great a penalty to make him pay what he had stipulated to pay. It has been observed that an award of wages is truly *nomine damni*, because the servant has not rendered the service which was the stipulated consideration for the payment of wages; the servant, though willing, has not, it is true, given the service, but he has suffered in feelings and character, as well as pecuniarily, by being dismissed unjustly, and if the defender's view were a sound one he could get nothing as *solatium* or damages if he happened to get another place immediately. The defender's pro'r. admitted that the pursuer was not bound to seek another engagement during the currency of the year in question, and if he had not obtained one, of course the defender would have had no answer to the demand for full wages.

"The Sheriff-Substitute cannot see why the defender should benefit by the pursuer's industrial inclinations, by escaping the penalty which he had incurred. If the measure of the penalty imposed on a master is to be the actual pecuniary loss suffered and no more, it ought in reason to be only the loss of necessity incurred, and the servant would be bound to obtain employment if possible; a rule which could not work, as it never could be ascertained whether or not it was entirely a servant's fault that he had not got a new place.

"Further, if the defender's contention were sound, no decision could be pronounced in any case until the expiry of the period fixed for the duration of the contract, as it could not be known whether or not a servant would get a new situation. If it were otherwise, the servant who was successful in getting a speedy decision would be in a better position than one whose case was contested in such a manner as the present has been, having a decree for full wages, and at the same time liberty to earn more, which would be denied to the other. No reservation is ever put into an interlocutor decerning for wages due, and if such were put in, the only effect would be to give power to the master to bring an action for repetition,—a course of procedure which no Court is likely to inaugurate unless compelled. If the defender had not raised untenable defences the present pursuer would have got his decree before he made his new engagement, and would thereby have been in a much better position than the defender wishes him now to be. It does not seem to the Sheriff-Substitute equitable that this more favourable position should be cut away by legal delays interposed by the defender."

On appeal, the Sheriff (NAPIER) adhered.

The defender appealed to the Court.

MILLAR, Q.C., and MACDONALD for him.

FRASER and HALL in answer.

The Court, after having allowed a proof before answer of the terms of the engagement, held that the engagement of Cameron had been for a year; and as he had been dismissed wrongously, he was entitled to damages, and these they assessed at the sum of £40. Their Lordships did not decide the question, Whether, by presumption of law, a gamekeeper was a yearly servant?

LORD BENHOLME said that he was glad that there had been a proof taken in the case, because his decision was based upon the result of that proof. He regarded this as a special case, and wished to avoid the enunciation of any general principle of the law of hiring. It had been made a special condition by Cameron that he should get a house. No doubt his wages were to be paid weekly, but that was made necessary by the nature of the employment, which was of a varying kind. In some parts of the year a gamekeeper was much busier than at others, and hence the necessity of an equalising wage. If the pursuer was wrongously dismissed he was entitled to a sum of money, *nomine damni*, and looking to the whole circumstances of the case, he was inclined to estimate the damages at £40.

Agent for Appellant—James Somerville, S.S.C.
Agent for Respondent—John Galletly, S.S.C.

Wednesday, January 10.

FIRST DIVISION.

M'INTOSH *v.* AINSLIE.

Discharge—Delegation—Misrepresentation.

A tradesman who had contracted to execute certain repairs on a farm-steading applied to the proprietor for a payment of £60 to account. The proprietor wrote to him to apply to his local factor, and, at the same time, wrote to the factor to pay the amount. The factor had amply sufficient funds belonging to the proprietor in his hands, but of this the tradesman was ignorant, and he was induced by the factor to take £20 in cash, and the factor's promissory-note for the balance of £40. Subsequently, after the performance of the work, the tradesman applied for the balance of the contract price. In the statement bringing out the balance he credited the proprietor with £60 "p. the factor." The proprietor again referred him to his factor, who made the same representations, gave him a small sum in cash, and his promissory-note for the balance. The factor having become insolvent, and unable to retire the promissory-notes, the tradesman raised an action against the proprietor for the unpaid balance.—*Held* that the proprietor, as the original debtor, had not been relieved of the debt by delegation, and was still liable.

Further, *held* that the mis-statement by the tradesman, in stating that he had received £60 from the factor in cash, whereas he only received £20 in cash, being an innocent mistake, and not made for any fraudulent purpose, did not operate as a bar against his recovering the £40 in question, the proprietor having failed to prove that he had suffered any loss in consequence of the mistake.

In October 1868 Mr Ainslie entered into a contract with Andrew M'Intosh & Son, contractors, Redcastle, for carpenter and other work to be executed on the farm-house and steading of Muirton. The contract price was £235, 10s. 6d. On the 11th January 1867, at the request of the contractors, Mr Ainslie sent them a cheque for £120 in payment to account of the contract price. They received payment of the contents of the cheque. On the 7th May 1867 they requested a second instalment of £60, and in answer he desired them to apply to Mr M'Lennan, Hilton, his factor, who would pay this second sum to account. M'Lennan had then in his hands funds belonging to Mr Ainslie amounting to £137, 12s. 10d. Of this M'Intosh & Son were ignorant. M'Lennan represented that he had not funds of Mr Ainslie's in his hands to the requisite amount, and induced them, after

some delay, to accept £20 in cash, and his promissory-note for the balance of £40. The note was in the following terms:—

"*Hilton, 6th July* 1869.

"£40, 0. 0.

"One month after date, I promise to pay to the order of Messrs M'Intosh, contractors, Redcastle, within the Caledonian Bank in Dingwall, Forty pounds stg., for value received in account of Mr Ainslie of Muirton. D. M'LENNAN."

On the 6th July Messrs M'Intosh wrote to Mr Ainslie in the following terms:—

"*Redcastle, by Inverness, 6th July* 1869.

"R. Ainslie, Esq. of Elvingston.

"Sir,—Having completed the works at Muirton last week, we will feel much obliged by your remitting to us at your convenience balance of contract (viz., £55, 10s. 6d).

Amt. of Contract for works at Muirton, . .		£230	0 0
Do. do. at Chapelton,		5	10 6
		£235	10 6
Cr. Jany. 14, 1869.			
Cash, per cheque,	£120 0 0		
Do., p. D. M'Lennan,	60 0 0		
		180	0 0
Balance still due, . .		£55	10 6

"We are, &c., ANDW. M'INTOSH & SON."

Mr Ainslie replied that M'Lennan would pay them the balance of their account, and wrote to M'Lennan directing him to pay them. M'Lennan again assured them that he had not funds of Mr Ainslie's, although it has since appeared that he had amply sufficient. He gave them 10s. 6d. in cash, and on the 16th July a promissory-note for £55, "for value received in balance of account for carpenter work executed at Muirton Mains, square of offices and dwelling-house."

On the 20th September, after the promissory-note became due, it was renewed in the form of a bill at four months.

Meanwhile, the note of 6th July fell due on 9th August, and as M'Lennan failed to retire it, and became insolvent, the bank who had discounted it required Messrs M'Intosh to pay it. The same happened with regard to the bill of 20th September.

On the 27th November 1869 M'Intosh & Son, through their agents, acquainted Mr Ainslie with what had passed, and required him to indemnify them. Mr Ainslie having refused, the present action was ultimately brought to recover the unpaid balance of £90.

The defender pleaded—

"2. The defender should be assoilzied, with expenses, in respect that the pursuers accepted M'Lennan's promissory-note and bill in lieu and satisfaction of the debt due to them by the defender, and that said debt is thus extinguished by delegation.

"3. In any view, the pursuers have failed to follow the defender's instructions as to receiving payment of the sums of £60 and £55, 10s. 6d. from M'Lennan, and having failed to inform the defender that payment had been applied for and had not been obtained, having taken M'Lennan's note and bill without the knowledge or authority of the defender, and having thus prevented the defender from realising the funds then belonging to him in the hands of M'Lennan, they cannot now claim payment from the defender, who should therefore be assoilzied, with expenses.

"4. The pursuers having, in the state of accounts rendered by them in July 1869, given the defender credit for the sums of £120 and £60, as paid in cash to account of the contract-price of the works, are not entitled now to claim payment of any part of the sums so paid, and their claim cannot, in any view, exceed the balance of £55, 10s. 6d., under deduction of the sum of £5, 10s. 6d., admittedly paid to account thereof."

The Lord Ordinary (GIFFORD), after a proof, found that it had been sufficiently established that the defender was still due and resting owing the balance sued for, and decerned in terms of the conclusions of the summons.

"*Note.*—There is no dispute between the parties as to the work done by the pursuers for the defender, or as to the contract price due therefore. The total contract price earned by the pursuers under the two contracts was £235, 10s. 6d.

"Neither is there any dispute that the pursuers, to account of this contract price, received certain sums, for which they give credit in the present action.

"The only question is, whether the pursuers are bound in addition to give credit for certain other sums contained in bills or promissory-notes which the pursuers took from Mr Donald M'Lennan, the defender's factor, but which bills or notes Mr M'Lennan has failed to pay, or to retire. The defender's plea is, that he furnished Mr M'Lennan with sufficient funds to pay the pursuers in cash; that he told the pursuers to apply to M'Lennan for payment: and as the pursuers, without the defender's consent, and without notice to the defender, have chosen to take bills from Mr M'Lennan instead of cash, they have, by so doing, taken M'Lennan as their sole debtor, and have discharged the defender to the extent of these bills. Mr M'Lennan has become insolvent, with considerable funds of the defender's in his hands.

"There is a good deal of force in an equitable point of view in the defender's plea; but, after full consideration, the Lord Ordinary has found himself unable to give it effect as operating in law as a discharge to the defender of the debt which he was admittedly owing to the pursuers.

"(1.) In substance, the defender's plea is, that the acceptance of Mr M'Lennan's bills amounted to delegation—that is, to the substitution of Mr M'Lennan as the full and only debtor instead of defender, and to the entire and final discharge of the defender. Now, delegation is never to be presumed; *in dubio*, a new obligant will be held as corroborative of the original obligant, and not as being substituted for him. Even novation, which is a mere change of obligation,—the obligant remaining the same,—is never presumed, and there is a still stronger presumption against delegation, which requires more elements to complete, and to instruct it.

"In the present case there is really nothing to instruct delegation beyond the bills themselves. There was no discharge granted by the pursuers when they took the bills, not even a receipt for the amount thereof. There was no delivering up of any document of debt; there was no letter or any document whatever expressing or implying that Mr M'Lennan was to come in place of the defender.

"The terms of the bills or notes themselves do not imply discharge of the defender, for they expressly bear that they are granted as for work done for the defender, and for which the defender is directly liable.

"It is quite fixed that, taking a new obligation or document of debt from a debtor himself,—for example, a bill, note, or bond,—does not innovate the old debt or obligation. It is thought that the circumstance that the bill is granted by the debtor's factor cannot *per se* have the effect of liberating the debtor.

"(2.) The Lord Ordinary holds it to be proved that the defender's factor, Mr M'Lennan, had no power to grant bills in the defender's name, or binding the defender, and that the bills in question were granted without the defender's authority. But this does not make the case stronger for delegation, but rather weaker. The defender can hardly say that he is discharged of his admitted and just debt by an act done without his authority, and without his knowledge or consent. The bills, it appears, were granted because the pursuers were pressing Mr M'Lennan for the money. Mr M'Lennan ought to have paid the money; but he said he had it not, and the bills were granted as an interim accommodation to the pursuers, who might raise money by discounting them. But it would be very strong to hold that this operates as a final discharge to the defender, the admitted debtor, whether the accommodation bills were paid or not. This is not an action upon the bills, which do not in the least bind the defender, but it is an action upon the defender's original and admitted debt, which has never been discharged.

"(3.) Indeed it was almost admitted in the argument by the Counsel for the defender, that the mere granting of the bills would not by itself be enough, but that it must be taken along with the fact that, at the time of granting the bills, M'Lennan, the defender's factor, had sufficient funds of the defender to pay in cash, but chose rather to pay in bills.

"Now, if it be once admitted, as it must be, that the granting of the bills would not have constituted delegation if M'Lennan had had no funds, it is difficult to see how his having funds should make a difference. For the pursuers did not know or suspect that M'Lennan had funds. This seems quite established. M'Lennan assured the pursuers that he had no funds, and for this reason he proposed a bill. The pursuers had no reason to doubt M'Lennan's word, and the defender is not entitled to say that he, the defender, is to profit by M'Lennan's fraud. Delegation is a question of intention, and the state of mind of the pursuers, who believed M'Lennan to have no funds, is far more important than the latent and unknown fact that he really had funds.

"But even the defender himself did not know that his factor had funds—he merely guessed or supposed it,—for it was not till long after that the factor's accounts were rendered. The Lord Ordinary knows of no authority for holding that the fact of delegation or no delegation, may be dependent upon the result of an accounting, of which the creditor, who is said to have taken a new debtor, was not cognisant, and with which he had nothing to do.

"(4.) The only remaining view urged by the defender was a sort of personal bar against the pursuers. The defender argued that the pursuers were told to get payment from the factor, their taking bills or notes without notice to the defender was said to be an act of bad faith, which precluded them from making any claim upon the defender, whether the notes were paid or not.

"Without denying that there may be some foundation for this complaint, it is thought to be insufficient as an answer to the pursuers' admitted and proved debt.

"The Lord Ordinary really cannot blame the pursuers very much for believing the statements of the defender's own factor, and taking the bills as interim accommodation. There was nothing to make them suspect fraud or unfair dealing. To intimate to the defender would imply that they doubted his factor's word, and would have been really putting the pursuers in a worse position than that they now occupy.

"Then it is not said or proved that the defender has discharged his factor, or settled with him on the footing that the payments were made in cash and not in bills. On the contrary, the factor's accounts were not rendered to the defender till after 30th November 1869; and this was after the defender had got notice from the pursuers' agents, that they claimed the sums in these bills as still due by the defender. The defender cannot say that he has lost anything, or discharged any debt, or parted with any security by reason of his factor having granted the bills. On the contrary, he was told of the bills, and that he was still held liable for the amount before he knew how his accounts with his factor stood.

"On the whole, the original debt due by the defender to the pursuers having been fully established and constituted, the Lord Ordinary thinks that the entire *onus* lies upon the defender to show that the balance of that debt has been discharged, and that the defender has been discharged of all liability therefore. He thinks that the defender has failed to show this; and, accordingly, the defender is still liable in the balance of the pursuers' account, which is admittedly due and unpaid.

"The only thing approaching a discharge on which the defender can found is the pursuers' letter of 6th July 1869, in the note annexed to which they give credit for £60,—£40 of which turns out to have been M'Lennan's first bill granted that very day. The answer seems to be satisfactory, that this cannot be founded upon as a receipt, for it is unstamped, and was not intended as such; that the pursuers have sufficiently explained the entry, by disclosing the facts about the bills, which were ultimately dishonoured and unpaid, and that the defender cannot qualify any loss or prejudice which he has sustained by reason of the pursuers' conduct. The defender himself must be primarily liable for his own factor's dishonesty or bankruptcy."

The defender reclaimed.

MARSHALL and JOHNSTONE, for him, argued—The pursuers were directed by the defender to take cash from M'Lennan, instead of which they chose to take promissory-notes from him, and never intimated this to the defender. They must therefore be held to have taken M'Lennan for their debtor. In any view, the pursuers have barred themselves from recovering the £40 mentioned in their letter of 6th July. They there state that they had received the whole £60 in cash from D. M'Lennan, whereas they had only received £20 in cash. Had the defender been told that his factor was giving promissory-notes to creditors, instead of paying them out of the funds in his hands, he would at once have called the factor to account. As it was, he was kept in ignorance by the pursuers' misstatement, till M'Lennan became insolvent, and the money was no longer recoverable.

Authorities—*Buchanan* v. *Somerville*, Feb. 19,

1779, M. 3402; *Chiene* v. *Western Bank*, July 20, 1848. 1 D. 1523.

SOLICITOR-GENERAL and BALFOUR in reply—*Pattie*, Dec. 23, 1843, 6 D. 350; *Wilson & Corse* v. *Gardner*, Nov. 26, 1807, Hume, p. 247; *Muir* v. *Dickson*, May 16, 1860, 22 D. 1070; *Williams & Co.* v. *Newlands*, July 20, 1861, 23 D. 1861; *Pollock & Co.*, Nov. 6. 1863, 2 Macph. 14; Pothier on Obligations, part iii, c. 2, art. 6, sec. 1, (vol. i, p. 392, English ed.).

At advising—

LORD PRESIDENT—The debt originally owing by the defender to the pursuers arose out of a contract for repairs of certain buildings. The offer by the pursuers was in writing, but it was verbally accepted. There was no provision for payment of the contract price by instalments, and so the pursuers had no right to demand any payments till the work was completed. On the 9th January 1869 they ask for a payment to account of £120. They say "in accordance with your proposal," which must refer to some verbal undertaking by the defender. The £120 was paid by cheque, and duly cashed, and about that sum there is no question raised. But on 7th May 1869 the pursuers make an application to Mr Ainslie for a second payment to account of £60, which they ask as a favour. In answer, Mr Ainslie refers them to his factor, and, at the same time he desires the factor to pay the £60. It is admitted that M'Lennan had sufficient funds of the defender's in his hands, but it is neither admitted nor proved that this fact was known either to the pursuers or to the defender. The pursuers went to M'Lellan and made their demand. He told them that he had not sufficient funds. He paid them £20 in cash, and his promissory-note for the balance. This, however, was not upon the first demand, but some time afterwards. The demand was made in May, and it was not till the 6th July that the note was granted. In fact, the pursuers, having got £20, were waiting on for the £40, being assured by M'Lennan that he had not the money. At last, in order to put them in funds for the conduct of their business, M'Lennan offered them his promissory-note for the amount. The note is payable at one month's date, and bears to be "for value received on account of Mr Ainslie of Muirton." Much the same thing is repeated as regards the payment of the balance of £55. The question is, Whether by these proceedings, taken in connection with one other piece of evidence, there has been created a discharge of Mr Ainslie's debt by delegation? That other piece of evidence is a letter by the pursuers to the defender, dated 6th July 1867, in which they ask for payment of the balance of the contract price. They bring out the balance in this way, crediting Mr Ainslie with "Cash per cheque, £120, Do. p. M'Lennan, £60." In this statement there is undoubtedly an inaccuracy. In point of fact they had only received £20 in cash from M'Lennan, and on this same day (6th July) they were taking his promissory-note for the balance. The question is, whether upon this evidence the debt has been discharged by delegation? I am clearly of opinion that no delegation was intended or effected. It must be kept distinctly in view what delegation is. It is accurately defined by Erskine, b. iii, t. 4, 22, as "the changing of one debtor for another, by which the obligation which lay on the first debtor is discharged; *e.g.*, if the debtor in a bond should substitute a third person, who becomes obliged in his place to the creditors, and who is called in the Roman law *expromissor*, this requires not only the consent of the expromissor, who is to undertake the debt, but of the creditor. For no debtor can get quit of his obligation without the creditor's consent, except by actual performance; and no creditor can be compelled to accept of one debtor for another against his will." In any ordinary case of delegation one would expect the proposal to substitute one debtor for another to come from the original debtor. Here we begin with the awkward circumstance that the original debtor knew nothing about this supposed delegation, which was going on behind his back. I can understand that there may be a good delegation although the original debtor is no direct party to the transaction, if the new debtor makes a clear and direct contract with the creditor that he shall undertake the debt. But was there any such proposal or intention on the part of M'Lennan? Can it be said that he intended to put himself in place of Mr Ainslie, or even that such was the effect of the proceedings? The form of the promissory-note negatives any such contention. M'Lennan there records that what he is doing he is doing in his factorial capacity, though it may be that he is going beyond his powers. It has been laid down by all the authorities that delegation is not to be presumed, nay, further, I think that there is a presumption against delegation. Erskine says "neither novation nor delegation is to be presumed, for a creditor who has once acquired a right ought not to lose it by implication, and consequently the new obligation is *in dubio* to be accounted merely corroborative of the old." Here the circumstances are far stronger than if a new obligation had been contemplated. What is set about by the parties is the means of discharging the debt by payment, not a discharge by delegation, which implies that the debt is to be kept up. What took place was substantially this—The factor says, "I have not funds of Mr Ainslie's, but I will give you my note in the meantime to put you in cash for your trade purposes; and I will retire the note when it falls due." But, then, there is the circumstance of the inaccurate representation in the letter of 6th July. That is a piece of evidence in favour of delegation, not immaterial, but entirely inconsistent with, and, I may say, overwhelmed by the other evidence. It was a mistake on the part of the pursuers, but it goes a very short way to prove their acceptance of a new debtor. I think parties cannot drift unconsciously and fortuitously into delegation. There must be plain and clear intention. I do not mean to say that a creditor may not so conduct himself as to lead every one to suppose that he is accepting one debtor for another, but the inference from his conduct must, at least, be very clear. On this first point, I entirely concur with the Lord Ordinary, that delegation has not been proved. But this letter has been founded on by the defender as operating a sort of personal bar against the claim, so far as it refers to the £40. It can only operate as a bar against the pursuer's claim, upon the ground that it is a false representation, or, at least, an inaccurate representation followed by injurious consequences to the defender. If it had been a fraudulent misrepresentation, the defender might have availed himself of it without direct proof of injury. But it is not pretended that this representation was fraudulent. It is simply an inaccuracy through innocent mistake. I cannot think that a party can be made answerable for an inaccurate representation innocently made, unless

the party said to have been misled can prove that he has suffered injury in consequence of the misrepresentation. It is not even proved that Mr Ainslie lost money by M'Lennan, still less that loss was caused by this inaccurate representation. Who knows what Mr Ainslie would have done had the letter of 8th July contained an accurate statement, viz., "Cash per D. M'Lennan, £20, Promissory-note p. do. £40." Mr Ainslie was examined as a witness. He has not told us what he would have done. In the absence of any evidence on his part that the disclosure would have altered his conduct, I cannot take it for granted that he would have acted otherwise than he did. And without distinct proof of this, I cannot rest any liability against the pursuers on this innocent mistake.

LORD DEAS—I concur. I guard myself from affirming that an actual intention on the part of the creditor to accept a new debtor in place of the old one is essential to delegation. He may act in such a way as to lead the original debtor to believe that he had accepted another in his place. I do not think he will then be entitled to say—"Quite true, I led you to believe that I had accepted a new debtor in place of you, but I had no such intention, and therefore you are still bound." But the letter founded on by the defender does not bring the case up to this. As to the second ground of defence, I think there is a great deal in an observation of the Solicitor-General, that this second question must be dealt with pretty much as if the promissory-note had not existed. Here again comes in the materiality of the fact that Mr Ainslie never knew that there had been a promissory note granted. There is no sufficient evidence that he would have done anything different from what he did had he known it. It does not appear that he would have repudiated what had been done. Still less does it follow that the creditor was much to blame for taking the note. The relations between the parties, viz., landlord and steward, are most material. Mr Ainslie was under the responsibility for M'Lennan which every landlord is for his steward.

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered, with additional expenses.

Agents for Pursuers—Mackenzie & Black, W.S.
Agent for Defender—William Kennedy, W.S.

Thursday, January 11.

SECOND DIVISION.

PIRIE *v.* LAVAGGI.

Principal and Agent—Sale—Set-off. A rag merchant in London sent ten bales of rags to his agent in Aberdeen, in order that they might be sold there. The agent sold them to a third party, and, before the price was paid, became insolvent. The third party retained the goods as a set-off against a debt due by the insolvent to them. *Held*, in an action at the instance of the original owner, on a proof—(1) that the agent had represented himself to be the principal in the transaction; and (2) that the sale was complete, and, accordingly, that the defenders were entitled to plead "set-off," and should be assoilzied.

On September 1870 the respondent, a rag merchant in London, forwarded to Mr Joseph Wood, as a broker in Aberdeen, ten bales of cotton, in order that they might be sold on his account in Aberdeen. On 10th October Wood wrote a letter to Messrs Pirie & Sons, the appellants, to the following effect:—"The ten bales rags have been sent by the same party who sent the former lot. I shall feel obliged if you will have them sorted, and say what price you can give for them." The defenders were in the habit of dealing with Wood, sometimes as principal, and sometimes as agent for others; and the custom of trade was to take over the rags, have them sorted and manufactured, and thereafter fix the price thus ascertained as their value.

The Messrs Pirie accordingly took over the rags, and, before payment of the price, Wood became bankrupt. Wood was a debtor to Messrs Pirie to a larger amount than the price of the bales of rags. They retained the rags as a set-off against the debt. Mr Lavaggi accordingly in this action sued Messrs Pirie for the price of the goods, and in defence it was maintained:—"(1) The defenders having dealt with and relied on Mr Wood as a principal, are entitled to set-off the price of the goods against the debt due by Wood to them; Bell's Commentaries, Shaw's edition, p. 195. (2) The delivery of the goods to the defenders, with the letter from Wood, under the custom of trade between the parties, constituted a sale."

The Sheriff-Substitute (DOVE WILSON) assoilzied the Messrs Pirie, holding that there had been a completed sale by Mr Wood, not as agent, but as principal, of the rags to Messrs Pirie.

On appeal, the Sheriff (GUTHRIE SMITH) reversed, on the grounds—(1) that although Wood did not disclose his principal, the Messrs Pire were aware that he acted as agent in the sale; and (2) the sale was not completed, as the price had never been fixed, and consequently, as there had been no completed contract of sale, the property remained in the original owner.

He remarked in his Note:—"The question in the present case is, whether the defenders are at liberty to keep the goods of the pursuer in payment of a debt due to them, not by him, but by an insolvent named Joseph Wood, who carried on business as a broker and commission merchant, and to whom the goods in question had been consigned for the purposes of sale.

"When an agent or factor sells the goods of his employer as his own, the purchaser, being ignorant of the fact that he is only an agent, is entitled in an action by the principal for the price, to set-off a debt due to himself from the agent or factor. The reason is, that a vendor who allows another to deal with his goods as if they were his own, cannot deprive the vendee of the equities which he has against the apparent vendor, by resuming his character of principal, and reducing the seller to the position of a mere agent. But if the seller was known to possess a purely representative character, no such set-off can be pleaded against the principal, even although the buyer did not know who the principal was. This point was so ruled in the case of *Semenza* v. *Brinsley*, 34 L. J. p. 161, where it was said by the Judges that, in order to make a plea of set-off a valid defence within the rule stated, it must be shown that the contract was made by a person whom the plaintiff entrusted with the possession and ownership of the goods; that he sold them as his own, in his own name as principal, with the authority of the plain-