases collected in Evans on Commission-Agents, pp. 2-25; see also Smith's Leading Cases, p. 35; *Munro* v. *Butt*, 1858, 8 Ellis & Blackburn, 738; *Read* v. *Rann*, 1830, 10 Barn & Cress. 438.

Argued for the pursuers — When Mr Menzies, with the approval of the defenders, entered into the agreement with Mr Beal the sale was complete and the commission bargained for was earned. The pursuer could not be affected by the subsequent actings of the purchaser, or by any subsequent arrangement he might make with the sellers. Had no subsequent agreement been entered into, and had the purchaser refused to implement his contract, the commission paid to the pursuer would have been a part of the damage for which Beal might have been sued—*Horford* v. *Wilson*, 1807, 1 Taunton, 12; *Lockwood* v. *Levick*, 1860, 29 L.J.C.P. 340; *Petrie* v. *Earl of Airlie*, 1834, 13 Sh. 68. In any case the defenders were *lucrati* to the extent of

£5000, and the pursuer was entitled to remuneration *quantum meruit—Kennedy* v. *Glass*, July 3, 1890, 17 R. 1085; *Prickett* v. *Badger*, 1856, 26 L.J.C.P. 33, and 1 C.B.N.S. 296.

At advising—

LORD PRESIDENT—This is an action to recover commission on the sale of a brewery; and the question upon which the pursuers of the action claim our judgment is, whether, upon the admitted facts on record, the commission has not been earned.

The agreement to pay commission is set forth in the defenders' letter of 29th May 1889, the terms of which were accepted by the pursuer Mr Menzies (although Mr Menzies has joined with him his firm as pursuers, I shall, for the sake of brevity, speak of him as the pursuer). "We are willing," say the defenders, "on your obtaining for us the price arranged for brewery, to pay you a commission of 1½ per cent., but on the distinct understanding that the profits of the business are not to be advertised, or in any other way published; and that in the event of there being no sale you are to have no account against us."

Now, the pursuer found a purchaser in the person of a certain Mr Beal, and he presented to the defenders, in writing, the terms upon which Mr Beal was prepared to contract, and was proffered as purchaser. Mr Alexander M'Lennan, one of the three partners of the defenders' firm, perused the agreement, and wrote to the pursuer authorising him to sign a minute of agreement for sale of the brewery to Mr Beal, on the understanding that the price to be paid was £32,000 for everything except stock-in-trade and book debts, which were to be taken at valuation and paid for extra. Mr M'Lennan added—"I have perused the agreement mentioned, a copy of which is to be sent to me." The other two partners of the firm subsequently added to the letter, and signed the following docquet—"We homologate the above letter. We also homologate the arrangement made by our senior as to commission to be paid to you on the sale."

Thus authorised, the pursuer proceeded to execute the minute of agreement, as did Mr Beal. The pursuer's case now is, that upon this being done, his commission was earned, and, in my opinion, he is right.

The sequel of the story is this; the defenders and Mr Beal entered into a new agreement which superseded that executed by the pursuer and Mr Beal. Under this new agreement Mr Beal deposited a part of the price. After this had been done difficulties arose with Mr Beal; the purchase was not proceeded with; and in the end the defenders obtained no more than the deposit—their right to which had to be asserted at law. Of course they kept the brewery.

Now, in answer to the pursuer's demand for his commission, the defenders say two things—1st, that, on a true construction of their agreement with the pursuer, commission was not to be paid unless and until the purchase money was in their pockets; and 2nd, that, even assuming that the commission was to be earned on the completion of a binding contract of sale, the minute executed by the pursuer and Mr Beal was not such a contract.

(1) What then is the sound construction of the letter of 29th May 1889? The letter says that the pursuer is to have his commission, "on your obtaining for us the price arranged for brewery;" and, "in the event of there being no sale, you are to have no account against us."

These are the two alternative events—"Your obtaining for us the price arranged" and "there being no sale," and the language used in regard to the first event may well be construed by the language used in regard to the second. Now, so soon as there was a contract between buyer and seller there was most certainly a sale, and this being accomplished, the pursuers' relation to the transaction came to an end. He had no duty to carry the matter further, and could not claim to manage for the defenders the carrying out of the transfer. *Prima facie* (I am stating not a proposition of law but of ordinary observation) a commission on a sale, whether of goods or anything else, would seem to be earned when a *bona fide* bargain is made, and it is only in special agreements, such as the agreement for a *del credere* commission, that the agent's remuneration depends on the bargain being duly implemented. Now, in the agreement before us I see nothing to show that the event contemplated is the implement and not the execution of a contract of sale. The words "obtaining the price" are explained by the fact that it was a particular sum which had been arranged. "Getting" would seem to be a very close equivalent for "obtaining," and if the bargain with a commission agent or anyone else were that he was to have 1½ per cent. on getting certain specified prices for goods, he would be a good deal surprised if he were refused his commission on the ground that subsequent to the sale the purchaser had failed to pay.

(2) The other ground upon which the defenders rely is that, in the minute of agreement executed by the pursuer and Mr Beal, there was a clause providing that Beal should make certain deposits, and that in the event of his failing before a particular date to pay the purchase money, then the moneys deposited should be forfeited. The defenders say that this clause reduces the agreement from being a contract of purchase and sale to being a contract either to pay the purchase money and get the brewery, or to forfeit the deposit and not get the brewery, whichever the purchaser preferred. In this I think the defenders are wrong. I do not think that the purchaser had any such option, and I consider that the sellers could have enforced the obligation to pay the purchase money on tender of a disposition. In the agreement signed by the pursuer and Mr Beal there was not, as there was in the agreement which superseded it, a provision that the forfeiture of the deposited moneys

should be in full satisfaction of all causes of action, and without such a contractual exclusion I think that an action for implement would have lain.

There is, however, a separate and conclusive answer. When the pursuer presented Mr Beal to the defenders he presented at the same time Mr Beal's terms; the minute of agreement was considered and approved by the defenders themselves, and with direct relation to those terms the two partners said to the pursuer in their docquet, "We also homologate the arrangement made by our senior as to commission to be paid to you on the sale." After this, it is in my opinion impossible for the defenders to maintain that the bargain with Mr Beal was not a sale.

LORD ADAM—I concur in that opinion.

LORD M'LAREN—Under the defenders' letter of 29th May 1889 Mr Menzies was to be paid a commission of 1½ per cent. on the price of the brewery for the service which he proposed to render, which is thus expressed—"On your obtaining for us the price arranged for brewery." In the view taken by the Lord Ordinary the commission would only be payable if the price arranged should be actually received by the seller. This is doubtless a possible construction of the words of the letter, but it is also consistent with the ordinary use of language that the expression "obtaining for us the price arranged" should mean obtaining for us a contract of sale at the price arranged. When it is considered that the business of a commission agent is to procure a contract of sale, and not necessarily to enforce the performance of the contract, and when it is further considered that according to ordinary usage a commission is earned when the contract is made, unless a *del credere* commission be specially undertaken, I agree with the Lord President that the construction which is consistent with the nature of the employment is the true construction, and that Mr Menzies' right to a commission was not made conditional on the purchaser's performance of his contract. This construction is also indicated by the words which follow—"in the event of there being no sale you are to have no account against us." The two heads of the letter are mutually exclusive, and as there is to be no account, *i.e.*, no commission "in the event of there being no sale," I infer that if there is a sale the commission is understood to be earned.

It is of course implied that a real sale at the price arranged is effected. The mere form of a sale would not be sufficient. But while it is easy to see that a question might arise as to the reality of a sale, I am of opinion that no such question can arise in the present case, because the sellers ratified the contract which Mr Menzies had made for them, and accepted Mr Beal as the purchaser of the brewery. In such circumstances it must be taken that the contract of sale effected by Mr Menzies was a sale in terms of the agreement for a commission.

Again, I do not think that this can be considered as a conditional sale. There is a clause in the final contract applicable to the event of the price not being paid on or before 31st October 1889. But when this clause is considered, its true object appears to be to effect a rescission of the sale on the ground of non-fulfilment of the purchaser's obligation with a right on the part of the seller to retain the instalment of £5000 already deposited and virtually paid to account. The defenders exercised their right of rescission, and they are no longer under obligation to convey the brewery. They also successfully asserted their claim to the deposit of £5000. But the exercise of their rights cannot, as I conceive, annul the facts that a contract of sale was executed on 22nd August 1889 by and between the defenders and Mr Beal, and that this contract was obtained through the agency of Mr Menzies. It follows, in my opinion, that the pursuers are entitled to the commission sued for.

LORD KINNEAR was absent.

The Court recalled the interlocutor of the Lord Ordinary and gave decree for the sum concluded for.

Counsel for the Pursuers—Baxter—W. Campbell. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Defenders—H. Johnston — Craigie. Agents — Watt & Rankin, S.S.C.

Friday, January 25.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

HOPE JOHNSTONE *v.* HOPE JOHNSTONE'S EXECUTOR.

Bill of Exchange—Promissory-Note—Renewal—Loan—Interest—Presumption of Abandonment of Claim for Arrears of Interest.

On 13th August 1885 A lent B £300, for which B granted his promissory-note. When the note was about to prescribe, a new note was granted by B on 19th August 1891 for the same sum, and A gave up the old note to B. B having died in 1893 without having paid back any part of the loan, A brought an action against his executor for the £300 given in loan, with interest from 13th August 1885. The defender admitted that the principal sum of £300 was received by B in August 1885, and had not been repaid, and offered payment of that sum with interest thereon from 19th August 1891, but refused to pay interest between 13th August 1885 and 19th August 1891. He averred that when the first note was granted A intimated to B that she might possibly never use it, and that there was no arrangement to pay interest and no