the claimant Andrew Simpson M'Clelland, trustee on the sequestrated estate of Robert Bennett Browne, and preferred the claimant H. D. Anderson to four-fifths of the fund *in medio*.

Counsel for the Claimant and Reclaimer H. D. Anderson — W. Campbell, K.C. — Younger. Agents—Bell & Bannerman, W.S.

Counsel for the Claimant and Respondent A. S. M'Clelland—H. Johnston, K.C. —Leadbetter. Agents—Forrester & Davidson, W.S.

Agents for the Pursuers and Real Raisers —Campbell & Smith, S.S.C.

Tuesday, December 10.

SECOND DIVISION.

[Lord Low, Ordinary.

CASTANEDA *v.* CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED.

Title to Sue—Foreign Monarchical State—Foreign—Breach of Contract to Build War Vessels—Action by Minister of Marine.

The only person who has a good title to sue an action in the courts of this country for the purpose of vindicating the rights of a foreign monarchical state against a person subject to the jurisdiction of the Scottish courts is the monarch himself.

In 1896 a contract to build four torpedo boat destroyers for the Spanish Navy was entered into between A, chief, and B, Commissary of the Spanish Royal Naval Commission, London, "both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government," and a Scottish shipbuilding company. The contract provided that it was to have no legal power until ratified by the Spanish Government. C was at that time the Spanish Minister of Marine at Madrid. The contract was duly ratified by the Spanish Government. In 1900, D, then Spanish Minister of Marine at Madrid, E, then chief of the Spanish Royal Naval Commission, London, F, the Commissary of the same, and the said Spanish Royal Naval Commission, raised an action against the shipbuilding company for breach of the contract of 1896 upon the ground that the torpedo boat destroyers had not been delivered within the time specified in the contract, and that loss and damage had been sustained by the Spanish Government owing to the delay. The pursuers averred that both in making aud enforcing contracts relating to war vessels the Government of Spain was by the law of Spain represented by the Minister of Marine.

Held (*rev.* judgment of Lord Low, *diss.* Lord Young) that the contract having been made on behalf of the Spanish Government, and solely in its interest, the King of Spain alone could have a title to sue an action upon the contract in the Scottish courts, and that therefore the pursuers had no title to sue.

Title to Sue — Action Brought by Person Not Entitled to Sue — Ratification pendente lite by Person Entitled to Sue — Process.

A raised an action against B. In the condescendence A stated that he had been expressly authorised by C to prosecute the action. On B pleading "No title to sue," A lodged in process a mandate signed by C, but dated after the raising of the action. In this mandate C declared that the action had been instituted with his sanction and approval, and authorised A to prosecute it, with full power and authority to act in the matter as if the action had been raised in C's name.

It having been decided that A had no title to sue, and that C alone was entitled to do so, *held* further that the defect in the instance of the action could not be cured by C's ratification.

By contract dated 4th June 1896 made between His Excellency Commodore Don Manuel De La Camara, Chief of the Spanish Royal Naval Commission, 65 and 66 Chancery Lane, London, and Don Nicolas Prat, Commissary of the same, both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, thereinafter called the Spanish Government, on the one part, and James and George Thomson, Limited, engineers and shipbuilders, Clydebank, Scotland, in their own name and representation, thereinafter called the contractors, on the other part, the contractors in the first article of the contract undertook to build for the Spanish Government two twin torpedo boat destroyers each of about 380 tons load displacement, of materials and dimensions and fitted with machinery, guns, torpedo tubes, and torpedoes in accordance with specifications and plans mutually signed, the guns, torpedo tubes, and torpedoes being supplied by the Spanish Government.

By the second article of said contract the contractors undertook that the said vessels should be finished, complete and ready for sea—the first vessel in six and three-quarter months, and the second vessel in seven and three-quarter months, from the signing of the contract and the accompanying specifications and plans.

By the third article of the contract it was provided that the penalty for late delivery should be at the rate of £500 per week for each vessel not delivered by the contractors in the contract time; and by the fourth article of the contract it was provided that should the delivery of either of the vessels be delayed by *force majeure* the time should be correspondingly extended, and no penalty should be exacted for such delay.

The price of the vessels was, by article 7 of the contract, declared to be £134,360, being £67,180 for each.

By contract, dated 24th November 1896, entered into between the same parties the contractors undertook to build two other torpedo boat destroyers, which were to be finished complete and ready for sea — the first vessel in six and a-half months, and the second in seven and a half months, from the signing of the contract, and of the accompanying specifications and plans. These vessels were to be equal to the two vessels arranged for in the preceding contract. The price was to be £131,300, or £65,650 for each. This contract also contained clauses identical in terms with those in the contract of 4th June 1896 above recited, and in particular it contained a clause providing a penalty for late delivery identical with that above summarised. It was further provided that the contract was not to have any legal power until ratified by the Spanish Government. Both contracts were duly ratified by the Spanish Government by royal order.

The name of the Spanish Minister of Marine at the date of these contracts was not stated.

On 29th December 1900 his Excellency Rear-Admiral Don Jose Ramos Yzquierdo y Castaneda, the Spanish Minister of Marine in Madrid; Don Manuel Diaz e Iglesias, presently Chief of the Spanish Royal Naval Commission, whose office is at Nos. 65 and 66 Chancery Lane, in the City of London; Don Diego de Tapia, Commissary of the same; and the said Spanish Royal Naval Commission, raised an action against the Clydebank Engineering and Shipbuilding Company, Limited (to which name the firm name of J. & G. Thomson, Limited, had been altered in 1896), having its registered office at Clydebank, Dumbartonshire, now in liquidation; and Charles Ker, Chartered Accountant, 115 St Vincent Street, Glasgow; and William Barclay Peat, of 3 Lothbury, London, liquidators thereof. The conclusions of this action were that the defenders should be ordained to make payment to the pursuers of (1st) the sum of £25,000 sterling; (2nd) the sum of £23,000 sterling; (3rd) the sum of £12,500 sterling; and (4th) the sum of £15,000 sterling, or alternatively to the foregoing conclusions, to make payment to the pursuers of the sum of £75,500 sterling, with interest upon each of the said respective sums, at the rate of five per centum per annum from the date of citation until payment.

It appeared that Don Jose Ramos Yzquierdo y Castaneda was not Minister of Marine when the contracts sued upon were entered into.

The pursuers averred that none of the four vessels contracted for under the above-mentioned contract had been finished complete or ready for sea, or delivered within the contract time, the two vessels contracted for in the first contract, named the "Audaz" and the "Osado," being delivered fifty weeks and forty-six weeks respectively after the expiry of the stipulated period, and the two vessels contracted for under the second contract, named the "Pluton" and the "Proserpina," being delivered twenty-five and thirty weeks respectively after the expiry of the stipulated period. The pursuers therefore alleged that the defenders were liable to pay them the four sums concluded for, being at the stipulated rate of £500 for each week of delay.

The pursuers further averred—"The said sums sued for are liquidate and agreed-on damages, and were stipulated and contracted for by the buyers owing to the difficulty of ascertaining exactly the damage which would be suffered by them were delivery delayed beyond the contract periods. The vessels were required for the Spanish-American War, and the naval operations of the Spanish Government, for whose use they were contracted for, were greatly hampered by the want of said vessels, and great loss, injury, and damage was thereby occasioned to the said Government. It was intended and desired to send the vessels to Cuba to assist in suppressing the insurrection there, but owing to the delay in delivery it was useless to send two of the vessels to Cuba at all, and the other two although sent arrived too late to be of any real service, the ports being then effectively blockaded by American vessels. The loss, injury, and damage sustained by the Spanish Government owing to the delay in the delivery of said vessels is moderately estimated, apart from the penalty clause, at the four sums above specifically sued for. Had the vessels been delivered within the contract period and used as was intended by being immediately sent to Cuba, it is believed and averred that the insurrection might have been checked and war averted, and great loss and damage to the Spanish Government thereby avoided. In addition the pursuers on behalf of the Spanish Government had to disburse large sums for the pay and maintenance of the captains, officers, and crews of the ships who were sent to this country to receive them at the contract periods and were obliged to remain till delivery was actually given. The delay in delivery was not due to *force majeure* within the meaning of the contracts. The pursuers repeatedly protested against the delay in delivery but to no purpose. . . . Don Manuel Diaz E Iglesias and Don Diego de Tapia are the respective successors of Commodore Don Manuel de la Camara and Don Nicolas Prat in the offices of Chief and Commissary of the Spanish Royal Naval Commission. The said Spanish Royal Naval Commission represents the Government of Spain and their Minister of Marine in London in regard to all matters connected with the Navy. The pursuer Don Jose Ramos Yzquierdo is the successor of Don Francisco Silvela (to whom authority to constitute the present claim was granted) (in the liquidation) in the office of Spanish Minister of Marine at Madrid. The Government of Spain is represented both in making and in enforcing contracts and in claiming damages for the breach thereof, so far as relating to war vessels, by the Minister of

Marine in Madrid, and he is the person who by the law and practice of Spain directly represents the said Government in such matters and is entitled to enter into such contracts and sue for damages for the breach thereof. The pursuers have been expressly authorised and empowered by the King and the Queen Regent of Spain to prosecute the present proceedings on behalf of the Spanish Government."

The pursuers pleaded—"(1) The sums sued for in the first four conclusions of the summons being due and resting-owing to the pursuers as liquidate damages in respect of the defenders' failure to have finished, complete and ready for sea, and to deliver the four vessels mentioned, within the periods mentioned by the contracts libelled, the pursuers are entitled to decree therefor, with interest and expenses as craved. (2) The pursuers having suffered loss, injury, and damage through the failure of the defenders to have finished, complete and ready for sea and to deliver the said vessels within the periods mentioned in the said contracts, and the sums sued for being reasonable in amount, the pursuers are entitled to decree in terms of said conclusions of the summons, with interest and expenses as craved. (3) Or otherwise, the pursuers having suffered loss, injury, and damage through the defenders' breach of contract as libelled, the defenders are bound to make reparation to the pursuers, and the sum sued for in the alternative conclusion of the summons being reasonable in amount, the pursuers are entitled to decree therefor, with interest and expenses as craved. (4) The defences are irrelevant."

The defenders *inter alia* averred—"By the law of nations the sovereign of a monarchical state alone has title or interest to sue for the property of the state in the courts of a foreign state. The contracts here sued on were entered into on behalf of His Majesty the King of Spain, and were duly ratified by him, and the King of Spain alone can sue under them in the courts of this country."

The defenders pleaded—"(1) No title to sue."

The record was closed on 26th February 1901. Thereafter the pursuers lodged in process a royal decree by the Queen Regent of Spain in name of the King, dated 27th March 1901, ratifying and approving and confirming the judicial proceedings instituted by the pursuers, so far as already prosecuted, and declaring that these proceedings were and had been prosecuted with her sanction and approval, authorising the pursuers Don Manuel Diaz e Iglesias and Don Diego de Tapia, Chief and Commissary respectively of the Spanish Naval Commission in London, and the said Commission as well as their respective successors in office, to continue the proceedings and prosecute the same to judgment, and generally committing to the said pursuers and their successors in office full power and authority to act in this matter as if the proceedings had been raised in her name. This decree proceeded upon the narrative that judicial proceedings had been instituted in the Supreme Court of Scotland by their Excellencies the Ministers of Marine Don Francisco Silvela and Don Jose Ramos Yzquierdo, and by Don Iglesias and Don De Tapia above mentioned.

On 31st July 1901 the Lord Ordinary (Low) pronounced the following interlocutor:—"Before further answer allows to the pursuers a proof of their averments in the closed record, and to the defenders of their answers thereto, and appoints the same to proceed upon a day to be afterwards fixed."

Note.—"This is an action of damages for an alleged breach by the Clydebank Engineering and Shipbuilding Company (whom I shall call the defenders) of a contract to build four torpedo boat destroyers for the Spanish Navy. The contract was entered into between the defenders and Don Camara, chief of the Spanish Royal Naval Commission, 65 and 66 Chancery Lane, and Don Prat, Commissary of said Commission, 'both in the name and representation of His Excellency the Spanish Minister of Marine in Madrid, hereinafter called the Spanish Government.'

"The pursuers in the present action are (1) His Excellency Rear-Admiral Don Castaneda, the Spanish Minister of Marine in Madrid at the time when the action was brought; (2) two gentlemen who are respectively described as Chief of the Spanish Royal Naval Commission in London, and Commissary of the same; and (3) the said Spanish Royal Naval Commission. The gentlemen who are pursuers, as being at the date of the action the Chief and Commissary of the Naval Commission, are not the same individuals as those with whom the contract was entered into.

"The first question is whether the pursuers, or any of them, have a title to sue. The defenders maintain that the contract having been for the supply of warships for the Spanish Government, the King of Spain alone can sue an action upon the contract in this Court. None of the numerous cases which were cited seem to me to warrant that proposition. It may be that the action might have been competently raised by the King of Spain, but it does not necessarily follow that the pursuers have no title. The action is laid upon contract, and in general the question who is entitled to sue upon a contract is answered by ascertaining who were the parties to the contract. Here the contract was actually made by Don Camara and Don Prat, but they acted as agents for the Spanish Minister of Marine in Madrid. That official is not described by name in the contract, but by his office, and he is called throughout the contract the 'Spanish Government.' The defenders accordingly appear to me to have contracted with the Spanish Minister of Marine at Madrid upon the footing that as regarded the subject-matter of the contract he was equivalent to the Spanish Government. The pursuers aver that that was actually the case. They say—'The Government of Spain is represented both in making and in enforcing contracts, and in claiming damages

for the breach thereof so far as relating to war vessels, by the Minister of Marine in Madrid, and he is the person who by the law and practice of Spain directly represents the said Government in such matters, and is entitled to enter into such contracts and sue for damages for the breach thereof.'

"Assuming that averment to be true, why should not the Spanish Minister of Marine sue upon the contracts. The defenders' argument, if I understand it aright, is of this nature. The Minister of Marine cannot sue because he was only agent for the Spanish Government, and the Spanish Government cannot sue because they are an unknown and undefined body, and therefore the Sovereign alone can sue. I do not think that that argument is sound. If the head of a Government department is authorised by the law and constitution of the State to enter into a contract relating to his department which shall be binding upon the State, and if he does enter into such a contract I fail to see any good reason why he should not have a title to enforce it.

"I am therefore of opinion that the Spanish Minister of Marine has a title to sue, assuming, as I must do at this stage, that the averments of the pursuers which I have quoted are true; on the other hand, I do not think that upon the contract the present Chief of the Naval Commission and the Commissary have a title to sue. Their predecessors in office who made the contract did so as individuals and not by virtue of their office, and only as agents of the Minister of Marine, and all the stipulations of the contract are between the defenders on the one hand and the Spanish Government, that is, the Minister of Marine, on the other. The fact, however, that only one of two or more pursuers has truly a title to sue does not, according to the practice of this Court, render the whole instance bad, unless it can be shown that the defenders are prejudiced by the conjunction of the parties whose title is defective with the party whose title is unimpeachable. Here I do not think that the defenders have suffered or can suffer any prejudice by the representatives of the Spanish Naval Department in London being conjoined with the Minister of Marine as pursuers.

"I do not, however, propose to dismiss the action at this stage as regards the pursuers other than the Minister of Marine, because the pursuers state that they have been expressly authorised and empowered by the King of Spain to prosecute the present proceedings on behalf of the Spanish Government. That averment is not denied, and although I understand that there are objections to the alleged mandate, I am not in a position to deal with the question at present. [*His Lordship then dealt with questions outwith the scope of this report*].

"I have now dealt with all the questions which were argued in the Procedure Roll, and the result is that in my opinion a proof before answer must be allowed. I do not propose to deal with any of the pleas-in-law at this stage, because (1) the title of the Spanish Minister of Marine may depend upon his being able to show that by the constitution of Spain he had authority to make and enforce contracts for the Government, and (2) although I think that the sums specified in the penalty clause are *prima facie* liquidated damages, the contract is a somewhat unusual one, and it seems to me to be safer not finally to dispose of the question until I am in possession of the precise circumstances under which the contract was entered into."

The defenders reclaimed, and argued—The pursuers had no title to sue. They must sue either as individuals for their own interests or as representing the Government of Spain. There was no other alternative. They were not entitled to sue as individuals, because they were not the persons who had entered into the contract. And they were not entitled to sue as representing the Government of Spain. In a monarchy the king was by the law of nations vested in all the rights and interests of the nation. The sovereign individually in all questions between his kingdom and other states represented the nation, and all transactions must proceed in his name, he alone being considered to be the owner of the public property of his state and having the interest to sue—*United States of America* v. *Wagner*, 1867, L.R., 2 Ch. App. 582, opinion of L.C. Chelmsford, 587, and Lord Cairns, 593; *Hullett* v *King of Spain*, 1828, 2 Bligh's Reports (N.S.) 31, opinion of Lord Redesdale, 60; *King of Spain* v. *Machado*, 1827, 4 Russell 225; *Penedo* v. *Johnson*, 1873, 29 L.T. (N.S.) 452; *Schneider* v. *Lizardi*, 1846, 9 Beavan 461. There were no cases of the kind in the Scots courts, but the practice in England had invariably been for the monarch to sue—*Emperor of Austria* v. *Day*, 1860, 30 L.J., Ch. 690; *King of Two Sicilies* v. *P. and O. Steam Packet Co.*, 1850, 19 L.J., Ch. 202; *Emperor of Brazil* v. *Robinson*, 1838, 6 Ad. & El. 801; *King of Greece* v. *Wright*, 1837, 1 Jurist 944; *Colombian Government* v. *Rothschild*, 1826, 1 Simons 94. The principal disclosed in the contract was the Government of Spain, and as a general rule an agent was not entitled to sue in the place of a disclosed principal. Cases such as that of *Levy & Co.*, *infra*, turned on special circumstances, and were exceptions to the rule. The pursuers having no interest to sue either as individuals or as representing the Spanish Government had no title to sue—Mackay's Manual of Practice, 125; *Edinburgh United Breweries, Limited* v. *Molleson*, March 9, 1894, 21 R. (H.L.) 10, 31 S.L.R. 922; *Creighton* v. *Rankin*, May 26, 1840, 1 Rob. App., opinion of L.C. Cottenham 128. As to the alleged ratification of the action by the Queen Regent of Spain, it was dated three months after the raising of the action, and was therefore too late. It was impossible to validate proceedings brought by a person who had no title to sue by thereafter getting the concurrence of the proper pursuer — *Symington* v. *Campbell*, January 30, 1894, 21 R. 434, 31 S.L.R. 372; *Lundie* v. *MacBrayne*, Janu-

ary 23, 1894, 21 R. (J.C.) 33, 31 S.L.R. 337.

Argued for the pursuers and respondents—The plea of no title to sue was manifestly unsubstantial and should be looked at with disfavour by the Court. The Minister of Marine was the true party to the contract, and all through the contract the Spanish Government could be read as the Minister of Marine. The Minister of Marine for the time being was bound to account to his Government for the performance of the contract, and had thus a substantial interest to sue—*Welsh* v. *Rose*, February 11, 1857, 19 D. 404; *Milne* v. *Ritchie*, December 15, 1882, 10 R. 365, 20 S.L.R. 249. The defenders had deliberately elected to enter into a contract with the head of a Government department authorised by the law of his state to enter into such contracts so as to make them binding on the State. Having done so it was impossible for them now to turn round and refuse to recognise the head of that department. All that the cases cited by the other side decided was that the King of a foreign country was entitled to sue in the courts of this country where the public rights or interests of his kingdom were concerned. They all dealt with questions of procedure, and were in this connection referred to in Westlake's Practice of International Law (3rd ed.), p. 229; Gillespie's Translation of Bar's International Law, p. 1127; Bullen & Leake's Precedents of Pleading (5th ed.) p. 193. But no case had been quoted definitely laying it down that the head of a department of a foreign government was not entitled to sue for the fulfilment of a contract entered into by the head of that department. Even if the disclosed principal in the contract was not the Minister of Marine but the King of Spain, there was no absolute rule that where an agent contracts for a disclosed principal, only the disclosed principal has a title to sue—*Bonar* v. *Liddell*, March 9, 1841, 3 D. 830; *Levy & Company* v. *Thomsons*, July 10, 1883, 10 R. 1134, 20 S.L.R. 753; *Russell* v. *Da Bandeira*, 1862, 13 C.B. (N.S.) 149. Further, in the present case the title of the pursuer had been fortified by the ratification of the Queen Regent. The pursuers had averred on record that they had been expressly empowered by the King and Queen Regent of Spain, and when this was challenged they produced proof of the truth of their statement on record.

At advising—

Lord Justice-Clerk—This case arises out of a contract made by the defenders with certain persons, Spanish Government officials, by which they undertook to build and deliver for use in the navy of Spain certain sea vessels for war purposes. That contract had for the other contracting party Don Camara, Chief of the Spanish Royal Naval Commission, and Don Prat, Commissary of the said Commission, and it bore that these gentlemen acted "both in name and representation of his Excellency the Spanish Minister of Marine in Madrid." This contract was completed, and the vessels delivered, the defenders receiving the stipulated price. But according to the statements in the record in this case the vessels were not delivered by the time of delivery stated in the contract, but much later, and it is for damages for the delay in delivery that the defenders are sued in the present action. The pursuers of the action are his Excellency Rear-Admiral Yzquierdo, the Spanish Minister of Marine in Madrid; Don Manuel Diaz e Iglesias, the present Chief of the Spanish Royal Naval Commission in London; and Don Diego de Tapia, Commissary of the said Commission. The question at present before the Court is whether these gentlemen have a title to sue the defenders in this Court for damages for alleged breach of contract. The Lord Ordinary has expressed his opinion in his note, and in that opinion I concur, that the two gentlemen, the Chief and the Commissary of the Naval Commission, have no title. The contract was not made with them but with two other gentlemen, who were the only persons named in it, and by its terms were acting not for themselves but for the Minister of Marine of Spain. Their successors in office in the department to which they belonged could have no right to represent them in the contract, which upon the face of it was made by them "in name and representation of his Excellency the Spanish Minister of Marine in Madrid."

But his Lordship has expressed his opinion that the present Spanish Minister of Marine, who is not the same person as the person who held that office at the time of the contract, has a title to sue, and has therefore allowed a proof by his interlocutor. He so holds upon the averment made by the pursuers that "the Government of Spain is represented both in making and in enforcing contracts, and in claiming damages for the breach thereof, so far as relating to war vessels, by the Minister of Marine in Madrid, and he is the person who by the law and practice of Spain directly represents the said Government in such matters, and is entitled to enter into such contracts and to sue for the breach thereof." I am unable to agree with the Lord Ordinary in so holding. Whatever may be the law and practice in Spain as regards the making of contracts by Government Departments cannot affect the law as regards the right to sue in a different country where the Government of Spain desires to make a claim against a citizen of that other country in its courts of law on behalf of Spain. If this contract was one made for Spain, then the right to enforce its stipulations must be in the Spanish State, and not in any persons professing to represent that State, but suing as individuals and not as representing the State by any authorisation other than that they hold certain offices in Government Departments. Here the summons sets forth the persons suing as individuals, and it is only from designations naming their official position that any right to sue in this country as representing Spain can be spelled out. Now, Spain is a monarchy, and there can be no doubt that where a country has a monarch at its

head that that monarch can sue in the courts of another country for the establishment of rights of his own nation in regard to matters in which there is private dispute with citizens of that country. If is undoubtedly so in this country, as the books contain many cases in which the right of a foreign sovereign to sue in the law courts of Great Britain has been recognised and upheld. The principle is that where there is a king he is the possessor of the right, and entitled to vindicate it himself as being the depository of the national right. The law in this matter was very clearly laid down in the case of the *United States* v. *Wagner*. In that case the question was whether the United States of America could sue in that name without any personal name in the instance, it being argued that the President of the Republic should be a party to the suit. This contention was negatived, on the ground that as in a monarchy there was a vesting of the national rights in him, and therefore he was the proper suitor, the United States Republic being a recognised State among nations, and its rights not being vested in any person, the United States themselves were the proper and competent suitors. And this contention was upheld as sound. But while that was the direct question for solution in *Wagner's* case, the judgments given were most instructive upon the question how a suit for a monarchical state should be instituted, viz., by the monarch. And all the opinions expressed seem to take it for granted that that must be so, the sovereign being a person in whom the national rights are vested.

The Lord Chancellor (Lord Chelmsford) said this—"In a monarchy all the public rights and interests of the nation are vested in and represented by the monarch. . . . When a foreign monarch sues in the courts of this country it is not as the representative of his nation but as the individual possessor of the rights which are the subject of the suit."

Lord Justice Turner expressed himself on the same point thus—"I take it to be an inflexible rule of this Court that suits can be brought only by the persons or bodies to whom the property in question belongs, or who have some right or interest in it. Public property . . . vests in the sovereign, subject to a moral obligation on his part to apply it for the benefit of his subjects, and when he sues in respect of the public property he sues not as the mere representative of the state, but as the person in whom the property is vested for the benefit of the state."

Lord Justice Cairns, afterwards Lord Chancellor Cairns, said—"The proper plaintiff is to be sought in the owner of the subject-matter of the suit, and a foreign state is at liberty to sue in any of our courts. . . . It was contended that when a monarch sues in our courts he sues as the representative of the state of which he is sovereign; that the property claimed is looked upon as the property of the people or state; and that he is permitted to sue, not as for his own property, but as the head of the executive government of the state to which the property belongs. . . . This argument, in my opinion, is founded on a fallacy. The sovereign in a monarchical form of government may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers, over the property which he seeks to recover. But in the courts of Her Majesty . . . it is the sovereign, and not the state or the subjects of the sovereign, that is recognised. . . . In him individually, and not in a representative capacity, is the property assumed by other states, and by the courts of other states, to be vested."

These opinions seem to state the matter very sharply. They indicate that the king is the person in whom national rights or property are vested, and that he sues in that right, and as Lord Redesdale said in the case of the *King of Spain* v. *Hullett*, it is the "clearest case" of right to sue, the ground being that a suit can only be brought by him to whom property belongs or who has a right or interest in it to vindicate. Accordingly, all the writers upon the subject seem to express it as not disputable that in a monarchical state it is the sovereign who sues in a foreign country for the enforcement of any right against any of that foreign country's citizens. And it was held that in a case where the subject-matter in dispute was in this country, and was directly connected with the rights of a foreign state in its minister-plenipotentiary, and had nothing directly to do with any real national matter, yet nevertheless the minister himself did not represent the sovereign by suing in his own name (*Penedo* v. *Johnson*).

In the present case what is disclosed is most distinctly national in all respects. The parties who in the contract were giving the order stipulated that before it should be binding it should be ratified by the Spanish Government, the ratification was given expressly as "in accordance with a royal order," the order itself was for certain war vessels fitted with guns, torpedo tubes, and torpedoes, to be supplied by the Spanish Government; and the record sets forth that the purpose for which the vessels were required was the Spanish-American War, and that "it is believed and averred" that the insurrection in Cuba might have been checked and war averted had these war vessels been delivered in time under the contract. It is therefore clear that what is complained of is that these vessels were by the failure of the defenders not made part of the Royal Navy of Spain when they should have been, and that damage has resulted to the Sovereign of Spain in his dominions in consequence of the failure to deliver these to him as his property, just as the rest of the fleet is his property. The right which is claimed is his right, and I am of opinion that the right to sue is his right alone.

But the pursuers maintain that even if the King must sue he can assign his rights, and that he must be held to have done so by a royal decree of the Queen Regent. I do not think it necessary to do more upon

that question than to say that whatever might have been done it was not done. The King does not appear as a pursuer named who has given a mandate to another to enforce his rights. The suit is not that of assignees, but of persons suing as in their own right, and the royal decree which was issued three months afterwards, even if such a decree could set up the right of private pursuers, cannot validate the summons. It is a little curious to notice that not only are the persons suing not the persons who made the contract, but that the persons who by the royal decree of 27th March 1901 are declared to have raised the action, are not the persons who on 29th December 1900 raised the action. For while the action was raised by one Rear-Admiral—Yzquierdo—as Minister of Marine, and the two officials of the Naval Commission, Iglesias and Tapia, the royal decree three months afterwards states that judicial proceedings have been instituted in the Supreme Courts of Scotland by their Excellencies the Ministers of Marine Don Francisco Silvela and Don Jose Ramos Yzquierdo, thus bringing in a second Minister of Marine whose name does not appear upon the summons, and then when the royal authority is given to proceed, it bears to be given only to the two pursuers belonging to the Naval Commission, who the Lord Ordinary holds have no right to sue.

I would move your Lordships to recal the Lord Ordinary's interlocutor, to sustain the first plea-in-law for the defenders, and to dismiss the action.

LORD YOUNG—The contracts founded on by the pursuers, and for breach of which they seek damages, are admitted. They are in writing, and bear to be between official representatives of the Spanish Government on the one part, and James & George Thomson, shipbuilders in Scotland, on the other, their purpose being the building of four ships of war (torpedo boat destroyers) for the Spanish Navy. The ships were built by the contractors, and delivered to and paid for by the Spanish Government, which now seeks in this action to recover from the builders damages for breach of contract — the alleged breach consisting in delay of delivery. The firm name of the shipbuilders (J. & G. Thomson) was altered, as explained in the condescendence, to that of the limited company (now in liquidation), the defenders before us. There is no question raised as to this, or the relevancy of the averments of breach of contract for which damages are claimed. The point of law which is by necessary implication decided by the Lord Ordinary's interlocutor allowing a proof before answer, is that, assuming the truth of the pursuers' averments, they have a good title to sue the action. The material averments which regard the title to sue are not those relating to the breach of contract, but those relating to the constitutional position of "the Spanish Minister of Marine in Madrid," and that the pursuers have been expressly authorised by the King and the Queen Regent of Spain (the King being in minority) to prosecute the present proceedings on behalf of the Spanish Government." The pursuers' averments are distinct, and that they are untrue is inconceivable, though in the absence of express admission evidence may be necessary.

The contracts were made by the defenders with "the Spanish Minister of Marine, in Madrid," and the defenders aver on record that they "were entered into on behalf of His Majesty the King of Spain, and were duly ratified by him." They also aver, though in a plea-in-law, "that each of the said ships was delivered to and accepted and paid for by the Spanish Government." The character of the contracts is therefore not doubtful, and indeed not disputed. It follows that if the defenders committed the breach of contract which is averred, they are responsible to the Spanish Government in damages recoverable by action in this Court, determinable according to the law of this country where the contracts were made and the breach (if any) committed.

I agree with the Lord Ordinary in thinking that the action may be regarded and dealt with as at the instance of only "the Spanish Minister of Marine in Madrid," although "the Spanish Royal Naval Commission" in this Kingdom and two members thereof are conjoined as pursuers along with him. I think this conjunction, though not necessary, was intelligible and proper, just as a similar conjunction was in the contracts themselves. This conjunction could not and cannot possibly harm the defenders, and indeed was manifestly intended only to afford facilities in making and receiving communications to and from the Spanish Government with which the defenders were dealing.

The contention of the reclaimers (the defenders) is that the Lord Ordinary ought to have sustained their first plea-in-law "No title to sue," and that on the ground expressed by them, that the contracts sued on having been entered into on behalf of the King of Spain, he alone can sue under them. Numerous cases involving considerations connected with international law and comity were referred to by the reclaimers in support of their contention. They were no doubt the same "numerous cases" which the Lord Ordinary notices as having been cited to him in support of the same contention, but none of which in his opinion warranted it. I agree with his Lordship.

It seems to me to be clear that the Spanish Government, which admittedly paid for the ships according to the contracts sued on, satisfies any and every rule of international law incumbent upon it when claiming damages for breach of these contracts by submitting their claim to this Court to be determined according to the law of Scotland, exactly as would be a similar claim made by the British Government under similar contracts with Scotch shipbuilders for ships built for the British Navy which had been delivered to and paid for by the British Government. This they have done.

With respect to the duty of this Court, as one of the King's Courts of Justice, to observe international comity, I think we ought to recognise and take respectful account of the constitutional position and power of a minister of state in a sister kingdom, as we do of the constitutional position and power of a king or regent in such kingdom. In this Kingdom, while the King is head, the management of national business is divided and committed to departments, the members of which are nominated by the King—all of them—the Board of Trade, the Woods and Forests, the Admiralty, &c., which are all of them Committees of the Privy Council. The ministers of the Crown appointed to any of these departments are, in transacting the business and discharging the duties thereof, constitutional representatives of the sovereignty of the Kingdom with all the requisite sovereign powers. They have ever been so regarded by the law courts of this country, and, I have no reason to doubt, of foreign countries also, as required by the known comity of nations.

What then, by international law or comity of nations, is our duty to Spain in dealing with the defenders' plea that "the Spanish Minister of Marine in Madrid" has no title to sue this action. That Minister himself informs us that "the Government of Spain is represented both in making and enforcing contracts and in claiming damages for the breach thereof, so far as relating to war vessels, by the Minister of Marine in Madrid, and he is the person who by the law and practice of Spain directly represents the said Government in such matters and is entitled to enter into such contracts and sue for damages for the breach thereof. The pursuers have been expressly authorised and empowered by the King and the Queen Regent of Spain to prosecute the present proceedings on behalf of the Spanish Government." If this be true—and we must at least proceed now on the assumption that it may be proved to be so—I am of opinion that we must affirm the Lord Ordinary's interlocutor. To recal it and dismiss the action would be to refuse to recognise and respect the constitutional position and powers of a foreign Minister of State. This is sufficient for the decision of the case.

But it is proper that I should refer to the royal authority given to the pursuers, the Minister of Marine and those conjoined with him, to prosecute this action on behalf of the Spanish Government. I think this also is by itself sufficient for the decision of the case by repelling the objection to the pursuers' title to sue—the documents giving the royal authority being produced.

Had there been any suggestion which the defenders' counsel deemed worthy of statement that the defence or any legitimate interest of the defenders in stating and maintaining it might possibly be prejudiced by allowing the action to proceed at the instance of the pursuers, I would of course have considered it willingly and carefully, but no such suggestion was made and I can conceive no ground whatever for any such.

A judgment on the merits in favour of the defenders will undoubtedly be *res judicata* against the Spanish Government, and they will certainly not be required to implement an unfavourable judgment except on a discharge good against the Spanish Government.

LORD TRAYNER — This is an action to recover damages for an alleged breach of contract, and the question we have to determine is, whether the persons in whose name the action is brought have a title to sue. I take it to be a proposition not open to controversy that no one can sue upon a contract either to enforce implement thereof or for damages on account of breach of contract, except the person (1) who made the contract; (2) the person for whose behoof and in whose interest it was made; or (3) the person who has lawfully acquired and been vested with the interest under the contract. To use the words of Turner, L.-J., in the case of *Wagner*, it is "an inflexible rule . . . that suits can be brought only by the persons or bodies to whom the property in question belongs, or who have some right or interest in it." That being so, the question is, who was the person who made the contract in question, or in whose interest and behoof was it made?

There are two contracts before us, but as they are made between the same persons and embody the same or similar conditions, they may be dealt with as one. The contract then bears to have been made between two persons named "in the name and representation of His Excellency the Spanish Minister of Marine, in Madrid, hereinafter called the Spanish Government, on the one part," and the defenders on the other. That contract must either have been made on behalf of the Spanish Government, that is, the Spanish State, or the person who then held the office in the Spanish Government of Minister of Marine, but in either view of it I think the present pursuers have no title to sue this action.

There can be no doubt I think that the contract was one made on behalf of the Spanish State and in its interest alone. The subject-matter of the contract (the providing ships of war) points to this, as also does the fact that the contract was not "to have any legal power until it is ratified by the Spanish Government." But the pursuers' averments put this beyond doubt, for they set forth that the defenders "undertook to build for the Spanish Government" the vessels mentioned in the contract. Taking it as a contract for behoof of the State, who has the right to enforce it, or insist in any claim in respect of it? I am of opinion that (as the State interested was a monarchy) the Sovereign of that State can alone do so, and that any action on the contract must proceed in his name. This appears to me to be well settled on the authorities cited to us, and I cannot express my own view better than by quoting the words of Lord Cairns in giving judgment in the case of *Wagner*. He said—"The sovereign in a monarchical form of government may, as between himself and his subjects, be a trustee for the

latter, more or less limited in his power over the property which he seeks to recover. But in the courts of Her Majesty, as in diplomatic intercourse with the Government of Her Majesty, it is the Sovereign and not the State or the subjects of the Sovereign, that is recognised. . . . In him individually and not in a representative capacity, is the public property assumed by all other states and by the courts of other states, to be vested." Now, if it is the King of Spain individually who alone can be recognised as vested in the interest under this contract, and if no one can sue upon a contract except the person having the interest in it, it follows that the King of Spain alone could sue this action. It is said that the King of Spain could authorise any other person he pleased to name to sue upon the contract, and I assume that he could. But the action even then must proceed in his name—a mandatory who raises an action must do so in the name of the mandant. It is further said that the Spanish Sovereign has approved of this action and given his sanction to it. But his concurrence and approval will not mend the defective instance. In *Hislop's* case (8 R. (H.L.) 95, at p. 105, 19 S.L.R. 571, at p. 576), Lord Watson said—"I know of no authority for holding that according to the law and practice of Scotland a person who has no right or title whatever can sue an action, provided he can obtain the consent and concurrence of the party to whom alone such right or title belongs." I am therefore of opinion that the defenders' plea of no title to sue must be sustained if this is regarded as a contract made in the interest and for behoof of the Spanish State.

Taking the case now on the alternative view that the contract was made by or on behalf of the person (not named) then holding the office of Minister of Marine in the Spanish Government, the case does not appear to me to be in any different position. The person who was Minister of Marine at the date of the contract is not suing. That is admitted, and indeed it was said that the present person is not even the immediate successor of the Minister of Marine in office at the date of the contract. None of the persons named or described in the contract are now pursuers; and the pursuers do not aver that they are in right of the contract by assignation or any other title which transferred the contract to them.

The defenders' plea might have been avoided by sisting the King of Spain here as a pursuer. This, however, could only be done by consent of the defenders, and this consent they refuse to give.

LORD MONCREIFF — I agree with the majority of your Lordships that the present pursuers have no title to sue. The defenders' plea to title simply means this, that in point of form the name of the King of Spain should appear as the pursuer or at least as a pursuer of the action. I have come to this conclusion with reluctance, because there is no doubt that this action is insisted in with the ratification and approval of the King of Spain (given subsequently to the raising of the action) to two of the pursuers. If our practice admitted of it, the defect in the instance could be cured by the King of Spain being sisted as a pursuer, but unfortunately the practice is settled to the opposite effect by the highest authority—*Hislop*, 8 R. (H.L.), 95, *per* Lord Watson, 105; and therefore if the instance be bad it cannot be cured in this action.

The pursuers are (1) the present Spanish Minister of Marine at Madrid; (2) the present Chief of the Spanish Royal Naval Commission in London; (3) the Commissary of the same; and (4) the said Spanish Royal Naval Commission. Neither the King of Spain nor the Government of Spain is mentioned in the summons.

The pursuers seek to enforce two contracts with the defenders dated respectively 4th June and 24th November 1896. The first parties in these contracts were (1) the then Chief of the Spanish Royal Naval Commission in London, and (2) the then Commissary of the same (both of whom are named), "both in the name and representation of His Excellency the Spanish Minister of Marine at Madrid hereinafter called the Spanish Government." The name of the Spanish Minister of Marine is not given, and nowhere appears in connection with these contracts.

The first question is, whether the present pursuers, none of whom were individual parties to these contracts, are (all or any of them) entitled to sue upon them. The Lord Ordinary has indicated an opinion that the Minister of Marine (but not the other pursuers) has a title to sue upon the contract. Now, I do not doubt that even where, on the face of a contract the principal is disclosed, it is open to the parties to so frame the contract that the agent and not the principal shall be taken as the party entitled to sue and be sued upon it, and it may sometimes be a matter of convenience that this should be done. I refer as examples to *Levy & Company* v. *Thomson*, 10 R. 1134; *Bonar* v. *Liddell*, 3 D. 830; and *Russell* v. *Sa Da Bandeira*, 13 C.B. (N.S.), 149-181. And therefore if these contracts had been so expressed as clearly to state or reasonably to imply that the proper person to sue and be sued upon them was the Spanish Minister of Marine and his successors in office, I should have accepted this as a good instance. But on examination of the contract I do not think that this can be maintained for these amongst other reasons—(1) The name of the Spanish Minister of Marine (who was not the present holder of the office) is not given, and no mention is made of his successors in office; (2) throughout the body of the contracts the Spanish Government alone is named; and (3) both contracts were specially ratified by royal order. This would have been unnecessary if the Minister of Marine had been the true principal. All this I think shows that the true and indeed the only principal was the Spanish Government, for whom the contracts were made through the Minister of Marine, or rather

through his department of the state, because no individual is named, and the expression "Minister of Marine" is at once defined as meaning the Government of Spain. It undoubtedly was a competent way of making a contract which should be effectual to the Spanish Government to make it through the Minister of Marine; but authority to make a contract does not necessarily imply that the agent who contracts on behalf of a disclosed principal is entitled to sue upon the contract. I cannot therefore quite agree with the Lord Ordinary's view—"If the head of a government department is authorised by the law and constitution of the state to enter into a contract relating to his department which shall be binding upon the state, and if he does enter into such a contract I fail to see any good reason why he should not have a title to enforce it." This is too broadly stated. In each case it depends on the terms of the contract, but the general rule is that the disclosed principal must sue.

II. If, then, the true principal in these contracts is the Government of Spain, the form of Government being monarchical, the King of Spain is the proper person to sue. The public property of the State is held to be vested in him individually, and according to international law he alone is recognised in the courts of this country—*United States of America* v. *Wagner*, L.R., 2 Ch. App. 582. It is said that he is entitled to sue by an authorised representative. I assume that in Spain he can do so, and that in matters relating to war vessels the Minister of Marine in Madrid, by law and practice in Spain, directly represents the Government. But that is not the question. If a foreign sovereign desires to bring an action in this country, he must do so according to the law and practice of the *forum;* and the validity of the instance must be judged of just as if the question arose between any two parties who are subject to the jurisdiction of the Scottish courts and as if no privilege of exterritoriality existed. Now, in this country, as in England, in judicial proceedings the person having the real interest in the suit must sue in his own name, and he cannot delegate the right to sue to an agent or representative who has no interest in the suit.

No doubt if not resident in this country he can grant a factory and commission authorising another to raise an action for him. But the name of the principal must appear on the face of the writ, and the action must be raised in his name, although the name of the factor may be conjoined. This of course is without prejudice to what I have already noted, viz., that an agent or factor may specially contract for right to sue in his own name, or the contract may be so framed as to involve this, and also to involve the personal liability of the agent.

As to the general law, I may refer to *Levy* v. *Thomson*, *Bennett* v. *Inveresk Paper Company*, 18 R. 975, 28 S.L.R. 744; and to Pollock on Contracts, 5th ed., p. 96, and Evans on Principal and Agent, p. 453. In *United States of America* v. *Wagner* Lord Cairns says (L.R., 2 Ch. App. 595)—"I apprehend that the only rule is that the person, state, or corporation which has the interest must be the plaintiff."

III. If I am right in this, the only other question is whether the subsequent ratification of these proceedings by the King of Spain cures the defect in the instance. It is settled by the case of *Hislop* that it does not. Lord Watson says (8 R. (H.L.) 105),—"I know of no authority for holding that according to the law or practice of Scotland a person who has no right or title whatever can sue an action provided he obtain the consent and concurrence of the party to whom alone such a right or title belongs." And his Lordship is equally clear that it is incompetent to introduce a new party as pursuer. As I have said, these rules of practice and procedure are binding upon a foreign sovereign who sues in our courts.

Therefore although I have some doubt upon the first question, I agree that the first plea-in-law for the defenders should be sustained and the action dismissed.

The Court recalled the interlocutor reclaimed against, sustained the first plea-in-law for the defenders, and dismissed the action.

Counsel for the Pursuers and Respondents —Dundas, K.C. — Blackburn. Agents — Macandrew, Wright, & Murray, W.S.

Counsel for the Defenders and Reclaimers —Campbell, K.C.— Tait. Agents — Forrester & Davidson, W.S.

Tuesday, December 10.

FIRST DIVISION.

[Railway Commissioners.

ALEXANDER COWAN & SONS *v.* NORTH BRITISH RAILWAY COMPANY.

Railway — Railway and Canal Commissioners — Jurisdiction—Appeal — Rebate on Sidings Rate—Station Accommodation —Special Services at Trader's Siding—Railway Rates and Charges (No. 25) Order Confirmation Act 1892 (55 *and* 56 *Vict. c. lxiii.)—Railway and Canal Traffic Act* 1894 (57 *and* 58 *Vict c.* 54), *sec.* 4.

In an application to the Court of the Railway and Canal Commission under the Railway and Canal Traffic Act 1894, section 4, by a trader who received coal at a private siding, for a rebate from a siding-to-siding rate, upon the ground that the siding-to-siding rate exceeded the maximum rate for conveyance, and was the same in amount as the siding-to-station rate charged to a neighbouring station, the railway company maintained in defence that the siding-to-siding rate in so far as in