up a scaffold for such a purpose, the pursuer's case must be founded on Young not having erected it properly on this particular occasion. But if there was anything wrong with the way in which Young did his work I do not think it was more than an error of judgment on his part. I do not think carelessness or fault is brought home to him. Apart from that I do not think it is proved that the accident was due to any act or omission or any mistake of his. Now, is the master to be liable because owing to something which is not explained this scaffolding gave way? I think not.

The man Young did his best. He went on to the scaffold and used it himself. He may have made a mistake, but we cannot assume that he did, because the immediate cause of the accident is unexplained. But if there was an error on his part I do not think it was caused by any negligence or carelessness.

On the whole matter I think the Sheriffs were right, and that we should not interfere with their judgment.

LORD YOUNG—This case is in the narrowest compass. The pursuer is a mason and he suffered injury on account of the fall of a scaffolding on which he was working. He is claiming damages for those injuries. It is admitted that he has no case at common law. His case therefore is rested upon the Employers Liability Act 1880, sec. 1 (1). That sub-section enacts that a workman is to have compensation for personal injury caused "by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer." The pursuer says that this scaffold was part of the ways, works, or plant used in connection with the business of his employer. But the Employers' Liability Act 1880 by sec. 2 (1) provides that the provisions of sec. 1 (1) shall not have effect "unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition." That person here is Young. The case must necessarily be founded on some alleged negligence on the part of Young in erecting this scaffolding, or in not seeing that it was correctly done. The question is, Has such negligence on his part been proved? Without going into the details of the evidence, which I think is quite unnecessary, but giving my verdict upon the evidence, I think that there was no negligence on Young's part. I agree with your Lordship and with both Sheriffs that the defender should be assoilzied.

That is enough for the decision of the case, but I think it right to say that in my opinion the cause of this accident is not explained. I agree with what the Sheriffs, and especially Mr Sheriff Berry, have said as to that. I do not think that it is proved that the accident was due even to error of judgment upon Young's part, but it is sufficient for the decision of the case to find that it was not occasioned by his negligence.

LORD TRAYNER—I am of the some opinion. The ground of this action is alleged fault on the part of Young. I think that fault is not proved. Nothing is proved from which we could even reasonably infer that the accident through which the pursuer was injured was due to Young's fault. It is only fair to Young to say that I think he took every precaution which he could to see that this scaffolding was safe, and this was only what was to be expected, for his own as well as the pursuer's safety depended on the sufficiency of this scaffolding.

LORD MONCREIFF—I agree. The pursuer cannot succeed without proving fault on the part of Young, and I think he has failed to do so here.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel for the pursuer in his appeal against the interlocutor of the Sheriff-Substitute and the Sheriff of Lanark, dated respectively 19th December 1896 and 1st November 1897, Dismiss the appeal, and affirm the interlocutor of 1st November 1897: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor of 19th December, except in so far as altered by the said interlocutor of 1st November, which alteration affirm: Therefore of new assoilzie the defender, and decern," &c.

Counsel for the Pursuer and Appellant—Jameson, Q.C.—A. S. D. Thomson. Agents—Emslie & Guthrie, S.S.C.

Counsel for the Defender and Respondent — Dewar — A. Moncreiff. Agents — Drummond & Reid, W.S.

Friday, December 10.

SECOND DIVISION.

[Sheriff-Substitute of Lanarkshire.

RANSOHOFF & WISSLER *v.* BURRELL.

Arbitration—Clause of Reference—Whether Reference Clause Covers Disputes as to who are the Parties to the Contract—Pursuer of Action Founding on Clause of Reference.

A contract of sale contained a clause appointing the council of a trade association the referee of all disputes. It incorporated the rules of the association as part of the contract, and it was in the form framed and issued by the association. In an action upon the contract the defence pleaded was that the terms of the contract excluded the pursuers' common law right to sue upon the contract as disclosed princi-

pals. *Held* (*diss.* Lord Young) that the question whether the pursuers were entitled to enforce the contract was for the Court and not for the arbiters, in respect that the reference clause could have no effect except as between persons who were found to be parties to the contract in which it occurred.

Question — Whether the pursuers were not barred from pleading the reference clause by having brought the action into Court.

Principal and Agent—Sale—Construction of Contract—Whether Right of Disclosed Principals to Enforce Contract of Sale Signed by Agents on their Account Excluded by Special Terms of Contract.

Contracts for the sale of sugar bore to be signed as sellers by a firm of sugar brokers on account of a named principal. The contracts each contained the following clause—"Persons acting as brokers or agents between two principals declared on the face of the contract shall be entitled to sign the same, principals signing the confirmation slip. But in all other cases the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip." In the case of the contracts in question, the buyer, who was not a sugar broker or sugar merchant, signed a confirmation slip, but neither the contracts nor any relative confirmation slips were signed by the principals of the selling brokers. In actions by them against the buyer, in which the buyer maintained that he had no contract with them—*held* (*diss.* Lord Young) that the effect of the clause above quoted was to exclude the right of disclosed principals to enforce contracts made on their behalf, unless the principals themselves signed the contract or a confirmation slip, and that consequently in this case the principals of the selling brokers had no right to enforce these contracts against the buyer.

Ransohoff & Wissler, sugar brokers and merchants, London, brought these actions in the Sheriff Court at Glasgow, against Henry Burrell, shipowner in Glasgow, in which they sued for payment of £637, 16s. 10d., £133, 15s. 6d., and £124, 11d. 3d. respectively, being the differences between the contract prices of sugar alleged to have been sold by the pursuers to the defender, and the sums for which the sugar was ultimately sold upon the defenders' refusal to accept delivery of it when tendered.

The action in which the pursuers sought decree for £637, 16s. 10d., though not the first in date, was the first appealed to the Court of Session, and is in this report referred to as the principal action. The other actions, which had been appealed to the Sheriff, were transmitted *ob contingentiam*.

The contracts sued upon in the principal action were dated 27th and 31st March 1896 respectively, and were, except as regards quantities and prices, identical in their terms. The contract dated 27th March was as follows:—"Beetroot Sugar, Clearing Contract For the United Kingdom, Form A., (a) Insert "ourselves" or "Messrs .." Henry Burrell, Esq.—Subject always to the Printed Rules, Regulations, and Bye-laws of the Beetroot Sugar (b) Insert "bought of" or "sold to" Association, and of the Clearing Department thereof, We, acting on Account of (a) *Messrs Ransohoff & Wissler, London*, have this day (b) *sold to* you, acting on (c) Insert "yourselves" or "Messrs .." account of (c) *yourself* (*1500 tons*) Quantity. *15,000* Bags of BEETROOT SUGAR of 100 kilos. nett each, fair quality of first products of the Price. crop of *1896/97* at *11/6* per cwt., free on Board at Hamburg, for 88 degrees nett analysis, each degree or fraction of a degree above or below 88 to be paid or allowed for at the rate of 1½d. per degree. . . .

"The Sugar to be at shipping port, Delivery. ready for shipment, in *October, November, and December* in equal quantities per *month*

"The above-mentioned rules, regulations, and bye-laws are incorporated in this contract as fully as if the same had been expressly inserted herein. The Council of the Beetroot Sugar Association of London is the referee of all disputes. Persons acting as brokers, or agents between two principals declared on the face of the contract shall be entitled to sign the same, principals signing the confirmation slips. But in all other cases the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip.

"1 % *Brokerage, or if profitable* 1¼%

"(*Sgd.*) *Stewart, Govan, & Co.*"

Confirmation slips relative to these contracts were signed by the defender. The confirmation slip relative to the contract dated 27th March was in the following terms:—"Messrs Stewart, Govan, & Co., 116 St Vincent Street, Glasgow—"We hereby acknowledge and confirm your contract, No. date *27/3/96* for *15,000* Bags BEETROOT SUGAR, @ *11/6* *bought of* you *acting on account of Messrs Ransohoff & Wissler.* Delivery *Oct./Decr.*

Please sign and return this Slip.

HENRY BURRELL."

No confirmation slip was signed by the pursuers.

At the foot of the contract forms used in connection with these contracts was printed the following clause:—"Messrs

London 189 In accordance with your instructions, we have entered into the contract of which the above is a notice. You will observe that it confers and imposes no rights or liabilities on any principals or persons not named therein, but is to be deemed to have been made between those persons alone who appear on the face of it to be the contracting parties.—Yours faithfully ( ) per cent. to us." In both the contracts in question this

clause was deleted, and initialled by a partner of the firm of Stewart, Govan, & Company. On the margin of this clause the following words were printed—"This clause to be used only for copies of contract to principals. Where there are no principals the clause must be struck through and initialled (underlined) by the member signing the contract." The forms of contracts and confirmation slips used on this occasion were framed and issued by the Beetroot Sugar Association.

In the principal action the pursuers set forth the contracts sued upon, and averred, *inter alia*—"(Cond. 2) The said contracts were entered into by Messrs Stewart, Govan, & Company, sugar brokers, Glasgow, acting on account of the pursuers. . . . The said contracts were constituted by formal contract-notes sent to and retained by the defender, and were duly confirmed by the defender by confirmation slips signed by him." (Cond. 3) That Messrs Stewart, Govan, & Company, acting on the pursuer's instructions, and on account of them, on various dates tendered to the defender various lots of sugar in implement of the contracts in question, and that they were entitled to make these tenders under the terms of said contracts. "(Cond. 4) The defender, who had in answer to a previous tender made under the said contract of 31st March 1896, written a letter to Messrs Stewart, Govan, & Company dated 9th October 1896, in which he 'refused to have anything to do' with the pursuers, did not take delivery of the said sugars tendered to him. The sugar was thereupon stored in terms of the said contracts, and the warrants, with relative policies of assurance against fire, and certificates of analysis and weights, were duly tendered and presented to the defender on 27th October 1896, but the defender failed to take them up." They also averred that the sum due in terms of the contracts was £2917, 3s. 11d., and that owing to the defender's failure to take up said documents the sugar was sold in terms of the said contracts, and realised £2279, 7s. 1d., leaving £637, 16s. 10d., the sum sued for, and further, that the amount sued for was also fair and reasonable loss and damages payable to the pursuers in consequence of the defender's breach of contract.

In their answers to the defender's statement of facts the pursuers averred that Messrs Stewart, Govan, & Company were authorised by the pursuers to enter into the contracts, and duly sent the confirmation slips, signed by the defender, to the pursuer, as evidence that the contracts had been entered into; that the contracts were also confirmed by the pursuers in writing to Messrs Stewart, Govan, & Company; that the pursuers afterwards repeatedly recognised the validity of the contracts, and that this was well known to the defender; that the defender never questioned the validity of the contracts till he was sued upon them, and that on the contrary, not only did he not ask for confirmation slips, but he repeatedly recognised the contracts as binding.

The defender in his statement of facts averred, *inter alia*—"(Stat. 12) The defender believes and avers that the said Stewart, Govan, & Company never entered into the alleged contracts of 27th and 31st March 1896; . . . that any dealings between the pursuers and the said Stewart, Govan, & Company were not on behalf of the defender, and, as the pursuers knew, were upon terms essentially different from those in the said alleged contracts, which illegally and fraudulently misrepresented the facts, and that the defender has no liability whatever to the pursuers."

The pursuers pleaded, *inter alia* — (3) That the defender was indebted and restingowing to them the sum sued for under the contracts libelled; (4) that they were entitled to decree for the sum sued for as damages for the defender's breach of contract; and (5) "*Separatim*, in any event, the defences fall to be decided by the Council of the Beetroot Sugar Association of London as arbiters under the said contracts."

The defender pleaded, *inter alia* — (2) "There being no contract between the pursuers and defender, the defender ought to be assoilzied with expenses."

The rules of the Beetroot Sugar Association relating to the treatment of sugar stored abroad or dealt with upon the London Clearing form of contract provide, *inter alia*, as follows:—"46. In all cases where a member of the Beetroot Sugar Association enters into a contract to buy or sell sugar on behalf of a principal, such member, in the absence of express instructions to the contrary from such principal, shall be entitled to enter into such contract in his own name without disclosing the name or existence of his principal; and in such case the contract shall confer and impose no rights or liabilities on such principal against or to the other parties to the said contract, but he shall be bound and entitled to settle with his own agent alone. 48. The seller shall fill in the confirmation slips, and shall have the right to claim the same, in exchange for the contracts, signed by a member of the buyer's firm, or by a person or persons authorised by them to sign for the firm, of which authority notification shall be given to the secretary."

The contracts, circumstances, averments, and pleas in the other actions were, except as regards details of quantities, prices, and the like, substantially identical with those in the principal action.

In the action for £124, 11s. 3d. the defenders pleaded, *inter alia*—(2) "There being no contract between the pursuers and defender, and the contracts alleged being false and fraudulent, the defender ought to be assoilzied, with costs."

On 22nd December 1896 the Sheriff-Substitute (STRACHAN) issued the following interlocutor in the principal action—"Having heard parties and considered the closed record, finds that the contract libelled was entered into exclusively between Stewart, Govan, & Company and the defender, and that the pursuers were no parties thereto; therefore dismisses the

action, and decerns: Finds the pursuers liable in expenses," &c.

Note.—"I am unable to see any real distinction between this case and the one between the same parties which I disposed of on 2nd December current, and to the note in which I refer. In that case I held that the pursuers, not having signed a confirmation slip, were no parties to the contract, and in that respect this case is entirely in the same position. The pursuers have added a number of statements to the effect that they confirmed the contract in writing, that they recognised the same as binding on them, and that the defender not only never questioned the validity of the contract, but repeatedly recognised it as binding. Now, assuming that the confirmation slip could be dispensed with, I find no confirmation of the contract that could in any way affect the defender. So far as regards the validity of the contract, no question is or can be raised between the parties. It is perfectly binding on the parties thereto, viz., Stewart, Govan, & Company and the defender. The only question is whether the pursuers are parties to it, and I hold, for the reasons stated in the note referred to, that they are not. The contract being thus one between Stewart, Govan, & Company and the defender, any actings by the pursuers could not, so far as I can see, make the pursuers parties thereto, or establish any *nexus* between them and the defender. Such actings are easily referable to the existing contract with Stewart, Govan, & Company, and do not necessarily imply any contract between the pursuers and the defender."

In the interlocutor dated 2nd December 1896, which was the interlocutor issued by the Sheriff-Substitute in the action for £124, 11s. 3d., he decerned as follows:—"Finds that there was no contract between the pursuers and the defender, and that the pursuers have no right or title to insist in the present action; therefore to this extent sustains the second plea-in-law for the defender, dismisses the action, and decerns; finds the defender entitled to expenses," &c.

Note.—"In this action the pursuers, who are sugar brokers and merchants in London, sue the defender for the sum of £124, 11s. 3d., alleged to be due to them by the defender under a contract for the purchase of beetroot sugar, dated 27th March 1896, entered into between the defender and Messrs Stewart, Govan, & Co., sugar brokers in Glasgow, acting on account of the pursuers.

"The said contract sets forth that Stewart, Govan, & Co., acting on account of the pursuers Messrs Ransohoff & Wissler, had sold to the defender on account of himself (1500 tons) 15,000 bags of beetroot sugar, of the crop of 1896-97, at 11s. 6d. per cwt., free on board at Hamburg, the sugar to be at shipping port ready for shipment in October, November, and December, in equal quantities per month.

"The contract also contains the following provision:—'Persons acting as brokers or agents between two principals declared on the face of the contract shall be entitled to sign the same, principals signing the confirmation slips; *but in all other cases* the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip.' There is appended to the contract the form of a communication to be made by the broker to his principal, intimating that he had entered into the contract on his behalf, and there then follows the form of the confirmation slip. Opposite the form of intimation by the broker there is the following marginal note:—'This clause to be used only for copies of contract to principals. When there are no principals, the clause must be struck through and initialled by the member signing the contract.'

"The contract, which is addressed by Stewart & Co. to the defender, was signed by them, and a confirmation slip was thereafter signed and delivered by the defender to Stewart, Govan, & Co., but the pursuers neither signed the contract nor any confirmation slip. The 'clause' directed to be used 'for copies of contracts to principals' was struck through and deleted, and it is said by the defender that this deletion was made and initialled by Stewart & Co.

"In these circumstances it is maintained by the defender that the pursuers not having signed the contract or a confirmation slip, they were no parties to the contract, and that no rights or liabilities were thereby conferred or imposed on them. This contention seems to me to be well founded.

"The meaning of the provision in the contract with regard to principals I take to be that, when brokers are parties to the contract, they will bind themselves by signing it, but not their principals, unless the latter sign a confirmation slip. I see no other construction that can be put on the words, 'The contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip.' Indeed, a clear interpretation of the provision is supplied by the contract itself, or rather the 'clause' referred to, in which it is stated that the contract 'is to be deemed to have been made between those persons alone who appear on the face of it to have been the contracting parties.' This clause is, no doubt, deleted in the present case, but being printed along with the form of the contract it may, in my opinion, be looked at as interpreting or explaining its terms.

"Now, the persons who appear on the face of the contract in question as the contracting parties are Stewart, Govan, & Co. on the one hand, and the defender on the other, and if these are to be deemed to be the parties between whom it was made, there is very clearly no contract between the pursuers and the defender.

"It was argued by the pursuers that the contract was binding at common law, and that it is immaterial even whether the pursuers were aware of it at the time, it being sufficient that they have adopted it and are now seeking to enforce it. That may be so at common law, but it does not appear to

me to affect the present question. There is here an express declaration that the contract confers no rights or liabilities on any persons except those who sign it or the confirmation slip, and by this provision the operation of the common law with regard to principal and agent is, I think, entirely excluded. The pursuers are not entitled to found on or take the benefit of a contract, and at the same time repudiate one of its leading provisions."

The interlocutor of the Sheriff-Substitute issued in the action for £133, 15s. 6d. was identical with that issued in the principal action.

The defenders in the principal action appealed to the Court of Session, and the other two cases were transmitted *ob contengentiam.*

Argued for the pursuers and appellants—It was maintained for the defender that the pursuers had no right to sue on these contracts. That was not so at common law, for the pursuers were disclosed principals, and that contention could only be maintained upon the special terms of these contracts, and only upon a particular construction of their terms which was disputed by the pursuers. That was a dispute for the consideration of the referees under the clause of reference, and the Court was not entitled to decide it, but ought to remit the dispute to the referees under the contract. But even if the question whether the pursuers had any rights under the conrract was a question for the Court, the pursuers maintained that the construction of the contract contended for by the defender was erroneous. The expression "principals signing the confirmation slips" referred to principals acting without agents, and not to the case of disclosed principals with agents acting for them. "In all other cases," meant in cases where no principals were disclosed at all, which was not the case here. The first sentence of the clause disposed of the case of disclosed principals, and was the provision applicable to this contract. The second sentence had no application. The effect of this interpretation was (1) that agents acting for disclosed principals (as was the case here on the pursuers' side of the bargain) can sign and bind their principals and give them rights under the contract; (2) that principals acting without agents (as the defender was) are bound by signing the confirmation slip; and (3) that undisclosed principals also become bound by signing the confirmation slip. This interpretation harmonised with the common law, and carried out the purpose of Rule 46 of the rules of the Beetroot Sugar Association. It also harmonised with what actually took place here, for the agents sent a confirmation slip signed by the defender to the pursuers, and sent the contract signed by themselves to the defender. The deleted clause could not be regarded—*Inglis* v. *Buttery & Company*, March 12, 1878, 5 R. (H.L.) 87, but if it were looked at the word "principals" in the side-note meant "principals" not disclosed on the face of the contract. Therefore, even if the Court was bound to decide whether under this contract the defender was bound to the pursuers, that question ought to be answered affirmatively, and if there were contracts between the pursuers and the defender, it could not be disputed that any disputes as to the meaning and effect of these contracts came under the arbitration clause. The pursuers were not barred from pleading that clause by having brought the defender into Court. The pursuers did not know what or whether any defence was to be stated. The defender was bound by the rules of the Association, although not a member—*Stewart, Brown, & Company* v. *Grime*, January 27, 1897, 24 R. 414.

Argued for the defender and respondent—(1) The question whether the pursuers were parties to these contracts, and entitled to enforce them against the defender, was for the Court, and not for the referees under the arbitration clause. The defender could not be bound under these contracts to submit any question between him and the pursuers to arbitration until it had been determined whether or not the pursuers and the defender were contractually bound to one another under these contracts at all. (2) The contracts founded upon by the pursuers each contained a clause which was equivalent to a proviso that the pursuers were to have no rights under them. The first sentence in the clause in question dealt only with the case of two agents acting for two disclosed principals, and it meant that principals were to have no rights or liabilities under the contract unless they signed the confirmation slips, even when the agents had signed the contracts on their behalf as disclosed principals. The object was to prevent repudiation on the part of principals. This case, therefore, did not fall under the first sentence, but under the second, which dealt with "all other cases," and in terms of that part of the clause the pursuers had no rights under the contracts because they had not signed the confirmation slips. (3) Even if there was a contract between the pursuers and the defender, and the arbitration clause was consequently binding upon the parties, and even if the question whether there was such a contract between them was one which, apart from the way in which this case had arisen, would have fallen under the arbitration clause, the pursuers were barred from pleading that clause here, because they had themselves brought the pursuer into Court. If they wanted arbitration, they should have gone to the arbiters to begin with, and then come to the Court to enforce their decision. That was the usual course. As they had elected to proceed by way of an action-at-law, and the defender was not objecting to the jurisdiction of the Court, the arbitration clause must be taken to have been waived by both parties, and in these circumstances, as it was not *pars judicis* to propone it, the matters in dispute must be determined by the Court. No doubt actions were often sisted to await the result of an arbitration, but that was when the defender, having been brought into

Court, appealed to the arbitration clause, and not on the motion of a pursuer who had elected to raise an action. As a rule, such a plea was preliminary, whereas here it came last, and what it was proposed to submit to arbitration was not the pursuers' case, but the defender's defences. The nature of the defender's case was disclosed to the pursuers when he wrote refusing to have anything to do with the pursuers.

At advising—

LORD JUSTICE-CLERK—The pursuers Ransohoff & Wissler sue the defender Burrell for the difference between the price of goods which they tendered to him under his alleged contracts, and the price at which they were sold, on his refusing to take delivery. They found upon two sets of documents—(1) two contract-notes, and (2) two relative confirmation slips. The notes and slips are in the forms provided by the Beetroot Sugar Association of which they are members, and the former contain certain special stipulations which have a bearing upon the question whether what took place constituted a completed contract. By the notes Messrs Stewart, Govan, & Company bear to sell the goods as for Messrs Ransohoff & Wissler as principals to the defender, and by the confirmation slip the defender acknowledges and confirms the contract to them as acting for the pursuers.

The defender maintains, on grounds to which I shall presently advert, that no completed contract was ever made between the pursuers and him. To this the pursuers answer by a preliminary plea that, however that question may fall to be decided, it is not for this Court to decide, as it is declared on the face of the documents that "the council of the Beetroot Sugar Association is the referee of all disputes." They maintain, therefore, that the question whether there is a completed contract or not must be referred to that Association for decision. I am unable to assent to that contention. If there is a contract—if the pursuers can establish that they are in right of a completed contract—then all disputes arising under it are, by the clause I have quoted, referred to the Association, but if there is no contract that is binding, then there can be no reference by a contract of disputes under it. Until it is ascertained whether what has passed binds the parties as contracting parties, the clause of the alleged contract which relates to the working out of questions under it cannot come into active operation. The question raised in the defender's second plea-in-law is one, therefore, which must I think be answered by the Court.

Turning, then, to the contract-notes founded on, it appears that they contain certain special stipulations regarding what is necessary to "impose" and "confer" "rights and liabilities" as between parties, to use the words of those stipulations themselves, which in passing it may be observed seem to be intended to take the contracts made by members of the Beetroot Sugar Association out of the operation of the rules of the common law in certain particulars.

The stipulations are—[*His Lordship read the clauses in the contract quoted above*]. These stipulations are certainly very ill-framed to convey any clear and unambiguous meaning. After repeated study of them I am unable with any confidence to state any interpretation of them as being the only interpretation they will bear. As regards the first sentence, it appears to me to refer to the case where there are two principals disclosed by brokers who sign the contract. That is plainly not the case with which we are dealing here. It is suggested that it might include another case, viz., that of a broker acting for a disclosed principal transacting with another party directly. I am not able so to read it. The first meaning I have put upon it seems to me to be the natural and the true meaning, and the other to be inconsistent with it. But even if it could be so read, it would not, as I think, exclude the words being still held to mean that the principal who did not sign the contract-note should sign a confirmation slip in order to make the contract with him complete.

The second part of the clause bears to relate to "all other cases." It must, therefore, rule this case, if this case does not fall under the first head. It declares that the contract shall confer or impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip. We are only concerned here with "rights." The pursuers say they have rights, under which they are entitled to obtain decree against the defenders under a contract. But what they found on as giving them their right is not signed by them, nor have they signed any confirmation slip relating to it. They are thus in the position described that what they found on as a contract confers no rights on them as principals, they not having signed the same, or the confirmation slip. I am therefore of opinion that the conclusion at which the Sheriff-Substitute arrived was right, and that his interlocutor should be affirmed.

LORD YOUNG—The question which we have to decide arises in each of three actions now before us on appeal from the Sheriff Court of Glasgow. The actions—which are indistinguishable in all respects, except only the amount of the money conclusions—are founded on two contracts of sale, which also are indistinguishable for all purposes connected with the question decided by the Sheriff and now before us on appeal.

The pursuers (Ransohoff & Wissler) aver that on 27th March 1896 they "sold to the defender (Henry Burrell) 1500 tons (15,000 bags) of beetroot sugar," and that "the said contract was entered into by Messrs Stewart, Govan, & Co., sugar brokers, Glasgow, acting on account of the pursuers." This is the first contract.

In like manner and terms the pursuers aver that on 31st March 1896 they "sold to the defender 450 tons (4500 bags) of beetroot sugar." This is the second contract.

These are distinct averments that on the days mentioned the pursuers sold to the defenders the specified quantities of sugar, and that Stewart, Govan, & Co. were authorised by them to enter into and sign on their account—that is, for them—the contracts by which the sales were effected. The written and signed contracts are produced and are in accord with the averments.

The pursuers further aver with respect to each of these contracts that it was "constituted by formal contract-note sent to and retained by the defender, and was duly confirmed by the defender by confirmation slip signed by him." The two confirmation slips are produced.

With respect to delivery of the sugar sold, it is a term of each contract that the sugar shall be at shipping port (Hamburg) ready for shipment in October, November, and December in equal quantities per month. The pursuers aver that as regards October this term was exactly fulfilled by them, and that the sugar deliverable in October was on 8th, 9th, and 14th of that month duly tendered to the defender, who, without any reason assigned, declined to take it, whereupon the sugar was warehoused and thereafter sold by the pursuers, all in terms of the contracts, as they aver, and with a loss to them of £896, 3s. 7d. This is the amount sued for in the three actions taken together, and must be regarded as damages claimed from the defender for breach of contract.

The defender does not on record distinctly admit any of the pursuer's averments, with the exception of the receipt of letters and telegrams from Stewart, Govan, & Company on 8th and 17th October, professing to make a tender "on behalf of the pursuers" of certain quantities of sugar. He formally denies all the other averments. The genuineness of the contracts and confirmation slips was assumed by his counsel in the argument before us, but in the "Statement of Facts for the Defender" (Stat. 12) it is averred as follows:—"The defender believes and avers that the said Stewart, Govan, & Company never entered into the alleged contracts of 27th and 31st March 1896, referred to in articles 1, 2, 4, and 5 of the present statement of facts; that any dealings between the pursuers and the said Stewart, Govan, & Company were not on behalf of the defender, and, as the pursuers knew, were upon terms essentially different from those in the said alleged contracts, which illegally and fraudulently misrepresented the facts; and that the defender has no liability whatever to the pursuers."

The defender's 2nd plea-in-law is—"There being no contract between the pursuers and the defender, and the contracts alleged being false and fraudulent, the defender ought to be assoilzied, with costs."

The Sheriff, by the judgment appealed against, "Finds that there was no contract between the pursuers and the defender, and that the pursuers have no right or title to insist in the present action: Therefore to this extent sustains the second plea-in-law for the defender, dismisses the action, and decerns."

The Sheriff's ground of judgment is clearly enough expressed in his note, and is in substance this—that by a clause in each of the contracts, which he quotes, it is said that "the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slips," and that the pursuers not having signed either, they are not parties to the contract, and so cannot sue upon it.

The defender supports the judgment on the ground that this is the true meaning and effect of the clause. The pursuers dispute this, and also contend that this dispute, as well as all other disputes between the parties, must, under another clause in each of the contracts, be referred to the counsel of the Beetroot Sugar Association of London.

Leaving out of view, for the moment, the reference clause, and assuming the truth of the pursuers' averments in fact which I have called attention to, I see no ground for doubting that the pursuers are parties to the contracts. They meant to contract with the defender, and the defender meant to contract with them. The contracts bear that. Why it should be thought that they could not validly empower Stewart, Govan, & Company or any other to enter into a contract for them and sign it for them I cannot conceive. Can a trader not empower his managing clerk, or solicitor, or anyone in whom he has confidence, to enter into and sign a contract for him, or will a contract so made and signed be regarded otherwise than as a contract made and signed by the trader?

But it is contended by the defender, and the Sheriff has so held, that it is here matter of special contract between him and the pursuers, or between him and Stewart, Govan, & Company, that the pursuers shall be under no liability to him until they themselves, and with their own hands, sign the contract or the confirmation slip, however distinctly and solemnly (and admittedly) they may have empowered Stewart, Govan, & Company to sign for them as they did. I must say that I regard this contention as unreasonable, and indeed extravagant. But supposing for a moment that this could be regarded as the meaning of the clause in question, what, I venture to ask, is the limit in point of time to the pursuers, as principals, signing the contract or the slip with their own hands, and so as formally to bind themselves? Would it be sufficient to do it as soon as they were asked, or at any time before the defender had suffered prejudice or inconvenience from the omission? In his sixth statement the defender says that he "never received any confirmation from the pursuers of said alleged contract." But each contract bears to be a sale to him by the pursuers, and the defender distinctly admits that the goods were duly, and as required by the contract, tendered to him "on behalf of the pursuers," that is, by

the sellers from whom he bought them. I have already noticed that the defender stated no reason for not taking delivery when tendered, and, indeed, that from the date of the contract until action against him for breach was brought into Court he "never questioned the validity of the said contracts." He does not say that he ever asked for confirmation slips from the pursuers, who aver very distinctly, and I assume truly, that he never did. Suppose he had written to them in London asking for confirmation slips, and they had answered that as Stewart, Govan, & Company had, as authorised, signed the contracts for them, it had probably not occurred to them that it was necessary to sign the slips also, but that if he desired that they should, they had full authority to do so, and no doubt would if requested by him, or that if he preferred to have them sent to London for their (the pursuers') own signatures, they were ready to give them. Would signatures thus obtained be sufficient or come too late—and after what date or lapse of time too late? After action raised by the pursuers on the footing that they were the sellers, and with an averment by them that the contracts were entered into and signed on their account and with their authority, it would not probably occur to anyone that their averments would be strengthened by their signatures to confirmation slips. The purpose of confirmation slips, and of the contract clause which I am now considering, is to show that a person having right to do so (for that is essential) has acknowledged and confirmed a contract which he did not make. It can have no other purpose, and occurring in an ordinary mercantile contract, I cannot read it as overthrowing the rule of the common law and of common justice and common sense that a man is bound by a lawful contract which he admits that his agent made and signed in his name on his account and with his authority. Suppose that the buyer (the defender) had sued the sellers (the pursuers) for breach of contract, is it really doubtful that their judicial admission that they were the sellers, and that the contracts were made and signed for them with their authority, would be sufficient to bind them? The Sheriff says in his note—"Now, the persons who appear on the face of the contract in question as the contracting parties are Stewart, Govan, & Company on the one hand, and the defender on the other, and if these are to be deemed to be the parties between whom it was made, there is very clearly no contract between the pursuers and the defender." But this is clearly erroneous. Stewart, Govan, & Company were not the sellers, and incurred no obligation to the buyer beyond responsibility for the truth of the representation that they had authority to act and sign for Ransohoff & Wissler. They were not parties to the contract in any other sense than a clerk or agent who signs a contract *per procuration* of his master or client is. The defenders certainly bargained with Stewart, Govan, & Company for no more than that Ransohoff & Wissler should as sellers implement the contract according to its terms, as they certainly did. They could not compel him to take delivery of the goods tendered. If he had taken delivery he would have been liable for the contract price, and I think it clear that his liability would have been to Ransohoff & Wissler, who accordingly would have had title to sue him for payment. Having declined to take delivery, and so committed a breach of contract, I think it equally clear that his liability for that breach is not to Stewart, Govan, & Company, but to Ransohoff & Wissler.

I am therefore of opinion, first, that the pursuers were parties (as sellers) to the contracts, and second, that the clause on which the Sheriff's judgment is rested does not, assuming the truth of their averments, relieve them of the liabilities which the contracts impose on the sellers, or deprive them of the corresponding rights. Irrespective of that clause, the conclusion that the pursuers were parties to the contracts, and bound accordingly, is undisputed and indisputable. The language of the clause is not clear, and the opinion which I have ventured to express upon it (leaving out of view in the meantime the reference clause, and the pursuers' plea upon it) is negative rather than positive. What I mean is only this, that in my opinion the clause does not relieve the seller, by a contract made and signed for him by his agent, with his authority, of his liabilities as such seller, and that if he has duly, according to the terms of such contract, fulfilled his obligations under it, this clause will not deprive him of his remedy against the buyer, who has failed in his.

I have now to consider the reference clause which says that "the council of the Beetroot Sugar Association of London is the referee of all disputes." The pursuers contend that all disputes between them as sellers and the defender as buyer by the contracts containing this reference clause must go to the referee, and I see no answer to the contention. The defender founds on the clause about confirmation slips as relieving him, because it relieves the pursuers of liability. The pursuers admit that this clause must have effect according to the true intent and meaning of it, but dispute the intent and meaning ascribed to it by the defender. I should have thought this a typical case of a dispute falling under the reference clause which appeals to the authors of the clause the meaning and effect of which is in dispute. That the defender should be allowed to rest his defence on a clause in the contracts sued on, and when its meaning as represented by him is disputed by the pursuers against whom he pleads it, that he shall be allowed to ignore the clause of reference which stands alongside of it, is a view which I cannot assent to, and must therefore reject. If he can be permitted to plead the one clause of the contracts against his adversaries, they must, in my opinion, be permitted to found on the other, with a view to ascertain its

true meaning as a clause of the contracts in which it occurs.

LORD TRAYNER—In the argument addressed to us there were two questions raised, (1) is there any contract between the parties which the present pursuers can enforce, and (2) if there is a contract, does it refer, or bind the parties to refer, any dispute regarding the contract to the referee named. I confess I do not see how it is possible to reach the second question until the first has been decided. If there is no contract, there cannot be a clause of reference in it. It is said that the defender entered into a contract, and is now pleading upon its terms so as to exclude the pursuers' claims. That may be so, but the defender is pleading on the contract he made to the effect of showing that he made no contract with the pursuers of this action. If that is sound, then whatever may be the defender's liability on the contract to the parties with whom he contracted, he is under no liability to the pursuers with whom he did not contract.

The first question would not present any difficulty if we applied to it the rules of common law. We would then have here a disclosed principal suing on a contract made for him by his agent, who was not only entitled to enforce the contract, but who would on the other hand be liable for its fulfilment—a principal who when disclosed or discovered would have all the rights and be liable in all the obligations conferred or imposed by the contract. But I think the rules of the Beetroot Sugar Association (which are incorporated and made part of the contract in question) were framed for the purpose of excluding the application of the rules of the common law to their transactions. The association has made a law for itself, and those persons who contract with its members. An illustration of this may be found in a case recently decided in this Division (*Stewart Brown & Company*, 24 R. 414). Further evidence of this is afforded by, for example, rule 46, which provides that a principal, not disclosed, but who has authorised an agent to enter into a contract on his behalf (for that authority is involved in the expression "on behalf of a principal"), shall not be liable to the other contracting party, but only bound to settle with his own agent. Now, according to the common law, the principal in such a case would be liable to the co-contractor directly for non-fulfilment of a contract entered into on his behalf whenever he was disclosed or discovered.

The common law, then, is not to be applied here. The rule regulating the rights and obligations of the parties must be ascertained from the contract which has been entered into, "subject always to the printed rules, regulations, and bye-laws of the Beetroot Sugar Association." This rule, I am bound to confess, it is not easy to find. It has been suggested that we should leave the Association to construe the clauses of their own form of contract. I should not object to do so if I could. But as between whom are they to construe them? It can only be as between the parties to the contract, and who these parties are is the question first to be determined. The Association may be entitled to determine a dispute arising out of a contract, but whether there is a contract or not must be determined by the Court.

The facts out of which the question at issue arises are these. Messrs Stewart, Govan, & Company, in the end of March 1896, sent to the defender the two contract-notes which are printed in the print of documents for the pursuers. Each of these notes bears that Stewart, Govan, & Company, "subject always to the printed rules, regulations, and bye-laws of the Beetroot Sugar Association," had, on the date of the notes, "acting on account of Messrs Ransohoff & Wissler," sold to the defender, "acting on account of" himself, a certain quantity of sugar at a certain price. The notes each bore the following clause—"Persons acting as brokers or agents between two principals declared on the face of the contract shall be entitled to sign the same, principals signing the confirmation slips. But *in all other cases* the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip." In reference to each note, the defender signed and delivered to Stewart, Govan, & Company a confirmation slip confirming the contract. No confirmation slip was ever signed by the pursuers. In these circumstances the defender maintains that no contract was made with him by the pursuers that it was essential to such a contract that the pursuers should themselves sign a confirmation slip, which they did not do. Whether that contention is sound depends upon the construction put on the clause I have already quoted. What that clause means it is not easy to say, and diverse views of its meaning have been presented to us by the parties, but I shall state the view of its meaning which I have adopted (not without hesitation) after repeated consideration of its terms. The clause consists of two sentences, the first of which is, "Persons acting as brokers or agents between two principals declared on the face of the contract shall be entitled to sign the same, principals signing the confirmation slips." Now, the case to which these words most obviously apply is the case where two brokers or agents enter into a contract disclosing on the face of it the two principals for whom they are respectively acting. It is "brokers or agents," in the plural, and therefore the case of one broker acting for a disclosed principal, contracting directly with another principal, would not fall within the case provided for. If not, then the case last supposed (which is the case we are dealing with) would be covered by the second sentence of the clause, which applies to "all other cases" than that provided for in the first sentence. If this case falls within the second sentence, then the con-

tracts in question confer no rights and impose no liability on the pursuers, for they neither signed the contracts nor the confirmation slips.

But the first sentence of the clause under construction may possibly cover another case than that which I have already instanced, the case, namely, of a contract entered into between a broker for a disclosed principal, and another principal (of course disclosed) acting for himself. That case is not so precisely in terms of the language of the clause as the first instanced, but possibly the words of the clause may be held to cover that case also. If so, it describes the case before us. Now, in that case the clause authorises the agent or broker to sign the contracts, and requires the principals to sign the confirmation slips. If this means both principals, then the requirements of the clause have not been satisfied. If it means only one principal, then which principal? I think the principal who was represented by the agent. The other principal would properly sign the contract itself, on which his name appeared as a contracting party, and nothing more was needed to give him the rights or make him responsible for the liabilities arising under the contract. The other principal, represented by an agent, is required to sign a confirmation slip for probably this reason (and there may be others), to show that he had authorised the agent to make the contract for him, and so to prevent him evading or questioning his liability under the contract, should liability arise. It might seem as if what actually took place militated against this view, and suggested a different reading of the clause. The defender, although a party to the contract, signed a confirmation slip. But I think the answer to this is, he signed the confirmation slip because he had not signed the contract. He must sign one or other, and it is not very material which of them he signs. And he relies on the other principal doing the same, in order that that other principal may have the rights or be under the liabilities arising from the contract.

Whether the case before us is provided for by the first or second sentence of the clause, I think it equally necessary that a principal not acting directly, but through a broker or agent, and who does not sign the contract, shall sign a confirmation slip. It appears to me that the clause comes to this, that in all cases the principal or principals, in order to have any rights or liabilities under a contract, are required to sign confirmation slips, except in the one case, namely, where they have signed the contract itself. If that is the effect of the clause, then the pursuers have no right under the contract libelled, for they neither signed the contracts nor confirmation slips. They have, in that view of the case, no right to sue this action, and the interlocutor appealed against should be affirmed. I may add that, in my opinion, any ambiguity in the clause would fall to be construed *contra proferentem*. The pursuers are *proferentes* in the double sense (1) that they put forward the contracts in question as the ground of their claim, and (2) that the language of the contract is the language chosen by themselves, not chosen by the defender.

Had I been of opinion that the pursuers were entitled to sue on the contracts libelled, I am by no means clear that they would be entitled now to insist on the dispute which has arisen being referred to the Association. They have, notwithstanding the clause of reference, elected to appeal to a court of law, and the defender is content to meet them there. In such circumstances it might be held that the pursuers have waived their right to appeal to the Association. But it is not necessary to decide that.

LORD MONCREIFF—The defender Burrell pleads that he has no contract with the pursuers Ransohoff & Wissler. He maintains that although the contract bears that Stewart, Govan, & Company in selling to him acted on behalf of the pursuers as principals, the latter are not parties to, and have no rights or liabilities under the contract, because they have not ratified it by signing the confirmation slip. The defender maintains that this is the meaning and effect of the last clause in the contract.

If this construction is sound, the pursuers are not parties to the contract, and cannot sue on it. The Sheriff has sustained this contention and dismissed the action.

But the pursuers say that if the defender disputes their title to sue, that dispute must be referred to the Council of the Beetroot Sugar Association of London, which by the contract is declared to be "the referee of all disputes."

The defender's answer is that the reference clause cannot be invoked until it is ascertained that the pursuers are parties to the contract, and entitled to sue on it, and that that question is one for the Court to decide.

Although I recognise the expediency of referring to the council the meaning and effect of the contract-note framed by their own Association, I think that in law the defender is right in his contention. In my opinion a reference clause in a contract so expressed can only affect the parties to the contract, and it is for the Court and not for the referee to determine who are parties to the contract. One who alleges that he is not a party to the contract is not bound to submit the question whether he is a party to it to a referee to whom *ex hypothesi* he has never agreed to submit any dispute. In short, the reference clause does not come into operation until the existence of a contractual relation is either admitted or established by a court of law, and it is immaterial that, in order to decide that question, the contract which contains the clause of reference requires to be construed. This view is supported by practice and decision. In the case of *Levy & Company* v. *Thomsons*, 10 R. 1134, the Court construed the contract in order to ascertain whether the pursuers had a title to sue, and having sustained their title, remitted the pursuers' claim to arbitration.

In that case the pursuers, who, as agents for a disclosed principal, had entered into a contract with the defenders, sued the latter in their own name for penalties in respect of the defenders' failure to deliver certain vessels which they had agreed to build. The defenders stated two preliminary pleas—(1) no title to sue, and (2) that the questions raised in the action fell to be decided by the arbiter named in the contract. The Lord Ordinary repelled both pleas and ordered issues. The First Division, however, repelled the first plea only (being the plea to title) holding on a construction of the contract that the defenders had expressly agreed to pay the penalties to the pursuers personally. *Quoad ultra* they held that certain of the pursuers' claims fell within the arbitration clause, and remitted accordingly.

It will be observed that in that case the question of title depended upon the construction of the terms of the contract, and was disposed of by the Court although the contract contained a clause providing for reference to an arbiter "in case any questions or differences shall arise between the parties relative to the true intent and meaning of this contract or the rights of parties under the same."

In *Levy & Company* v. *Thomsons*, neither party appears to have disputed the jurisdiction of the Court to decide the question of title; but in the later case of *Symington's Executor* v. *Galashiels Co-operative Store Company*, 21 R. 371, the jurisdiction of the Court was objected to and was sustained. In that case the rules of the society provided that in the event of a dispute between any member of the society and any person claiming through a member it must be referred to a committee of the Society. On the executor-dative of a member raising an action against the society, the defenders, while they denied the pursuer's right to represent the deceased, maintained that the jurisdiction of the Court was excluded by the reference clause, as the pursuer was a person claiming through a member; that is, they desired that the committee should decide whether the pursuer had a title to sue. The Lord Ordinary sustained the defence of no jurisdiction, but the Inner House held that the jurisdiction of the Court was not ousted, as the question as to the pursuer's title was not a dispute in the sense of the rules. I may also refer to the English cases of *Prentice* v. *Loudon*, L.R., 10 C.P. 679; and *Willis* v. *Wells*, L.R. [1892], 2 Q.B. 225, which have a bearing on this case.

On the construction of the last clause of the contract, I think the preferable reading is that adopted by the Sheriff. The primary meaning of the first sentence is that where there are two principals represented by two agents who sign the contract, both principals, although disclosed, must confirm the contract signed by their agents by signing confirmation slips. That is a typical case, in which, at common law, confirmation by the principals would not be necessary. If it is necessary in that case, it must also be necessary where, as here, one principal acts for himself and the other through an agent.

The object of the proviso apparently is to prevent denial of authority by principals.

The second half of the clause runs—"But in all other cases the contract shall confer and impose no rights or liabilities on any principals, except those who shall sign the same or the confirmation slip." These words may, and probably do, refer to the case of principals not disclosed. There also, contrary to common law, they are to have no rights or liabilities unless they sign the contract or a confirmation slip. In short, I think the meaning of the whole clause might have been expressed in the concluding words alone—"the contract shall confer and impose no rights or liabilities on any principals except those who shall sign the same or the confirmation slip."

I hold this with hesitation as the contract and rules (46 and 48) are expressed with much confusion.

The result is that, in my opinion, the pursuers have no title to sue, as they did not sign the confirmation slip.

The Court dismissed the appeals and affirmed the interlocutors appealed against, and of new dismissed the actions, and decerned, with expenses.

Counsel for the Pursuers—D.-F. Asher, Q.C.—Ure, Q.C.—Deas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender—Balfour, Q.C. —Salvesen. Agents — Webster, Will, & Ritchie, S.S.C.

Tuesday, December 14.

SECOND DIVISION.

[Dean of Guild Court, Dumbarton.

MAIR *v.* THOMSON.

Police—Street—Meaning of "New Street"—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 146 *and* 152.

By section 146 of the Burgh Police (Scotland) Act 1892 it is enacted—"Every person who intends to form or lay out any new street shall give notice thereof to the commissioners, and along with such notice he shall lodge a plan of the proposed street, with longitudinal and cross sections, showing the proposed levels and means of drainage thereof, in order that the level of such street may be fixed by the commissioners."

A person petitioned for warrant to build a double cottage 10 feet back from and facing a public road within burgh. There was no house on the opposite side of the road, and the nearest house on the same side of the road was over 150 yards off across another road.

Held that section 146 did not apply to the petitioner.