Thursday, July 9.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

GALBRAITH & MOORHEAD *v.* "ARETHUSA" SHIP COMPANY, LIMITED.

Contract—Duration of Contract where No Period Expressed.

A firm of brokers agreed to take 500 shares in a company formed for the purpose of owning and working the ship "Arethusa," "provided that we are appointed sole chartering brokers for the 'Arethusa,' and that all her charters are to be done through us, the company paying us the usual brokerage of 1¼ per cent. on each charter, it of course being always understood that we are able to do as well as any other brokers regarding rates and terms."

Held that the company were not entitled to terminate the contract at any time, but only on reasonable cause shown.

The "Arethusa" Ship Company, Limited, was formed for the purpose of purchasing, owning, and working the ship "Arethusa," and its operations were, by the memorandum of association, confined to that vessel.

Messrs J. M. Macfarlane & Company, shipbrokers, Greenock, the managers of the company, entered into an agreement with Messrs Galbraith & Moorhead, insurance brokers, London, under which the latter were to act as brokers for the vessel.

The agreement was constituted by the following letters:— "9th Septr. 1891.

"Messrs J. M. Macfarlane & Coy.,
Greenock.

"*Arethusa" Ship Coy., Ltd.*

"Dear Sirs,—Referring to previous interviews and correspondence, we now beg to say that we are prepared to take £500 in shares in the above company, provided that we are appointed *sole chartering brokers* for the 'Arethusa,' and that all her charters are to be done through us, the company paying us the usual brokerage of 1¼% on each charter, it of course being always understood that we are able to do as well as any other brokers regarding rates and terms; also we are to have a line of insurance either on hull or freights of not less than £5000 p. voyage, of course also provided that we can do as well as other brokers; and we agree to return Messrs J. M. Macfarlane & Coy. half of our 5% brokerage. We shall be glad to hear from you by return with your confirmation of this arrangement.—Meantime, we remain, Dear Sirs, yours faithfully,

"GALBRAITH & MOORHEAD."

"Greenock, 15th Sept. 1891.

"Messrs Galbraith & Moorhead,
London.

"*Arethusa.*"

"Dear Sirs,—Yours to hand, contents noted, and we agree to your proposal to take £500 in this ship in terms of your favour of the 9th inst., which shall be held as the basis of our agreement." . . .

This agreement was acted on for some years, but a change having taken place in the management, the new managers ceased to employ Messrs Galbraith & Moorhead as sole chartering brokers.

Messrs Galbraith & Moorhead raised an action in the Sheriff Court against the "Arethusa" Company, concluding for £600 damages for breach of contract.

The defenders pleaded—"(1) The action is irrelevant, and should be dismissed. (2) The defenders not being parties to said agreement, and the letters founded on not having been executed by them, they are not bound thereby, and have committed no breach, and should be assoilzied. (3) *Et separatim*—Even assuming the defenders were made parties to said agreement by Messrs Macfarlane—(*a*) it being *ultra vires*, or in restraint of the company's liberty, was void; or (*b*) being terminable at any time, no action lies, and the defenders should be assoilzied."

The Sheriff-Substitute (J. HENDERSON BEGG) on 21st January 1896 dismissed the action.

Note.—"I had the advantage of a very able argument on the various points raised by the defenders' pleas-in-law, but the opinion I have formed as to the true meaning of the letters founded on by the pursuers renders it unnecessary for me to decide more than the first of the pleas referred to. Under the agreement constituted by the letters of September 1891 the pursuers were appointed sole chartering brokers for the defenders' ship the 'Arethusa,' and they aver that the agreement was acted on till lately, when a change took place in the management of the defenders' company. The new managers of the company have failed to employ the pursuers as their sole chartering brokers, and this is averred by the pursuers to be a breach of the agreement, entitling them to the damages sued for. Now, the agreement does not specify any terms of duration, and the pursuers maintain that it must therefore be construed as a perpetual agreement, subject only to such contingencies as would be sufficient in point of law to put an end to even an agreement for a fixed period (see *Rhodes & Forwood*, 4th May 1876, 1 App. Cases 256, and *Patmore & Company* v. *Cannon & Company*, 14th July 1892, 19 R. 1004). But I do not know of any authority for the proposition that an agreement indefinite as to its duration is equivalent to a perpetual agreement, while authority to the contrary effect may, I think, be found in the cases of *Dunlop & Company* v. *Steel & Company*, 27th November 1879, 7 R. 283; *Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, 19th October 1883, 11 R. 18; and *Cormack* v. *Keith & Murray*, 15th July 1893, 20 R. 977. In the words of the late Lord President in the second of these cases, 'I do not think that the law recognises an agreement of this kind as perpetual; and where there is no term stated, the general rule is that either party may put an end to

it, not on reasonable cause shewn, but on reasonable notice.' In the present case, the pursuers make no averments as to the defenders having failed to give reasonable notice. In the course of the debate before me I offered the pursuers' procurator an opportunity of amending the record by the addition of such averments, but he declined the offer (quite rightly, I have no doubt), on the ground that any damages which he might so qualify would be too small to be worth suing for in the ordinary Sheriff Court."

The pursuers appealed to the Sheriff (CHEYNE), who on 7th March adhered to the interlocutor of the Sheriff-Substitute.

Note.—"I may say at the outset that I have no difficulty in regard to the defenders' second plea, for I am clearly of opinion that the agreement on which the pursuers found was made with Messrs J. M. Macfarlane & Company, and not in their private capacity, but in their character of managers of the defendant company.

"In the next place, I may remark that, so far as I can judge, none of the three cases mentioned by the Sheriff-Substitute rules the present case.

"The earliest of them—*Dunlop & Company* v. *Steel & Company*, November 27, 1879, 7 R. 283, was treated by the Court as a case having to do with a lease of water-power, and there being no ish specified, the Court, applying a well-known principle in the law of leases, held the contract not to be binding.

"The contract in the second case—*Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, October 19, 1883, 11 R. 18—might perhaps have been treated as a contract of lease also, but the Court did not so treat it. They dealt with the case as one of the construction of an innominate contract. Two constructions of the deed in which the contract was embodied were possible. One was that the road trustees might any time, or at least on reasonable notice, call for the removal of a railway which they had on certain conditions allowed the coal company to place across one of the roads under their charge, and the other was that they were not entitled to do so unless and until they were in a position to say that the public safety was being endangered, or that the public were being put to inconvenience. The presumption, as the Lord President stated, was in favour of the former of these two alternative views, and as the Court found nothing in the deed to redargue the presumption, they gave effect to it, Lord Shand pointing out that there were some considerations drawn from the deed itself which favoured the conclusion that the agreement was not meant to be perpetual, viz., that nothing in the shape of a *grassum* had been paid by the coal company for the privilege of having the railway where it was, and that there was no obligation placed upon the company to continue to use the railway or pay the way-leave.

"The remaining case is *Cormack* v. *Keith Murray*, July 15, 1893, 20 R. 977, where a testator in his trust-settlement appointed A B to be agent to the trust, and at the same time gave his trustees power to appoint law-agents, and where the Court held the trustees entitled to dispense with A B's services when they saw fit, there being nothing in the deed to warrant the inference that the testator intended A B's appointment to be a permanent one.

"From this summary it will be seen that none of these cases is an authority for the broad proposition that where in a mutual contract, obviously intended to endure for some time, the period of duration is not expressly mentioned, the contract is, in the absence of any recognised usage, to be held to be terminable by either party on reasonable notice. Doubtless there is a presumption to that effect, but it is not a *præsumptio juris et de jure*. In every case the Court will proceed upon a construction of the document or documents constituting the agreement, and will give effect to the intention of the parties as gathered by clear or necessary implication from the terms in which they have expressed themselves.

"Is it, then, as the pursuers contend, a fair and reasonable inference to draw from their letter of 9th September 1891, which really contains the terms of the agreement now in question, that the agreement was to subsist, or, in other words, the employment of the pursuers as chartering and insurance brokers for the 'Arethusa' was to continue, till either the pursuers' firm was dissolved or the company was wound up? In support of their contention the pursuers found strongly upon the fact that they gave substantial consideration for the appointment, inasmuch as they agreed to take, and did take, fifty shares in the company, which it was argued they would not have been likely to do if the appointment had been terminable at any time; and they point to the clause 'All her (*i.e.*, the 'Arethusa's') charters are to be done through us' as showing that the appointment was intended to be a permanent one. These considerations are certainly not without force, though as regards the latter of them it may be observed that it is a possible though not perhaps the most natural reading of the clause to read it as if it ran 'All her charters *during the continuance of this agreement*,' an interpretation which would, of course, deprive the clause of all importance in its bearing upon the question now to be determined. There is, however, one consideration which is, as it seems to me, fatal to the view presented by the pursuers as to the inference deducible from the letter of 9th September 1891, and it is this, that as I read the letter the pursuers are not put under any obligation to exert themselves in the way of procuring charters for the vessel. If the remuneration mentioned in the letter became at any time, in their opinion, too small, or if for any reason they wished to get rid of the agreement, they would decline to take any trouble to obtain charters. In other words, they had it in their power to terminate at any time the relation constituted by the agreement, and that being so, it appears to me that it would require clearer *indicia* than are to be found within the four corners of the letters

founded on to warrant the conclusion that the company meant to come under an obligation to employ the pursuers as their chartering and insurance brokers during the period of their joint existence.

"Accordingly, while I feel more difficulty about the case than the Sheriff-Substitute appears to have felt, I feel obliged to concur in the result at which he has arrived, and like him I find it unnecessary to decide whether the making of a permanent appointment was or was not *ultra vires* of the managers."

The pursuers appealed to the Court of Session, and argued—They did not claim that the agreement was "perpetual" in the sense the Sheriffs attributed to them. It was terminable on the occurrence of a large number of events, such as the loss of the ship, the winding-up of the company, or if the pursuers did not do as well as other brokers. It was only a contract that the pursuers should get the preference, other things being equal. Accordingly the Sheriffs' grounds of judgment were wrong, being based on this misapprehension of the pursuers' contention. What they did assert was that the defenders were not entitled to put an end to the contract at will whenever they pleased. There was no authority against an appointment such as this, *e.g.*, of a commission agent—*Bilbee* v. *Hasse & Company*, July 17, 1889, 5 Times L.R. 667. This was not a question of general law but of the construction of the particular contract.

Argued for respondents—This was a contract of service which was terminable on reasonable notice. It was against public policy that such a contract should be perpetual—Fraser's Master and Servant, p. 56. What the pursuers asserted did amount to perpetuity, and the Court would not imply such a term in a contract where it was not expressed, nor would they ever order specific performance in such a case as this—*Fifeshire Road Trustees* v. *Cowdenbeath Coal Company*, October 19, 1883, 11 R. 18. The contract did not constitute merely a preference as the pursuers stated, but the defenders would be liable for a breach every time they passed over the pursuers. No sufficient consideration had been given for entering into such an obligation to go on for perpetuity. The pursuers' construction involved a *delectus personæ*, but according to their contention the employment must continue even if they became unfitted to carry out their share, there being no obligation in the contract on the pursuers to do their best for the ship.

At advising—

LORD PRESIDENT—The defenders' company was formed for the objects of purchasing, owning, and working the ship "Arethusa"; and its operations were by the memorandum of association confined to that vessel. By the agreement, for breach of which this action is brought, the pursuers agreed to take £500 in shares of the company provided they were appointed sole chartering brokers for the "Arethusa," and that all her charters were done through them, it being always understood that they were able to do as well as any other brokers regarding rates and terms.

The defenders claim right to "terminate the agreement at any time," and their way of doing so is simply by giving other brokers their charters, because they so please. The Sheriff-Substitute and the Sheriff, on different grounds, have sustained this contention. I am unable to concur in this result, or in the reasoning of either Sheriff.

First of all, what is the fair reading of the agreement so far as duration goes? I think it means simply this—that so long as the pursuers' firm are in business and do as well as other brokers regarding rates and terms, they shall get the "Arethusa's" charters. To call this a perpetual contract is surely inaccurate. The conditions are the continued existence of the "Arethusa," and of the pursuers' firm, and also the getting by them of as good rates and terms as other brokers get. The life of a ship is very far from a perpetuity; the joint lives of a ship and a firm of brokers still farther; while the condition about rates and terms still more reduces the stability of the tenure. When the employment, such as it is, is the counterpart for a substantial contribution of capital, the arrangement does not seem to call for remark or to warrant any reluctance in treating a breach of it as a breach of contract.

Accordingly, I do not agree with the Sheriff-Substitute in considering this contract to be indefinite in its duration; and (agreeing here with the Sheriff) I do not think that the cases cited by the Sheriff-Substitute rule the present case, or indeed have the general application which he ascribes to them. On the other hand, I am unable to regard the absence of an obligation on the defenders to exert themselves in the way of procuring charters for the vessel as of decisive importance. I should have thought this necessarily implied. And yet this is the circumstance which has determined the decision of the Sheriff.

If the construction which I put on the contract be sound, there is, so far as I know, no rule of law which refuses it effect. There is nothing illegal in a trader engaging to give all his business, so long as he carries it on, to a broker for any consideration he likes (including £500), if a contract to this effect be made in writing. Again, no valid argument—indeed no argument at all—was offered us to the effect that this "Arethusa" Ship Company, Limited, could not enter into such a contract if an individual could, and if the company could, then the "managers" could, for the "managers" have the most absolute power to do everything competent to the company except what is expressly reserved for general meetings (an exception which of course has no application to the present question).

I think that the first and third pleas of the defenders should be repelled, and the case remitted to the Sheriff to allow a proof and to proceed. It would I think be premature to dispose of the defenders'

second plea until the facts are ascertained, although this does not imply any undue appreciation of its importance on averment.

LORD ADAM—I agree with the Sheriff that this case depends solely upon the construction of the agreement contained in the letter of 9th September 1891, by which the pursuers were appointed sole chartering brokers for the "Arethusa," and the question is whether that agreement could be determined by the defenders on reasonable notice, or on reasonable cause only. Now, it will be observed that the pursuers paid for the appointment of sole charterer's brokers, and the consideration was their taking and paying for £500 shares in the company—which it is not disputed they did. I have great difficulty in holding that an agreement for which consideration had been thus given could be terminated at will by the other contracting party.

I observe that the Sheriff says this:—"There is however one consideration which is, as it seems to me, fatal to the view presented by the pursuers, and it is this—as I read the letter—the pursuers are not put under any obligation to exert themselves in the way of procuring charters for the vessel." I think the Sheriff is wrong in this—because the agreement bears to be entered into "on the understanding" that the pursuers are able to do as well as any other brokers regarding rates and terms. I suppose the pursuers could not do as well as any other brokers unless they exerted themselves to get charters, and that is equivalent to saying that if the pursuers do not exert themselves in procuring good charters for the vessel the defenders would be entitled to put an end to the agreement.

On the whole, I am of opinion that the agreement was not terminable at the will of the defenders, but only on cause shown.

LORD M'LAREN and LORD KINNEAR concurred.

The Court sustained the appeal, repelled the first and third of the defender's pleas, and remitted to the Sheriff to allow a proof and proceed.

Counsel for the Pursuers—Ure—Younger. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Balfour, Q.C. —Salvesen. Agent—William B. Rainnie, S.S.C.

Thursday, July 9.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

NELSON'S TRUSTEES *v.* TOD.

Superior and Vassal—Maills and Duties—Holder of Bond over Superiority.

Held (following Prudential Assurance Company, Limited v. *Cheyne, &c.*, June 4, 1884, 11 R. 871)—*diss.* Lord Young—that the creditor in a bond and disposition in security over a superiority, with an assignation to feu-duties and casualties, has no title to pursue an action of maills and duties against the vassals of his debtor.

This was an action of maills and duties brought by the trustees of the deceased William Nelson, printer and publisher in Edinburgh, as creditors in a certain bond and disposition in security in their favour dated and recorded 25th May 1891.

Included in the subjects first disponed in security by the said bond and disposition in security, was the superiority of a piece of land known as Kevockmill Bank, which formed part of the lands of Kevockmill. The present action was brought against (1) Mrs Isabella Currie or Jameson or Galbraith, widow, sole disponee and universal legatory of the late Dr Jameson, who was at his death vassal in a portion of this piece of land, as herself vassal in or proprietor of said portion and as representing Dr Jameson; and (2) Miss Jean Tod, heritable creditor in possession of another portion of said piece of land, in virtue of a decree of maills and duties in her favour. The action concluded that these defenders should be ordained conjunctly and severally to pay to the pursuers the maills and duties payable by them in respect of their possession of said lands, *videlicit*, the feu-duties payable in respect of their feus, at least so much thereof as would satisfy and pay the balance of principal and the interest and penalties due under the bond and disposition in security in favour of the pursuers.

The bond and disposition in security contained a clause assigning rents and feu-duties and casualties.

The debtors in the bond, who were the superiors of the piece of ground above referred to, had been sequestrated, and a sum of £6000 of principal due under the bond still remained unpaid, and also the interest due thereon since the term of Whitsunday 1894, up to which term the interest had been duly paid.

The piece of land in question was originally feued out in 1827, subinfeudation being expressly prohibited, and the yearly feu-duty was fixed at £69, 15s. 9d. It had ultimately come to be divided into four parts, of which the first belonged to the late Dr Jameson, the second to the late Colonel Pullan (being the portion possessed by Miss Jean Tod as heritable creditor in possession), the third to the North British