1, of the Local Government Act 1889 and the Police Commissioners (or so many of the Police Commissioners as the Sheriff shall fix as a committee) jointly; (2) That the second parties are alone entitled and bound to impose and levy within the police burgh the assessments necessary to raise the due proportion effeiring to the burgh of the moneys necessary to be raised by assessment for the existing and contemplated water-works."

Counsel for the First Parties—Dickson—Dundas. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second Parties—Balfour, Q.C.—Lorimer. Agents—Douglas & Miller, W.S.

Tuesday, November 12.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GIRVIN, ROPER, & COMPANY *v.* MONTEITH.

Principal and Agent—Foreign—Undisclosed Principal—Choice of Laws.

By the terms of a contract of sale entered into by the Scotch agent of a foreign undisclosed principal with an English firm, it was agreed that the contract should, for the purpose of legal proceedings, be deemed to have been made in England and to be performable there, and that all disputes which might arise under the contract should be settled according to the law of England.

Held (1) that the question whether the foreign principal was liable to be sued upon the contract by the sellers fell, as a dispute arising under the contract, to be determined by the law of England, although the contract of agency was concluded in Scotland; (2) that there being no express or implied authority conferred upon the agent to bind the foreign principal, the latter, in accordance with the rule of English law, was not liable to be sued upon a contract in his agent's name.

Question whether in this respect the law of Scotland was the same as the law of England.

On 19th December 1893 Messrs Younger & Monteith, grain merchants, Edinburgh, received instructions from Andrew Tait Monteith, Vancouver, British Columbia, to purchase for him a cargo of Californian wheat. The order was given in a telegram dated 18th December 1893, in the following terms:—"Buy cargo Californian wheat well forward immediately remittance ready telegraph."

Mr Younger, the sole partner of Younger & Monteith, was in London at the time, and the telegram was repeated to him from Edinburgh. On the same day, 18th December 1893, he instructed Messrs Dowker & Company, corn brokers, to buy the required cargo of wheat. Messrs Dowker & Company through another broker purchased a cargo of wheat at the price of £11,803, the property of Messrs Girvin, Roper, & Company, grain merchants, London.

The contract note was headed:—

"The Liverpool Corn Trade Association, Limited.

"*London, Dec.* 19*th* 1893.

"Bought of Messrs Girvin, Roper, & Co., London, for a/c of Messrs Younger & Monteith, Edinburgh, through Messrs A. Dowker & Co., London, on the printed conditions and rules endorsed on this contract, a cargo of Californian wheat. . . ."

It contained the following stipulation:—"Buyer and seller agree that, for the purpose of proceedings either legal or by arbitration, this contract shall be deemed to have been made in England, to be performed there, any correspondence in reference to the offer, the acceptance, the place of payment or otherwise notwithstanding, and the courts of England or arbitrators appointed in England, as the case may be, shall, except for the purpose of enforcing any award made in pursuance of the arbitration clause hereof, have exclusive jurisdiction over all disputes which may arise under this contract. Such disputes shall be settled according to the law of England, whatever the domicile of the parties to this contract may be or become."

The cargo was deliverable at any safe port in the United Kingdom with an option to the purchaser to send the ship to certain ports on the Continent. The price was to be paid by cash in London in exchange for shipping documents, or at the seller's option by buyer's acceptance of shipper's or seller's "drafts, domiciled in London," with documents attached as usual.

Before signing the contract, Girvin, Roper, & Company made inquiries about Younger & Monteith, and as the result of these inquiries their name was accepted and inserted in the contract as apparent principals. The sellers knew that Younger & Monteith were acting for a foreign principal, though the name of the principal was neither asked nor given.

The sellers took a bill from Younger & Monteith for the price, and the shipping documents were made out in their favour. On the arrival of the cargo Younger & Monteith failed to take up the documents and to meet their acceptance.

Messrs Girvin, Roper, & Company accordingly took over the cargo, and paid over the contract price. They then re-sold at a loss of £2100, which they called upon Messrs Younger & Monteith to make good. On their failure to do so, and having ascertained the name of the foreign principal, Girvin, Roper, & Company, after founding jurisdiction by arrestment, raised an action against him concluding for payment of £2100, being the difference in the price paid, and that realised by them for the cargo.

The defender pleaded—"(4) The defender having given no authority to Messrs Younger & Monteith to pledge his credit, and the

contract having been entered into with them as principals, according to the custom in the foreign trade and the law of England, the defender is not liable to be sued thereon by the pursuers."

On 31st October the Lord Ordinary (STORMONTH DARLING) allowed a proof, the result of which is sufficiently indicated above and in his Lordship's opinion.

On 3rd April the Lord Ordinary sustained the defender's fourth plea-in-law, and assoilzied him from the conclusions of the summons.

Note.— . . . [*After stating the facts*]—"There is no dispute as to the breach of contract, nor as to the measure of damages, but the defence is that the defender gave no express authority to Younger & Monteith to pledge his credit to the pursuers; that without such authority (he being a foreign principal) his credit was not and could not be pledged; and therefore that by the law of England (which the defender says must rule) the pursuers have no recourse or action against him.

"The first question thus comes to be, whether the law of England is to rule? If in this, as in so many branches of the law merchant, the laws of England and Scotland were identical, the question would be one of merely academic interest. But I am by no means satisfied that they are. After a careful examination of the *dicta* in *Miller* v. *Mitchell*, 22 D. 833, and of the judgment of the First Division in *Bennett* v. *Inveresk Paper Company*, 18 R. 975, it rather seems to me that the law of Scotland admits to a very modified extent the presumption which exists in England, that the credit of a foreign principal is not pledged in a contract made by an agent at home. The latter case in particular (as I read it) practically comes to this, that the presumption (if it exists at all) is displaced by evidence of the mere fact of agency. It therefore becomes a question of practical importance to determine which law is to be applied.

"Now, the written contract of 19th December 1893 provides that for the purpose of proceedings, either legal or by arbitration, the contract shall be deemed to have been made in England, and to be performed there; that the Courts of England shall have exclusive jurisdiction over all disputes which may arise under it, and that such disputes shall be settled according to the law of England whatever the domicile of the parties to the contract may be or become. Is this then a dispute arising under the contract? If it is, the pursuers themselves have stipulated that it shall be settled according to the law of England. I cannot doubt that it is. The pursuers' right of action depends on the contract; they have no other. It is said that the question is not one as to the interpretation of the contract, but one depending on the collateral contract of agency between the defender and Younger & Monteith. No doubt the contract of agency must be examined, but only for the purpose of determining whether the defender is liable on the contract of sale, and the results derived from an examination of the one contract must be applied to the other before any conclusion can be reached. I am unable to hold that the question who is liable on a contract can ever be anything but a dispute arising under that contract. But the pursuer urges another argument against the applicability of English law. He says—'Be it that this is a dispute arising under the contract, it is a question depending for its solution upon a presumption, and presumptions being truly a part of the law of evidence, are to be determined by the *lex fori*.' Now, nobody doubts that when the courts of one country are called upon to adjudicate upon a contract made in another, they must be guided by their own rules of procedure and of proof. The well-known case of *Don* v. *Lippman* (2 Sh. & Macl. 682) settled that these rules include local laws relating to prescription. But that is on the ground that whatever relates to the remedy, as distinguished from the substance of the obligation itself, is to be governed by the *lex fori;* and Lord Brougham was at pains to show (pp. 728, 729) that the parties could not at the time of making the contract have had the remedy in view, because in that case they would have been contemplating, not the performance of the contract, but the breach of it. Even as regards prescription, the rule would seem to be different where the set period, as in the case of the septennial limitation of cautionary obligation, is of the essence of the contract—*Alexander* v. *Badenoch*, 1843, 6 D. 322. Now, it seems to me that the question whether a foreign principal, known to exist though undisclosed as to identity, has rendered himself liable under a contract, is a question which relates not to the remedy but to the nature of the obligation; and, moreover, is one which the parties must have had in view as among those which they agreed should be determined according to the *lex loci contractus*. In resorting to that law this Court is not called upon to violate any of its own curial rules, any more than the House of Lords did in *Hamlyn* v. *Talisker Distillery Company*, L.R., 1894, App. Cas. 202, when effect was given to an English clause of reference to arbiters unnamed. All it has to do is to inquire according to its own rules, and by evidence satisfactory to itself, whether a presumption existing in the law by which the parties contracted has or has not been overcome. I therefore hold that the law of England must be applied.

"I was favoured with some interesting evidence on that law, which, of course, I am bound to treat as a question of fact. The result seems to me to be this, that a presumption exists in that law against the credit of a foreign principal being pledged in any contract made by his agent in this country, and that the presumption can only be overcome by evidence of authority to do so. I refrain from saying express authority, though that phrase has the high authority of Lord Blackburn, because Mr Boyd, the pursuers' skilled witness, demurred to it, and certainly he adduced, in the course of his very able review of the cases, strong reasons for holding that the authority may be implied either from the terms of employ-

ment as agent or from a course of dealing. But I think it is plain that the authority, if not express, must be implied from something much more direct than the mere fact of agency. I am not concerned to inquire what the origin of the presumption was. Some lawyers have referred it to the improbability of the English merchant giving credit to the foreigner. Others have viewed it rather from the foreigners' standpoint. Perhaps it partakes of both elements, but whatever may have been the original motive, the rule has come to tell quite as much in favour of the foreigner as of the merchant at home.

"Has the presumption, then, been overcome in this case? On that point I am simply exercising the functions of a jury, subject to what I think would be the direction of an English judge, viz., that it cannot be overcome merely by the fact of agency. There was here no general appointment and no course of dealing. There was simply the telegram instructing the particular purchase. In the case of *Hutton* v. *Bulloch*, L.R., 9 Q.B. 576, Lord Esher (then Mr Justice Brett) says—'It is now settled that it is not in ordinary course for the foreign merchant to authorise the English merchant to bind him to the English contract.' Can I imply from the words in the telegram, 'Remittance ready,' that the defender, contrary to 'ordinary course,' authorised Younger & Monteith to pledge his credit to the pursuers? I think not. I regard these words as merely an assurance to the agent that the price (or the difference in case of loss on a re-sale) would be forthcoming. Such an assurance might make the agent more ready to undertake the liabilities of a principal (as in point of fact he did), but it did not, I think, express or imply any willingness on the part of the foreign principal to establish privity of contract with the English seller.

"That, I think, is sufficient for the decision of the case in favour of the defender. If Younger & Monteith had had authority to pledge the defender's credit, I do not think it would have been necessary to show that they did in fact pledge it by express words . . . .

"I would only add that the question here is much more than a technicality. The defender is undoubtedly liable to Younger & Monteith, but he has claims against them which, so far as I see, he could not plead against the pursuers, because the law of England seems to be that a plaintiff suing an undisclosed principal is not liable to have the state of accounts between the principal and the agent pleaded against him unless he has by his conduct induced the principal to alter his position prejudicially by payments made subsequent to the contract. Here the payments were all antecedent to the contract, and were in no way affected by any action on the part of the pursuers.

"I am therefore of opinion that the defender is entitled to absolvitor with expenses."

The pursuers reclaimed, and argued—1. Assuming that the rule of English law was correctly stated by the Lord Ordinary, there was sufficient in this case to show that the defenders had authorised Messrs Younger & Monteith to pledge their credit. This might be inferred from the terms of the telegram, and from the fact that it was used as an inducement to sellers. This was the effect of the words "remittance ready" in the telegram. 2. But the law of England did not rule this question. The question does not arise in the interpretation or effect of the contract of sale, but depended upon the contract of agency between the defenders and Messrs Younger & Monteith. It must therefore be decided by the law of Scotland, Scotland being the domicile of the agents—*Mastons y Hermano* v. *Mildred*, 1882, 9 Q.B.D. 530; *Piercy* v. *Young*, 1879, 14 Ch. Div. 200; Westlake's Private International Law, sec. 224. The question was as to the extent of the mandate given to the agent, and it had nothing to do with the contract of sale. 3. Assuming that the law of Scotland governed, the rule that the undisclosed principal was liable if the fact of agency were proved applied to a foreign principal as well as to others—*Millar* v *Mitchell*, 1860, 22 D. 833; *Bennett* v. *Inveresk Paper Company*, 1891, 18 R. 975.

Argued for the defenders — 1. The law of England was applicable for the reasons stated by the Lord Ordinary. 2. By the law of England there was a presumption in law against the liability of a foreign principal, which could only be rebutted by evidence of authority to pledge his credit having been given. Even if Lord Blackburn were wrong in saying the authority must be express, the authority must be implied from something much more direct than the mere fact of agency — *Hutton* v. *Bulloch*, June 13, 1879, L.R., 9 Q.B. 572, at 576; *Elbinger Company* v. *Claye*, April 18, 1873, L.R., 8 Q.B. 313. The general terms of the telegram were not sufficient to prove that authority had been given. 3. Even if the law of Scotland applied, the presumption against the liability of a foreign principal existed there too, though perhaps to a more modified extent than it did in England, and the presumption had not been rebutted by the evidence.

At advising—

LORD M'LAREN — This case raises an interesting question in relation to the liability of an undisclosed principal upon contracts entered into on his behalf by a foreign agent.—[*His Lordship here stated the facts*].

Now, even if there were more doubt as to the proper *locus* of this contract than I can entertain, I should hold that the parties had settled the question for themselves by agreeing that the contract should be treated for all purposes as a contract made in England and to be performed there. This is in legal effect as if the parties had set forth a summary of the known rules of the law of principal and agent as administered by the Courts of England, with this addition, "We agree that these rules shall be incorporated with our contract, and shall regulate

the rights and liabilities arising under it." I do not know the law has set any limit to the right of parties to interpret their contracts by setting up systems of rules which are made part of the particular contract, and it is no objection to such a system or scheme of interpretation that the law of England is made the canon of interpretation rather than a private code; because wherever the contract has to be enforced, the law of England applicable to the question in dispute can always be ascertained. If this were taken to be to certain effects a contract to be performed in Scotland, I should still be of opinion that the rights arising out of it are governed by the law of England, because the parties have so agreed. But independently of agreement I have no doubt that it is an English contract. London is known to be a principal centre of the corn trade, and when the defender telegraphed to his agent and former partner instructing him to buy a cargo of wheat, he did not mean that the purchase was to be made in Edinburgh, but rather wherever an advantageous bargain could be made, and subject to all the usual conditions. Mr Younger, as I conceive, was entitled to make the purchase in the London market and for a price payable there. In this view also the law of England is applicable to the rights arising under the contract.

I now come to the particular question as to which the parties are in dispute. It is this—The sellers, Messrs Girvin, Roper, & Company, having discovered that Younger had a principal behind him, are suing Monteith, and they claim to be entitled to do so under the rule which in general gives to the party enforcing a contract made with an undisclosed principal an election to sue either the principal or the agent who represented him in making the contract. In defence it is pleaded that a foreign principal is not liable to be sued on the contract, unless he has given authority to his agent to make him a party to the contract. I am not now quoting from the defender's pleas; I am not sure that I should agree with any of the defender's propositions in the precise terms in which they are stated. But I am putting in my own words the substance of what was maintained in the argument addressed to us.

If this proposition be true, then the action must fail; because at the time the contract of sale was made between the pursuers and Mr Younger, Mr Younger's only authority to act for the defender was the telegram I have quoted. Now, as I read this order, it neither empowers the addressee to make his principal a party to the contract of purchase and sale, nor inhibits him from so doing, but simply instructs the agent to make a contract in the usual form. The question then is, what is the true doctrine of the law of England regarding the liability of a foreign principal. The authorities have been very distinctly brought before us in the statements of the English counsel who gave evidence on this subject. I am glad to be able to say that there is less difference of view in the opinions of these learned gentlemen than we often find in cases of expert evidence, and this is only what I should expect from members of the bar when giving their opinions on a case. But, of course, it is necessary that we should consider the authorities; and without entering on a discussion, which I conceive to be unnecessary for the purposes of the present case, I accept the statement of Lord Esher, quoted by the Lord Ordinary, as entirely satisfactory and sufficient with reference to the question I am considering. "It is now settled that it is not in ordinary course for the foreign merchant to authorise the English merchant to bind him to the English contract"—*Hatton* v. *Bulloch*, L.R., 9 Q.B. 576. From this it follows that an order to purchase a cargo, expressed in the general terms which I have read, would not amount to an authority to make the foreign principal a party to the English contract, and therefore there is no relation of contract between the pursuers and the defender. This is my opinion on the merits of the case.

While my opinion on all essential points is in entire agreement with the judgment of the Lord Ordinary under review, I should desire to reserve my opinion on the question first considered by his Lordship, viz., whether on the question of the liability of the foreign principal the laws of England and Scotland are identical. The Lord Ordinary observes, under reference to the cases of *Millar* v. *Mitchell*, and *Bennett* v. *Inveresk Paper Company*, that the law of Scotland "admits to a very modified extent the presumption which exists in England that the credit of a foreign principal is not pledged in a contract made by an agent at home." Now, there can be no doubt that the known principles of the law of Scotland in relation to mercantile agency are largely founded on the decisions of the English courts of law; and it was certainly not my intention, nor, so far as I know, the intention of any of my colleagues who took part in the decision of the case of *Bennett*, to introduce a new distinction between the laws of England and Scotland in relation to principal and agent. In the judgment the question of the principal's title to sue is treated as a question of general mercantile law or usage. It was not a case of singular employment like the present; there was a standing agreement in writing between the principal in Australia and his agent in London, under which the powers of the agent were carefully limited, and his accountability to his principal defined; and we were of opinion that in such a case the principal was in the position of a party to the contracts made for him by his agent, although his name was not immediately disclosed. It may be inferred from my opinion in *Bennett's* case that I am not prepared to subscribe to an expression attributed to Lord Blackburn to the effect that there is a presumption of law against the foreign principal being bound. But, on a reconsideration of the English authorities, I see no reason to believe that the case of *Bennett* would have been decided differently in England supposing the law of

England were applicable, except that the question as to the extent of the agent's authority would most probably have been determined by a judge and jury instead of by the Court. If there be any divergence of view in this class of cases, I think that at most it is no more than such as occasionally occurs where co-ordinate courts of the same country have to apply known principles of law to different states of fact.

The Lord Ordinary has assoilzied the defender from the conclusions of the action, and if your Lordships agree with me the reclaiming-note will be refused.

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

The Court adhered.

Counsel for the Defender and Respondent—Vary Campbell—J. Thompson. Agents—W. & J. Burness, W.S.

Counsel for the Pursuers and Reclaimers—Jameson—Burnett. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday November 14.

FIRST DIVISION.

CUMMING'S TRUSTEES *v.* CUMMING AND OTHERS.

Succession—Vesting—Fee and Liferent—Conditional Institution—Vesting subject to Defeasance—Interposition of Two Liferents.

A testatrix in her trust-disposition and settlement directed her trustees to invest the sum of £1300, and divide the annual interest to be derived therefrom equally among her two nieces: "providing that on the death of either . . . without lawful issue the whole of the said annual interest shall be paid to the survivor; but in case either shall die leaving lawful issue, then such issue shall be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum of £1300 shall be paid by said trustees to the lawful issue of each . . . but providing and declaring that if either or both . . . shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall on the death of the survivor be paid by the said trustees to my brother R." The testatrix died in 1869, one of the liferentrices in 1873, and R in 1894. R bequeathed his whole estate to the surviving liferentrix. *Held* that the legacy vested in R *a morte testatoris*, subject to the liferents, and subject to defeasance to the extent of one-half in the event of either of the liferentrices leaving issue.

Held further that, on the death of the one liferentrix without issue, one-half of the legacy vested absolutely in R, and that the surviving liferentrix, as his sole legatee, was entitled to immediate payment thereof on renouncing her liferent over it.

Miss Mary Carnegie Cumming, who died on 26th March 1869, left a trust-disposition and settlement by which she disponed to trustees her whole estate, heritable and moveable, and *inter alia* directed—"(Thirdly) That my said trustees may, as soon after my death as they conveniently can, lend and place out on good security, heritable or moveable, the sum of £1300 sterling, and pay and divide the annual interest to be derived therefrom equally between my nieces Jane May Cumming Anderson and Isabella Robina Anderson, residing at Newtyle Cottage, during their joint lives, exclusive always of the *jus mariti* and right of administration of any husband they may marry, and declaring that the receipts of the said Jane May Cumming Anderson and Isabella Robina Anderson alone for the said interest shall be valid and sufficient to the receivers: Providing that on the death of either of the said Jane May Cumming Anderson or Isabella Robina Anderson without lawful issue the whole of the said annual interest shall be paid to the survivor; but in case either shall die leaving lawful issue, then such issue shall be entitled to their parent's share of said interest; and upon the death of the survivor one-half of the said sum of £1300 shall be paid by the said trustees to the lawful issue of each of the said Jane May Cumming Anderson and Isabella Robina Anderson; but providing and declaring always, that if either or both of the said Jane May Cumming Anderson and Isabella Robina Anderson shall die without leaving lawful issue, then the half or the whole of said £1300, as the case may be, shall on the death of the survivor, be paid by the said trustees to my brother the said Robert Cumming."

The clause dealing with residue was as follows:—"With regard to the residue and remainder of my estate, heritable and moveable, real and personal, above conveyed, I direct the said trustees, at and immediately after the decease of the said Alexander Cumming, to pay and assign the residue (and including the sums liferented to the said Alexander Cumming) to and in favour of the said Hugh Macpherson Cumming and Robert Cumming, and their heirs, executors, and successors whomsoever."

The sum of £1300 which the testatrix directed to be invested for behoof of her nieces was invested by the trustees, and the interest was paid to them equally down to the death of Miss Isabella Robina Anderson, who died unmarried in May 1873, after which date Miss Jane May Cumming Anderson received the whole income. Robert Cumming died in October 1894, leaving a will by which he bequeathed his whole estate to Miss Jane May Cumming Anderson.

Questions having arisen as to the effect of the bequest of £1300, a special case was raised by (1) Miss Cumming's testamentary trustees; (2) Miss Jane May Cumming