

was the share in the said commission to which the late Edward D. Whyte became and was entitled, and what part or portion thereof, if anything, is still due to the plaintiff herein from the defendants or either of them, having regard to the declarations aforesaid."

The declarations were: (1) that the agreement to pay commission was established, and that thereunder a commission of 10 per cent. became payable by the appellant to Edward D. Whyte and the defendant Gordon; (2) that the manner of payment was to be by money and shares as described; (3) that the beneficial interest in the commission to which Whyte became entitled did not, in consequence of his death, pass to the defendant Gordon, but that the appellant is liable to the plaintiff for Whyte's share.

When this case was before this Court previously, it was expressly decided that the contract sued on was a joint one, and that the respondent must add the co-contractee before judgment could be given. This had now been done. The judgment, consequently, must be for recovery by both parties, the respondent and the added defendant, against the appellant, as was done in *Cullen v. Knowles*, [1898] 2 Q.B. 380. This situation was correctly apprehended in the judgment now appealed from, and paras. (1) and (2) were correct in form and in law.

It appeared, however, from the evidence taken in this case on the former trial, and was not now disputed, though not formally proved at the new trial, that the appellant had settled with the defendant Gordon, paying him a moiety of the commission earned under the agreement sued on; and the defendant Gordon, as between himself and the respondent, admitted by his silence in face of para. 19 of the amended statement of claim, that the respondent was entitled to the other moiety.

In these circumstances, a reference was unnecessary, unless the appellant wished to prove formally therein, at his own expense, the fact of the settlement with the defendant Gordon. If not, judgment might properly be entered for the respondent for one half of the commission, payable as set out in para. 2 of the judgment in the Court below, the same being prefaced by a recital that the appellant had paid to the defendant Gordon his moiety of the commission, and that Gordon admitted, under the pleadings in this action, the right of the respondent to the other moiety; and there should also be included a declaration that, upon the appellant paying the respondent the remaining moiety, he should be entirely discharged from all further liability under the contract sued on. This would safeguard the appellant. If he desired it, he might reserve his right against Gordon to recover from him the