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

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

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered, with additional expenses.

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

Thursday, January 11.

SECOND DIVISION.

PIRIE *v.* LAVAGGI.

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

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

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

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

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

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

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

tiff; and that the defendant then believed him to be the principal in the transaction.

"Thus, the first point for decision in this case is, whether the defenders dealt with Wood as principal in the transaction, and had reason to believe that the rags in question were his property. The Sheriff is inclined to think that this can hardly be maintained in the face of the letter of 1st October 1870, which opens with the statement that the rags had 'been sent by the same party who sent the former lot, and who specifies them as cotton rags No. 2.' The plain meaning of this is, that this unnamed person had sent the rags to Wood for disposal on commission, not that Wood had acquired or purchased them from the same collector. The language used is just what an agent would have employed under the circumstances, and the defenders, as men of business, must have known quite well Wood's position in the matter. If that be so, the pursuer, as principal in the transaction, is still in time to come forward and claim the price of his property.

"The second point is, whether the transaction, at the date of the declaration of Wood's insolvency, was so complete as to vest the pursuer's property in the defender's person. In the letter of 1st October, already referred to, Wood writes:—'I shall feel obliged if you shall have them sorted, and say what price you can give for them.' It is explained by the rag merchants who were examined that this is the common way of doing business. 'When a party with whom we are not familiar brings us mixed rags, we sort them first, and report to him the yield of them—that is, the various classes of rags contained in the lot. After classing them, we say what we are willing to give. If the seller agrees, the bargain is closed.' But if, says another, 'the seller is not content with our price, he can take them away; there is no sale till the price is agreed to.' The defender Mr Gordon Pirie does not contradict this evidence. He says he bought the rags on the footing that the price was to be left to himself, after he had examined them to see what they were worth. This, however, is not the fair meaning of the letter of 1st October, nor was it Wood's own understanding, so far as that can be gathered from his letter to the pursuer of 29th October. It is there assumed that the sale was to be considered unclosed until the value of the rags had been reported on by the defenders. Accordingly, it is not surprising that the defender candidly admits that he would not have held Wood to his bargain had he objected to the price when he came to state what he was willing to pay. Now, that is just what has happened. Nothing more was said on the subject till after Wood's insolvency, and when the price was mentioned it was objected to by the pursuer as much too little. So standing the facts, it cannot be held that there was here any completed sale. It is necessarily implied in the very nature of sale that the parties should be at one in respect to the price (1 Bell's Com., p. 87). If the price is left to the buyer himself, or is to depend on his own measurement, the sale will be held to be complete; but if the concurrence of the seller is necessary, either for the purpose of fixing the price, or for ascertaining the measurement when the price depends upon the quantity, the performance of these things is a condition precedent to the transfer of the property. For these reasons the Sheriff is of opinion that there was here no concluded contract, and that the property still remains in the original owner."

The defenders appealed.

Mr Shand and Mr Maclaren for them.

Mr Balfour in answer.

At advising—

Lord Justice-Clerk—There are two questions which it is necessary to decide in this case—(1) Whether Pirie dealt with Wood as a principal? and (2) On the supposition that he was dealt with as a principal, was there a completed contract of sale? In the event of our being of opinion that the first question should be answered in the negative, it would be unnecessary to consider the second question, because, undoubtedly, if Wood acted as an agent for Lavaggi, and Pirie was aware of that, then there was no completed contract of sale.

Upon considering the proof, I can see no reason for thinking that Pirie dealt with Wood as the agent for another. I had no reason to suppose that Wood was not the principal in the bargain. Nor can I have any doubt that, according to the custom of this particular trade, the bargain was completed. It is true that neither had the price been paid, nor even fixed in money, but the contract was that Pirie should pay for the rags whatever was found ultimately to be their true value after they had been sorted and weighed.

The case therefore involves no question of difficulty in the law of sale, because both parties are agreed that if Wood represented himself as a principal, then Messrs Pirie are entitled to plead his debt to them, by way of set-off, in an action such as this, at the instance of the true owner, for the price of the goods.

The Sheriff is perfectly right in the law which he lays down in the note to his interlocutor, but in my opinion he is wrong in holding, on the proof, that Messrs Pirie were aware that Wood was acting as an agent for another, and therefore I am for recalling his interlocutor, and confirming that of the Sheriff-Substitute.

Lords Cowan, Benholme, and Neaves concurred.

Agents for Appellant—Henry & Shiress, W.S.

Agents for Respondents—Tods, Murray, & Jameson, W.S.

Friday, January 12.

FIRST DIVISION.

BANNATINE'S TRS. *v.* CUNNINGHAME.

(*Ante*, vol. v., p, 516, 641.)

Process—Reclaiming-Note—Judicature Act (6 *Geo. IV, c.* 120), § 17—*Court of Session Act* (31 *and* 32 *Vict. c.* 100), §§ 52, 53, and 54.

The Lord Ordinary on 15th July 1871 pronounced an interlocutor, which, in connection with a previous interlocutor, disposed of the whole merits of a cause, and by which he appointed the cause to be put to the roll for the disposal of the question of expenses; and by an interlocutor, dated 2d November 1871, he found the pursuers entitled to expenses. *Held* that a reclaiming-note presented by the defender on the 10th November against the interlocutor of 2d Movember, competently brought under the review of the Inner House, not only the interlocutor of 2d November, but the interlocutor of 15th July and previous interlocutor.