ing the pits, that they were sunk altogether on ground with which Mr Hendrie had nothing to do, viz., on Calderbank, which was Mr Stewart's own separate property; and how Mr Hendrie could have had any right or title to interfere with these proceedings I am at a loss to see. Therefore I do not think, with deference to the Lord Ordinary, that the case would be safely rested upon these acts as implying the discharge of Mr Hendrie's rights.

There is another and quite distinct ground on which the Lord Ordinary bases his decision for the defenders; but I cannot be held as agreeing to that either. It is this—He says the pursuers are not entitled to interdict because the loss which would result to the defender by the stoppage of his works would be out of all proportion to any advantage which the owner of the surface could obtain. I confess it is new to me in the law of Scotland that a person's right, and in that view an undisputed right, is to be taken away because it would be for the pecuniary advantage of another person that he should lose it. That appears to me to be quite a novelty in the law of Scotland, and I think the Lord Ordinary has been under a little misapprehension here. These considerations are most material, not when we are considering any matter of established right, but where the question is a question of interdict before the right is established. But the assumption on which the Lord Ordinary puts the case is that the right is established, and is to be taken away, because it is more convenient for the defender, and because it will cause comparatively little pecuniary loss to the pursuers to lose their right. As I said before, I cannot agree in that ground of judgment; but upon the first ground which I have stated I adhere.

LORD KINNEAR—I am of the same opinion. I think the question depends entirely on the true construction and effect of the title now before us, and I am unable to agree with the view which appears to me to be suggested by the Lord Ordinary's observation, that that is a question which can be governed by previous decisions as to the construction of other deeds in different terms. We must ascertain for ourselves what is the true meaning and effect of this particular deed. Now, I entirely concur in the construction which Lord Adam puts upon it, and for the reasons he has given, and I think it unnecessary to repeat those reasons. I agree with Lord Adam also in thinking that, if the title bore a different construction, it would not be possible to sustain the grounds upon which the Lord Ordinary holds, that nevertheless the proprietor of the surface shall not be allowed to prohibit proceedings, which will bring down the surface contrary to the right which he holds to be established in him. I agree with Lord Adam that the ground upon which the Lord Ordinary proceeds is not satisfactory, but I think the result at which he has arrived is right.

LORD PRESIDENT—I agree with your Lordships in adhering, and that the Lord Ordinary's interlocutor shall stand. With regard to the question which his Lordship discusses under the third branch of his note, it appears to me that there is no evidence of acquiescence at all, and that the view his Lordship takes upon the authority of Professor Bell in his Principles is not at all justified by the text of the section to which he refers. I quite agree with Lord Adam that to sustain as a reason for refusing to enforce a right, that enforcement would be a great inconvenience or pecuniary loss to somebody else, is quite unknown to the law of Scotland. I am for adhering.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers—Ure—Fleming. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Guthrie—Dickson. Agents—Drummond & Reid, W.S.

Friday, June 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

BENNETT *v.* INVERESK PAPER COMPANY.

Principal and Agent—Sale—Foreign Trade—Title of Foreign Principal to Sue.

In an action at the instance of an Australian firm against manufacturers in this country for breach of contract, it was pleaded in defence that the contract had been entered into with commission merchants in London as principals, and that the pursuers had no title to sue.

Held that the pursuers had a title to sue on the contract, it being proved that they had appointed the commission merchants their agents in this country.

Observations in regard to the question of the title of a foreign trader to sue on contracts made on his behalf by commission merchants in this country.

A firm carrying on business as printers and publishers in Sydney, New South Wales, under the name of Samuel Bennett, sued the Inveresk Paper Company for certain claims, damages, and expenses, in respect of the defenders having failed to pack sufficiently certain consignments of paper shipped to them. The pursuers alleged that the contract under which the paper had been shipped had been entered into by Messrs Poulter & Sons of London, as agents on their behalf, with the defenders.

The defenders explained that they contracted with Messrs Poulter & Sons, who were paper merchants in London, and

knew nothing about the pursuers of this action, or that the paper was to be used by the pursuers in Sydney or elsewhere, and pleaded no title to sue.

The Lord Ordinary (WELLWOOD), before answer, allowed a proof as to the constitution and nature of the contract founded on by the pursuers.

It appeared that the pursuers had appointed Messrs Poulter & Sons as their agents in this country by the following letter to them of date 10th December 1885—"I herewith appoint you my sole agents and representatives in the United Kingdom for the term of 5 (five) years from Jany. 1st, 1886, for the purchasing and forwarding of all papers, machinery, type, and other merchandise of every description which I may require to be bought or shipped in or through the United Kingdom, and for the transaction of all my business generally, as per instructions which you may receive from me (or my firm) from time to time, at a commission of 1¼ % (one and a quarter per cent.), free of all charge, said commission to be charged on the nett amount of each invoice, and to be added to same, together with all disbursements. My impression is that the nett amount of business will always exceed £40,000 (forty thousand pounds sterling) per annum, but at the same time I cannot guarantee this, and so you are to be at liberty to determine this agreement at any time by giving me 6 (six) months' notice of such your wish. It is an understood thing that you will always secure for me the lowest market prices and freights to the best of your ability, and that you will give me credit for all trade and cash discounts and commissions allowed by makers off purchases, and also the primage allowed off freights. In consideration of my appointing you for the term of five years, you agree to send me all makers' and shipbrokers' original documents and receipts, showing discounts and deductions (if any), and also to keep me well posted up in all business matters coming under your notice, and which may in your opinion be useful to me or necessary for me to know. . . . My bankers in London will have instructions to negotiate all documents which you may present to them on my behalf, and which are accompanied by the usual shipping and insurance documents customarily required by colonial banks in London."

Evidence was also led on the question whether the defenders were aware that Messrs Poulter & Sons had been acting for the pursuers, but, in view of the ground on which the case was ultimately disposed of, it is not necessary to review this evidence.

On 30th March 1891 the Lord Ordinary repelled the plea of no title to sue, and allowed a proof on the merits.

"*Opinion.*—The pursuers, who carry on business at Sydney under the name of Samuel Bennett, sue the Inveresk Paper Company for certain claims, expenses, and damages, made in respect of the defenders having failed to pack sufficiently certain consignments of super-calendered printing paper, which were shipped to Sydney under a contract, said to have been entered into by Messrs Thomas Poulter & Sons, as agents on behalf of the pursuers, with the defenders. The defenders plead *in limine* that the pursuers have no title to sue. The defence is thus stated in the second answer —'Explained that the defenders contracted with Messrs Poulter & Sons, who were paper merchants in London, and knew nothing about the pursuers of this action, or that the paper was to be used by the pursuers in Sydney or elsewhere. The defender's contract was to put the paper f.o.b. at London or Liverpool.'

"The proof allowed was confined to evidence calculated to throw light upon the question of title to sue. . . . So far as appears on the face of the letters forming the contract, and the accounts, memoranda, invoices, and receipts, the pursuers' firm is not named, and the contract was entered into and payments were made thereunder by Poulter & Sons in their own name. On the other hand, it is proved that in the transaction Poulter & Sons acted merely as agents for the pursuers, under a letter of appointment, dated 10th December 1885. By that letter Samuel Bennett appointed Poulter & Sons to be his sole agents and representatives in the United Kingdom, for the term of five years, for the purchase and forwarding of all papers, machinery, type, and other merchandise, which he might require to be bought or shipped in the United Kingdom. Poulter & Sons were taken bound to secure the lowest market prices and freights, and to give Bennett credit for all trade and cash discounts and commissions allowed by makers off purchases, and also the primage allowed off freights. On the other hand, they were to receive a commission of 1¼ per cent. free of all charge, said commission to be charged on the net amount of each invoice and to be added to same, together with all disbursements; and Bennett undertook to instruct his bankers in London to negotiate all documents which his agents might present to them on his behalf, accompanied by the usual shipping and insurance documents customarily required by colonial banks in London.

"If these were the whole of the material facts in the case, it would simply be one in which an agent contracts in his own name on behalf of an undisclosed principal, the principal being resident abroad.

"I shall first consider how the pursuers' title to sue would stand on that footing according to the law of Scotland.

"If all the parties had been resident in this country the law would have stood thus—The pursuers, the undisclosed principals, would have been entitled to sue the defenders on their, the pursuers, agents' contract, the defenders, however, being entitled to maintain in defence any pleas which they could competently have stated had the action been raised by the agent. On the other hand, the defenders if they had had occasion to do so, as for instance on the bankruptcy of the pursuers' agent, might have sued the pursuers on the contract when disclosed, although when they

entered into it they only knew of and gave credit to the agent. In such a case the agent binds himself but does not free his principal. This shows that in some cases both principal and agent may be bound (subject always to the other contracting party electing which of the two he will sue to judgment) notwithstanding that there is not and cannot be what is called 'privity of contract' between the principal while undisclosed and the other contracting party when the contract is entered into. It also supports the view of those jurists who hold that the question of liability or title to sue on a contract cannot always be solved by considering to whom credit was given; but that it depends, at least in some cases, on the scope of the mandate.

"The defenders, however, maintain that the pursuers are not entitled to sue on the contract because they are resident abroad. They maintain that this being so, Poulter & Sons had no authority to bind the credit of the pursuers, and that there was no privity of contract between the latter and the defenders.

"In considering this defence it is material to see precisely what the question is, and how it arises. The question simply is, whether the defenders are to be sued by the pursuers or by their agents, Poulter & Sons—the defences on the merits being precisely the same in either case? There is no question here as to the liability of the agents. The defenders have been paid the price of the paper, and therefore have no interest to hold Poulter & Sons liable. Again, they are being sued in the Courts of their own country, and the pursuers have been obliged to sist a mandatory. The defenders therefore have no interest on that ground to object to the pursuers' title. Lastly, it is not disputed that if the true view of the evidence is that Poulter & Sons were acting for an undisclosed principal, the defenders will be entitled to all the defences which they could have used if Poulter & Sons had been pursuers of the action. They will in any view be entitled to maintain any defences which arise on the terms of their contract, such as that their responsibility ceased on their delivering the goods f.o.b. in London. It will thus be seen that the question is purely technical, viz., whether the pursuers, for whom the contract was made, or their agents in whose names it was made, should stand pursuers in the action?

"It is true that certain modifications have been recognised in the law of Scotland of the rules which regulate the rights and liabilities of principal and agent to and against third parties in cases where the principal is resident abroad. But I think the import of the authorities, and especially of the opinions of the Judges in the leading case of *Millar* v. *Mitchell*, 22 D. 833, amounts only to this, that the fact that the principal is a foreigner is an element, the weight to be given to which depends upon the circumstances of each case, and the way in which the question arises. There is no presumption of law by the law of Scotland that the home agent has no authority to bind, and does not bind his foreign principal. The majority of the consulted Judges in that case affirm the proposition that 'the natural rule in a contract of sale seems to be that the person whose goods are sold, and who is in the end to receive the price, shall be esteemed the seller; and that he by whose desire, and for whose benefit the goods are purchased, shall be esteemed the buyer, though both parties transact through agents.'

"After specifying certain exceptions, they decline to recognise as an additional exception the case where the disclosed principal is abroad. They say—'It thus appears that the presumption arising from the fact of the principal being a foreigner is nothing more than a presumption of fact. It is a presumption which will constantly vary with the varying circumstances of each particular case. . . . The presumptions in all such cases, weaker or stronger as the circumstances may be, are all mere presumptions of fact, and presumptions of fact are nothing else than pieces of evidence. The legal relations between the parties and the *onus* of proof remain in all cases the same. There is no presumption of law against the agent of a foreign principal more than against the agent of any other party.'—Opinion of consulted Judges, 22 D. 845.

"The reported cases in Scotland, including *Millar* v. *Mitchell*, in which the question has arisen have been cases in which an attempt has been made to fix the home agent with personal liability. They were cases in which the agent contracted *factorio nomine* for a disclosed principal, and therefore would not have been personally liable if the principal had not been a foreigner. But the question has been treated as one of degree, and even in such cases it has been held that less weight is to be given to the fact where the agent is a selling and not a purchasing agent.

"Where, however, an agent contracts in his own name for an undisclosed principal it seems to me that there is no reason why the rights and liabilities of parties should not be the same whether the principal is a foreigner or not. In either case the party contracting with the agent is entitled to elect to sue the agent if he finds it for his advantage to do so.

"Again, if the undisclosed principal comes forward and sues on the contract the other party can plead any equitable defence which he could have maintained against the agent. Where there is no question as to the agent's liability, and where, as here, the one contracting party has been paid in full and no prejudice is averred, I see no room for any modification of the common law right of the principal, when disclosed, to sue on the contract made for him by his agent. As in a question between the pursuers and Poulter & Sons there is no doubt that the latter were simply agents, and being so were bound to cede to their principals, without the necessity of a formal assignation, all contracts made on their behalf. This follows from the principles of the law of mandate which

have been adopted in our law. Therefore, taking the simplest view of the pursuers' rights, they are entitled at least to the privileges of assignees, the defenders, on the other hand, being entitled, if they contracted with Poulter & Sons in ignorance of their true position, to state any equitable defences which they might have pleaded against the latter.

"It was strongly contended by the defenders that there is conclusive authority in the law of England to the effect that a foreign principal is not entitled to sue. For instance, in the fifth edition of Pollock's Principles of Contract (1889), p. 97, the import of recent decisions is stated thus—'When the agent is dealing in goods for a merchant resident abroad, it is held, on the ground of mercantile usage and convenience, that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person.' Again, in the fourth edition of Benjamin on Sale (1888), p. 206, the import of the cases is stated by the editors to the same effect, and they add—'This apparent exception to the rule arises from the peculiar character of the relationship existing between the commission agent and his foreign constituent, a relationship which for some purposes is treated as one, or analogous to one, of vendor or vendee.'

"Now, in the first place, the law thus stated was not recognised by the Court in the case of *Millar* v. *Mitchell*, although they had fully before them all the English authorities at that date (1860) as to the presumption alleged to be drawn from custom or the usages of trade. On this point Lord Curriehill says (p. 850)—'Nor is it proved that the doctrine has been founded on the usage of Scotland. If there were such usage it would have manifested itself by a clear test, inasmuch as the commission on such agency business, when the agents guaranteed the fulfilment of the contracts, would of course be increased in proportion to the increase of the risk, for the same reason that a *del credere* commission is payable when an agent guarantees to his constituent the performance of the factorial contracts by the other contracting party. But it is not proved, nor even alleged, that there is such usage in Scotland. Nor does it appear from the authorities in the law of England, if I rightly understand them, that there is now any such exception in that country to this general rule of the law of principal and agent.'

"I do not find either in that case, or in later Scotch cases, any countenance given to the view that for such purposes the home commission agent stands in the position of vendor to his foreign principal. That question was incidentally referred to in the recent case of *Delaurier* v. *Wylie*, November 30, 1889, 17 R. 167. I refer particularly to Lord Kyllachy's opinion on p. 191. I agree in the views which he there expresses on that subject, although I differed from him in the result on the question (as to the cargo of iron) with which he is there dealing.

"But further, I find that the cases which are quoted as the authorities for those statements of the law, or at least as settling the law, are all of recent date, the judgment of the Court being pronounced in at least three cases by the same eminent Judge, Justice, afterwards Lord Blackburn. The cases in question are as follows—*Armstrong* v. *Stokes*, 1872, L.R., 7 Q.B. 598-605; *Elbinger Actien-Gesellschaft* v. *Claye*, 1873, L.R., 8 Q.B. 313, and 41 L.J., Q.B. 253; *Hutton* v. *Bullock*, 1873, *ib.* 331—*aff.* in Exch. 9 Q.B. 572; *New Zealand Land Company* v. *Watson*, 1881, 7 Q.B.D. 374, and 50 L.J., Q.B. 433.

"I have not been referred to any case in which the House of Lords has endorsed the law thus broadly laid down, and there are indications in later cases and in text-books on the law of principal and agent that even in England that statement of the law is not universally accepted. For instance, in Evans on Principal and Agent, 2nd ed. (1888), p. 524, the author says—'Where the principal is a foreigner resident abroad there is no practical difference in the legal principles applicable. At one time it was contended that not only is the agent the person who is primarily liable, but that he is in general the only person liable. The true rule seems to be that although the agent does not *prima facie* pledge the principal's credit, evidence may be given to rebut this presumption.'

"Whatever may be the law of England on the subject, the case of *Millar* v. *Mitchell* has not been over-ruled, and is conclusive in this Court if it applies. While it decides that there may be cases in which to prevent prejudice to the home seller there will be held to be a presumption of fact that when the principal is a foreigner the agent pledges his own credit, it does not decide that there is any presumption against the foreign principal's right to sue on the contract when no prejudice is averred. In such a case the presumption, which is founded on equitable considerations, reaches a vanishing point, and no *onus* remains on the principal to establish his title to sue beyond proving the fact of agency.

"It may be that a change has taken place in the law of England since 1860; and it may be that the time has come for declaring and establishing in the law of Scotland that, on grounds of mercantile convenience and the usages of trade, there is a general legal presumption that a foreign principal has no title to sue on his agent's contract. But if this be so, the alteration in the law must be established by decision of the whole Court or of the House of Lords.

"Even if *prima facie* the pursuers have no title to sue, I think there is sufficient evidence to overcome any presumption there may be against their title. I cannot within the limits of my opinion analyse the correspondence in detail, and I shall therefore merely select certain parts of it to illustrate the view which I take—[*His Lordship then reviewed certain portions of the correspondence.*]

"It is right to add that the correspondence

contains passages which, taken by themselves, favour the defender's view; and other passages which are double-edged, and can be appealed to by either side. I have selected the passages which I have quoted because I think they are absolutely inconsistent with the view that the defenders dealt solely and exclusively with Poulter & Sons, and did not know of or recognise Bennett in connection with the contract. On a consideration of the whole of the correspondence, to which I attach much more importance than to the parole evidence on either side, I think it is made out that the defenders, through Oldham, knew that the paper was ordered for Samuel Bennett, and was to be sent to Sydney; and further, that when the claim for damages emerged they showed that they did not regard Poulter & Sons as the only parties with whom they had to deal, but on the contrary that they knew and admitted that the pursuers were the parties whom they had to satisfy as to the packing of the paper.

"In those circumstances I think that the objection to title must be repelled and a proof allowed."

The defenders reclaimed, and argued—There was a rule, or at least a strong presumption of fact, that a foreign undisclosed principal could not sue, there being no privity of contract between him and the person with whom his agent contracted—Bell's Prin., sec. 219, p. 141 (9th ed.) The contract here was in name of a commission agent. The evidence pointed to a contract between the reclaimers and Poulter, and with no one else. There was nothing to indicate he was only agent for an undisclosed principal abroad. Poulter admitted in his evidence that the same order form had been used as if he had been contracting for himself. The great inconvenience that would result, if there were privity of contract between the foreign constituents of a commission merchant and the home suppliers of the goods, had been recognised in England as amounting almost to a rule of law against such privity—*Armstrong* v. *Stokes*, July 6, 1872, L.R., 7 Q.B. 598 (Lord Blackburn, 605); *Elbinger Actien-Gesellschaft* v. *Claye*, April 18, 1873, L.R., 8 Q.B. 313; *Hutton* v. *Bullock*, May 23, 1873, L.R., 8 Q.B. 331 (Lord Blackburn in both cases). Lord Blackburn was not alone in these judgments, nor was he unsupported by previous cases, as the Lord Ordinary seemed to think—*Addison* v. *Gandasequi*, 1812, 4 Taunton, 574; *Paterson* v. *Gandasequi*, 1812, 15 East, 61; Evans on Principal and Agent (2nd ed.), 518-528. The Lord Ordinary had not followed these cases because of the case of *Millar* v. *Mitchell*, &c., February 17, 1860, 22 D. 833. But in that case the agent had contracted *factorio nomine*, and the principal had been disclosed from the first. That case being out of the way, *Elbinger's* case and the case of *Kaltenbach* v. *Lewis*, 1883, L.R., 24 C.D. 54, were in point, and in both an undisclosed foreign principal was held not entitled to sue. If they were held to have known of the existence of the principal, which they denied, then it became a question of election, and they had throughout chosen Poulter alone as their creditor.

Argued for respondents—There might be a presumption of fact against a commission merchant in this country being only the agent of a foreign principal, but it was not a presumption of law, and here it had been clearly rebutted by the evidence, especially by Bennett's letter of mandate. The Lord Ordinary was right in holding that the defenders must have known this was a case of agency, but even if they did not, and the principal was undisclosed, there was no authority against his now coming forward. He could certainly do so if in this country, and his being abroad made no difference—Bell's Comm. i., 527, 540, notes, 541; *Millar* v. *Mitchell*, *supra*, 22 D. 845; *Delaurier* v. *Wylie*, November 30, 1889, 17 R. 167 (Lord Kyllachy, 191). In the case of *Elbinger*, relied on by the other side, the principal had been disclosed from the first, but rejected. Where the doctrine of election came in, and the principal or agent, as the case might be, had been distinctly chosen to the exclusion of the other, there would be no privity of contract with the other, but that doctrine did not apply in this case—*Athya & Company* v. *Buchanan*, October 22, 1872, 25 Jur. 16, and *Irvine* v. *Watson*, 1879, L.R., 5 Q.B. 102, which seemed to throw doubt upon *Armstrong* v. *Stokes*, *supra*.

At advising—

LORD M'LAREN—This is an action at the instance of a commercial firm trading under the name of Bennett, whose domicile is in Sydney, and who sue the Inveresk Paper Company on a contract arising out of an order by Bennett for a large quantity—I think 3600 reams—of printing paper. This order was given to or through their correspondents in London, gentlemen named Poulter. Messrs Bennett sue the Inveresk Paper Company for breach of contract, in respect that the paper when it arrived in Australia was found to be damaged, as they allege, through insufficient packing. One of the defences to the action is that the pursuers have no title to sue; and this defence is founded on a legal proposition which I think may be expressed in this way—that in all transactions between a seller in the home country and a foreign purchaser effected through a middleman, it is a presumption of law that the middleman contracts as an independent contracting party with the seller and the ultimate purchaser respectively; that as matter of law the intermediary is not and cannot be the agent of either party; or, as it is otherwise put, that in the foreign trade there is and can be no privity of contract between the seller and the buyer, unless they are in direct communication.

The Lord Ordinary on considering this plea thought it expedient that the facts relating to the sale and purchase of the paper in question should be investigated with a view to the determination of the question of title, and by interlocutor of 11th December 1890 his Lordship allowed a

proof. The interlocutor reclaimed against, dated 30th March 1891, proceeds upon a consideration of the proof taken under that order, and in it his Lordship repels the second and third pleas-in-law for the defenders, being the pleas to the title, and before answer allows the parties a proof of their respective averments on the merits of the cause.

Before considering whether there be such a rule of law regarding foreign transactions as the defenders maintain, it may be convenient in a few sentences to review the general rules of the law of principal and agent in relation to questions of title to sue and liability to be sued. Supposing the parties were within the jurisdiction, I apprehend there can be no doubt that a seller to the agent of an undisclosed principal, when he comes to know the name of the principal, may elect to sue the principal for the price. But, if he takes advantage of this right, he is disabled from maintaining any plea that would alter the relations of the principal and the agent to the disadvantage of the principal. That qualification of the right of election is recognised in one of the leading cases on this subject—*Thomson* v. *Davenport*. I may here quote what Lord Tenterden says on the subject, as reported in Smith's Leading Cases—"I take it to be a general rule that if a person sells goods (supposing at the time of the contract he is dealing with the principal), but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but the agent for a third party, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." A corresponding rule exists that a principal, if he has occasion to sue for fulfilment of a contract, may come forward and disclose himself, and may sue the other party in his own name. But he also, if he elects to sue in his own name, will be affected by any counter claims that might have been pleaded against his agent. This qualification of the principal's right of action is very distinctly stated in Bell's Commentaries in a passage which was read in the course of the argument. Now, the rule in question applies to cases where the principal at the time of the purchase is undisclosed; and it is plain enough in principle, that, if the seller knew who the principal was from the beginning, the election is held to be made at the time of making the contract, because the seller is bound to elect whom he is to take as his debtor, as soon as he comes to know who is the principal to whom the goods are sold. That, I apprehend, was the chief point under consideration in the leading English cases of *Paterson* v. *Gandasequi* and *Addison* v. *Gandasequi*; also reported in Smith's Leading Cases. These cases were both concerning the same purchaser, and the claims arose out of the bankruptcy of his agent. Gandasequi was a foreign merchant who had come over to England to make purchases. Gandasequi accompanied his agent or commission merchant to the wholesale houses in London, and assisted him in the selection of the goods. In the case of *Paterson* the presiding judge, on proof of the fact that Gandasequi was present at the time of the purchase and was made known to the seller, directed a non-suit, but on a motion for a new trial Lord Ellenborough (the presiding judge), agreed with his colleagues that a new trial should be granted on the ground that it ought to have been left to the jury to determine on the evidence whether the London merchant had elected to take Gandasequi, or his agent in London, as the proper debtor in the account. In the other case, *Addison* v. *Gandasequi*, there was no doubt as to how the right of election was exercised, because Gandasequi's agent had been debited in the books of the seller from the beginning. The jury by their verdict affirmed that the agent was taken by Addison as his debtor, and the verdict was upheld. But, as I gather from the opinions of the learned Judges, these cases were not at all decided upon any theory that there was a difference in the law applicable to the relation of principal and agent, depending on whether the transaction is one in the home or the foreign trade. In *Paterson's* case Lord Ellenborough in stating the point says—"The question is, whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases that an unknown principal when discovered is liable on the contracts which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal and had elected to take Larrazabal and Company as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt on the evidence whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered." Lord Ellenborough there states the law in relation to this, which was a foreign contract, in terms which are substantially identical with what has been laid down in the Courts of England and Scotland with reference to transactions in which all the parties—buyer, seller, and agent—were domiciled in Great Britain. Therefore it cannot be inferred from the report that it was the intention of the Court of King's Bench to proceed there upon any ground peculiar to foreign contracts. It seems to me that the point of this case was, that the principal was from the beginning known to the seller to be the principal, and therefore that his election had to be made, or might be made, at the time of the sale.

But it is contended against the interlocutor that by more modern decisions a rule of law has been established, that in all foreign transactions the broker or com-

mission merchant is deemed to be an independent contracting party and not an agent; and reliance is placed on certain judicial observations—especially those of Lord Blackburn—in the series of cases that were cited. The most distinct and probably the most authoritative statement of Lord Blackburn's opinion on this question is contained in the report of the case of *Ireland* v. *Livingston* (1872), 5 English and Irish Appeal Cases, p. 408, where his Lordship suggests that some of his colleagues had fallen into error from not having adverted to the usage of the foreign trade, and he says—"It is quite true that the agent, who in thus executing an order ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between persons supplying goods to the commission agent and the foreign correspondent, than there is between the brickmaker who supplies bricks to a person building a house and the owner of that house." Now, I can only read this passage and those of a like nature which have been cited as a statement by Lord Blackburn of what is known to be a general usage (not necessarily universal) in the foreign trade. For reasons of convenience it is found better that the commission merchant should in such cases contract as purchaser on his own account, and should resell to his correspondent abroad. The inconvenience resulting from entering into such transactions on the footing of agency is such, that a practice has grown up, under which the commission merchant acts as an independent contracting party towards those from whom he buys, and to whom he sells. But Lord Blackburn never said, and I do not think that he intended to say, that, if a foreign or colonial house chooses to appoint an agent in London for the management of its business, including the sale of its goods or the purchase of goods on its account, the law will not give effect to such an arrangement. To say so would be to place a restriction on the freedom of contract, which could not emanate from any authority other than the Legislature, and which is certainly not warranted by any legal principle that I have been able to discover in the judicial opinions to which I am referring. But I think perhaps this also may be inferred from Lord Blackburn's opinion, that in the absence of evidence to the contrary it is a reasonable presumption of fact, that the commission merchant contracts as an independent party and not as agent for the foreign trader. In the absence of evidence so much would be presumed, though we know that in other cases this very question has been made matter of inquiry by a court or jury. Accordingly, if there had been no documentary evidence in this case defining the position of the London house, I should have agreed with the Lord Ordinary in thinking that it was a proper subject for inquiry by proof, whether the London house acted as Messrs Bennett's agents or as merchants. But it appears to me that this matter is really not open to dispute, because if we refer to the letter constituting Messrs Poulter the agents of Bennett, I think its terms are very clear. They admit of no other construction than that Poulters' relation to Bennett was, in the strictest sense, that of an agent to a principal. The letter begins—"I herewith appoint you my sole agents and representatives in the United Kingdom for the term of five years from January 1st, 1886, for the purchase and forwarding of all papers," and so on, "and for the transaction of all my business generally, as per instructions." Then it proceeds to set out that the Poulters are to be paid a commission of 1¼ per cent.; the probable amount of business is stated; and it is left open to either party to terminate the agreement by giving six months' notice. Then there are provisions under which the Poulters are to give credit for all trade and cash discounts, and, in order that the Bennetts may see that their agents are acting fairly towards them, they are to be bound to send "all makers' and shipbrokers' original documents and receipts." I do not think it can be disputed that, as matter of construction, this is an appointment of Messrs Poulter as agents for the Australian house, and that all orders given in execution of the mandate given by this letter, followed by this special instruction, are to be regarded as orders given by Messrs Bennett and their agents.

In these circumstances it appears to me that this must be treated as an exception to what we are told on high authority is the general usage of the foreign trade. Parties may make their own contracts and are not bound to conform to usage, and as in this case Messrs Bennett have chosen to act through an agent in London, the relations of these agents with the manufacturers from whom the paper was purchased must be subject to the known and settled laws of principal and agent. For these reasons I am of opinion that Messrs Bennett are entitled to declare themselves and to sue the Inveresk Paper Company for fulfilment of their contract. It does not appear from the proof that they were known to be principals at the time when the first orders were given, but they certainly came to be known afterwards. That is a circumstance more material to the election of the vendor when the option lies with him as to which party he will sue, and would not, in my judgment, amount to a limitation on the right of the purchaser, when he thinks proper, to declare himself, and to sue in his own name. As he will be affected by any counter claims or pleas pleadable against his agents, no possible injustice can be done to the Inveresk Paper Company. The objection is a purely technical one, and I am of opinion that it is not well founded in law..

LORD ADAM, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for Pursuers and Respondents—Comrie Thomson — Guthrie. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for Defenders and Reclaimers—Jameson—W. C. Smith. Agents—Menzies, Black, & Menzies, W.S.

Tuesday, June 30.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

HARRIS *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Passenger—Contract of Carriage—Ejection from Train—Damages.

A passenger in a railway train handed to the ticket-collector, along with his own ticket, the tickets of the other passengers who were travelling in the same compartment as himself. The collector having discovered one of these tickets to be defective, demanded from the passenger who had handed him the tickets payment of the difference between it and a good ticket. On the passenger refusing to pay he was removed from the carriage. In an action by him against the railway company it was proved that his own ticket had been good for the journey.

Held (*aff.* Lord Kincairney) that he was entitled to damages, and that his claim was not barred by his having handed to the collector the tickets of the other passengers along with his own.

Opinion by the Lord Justice-Clerk, that after a ticket-collector has left a compartment he cannot challenge the validity of a ticket tendered to him by a passenger in that compartment.

On 13th November 1890 Jacob Harris travelled from Kirkcaldy to Edinburgh by the North British Railway Company's line. On the arrival of the train at Haymarket Station, Harris, who had previously received their tickets from the five other passengers travelling in the same compartment as himself, handed them along with his own to the ticket-collector, who took them and left the compartment. He returned almost immediately, and declaring that one of the tickets was from Leven to Kirkcaldy, demanded payment from Harris of 1s., as the fare between Kirkcaldy and Edinburgh. Harris refused to comply with this demand, and was ejected from the carriage by the ticket-collector, with the approval of the stationmaster. Harris was then taken to the stationmaster's office, and was there charged with attempting to defraud the company by travelling without having paid his fare, and with intent to avoid payment. He was requested to give his name and address, and did so.

Harris thereafter brought an action of damages against the railway company.

He averred that he was travelling on the day in question with a return ticket from Kirkcaldy to the Waverley Station, Edinburgh. "(Cond. 3) The pursuer was a lawful passenger. He was entitled to keep his seat, and the defenders were bound to carry him on to the Waverley Station. Without any legal warrant the defenders' servants, for whom they are responsible, expelled him and obliged him to leave the train, and while treated with incivility and violence at their hands, he was exposed to a public affront, and dealt with as one who had been guilty of cheating the defenders."

The defenders denied that the pursuer had had a return ticket from Kirkcaldy to Edinburgh, but admitted that he had been expelled by their servants from the train, and accused of attempting to defraud the company.

They pleaded, *inter alia*—"(2) The pursuer having tendered to the defenders' collector at Edinburgh a ticket not available for the journey he was then making, and having refused to pay the fare for the said journey, the defenders' collector was entitled to expel the pursuer from the said carriage."

A proof was allowed, the result of which is summarised at the beginning of the Lord Ordinary's opinion.

On 21st March 1891 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor:—"Finds that on the date libelled the pursuer was illegally and wrongfully and forcibly removed by the defenders from the railway carriage in which he was seated, and was prevented from completing the journey for which he had purchased a railway ticket from the defenders, and that the defenders are liable in damages therefor: Assess the damages at £25, and decerns therefor against the defenders; Finds the pursuer entitled to expenses, &c.

"*Opinion.*—There has been a great deal of discrepancy in the evidence in this case, and on some points it is impossible to come to any certain or confident conclusion. I can only decide accordingly to what appears to be the balance of the evidence, without much assurance that my conclusions are correct.

"I do not propose to criticise the evidence, but merely to state the facts which I think established, and on which the question depends.

"It is well proved that on 13th November last the pursuer took a return ticket from Edinburgh to Kirkcaldy, and had the one half of it in his possession when he returned to Edinburgh, and delivered that half to the ticket-collector at the Haymarket Station. The proof on that point is unusually satisfactory and complete, and there is no need to refer to it.

"The pursuer, when he reached Haymarket, was in a third-class compartment, in which there were five other passengers, four of whom were his acquaintances.