these had necessarily been made with the view to obtain a fraudulent advantage.

Upon the motion of the Advocate-Depute, the diet was deserted *simpliciter*, and the panel dismissed from the bar.

Counsel for the Prosecution—Lancaster, A.-D.
Counsel for the Panel—Scott Moncrieff. Agent—Mr Honeyman, Kinross.

Friday, September 27.

ABERDEEN.

(Before Lords Neaves and Jerviswoode.)
[Sheriff of Banff.

BAIN *v.* STEUART.

Expenses—Debts Recovery (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 96)—*Fees to Procurators.*

In an action brought under the Debts Recovery Act 1867, the Sheriff-Substitute gave decree for expenses, which included, in addition to the statutory fee to the procurator conducting the cause, charges to other procurators for attending a commission to examine a witness resident at a distance, and for making inquiries as to the residence of a witness. *Held* that the charges were reasonable and necessary in conducting the case, and admissible under the statute.

This was an appeal against a decree for expenses pronounced by the Sheriff-Substitute of Banffshire in an action under the Debts Recovery Act 1867 at the instance of Robert Bain, bootmaker, Elgin, against Andrew Steuart, Esquire of Auchlunkhart. The action was for £12, 13s. 6d., the amount of an account for goods supplied to Mr Steuart's wife and daughter. A commission to take the evidence of Mrs Steuart, who was then living in Stirling, was granted on the pursuer's motion. Decree was given against Mr Steuart, with expenses. These expenses included, in addition to the statutory fee of £1, 10s. to the procurator conducting the cause, charges for fees to three other procurators in various parts of the country, making in all £5. Two of these procurators' accounts were for charges incurred in making inquiries after the residence of a witness; the third was for attending the commission, and conducting the pursuer's case there. All these charges had been allowed by the Sheriff-Substitute.

Argued for the appellant, that the language of section 18 of the Debts Recovery Act precluded the possibility of other sums being charged for the procurator's work. In regard to the competency of the appeal, the decision of the Sheriff was in excess of jurisdiction, which justified an appeal to the Circuit Court.

Argued for the respondent, (1) that the appeal was incompetent under section 17 of the Act; (2) on the merits, that the sums to which objections were taken were not fees, but outlays; had the procurator conducting the cause gone to Stirling himself instead of employing a procurator there, he would have been entitled to his expenses, which would have amounted to considerably more.

The Court pronounced the following interlocutor:—

"Find that it was not incompetent or *ultra vires* for the Sheriff to decern for the expenses here complained of, which were reasonable and necessary outlays in conducting the proceedings, and admissible under the statute; therefore dismiss the appeal, and decern; find the respondent entitled to expenses of the appeal, and modify the same to £5, 5s., for which decern."

Counsel for Defender and Appellant—Birnie Agent—Charles Kelman, Keith.
Counsel for Pursuer and Respondent—Jameson. Agent—John Christie, Banff.

COURT OF SESSION.

Tuesday, October 22.

SECOND DIVISION.

[Sheriff-court of Lanarkshire.

BUCHANAN & SON *v.* ATHYA & COMPANY.

Sale—Agency—Liability.

Circumstances in which A, who had contracted to supply certain articles to B, and had done so through his correspondent C, was found to be the party liable to B on account of the articles which C had sent not being conform to order.

This was an action raised in the Sheriff-court of Lanarkshire by Joshua Buchanan & Son, ham-curers and butter and cheese merchants, Glasgow, against John Athya & Co., American Produce Brokers, Glasgow. The pursuers based their action upon the following averments—The defenders, prior to June 1864, held themselves out to the public, and among others to the pursuers, as ready to take orders for the purchase of American produce. They also held out that Mr E. J. Donnell of New York was their representative there, and they circulated cards in the following terms:—"Bigland, Athya, & Co., Liverpool. John Athya & Co., Glasgow. Represented by E. J. Donnell, New York." In giving orders to the defenders, the pursuers understood that they were contracting with the defenders alone, and the defenders undertook to execute the orders either personally, or through their servants or agents, or other representatives for whom they were responsible. Upon this understanding the pursuers, on or about the 27th June 1864, gave the defenders' clerk or traveller an order for 100 boxes prime States cheese; terms, payment by bill of sixty days, sight of shipping documents. On the 16th day of August 1864 the defenders rendered to the pursuers an invoice of 124 boxes of cheese, which they represented as being in terms of said order, and in implement thereof, and they handed to the pursuers the bill of lading therefor. On the same date the pursuers, instead of paying by bill, paid in cash to the defenders the sum of £153, 0s, 1d., under deduction of the discount of £2, 2s. 2d., conform to the invoice, account and receipt by the said John Athya & Co. On or about the said 16th August 1864, the steamship 'Caledonia,' with the said cheeses, arrived at the Port of Glasgow, and the pursuers received delivery of 122 boxes, being two less than the number invoiced and paid for as aforesaid. On examination the pursuers found that the cheeses were not conform to the order given. The pursuers immediately gave notice to this effect to the defenders, and required them to take away the cheeses and repay the price. With this request the defenders refused to comply, and the cheeses were subsequently sold under authority of the Court.

The price of the 124 boxes cheese paid by the pursuers to the defenders was				£150	17	11
The freight thereon amounted to				12	11	3
The landing and delivery dues amounted to				0	7	1
				£163	16	3
From this there falls to be deducted—						
Proceeds of sale	£141	13	7			
Expenses of sale, store charges, commission, &c.	£6	10	3			
Expenses of process	4	16	6			
				11	6	9
				130	6	10
				£33	9	5

leaving a balance of £33, 9s. 5d. of loss sustained by the pursuers in the transaction.

For repayment of this balance of £33, 9s. 5d. the pursuers raised this action.

The defenders stated that in taking the orders they gave the public, and amongst others the pursuers, to understand that they were taken on behalf of E. J. Donnell, commission agent in New York, and that they were to be executed by him, the defenders merely acting as brokers between the buyer and seller. That a weekly circular was issued at New York by Mr Donnell for circulation by the defenders, as his correspondents, among the trade in Glasgow, and on the basis of the quotations contained in these circulars the trade gave their orders; and that such was the basis on which the order in question was taken from the pursuers, who were perfectly aware that the defenders were only acting as the brokers or agents of Mr Donnell in the transaction. The defenders therefore pleaded that, having only acted as agents for Mr Donnell in the sale of the cheese, and having disclosed their principal at the time of the bargain, no action lay against them. Further, the defenders denied that the goods were not conform to order, and pleaded that, if any latent defect existed in some of the cheeses at the time of shipment, the defenders and their correspondents at New York, having executed the order in a careful, skilful, and diligent manner, the defenders were not responsible for such defect.

A proof having been led, the Sheriff-Substitute pronounced the following interlocutor:—

"*Glasgow*, 22*d November* 1866.—Having heard parties' procurators on the closed record, concluded proof, and whole process—Finds in point of fact that the present action is one for £33, 9s. 5d., being loss and damage alleged to have been sustained by the pursuers on a consignment of cheese sent from New York to Glasgow: Finds (2) that the order for the cheese in question was given by Joshua Buchanan, one of the pursuers' firm, to Alexander Drysdale, traveller for the defenders, on the 27th June 1864, at the pursuers' premises: Finds (3) that it was the understanding of parties at the time of the giving of the order that the cheeses were to be purchased in America by some party there, who was to be instructed by the defenders: Finds (4) that in previous transactions of a similar nature the defenders had formerly instructed Francis Macdonald & Co., and latterly E. J. Donnell of New York, to make the purchases: Finds (5) that in two such transactions with E. J. Donnell that party wrote direct to pursuers with regard to the consignments when made by him: Finds (6) that the pursuers had, previously to the transaction, received from the defenders documents headed 'New York produce market,' and bearing that E. J. Donnell of New York was represented in Glasgow by the defenders, and also cards bearing that the defenders were represented by E. J. Donnell of New York: Finds (7) that at the time the order was given there was no mention of E. J. Donnell as the party in America to be instructed as aforesaid, and that Joshua Buchanan, on the contrary, swears that Drysdale stated that he could depend on getting first-class cheese, as they would be purchased by a Mr Pyott in New York, and that he, Buchanan, understood from Pyott's own statement that he was out in New York acting for the defenders, and did not know that he was in the employment of Donnell at that time: Finds (8) that while Buchanan depones that he understood he was dealing with the defenders as principals, Drysdale depones that he understood that defenders were only to send an order to Donnell and Co., and that Buchanan and Co. was to take the risks, but that he could not say that any of these things were specially mentioned, and that from anything that took place defenders might have sent the order to any other person: Finds (9) that on the same day on which the order was given the defenders wrote to pursuers a letter regarding the order, and stating, 'We have forwarded to our New York correspondents the following order on your account and risk:' Finds (10) that in these circumstances it is maintained by the defenders either (I) that the defenders were not acting in the matter as principals, but simply as agents for E. J. Donnell; or (II) that if the defenders are to be regarded as agents of the pursuers in making the purchase, then the defenders are not liable, on the ground that the damage, if any, occurred through the fault of a sub-agent, Donnell, whose employment was authorised by the pursuers: Finds in law (1) that as Donnell's name was not mentioned at the time of the contract, and the order might have been sent to any other person, the defenders, if acting for a third party, were acting for an undisclosed third party, and therefore the first plea in defence above mentioned must be repelled; and (2) that even if the contract were to be looked on as one of agency, the employment of Donnell as the sub-agent is not proved to have been authorised by the pursuers, and therefore the second plea above mentioned falls to be repelled: Finds therefore that the liability of the defenders, in so far as regards the nature of the contract, must be held to be established: Finds, however, that it is maintained by the defenders that they are not liable, in respect the goods were delivered and paid for without objection at the time, and that no proof on this point could have been or was led under the Sheriff's interlocutor limiting the proof; therefore allows to the defenders a proof of the above averment, and to the pursuers a conjunct probation: Farther, allows the pursuers a proof on the question of damage, and to the defenders a conjunct probation: Grants diligence to cite witnesses and havers, and appoints the case to be enrolled in the diet roll (Sheriff Galbraith's) of 30th curt."

Against this interlocutor the defender appealed, and the Sheriff pronounced the following interlocutor and note:—

"*Glasgow*, 28*th March* 1867.—Having heard parties' procurators at great length under the defenders' appeal upon the interlocutor appealed against, and having made avizandum with the cause, and advised the proof adduced, productions, and whole

process—adheres to the interlocutor for the reasons stated by the Sheriff-Substitute, as also those in the following note, and dismisses the appeal.

"*Note.*—This at first sight appears to be an intricate and difficult case, and it has been the subject, upon the proof that has been led, of a very distinct interlocutor by the Sheriff-Substitute. The additional proof which he has allowed by his interlocutor is obviously necessary for the final decision of the cause. But in the meantime his findings in point of fact and in law upon the proof that has been already led, so far as they go, and which disposes of the chief point in the case, appear to the Sheriff to be well founded.

"Every case of this description is one of circumstances, for it is from a comparison of circumstances and facts that the intention and liability of parties is to be gathered. There is no fixed presumption of law in the absence of evidence one way or other.

It was held by the court in the case of *Millar* v. *Mitchell & Co.*, 17th February 1860, that there is no *presumptio juris*; that where an agent in this country sells *factorio nomine* for a foreign house to a merchant in this country, he is personally liable to fulfil the seller's part of the contract, where he disclosed the principal at the time of contracting. There can be no doubt that that decision is well founded, and the rule it recognises is one of daily observance in this court, where the fact of the foreign merchant's name being *disclosed* or *withheld* is considered as the surest test of whether the contract was entered into with the foreign house or the British agent. In *Millar's* case the foreign sellers' names were given at the very time the contract was entered into, and accordingly they were the parties with whom the contract was held to have been entered into. But *here* the case is precisely the reverse. Not only was the foreign merchant's name *not* given *ab initio*, but the productions and letters in process demonstrate that the contract was entered into by the pursuers with Athya & Co. directly in Glasgow, and that the name of the party representing them in New York was not at the time communicated. The business card of the defenders, No. 8-5 of process, is in these terms: 'Bigland, Athya & Co. Liverpool. John Athya & Co., Glasgow. Represented by E. J. Donnell, New York.' The letter No. 8-2, written by the defenders to the pursuers, dated 27th June 1864, the very day the order for the cheese was given, giving an account of what they had done with the order, is as follows:—'Dear Sirs,—Agreeable with your instructions, we have forwarded to our New York correspondent, following order on your account and risk, viz., to purchase and ship for you, per steamer 'Caledonia,' direct to Glasgow, one hundred boxes prime States cheese, grass made, of finest quality, well coloured and flavoured, and fat, upon best terms, cost, freight, and insurance; cheese to weigh from 50 to 80 lbs. each, carefully selected. Terms, payment by bill at 60 days, sight of shipping documents.' It will be observed that in this letter Athya and Co. do not so much as mention the name of the party as their correspondent at New York to whom they had transmitted the order, but simply say that they had sent it to their correspondent in New York. Can it possibly be held that the pursuers in Glasgow entered into a contract with an unknown party in New York, instead of the party with whom they had a privity of contract in Glasgow, and with whom, as it appears from the invoices and receipts in process, they had had a great number of previous transactions direct with each other, without the intervention of any other party whatever? The case is exactly the same as that of a person who orders a book from a London foreign bookseller, or a lady's dress from a London haberdasher, and these parties, not having the articles in stock themselves, send the orders on,—the one to Leipsic and the other to Paris. Could it possibly be maintained that because the party giving the orders having afterwards discovered to whom they had been sent for implement, the original contract was entered into not with the known London tradesman, but with the unknown foreign correspondents? And so far was the name of the New York correspondent from being divulged here at the time the contract was entered into, that the pursuer, Mr Buchanan, swears that he was led to believe that the order was to be executed and the cheese purchased in New York, not by Donnell, but by a party named *Pyott;* and that he understood from Pyott's own statement that he was out in New York acting for the defenders; and this is corroborated by the defender's own traveller, Drysdale, who swears that, although he considered that the defenders were only to send the order to Donnell in New York, yet that, from anything that took place, the defenders might have sent the order to any other person. In these circumstances, it seems clear that the contract was with the defenders in Glasgow as principals, and that it is hopeless in them to attempt to roll the pursuers over on their undisclosed New York correspondent."

A proof was subsequently led on the question of damages, and the Sheriff-Substitute and, on appeal, the Sheriff, found the defenders liable for the sum concluded for.

The defenders appealed to the Court of Session, limiting, however, their appeal to the question of liability.

For the defenders it was argued, that upon the evidence Messrs Athya & Co. were, in regard to this transaction, in one of two positions, either (1) they were agents for Donnell, or (2) they were agents for Buchanan & Son, to send out their order to Donnell. If they acted as agents for Donnell, then Donnell was the principal, against whom alone Buchanan & Son had recourse, and if they acted as agents for Buchanan & Son, then Donnell was the sub-agent agreed upon, and that in circumstances in which the employment of a sub-agent was necessarily implied, and in such a case, it was argued, the sub-agent is the party liable—Story on Agency, sec. 201, 217 A. and 313; Smith's Mercantile Law, p. 104; Bell's Com. vol. i, p. 517.

For the pursuers it was argued, that there was no evidence to show that Donnell was appointed sub-agent at all, but that the defenders contracted simply to supply the goods to the pursuers, and might have employed any sub-agent they chose, and that the true nature of the proceeding seemed to have been a joint adventure between Athya and Donnell—*Jones* v. *Littleton*, 1 Neville and Perry.

At advising—

LORD JUSTICE-CLERK—I am clear that the pursuers should prevail. As the case now stands, it must be held that the contract of sale in dispute was not duly implemented, and that no price was due under it. Even if the defenders had acted as agents, I am not sure that they could have prevailed. The contract was that a bill should be granted to them as payees, and, as it happened, the price was actually paid to them before the pursuers had an opportunity of examining the goods, —was, in fact, paid by mistake. But the ground

of my opinion is that the defenders acted as principals, and that the case fails on its merits. This is not a case analogous to the case of *Mitchell* v. *Millar*, which is a case of admitted agency, where the name of the principal was set forth in the contract, for Athya & Co. are produce brokers, acting at one time as principals, and at another time as agents, sometimes sending out orders to America—the correspondent being the principal—and sometimes receiving orders for the purchase of British goods. There was nothing in the course of their trade raising the presumption that they were acting in any particular instance as agents. So we must look at this particular contract, and the circumstances in which it was made; and, to my mind, the contract itself, and the progress of the correspondence connected therewith, bear out the view that it was a personal contract between the pursuer and the defender. Donnell's name, it is admitted, was not at first mentioned, and he is alluded to in the correspondence only as "our New York correspondent." Athya & Co. could clearly have sued for the price,—they had all the privileges of sellers, and therefore all the burdens. On the other hand, what had Donnell to do with the matter? Could he have insisted on the contract being implemented? I think not. Or if Donnell had refused to implement the contract, and it had been executed by some other person, still Buchanan & Co. would have been bound to receive the articles. Then the invoice of the goods, and the account and receipt, are headed Buchanan & Son to Athya & Co. In these circumstances, I do not think there is the smallest doubt that it was a personal contract between the pursuer and the defender; and what was the relation between Donnell and Athya & Co. is a matter with which we have no concern whatever.

On the other ground of defence, viz., that Donnell was a sub-agent employed with the sanction and authority of Buchanan, I mean to say nothing, because it is clearly proved that Athya & Co.'s position towards Buchanan was that of principal. I therefore think that we ought to sustain the interlocutor appealed against.

LORD COWAN—I concur with your Lordship. The issue depends upon the question—Were Athya & Co. acting as principals or agents? I am clear they acted as principals. The contract between the defenders and the pursuers was a verbal one, and there seems to have been no reference made to a foreign principal, and further, there is no such reference in the letter of June 27th. So I can find no trace of Buchanan having adopted Donnell as principal. I may refer to an English case of great importance, viz., *Pace* v. *Walker*, where the true principal in cases of this sort is laid down. Now, apply these two tests to the case, and you will find that they lead to the same results. Suppose, in the first place, that the goods had been conform in every way to order, and that Buchanan & Co. had not paid the price to Athya and Co., could Athya not have raised an action in his own name? I am clear that he could. Or, in the second place, suppose that some one else than Donnell had acted in America, and chosen the cheese, could Buchanan on that account have refused to take delivery? Most certainly not.

LORD BENHOLME—I take it that the real question here is, Was there an implement of the contract of sale? and I think it is proved that there was not a good implement of that contract. The summons in this case is not framed on any claim of damages which might have raised the questions touched on by your Lordships. I do not think that the position of Athya & Co. comes up here at all, but I do not differ from your Lordships on that point. The defenders received the money as the price of the articles duly furnished, and the goods having turned out not to be conform to order, are they to be permitted to retain the money? I am of opinion that they are not.

LORD NEAVES—I concur with your Lordship on all points. In *Millar's* case I held the presumption of agency was only of fact. That was a special case, not likely to occur again.

The Court pronounced the following interlocutor:—

"Find that the respondents Buchanan & Son, on the 27th June 1864, entered into a contract of purchase and sale with Alexander Drysdale, the traveller of the appellants, by which Buchanan & Son agreed to purchase, and Drysdale, on behalf of his employer, agreed to sell, 100 boxes of prime States cheese, grass made, of finest quality, well-coloured and flavoured and fat, upon best terms, cost, freight and insurance, cheese to weigh from 50 to 80 lbs each, and carefully selected; terms, payment by bill at sixty days, sight of shipping documents: Find that, in concluding that contract Alexander Drysdale acted for behoof of the appellants: Find that, when the contract was made no mention was made of the name of E. J. Donnell of New York, and that he was no party to the same: Find that the defenders transmitted instructions to the said E. J. Donnell to purchase in the American market the goods which were the subject of the said contract, and that a consignment of cheese, accompanied by shipping documents, was transmitted by Donnell to the appellants in implement of these instructions: Find that, on receiving from the appellants the shipping documents, the respondents paid the price of the cheese to the appellants, minus two months' discount, and the appellants discharged it in their own name by the account, No. 12 of process, in which they are entered as the creditors: Find that, two days afterwards, the respondents intimated that the goods were disconform to order, a fact which has now been judicially established in this process: Find that the contract in question was entered into by the appellants as principals, and not as agents for E. J. Donnell of New York; and find, separately, that no intimation was made to the purchaser at the time the said contract was made that the sellers were not acting therein on their own account, but as agents merely: Therefore dismiss the appeal; affirm the judgment appealed from, and decern: Find the appellants liable in expenses, and remit to the Auditor to tax and report."

Counsel for Pursuers — Watson and Crichton. Agents—J. & A. Peddie, W.S.

Counsel for Defenders — Shand and Asher Agents—Millar, Allardice, & Robson, W.S.