do not think that the defenders have shown a special cause in the statutory sense why the case should not be sent to a jury.

LORD HUNTER—I agree. The case is certainly a peculiar one on the facts. At the same time, applying the principles that have been laid down in previous cases, I do not think it is possible to say that we can determine without knowing the facts in this case that the pursuer has no good cause of action against the defenders.

The substance of her case is that she was walking lawfully upon the pavement when a car was driven towards her in so reckless and careless a manner that it swayed, and she became terrified lest it should leave the car lines, get on to the pavement, and do her injury. Now that may be a difficult case on fact to establish, but upon averment it seems to me to be quite a good case upon the previous decisions. In the pursuer's averments there is a considerable amount of reference to what occurred when the tramway car after passing the pursuer actually left the rails, got on to the pavement and came into contact with a standard, and caused injury to a number of other people. Now the sight of an occurrence like that may perfectly well unnerve a person in the delicate condition in which the pursuer was. At the same time a shock occasioned by a sight of that sort where there was no real fear of injury to the pursuer herself would not in my opinion be a good ground of action against the defenders. But as I follow the record the pursuer does not found upon that occurrence as giving her a cause of action at all; and I therefore hope that in presenting her case her counsel will be very careful to keep that incident in the background and not allow it too prominent a position before the jury, who may be tempted to consider that it is a part of her case.

That appears to me to be the one difficulty in this case. But I do not think that difficulty is of such a character as to afford good ground for our refusing the pursuer the ordinary mode of trial prescribed for an accident case like hers—that is, trial by jury—and ordering a proof before ourselves. In the case of *Fowler* (1914 S.C. 866, 51 S.L.R. 745) it was manifest that the course taken by the Court was because there was a disinclination, to say the least, on the part of members of the Court to follow the previous case of *Cooper*, 4 F. 880, 39 S.L.R. 660. In the present case there is no such difficulty so far as the law is concerned. I think the law applicable to the case is quite well determined by the previous decisions. The only difficulty is to keep out of the ground of action any injury that may have been caused by the subsequent accident, which would not be justification for the pursuer getting damages against the defenders.

The Court adhered.

Counsel for Reclaimers (Defenders)—Fraser, K.C.—J. C. Watson. Agents—Simpon & Marwick, W.S.

Counsel for Respondent (Pursuer)—Macgregor Mitchell. Agents—Ross & Ross, S.S.C.

Saturday, June 10.

SECOND DIVISION.

[Lord Anderson, Ordinary.

GRAHAM & COMPANY *v.* UNITED TURKEY RED COMPANY, LIMITED.

Contract—Agent and Principal—Condition — Breach of Material Condition by Agent — Agent's Right to Sue—Accounting for Commission — Agent's Right to Commission Earned Prior to Breach.

A firm of manufacturers entered into a contract with a firm of agents for a term of years under which the latter undertook to sell the former's goods for a stipulated commission and bound themselves during that period not to act as agents for others in that class of goods. During the currency of the agreement the agents, in contravention of this restrictive condition, acted as agents for another firm in the same class of goods. In an action at the instance of the agents against the firm of manufacturers for an accounting for the commission due to them, in which the agents ultimately admitted that they had been in breach of a material condition of the contract, *held* (*rev.* judgment of Lord Anderson, Ordinary) that the agents were entitled to an accounting for the period prior to the breach but were not entitled to an accounting for the period subsequent thereto.

Observed (*per* Lords Salvesen and Ormidale) that if the defenders were benefited by the services of the pursuer after the date of the breach, the claim of the latter would be, not *quantum meruit* the pursuer, but *quantum lucrati* the defenders, with the onus of proof on the pursuer.

Authorities examined.

Alexander Graham & Company, merchants and general agents, Glasgow, *pursuers*, brought an action against the United Turkey Red Company, Limited, Glasgow, *defenders*, in which they craved decree ordaining the defenders "to exhibit and produce before our said Lords a full and particular account of all orders received by them from customers introduced by the pursuers, and of all such orders implemented by them, and of the whole commission earned by the pursuers in terms of the agreement entered into between the pursuers and the defenders by letters dated 26th February and 2nd March 1914, with the extension or continuance thereof contained in the letter written by the pursuers to the defenders dated 12th December 1916, whereby the true balance due by the defenders to the pursuers may appear and be ascertained." The balance sued for on an accounting was £5000, and in the event of the defenders failing to produce an account there was a conclusion for payment of £5000. There was also a conclusion for payment of £5000 as damages, but this conclusion was departed from at the close of the proof before the Lord Ordinary.

The letters founded on as constituting the agreement contained, *inter alia*, the following passages:—On 26th February 1914 Mr Graham (the sole partner of the pursuers' firm) wrote—"I beg to offer my services for selling and developing your productions under the following terms, viz.—1. I shall confine myself solely to your productions with the exception of styles and goods which at present you do not produce, but which whenever you are ready to do so will be transferred to you. . . ." To this letter the defenders replied—"2nd March 1914—We now beg to formally accept the offer of your services contained in your favour of 26th ultimo. We propose that the agreement should be for the term of three years and date from 28th February 1914, with a break in our option at the end of one year from that date. . . ." On 12th December 1916 the defenders wrote—"We beg to confirm the fact that our agreement of 26th February 1914 is hereby cancelled and the following agreement substituted:—1. It is understood between us that all cotton goods handled by you or offered by you for sale will be the production of the United Turkey Red Company, Limited. . . . 4. This agreement to be for five (5) years from to-day's date, and thereafter to continue in force subject to six months' notice by either party."

The pursuers, *inter alia*, pleaded—"1. The pursuers having sold goods on commission for the defenders are entitled to decree of count and reckoning as concluded for."

The defenders pleaded, *inter alia*—"1. The pursuers' averments being irrelevant and insufficient to support the conclusions of the action, the same should be dismissed. 2. The pursuers being in breach of their contract with the defenders, are barred from pursuing the present action, which should be dismissed. 4. The defenders having accounted to the pursuers for all commission presently due to them under the contract sued on, are entitled to absolvitor."

On 17th May 1918 the Lord Ordinary (ANDERSON) allowed a proof before answer.

The following narrative of the averments of the parties and of the import of the proof is taken from the opinion of the Lord Justice-Clerk:—"In the summons in this action the pursuers, founding on three letters dated 26th February, 2nd March 1914, and 12th December 1916, sue for commission earned by them in terms of agreements constituted by said three letters. The form in which this claim is put is a conclusion for count, reckoning, and payment, the balance sued for as due on the accounting being £5000. In the second place the pursuers claim decree for a further sum of £5000, which is explained in the condescendence to be damages for breaches of the agreement between the parties. In their condescendence the pursuers (Alexander Graham having been during the whole period in question the sole partner) say, article 2, 'The agreement constituted by the said letters of 26th February and 2nd March 1914 was by the letter of 12th December 1916 cancelled and a new agreement made.' The pursuers further aver—'It was also agreed by defenders that when pursuers were able to obtain from their customers orders for any class of goods covered by the agreement at a price in excess of the price quoted to them by defenders, such extra price was to be added to the pursuers' commission and paid to them by defenders. This was originally arranged in the agreement of 1912, which is referred to by the defenders in answer 1 and which is still in force. The arrangement was embodied in the defenders' letter to pursuers of 14th September 1912, a copy of which is produced.' In answer 2 the defenders say 'The agreement of 1914 superseded all previous arrangements between the parties and was in turn cancelled by the agreement of December 1916,' and they call on the pursuers to state on which agreement they now found. They further aver that there is no obligation on them in either of the agreements to sell only through the pursuers or to sell through them any specific quantities of goods. In condescendence 3 the pursuers aver that immediately the said agreement was made the pursuers 'devoted their whole energies to procure orders for the defenders, with such success that by the middle of 1916 they were earning commission.' In their answer to this article the defenders say 'That the said Alexander Graham earned substantial commissions under the agreement, but not up to the rate stated. *Quoad ultra* denied. . . . Explained further that the said Alexander Graham had other agencies than that of the defenders, and to these he is believed to have devoted considerable time, and further, that without having formal agency agreements he frequently sold goods for other people on commission terms, or bought from others and re-sold on his own account.' To this the pursuers replied 'That the only agency held by the pursuers other than that of the defenders was an agency for Messrs Alexander Murdoch & Company, Limited, Bridgeton, Glasgow, for the sale of carpets in London, that this agency was undertaken by the pursuers with the defenders' knowledge and consent, and that it did not in any way conflict with the interests of the defenders.' In condescendence 4 the pursuers aver that the defenders formed a scheme to deprive the pursuers of their customers and to end the said agreement between the parties to this process. They also say that under the agreement the pursuers were bound not to deal in cotton goods except those manufactured by the defenders, and they give details of said scheme and alleged breaches by the defenders of the agreement with the pursuers; one of these details added by the pursuers by amendment of the record on 6th December 1918 is thus expressed—'(5) In September 1917 they sent the pursuers a list of certain London firms and instructed the pursuers not to call on these firms, stating that the defenders would work these firms through Messrs Heath & Goddard. Four of these firms, viz., Young & Rochester, Limited, the Co-operative Wholesale Society, Limited, Rowe & Company, and T. & J. Wigley & Company, were customers of the pursuers who had been intro-

duced by pursuers to defenders.' In condescendence 5 the pursuers aver that they 'intimated to the defenders by letter dated 26th November 1917 that the agreement was terminated by reason of the defenders' persistent breaches thereof.' In answer the defenders said the pursuers were in breach of contract not only in respect of the letter of 26th November 1917 but in other respects. They further said—'The pursuers in July 1916 entered into an arrangement with the firm of Elia Torres, calico printers, 56 Faulkner Street, Manchester, to represent them as their agents in London for the sale of cretonnes at agreed rates of commission. In pursuance of that agreement the pursuers between July 1916 and the raising of the present action have continually sold and offered for sale under said agreement goods produced by Messrs Elia Torres. These goods were principally cotton cretonne goods, and were such as the defenders produce. The pursuers in entering into and acting under said agreement were in breach of contract to the defenders, whether under the agreement of 1914 or the agreement of 1916.' To this later averment the pursuers replied—'Denied that pursuers had any agreement with Mr Elia Torres of Manchester. Admitted that they sold certain goods for him, but explained that this was done with the knowledge and consent of defenders, who had declined to accept the orders for the goods so sold.' The defenders also in their answers state that the pursuers in several other cases sold goods other than those of the defenders' manufacture. After a hearing in the procedure roll the Lord Ordinary on 17th May 1918 pronounced this interlocutor—[*His Lordship quoted the interlocutor, which allowed a proof before answer.*] Thereafter on 6th December 1918 and 16th January 1919 the Lord Ordinary allowed the record to be amended, and proof was ultimately taken in July 1921. On 20th July 1921 the Lord Ordinary disposed of certain of the parties' pleas and appointed the defenders to lodge accounts, that is, for the period from March 1914, and the pursuers to lodge objections thereto, and he found the pursuers entitled to expenses since the closing of the record. The present reclaiming note was lodged against that interlocutor. There were thus these demands made in the summons—(1) for an accounting for commission, and (2) a claim for £5000 for damages. Proof was allowed and led as regards both of these claims, under reservation of all questions of accounting. The Lord Ordinary, however, in his note says—'Mr Gentles at the conclusion of the proof stated that the pursuers no longer insisted on damages for breach of contract and that they were not, *in view of the evidence*, to press their claim for over-prices.' Though the Lord Ordinary has not in his interlocutor dealt with these conclusions, the defenders are entitled to be assoilzied therefrom, as the position as regards them taken up before the Lord Ordinary was adhered to before us. The only points argued before us were whether the defenders were liable to account to the pursuers for commission, and if so for what period. The Lord Ordinary's finding as to expenses was also challenged. As to the first of these questions (the defenders' liability to account) I do not think the contract of 1912 can be referred to or that the accounting could in any event be carried back earlier than February/March 1914. In the summons what is claimed is an account for the commission due to the pursuers in terms of the agreement entered into between the pursuers and the defenders by letters dated 26th February and 2nd March 1914, with the extension or continuance thereof contained in the letter of 12th December 1916. The 1912 agreement seems to have been only introduced into the condescendence in support of the claim in respect of over-prices, which has now been departed from by the pursuers. The first provision in the letter of 26th February 1914 was thus expressed—['... *His Lordship quoted the letters....*'] I have already quoted the averments on record by the parties as to an agency agreement with Mr Elia Torres of Manchester which the defenders said was entered into in July 1916, and while the pursuers denied that they had any agreement with Torres they admitted that they had sold goods for Torres, but said this had been done with the knowledge and consent of the defenders, who had declined to accept the orders for the goods so sold. I do not think the evidence given by Mr Graham as to this matter was candid, and I cannot accept it. In my opinion the defenders have established that in or about July 1916 the pursuers accepted an agency for Torres, that this agreement remained in force and was operative till at least 1917, that the pursuers sold Torres's goods under that agreement to a material extent and that they thereby contravened both the agreement of 1914 and the agreement of 1916. In the course of the argument before us, while senior counsel for the defenders was replying, the pursuers' senior counsel intimated that he admitted that there had been material breaches on the pursuers' part of the obligations as to not selling other goods than those of the defenders' manufacture both under the 1914 agreement and the 1916 agreement. In my opinion the Lord Ordinary was right in finding as he does that the pursuers were in breach. But it is now admitted that they were also in breach in this respect of the 1914 agreement to a material extent, and I am of opinion that the defenders have substantially proved the breaches they averred as to the sale of Torres's goods."

On 20th July 1921 the Lord Ordinary (ANDERSON) sustained the first plea-in-law for the pursuers, repelled the first, second, and fourth pleas-in-law for the defenders, and ordered accounts.

Opinion.—"I have found the decision of this case to be attended with considerable difficulty, but I have reached the conclusion that the pursuers are entitled to the accounting which they crave. Their position as ultimately formulated by their counsel appears to me to be eminently reasonable. By their action they conclude for (1) damages for breach of contract, (2)

accounting for and payment of commission earned and unpaid, and (3) accounting for and payment of what have been termed 'over-prices'—that is, prices obtained by the pursuers for the defenders' goods in excess of the selling lists of the defenders. . . .

"Mr Gentles at the conclusion of the proof stated that the pursuers no longer insisted on damages for breach of contract, and that they were not in view of the evidence to press their claim for over-prices.' All that the pursuers now ask is an accounting for commission admittedly earned. The defenders concede that they hold at least £300 of such commission. The pursuers' counsel further stated that he was willing that extract of any decree pronounced in favour of the pursuers should be superseded until the defenders had an opportunity of constituting any claim which they might have against the pursuers for breach by them of any stipulation of the contract. This position of the pursuers, as I have said, seems to me to be reasonable. The defenders have had in the shape of services rendered the *quid pro quo* of the sums which they hold; the pursuers ask that they should obtain the counterpart of the services rendered. On the other hand the defenders in my opinion take up a position which does not seem to present the same features of reasonableness. They refuse even to account to the pursuers for the sums which they have earned. Their case is that as the pursuers have been in breach of a stipulation of the contract they (the defenders) are entitled to forfeit what has been earned by the pursuers. The defenders have not attempted to constitute any claim of damages which they may have against the pursuers for breach of contract, but have in effect themselves assessed damages at the amount of earned commission which they hold.

"The defenders justify their position in law by appealing to the rule of contract law that a party to a contract who himself has broken it cannot sue the other party for implement of a contractual obligation. The rule has doubtless often been stated as I have expressed it, but in my opinion that mode of expression is not accurate. It is not every breach which will debar a party to a contract from suing upon it. It is only such a breach as goes to the root and substance of the contract—*Steel*, 1907 S.C. 360; *Sanderson & Son*, 1921 S.C. 18. As Lord Collins put it in the case of the *General Billposting Company, Limited* (1909 A.C. 118, at p. 122)—'The true test . . . is that which is laid down by Lord Coleridge, C.J., in *Freeth* v. *Burr*, and approved in *Mersey Steel Company* v. *Naylor* in the House of Lords, "that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."' The correct expression of the rule seems to me to be that suggested by Mr Gentles, to wit, that a party cannot sue for the implement of a contractual stipulation unless he has performed the counterpart of what is sued for. Here it is said the pursuers have by services rendered and accepted performed the counterpart of the obligation for implement of which they sue, namely, for payment of commission in respect of those services. The pursuers therefore, it seems to me, are entitled to sue although they may have been in breach of another stipulation of the contract which is not fundamental.

"The defenders allege that the pursuers were in breach of the contract of agency (1) by terminating the contract without justification in November 1917, and (2) by having during the operation of the contract sold goods which were not the defenders' in breach of an express stipulation not to do so.

"As to the first of those points, it was maintained for the pursuers that even if they were not justified in terminating the contract, they were nevertheless entitled to the accounting claimed. I am unable to assent to this contention. The counterpart of the pursuers' right to receive commission was the rendering by them of the stipulated services, and the contract provided that these services should be continued until December of the present year. The pursuers must therefore show that they were justified in terminating the contract when they did. They must prove that the defenders had then shown by their actings that they had resolved not to perform the contract but had repudiated it in its entirety. I am of opinion that the pursuers have proved that they had this justification for terminating the contract in November 1917.

"The defenders' counsel submitted an argument as to the contract of agency with which I am unable to agree. The pursuers began to act as the defenders' agents in September 1912, and they continued so to act until November 1917. There was no break or hiatus in the relationship during that period, there was no change in the area traversed by the pursuers, and there was very little difference in the kind of goods sold during the whole period. There were, however, new conditions and terms formulated in writing, first in February 1914 and again in December 1916. The defenders' counsel on the question of the pursuers' justification in terminating the contract argued that there were three separate contracts of agency, each watertight and so independent of the others that what was done or not done under one contract could not be considered or founded on in a question of whether either of the other contracts had been duly implemented. This seems to me to be too artificial a view. In my judgment there was one contract of agency which began in 1912 and came to an end in 1917, modifications of the terms of this contract being made in 1914 and 1916. In any event if there were separate contracts, they were in my opinion so interdependent that the circumstances of one might competently be considered and founded on in order to ascertain whether or not one of the others had been duly implemented.

"When the contract was entered into in 1912 the only writing regulating its terms was the said letter of 14th September 1912. All the other terms of the contract were

matters of verbal arrangement and actings of the parties.

"Certain conditions and terms of the contract were more precisely formulated by the letter of 26th February 1914. These terms were cancelled by the letter of 12th December 1916, which substituted therefor other terms specified in said letter.

"It will be noted that one fundamental term of the contract had never been referred to in writing, that, namely, whereby the pursuers were to be paid commission. The practice of the parties as disclosed by the proof establishes that the agreement as to this matter was that the pursuers were to be paid by monthly payments all commission, at the stipulated rates, which had been earned on orders received, accepted, and executed.

"The pursuers maintain that in November 1917 it had been obvious that the defenders were in breach of this vital term of the contract (1) by having without the pursuers' assent reduced their commission in certain cases shown in No. 678 of process from the agreed-on minimum of 2½ per cent. to 1 per cent., and (2) by having refused to pay other commissions, calculated at the agreed-on rate, in certain other cases therein specified. As to these last the defenders allege that as to some items the pursuers agreed to forego commission, as to others that they agreed to postpone or delay pending bankruptcy proceedings their claim to receive payment. These allegations were denied by the pursuers and have not been proved by the defenders.

"The matters of overdue and unpaid and understated commissions were so unsatisfactory to the pursuers that in May 1917 they put the matter into the hands of their solicitors. A correspondence took place during the summer of 1917 between the parties' solicitors, but no arrangement satisfactory to the pursuers was arrived at. All the unadjusted items of commission, it is true, save one, were in connection with transactions between 1914 and 1916, and the defenders' counsel took the point that the pursuers entered into a new arrangement in December 1916 with these matters unsettled. It was urged that the pursuers had thereby abandoned these claims, or at all events that they could not found upon them as justifying breach of the arrangements come to in December 1916. I am unable to assent to these contentions. The pursuers never discharged, expressly or impliedly, the claims which their solicitors were urging in 1917, and I am of opinion that they were entitled to press these claims when they found that in connection with the firm of Young & Rochester the defenders under the December arrangements were making further trouble with reference to the payment of commission earned.

"The other ground of justification urged by the pursuers for the termination of the contract in November 1917 is disclosed by the terms of the letter of 10th September 1917. The defenders thereby made a serious restriction of the pursuers' market for which they had no authorised reason in the terms of the contract, express or implied.

"In my opinion this action on the part of the defenders afforded further justification to the pursuers in bringing the contract to an end when they did. The defenders' counsel argued that the pursuers by continuing to act as the defenders' agents after 10th September 1917 had acquiesced in the proposed restriction of market. I am unable to agree. The pursuers protested by their letter of 11th September 1917 and continued the agency in the hope that the restriction would be removed. It was only when they were satisfied that the defenders were to persist in the restriction, and when they perceived that the defenders were obdurate in reference to the disputes as to commission, that they resolved to terminate the contract.

"The defenders also allege that the pursuers were in breach of the first term of the arrangements come to on 12th December 1916 by having sold and handled cotton goods which were not produced by the defenders. The pursuers allege that they never sold goods other than the defenders' except when the defenders were unable to supply the goods ordered, and certainly it has not been proved that the pursuers had any motive in the shape of higher commission to sell goods other than those manufactured by the defenders. I am satisfied, however, that the pursuers have not proved their said allegation, and, moreover, it is established that in a number of cases they acted as merchants with reference to the cotton goods of others, buying at one price and selling at a higher, and thereby making a profit. I therefore hold it proved that the pursuers were in breach of the foresaid stipulation.

"But what is the legal result? The pursuers say, damages for the breach, to be constituted in the ordinary way and set off by way of compensation against the pursuers' claim for commission. The defenders say, forfeiture of the sum in their hands.

"The test of the matter is that which I have suggested. Was the foresaid stipulation fundamental of the contract in this sense that it must be concluded that the pursuers by breaking it totally repudiated the contract? I am unable to hold that the pursuers' breach had this signification. The fundamental purpose of the contract was the sale of the defenders' goods. This purpose was capable of fulfilment and was being fulfilled by the pursuers despite the said breach. The remedy suggested by the pursuers' counsel seems therefore the appropriate one, if that remedy is open to parties who have themselves, according to what I have said, been in breach of a fundamental term of the contract. This last point, however, is not *hujus loci*, but will only arise if and when the defenders bring an action of damages for breach by the pursuers of the said term of the contract.

"I ventured at the debate to test the defenders' contention by an extreme case, which if their contention is sound it should of course satisfy. Suppose a large sum, say £5000, admittedly due as commission, and breach of the foresaid stipulation by the sale of a dozen handkerchiefs, with resultant

damage to the defenders practically nil. Impressed with this illustration the defenders' counsel disclaimed the suggestion of forfeiture, and conceded that although the pursuers were debarred from suing for commission due under the contract they were entitled to sue for a *quantum meruit*. But there has been no agreement to employ the pursuers for remuneration estimated on the principal of *quantum meruit*. And if *quantum meruit* were demanded, the *quantum* would doubtless be found to be just what is asked as commission. The defenders therefore would seem to be driven to this position, that they are bound and are willing to give the pursuers what they ask if they call it *quantum meruit* but not if they call it commission.

"I shall therefore order accounts as craved, but there are two matters which the evidence led enables me to exclude from the accounting. The first is that of 'overprices,' on which the pursuers do not now insist. The second has reference to what is called block-printing. . . .

"Other authorities cited—Gloag on Contracts, pp. 696, 720-726; *Mersey Steel Company*, 9 A.C. 434; *Turnbull*, 1 R. 730; *Dingwall*, 1912 S.C. 1097; *Macdonald*, 3 F. 923; *Forrest*, 1916 S.C. (H.L.) 28."

The defenders reclaimed, and argued—The present contract was a mutual one, and the pursuers having failed to perform a material part of it could not sue the defenders for performance of it—*Turnbull* v. *M'Lean & Company*, 1874, 1 R. 730, *per* Lord Justice-Clerk (Moncreiff) at p. 738, 11 S.L.R. 319; *Dingwall* v. *Burnett*, 1912 S.C. 1097, *per* Lord Salvesen at p. 1102, 49 S.L.R. 882; *M'Donald* v. *Kydd*, 1901, 3 F. 923, *per* Lord Trayner at p. 927, 38 S.L.R. 697; *Steel* v. *Young*, 1907 S.C. 360, 44 S.L.R. 291; *Earl of Galloway* v. *M'Connell*, 1911 S.C. 846, 48 S.L.R. 751; *Forrest* v. *Scottish County Investment Company*, 1916 S.C. (H.L.) 28, and *per* Lord Buckmaster, L.C., at p. 33, 53 S.L.R. 7. The unity of the contract must be respected, and this applied to the contract of agency as well as to any other contract—*Andrews* v. *Ramsay & Company*, [1903] 2 K.B. 635; *Nitedals Taendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671; Story on Agency, 9th ed., pars. 331 and 334. The pursuers were only entitled to their commission if they had fulfilled the contract, and this they had not done. [The LORD JUSTICE-CLERK referred to *Hippesley* v. *Knee Brothers*, [1905] 1 K.B. 1.]

Argued for the pursuers and respondents—*Esto* that the pursuers had broken a stipulation of the contract it did not follow that they were not entitled to the commission which they had earned. There had been substantial compliance with the contract on the part of the pursuers, and the contract therefore remained as a ground of action. The very existence of the relationship of principal and agent implied a liability to account. The defenders' remedy was either to sue for implement and damages, which when constituted could be set off against the commission claimed, or to rescind the contract, and they had done neither. There was no clause of forfeiture in the contract, and even if there had been the Court was always unwilling to give effect to such a clause—*Robertson* v. *Driver's Trustees*, 1881, 8 R. 555, 18 S.L.R. 364; *Kilmer* v. *British Columbia Orchard Lands, Limited*, [1913] A.C. 319. The cases quoted *contra* were not in point, and most of them were cases of executory contracts and had no application to commissions between principal and agent—*Johnston* v. *Robertson*, 1861, 23 D. 646, *per* Lord Justice-Clerk Inglis at p. 656. There was no such breach in the present case as disentitled the pursuers to recover the commission they had earned under the contract — *Sanderson* v. *Armour & Company*, 1922, 59 S.L.R. 268, *per* Lord Dunedin at p. 269, *distinguishing Johannesburg* v. *Stewart & Company*, 1909 S.C. (H.L.) 53, 47 S.L.R. 20.

At advising—

LORD JUSTICE-CLERK—[*After the narrative above quoted proceeded*]—What then in that state of the facts is the legal position of the parties? The pursuers maintained the position which they seem to have taken up before the Lord Ordinary, that their right to commission under the agreement was not altered by any breaches they have committed. The defenders at first contended that the pursuers' right to sue for any commission under the agreement of 1914-1916 was wholly gone, whatever rights they might have upon the principle of *quantum lucratus*, but eventually they did not contest the pursuers' right to sue so far as commission related to orders prior to July 1916 and not yet paid. The defenders maintained, and I think established, that commission accounts were rendered to the pursuers monthly during the whole period and duly paid, though that may not be strictly *hujus loci* at present. There was thus raised a question of law which is not without difficulty. The Lord Ordinary on the case as it stood before him was in favour of the pursuers' contention. As the case was argued before us I think the authorities were more fully gone into and admissions in fact were ultimately made by the pursuers which were not before the Lord Ordinary. *Turnbull's* case (1 R. 730) has, so far as I know, always been accepted in our Courts as sound, and although the opinion of Lord Justice-Clerk Moncreiff (at p. 738) is what has been generally quoted, Lord Benholme and Lord Neaves were equally distinct in their opinions as to the law. Even before *Turnbull's* case the same principle as that expressed by Lord Moncreiff had been stated by Lord Justice-Clerk Inglis in the case of *Johnston* v. *Robertson* (1861, 23 D. 646, at p. 656), thus—"The defence arises out of an obligation in a mutual contract which is to be enforced at the same time as the stipulations in favour of the pursuer. Even that consideration might not be conclusive against the objection that a separate action should be raised to enforce this claim under the contract. But then we must take into consideration this other principle that in a mutual contract where one party seeks performance of the stipulations in his favour he must

show that he has given or tendered performance of his part of the contract. Every action on a mutual contract implies that the pursuer either has performed or is willing to perform his part of the contract; and it is therefore always open to the defender to say that under the contract a right arises also to him to demand performance of the contract before the pursuer can insist in his action."

In the still earlier case of *Barclay* v. *Anderson Foundry Company* (1856, 18 D. 1190, at p. 1198) Lord Cowan puts the point thus—"Now where their is a clear failure by one of the parties to a mutual contract to fulfil in essential respects his part of it, I cannot hold that notice is necessary by the other party ere he can regard himself free of his obligations under it and entitled to act on that footing. There may, indeed, be room for saying that when the neglect or failure to perform is but trifling in extent or has arisen from inadvertence or permits of satisfactory explanation, the contract cannot be held in such a state of matters to have become void." Erskine (iii, 3, 86) puts the matter thus—"No party in a mutual contract, where the obligations on the parties are the causes of one another, can demand performance from the other if he himself either cannot or will not perform the counterpart, for the mutual obligations are considered as conditional." The law to the same effect, and more fully, is stated in Bell's Prin., sections 70, 71. In *Ramsay* v. *Brand* (1898, 25 R. 1212, at p. 1214) Lord President Robertson puts the matter thus—"The question whether in any given case the deviations are of such materiality as to fall within the general rule or are of such detail as to fall within the modification of the rule is necessarily one of degree and circumstance. If the deviations are material and substantial, then the mere fact that the house is built would not prevent the proprietor of the ground from rejecting it and calling on the contractor to remove it, and he might do so if not barred by conduct from insisting in his right. If this right were so insisted in, then the contractor would of course have right to the materials, but he would have no right to payment. If on the other hand the proprietor made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense, and this, be it observed, would be not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor. Accordingly when contractors do not stick to their contracts they not only unmoor themselves from their contract rights but they drift into much less certain and much less definite claims." See also Lord Trayner's judgment in *Macdonald* v. *Kydd* (1901, 3 F. 923) and *Steel* v. *Young* (1907 S.C. 360), where the judgment of the Court was given by Lord Low. Some of these cases were considered in the House of Lords in the case of *Forrest* (1916 S.C. (H.L.) 28), but the judgment there, in my opinion, does not affect the legal principle which according to these cases falls to be applied in this case. The Lord Chancellor in *Forrest's* case (*supra* at p. 33) began his remarks on the two Scottish cases of *Ramsay* v. *Brand* and *Steel* v. *Young* by saying—"Upon the view that I have expressed the cases quoted do not apply. The case of *Ramsay & Son* v. *Brand* depends entirely upon the view that the contract sued upon had in fact been broken but only in an immaterial respect, and I reserve my opinion as to the validity of this case; while the case of *Steel* v. *Young* only decides that where a contract binds a builder to use a particular substance in construction the architect has no power to substitute a wholly different material." Lord Parmoor distinguishes the same cases, while Lord Wrenbury said—"Further, if I had found that the contract had not been performed I could not hold that the builder could sue for the contract price, and that the building owner could have a remedy in damages. The two things are to my mind wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot co-exist." Two recent English cases were referred to—*Andrews* v. *Ramsay*, [1903] 2 K.B. 635, and *Nitedals Tændstikfabrik*, [1906] 2 Ch. 671. These cases seem to show that a distinction is to be drawn between deliberate or dishonest breaches and breaches due to inadvertence or mistake.

In Story on Agency the law I am now discussing is dealt with thus (9th ed., paragraph 331)—"In the next place, the agent is entitled to his commissions only upon a due and faithful performance of all the duties of his agency in regard to his principal. . . It is a condition-precedent to the title to the commissions that the contemplated services should be fully and faithfully performed. If, therefore, the agent does not perform his appropriate duties, or if he is guilty of gross negligence, or gross misconduct, or gross unskilfulness, in the business of his agency, he will not only become liable to his principal for any damages which he may sustain thereby, but he will also forfeit all his commissions. Slight negligence or slight omissions of duty will not, indeed, ordinarily be visited with such serious consequences, although if any loss has occurred thereby to the principal, it will be followed by a proportionate diminution of the commissions." Paragraph 334—"*A fortiori* an agent will forfeit his commissions if he engages in any transaction which amounts to a fraud upon his principal, such as betraying his trust by acting adversely to his interests, or by embarking his property in illegal transactions, or by being guilty of barratry, or by fraudulently misapplying his funds. And if the agent has stipulated to give his whole time and services to his principal, he will not be permitted to derive any commissions or other compensation for services in another employment during the same period. Indeed, the commissions or other compensation earned by services in another employment, under such circumstances, would, in equity at least, seem properly to belong to the principal."

Having in view the character of the breaches on the pursuers' part now admitted

in this case, especially having regard to the breaches in connection with Torres, the averments in the pursuers' record, and the evidence bearing on this point, I am of opinion that the pursuers are not entitled to recover commission under the contract for the period subsequent to July 1916.

As to the period prior to that date, I have come to be of opinion, though not without difficulty, that the pursuers are entitled to an accounting and to payment of any commission that may be still unpaid for orders obtained between February-March 1914 and July 1916. Accounts showing the commission due appear to have been rendered, as I have said, to the pursuers by the defenders monthly, and payment as in full or to account seems to have been also made monthly, but the parties are not agreed as to this.

[*His Lordship then dealt with a matter which is not reported.*]

LORD SALVESEN—The sole question decided by the Lord Ordinary in the interlocutor submitted to review is that the defenders are bound to lodge accounts showing the commissions earned by the pursuers under two agency agreements which they entered into with the defenders. In the end this may prove to be quite academic, and it is regrettable that a proof extending to 130 pages of print, and documents produced relative to the proof extending to another 430 pages, should have been thought necessary to elucidate this question which, now that the facts which give rise to it are admitted, is a purely legal one. It appears that during the whole course of the agency the defenders regularly rendered monthly accounts to the pursuers of the commissions that they admitted to be due, on the assumption that the pursuers were faithfully performing the obligations which they undertook under each of the agreements, and the real question on the merits appears to relate merely to a balance which the defenders have retained on discovering that for a considerable time before the last agreement was terminated by the pursuers they had been systematically in breach of it. The pursuers have abandoned their claim for damages which bulks largely in their summons, and also for commission on what are called "over-prices." They admit that any balance of commissions which the defenders' accounts might show to have been earned on the assumption that the pursuers had honestly fulfilled their duties as agents, may be legitimately retained by the defenders to meet any counter-claims of damages which they may be able to instruct. What we are asked to decide at this stage, when there has been only a partial inquiry, is the legal question whether the breach of agreement which is averred, and which is not now disputed, disentitles the pursuers from calling upon the defenders to produce accounts and to pay commission at the stipulated rate, subject always to their admitted right to set off against these commissions any loss that was caused to them by the pursuers' breach of duty towards them as their agents.

Now all this procedure might have been avoided and the merits at once dealt with in one of two ways—either the defenders might have lodged their accounts under protest, and so made the course clear for the determination of the matter in which the parties are truly interested, namely, whether any sum is due to the pursuers or not; or when the defenders maintained that they were not liable to account to the pursuers because of their breach of the agreement under which alone they were entitled to commission, the pursuers might have frankly admitted the breach (as they have now been compelled to do), and so have avoided the expense of an inquiry and recovery of documents which have been rendered necessary by their denial. In that case the legal question might have been discussed in the procedure roll at a mere fraction of the expense to which the parties have actually been put.

The first agreement is contained in a letter of 26th February 1914 from the pursuers to the defenders and their acceptance of same on 2nd March. The first head of that agreement provides that the pursuers were to confine themselves solely to the defenders' productions "with the exception of styles and goods which at present you do not produce, but which whenever you are ready to do so will be transferred to you." For a considerable time it appears that the pursuers honestly fulfilled this part of their agreement, but from July 1916 (if not earlier) and onwards they systematically violated it by selling the goods of other makers which did not fall under the exception. In July of that year they actually entered into a written agreement with Elia Torres under which they were appointed as his London agents for the sale of cretonnes, domestics, sateen, and down-quilt sateens at a commission of 2½ per cent. and of 5 per cent. on the high class and wide cretonnes. All these were goods which the defenders produced and which the pursuers accordingly were debarred by their agreement with them from selling for other manufacturers. While this agreement was still current a new agreement was on 12th December 1916 entered into between the pursuers and the defenders by which the agreement of 26th February was cancelled and the new agreement substituted. By the very first article of that agreement it was provided "that all cotton goods handled by you or offered by you for sale will be the production of the United Turkey Red Company, Limited." At the very time when the pursuers agreed to this stipulation they were acting as the agents of Elia Torres for the sale of cotton goods, and they continued to do so until November of the following year, when their breach was discovered. Not merely so, but they continued to purchase and sell cotton goods which were the production of other manufacturers than the defenders. No attempt is now made to excuse the pursuers' conduct in this respect, although Mr Graham himself in the witness-box offered various explanations, all of which were manifestly false and have been completely disproved.

The defenders in maintaining their second plea-in-law rely upon the opinion of the

Lord Justice-Clerk in the case of *Turnbull* (1874, 1 R. 730, at p. 738), where he says—"I understand the law of Scotland in regard to mutual contracts to be quite clear (first) that the stipulations on either side are the counterparts and the consideration given for each other; (second) that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance." Similar views were expressed by Lord Benholme and Lord Neaves. The former said—"It is very important that we should express our determination to abide by the well-established rule of Scotch law that in mutual contracts there is no ground for separating the parts of the contract into independent obligements so that one party can refuse to perform his part of the contract and yet insist upon the other performing his part. The unity of the contract must be respected." And Lord Neaves said—"It is a general principle that all the material stipulations in a contract forming a *unum quid* are mutual causes." Now the pursuers' counsel frankly admitted that the condition which I have already quoted was a material part of the contract, so material indeed that if the pursuers had not assented to it it may well be that no contract would have been entered into. And certainly it is to be presumed that neither as regards the rate of commission fixed or the duration of the agreement would the terms have been the same if the pursuers had disclosed what seems to have been their intention throughout of deliberately ignoring the prohibition in question. In the subsequent case of *Ramsay* v. *Brand* (25 R. 1212), which applied to a building contract, the Lord President said (at p. 1214)—"In judging of this question it is necessary to bear in memory the law applicable to it. No man can claim the sum stipulated to be paid on the completion of certain specified work unless he has performed that work *modo et forma*, and this applies to building contracts just as much as to other contracts." Accordingly in that case it was held that the contract price sued for was not due except under deduction of the full amount which would be necessary in order to enable the proprietor of the house to take down those parts which had been erected disconform to the contract and complete the work in accordance with the contract. The Lord President in the same case stated that if the proprietor, instead of demanding that the house should be removed, made the best of it and let the house stay, the only claim which the contractor could have would be a claim of recompense, "and this, be it observed, would be not for *quantum meruit* the builder, but for *quantum lucratus est* the proprietor." This case was followed by the Second Division in *Steel*, 1907 S.C. 360. Lord Low (at p. 366), who gave the leading opinion, held that in circumstances of very great hardship to the contracter "the strict rule of law that a person who has broken a contract cannot sue upon it should be applied," and the other judges concurred. The case of *Ramsay* v. *Brand* was questioned by Lord Buckmaster in the case of *Forrest* ((1916) S.C. (H.L.) 28), but Lord Wrenbury seems to express precisely the same proposition in law as was given effect to in *Ramsay* v. *Brand* and *Steel* v. *Young* in the following passage (at p. 39)—"If I had found that the contract had not been performed I could not hold that the builder could sue for the contract price, and that the building owner could have a remedy in damages. The two things are to my mind wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot co-exist." In any event the Scottish decisions to which I have referred appear to me to be binding upon us.

Now it is quite true that these decisions are not in terms applicable to a contract of agency. But the general statement of the law in *Turnbull* v. *M'Lean* makes the rule the same wherever there are mutual stipulations and any material stipulation has been violated by the party who is suing on the contract. It does not follow that he necessarily forfeits all claim, but it puts upon him the onus of proving the extent to which the other party has been *lucratus* by the services he has rendered, instead of putting upon the defenders the onus of showing the amount of loss which has flowed from their agents' breach of duty. Such a claim must necessarily be very difficult to establish and is obviously incapable of exact pecuniary ascertainment. There are two cases in England dealing with breach of duty by an agent, which, although not precisely in point so far as the facts are concerned, have nevertheless a strong bearing upon the pursuers' claim. In the case of *Andrews* ([1903] 2 K.B. 635), an agent to sell property, who sold the property but received a secret profit from the purchaser, was held liable not only to account for that profit but also disentitled to any commission from his principal. Lord Alverstone said (at p. 637)—"It seems to me that this case is only an instance of an agent who has acted improperly being unable to recover his commission from his principal. It is impossible to say what the result might have been if the agent in this case had acted honestly. . . . A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission." In the subsequent case of *Nitedals* ([1906] 2 Ch. 671), Neville, J., distinguished between the cases in which the agent had acted honestly and those in which he had acted dishonestly, and allowed him to take credit for the commission in the former but disallowed all commission in the latter cases. He also held that the agent must account for any secret profits which he had made. The pursuers founded strongly upon this case, which in some respects is very similar to the one with which we are dealing. But it does not seem to me to decide the strict legal question with which we are concerned, and which involves, according to the pursuers' contention, that the defenders are liable to the same strict accounting as regards the pursuers' commissions as if they

had throughout implemented the whole terms of the agreement by which alone they were entitled to commission at all. In the end the equitable result may be very much the same as that arrived at by Mr Justice Neville. But the pursuers must prove in the ordinary way the account of the unpaid commissions, and the defenders are entitled to demand an accounting from the pursuers of the secret profits which they made upon other transactions in breach of their duty as their agents, in addition to any loss that they may be otherwise able to qualify through the pursuers having sold inferior goods as theirs or in any other way. We shall then get to the real merits of the dispute between the parties and ascertain on which side there is a debit balance. In view of the body of authority that I have cited I am unable to concur in the Lord Ordinary's view that an agent who deliberately violates a material part of the contract under which he is appointed and which alone entitles him to commission at the stipulated rate shall have exactly the same rights of action against his principals in the matter of compelling them to lodge accounts as if he had throughout honestly performed all the stipulations of the contract incumbent upon him.

In the view I have taken I think it unnecessary to decide whether the defenders by restricting the pursuers from canvassing the customers of their London agents, were themselves in breach of the contract so as to justify the pursuers in terminating it. As at present advised, I am not able to assent to the Lord Ordinary's view on this matter, but it will only arise if a claim is made by the defenders for damages in respect of the unexpired period of the contract, which it is quite possible that they may not press. At all events this question does not arise at the present stage.

[*His Lordship dealt with a matter which is not reported.*]

LORD ORMIDALE—This action as laid, and when proof was allowed by the Lord Ordinary, embraced several matters which by the admission of the pursuers it became unnecessary to consider and determine in the Inner House. I refer to the claim for damages by the pursuers and their claim for over-prices. One other question it is unnecessary to decide, viz., whether or not the pursuers were justified in terminating their contract as they purported to do in November 1917? Whatever relevancy this topic might have if the defenders were to make a claim for damages against the pursuers, as they reserve their right to do, the determination of it does not appear to me to have any direct relation to the true and only matter now in dispute, viz., whether the defenders are freed from liability to account to the pursuers for commissions alleged to have been earned by them, in consequence of breaches by the latter of the stipulations of the commission contracts.

The commission contracts libelled in the conclusions of the summons are those of February 1914 and December 1916. Incidental mention is made in the record of a letter of 12th September 1912, which refers to commission, and as I understand formed the basis of the pursuers' claim for over-prices. That claim, however, as already noted, is no longer insisted in, and apart from that there is no evidence to support it.

Article 1 of the 1914 agreement is as follows:—"1. I shall confine myself solely to your productions with the exception of styles and goods which at present you do not produce, but which whenever you are ready to do so will be transferred to you."

Article 3 provides, in return for orders secured by the pursuers for, *inter alia*, the payment of certain commissions to the pursuers. The agreement was to endure for three years.

On 12th December 1916 the agreement of February 1914 was cancelled and another agreement substituted for it, article 1 of which is as follows:—"1. It is understood between us that all cotton goods handled by you or offered by you for sale will be the production of the United Turkey Red Company, Limited."

By article 2 certain rates of commission are mutually agreed. This agreement was to endure for five years. Notice to terminate it was given by the pursuers in 1917.

The practice was for the defenders to make monthly payments of the commission earned by the pursuers. The latter aver that the payments so made fell far short of the sums to which they were entitled, and as the defenders do not plead settled accounts the claim for an accounting would in the ordinary case be a relevant and legitimate claim. But the defenders, while denying that any of the commissions due to the pursuers are in arrears, further set out in their defences various instances of serious breaches of the two agreements and maintain that the pursuers are not entitled to the remedy they seek, and plead—"2. The pursuers being in breach of their contract with the defenders are barred from pursuing the present action, which should be dismissed."

This plea the Lord Ordinary has repelled and has ordered the defenders to lodge accounts as craved.

It is clear enough on the proof that the pursuers did for a considerable time act in strict compliance with the terms of the agreement of 1914, rendering valuable services to the defenders. During the years 1914 and 1915 the latter had no cause of complaint. It is at least doubtful in my opinion whether the pursuers were not in March 1916 in breach of their contract. It is clearly proved that in and after July they were engaged in transactions in material breach of both the agreements, a flagrant instance of which is their agreement and transaction with Elia Torres to which your Lordship has referred in detail. They failed to confine their activities as agents solely to the defenders' productions. They handled and offered for sale cotton goods which were not the production of the defenders. They also engaged in transactions in such goods as ordinary merchants. In the end it was not disputed by their

counsel that they were in material breach of both the agreements, and it is unnecessary therefore to examine the evidence in detail.

In such a position of affairs it is impossible to give effect to the contention of the pursuers that they are entitled to claim an accounting for the commissions alleged to be due under the contracts which they themselves have broken, leaving the defenders to seek a remedy by way of an action for damages. In *Forrest* v. *Scottish County Investment Company* (1916 S.C. (H.L.) 28) which was concerned with a building contract Lord Wrenbury (at p. 39) says — "Further, if I found that the contract had not been performed I could not hold that the builder could sue for the contract price and that the building owner could have a remedy in damages. The two things are to my mind wholly inconsistent. The builder can sue for the contract price only if the contract has been performed. The building owner can sue for damages only if it has not. The two rights of action cannot coexist." The weight of authority is entirely to the same effect, and while in most of the cases cited the contracts in question were not contracts of agency the principle of law enunciated in the opinions of the judges who decided them as expressed in the passages already quoted by your Lordships is clearly applicable, the principle, namely, that a person who has broken a contract cannot sue upon it. In the case of *Andrews* v. *Ramsay & Company* ([1903] 2 K.B. 635), which was a case of agency, the question was considered whether an agent who had carried through a transaction but had acted dishonestly in the course of doing so was entitled to an agreed-on commission. It was held that he was not. The case, however, was concerned only with a single transaction. In the case of *Nitedals Taendstikfabrik* ([1906] 2 Ch. 671) there were numerous transactions, some of them free from the taint of dishonesty and some of them not, and it was held that the agent was entitled to commission in the instances in which he had been honest but not in those in which he had not been honest. Mr Justice Neville in giving judgment says (at p. 674)—"I am asked to say that he has to have no commission in any case where he has acted properly under his agency as well as in the cases where he acted improperly. Having regard to what is said in *Andrews* v. *Ramsay & Company*, I feel that there is a difficulty about the matter, but the conclusion I have come to is this, that the doctrine there laid down does not apply to the case of an agency where the transactions in question are separable, as I think they are in this case, and does not entitle the principal to refuse to pay commission to his agent in cases where he has acted honestly because there are other cases in which the agent acting under the same agreement has acted improperly and dishonestly."

This case suggests a distinction to which, in my opinion, effect may be given in the present case to the extent of holding that the pursuers are entitled to the agreed-on commissions prior to the date when they breached the agreement and commenced to act improperly and thereafter not. Having ceased to perform the stipulated services in terms of their contract they forfeited the right to call for commissions—the reward stipulated in the contract for these services —the one being the direct counterpart of the other. It is obvious that the defenders may have been seriously prejudiced by the wholly indefensible actings of the pursuers. I cannot agree with the Lord Ordinary that the pursuers in any view were entitled to a *quantum meruit* and that the *quantum* would be found to be just what is sued for as commission. If the defenders were benefited at all by the services of the pursuers after July 1916 the question would not be *quantum meruit* the pursuer but *quantum lucrati* the defenders, and the burden of proof would be on the pursuers.

Accordingly I concur with your Lordship that the order for accounts pronounced by the Lord Ordinary must be recalled, and that the accounting must be restricted to the period commencing on 28th February 1914 and terminating at July 1916.

[*His Lordship dealt with a matter which is not reported.*]

LORD HUNTER—[*After narrating the conclusions of the summons proceeded*]—The pursuers acted for a number of years prior to 27th November 1917 as agents for the sale of goods manufactured by the defenders.

By letter dated 26th February 1914 the pursuers undertook to confine themselves solely to the defenders' productions with the exception of styles and goods which they did not then produce, but which whenever the defenders were ready to do so would be transferred to them. In return for orders placed with the defenders the pursuers were to receive a minimum commission of 2½ per cent. to be placed to their credit, and in special lines a commission to be agreed upon from time to time, also a fee of £100 per annum and an allowance of £100 per annum of travelling expenses. This agreement was cancelled, and in substitution for its provisions it was provided, as set forth in a letter from the defenders to the pursuers dated 12th December 1916, that all cotton goods handled by the pursuers or offered by them for sale should be the production of the defenders. In return for their services the pursuers were to receive a maximum commission of 5 per cent. on handkerchiefs and 2½ per cent. on other commission goods, but on special lines another rate might be agreed on from time to time. Provision was made for the formation out of 1 per cent. of the commission of a fund out of which bad debts were to be met. The agreement was to be for five years from 12th December 1916. On 26th November 1917 the pursuers intimated that they terminated the agreement by reason, as they allege, of the defenders' persistent breaches thereof. The present action was then brought. According to the pursuers' averments the defenders received and implemented many orders forwarded by the pursuers without accounting for the commission to which they were entitled. The defenders admit that the pur-

suers' commission was payable monthly, but they aver that it is not in arrear.

The first step ordinarily taken in an action of accounting like the present would be an order for accounts, leaving the merits of the dispute to be determined on the objections stated to the accounts produced and the answers thereto. Even in the present case I am not sure that such procedure would not have saved considerable expense, and served to focus the real questions in dispute in a way that has not been accomplished by the procedure actually adopted. The defenders, however, contended that they were under no liability to produce any accounts, the pursuers being "in breach of contract to the defenders" not only in respect "of the letter of 26th November 1917, there being no justification therefor or for the termination of the agreement of 1916 therein intimated, but also through their disregard both of the agreement of February and March 1914 and of the agreement of 12th December 1916, in virtue of which they were in the former case bound to confine themselves to defenders' productions except as stated in the agreement of 1914, and in the latter case were prevented from selling or offering for sale any cotton goods not produced by the defenders." Instances of alleged breach were set out on record. The pursuers replied that they were entitled to terminate the agency when they did on account of certain acts of the defenders to which they refer, and denied that they had themselves committed any act in breach of their agency agreement as contained in the letters of 1914 and 1916 already mentioned. The second plea-in-law for the defenders is—"The pursuers being in breach of their contract with the defenders are barred from pursuing the present action." On 17th May 1918 the Lord Ordinary before answer, and under reservation of all questions of accounting between the parties, allowed them a proof of their respective averments on record and the pursuers a conjunct probation. After a proof the Lord Ordinary sustained the first plea-in-law stated for the pursuers, and repelled the first, second, and fourth pleas-in-law for the defenders, on whom he pronounced an order for the production of accounts. Against this interlocutor the present reclaiming note was taken.

From the Lord Ordinary's opinion it appears that he held on the evidence that the pursuers had proved that they had justification for terminating the contract in November 1917. At the same time he found that it was proved that the pursuers had acted in breach of the first term of the arrangement come to on 12th December 1916. The soundness of the latter finding was not disputed by the pursuers' counsel. On the evidence it is, I think, established that the pursuers were in breach of their agreements with the defenders by acting as agents for manufacturers who were the defenders' rivals in trade, and in a number of cases, to use the Lord Ordinary's words, by acting as merchants with reference to the cotton goods of others, buying at one price and selling at a higher and thereby making a profit.

It does not appear to me to be necessary to consider whether the Lord Ordinary was right or wrong in holding that the defenders had given the pursuers good ground for refusing to act longer as agents. I express no opinion upon this point. A finding to this effect cannot benefit the pursuers, who are proved to have been in serious breach of the obligations undertaken by them and to have given the defenders just cause for terminating the contract. In these circumstances they could not use such a finding as the foundation for a claim of damages which at the conclusion of the proof their counsel had the good sense to abandon. So far as the defenders are concerned I do not think that a finding that the pursuers were not justified in terminating their agreement with the defenders on 26th November 1917 would necessarily lead to the action being dismissed, although it would constitute good ground for a claim of damages in which at the present moment they are not insisting. Their second plea-in-law is in my opinion stated in too absolute terms. If A contracts to build a house or to do some piece of work according to certain requirements, he cannot claim payment under the contract unless he has complied with the material obligations undertaken by him. The most apt illustrations of this rule are probably to be found in building contracts. In *Ramsay* v. *Brand* (1898, 25 R. 1212, at p. 1214) Lord President Robertson said—"No man can claim the sum stipulated to be paid on the completion of certain specified work unless he has performed that work *modo et forma*, and this applies to building contracts just as much as to other contracts." At another part of his opinion he says—"When contractors do not stick to their contracts they not only unmoor themselves from their contract rights, but they drift into much less certain and much less definite claims." In that case, however, the Court gave the building contractor, who had deviated from plans agreed upon, the contract price under deduction of the cost of bringing the building into conformity with the plans. In *Steel* v. *Young* (1907 S.C. 360) it was held that a contractor who had in breach of his contract substituted milled lime for cement mortar was not entitled to sue for the contract price, Lord Low said (at p. 365)—"The general rule is that a building contract, like any other contract, must be performed *modo et forma*, and if the builder departs from the contract he loses his right to sue for the contract price." These cases were considered in the House of Lords in the more recent case of *Forrest* (1916 S.C. (H.L.) 28), but although some of the judges expressed doubt as to their soundness they were not overruled and are binding upon this Court. It does not appear to me, however, that statements of the law made by judges in the cases of *Ramsay* and *Steel* necessarily apply to contracts of a different character from those which were the subjects of those decisions. In the case of *Forrest* Lord Parmoor says (at p. 36)—"I dissent in principle from the proposition that the right of a builder to claim contract price for contract works stand on the same basis in a measure

and value contract as in a contract for a lump sum. If the case of *Steel* v. *Young* can be taken to affirm any such proposition I respectfully differ from the judgment of the Court of Session." He then proceeds to point out that in the case of a measure and value contract "the covenants for work are independent of each other in this sense, that a builder who has completed a number of items conform to the contract, and has handed over the works to the building owner, and has obtained the final certificates of the architects and measurers, is not disentitled to recover in respect of these items on the ground that on other items he has failed to conform with the contractual conditions." In this part of his opinion Lord Parmoor proceeds upon the footing that even in a building contract you may have severable and independent obligations. It was argued for the defenders that this view is contrary to Scots law, and reference was made to the opinions of the Lord Justice-Clerk and Lord Benholme in *Turnbull* v. *M'Lean & Company* (1874, 1 R. 730), where the latter (at p. 739) said—"It is very important that we should express our determination to abide by the well-established rule of Scots law that in mutual contracts there is no ground for separating the parts of the contract into independent obligements so that one party can refuse to perform his part of the contract and yet insist upon the other performing his part. The unity of the contract must be respected." I do not take this as meaning that in every contract where a party is in breach of a material condition he is not entitled to recover what was due to him under the contract prior to the breach and independent thereof. If a servant under a contract of service where his wages are payable weekly or monthly is justifiably dismissed he does not forfeit the wages he has already earned before he was guilty of misconduct. This has been decided in England—*Gordon* v. *Potter*, 1859, 1 F. & F. at 645; *Parkin* v. *South Hetton Coal Company*, 1907, 97 L.T. 98—and I think that the same rule applies in Scotland. As regards agency cases it was held in *Andrews* v. *Ramsay* ([1903], 2 K.B. 635) that a dishonest agent could not recover any commission at all, but the agent's misconduct affected the transaction in respect of which commission was claimed. In the case of *Nitedals Taendstikfabrik* ([1906], 2 Ch. 671) it was held by Neville, J., that where an agent in transactions that are severable has been honest in some but dishonest in others he is entitled to his commission in the former but not in the latter cases. At p. 674 Mr Justice Neville said—"Having regard to the decision in *Andrews* it is clear that the defendant is not entitled to charge any commission in all the cases where he has credited a price to the plaintiffs other than that received by him from the customer. But I am asked to say that he is to have no commission in any case where he acted properly under his agency as well as in cases where he acted improperly. Having regard to what is said in *Andrews* v. *Ramsay & Company* I feel there is a difficulty about the matter, but the conclusion I have come to is this, that the doctrine there laid down does not apply to the case of an agency where the transactions in question are separable as I think they are in this case, and does not entitle the principal to refuse to pay commission to his agent in cases where he has acted honestly because there are other cases in which the agent, acting under the same agreement, has acted improperly and dishonestly." Applying this reasoning to the present case I do not think that the pursuers by a breach of the agreement committed in November 1917 would thereby forfeit all commissions earned by them under their agency prior to the date of the breach. In my opinion the defenders would not have escaped liability to account by showing that the pursuers committed a breach of their agency contract by terminating the agency when they did, though the fact if established might found a claim of damages and therefore have an important bearing upon the extent of the defenders' pecuniary liability to the pursuers.

The real question that arises in this case is whether the pursuers from the date when it is established that they were in breach of their agency obligations are entitled to make a claim for commission under the contract. According to the Lord Ordinary the pursuers are entitled to commission under the contract and therefore to the accounting which he has allowed because they have admittedly rendered the services in respect of which commission is payable. If this be the correct way of looking at the contract the conclusion reached is sound. In my opinion, however, it is impossible to treat the clause as to remuneration as separable from and independent of the agents' obligation as to not selling the goods of rival traders. I do not think it can be said that if they had reserved to themselves liberty to act for competitors in trade of the defenders they would necessarily have received the commission stipulated in the contract. In an English case—*Stavers* v. *Curling*, 1836, 3 Sc. (C.P. 740)—Tindal, C.J., said—"The rule has been established by a long series of decisions in modern times that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument and by the application of common sense to each particular case—to which intention, when once discovered, all technical forms of expression must give way." From July 1916 the pursuers appear to me to have been continuously acting in breach of obligations to the defenders that affected their claim to commission and during that period they are therefore not entitled to found upon the contract as giving them a claim to remuneration whatever may be their claim independent thereof. I think therefore that the Lord Ordinary's interlocutor should be altered by confining the period for an accounting to the time prior to July 1916.

The Court pronounced this interlocutor—

". . . Recal the said interlocutor [of

20th July 1921]: Find that the pursuers are entitled to claim from defenders an accounting for commissions, but only for the period between 26th February 1914 and 10th July 1916, but excluding from the accounting allowed all questions relating to over-prices: Assoilzies the defenders from the conclusions of the summons so far as applicable to the period subsequent thereto, and also from the pecuniary conclusions of the summons stated in the second place, and decern."

Counsel for the Pursuers and Respondents —Gentles, K.C.—Aitchison. Agents—Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defenders and Reclaimers —MacRobert, K.C.—Black. Agents—Macpherson & Mackay, W.S.

Friday, June 2.

SECOND DIVISION.

[Sheriff Court at Glasgow.

FEACHAN *v.* GLASGOW SUBWAY COMPANY, LIMITED.

Reparation — Negligence — Property—Trap — Lighting of Common Stair — Averments — Relevancy — Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii), sec.* 361.

The Glasgow Police Act 1866, sec. 361, enacts that the owner of heritable property "having an access by a common stair shall provide and maintain suitable gas pipes and brackets, lamps and burners, in such common stair to the satisfaction of the inspector of lighting . . . placed as the said inspector . . . may direct, . . . and the Corporation shall cause them to be supplied with gas and lighted during the same hours as the public street lamps," and should recover the cost from the owner.

In an action of damages for personal injuries against the owners of a tenement the pursuer averred that after dark in order to ascertain an address she entered the tenement and proceeded along the passage to the door of a house which was situated in a recess at the end of the passage. She averred that while there was a light in the passage, it was so placed that the recess was completely dark, and that while groping her way to find the door she fell down a stair leading to the basement and received the injuries complained of. She averred further that the stair was defective in construction, and that it should have been provided with a railing or door to mark it off from the recess. *Held* that the action was irrelevant (1) in respect that the pursuer's averments showed that the accident was due to defective lighting, and it was not averred that the defenders had failed to light the stair to the satisfaction of the inspector of lighting; (2) that *quoad* the construction of the stair the defenders owed no duty to the pursuer.

Gaunt v. *M'Intyre*, 1914 S.C. 43, 51 S.L.R. 30, *followed.*

Mrs Catherine M'Cormack or Feachan, Glasgow, *pursuer*, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Glasgow Subway Company, Limited, *defenders*, in which she claimed £100 damages for personal injuries.

The pursuer averred—"(Cond. 2) On or about 16th November 1921 pursuer was intending to visit her son Anthony Feachan. She was not sure of his address and went into the close in No. 16 Herbertson Street to inquire. When she went into the close she proceeded towards the door of the dwelling-house in the close at said No. 16 Herbertson Street, but before she could do so she fell down a stair which led from the lobby or recess in the close to a sunk area at the back. The floor of the sunk area at the back was about ten feet below the level of the floor of the close where the stair begins. She fell down the steps of the stair to the back area almost to the bottom, injuring herself very badly. She has not yet recovered from said accident, and her haunches and back have been permanently injured. (Cond. 3) The close or tenement in which the accident happened belongs to defenders, and is under their control as regards maintenance and condition. The close in No. 16 Herbertson Street goes straight in till it reaches the back wall of the building. There is a recess to the right in which an entrance into the house in the close is provided. Pursuer went into that recess in order to go to the door of the house, but the recess was completely dark, and no light was provided by which she could see where she was going. The top of the stair to the ground behind was also completely dark, and in searching for the door of the house in the close pursuer put her foot on the steps of the stair to the back, and missing her footing she fell down the stair. (Cond. 4) The cause of the accident was—(1) the bad construction of the building, in which a very steep and quite dangerous stair, of which the steps were too narrow and the slope or spread of which was too steep, was left as an approach to the back area; and (2) the want of a railing or door which should have been provided by the proprietors to mark off the stair from the recess or passage to the house in the close, and thus prevent persons going on to the stair, or at least warn passengers of its existence there; and (3) the want of light in the close to light the entrance to said back stair. There was at one time a gate on said back stair, but for a long time there has been no gate and no fence or railing to prevent passengers as aforesaid from falling. The lamp which lighted the close was not so placed so that it lighted the recess or entrance to the door of the house in the close and the entrance to the back stair referred to. It only lit a straight line of the close or entrance, with the usual effect of leaving the said recess or entrance to the stair in deeper shadow than if the light had not been there at all. Since the accident the defenders have altered the position of the light in the said close. It is explained