

Thursday, December 16.

FIRST DIVISION.

[Sheriff Court at Glasgow.

WALKER, FRASER, & STEELE v.
FRASER'S TRUSTEES.

Agent and Principal—Estate Agent—Commission—Right to Commission—Test of Agent's Right to Commission on Sale of Property.

In 1898 a firm of estate agents was instructed by F. to sell the estate of B. In compliance therewith they in 1903 furnished particulars of the estate to S. Owing to the price then asked, however, (£38,000) no sale was effected, and matters fell into abeyance till 1906, when negotiations were resumed between S. and the firm, who in 1906 and 1907 again supplied S. with full information as to the property. Throughout the negotiations S. made it a point that his name should not be disclosed to the seller, and accordingly the firm did not do so. In 1907 S. inserted in a newspaper an advertisement for estates of the kind desired, to which F. (the seller) replied. S. bought the estate in December 1907 for £31,000.

In an action at the instance of the agents against the seller for commission, the defender pleaded that the sale had not been due to the pursuers' intervention or to any services rendered by them in connection therewith.

Held that as the pursuers had contributed in a material degree to the sale they were entitled to commission, and decree *granted* as craved.

Walker, Fraser, & Steele, property agents, Glasgow, brought an action against John Fraser, manufacturer, Glasgow, in which they sued for £310, being commission at the rate of 1 per cent. on the purchase price (£31,000) of the estate of Balfunning, sold by the defender to a Mr Scott in the end of 1907, the sale of which they alleged had been effected through their exertions.

[Mr Fraser, the defender, having died, his testamentary trustees were on 10th June 1909 duly sisted as defenders.]

The defenders pleaded, *inter alia*—“(3) The defender not having dealt with the pursuers on any footing in the negotiations and sale of the estate, and the same not having been sold through their intervention, the defender is not liable to them in any commission on the price, either by introducing a purchaser to him or otherwise. (4) The pursuers not having rendered any services to the defender in connection with the sale of said estate, he is not liable to them in any remuneration whatever, and he should be assoilzied with expenses. (5) In any event the sum claimed is excessive.”

On 28th May 1909 the Sheriff-Substitute (FYFE) pronounced the following interlocutor—“Finds (1) that pursuers are property agents in Glasgow; (2) that they publish periodically a list of properties for sale or

to let; (3) that in 1898 defender owned an estate called Balfunning, which he desired to sell; (4) that he furnished pursuers with particulars and authorised them to sell it if they could find a purchaser; (5) that this authority was never withdrawn; (6) that pursuers, by notice in their printed list and by answering inquiries, brought the estate before the public as for sale; (7) that in particular they first” (*this erroneous*) “brought it under the notice of Mr W. R. Scott; (8) that in 1898 defender wanted not less than £38,000 for the estate, but no inquirer was willing to give that price; (9) that about ten years later the said Mr W. R. Scott bought the estate from defender at the price of £31,000; (10) that 1 per cent. upon the sale price is the usual rate of commission in the absence of special contract: *Finds in law* that pursuers, having been employed to sell the estate of Balfunning, and having first” (*this erroneous*) “brought it to the notice of the party who ultimately purchased it, are entitled to commission as sued for: Therefore decerns as craved.”

The following *narrative of the evidence* is taken from Lord Dundas' opinion—“There is, I think, no room for doubt as to the original employment of the pursuers on behalf of the defender early in 1898 to sell the estate. The defender's own evidence on the point is somewhat evasive. ‘(Q) You were aware that the pursuers were trying to sell the estate of Balfunning?—(A) I was aware that they had the particulars of it. . . . (Q) And as a matter of fact, had it really gone out of your mind’ (*i.e.* by 1907) ‘that the pursuers were dealing with it?—(A) I had not appointed them agents at all. I only gave them particulars, and I gave particulars to a London agent too, who might have come down on me in the same way.’ But the employment is clearly proved by the evidence of the partners of the pursuers' firm, and of the defender's son Mr A. R. Fraser, and by the documents produced; and the agency thus constituted was never recalled prior to the sale of the estate to Mr Scott in the end of 1907. There is also, I think, no doubt that the pursuers did a great deal all along to try to sell Balfunning, offering it to customers when occasion arose and publishing it regularly in their printed annual register. Their first relation with the Scotts was, as I have said, when Mrs Scott shortly after her return from abroad wrote on 30th April 1903 asking for particulars of Dalnair. The pursuers in replying sent particulars, not only of Dalnair but of four other estates, one of which was Balfunning. Mr J. W. Fraser, of the pursuers' firm, depones that after that there were frequent meetings with Mr and Mrs Scott in the office; that Balfunning was brought before them; and that ‘they thought very favourably of Balfunning, but they thought the price too much. It was simply a question of the price.’ The minimum price, I should mention, which the defender had instructed the pursuers to ask was £38,000. So far, then, it is plain enough that the pur-

suers, acting as authorised agents for the defender, were the means of introducing the estate to Mr Scott's consideration, affording him full information about it and apparently arousing in him (apart from price) a favourable impression of its merits. But the negotiations at that time came to nothing, and during the next three years or so there seems to have been little communication between the Scotts and the pursuers. Mr Steele, however, deposes—'I cannot say if there were no communications of any kind, verbal or in writing, between me and Mr Scott or between my firm and Mr Scott from the time we sent the particulars to Mr Scott in 1903 down to the letter of 17th July 1906. I am quite certain there were communications, and I am quite certain there were calls from Mr Scott;' and Mr Scott says—'During the interval between 1903 and 1906 I was in communication with the pursuers about Dalnair and other places.

"But in July 1906 active relations were resumed, and there were meetings between the pursuers and Mr Scott at which Balfunning was prominently to the fore. Mr Scott admits that after one of these meetings 'Mrs Scott wrote to the pursuers for full particulars of Balfunning. It is very likely that I got full particulars of Balfunning at that time and also other times before that; Balfunning was frequently brought before my notice.' That Mrs Scott's request for full particulars was complied with appears from the pursuers' letter of 11th July 1906 to Mr A. R. Fraser, asking for 'a note of the detailed rental of this property,' which that gentleman supplied to them, and their letter of 17th July forwarding the information to Mrs Scott. We have also her letter to the pursuers of 20th July (*asking size of house, lodges, gardens*), and their reply of 21st (*sending note of accommodation*). Mr Steele gives an account of what passed at an important meeting in his office, at which his partner Mr J. W. Fraser and Mr Scott were present. 'We discussed the property, and Mr Scott stated that he thought it was too dear. We asked him to make an offer for it. He asked us if we had any other places, and we told him he would not get a more desirable place within a similar radius of Glasgow; he would have to go further away. He then asked Mr Fraser, who was carrying out the negotiations for him, to get further information for him, and Mr Fraser got that. He told us it was a little too dear and we asked him to make an offer—which remark nearly every purchaser makes.' Mr J. W. Fraser's evidence is to a similar effect. He says—'We were discussing the estate of Balfunning, and Mr Scott said it was undoubtedly a fine estate. He seemed to think the price was too much, and we asked him to make an offer. I was quite sure that if Mr Scott would make an offer we would be able to do business.' Mr Walker, one of the pursuers' firm, speaks to a meeting about August 1906 between himself and Mr Scott in the latter's office. 'I went to Mr Scott to see if he would go

in for Dalnair. I then again pressed him closely to go in for Balfunning. He admitted that it was a good place, and I asked him if he would not care to go and see it. He said that as he had already got a great amount of information from us he knew all about it. He said the price was really too high. He said that by the time Mr Fraser had got an idea how much the place was worth, he would probably consider the matter. . . . He said Mr Fraser must take a more reasonable view of the value of his property, and meantime he would keep it constantly before him, and he would be glad to make an offer for it. I told him that while £38,000 was our last figure, that as it had been in the market for a long time a lower figure would be taken if he would make an offer. It was just on general knowledge of the office that I made that offer.' It thus appears that in and about July 1906 Mr Scott had for the second time, at his own request, full information about Balfunning brought before him by the pursuers, and was invited by them to make an offer at some lower figure than that at which their instructions were to sell it. Looking to what ultimately happened, I do not think it unreasonable to suppose that if he had chosen to make an offer it would (or might) have resulted in a sale, in which case the pursuers would, I apprehend, beyond all question, have been entitled to a commission. I should here add that the pursuers were not in a position to mention Mr Scott's name to the defender, because Mr Scott admittedly made it a point that his name should not be disclosed.

"The next development of the matter was that in November 1907 Mr Scott again applied to the pursuers for a list of places likely to suit his requirements, and received from them on 12th November such a list, in which, for the third time, Balfunning was, amongst others, brought to his consideration. Taking matters as they stood in November 1907, and if the above was all the evidence in the case, I confess I think it would be difficult to affirm, or to infer, that if Mr Scott bought the estate of Balfunning, as he did before the close of 1907, all this energetic action by the pursuers as the defender's accredited agents for sale was absolutely nugatory, and in no way contributed to bring about the purchase.

"The remaining facts of the case can be briefly stated. On 16th October 1907, *i.e.*, some weeks before his latest application to the pursuers, Mr Scott inserted in the *Glasgow Herald* an advertisement for estates of the general description which he desired. The defender having seen this advertisement, wrote to Mr Scott, who he says 'never mentioned the pursuers' name to me, nor did he show any prior knowledge of the estate of Balfunning. . . . I got a letter from Mrs Scott asking me to send particulars. . . . I wrote Mrs Scott on 2nd November 1907 . . . giving full particulars.' It seems odd that Mrs Scott should have thought it necessary to ask for 'particulars' of Balfunning

seeing that these had, as already narrated, been on two previous occasions, in 1903 and in 1906, supplied to her by the pursuers. She may have forgotten these facts. But she says in her evidence—'I never got a detailed account of what was the rental, the farms, or anything' (which she certainly did). 'When Mr Scott put the advertisement into the *Herald* in the autumn of 1907 we got a great number of replies. We picked out Balfunning, because most of the replies were for places in the east of Scotland, nearer Edinburgh. . . . (Q) When you picked out Balfunning did you recollect that you had asked for the particulars before?—(A) I recollect it was the same place.' Mr and Mrs Scott visited Balfunning and arranged with the defender to purchase it at the price of £31,000. On 17th December 1907 Mr Scott wrote to the pursuers—'I yesterday decided and have purchased the estate of Balfunning, which I had under negotiation before I thought of Kilbride. . . . I thank you for all the trouble you have taken.' The pursuers at once replied, saying they were 'pleased to hear you have purchased Balfunning, which we have so strongly recommended to you on several occasions. We presume you would inform Mr Fraser that we had done so, so that our commission on the sale will be entirely payable by him according to the usual custom.' To this letter Mr Scott replied on 18th December—'I did not give your name to Mr Fraser, because the purchase was not carried out by means of you, nor does Mr Fraser know you had ever mentioned Balfunning to me.' I pause to repeat that the pursuers had been debarred by Mr Scott's own request from revealing his name to the defender. The letter continued—'When you mentioned Balfunning to me the price was so prohibitive that I did not give it any consideration, and this purchase is the result of negotiations with Mr Fraser some time before I called on you in reference to having another place instead of Aberdona. Mr Fraser is therefore in no way due you any commission on the sale.' After some further correspondence this action was raised in June 1908.

'The defender stated in the witness-box—'I saw Mr Scott, and he said that they' (the pursuers) 'had had nothing to do with the purchase by him of Balfunning. In consequence of that I respectfully declined to pay the commission.' Mr Scott as a witness no doubt confirmed the opinion thus stated. He says broadly—'I trace no connection in the slightest between the continual bringing before my notice of Balfunning and my ultimate purchase of it.' But I confess I do not think his evidence is very satisfactory. There is room for rather more than a surmise that he bore the pursuers' firm something in the nature of a grudge, because he thought they had 'bungled' his chance of purchasing Dalnair. He says—'I reproached them about bungling the thing. I had no personal feeling, but they missed a chance there'; and again—'I probably said some-

thing to the effect that I was disgusted with the way Mr Walker had dealt with Dalnair. I was not pleased with the proceedings in regard to Dalnair, and I told Mr Walker so himself.' I think Mr Scott was perhaps not sorry to persuade himself into the belief that the pursuers' exertions had in no way contributed to or influenced him in his ultimate purchase of Balfunning. My impression is strengthened when I find that Mr Scott's account of what he says did influence him in his purchase is based upon varying grounds, inconsistent with each other, and unsatisfying in themselves. At one part of his evidence he says—'When I went and saw Balfunning I did not give any indication that I knew about it. The only thing I may have mentioned—but I do not remember—would probably be that a lady had told me about it. That was the only reason I ever thought of Balfunning. A lady had gone to see it previous to my going to the South of France, and she told us about it. That is probably the reason why Mrs Scott wrote about a month after we got back. The price interfered with any negotiations; we made no further inquiries. That lady's recommendation led to nothing, except that it was she who influenced me in thinking of it.' Mr Scott is surely in error when he says—'we made no further inquiries,' looking to what passed in 1906; and as I have already pointed out, Mrs Scott's letter of 30th April 1903 had reference solely to Dalnair. I think it is impossible to accept the view that any information derived from the lady at Cap Martin was the only reason Mr Scott 'ever thought of Balfunning,' or that 'it was she who influenced' him 'in thinking of it.' But elsewhere in his evidence Mr Scott gives a different account of his reasons. He says that he had a good many replies to his advertisement in the *Glasgow Herald*, but 'I picked out Balfunning. (Q) You remembered that you had been nibbling at it before?—(A) I remembered that it was the only convenient place. There were a great many round about Edinburgh, and Balfunning was the only place convenient to Glasgow'; and in a later passage, 'it was its situation that influenced me.' But it is clear that the situation of Balfunning, and its convenient proximity to Glasgow, had been brought prominently to Mr Scott's notice at his meetings with the pursuers, and by the full information he obtained from them on repeated occasions. Mr Scott's alternative explanation of his true reason for concluding his purchase seems to me as difficult of acceptance as the first; and I do not think that his mere statement, already quoted, that he traces no connection in the slightest between the pursuers' continual bringing Balfunning before his notice and his ultimate purchase of it, can be taken as of much account as against the inferences which the Court would otherwise draw from the whole history of the case and of the pursuers' actings above detailed.'

The defenders appealed, and argued—The sale was not effected by the pursuers. They had not introduced the buyer to the

seller nor contributed in any way to the actual sale. *Esto* that they had at one time brought the estate to the buyer's notice, they had done no more, for the price then asked had finally put an end to the negotiations between them, and nothing they did then could be regarded as the *causa causans* of the contract. They were not therefore entitled to any commission.

Argued for respondents—The respondents had materially contributed to the sale. They had kept the estate before the eyes of the eventual purchaser for ten years. An agent was entitled to his commission for bringing about a sale even though he had not actually introduced the parties. It was enough if the estate had been purchased through their intervention—*Mansell v. Clements*, (1874), L.R. 9 C.P. 139; *Green v. Bartlett*, (1863) 14 C.B., N.S. 681 (32 L.J., C.P. 261); *Robertson v. Burrell*, (1899) 6 S.L.T. 363; *Walker, Donald, & Company v. Birrell, Stenhouse, & Company*, December 21, 1883, 11 R. 369, at 374, 21 S.L.R. 252; *Jacobs & Company v. M'Millan & Son, Limited*, March 8, 1894, 21 R. 923 (Lord Wellwood's opinion), 31 S.L.R. 523.

At advising—

LORD DUNDAS—[*Read by the Lord President*].—In this case the pursuers, a well-known firm of property agents in Glasgow, sued the now deceased John Fraser, sometime proprietor of the estate of Balfunning, in Stirlingshire, for £310, being commission at the rate of 1 per cent. on the purchase price of that estate, which he sold to a Mr Scott in the end of the year 1907. Mr Fraser's testamentary trustees were on 10th June 1909 duly sisted in his room and place; but for the sake of convenience I shall throughout allude to him as "the defender." There was no dispute at our bar as to the percentage claimed if commission is payable, but the defender pleads that no commission is due, because the estate was not sold through the pursuers' "intervention," and that they did not render him "any services in connection with the sale." The Sheriff-Substitute has decided in the pursuers' favour, and I think his conclusion is right. He appears to have fallen into a slight inaccuracy when he says in his 7th finding in fact and in his finding in law that the pursuers *first* brought the estate to Mr Scott's notice; for the evidence discloses that he first heard of Balfunning in March 1903 from a lady whom he and his wife met at Cap Martin. It seems plain enough, however, though I shall have to revert later to Mr Scott's evidence on the point, that this lady's information, whatever it was, had nothing to do with his ultimate purchase of the estate, because Mrs Scott on returning to Scotland with her husband wrote (at his request) on 30th April 1903 to the pursuers for particulars, not of Balfunning, but of another estate called Dalnair. The Cap Martin episode may therefore for the present be dismissed from view.

As I have said, the decision of the learned Sheriff-Substitute is, in my opinion, sub-

stantially well founded. We were referred to a number of cases in this branch of the law and to judicial opinions and dicta. Shortly put, I think the test is whether or not the ultimate sale of Balfunning was brought about, or materially contributed to, by actings of the pursuers as authorised agents of the defender. Actual introduction of the purchaser to the seller is not a necessary element in a case of this sort; it is enough if the agents introduce the purchaser to the estate, and by their efforts contribute in a substantial degree to the sale. A careful consideration of the evidence leads me to hold that the pursuers have sufficiently complied with the test indicated. . . . [*His Lordship reviewed the evidence, v. supra.*] . . .

It was through the pursuers that Mr Scott first really got into touch with this estate, and got full information and particulars about it; and that they did not effect an actual introduction between him and the defender was only due to the facts that Mr Scott did not permit them to disclose his name in any way, and that he did not choose, at the pursuers' invitation, to submit an offer. It seems to me that the facts of this case bring it well within the region in which property agents have been found entitled to a commission upon a resulting sale. I think the fair inference to be drawn by the Court, viewing the matter as a jury, from the evidence, is that the pursuers' exertions, as duly authorised agents in the matter for the defender, did to a sufficient extent contribute to the ultimate purchase of the estate by Mr Scott. We should therefore, in my judgment, give decree for the pursuers, and substantially affirm the interlocutor of the learned Sheriff-Substitute, though the form of some of his findings may be put in more strictly accurate language.

LORD PRESIDENT—I concur.

LORD KINNEAR—I have had an opportunity of reading Lord Dundas' opinion, which has just been read by the Lord President, and I entirely concur in it.

LORD JOHNSTON gave no opinion, not having heard the case.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Vary the interlocutor of the Sheriff-Substitute dated 28th May 1909 (a) by deleting the word 'first' occurring in the seventh finding in fact, and substituting therefor the words 'in April 1903, July and August 1903, and November 1907'; and (b) by deleting the word 'first' occurring in the finding in law, and inserting in place thereof the word 'repeatedly'; and (c) by inserting after the words in said finding in law 'purchased it' the words 'contributed in a material degree to the sale and therefore': Affirm said interlocutor as thus varied: Repeat the findings in fact and in law therein: And of new decern against the defenders as craved: Find

the pursuers entitled to the expenses of the appeal, and remit the account thereof," &c.

Counsel for Pursuers (Respondents)—Sandeman, K.C.—R. S. Horne. Agents—Morton, Smart, Macdonald, & Prosser, W.S.
Counsel for Defenders (Appellants)—Hunter, K.C.—Hon. W. Watson. Agents—Robson & M'Lean, W.S.

Tuesday, December 21.

FIRST DIVISION.

Sheriff Court at Dingwall.

GAMAGE LIMITED v.

CHARLESWORTH.

Sale—Fraud—Bankruptcy—Seller's Right to Rescission and Restoration in Question with Buyer's Creditors—Failure to Prove Fraud Inducing Cause of Contract—Mora.

A firm of outfitters who had sold goods to A brought an action against her for their restoration on the ground that she had obtained them by fraud. The evidence showed that at the time of the sale, viz. in July 1908, A had stated to the firm's counting-house manager that she was entitled to money in September following; that this statement was reported to the firm's managing director on whose instructions the goods were then sold and delivered; that A had on a previous occasion bought goods from the same firm on credit, which she had afterwards paid for; and that when she obtained the goods in question, A, who was then subsisting solely on credit, had represented herself as the tenant of a sporting estate in the Highlands, to which the goods were sent without any further inquiry on the part of the firm. The managing director did not appear as a witness. The action for rescission was raised on 18th January 1909. On 30th January 1909 A's estates were sequestrated and a trustee appointed thereon, who was duly sisted as defender. No appearance was made for A.

Held that the defender must be assolizied—*per* Lord Kinnear, on the ground that the pursuers had, in the absence of a witness of their managing director, failed to prove that A's statement, though false and fraudulent, was the inducing cause of the contract; and *per* Lord Johnston, on the additional grounds (1) that rescission, being an equitable remedy, ought not to be granted where as here (a) the remedy would if given be inequitable to other creditors, and (b) the representations made were so unreliable in their nature that they ought not to have received any credence; and (2) that the pursuers were barred by *mora*.

Dissenting Lord Salvesen, who held

that rescission should be granted on the grounds (1) that the sale was induced by the fraudulent statement in question, and (2) that the action for rescission was raised prior to A's sequestration.

Opinion reserved (*per* Lords Kinnear and Johnston) as to whether A's supervening sequestration prevented rescission of the sale. *Opinion* (*per* Lord Salvesen) that it did not, A's trustee taking the property *tantum et tale* as it stood in A.

On 18th January 1909 Messrs A. W. Gamage, Limited, general outfitters, London, brought an action in the Sheriff Court at Dingwall against Miss Violet May Gordon Charlesworth, Flowerburn House, Ross-shire, for declarator that certain articles of furniture purchased by her in July 1908 were obtained by fraud, and that the pursuers were entitled to rescind and had rescinded the sale. There were also conclusions for redelivery of the articles sold, and for interdict against their sale or disposal. The defender's estates were sequestrated on 30th January 1909, and a trustee, Munro, appointed, who was duly sisted as defender. No appearance was made for Miss Charlesworth.

The facts were narrated thus by Lord Johnston—"... Messrs Gamage Limited, who are general outfitters in Holborn, London, sold certain articles of household plenishing to a Miss Charlesworth in July 1908. They now seek to rescind the sale and to recover the articles, on the ground that the sale was induced by Miss Charlesworth's fraud. The conclusions of their summons were to have it declared that the pretended sale of said articles by them to Miss Charlesworth on or about 24th or 25th July 1908 was induced by her fraud; that the pursuers were entitled to rescind, and had validly rescinded, said pretended sale; further, to have her ordained to redeliver the articles, which were described as "presently in Flowerburn House, Ross-shire," to them; and failing her doing so, to authorise them to remove the said articles from Flowerburn House, and meantime to interdict her selling or disposing thereof.

"The action was raised on 18th January 1909, and I do not find it alleged that the pursuers had done anything prior to that date to rescind the contract of sale. The rescission they found on is merely the adoption of the present proceedings, and therefore does not date back beyond 18th January 1909, or six months after the sale. Interim interdict was granted on 18th January 1909 along with warrant to cite, and service was made on the 19th January. There is no information on the record or in the evidence indicating when Miss Charlesworth became notour bankrupt, or when proceedings for her sequestration were commenced. But from No. 22 of process, which is a certified copy of Lord Skerrington's interlocutor of 22nd June 1909 recalling the sequestration, in respect that it was superseded by the English bankruptcy, I gather that the first order in the petition for seques-