equity, must yield to stronger equities. But here the facts are quite simple, and no blame can be imputed to the creditors, who presented their petition as soon as they became aware that the bankrupt had succeeded to the property. I am therefore of opinion that the cases quoted have no application, and that the Lord Ordinary's view is perfectly sound.

Lord Deas, Lord Mure, and Lord Shand concurred.

The Court adhered.

Counsel for Petitioner (Respondent)—Asher—C. S. Dickson. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondents (Reclaimers)—Keir—Harper. Agent—George Andrew, S.S.C.

Saturday, November 1.

SECOND DIVISION.

[Lord Craighill, Ordinary.

BAINES & TAIT *v.* COMPAGNIE GENERALE DES MINES D'ASPHALTE.

Agreements and Contracts—Where War suspended Completion of Contract—Commission on Work done—Supplementary Contract.

Under a contract for asphalt work B. & T. were entitled to 5 per cent. commission on the amount of the contract. The works were to be completed on 1st October 1877, three causes only being recognised as sufficient excuse for delay—ravages of war, inundations, and shipwreck. In consequence of war the works were stopped uncompleted in 1877. In 1878 the contractors entered into a new convention with their employers, without the knowledge of B. & T. to perform the remainder of the work, the new convention containing conditions similar to the original contract. B. & T., claimed damages for breach of contract in respect of non-payment of commission on the work executed under the new convention, which was refused on the ground that the original contract came to an end by lapse of time, and that what was embodied in the convention was a new contract with which B. & T. had nothing to do. *Held (rev.* Lord Craighill, Ordinary) that the war did not put an end to the whole contract, but merely suspended it; that the convention of 1878 must be considered as supplementary to the original contract for the purpose of carrying out its terms; and that therefore B. & T. were entitled to commission.

Agreements and Contracts—"Payment to be made in Bonds"—Whether Market or Nominal Value to be taken.

B. & T. were to be paid commission, one-fourth in money and three-fourths in bonds. At a certain date they had been largely overpaid in money and underpaid in bonds. Taking the bonds at their market value, B. & T. had been fully paid; at their nominal value a balance remained due to them. *Held* that the payments that had been made having been payments to account, the final adjustment must be carried out on the footing of the commission being payable one-fourth in money and three-fourths in bonds.

Process—Action of Damages.

In an action of damages for breach of contract for non-payment of commission on work to be executed, liability for which was disputed, the Court in the circumstances found, not that a sum of damages was due, but that the pursuers were entitled to commission.

Remarks per Lord Gifford on "undisclosed commission."

This case has already in one of its stages been reported, March 15, 1879, 6 R. 846, and 16 Scot. Law Rep. 471. Messrs Baines & Tait, iron merchants, London, sued the Compagnie Generale des Mines d'Asphalte, and W. O. Callender, London, John Young, London, and T. S. Lindsay, accountant, Edinburgh, partners thereof, for £296 stg., as alleged balance of commission past due and £4000 damages for breach of contract. The breach alleged was the non-fulfilment of a contract for asphalt work in the town of Jassy, in Roumania, upon the price of which the pursuers alleged they were to receive commission.

The following narrative is taken from the opinion of Lord Gifford:—"The contract under which the commission was claimed was embodied in letters passing between Mr W. O. Callender, one of the partners of the Asphalte Company, and as representing the company, and Mr A. G. Tait, one of the partners of the pursuers' firm. The principal letter embodying the agreement to pay commission, and which is still the binding contract between the parties, is dated 31st December 1872, and is in the following terms:—It is addressed by Mr Callender to Mr Tait.—'London, 31st December 1872—Messrs Baines & Tait—Dear Sir,—In the event of your being successful in securing for me the contract for the Asphalt Work in the town of Jassy, I agree to pay you a commission of 5 per cent on the same, such commission to be payable from time to time as the payments for work are made to me. Should you prove unsuccessful in obtaining the contract, I agree to pay you One hundred pounds for your expenses in going there.—Yours truly (signed) W. O. Callender. *P.S.*—I give you full power as to expenses. It is understood that in event of your non-success you receive fifty pounds over and above expenses. (Intd.) W. O. C.'

"The pursuers were successful in securing for the Asphalte Company the contract for asphalting the streets of Jassy. The principal contract with the municipality of Jassy was dated 22d May 1873. It is a complicated document (in French) containing a great variety of provisions and stipulations, but none of the provisions raise any question in the present action or any material question relative to the pursuers' commission excepting the provision in the 4th article by which it is stipulated that the works should be completed by the 1st October 1877, and that only three cases would be admitted as sufficient reason for their non-completion within the stipulated period. The three cases are called in the contract 'les trois cas suivants de force

CORRECTION.—In No. 3, p. 38, 2nd column, line 11 from top of page, for "incompetent" read "not incompetent."

majeure bien justifiée, ravages de guerre, inondations extraordinaires dans le pays, naufrage des vaisseaux chargés de materiel destine a servir pour ces constructions.' It was arranged that the payment of the contract price for the asphalt work should be made by the municipality of Jassy—one-fourth in cash and three-fourths in bonds of the municipality of Jassy—as the work progressed; and as the contract with the pursuers stipulated that the commission of five per cent should be payable from time to time as the payments for work done were made to the contractors, the Asphalte Company, it naturally followed that the commission due to the pursuers fell to be paid just like the contract price itself—one-fourth in cash and three-fourths in bonds by the town of Jassy. This arrangement, which naturally follows from the terms of the contract, was expressly assented to by both parties. This is admitted upon record, and the pursuer Mr Tait in his evidence says—'I agreed to take payment of my commission in the same way as Mr Callender, for the company was paid for his work.'

"The Asphalte Company commenced operations under the contract in or about July 1873, and the work went on during the working periods of the succeeding years down till towards the end of 1876. Accounts from time to time were rendered by the company to the present pursuers with the view of showing the amount of the pursuers' commission, and from time to time payments to account were made to the pursuers both in cash and in bonds, but no final settlement ever was come to—the payments of commission were always simply payments to account, whether cash was paid or whether bonds were delivered, or whether, as often happened, bills were granted. The receipts all bore to be 'on account of commission on Jassy contract.'

"In 1875 a dispute arose between the pursuers and the defenders regarding the pursuers' commission, the chief point of difference being whether the commission extended to all descriptions of work under the contract, or whether it was confined to proper asphalt work only. There were also disputes as to expenses and some other matters. These differences led to proceedings in Chancery in 1875, but the whole controversy then arising was ultimately referred to arbitration to Messrs Nash and Henderson, and these arbitrators ultimately on 28th July 1877 pronounced a final award disposing of the matters referred. The leading finding by the arbitrators was that the present pursuers were entitled to their commission of five per cent. only upon the price of the asphalt paving, and not upon the price of other work included in the contract, and they ordained the Asphalte Company to make good to the pursuers their commission—one-fourth in money and three-fourths in bonds of the municipality of Jassy—on so much of the work as was completed in 1876, 'and also on the said asphalt work remaining to be completed after the end of the year 1876, in money and bonds in the like proportion from time to time as and when payments on account thereof have been or shall be made to the defendant by the municipality of Jassy.' It is not disputed that this award is binding upon both parties, and will fall to receive effect in any accounting between them.

"It appears that on account of the war between Russia and Turkey the asphalt works contemplated in the original contract as to be executed in the year 1877 were suspended, and no work was done that year, or very little. The Danube was blockaded and the railways were taken possession of by the Russian troops, and the Asphalte Company were unable to take the necessary materials for their work to Jassy, and the work came to a standstill till 1878. In 1878, however, negotiations were opened between the municipality of Jassy and the Asphalte Company for resuming and completing the work so far as left undone, and the result was a convention or agreement between the municipality of Jassy and Mr Callender as representing the Asphalte Company, which is dated 26th July 1878.

"It is proper to keep in mind that this convention, which I think I may properly describe as a supplementary agreement between the town of Jassy and the Asphalte Company, was entered into and concluded without the knowledge or concurrence of the present pursuers. The present pursuers were no parties to the supplemental convention, or to the negotiations which preceded it. Indeed, it appears that the pursuers did not know either of the convention itself or of the negotiations which preceded it until proof was led in the present action, when the whole arrangements were for the first time disclosed. It is necessary to keep this circumstance in view, as it has led to some difficulty in reference to the form of the present action.

"The present action was raised on 9th November 1878, and it concludes, 1st, for a sum of £296 sterling, being an alleged balance of the pursuers' commission on price received in money and bonds up to October 1876; and 2d, for a random sum of £4000 sterling in name of damages for the commission which would have been due to the pursuers as commission on work not executed as at October 1876, and also the commission on the price to be paid to the Asphalte Company for maintaining the works from 1880 to 1895. The action seems to have been raised in ignorance of the supplementary convention of 26th July 1878, and under the impression that the Asphalte Company in breach of contract had refused to recognise the pursuers' claim for commission after the suspension of the works in 1877.

"Two main questions have been raised—(1) Whether any and what balance of commission is due to the pursuers upon prices received for work executed down to the end of 1876? and (2) Whether the pursuers have any further claim for commission for price received for works executed under the new or supplemental convention of 26th July 1878? A third question at one time seems to have been mooted—Whether the pursuers are entitled to commission upon sums which the Asphalte Company will receive under the contract for the maintenance of the streets from 1880 to 1895, the execution of which contract has not yet commenced? It was stated at the bar, however, that this last question as to the maintenance contract is no longer in dispute between the parties, the defenders not resisting their obligation to pay commission on the maintenance contract if and when they receive payment of the sums stipulated therein."

In August 1877, when the accounts were balanced, the defenders had paid the pursuers a

considerable sum as commission both in cash and bonds of Jassy, but they had received a much larger proportion of cash than one-fourth. The pursuers alleged that this was in consequence of the inability of the defenders to pay in bonds, as they had pledged all they had, and that the defenders paid in money to suit their own convenience. The pursuers had been overpaid in cash in August 1877 £3382, 12s. 7d., and they were entitled to receive bonds of the par value of £3678. They therefore claimed the difference between these two sums, £296, which was the first sum claimed by them in this action. It appeared, however, that the Jassy bonds had never attained to par value, their highest value having been 75 or 80 per cent. The defenders therefore maintained that the pursuers had been fully paid, and could not claim the difference in money between the actual and the par value of the bonds, and they expressed themselves willing to hand over to the pursuers bonds to the par value of £3678 upon receiving £3382, 12s. 7d. in cash.

The second sum claimed was, as already stated, £4000 damages for breach of contract, as the defenders maintained that the contract was at an end, and refused to pay commission after the outbreak of the war. The question came to be, Whether the pursuers were entitled to commission on the work done under the convention of July 1878?—the defenders alleging that the original contract came to an end in October 1877, when the works were stopped by the war; that the pursuers had nothing to do with the convention of July 1878, and were therefore not entitled to commission on work done under it. The convention of 12th July 1878 proceeded upon this narrative—"The undersigned . . . taking into account the events of the past year 1877, which prevented the completion of the greater part of the works of paving of that year, and wishing that these works be completed in the future, have agreed as follows—(1) All the conditions of the primitive convention which are not contrary to the present convention remain in force. (2) All the works of paving which remained to be completed by the primitive convention of the 22d May 1873, and after the modifications which were made subsequently by the votes of the Communal Council—that is to say, the whole of the works which have remained unexecuted in the 5th campain, and the last one of the concession, will be executed in the campain of the present year and the four subsequent years, in the manner as will be shown below." As already stated, the pursuers were ignorant of this convention.

Thereafter proof was led before the Lord Ordinary (CRAIGHILL), who subsequently pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators on the closed record, productions, and proof, and having considered the debate and whole process—In the first place, and with reference to the conclusion for payment of £296, Finds as matter of fact (1) That by the agreement between the pursuers and the defenders the pursuers became entitled to receive from the defenders, and the defenders became bound to pay to the pursuers, commission at the rate of five per cent. on the proceeds of the contract between the defenders and the municipality of Jassy, referred to on the record, for paving the streets and footways of Jassy with asphalt; (2) That this commission, like the sums under the contract between the defenders and the municipality of Jassy, was to be paid one-fourth in cash and three-fourths in bonds of the municipality, as the work contracted for by the defenders proceeded and the contract price was received; (3) That this condition as to the manner in which the pursuers' commission was to be paid has not been altered, but remains obligatory both on the pursuers and on the defenders; (4) That as at 21st August 1877 there had been paid to the pursuers in cash, beyond the one-fourth of the commission which was to be paid in cash, £3382, 12s. 7d.; and on the other hand, there had been short delivered of the bonds in which the other three-fourths of the pursuers' commission was payable, bonds of the nominal or par value of £3678; (5) That these bonds of the municipality of Jassy were never of par value, and 80 per cent., which is now their full value, is more than could have been obtained for them at the times when the payments which have been made in cash were received by the pursuers from the defenders; (6) That the overpayments in cash and underpayments in bonds (dealing with the bonds still undelivered as of the value of 80 per cent.) has not been the cause of loss to the pursuers; and (7) That accounts between the pursuers and the defenders falling to be settled on the foregoing data, neither the sum of £296 sued for, nor any other sum, was at 21st August 1877, or is now, due by the defenders to the pursuers: Finds as matter of law, the facts upon this part of the case being as above set forth, that the defenders are entitled to be assoilzied from the conclusions for the payment of the £296 sued for; Therefore assoilzies the defenders from that conclusion of the summons, and decerns: In the second place, and with reference to the conclusion for £4000 of damages for alleged breach of the agreement between the pursuers and the defenders in and subsequent to 1877, Finds as matters of fact, so far as regards the construction of the works contracted for—(1) That the contract between the municipality of Jassy and the defenders, referred to on the record, came to an end on 1st October 1877, though the works contracted for were not fully completed; (2) That war as *une force majeure* was specified in said contract as one of the things the occurrence of which should be an excuse for non-performance of work undertaken; (3) That the war between Russia and Turkey which broke out in the spring of 1877 interfered with the execution of the work remaining to be performed in that the last year of the contract, the consequence being that only a small part of that work was preformed; and (4) That what was not performed became, along with other work, the subject of a new contract concluded between the defenders and the municipality of Jassy in May 1878—the rates contracted for under the old contract being substantially the same as those for the same work under the new contract: Finds as matter of law, the facts being as above set forth, that the pursuers are entitled to commission only on the proceeds of the work actually performed in the season of 1877, and are not entitled either to commission on the proceeds of the work done or to be done under the new contract, or to damages for work contracted for in the old con-

tract not having been performed before that contract came to an end: In the third place, and as regards commission on the sums to be received by the defenders for the maintenance of streets or roads and footways in asphalt—Finds it admitted by the defenders that the pursuers are entitled to commission at the rate of five per cent., payable wholly in cash, on the payments to be received by the defenders from 1880 to 1895, under the first of the contracts above mentioned, for the maintenance of streets or roadways and footpaths constructed in asphalt under that contract prior to its expiry on 1st October 1877: Appoints the cause to be enrolled, that these findings may be applied and an interlocutor exhausting the cause be pronounced, reserving in the meantime all questions of expenses."

The pursuers reclaimed, and argued in regard to the second point—There was here no new contract at all; the convention of July 1878 was merely an agreement as to taking up again the old contract which had, on the best view of it for the defenders, been temporarily put an end to by the war. Here the ravages of war were recognised as an exception in favour of the defenders. They afforded an excuse if the works were not executed at the specified time. It followed, therefore, that the parties had in view the postponement of the works, and that the contract did not come to an end when the works were stopped in 1877. They did not, however, admit that the defenders were entitled to stop the works on account of the war. The country in which they were working was not itself ravaged by war, and it was only in that case that war had been regarded as a *force majeure* entitling a contractor to put a stop to a contract. They submitted therefore that the defenders were not entitled to stop the works, and that they, the pursuers, were entitled to damages for breach of contract because they did. Alternatively, they submitted that the new convention was merely the old contract in a new shape, and that they were entitled to their commission on the work done under it, as stipulated for in the original contract.

Argued for the respondents on the second point—The contract here on the part of the pursuers was a contract of risk, and the remuneration was very high on that account; they had been paid a large sum for very little work, and would suffer no hardship if they got nothing more. The war here extinguished the contract, for it made it impossible for the contractors to carry out the work and for the municipality of Jassy to pay for it. Though Roumania was not the theatre of war, it was a belligerent, and was occupied by the Russians, and all means of carriage—and chiefly the Danube—were shut off. [Lord Justice-Clerk—You may assume that the war made it impossible to carry on the contract.] The war therefore was one of the risks run by the pursuers, and they must suffer from it. Suppose the contract had not been a paying one, and the contractors had stopped it, the pursuers could not have compelled them to carry it out; they were only to get commission on money actually received. The contract was absolutely brought to an end by the war, for when in an executory contract of this kind circumstances altered so that it would be inequitable to force fulfilment of it, it was brought to an end.—*Geiful* v. *Smith and Another*, Jan. 26, 1872, L.R., 7 Q.B. 404; *Jackson* v. *Marine Insurance Co.*, Dec. 1874, L.R., 10 C.P. 125. If, therefore, the first contract was put an end to, there could be no good claim under the second, for it was a thing by itself with which the pursuers had nothing to do. The principle governing such cases as the present was that unless the order given or the contract obtained was the direct result of the introduction no claim arose to the introducer—*Moss* v. *Cunliffe & Dunlop*, Mar. 20, 1875, 2 R. 657. There was here no *jus quæsitum*—*Blumer & Co.* v. *Scott & Son*, Jan. 16, 1874, 1 R. 379. A commission agent such as the pursuers here had nothing to do with a contract entered into by the principal on his own account without reference to the agent—*Ex parte Maclure*, L.R., 5 Chan. App. 737, and *M'Intyre* v. *Belcher* there; *Rhodo* v. *Forwood*, L.R., 1 App. Ca. 256.

The opinion of the Court was delivered by

Lord Gifford—[*After stating the facts ut supra*]—The first question is as to commission on prices received for work done up to the end of 1876, and on this question I agree in the result reached by the Lord Ordinary. I think the pursuers have been fully paid all the commission which they could claim on the work done and paid for up to the end of 1876.

The real question here arises from the circumstance that the commission was payable one-fourth in cash and three-fourths in bonds by the municipality of Jassy. It appears that the Jassy bonds have never been in the market at their par value. They have never exceeded in the market the value of 80 per cent.—that is, they have always been at least 20 per cent. under par—and the defenders maintain that as the pursuers were bound to take payment of three-fourths of their commission in these bonds, they must now be settled with upon that footing.

It now appears that the payments to the pursuers to account of their commission have been made to a much larger extent than one-fourth in cash, and only to a small extent in bonds, and the pursuers' contention is that by the course of dealing the original stipulation about the payment of the commission to the extent of three-fourths in bonds has been departed from, and that the defenders are now bound to pay the whole commission in cash, at least so far as bonds have not already been delivered. In support of this contention the pursuers plead that the defenders incapacitated themselves from delivering bonds by pledging all the bonds they had and raising money thereon for their own purposes.

I agree with the Lord Ordinary that the pursuers' contention is not well founded. I think nothing has taken place which entitles the pursuers to demand that their commission shall be paid wholly in cash, or otherwise than in the mode covenanted and agreed to by both parties—that is, one-fourth in cash and three-fourths in bonds. The defenders are ready to deliver bonds to the pursuers, and have offered to do so if the pursuers prefer actual bonds to being allowed the market value thereof, which never exceeded 80 per cent. This offer seems reasonable. I think it is of no consequence that the pursuers have hitherto received more cash than they were entitled to claim, so that they have been largely overpaid in cash and underpaid in bonds. All the payments having been in express terms "payments to account," the final accounting in terms of the contract was

always open and was always reserved. The final balance was never struck between the parties, and the accounting now falls to be gone into in terms of the original agreement. If the pursuers now receive, either in cash or in bonds, the full amount of their commission, reckoning three-fourths of the commission in bonds at the highest value which the bonds ever attained, I think the pursuers can ask no more. Even yet the pursuers may have bonds if they wish them instead of their market value, and they have suffered no prejudice in not getting them sooner. The bonds never stood at a higher value than at present. To pay the pursuers in bonds at par would be to give them 20 per cent. more commission than that for which they stipulated. Now, on this footing it is admitted that no balance of commission is due to the pursuers for the work executed and paid for prior to 1877. I am therefore of opinion that the first seven findings contained in the Lord Ordinary's interlocutor are well founded, and that therefore the Lord Ordinary has rightly assoilzied the defenders from the first conclusion of the summons, being the conclusion for £296 sterling.

The next question, however, is attended with much more difficulty, and I could have wished that some of the facts bearing upon it had been more explicitly cleared up in evidence. The question is, Whether the pursuers are entitled to commission on the price received by the defenders for asphalt work done subsequent to 26th July 1878, under the convention of that date which I have already called the supplementary agreement between the town of Jassy and the Asphalte Company.

The plea of the defenders upon this part of the case is that the only commission which they agreed to pay to the pursuers was commission upon the original contract of 22d May 1873, that being the only contract entered into through the pursuers' agency, and on which the pursuers earned a commission. The defenders urge, and with some plausibility, that that original contract of 22d May 1873 came to an end, and was terminated, if not by the war, by the outrunning of the contract itself. By the contract provision was made for *vis major* or the ravages of war, and it is said that by the consent of both parties following upon the war the contract was terminated. As to this, however, the evidence is not very satisfactory. The plea that the contract came to an end by the expiry of the period fixed for its completion—that is, 1st October 1877—was urged with more plausibility, and the defenders contended that the pursuers have no concern with and no interest in the separate and new contract into which the defenders entered with the town of Jassy on 26th July 1878. It is urged that the very fact that this new contract was entered into without the knowledge of the pursuers proves that the pursuers had nothing to do with it—that they were not in any sense promoters or procurers thereof, and that they are not entitled either in law or in equity to any commission thereon.

I cannot assent to these arguments, which were very ingeniously urged for the defenders. In the first place, even supposing that the war between Russia and Turkey indirectly prevented by blockade or otherwise in 1877 the execution of the original contract (and the evidence on this point is very satisfactory), I do not think that this interruption operated as a termination or extinction of the whole contract. It only at the very utmost suspended its execution, and when the war ceased and the interruption was removed, then, unless the circumstances had entirely changed, the contract fell to be resumed. The general rule is that war suspends, but does not necessarily annul, civil contracts between private parties. But then looking to the terms of the contract itself, I think that the war between Russia and Turkey, assuming it to have constituted a *vis major* interrupting the work, was really provided for by the stipulation of the parties themselves. The contract expressly bears that "*force majeure bien justifiée*," the ravages of war, extraordinary inundations, and certain cases of shipwreck, might be pleaded as an excuse by the contractors for not completing their work within the stipulated time. But this is a mere excuse for delay in the execution, and not an annulment of the whole contract.

But the complete answer to the defenders' plea is, I think, to be found in the terms of the convention of 26th July 1878, which I again take leave to call a mere supplemental agreement for carrying out the original contract of 1873, and for providing for the change of circumstances which had arisen in consequence of the war of 1877, and in consequence of the delay thereby occasioned.

Turning, then, to the convention of 26th July 1878, I find it proceeds upon the narrative that "the events of the past year have prevented the completion of the greater part of the works of paving of that year," and on the further narrative that the municipality of Jassy "now wish that these works be completed in the future." This narrative clearly shows that the work which was to be resumed was just the work stipulated for in the original contract. The parties were not making a bargain for any new or different work.

Then the first article of the supplemental convention is that "all the conditions of the primitive convention which are not contrary to the present convention remain in force." It seems to me that so far from this being a new agreement, it is in express terms a continuation and confirmation of the old, the only variations being those rendered necessary by the delay which had occurred.

The second article provides that the works which have remained unexecuted in the fifth campaign—that is, in the campaign or working period of the year 1877—shall be executed in the campaign of the present year, viz., 1878 and the four subsequent years, and then provision is made how this is to be done. I think it plain that this is nothing more than a prorogation of the time for executing the works originally contracted for.

The remainder of the supplemental convention is occupied in providing for the details of payment for the work so postponed, and in arranging for the commencement of the contract of maintenance, which is just the contract contained in the original agreement. The only variation which could be pointed to relates to the paving of the Strada Carole, which apparently is to be paved in granite instead of asphalt, but this is just a dispensing with part of the asphalt work,

which the town of Jassy had power to do even though no interruption had taken place and although the war had never happened. The defenders will get the benefit of this alteration, for under the decision of the arbiters they have only to pay commission on the price of asphalt work and not of granite work.

The result is that I have come to be very clearly of opinion that the agreement or convention of 26th July 1878 is not a new contract with which the pursuers had no concern, but is simply a continuation or prorogation of the original contract providing for substantially the same work at substantially the same prices, and accordingly I am of opinion that the pursuers are entitled to commission at 5 per cent. upon the price of asphalt work done under the second contract in exactly the same way as they were entitled to commission upon the price of work done under the original contract of 1873. In truth it is the very same work—it is not in the least degree new or even additional work, and in strict language there is no new contract, but only a continuation with very slight modification of the old one.

I have already alluded to the difficulty which arises from the form of action. The pursuers' only conclusion is a conclusion of damages, and there is difficulty in giving under this conclusion the specific commission to which I think the pursuers are entitled. Looking to the whole circumstances, however, I have come to be of opinion that the pursuers may have their remedy under the present action. The defenders have repudiated liability altogether, and have maintained to the last that the work done was not done under the contract on which they undertook to pay commission. I think this was a repudiation or breach of contract, and as the defenders withheld all information as to the continued work, the pursuers were excusable for resorting to a claim of damages. The defenders were to blame for their absolute concealment of the supplemental agreement, and of the work done under it, and I should be very unwilling to remit the pursuers to a new action when without the slightest injustice I can give them their remedy under the existing action.

I am of opinion, therefore, that the Lord Ordinary has erred in finding that the pursuers are not entitled to commission on the proceeds of asphalt work done or to be done under the new contract, and that this part of his interlocutor should be recalled. I would suggest that it should be found that the pursuers are entitled to commission on the price of all asphalt work done under the convention of 1878 in the same way as if it had been done under the original contract of 1873, and as the defenders have not furnished any accounts showing the amount of this commission, I think we must remit to the Lord Ordinary to ascertain the amount and to decern therefor.

The liability for commission on the maintenance contract being admitted, the Lord Ordinary's finding to that effect may stand.

I have only one further observation to make, and it is in reference to what was frequently urged upon us from the bar—that the commission stipulated for by the pursuers was exorbitant and unreasonable, and that consequently the contract should be read strictly against the pursuers, who are seeking enormous *lucrum*. Now, the commission was certainly very large, and, so far as I can see, quite disproportioned to the work done or the risk run. Personally, and speaking solely for myself, I do not like, and I view with great suspicion, a stipulation for commission like that disclosed in the case before us. It is a commission not disclosed to and not known by the party who is to pay it. The town of Jassy, I think I may say, had no conception that besides the price of their asphalt and a full profit to the Asphalte Company they were to pay over and above five per cent., amounting to many thousand pounds, to the present pursuers. I say the town of Jassy is to pay this commission, for nothing is more certain than that the Asphalte Company, by whose hands the payment was to be made, added it on to the contract price. I am far from objecting to full and fair commissions for services rendered or for risks run, but I think such commissions should be openly charged and fully known to the party who is to pay them, and ought not to be wrapped up and hidden in a slump price, or in an enhanced rate of price, in which the employer cannot distinguish what is for commission and what is for work. I have sometimes wished that all commissions should be made illegal which are not fully and *ab ante* disclosed to all concerned. But these considerations have no applicability to the present case. The town of Jassy is not before us, and to refuse to the pursuers the commission which the defenders expressly agreed to pay them would do no good to Jassy, but would only permit the defenders to put into their own pockets not only the profit which they calculated on on the contract, but the commission which they added for behoof of the pursuers.

The Lord Justice-Clerk and Lord Ormidale concurred.

The Court pronounced an interlocutor adhering to the interlocutor reclaimed against, so far as regarded the first seven findings in point of fact contained therein, and of new assoilzied the defenders from the first conclusion of the action, being the conclusion for £296 sterling and interest, and decerned: *Quoad ultra* recalled the interlocutor of the Lord Ordinary: Found that under the agreement between the pursuers and defenders the pursuers were entitled to receive from the defenders a commission of 5 per cent.—one-fourth in cash and three-fourths in bonds of the municipality of Jassy—not only for the price of all asphalt work executed under the original agreement of 1873, but also on the price of all asphalt work done or to be done under the convention of 26th July 1878, in the same way as if the same had been executed under the original contract of 22d May 1873; and remitted the cause to the Lord Ordinary to ascertain the amount of said commission, and to proceed as might be just: Of new found it admitted by the defenders that the pursuers were entitled to commission at the rate of 5 per cent., payable wholly in cash, on the payments to be received by the defenders from 1880 to 1895, under the first of the contracts above mentioned, for the maintenance of streets or roadways or footpaths constructed in asphalt under that contract prior to its expiry on 7th

October 1877: And reserved all questions of expenses both before the Lord Ordinary and in the Inner House.

Counsel for Pursuers (Reclaimers)—Campbell Smith — Millie. Agents — M'Caskie & Brown, S.S.C.

Counsel for Defenders (Respondents)—Rutherfurd—Darling. Agents—Mackenzie & Kermack, W.S.

Saturday, November 1.

FIRST DIVISION.

[Lord Adam, Bill Chamber.

WATT BROTHERS & COMPANY *v.* SUEAD FOYN AND MANDATORIES.

Process — Sheriff Court — Suspension of Sheriff Court Decree where Appeal abandoned through Failure to Print—Court of Session Act 1868, *sec.* 71—*Act of Sederunt, March* 10, 1870, *sec.* 3, *sub-sec.* 5.

By the 71st section of the Court of Session Act 1868 it is enacted—"In case the record and other papers ordered to be printed shall not be printed and boxed by the appellant, or in case he shall not move in the appeal, it shall be lawful for the Court, on a motion by any other party in the cause, either to dismiss the appeal with expenses and to affirm the interlocutor of the Inferior Court, or to grant an order authorising the party moving to print and box the record and other papers aforesaid, and to insist in the appeal as if it had been taken by himself." The Act of Sederunt 10th March 1870, coming in place of the above provision, enacted that "on the expiry of the said period of eight days after the appeal has been held to be abandoned as aforesaid" (*i.e.*, by neglect to print within 14 days), "if the appellant shall not have been reponed, and if the respondent does not insist in the appeal, the judgment or judgments complained of shall become final, and shall be treated in all respects as if no appeal had been taken against the same; and the Clerk of Court shall forthwith retransmit the process to the Clerk of the Inferior Court."

Where a process had been retransmitted to the Clerk of the Inferior Court in terms of that enactment—*held* that it was incompetent to bring the case under review by way of suspension.

Suead Foyn, whale fisher, Tonsberg, Norway, and White & Bernsten, Glasgow, his mandatories, raised an action in the Sheriff Court of Lanarkshire against Watt Brothers & Company for £27, 16s. 7d. The Sheriff-Substitute (GALBRAITH) granted decree for the amount, and the Sheriff (CLARK) adhered. The pursuers appealed on 5th March 1879, but no prints were lodged in the appeal, which was in consequence held to have been abandoned; and as the appellants did not apply to be reponed, the process was on the 2d April retransmitted to the Sheriff Court in terms of the 5th subsection of the 3d section of the Act of Sederunt 10th March 1870, quoted above. In addition to the original decree, the Sheriff-Substitute on the 24th February 1879 decerned against Watt Brothers & Company for the expenses in the Sheriff Court, and on the 2d May for the sum of £3, 3s. in respect of the abandonment of the appeal. The pursuers extracted these decrees and charged the defenders to make payment thereof. Watt Brothers & Company then presented this note of suspension to the Lord Ordinary on the Bills.

The respondents pleaded, *inter alia*—"The action being an attempt to obtain review on the merits of a decided cause, is incompetent."

The Lord Ordinary on the Bills (ADAM) pronounced an interlocutor refusing the note of suspension. He added this note:—

"*Note.*—The respondents raised an action against the complainers in the Sheriff Court of Lanarkshire, in which the Sheriff-Substitute on 27th July 1878 decerned against the complainers for the full sum sued for with interest and expenses. This interlocutor was adhered to, on appeal, by the Sheriff by interlocutor of date 24th January 1879.

"The case, therefore, was finally decided against the complainers in the Sheriff Court.

"On the 5th March 1879 the complainers appealed against these judgments to the Court of Session.

"The complainers did not, in terms of the 3d section of the Act of Sederunt, 10th March 1870, within fourteen days after the process had been received by the Clerk of Court, print and box the note of appeal, record, &c., and they had not obtained the interlocutor dispensing with the printing of them. They were therefore held to have abandoned their appeal. They did not apply to be reponed to the effect of entitling them to insist in the appeal. The Clerk of Court therefore, in terms of the 5th subsection of the 3d section of the Act of Sederunt, retransmitted the process to the Clerk of the Inferior Court.

"The Sheriff Court interlocutors were thereafter extracted, and the complainers charged thereon. The object of the present suspension is to have these interlocutors submitted to review.

"The only reason stated why the appeal was not insisted in is, that the prints were omitted to be lodged *per incuriam*.

"The Lord Ordinary is of opinion that the suspension is incompetent in respect of the provisions of the 5th subsection of the foresaid Act of Sederunt. It is thereby declared that on the expiry of eight days after the appeal shall be held to have been abandoned, if the appellant shall not have been reponed, the judgment or judgments complained of shall become fiual, and shall be treated in all respects as if no appeal had been taken against the same. It cannot be meant that the judgments complained of shall become final as regards any review in the Sheriff Court, because they were final there already, and therefore the meaning must be that they shall become final as regards review in the Court of Session. It was maintained, however, that it was intended that they were to be treated in all respects as if no appeal had been taken against the same, and that if no appeal had been taken, review by suspension would have been competent. Suspension in that case would no doubt have been competent, but the Lord Ordinary thinks the words must be read in conformity with the leading clause of the section, that the judgments shall become final,