

Thursday, March 8.

SECOND DIVISION.

[Lord Wellwood, Ordinary.]

JACOBS & COMPANY v. M'MILLAN & SON, LIMITED.

Principal and Agent—Shipbroker—Commission—Introduction of Purchaser.

In August 1890 A applied to B & Company and C & Company, two firms of shipbrokers, asking them at what price they could get a sailing vessel of a certain description built.

On 1st August B & Company wrote to various shipbuilders, amongst others to D & Company, mentioning A as having decided to purchase a vessel, and asking them to state the lowest cash price covering $2\frac{1}{2}$ per cent. commission at which they could build the vessel. On 4th August D & Company sent in reply two letters to B & Company, one naming a quotation, the other stating that a commission of $2\frac{1}{2}$ per cent. was reserved for B & Company in the quotation sent.

On 1st August C & Company also wrote to D & Company asking them to state at what price they would build the vessel, but not naming the prospective purchaser. On 4th August D & Company replied to C & Company stating their price.

Thereafter D & Company heard no more of the matter till 17th October 1890, when they received a letter from C & Company referring to their letter of 4th August, stating that A was again inquiring as to their lowest quotations for building the vessel described, and asking them to send it. D & Company sent their quotation, and after some correspondence between A and C & Company, and C & Company and D & Company, a contract was entered into whereby D & Company agreed to build a ship for A at a certain price, which the latter bound himself to pay.

Held that B & Company were not entitled to any commission from D & Company in connection with this transaction.

John J. Jacobs & Company, shipbrokers, London, brought an action against Archibald M'Millan & Son, Limited, shipbuilders, Dumbarton, for £290.

The circumstances which gave rise to the action were as follows:—In May 1890 the pursuers brought an iron barque, the "Formosa," built by the defenders, under the notice of Mr Bielich, shipowner, Orebich, who was on the look-out for a suitable vessel.

On 17th May the pursuers wrote to the defenders—"We have a buyer who is inclined to build a vessel of about 800 regr., to carry about 1300 tons on about $16\frac{1}{2}$ /17 feet draft. He has seen the 'Formosa' here, and his idea of build would be on the basis of her lines. Please let us know what

would be your price to build such a craft, iron and steel respectively."

On 19th May the defenders replied—"We have to thank you for your esteemed enquiry of 17th inst., and in reply thereto to say that we should have pleasure in building a vessel of about 800 tons register, to carry say 1300 tons on about $16\frac{1}{2}$ /17 feet draft, for the sum of £10,000 (ten thousand pounds sterling). The proposed vessel would be built on much the same lines as the 'Formosa.'" . . .

On 21st May the pursuers wrote to the defenders—"Your esteemed favour of 19th inst. is duly before us, and we have submitted your proposal to our friend. He cannot make up his mind at present whether he will build now or wait on, but if we can induce him to make you an offer we shall again have this pleasure."

On 29th July Mr Bielich wrote Mr Brosinovich, the pursuers' manager, asking him to let him know at what price he could build a sailing vessel, steel or iron, of 1000 tons by good and well-known shipbuilders. The pursuers obtained quotations from three firms of shipbuilders, viz., the defenders, Messers Russell & Company, Port-Glasgow, and the Grangemouth Dockyard Company. The applications for quotations were made in precisely the same terms to all three firms. The pursuers' letter to the defenders, dated 1st August 1890, was as follows—"Referring to our letter of 21st May, our friend, Mr M. S. Bielich of Austria, has now decided to build an iron or steel barque of 1000 t. regr. to draw 18 feet of water when loaded, and to stand and shift without ballast with everything aloft. He requires a good East India outfit, steam winch, patent windlass, iron or steel lower masts and yards, raised quarter deck, crew's house, fore-castle, and all modern improvements. We shall be glad if you will send us full particulars of the dimensions, d/w capacity, &c. &c., and state time required for building, and lowest cash price, covering $2\frac{1}{2}$ % commission here, which please cover by separate note." On 4th August the defenders' replied—"In reply to your esteemed inquiry of 1st inst., we beg to inform you that our present price for a steel barque of about 1000 tons net register, having steam winch, patent windlass, raised quarter deck, crew's house, fore-castle, and all modern improvements, is £12,150 (twelve thousand one hundred and fifty pounds sterling). This offer is made subject to approval of plans, and to a specification to be mutually arranged, as well as subject to the adjustment of terms and conditions of sale." And in a separate note the defenders also wrote—"In our quotation to you of this date for proposed vessel we have reserved a commission of $2\frac{1}{2}$ % for you, payable on delivery of the vessel." These letters of the defenders the pursuers did not acknowledge. Quotations were also sent to the pursuers by Messrs Russell & Company and the Grangemouth Dockyard Company. All three quotations were sent to Bielich by the pursuers' manager, and some correspondence passed between them on the subject, in which the

pursuers' manager, while mentioning the firms of Russell & Company and the Grange-mouth Dockyard Company, and the terms on which they would build a vessel, made no further reference to the defenders.

On 29th July 1890 Bielich also wrote to Messrs Galbraith, Pembroke, & Company, shipbrokers, London, asking them to let him know at what price they could get a steel vessel of 1000 tons built for him. Messrs Galbraith, Pembroke, & Company, on 1st August, communicated among others with the defenders, asking them to name the price at which they could build such a vessel. In this letter the purchaser's name was not mentioned. The defenders replied on 4th August naming £11,850 as their price.

On 16th October 1890 Bielich wrote Messrs Galbraith, Pembroke, & Company as follows—"As I have not made as yet my arrangements for building a vessel in iron, and wishing to arrive at a settlement, please inform me at what price Messrs M'Millan & Son of Dumbarton are now prepared to build an iron vessel of about 1100 tons register." Messrs Galbraith, Pembroke, & Company thereupon wrote the defenders on 17th October—"Referring to your letter of the 4th August last, Mr Bielich is now here and asks us to get your lowest quotation for a steel barque about 1100 tons net register, with date of delivery, and we shall be glad if you would kindly let us have it by return of post." The defenders replied on 18th October naming £12,850 as their price. Various letters passed between Messrs Galbraith, Pembroke, & Company and the defenders, the result being that on 25th October a contract was completed by which the defenders contracted to build for Bielich a ship of 1000 tons at the price of £11,600.

Thereafter on 28th October the pursuers wrote to the defenders—"We are pleased to learn to-day that you have concluded a contract for a new ship with our friend Mr Bielich, whose name we gave you on 1st August last, and to whom we sent forward your letter of 4th August with quotation. You will of course have reserved our commission as stipulated in your memo. of 4th August last, and we shall be glad to have copy of contract for our books."

The defenders refused to pay any commission to the pursuers, alleging that the business was introduced and carried through by other brokers to whom a commission would be paid.

The pursuers raised the present action against the defenders for the amount of the commission claimed.

The pursuers' averred—"The pursuers' believe and aver that they were the first to mention Mr Bielich's name to the defenders, and that the contract effected by the defenders with Mr Bielich was the direct result of the recommendation of the defenders to him, and that they are therefore entitled to commission as charged, in terms of the undertaking by the defenders already mentioned, as well as by the custom of trade among brokers in the same line of business as the pursuers."

The pursuers pleaded, *inter alia*—"(2) The said order having followed upon and been

obtained by the defenders, through the introduction and recommendation of the pursuers, the latter are entitled to the commission claimed."

The defenders pleaded, *inter alia*—" (2) The pursuers not having been the *causa causans* of said contract, are not entitled to commission."

After proof the Lord Ordinary (WELLWOOD) on 6th February 1894 assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—When a shipbroker introduces a buyer to a builder and business results from the introduction, the broker is entitled by custom of trade to a commission to be paid by the builder. Bare proof of introduction is not sufficient; it must be shown that in a reasonable sense and to a material extent the contract or sale which followed was due to the introduction. On the other hand, it does not necessarily disentitle the broker to his commission that the contract or the details of the contract have been carried through and arranged, not by him, but by the buyer or another broker employed by the latter. Such stated in general terms is, as I understand, the custom of trade in regard to brokers' commission. But it is plain from the bare statement of it that each case must be judged of on its own circumstances, and in judging whether commission is due or not in a case in which the contract has not been made or completed by the broker who first introduced the buyer, it is material to inquire into the actings of the broker, not only before the introduction but between the date of the introduction and the completion of the contract, and also the grounds, if any, which the builder may have had for supposing that his negotiations with or through the first broker had fallen through when he came to deal with the buyer or the second broker.

"As the broker's commission depends on business being done, it is only right that after he has introduced a client to a builder he should be protected against the buyer thereafter depriving him of his commission by going behind his back, availing himself of the introduction and completing the contract with the builder either without the intervention of a broker or through another broker. If such a thing were to occur within a short time of the original introduction I do not understand it to be disputed that the builder would be liable to pay the first broker a commission, as he would virtually be in bad faith in concluding the contract direct with the buyer or through another broker. But, on the other hand, it would be hard on a builder if a broker by merely naming a client to him and asking for a quotation should be able to tie the builder's hands for months afterwards, although he took no steps to bring the client and the builder together, and actually was engaged during that time in trying to place the business in the hands of other builders.

"The present dispute is certainly due in a great measure to the conduct of the buyer, a Mr Bielich, an Austrian. No one

is found to say a good word for Bielich. The pursuer Mr Jacobs in one letter says of Bielich—'He gave us no end of trouble and work;' and Brosinovich, the pursuers' manager, says that when he found that the business had been put past the pursuers, and placed in the hands of Messrs Galbraith, Pembroke, & Company, he told Bielich that he thought he had done a very dirty action. No one acquainted with the case seems disposed to quarrel with these expressions. Bielich seems to have been a very troublesome client. He frequently changed his mind. At one time he said he wished to build a ship, at another he wished to buy a second-hand ship, and then he changed his mind again. Moreover, he frequently changed his brokers or employed several brokers at the same time; and there are some grounds for suspecting that this was not unconnected with the share of commission which this or that broker was disposed to give him. But whatever view may be taken of Bielich's conduct, that will not solve the present question, unless it can be clearly shewn that the defenders were in bad faith in dealing with Bielich through Galbraith, Pembroke, & Company after the introduction by the pursuers on 1st August 1890. . . .

"I shall state shortly the grounds on which I have come to be of opinion that the defenders are not liable in commission.

"The first introduction by the pursuers of Bielich to the defenders was by their letter of 1st August 1890. They had previously named the defenders to Bielich, and I assume recommended them as first-class builders; and Bielich had admired the 'Formosa,' a vessel built by the defenders and pointed out by the pursuers, and once thought of getting one built on the same lines, or at least the pursuers suggested that he should do so. But Bielich was not named by the pursuers to the defenders until 1st August 1893.

"I observe that on 17th May 1890 the pursuers asked the defenders what would be their price to build a craft on the lines of the 'Formosa' of about 800 tons register, to carry about 1300 tons. On 19th May the defenders reply that their price would be £10,000. They conclude—'We consider the figure named, which is our present price, a very low one, and think you should experience no difficulty in bringing your buyer to terms.' This however the pursuers did not succeed in doing. They write on 21st May to the defenders—'Your esteemed favour of 19th inst. is duly before us, and we have submitted your proposal to our friend. He cannot make up his mind at present whether he will build now or wait on, but if we can induce him to make you an offer we shall again have this pleasure.'

"On 29th July Bielich wrote to Brosinovich asking him to let him know at 'what price you could build a sailing vessel, steel or iron, by good and well-known shipbuilders, of 1000 tons register,' &c. The result of this order was that the pursuers obtained for Bielich quotations from various builders, amongst them the defenders, to whom they wrote on 1st August

1890. On that date the pursuers, in addition to writing to the defenders, wrote in precisely similar terms to two other firms of shipbuilders, viz., Messrs Russell & Company, Port-Glasgow, and The Grangemouth Dockyard Company. To both firms they named Bielich, and from both firms they asked a covering commission of two and a half per cent. From all three firms they obtained quotations, and on 5th August Brosinovich, who conducted the correspondence on behalf of the pursuers, forwarded those quotations to Bielich, who was abroad, placing Russell & Company first, the Grangemouth Dockyard Company second, and the defenders third, that being the order according to price, the lowest being stated first. Now, so far as appears from the evidence, that was the last step that was taken by the pursuers in the way of bringing Bielich and the defenders together. They did not even acknowledge the defenders' letter sending the quotation. I find no letters from the pursuers to the defenders between 1st August and 28th October 1890, by which time the contract had been completed through Galbraith, Pembroke, & Company; and I find no evidence that even when Bielich was in this country in September and October 1890 the defenders' names were ever brought under his notice either by Brosinovich or the pursuers.

"Not only so, but it appears from the correspondence that in many communications which passed between the pursuers and Bielich, or letters written by the pursuers on Bielich's behalf in August, September, and October 1890, they were endeavouring to secure the business, not for the defenders but for other shipbuilders, in particular Russell & Company of Port-Glasgow. . . . For instance, in the letter of 4th October the pursuers write to Russell & Company—'We would refer you to our letter of 1st August last, giving you Mr Bielich's name, which we are confident you will find to be the first time it was given to you, and you will therefore please protect us in case of business. We should add that we have also freely given your name, and submitted the correspondence with you to Mr Bielich;' and knowing Bielich's fickleness, the pursuers write on 7th October to Russell & Company—'It is just possible you may hear from him either direct or from another source, and in any case you will please protect us for our commission.'

"I need not refer to the correspondence between the pursuers and the Grangemouth Dockyard Company, which was practically to the same effect.

"Now, in these circumstances I think that the defenders were entitled to assume that all chance of business being done through the pursuers was with the assent of the latter at an end. The defenders had not even received an acknowledgment of their quotation, and that of itself was almost enough to justify their action. But besides that there was complete silence on the part of the pursuers for nearly three months, and although it is impossible to specify any fixed time on the elapse of which a claim

for commission would be lost, I think that in this case the lapse of three months following upon the pursuers' failure to acknowledge the defenders' quotation or to take any steps to bring Bielich and the defenders together is sufficient to disentitle the pursuers now to claim commission from the defenders.

"I have hitherto dealt with the actings of the pursuers and the defenders, which are probably sufficient for the disposal of the case. But if regard is to be had to Bielich's conduct and what influenced him in contracting with the defenders through Galbraith, Pembroke, & Company, I cannot affirm that he was to any material extent influenced by the pursuers' introduction, such as it was. He knew all about the defenders from other sources, and had actually come to pretty close quarters with them through Japp & Kirby, who were carrying on a correspondence on his behalf with the defenders between the end of June and the end of October 1890. . . .

"A good deal of evidence has been led on both sides in regard to the custom of trade with which I cannot agree. On the one hand, I cannot agree with the view of some of the defenders' witnesses that an introduction is necessarily to count for nothing unless the broker who introduces the buyer carries through the contract, or at least does some of the work connected with it. But, on the other hand, I cannot agree with some of the pursuers' witnesses, who speak as if it were enough for a broker to introduce the client and obtain a quotation, and then sit with his hands folded, and if a contract is entered into some months afterwards, but not through him, to claim his commission. If this view were well founded, a broker, on being applied to by his client to obtain quotations from well-known builders on the Clyde, it being certain that the buyer intended to do business with one or other of the builders on the Clyde, might obtain quotations from all the building firms of repute, naming the client, and thus ensure his commission in any event without taking any further steps to bring the buyer and builder together.

"The evidence which I consider of greatest weight in the case is that of the defenders' witness Frederick Gardiner, who gave his evidence with great clearness and moderation, and at the same time with judicious caution. His evidence is in accordance with the views upon which I have proceeded. It is plain from the answers which he gives as to custom of trade that in his opinion (and I think it is sound) in each case it is a jury question, depending upon circumstances, whether the broker has or has not earned his commission.

"It appears from the evidence that in some cases the commission is divided between the broker who first introduces the buyer and the broker through whom the contract is ultimately completed. I fancy that these are usually cases of arrangement or compromise. But even if in the absence of arrangement such a

division could be enforced in a court of law, I do not think that in this case there are sufficient grounds for awarding the pursuers a modified commission."

The pursuers reclaimed, and argued—The action of the pursuers in introducing Bielich to the defenders materially contributed to induce Bielich to give the contract to the defenders. The first introduction was the first and greatest step towards the completion of the contract, and the purchaser and the defenders having been first brought together by means of the pursuers' introduction, they were entitled to commission—*Cunard v. Van Offen*, 1859, 1 F. & F. 716; *Mansel v. Clements*, January 31, 1874, L.R., 9 C.P. 139; *Wilkinson v. Alston*, June 29, 1879, 48 L.J., 2 B. 733; *Walker, Donald, & Company v. Birrell, Stenhouse, & Company*, December 21, 1883, 11 R. 369.

Argued for the defenders—A shipbroker was only entitled to a commission if the relation of buyer and seller were really caused and brought about by what he had done. There was no case extant in which one broker having introduced the purchaser and another having independently introduced the purchaser and carried through the sale, the former had been found entitled to commission. The pursuers were not the *causa causans* of the contract, and therefore were not entitled to any commission. The pursuers had failed to prove that the contract was the direct result of their introduction. The judgment of the Lord Ordinary was right—*Green v. Bartlett*, May 30, 1863, 32 L.J., C.P., Chief-Justice Erle's opinion, p. 261; *Moss v. Cunliffe & Dunlop*, March 20, 1875, 2 R. 657; *White v. Munro*, July 11, 1876, 3 R. 1011.

At advising—

LORD YOUNG—The facts in this case are that in 1890 Macmillan & Son contracted for the building of a ship. The pursuers here say that they were the brokers in the transaction, and that they were entitled to the commission. The case for the pursuers is explained in Condensation 7, in which they say—[*His Lordship read the passage quoted in the narrative*].

They are, therefore, claiming commission upon this simple contract, which was made upon the 25th October in terms of the undertaking in the letter of 4th August, plus the custom of trade, or rather it is averred that the undertaking in that letter is quite in accordance with the custom of trade.

Now, the letter of 4th August is an answer to a letter from the pursuers to Macmillan & Son, asking their quotation. I shall refer to that to which it is an answer first. It is the first letter of the least importance in the case. They say—[*His Lordship read the letter*].

There are two letters of the 4th August, and it is the second one that is the undertaking. The first sends the quotation, the price being £12,150, and the second is a separate note covering the matter—that is concealing the matter, I suppose, of the 2½

per cent. commission—[His Lordship read the second letter].

Now, it is not disputed and it is clear that if the pursuers Jacobs & Company procured the contract between the defenders and Bielich or any other, it does not signify whom, in terms of the quotation of 4th August, the pursuers would have been entitled by this letter, and also by the custom of trade, to a commission of 2½ per cent. The question is did they procure the contract in terms of that quotation. If they did, they must prevail in this action; if they did not, they must fail. The Lord Ordinary has held upon the evidence that they did not, and I am of opinion with the Lord Ordinary that they did not. They did not acknowledge the quotation. I do not attach very great importance to that, and anything about it may be dropped out of the case. They did no more in the matter. They heard even no more of the matter until after the contract was completed on the 25th October, and it was then that for the first they came forward and said, "Oh, that contract has been effected through us; we were the brokers who effected it, and we are entitled to the commission in terms of the letter." Now, I think that is an untenable position. What importance Bielich attached to their recommendation of Maemillan as compared with the recommendation of other people I do not know. I shall assume that he had some confidence in their judgment and did attach some importance to it, but the commission is not due to those who recommend a ship-builder and whose recommendation is acted upon, the commission is due in law, sense, and according to the custom of trade, to the broker through whom a contract is effected. There may be a dozen brokers recommending the same shipbuilders as being likely to build a desirable vessel at a low price, but it does not follow that all these are entitled to commission. Only the one who effects the contract is entitled to it. Now, M'Millan & Son were of opinion that this contract in October was not effected by or through the instrumentality of the pursuers, from whom they had heard nothing since they applied for the quotation, the receipt of which they had never acknowledged in the month of August preceding. I think that was a just conclusion on their part, and that they were entitled accordingly to give a commission which I assume to have been due—but I have not to determine that—to Galbraith, Pembroke, & Company, through whom the contract was effected, and who had also applied for and received a similar quotation in the month of August preceding.

My opinion, therefore, upon the whole matter in this very simple case, as I conceive it—with very few facts in it, and very little law in it—is in accordance with the judgment of the Lord Ordinary, which I therefore think ought to be adhered to.

LORD RUTHERFURD CLARK — I am of the same opinion.

LORD TRAYNER—I am of the same opinion. On the 2nd August the defenders received two letters of the same date—1st August—one from Jacobs & Company, the pursuers, and the other from Galbraith, Pembroke, & Company, asking for a quotation for building a certain vessel. They sent replies to each of these letters, and as far as the pursuers are concerned the negotiations for that vessel there ceased. The pursuers did not acknowledge receipt of the quotation. What they did does not appear from the letters, but there their connection with the matter ceased. On the other hand, Galbraith, Pembroke, & Company having communicated the quotation which they had received from M'Millan & Son to Bielich, heard no more from him upon the subject until the following month of October, when he resumed communication with them in regard to this particular vessel for which they had asked and obtained a quotation from the defenders in the month of August. On 17th October Galbraith, Pembroke, & Company resumed correspondence with the defenders, and their letter of 17th October is this—"Referring to your letter of 4th August last Mr Bielich is now here, and asks us to get your lowest quotation for a steel barque about 1100 tons net register with date of delivery," and so on.

From that date 17th October until the 25th October, when the contract was concluded, Galbraith, Pembroke, & Company busy themselves in the matter of the contract, and ultimately bring the parties together and get the contract completed. In these circumstances I think it clear that the contract which was executed by M'Millan & Son was brought about through the agency of Galbraith, Pembroke, & Company, and through no other intermediary, and they are therefore, as the Lord Ordinary has held, entitled to the commission; and that Jacobs & Company are not entitled to any commission in respect that they had no direct influence in bringing about the contract at all.

LORD JUSTICE-CLERK—I am of the same opinion.

The Court adhered.

Counsel for the Pursuers—Dickson—Kennedy—Burnet. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders—H. Johnston—Kincaid Mackenzie. Agents—C. & A. S. Douglas, W.S.