pressed. I daresay it is in accordance with what we may conjecture would have been the intention of the testator in the circumstances which have occurred. I can only say that I cannot concur. In my opinion the judgment is contrary to what I believe to be a settled rule of construction.

LORD TRAYNER—I concur with the Lord Ordinary and agree with his opinion. I am further of opinion that the judgment which we are now pronouncing neither introduces a new rule of construction of such settlements nor interferes with the construction of any existing rule.

LORD YOUNG was absent.

The Court adhered.

Counsel for Pursuers—Lees—Tait. Agent—F. J. Martin, W.S.

Counsel for Defenders — Salvesen — M'Clure. Agents—Simpson & Marwick, W.S.

Saturday, December 9.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BIGGART & FULTON *v.* STEWART, BROWN, & COMPANY.

Sale—Contract—Principal and Agent—Disclosed Principal—Title to Sue.

Stevenson & Company, merchants in Manila, through their representatives in Liverpool and Glasgow, placed in the hands of Stewart, Brown, & Company, commission merchants, Glasgow, for sale a cargo of sugar on these terms—"We have this day sold to you on account of Stevenson & Company about 700 tons sugar at £10, 12s. 3d. c. i. f. Liverpool." Stewart, Brown, & Company, in disposing of this cargo, sold 100 tons to Biggart & Fulton, Glasgow, on these terms:—"31st March 1892—We have this day sold to you on account of Messrs Stevenson, Manila, about 100 tons sugar at £10, 17s. 3d. c. i. f. Liverpool." Biggart & Fulton authorised Stewart & Brown to finance this transaction, paid them £100 to account, and ordered them to sell the sugar on its arrival. They did so, but the price realised was less than that due to them, and they sued Biggart & Fulton for the difference.

The defenders maintained (1) that the pursuers being represented in the contract as agents for a disclosed principal were not entitled to sue; (2) that no such contract as there expressed was made between Stevenson & Company and the defenders; and (3) that in this contract the pursuers were not acting as agents for Stevenson & Company or with their authority.

Held (*diss.* Lord Rutherfurd Clark) that the contract of 31st March 1892 was at an end when the defenders had paid the contract price through the pursuers and taken delivery, and that the debt sued for arose not out of the contract but out of the agreement entered into subsequent thereto, and that the pursuers were entitled to sue the defenders as their principals in the sale made on their order.

These were cross-actions in the Sheriff Court of Lanarkshire by Stewart, Brown, & Company, commission merchants and produce brokers, Glasgow, with consent of W. F. Stevenson & Company, merchants, of Manila and Iloilo, against Biggart & Fulton, marine insurance brokers, Glasgow, and by Biggart & Fulton against Stewart, Brown & Company.

Stevenson & Company were represented in Liverpool by Horsley, Maclaren, & Company, and in Glasgow by Stevenson & Fleming. After negotiations, which began in the end of 1891, they in March 1892, through their representatives in Liverpool and Glasgow, disposed of a cargo of 700 tons of sugar to Stewart, Brown, & Company, in terms of the following sale-note:—

"*Liverpool*, 31*st March* 1892.

"Messrs Stewart, Brown, & Co.,
per Messrs Stevenson & Fleming,
Glasgow.

"DEAR SIRS,—We have this day sold to you on account of Messrs W. F. Stevenson & Co. about 700 tons usual American assortment of Iloilo sugar at £10, 12s. 3d. c. & f. Liverpool.

"*Shipment* by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

"*Payment.*—Buyers to accept shippers' drafts at 3 m/s, with shipping documents attached, deliverable against payment.

"*Insurance.*—Horsley, Kibble, & Co. to insure on their floating policies f. p. a. at buyers' expense.

"*Contingent comn.*—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10% profit.

"*Brokerage* ½% to buyers.—Yours truly,
"HORSLEY, M'LAREN, & Co."

In the course of splitting and re-selling the cargo Stewart, Brown, & Company, on 31st March 1892, sold to Biggart & Fulton 100 tons on these terms—"We have this day sold to you, on account of Messrs W. F. Stevenson & Co., Manila and Iloilo, about 100 tons usual American assortment of Iloilo sugar at £10, 17s. 3d. c. i. f. Liverpool.

"*Shipment* by steamer and/or steamers from Iloilo during the months of April and/or May and/or June 1892.

"*Payment.*—We to accept shippers' drafts at three m/s, with shipping documents attached deliverable against payment.

"*Insurance.*—Horsley, Kibble, & Co. to insure on their floating polices f. p. a. at buyers' expense.

"*Contingent Comn.*—Buyers to return shippers half the profit (if any), but not exceeding half of first 10% profit.—Yours truly, "STEWART, BROWN, & Co."

Stewart, Brown, & Company were afterwards instructed by Biggart & Fulton

to sell the sugar on its arrival, and credit themselves with the proceeds. They did so through their correspondents Clark & Company, on the arrival of the cargo in Liverpool, but the price realised was not as much as the price due under the contract quoted. To account of the difference Biggart & Fulton paid £100, leaving a balance of £31, 14s. 4d., for which Stewart & Brown now sued Biggart & Fulton.

The defenders "explained (1) the alleged contract is *ex facie* made on behalf of the pursuers W. F. Stevenson & Company, and the defenders aver and believe that the pursuers Stewart, Brown, & Company had no authority from the said W. F. Stevenson & Company to enter into the same; (2) that *ex facie* of said alleged contract, the pursuers Stewart, Brown, & Company are merely brokers for W. F. Stevenson & Company, and have no title to sue; (3) that no contract has been completed between the pursuers W. F. Stevenson & Company and the defenders, and said pursuers have no title to sue." They stated that in November 1891 they had been much pressed by the pursuers to grant a commission to buy sugar, and had reluctantly given them authority to buy 100 tons, to be shipped to Liverpool by a certain steamer. The letter of 31st March 1892 was only sent for the purpose of recording a change of shipment—"(Stat. 6) The defenders aver and believe that no such purchase as the pursuer proposed on behalf of the defenders was made, and that the pursuers Stewart, Brown, & Company failed to make the contract they were authorised to enter into, nor did they complete any contract between the pursuers W. F. Stevenson & Company and the defenders. (Stat. 7) In authorising said purchase of sugar, the pursuers Stewart, Brown, & Company were employed by the defenders solely in the capacity of brokers. (Stat. 8) The pursuers Stewart, Brown, & Company approached defenders in this capacity, and throughout represented themselves to be acting thus." On August 25, 1892, the pursuers represented that they were going to lose on the sugar, and induced the defenders to pay £100 to account. "(Stat. 10) Defenders lately ascertained, and at a date subsequent to said payment, that the pursuers were themselves the owners, and deriving a profit out of the sugar alleged to have been purchased by the defenders. (Stat. 11) The pursuers recommended the purchase, and were so confident of the result that their commission would be contingent on a profit being made, and they assured the defenders that unless the transaction turned out profitably the firm would derive no benefit whatever from it. (Stat 12) The pursuers Stewart, Brown, & Company, instead of being only interested in a contingent commission as represented, were in the position of principals, and taking a profit as condescended on." . . .

The defenders pleaded—"(1) No title to sue. (3) The defenders never having been indebted to the pursuers are entitled to be assoilzied. (4) *Separatim.* The alleged contract having been entered into on the faith of statements by the pursuers Stewart, Brown, & Company, which were false and fraudulent, or were at least misrepresentations of matters material to the contract, the falsity of which they knew, or ought to have known, the defenders are entitled to repudiate said contract. (5) The above action is premature in respect the defenders are entitled in any event to an accounting and full disclosure of documents by the pursuers Stewart, Brown, & Company, they (1st) being defenders' brokers, or *separatim* (2nd) having undertaken to finance the said alleged purchase on defenders' behalf."

Biggart & Fulton sued Stewart & Brown for repayment of the said sum of £100. The pursuers repeated their averments as above, and averred—"(*d*) The defenders approached the pursuers in the capacity of brokers, and throughout represented themselves to be acting thus, and it was solely in this capacity the pursuers employed and dealt with them. (*e*) Instead of defenders acting as brokers in said alleged contract, the pursuers believe and aver that they were the owners and deriving a profit out of the sugar alleged to have been purchased by the pursuers."

The pursuers pleaded — "(1) Pursuers never having been indebted to the defenders, and having paid the sum sued for under a natural and unavoidable error, they are entitled to repayment thereof. (2) The alleged contract having been entered into on the faith of statements by the defenders which were false and fraudulent, or were at least misrepresentations of matters material to the contract, the falsity of which they know or ought to have known, the pursuers are entitled to repudiate the contract."

The defenders pleaded—"(1) The pursuers' statements are irrelevant. (2) The defenders being due nothing to the pursuers, should be assoilzied, with expenses."

On 11th January 1893 the Sheriff-Substitute (GUTHRIE), before answer, allowed a proof.

"*Note.*—I have great difficulty in understanding the pleadings and argument for Messrs Biggart & Fulton, especially as regards their averments of misrepresentation. *Prima facie* it looks as if they were making a crude averment of misrepresentation without saying what the representations are, but it is perhaps intended to set forth the specific representations in Arts. 11 and 12 of the defences, and the corresponding articles of the condescendence in the counter action. If this be so, I am not sure whether any misrepresentation is averred, except that Stewart, Brown, & Company pretented to act as agents while they were principals. I have much doubt in remitting to probation a condescendence so vaguely and irregularly stated, but I do so on the supposition that there is truly the gist of the case, and reserving to disallow at the proof any minor averments which are not distinctly pleaded as misrepresentations.

"The preliminary pleas for Biggart & Fulton rest chiefly, as I think, on a misap-

prehension. Messrs Stewart, Brown, & Company are not suing on the sale made through them as brokers, but they are asking for an accounting in a transaction in which, no doubt, they passed a sale-note between Biggart & Fulton and merchants in Manila, but which, *ex facie* of that note, they undertook to finance, and, as they aver, did finance for the parties Biggart & Fulton. They are surely entitled to sue Biggart & Fulton as their principals in that financial transaction, and in the sale of the sugars which they say they made on their order. The consent of W. F. Stevenson & Company, the Manila people in this suit, in which Stewart, Brown, & Company have the main interest, appears to do no harm, and may turn out to be useful."

The Sheriff-Substitute allowed a proof.

H. F. Stevenson, of the firm of Stevenson & Fleming, deponed—"W. F. Stevenson & Company are export merchants in the Phillipine Islands, Manila and Iloilo. Their principal articles of export are sugar and hemp. There are two firms, Horsley, Kibble, & Company in London, and Horsley, Maclaren, & Company in Liverpool, who represent W. F. Stevenson & Company in these places, and we do all their business in Glasgow. We have frequently had transactions in sugar and hemp through Messrs Stewart, Brown, & Company. In these transactions Stewart, Brown, & Company acted as our agents to put through business. (*Being shown skeleton form of contract*)—'Messrs Stewart, Brown, & Co., Glasgow. —Dear Sirs,—We have this day, as agents for Messrs W. F. Stevenson & Co. of Manila and Iloilo, sold to you about . . . tons . . . sugar at . . . cost and freight terms. *Shipment* . . . *Reimbursement* by shippers drafts on you at six months sight for the f.o.b. value. *A Commission of* 2/6 per ton to be returned to you by sellers. *Contingent Commission* of half profit up to half of first 10% to be paid by you.—Yours faithfully, HORSLEY, KIBBLE, & CO.' That is the form in which the business in which they have acted has generally been put through. That is a contract for sugar. It bears to be that sugar has been sold to Stewart, Brown, & Company, but it contains a provision that they are to get a commission of 2s. 6d. out of the price. We have had several contracts in that form, and in these contracts they were acting as Stevenson & Company's agents. We knew that they were not buying that sugar for themselves, and we knew that they had clients in hand although they had not disclosed their names. I remember in November 1891 putting some sugar in the hands of Stewart, Brown, & Company for sale. After a number of changes and negotiations they sold 100 tons of that sugar to Biggart & Fulton under the contract (quoted above). We employed Stewart, Brown, & Company in this transaction because their business is to treat such sugars in that way. We never sell in these small quantities; we only sell in large quantities by a cargo at a time. In this skeleton contract the commission allowed is only 2s. 6d. per ton. I was aware that Stewart, Brown, & Company did not consider that sufficient remuneration, and I believe they added something more in the way of commission. (Q) In what way did this additional commission come to be added—as the result of what?—(A) They had this return from Manila for selling goods, and I suppose they added something more for the risk of the transaction with their buyers and trouble of financing. (Q) But in the first transaction which you had with them, what was the rate of commission?—(A) 2s. 6d. (Q) Did they say anything to you about that rate being insufficient?—(A) Mr Stewart in conversation remarked that 2s. 6d. would not pay them for all they had to do in such business. (Q) So that after the first transaction they added additional commission? (A) I suppose so. (Q) Are you in a position to judge what is or is not a fair sum in name of commission for the trouble which Stewart, Brown, & Company had?—(A) Yes, I think so. (Q) In this particular sale of sugar, started in November 1891, and finally concluded by the contract of 31st March 1892, was 5s. a reasonable commission to charge?—(A) I think it was quite reasonable. I would not have done it for the money. The trouble of splitting up the cargo into pieces is considerable."

John Stewart, a partner of Stewart, Brown, & Company deponed—"In November 1891 Mr Stevenson told me that he had a cargo of about 2000 tons of sugar, Manila assorted, for sale, and he asked if we could find buyers for it. There was a good deal of coming and going about that, but ultimately, on or about 31st March 1892, we sold 100 tons of the sugar then spoken of subject to certain changes to Biggart and Fulton in terms of the contract quoted. There were some transfers of the sugar from one ship to another and from one lot to another, but ultimately the sugar arrived in Liverpool per the ship 'Marie.' It was there sold by H. Clark & Company on Biggart and Fulton's instructions. Clark sent account sales to Biggart & Fulton, and the price was credited to them. The amount sued for correctly represents the amount due by Biggart & Fulton. . . . The cargo that was originally intended to be sold through us in November 1891 was one of about 2000 tons, and the price that was spoken of at first was £10, 5s. c. and f., United States. The market at that time looked very strong, and everyone expected a rise—an important rise, in fact. That had to do with the contingent commission which is provided for in the contract of 31st March 1892, because the shippers would have derived the benefit if the market had risen. I understand that contingent commission is a usual condition with Stevenson & Company's sugar. I have had experience of it before. It allows the buyers to get the sugar at a lower cost. In this first price of £10, 5s. we were to get 2s. 6d. per ton from the shippers. That 2s. 6d. was included in the £10, 5s. We set about trying to get purchasers for the sugar. Our understanding as to our position with Stevenson & Company was that we were entirely their agents, and we were to get 2s. 6d. per ton from them. Of course

we always added a little more to cover any extra risk and trouble. (Q) Why did it come that you tried to get something in addition to what you were in the habit of getting from Stevenson & Company?—(A) We split up the sugar into small lots, and there is a great deal of trouble in doing so, and of course we have increased risks. In previous cases we have tried 2s. 6d. and we found that it was not adequate at all. The rate we usually get is 2s. 6d., and other 2s. 6d., or 5s. altogether. That 5s. covered selling, accepting drafts, splitting up lots, and this selling again on arrival. I considered that to be a reasonable sum; I did not consider it was too much. Each 2s. 6d. represents about 1 per cent. in this particular case. Along with my partner Mr Govan I went and saw some buyers for the sugar, but before we had closed the cargo was withdrawn being under offer to Montreal. We tried to get a better price, and ultimately on 12th November we understood that we were told to close at a price yielding £10, 6s. 3d. nett. 'Nett' means that we were to add on the commission to the price. That was still sugar c. and f. United States. We closed with Biggart & Fulton for 100 tons of the sugar at that price. The price then was £10, 11s. 3d., that is the price of £10, 6s. 3d., plus 5s. of commission. We sold altogether about 700 tons at that figure . . . We had some negotiations for more; the market was very strong, it had risen to about £11, 5s., but no business resulted. It was at this time that we sent the sale-note of 14th November 1891 to Biggart & Fulton which is produced. After this some question arose about import duties being imposed in America upon sugar. . . . Of course it would have been quite out of the question to have sent the sugars then owing to the heavy duty they imposed on these sugars, and it was ultimately arranged to ship the sugars to Liverpool. This was done in the letter of 28th January 1892 on the contract of that date which we sent to Biggart & Fulton. There is a slight slip in the contract about the price. It is £10, 11s. 3d. where it should have been £10, 17s. 3d. The 6s. is the difference in freight, which, if added on to the £10, 11s. 3d., brings out £10, 17s. 3d. That was the extra freight to Liverpool. The contract contains a clause binding us to accept the shippers' drafts. That was just to carry through the transaction. We had sold the 700 tons to different people. Of course the shippers would not go to everyone of them and draw seven different drafts or four different drafts. They wanted to draw upon one person, and they drew upon us. I wrote that letter and contract. Then, coming on to March 1892, the market had gone weaker and had fallen a little bit, and it was thought advisable, if we could, to transfer these sugars to a later shipment, as there would be a greater chance of the market improving, because the Americans had bought by this time. We then went to our purchasers. I took some of them, and Mr Govan (pursuer's partner) took others, and the result was that the contract of 31st March 1892 was drawn out. That contract passed about the date it bears. I think we would send it probably the following day, and at the same time we bought back on behalf of Stevenson & Company from Biggart & Fulton the 100 tons which was to have come by the 'Ainsdale.' That is all shown by the contract which is produced. The contract of 31st March 1892 correctly represents our position in this transaction. . . . It was prepared on my instructions. (Q) At this or any other time had your position of agency for Stevenson & Company been in any way altered?—(A) No; it was always the same. (Q) And were you acting in the matter quite openly and above board?—(A) Quite. . . . We were acting as agents for them. (Q) Did they know that you were splitting up into smaller lots the sugar which was being sold?—(A) Yes. (Q) And the commission which you got was meant to cover that trouble as well as the other matters?—(A) Yes. (Q) You have had previous contracts with Stevenson & Company in similar terms?—(A) Yes. (Q) No. 14/70 is a skeleton form of contract of which you have had several?—(A) Yes. (Q) And in these were you acting as Stevenson & Company's agents?—(A) We were. (Q) And that in spite of the fact that this skeleton contract bears that the sugar has been sold to you?—(A) Yes. The sugar which arrived by the 'Marie' was sold through Clark & Company of Liverpool. Clark & Company were to be paid ½ per cent. for their trouble. That is a proper charge. We got nothing from Biggart & Fulton for re-selling these sugars. The sugars were sold *ex* quay. *Ex* quay terms differ from c. and f. terms to the extent of about £1 per ton. We accepted the draft for these sugars. Biggart & Fulton actually got the sugar that was sold in that contract of 31st March 1892. They have never done anything in the way of trying to return it."

William Govan, a partner of Stewart, Brown, & Company, examined as a witness for the defenders, deponed—"(Q) What particulars did you give to your buyer when you got this order?—(A) I told him the price. I gave him the price and the ship. (Q) What further particulars did you give him?—(A) I told him about the contingent commission. I told him all about the contract, as far as I remember. (Q) What particulars did you give as to your position in the transaction?—(A) I did not begin to talk about that at all. I did not say anything about that. (Q) What did you say about your brokerage?—(A) I said nothing about brokerage. I told him about the contingent commission; that was all I said. I told him the first advance of 10 per cent. was to be divided between the shippers and the receivers of the sugar, the buyers. (Q) Did you represent that you were only to have a brokerage in the event of it turning out profitable?—(A) I did not. I told him that our people had sold the sugar at a price so near the bone that unless the market advanced, and they participated in the contingent commission, it would leave them practically nothing."

Mr Fulton, of the firm of Biggart & Fulton, deponed—"I never discussed with

the pursuer's firm any business in any other position. We never entertained business of any sort with them unless as brokers pure and simple. I was approached by Mr Govan with regard to the sugar involved in this case. I saw him about the first week in November 1891, I think. He informed me then that he had a number of clients who were willing to make a purchase of sugar, amounting in all to about 2000 tons, and that it was all sold but 200 tons. He thought he could arrange it at £10, 10s.—would I give him an offer to take the 200 tons at that price? I thought it was rather large for us, and I declined to take it. (Q) How did they expect to secure the cargo? Was there anything said as to that?—(A) When they got their clients all together to enable them to make an offer for the entire cargo, they were going to approach the parties they spoke of as their Manila friends, and they were to make an offer on behalf of their clients to their Manila friends. That same afternoon my partner informed me that he had seen Mr Govan, and that he had instructed him to make an offer for 100 tons at the price of £10, 10s. per ton. I saw Mr Govan again about two or three days after this. He called at our office. My partner and I were both there. Mr Govan said that he had been unable to get his friends to accept our offer of £10, 10s., but he thought that if we raised our price 1s. 3d. per ton he would get the transaction carried through, and that all his other clients had agreed to the rise. We discussed the position of matters then. We were a good while together on that occasion, perhaps twenty minutes or so. We were not willing at first to agree to that proposal. . . . He also said that his commission was to be a contingent commission on the profit. That was to be his entire commission, that if we had no profit on our transaction, they as a firm would have no profit either. They were willing to enter into this arrangement, because they were so very strong in the belief that the market would rise. . . . We saw Mr Govan repeatedly, and by that time (March 1892) we were informed that the market had gone up somewhat, and we ultimately gave him instructions to realise our sugar. He then informed us that it was quite impossible to realise such a small lot out of a cargo until it would come home and had been analysed or sampled, or something to that effect. That was quite antagonistic to what he had formerly stated. . . . When the sugar came due it came into Liverpool, and the pursuers wrote us advising us of the price, and we said we would accept the price named. I forget now the actual price, as they refused to realise it in terms of the original agreement, that they were to sell the sugar for us on its arrival. We did not get delivery of any documents. Everything remained in their hands. We got accounts ultimately from Stewart, Brown, & Company; we got none from Clark & Company; we had no dealings or correspondence with them at all. I had a call from Mr Govan about 25th August, when he wanted a payment to account. He represented that their firm at the moment were rather short of cash, and that the sugar was now due, but that they could not get the documents until they had paid the difference owing to the sugar having fallen, and that he estimated our loss at about £100—would I oblige him by giving him the £100, although it was a little before the time agreed? I said I would do so, and that any little difference might be squared up when the transaction of the sugar was finally closed. That payment was made. We afterwards got what they termed the final account from the pursuers. There were one or two small things in it that we were not quite sure of, and I think the first thing we asked for was the concluded contracts and the original documents—by the concluded contracts I mean the contract binding us with Stevenson and Fleming, or W. F. Stevenson & Company. We did not receive these; they declined to give them. They said they were papers belonging to them and not to us. The result of that was these proceedings. We refused to pay anything further until we got all the documents which we thought we were entitled to, and we threatened to raise an action for repetition of the £100 that had been paid to them. That resulted in them suing us for the balance of £30 that we were still due to them."

Upon 28th July 1893 the Sheriff-Substitute (GUTHRIE) pronounced this interlocutor:—"Finds that by contract dated 31st March 1892 the parties Stewart, Brown, & Company, as agents for W. F. Stevenson & Company, Manila, sold 100 tons of sugar to the parties Biggart & Fulton on the terms condescended on by Stewart, Brown, & Company: Finds that Stewart, Brown, & Company were not in said sale acting as brokers or as agents for Biggart & Fulton: Finds that the said sale was not induced by fraud or misrepresentation of Stewart, Brown, & Company: Finds that the parties Stewart, Brown, & Company sold the sugar on arrival on behalf of the parties Biggart & Fulton, and that on a true accounting between the parties the sum of £29, 9s. 10d. is due and resting-owing by Biggart & Fulton to Stewart, Brown, & Company: Therefore in the action Biggart & Fulton against Stewart, Brown, & Company assoilzies the defenders, and decerns; and in the action Stewart, Brown, & Company against Biggart & Fulton decerns in terms of the petition as restricted by minute, &c.

"*Note.*—This case does not present at first sight a very favourable aspect for the defenders Biggart & Fulton, who are in the not very unusual position of speculators whose speculation has been unsuccessful, and who endeavour to find all sorts of pleas for shifting their liabilities to the middlemen through whom the transaction was effected. On the other hand, if they were able to show that Stewart, Brown, & Company, who sold to them, were their agents or brokers, and obtained an advantage in the transaction at their expense and behind their back, they are undeniably entitled either

to repudiate the transaction or to insist on that advantage or benefit being communicated to them. The case has been loaded with proof and argument, and a great deal of trouble and confusion has been so caused. But in the result I am not satisfied that any fiduciary relation existed between Stewart, Brown, & Company and Biggart & Fulton except in regard to the sale of the sugar on behalf of the latter when it came to this country. It appears to me that Stewart, Brown, & Company, though perhaps they may be called brokers, were simply what they describe themselves in the contract set forth in the condescendence, agents for W. F. Stevenson & Company of Manila, commission agents or commission merchants, selling goods for a principal abroad. If this be so, they are entitled to any benefit they were able to obtain with the knowledge and assent of Stevenson & Company in their sale to Biggart & Fulton, and it is proved that the 5s. per ton added to the price in Stevenson & Company's contract was an addition known and approved by them. Indeed, under the stipulation for contingent commission it is, I presume, a profit in which Stevenson & Company are entitled to share. There is no ground for regarding Stewart, Brown, & Company as simply brokers effecting a sale by Stevenson & Company to Biggart & Fulton. They were commission merchants having themselves an interest of a special kind in the sales effected. If this be so, the chief contention for Biggart & Fulton vanishes away, and we have only to deal with certain misrepresentations, which were so averred that it always appeared questionable whether any proof should be allowed, and which in evidence appear to amount to no more than misunderstandings by Biggart & Fulton to which the peculiar contract lent itself, or at most the usual inducements held out by sellers. It is impossible to point to any material misrepresentation or concealment that influenced and prejudiced the buyers. I cannot see how they would have been injured if the misstatement as to the 'Ainsdale' were proved, but it rather seems on this point there is no satisfactory evidence that any misstatement was made.

"In regard to the accounting, it appears that in selling the sugar Stewart, Brown, & Company got a share of the commission charged by the Liverpool brokers. But it does not appear that they were not entitled to a commission from Biggart & Fulton for selling the sugar, and it is clear that they got no other payment. The other items of charge in the account sales are shown to be usual and proper."

Biggart & Fulton appealed to the Court of Session, and argued—The pursuers had been engaged by the defenders as their brokers to buy sugar for them. They had not acted upon their orders, but traded upon their own account, bought the sugar from Stevenson & Company, and sold the sugar to the defenders at a higher price than they had paid for it. They had acted either as (1) agents for Stevenson & Company, or (2) as principals in the sale, and could not recover in either case—Benjamin on Sale, bk. i. pt. 2, p. 211; *Robinson* v. *Mollett*, July 6, 1875, L.R. (7 H. of L.), 802; *Bostock* v. *Jardine*, May 10, 1865, 3 Hurl. & Colt. 700; *ex parte Whyte*, February 18, 1671, L.R., Ch. App. 397, *aff. Towle & Company* v. *Whyte and Others*, March 11, 1873, 21 Weekly Rep. 465; *Muffet* v. *Stewart*, March 4, 1887, 14 R. 506; *Rothschild* v. *Brookman*, March 14, 1831, 2 Dow & Clark, 188.

The respondents argued—The defenders had accepted the goods, used them as their own, and disposed of them; it was therefore too late now for them to refuse to pay the loss which had arisen from a fallen market. The evidence showed that the pursuers had not been employed in the first instance as brokers by the defenders, but on the contrary had acted as brokers for Stevenson & Company, to whom they had paid the price asked, and if they were satisfied with the defenders' actings in getting a larger price for the sugar than they had paid for it the defenders could not complain. In financing the transaction for the defenders they had acted as their agents, and were entitled to sue for the difference due to to them.

At advising—

LORD JUSTICE-CLERK — In this case, though there has been a long proof, the circumstances may be shortly stated. Stevenson & Company had a cargo of sugar—700 tons—which they wished to dispose of, but they did not sell in small lots, but only in large lots, and they applied to Stewart, Brown, & Company with the view that Stewart, Brown, & Company should endeavour to get the sugar placed with a number of buyers. Biggart & Fulton, the defenders in this case, had interviews with a representative of Stewart, Brown, & Company, and as the result of these interviews they agreed to take 100 tons of sugar; and the form which the transaction took is shown by the letter of 31st March 1892. It bears on the face of it that Stewart, Brown, & Company "sold on account of Stevenson & Company, of Manila and Iloilo, sugar, about 100 tons usual American assortment." It appears that Stevenson & Company stipulated with Stewart, Brown, & Company that the sugar was not to be sold for less than £10, 11s. 3d. per ton, while in point of fact there was more paid for the sugar per ton in the transaction between Biggart & Fulton and Stewart, Brown, & Company, and what Biggart & Fulton complain of is that Stewart, Brown, & Company were taking a profit out of the transaction—in reality, that they had arranged only to sell at a lower price, and that the sale to Biggart & Fulton has been at a higher rate than that which they were authorised to take. Now, I am not satisfied that as regards that part of the case there was anything wrong in the transaction at all. I think it is satisfactorily made out that Stevenson & Company, while they stipulated that they were not to get less than £10, 11s. 3d, were quite

willing that the sugar should be sold for them at such price as Stewart, Brown, & Company could get, they keeping the difference between that price and the price Biggart & Fulton paid to Stewart, Brown, & Company for their trouble in working the transaction. Biggart & Fulton's case is this—that this was not the nature of the transaction at all, but that they, Biggart & Fulton, bought the sugar themselves, purchased the sugar direct, and that in the transaction Stewart, Brown, & Company were only acting for them. I have been unable on consideration of the evidence in this case to come to any such conclusion. The case as presented by Stewart, Brown, & Company is I think the true one. I do not attach the same weight to Biggart & Fulton's evidence on the matter as to the evidence given for Stewart, Brown, & Company. But then what happened was this, the price was paid to Stevenson & Company, but Biggart & Fulton, who were not themselves dealers in sugar at all, and were engaged in other ordinary business—a class of work of quite a different kind, and who were entering into this as a speculation in the hope of making some money out of it—arranged with Stewart, Brown, & Company that on the arrival of this sugar Stewart, Brown, & Company should act as their agents in getting it disposed of. The market for sugar fell remarkably, and the result was that on the realisation of the transaction by Stewart, Brown, & Company for Biggart & Fulton there was a considerable loss. Now, it seems to me that it is upon this latter part of the transaction that the true question between the parties arose. Stevenson & Company sold their sugar and got the money for it — the work being done by Stewart, Brown, & Company, who sold to Biggart & Fulton. Stewart, Brown, & Company sell for Biggart & Fulton, and a loss ensues. £100 had been already paid to Stewart, Brown, & Company by Biggar & Fulton for the sugar, and on the other hand Stewart, Brown, & Company bring out £132, leaving a balance of £31 which they had lost by the sale of the sugar.

I think the pursuers in the action at the instance of Stewart, Brown, & Company are entitled to prevail, and are not liable in the action at Biggart & Fulton's instance to pay back the £100.

I have stated my views very shortly after perusing the opinion of Lord Trayner, in which I entirely concur.

LORD RUTHERFURD CLARK — On 31st March 1892 the respondents advised the appellants that they had sold to them on account of Stevenson & Company 100 tons of sugar at £10, 17s. 3d. per ton. The appellants paid to the respondents £100 to account of the price, and instructed them to sell the sugar on arrival. The respondents did so, but they say that the sum realised, after crediting the £100, fell short of the price by £31, 14s. 4d. We have before us two actions, in the one of which the appellants seek to recover the sum of £100 before mentioned, and in the other the respondents sue for the foresaid sum of £31, 14s. 4d.

The case of the appellants is that there was no sale by Stevenson & Company to them, that they paid £100 to the respondents in ignorance of that fact, and that in the same ignorance they desired them to sell the sugar on arrival. They further say that the respondents represented themselves as acting as their brokers in making a contract with Stevenson & Company, while the fact was that the respondents had bought the sugar from Stevenson & Company at the price of £10, 12s. 3d. per ton, being 5s. less than the price advised to themselves.

On turning to the proof we find that Stevenson & Company are produce merchants on a large scale, and that they never sell so small a quantity as 100 tons of sugar. Mr Stevenson says—"We only sell in large quantities by a cargo at a time."

In March 1892 Stevenson & Company had 700 tons to sell, of which it is not disputed that the sugar in question was a part. By a sale-note dated 30th March they sold these 700 tons to the respondents at the price of £10, 12s. 3d. per ton. The clauses expressive of the conditions of the sale are—

"*Payment.*—Buyers to accept shippers' drafts at 3 m/s, with shipping documents attached, deliverable against payment.

"*Contingent Comn.*—Buyers to return to shippers half the profit (if any), but not exceeding half of first 10% profit.

"*Brokerage.*—½% to buyers."

With this document before me I cannot doubt that the respondents bought the sugar. It bears that they are purchasers, and they, and they only, are bound for the price. The clause relating to brokerage is unusual, but it is not inconsistent with the existence of a contract of sale. So far from it, the brokerage is given to the respondents "as buyers."

It is said that the respondents were only acting as the agents of Stevenson & Company in finding buyers of small quantities, and that the contract was a contract of sale in name only. It is true that Stevenson & Company knew that the respondents were endeavouring to procure such buyers, and that they paid them a commission for their trouble. But it is equally certain that the buyers for whom the respondents were selling were not to contract with Stevenson & Company, for the simple reason that that firm would sell nothing less than a cargo. The success of the respondents in finding buyers might result in the sale of the cargo. Consequently Stevenson & Company might think it right to give the respondents some remuneration. But as they would not sell less than a cargo, it follows that the respondents must be the buyers from Stevenson & Company, though they might not enter into a contract of sale until they had made arrangements for a re-sale.

There is evidence to show that the respondents, though buyers in form, were understood by Stevenson & Company to be

their agents only, and that the increase of 5s. per ton which the respondents put on the price is to be regarded as a charge by way of commission which Stevenson & Company authorised them to make. I can attach no importance to such evidence. It does not and cannot affect what was done. For in saying that they sell in cargoes only, Stevenson & Company reject the idea that the purchasers of small lots have any contract with them. Whatever might happen to these purchasers, the respondents were liable for the price in the sale-note. There was no contract under which they could be so liable except what professes to be a contract of sale, and in my opinion it is what it professes to be. Again, what is stipulated for as price must be regarded as price only. I cannot take it as including a concealed commission.

For these reasons I am satisfied that there was no contract between the appellants and Stevenson & Company. That the respondents improperly represented that they had made such a contract, and that in the belief that such a contract was made, the appellants paid £100 to account of the price and directed the sale on arrival. The question is, whether they are liable for the loss which has arisen, or whether they are entitled to recover the money which they paid under an erroneous belief.

I do not see how the appellants can be liable for any part of the price or for any loss under a contract which they never made. If nothing had been done, I think it clear that they could not have been bound by it. It is said that the respondents could have taken the place of Stevenson & Company and insisted on implement. I am not of that opinion. It is true that the appellants might have sued them, because they have not bound Stevenson & Company, and in that case they would have been entitled to avoid any claim of damage by offering to deliver the goods. But the converse does not hold. The appellants did not agree to make any contract except with Stevenson & Company, and if that contract was not made they are necessarily free.

Can it matter that the alleged contract was acted on? I do not think so. The appellants did nothing except what they believed themselves to be bound to do, and when they came to know their error they repudiated all liability. They did nothing from which it could be inferred that they took the respondents as their sellers instead of Stevenson & Company. Besides, their error was due to the misrepresentations of the respondents, and I cannot see how they can incur any liability to the respondents by acting under an error so produced.

It is said that the question before us does not arise by reason of the alleged contract of sale, but from the fact that the appellants employed the respondents to realise the sugar on arrival. This is not so. The appellants seek to recover what they paid to account of the price—the respondents to recover the loss on the contract. No doubt that loss is in part made up by debiting their own charges on selling. But apart from these charges, the claims of each depend on the existence or non-existence of the contract of sale. The appellants maintain that they were never liable under it. The respondents insist that the appellants are bound to fulfil it. It is only on that ground that the respondents could have any right to retain the £100 which was paid to account of the price, and to require the appellants to make good the loss. Nor are the charges in a different position. If there was no contract, they were incurred on a sale by the respondents of their own goods. No doubt the sale was ordered by the appellants. But the order was due to the misrepresentation of the respondents, and they can take no benefit from it.

For these reasons I am of opinion that the appellants should prevail in both actions. I do not require to enter on the question whether the respondents represented themselves as acting as the brokers of the appellants. It is enough, I think, for the disposal of the case that the appellants were not bound by any contract. Nor need I take any notice of the alleged custom under which it is said that apparent buyers are agents only, and that with the assent of the principals they increase the price in order to obtain a commission under the name of price. It is of no importance in this case, because I hold that the respondents were in truth the buyers from Stevenson & Company. But I am sorry that any such custom should exist. Unless it is known to all concerned, it is a means of deception. If all know of it, it is useless. It is a good rule to call things by their right names. It would be better for all parties if it were strictly followed.

LORD TRAYNER—I agree with the Sheriff-Substitute in holding that in the transaction under which the defenders (Biggart & Fulton) bought the 100 tons of sugar in question, the pursuers (Stewart, Brown, & Company) did not act as brokers or buyers for them. I think it is established on the contrary that the defenders in that transaction bought for themselves, and further, that they were not induced to make the purchase by fraud or misrepresentation on the part of the pursuers.

The defenders, however, maintain that the pursuers are not entitled to the decree which they ask, on the grounds (1) that the pursuers being represented in the contract of 31st March 1892 as agents for a disclosed principal, are not entitled to sue on that contract, the principal alone being entitled to do so; (2) that no such contract as is there expressed was made between Stevenson & Company and the defenders; and (3) that in making said contract the pursuers were not acting as agents for Stevenson & Company, or with their authority.

I am not sure that the ascertained facts support these contentions in law, but I am of opinion on another ground, which I shall state hereafter, that these pleas cannot receive effect in the present case. The facts appear to be these:—Stevenson & Company had about 700 tons of sugar to

dispose of, and indirectly—that is, through their representatives in Liverpool and Glasgow—placed them in the hands of the pursuers for sale. Stevenson & Company would not sell this sugar in small quantities; they desired to place the whole 700 tons by one transaction; but they knew that the pursuers as commission-agents were or might be in a position to place the whole quantity. Accordingly the 700 tons were placed at the disposal of the pursuers at a certain price by Stevenson & Compay, the latter knowing that the pursuers were not themselves buyers of the sugar, that they would merely procure buyers, and that they would get as much higher a price than Stevenson & Company required as they could, the excess obtained beyond Stevenson's price to belong to the pursuers as their remuneration for their trouble in placing the sugar. In this way Stevenson & Company got their whole quantity of sugar sold for them at the price they named, and the pursuers were remunerated for their trouble according to their success in getting a higher price than Stevenson had fixed. The defenders bought 100 tons of this sugar. Now, it may very well be said in one view of the facts as thus stated that Stevenson & Company were not the sellers to the defenders of, and never agreed to sell to the defenders 100 tons of sugar; that the price paid by the defenders for the sugar was not the price which Stevenson & Company asked or received; and that the pursuers were not directly authorised by Stevenson & Company to make as their agents the contract expressed in the sale-note of 31st March 1892. On the other hand, the truth and substance of the transaction is as stated by the pursuers. The sugar was Stevenson's and not the pursuers'; it was sold by the pursuers for Stevenson at the price fixed by the latter, with an additional price which Stevenson knew of and approved, and which went to remunerate the pursuers for their trouble in placing Stevenson's goods. It was not incorrect, therefore, for the pursuers to represent themselves as selling sugar for Stevenson which they were doing, and as to the price ultimately obtained it was no concern of the buyers how that was divided between the principal and agent; and, lastly, although Stevenson did not authorise directly a sale in his name of 100 tons of sugar to the defenders, yet he authorised it indirectly by allowing the pursuers to sell 700 tons of sugar in such quantities and to such persons as the pursuers might agree upon or with, at a price not less than that fixed, but at a price as much greater as could be obtained. In this view of the facts the pursuers were the agents for Stevenson, and the contract made with the defenders was one which came within the limits of the pursuers' authority as Stevenson's agents.

I am not, however, to be held as expressing the opinion that the view of the facts which I have last presented would have been a sufficient or successful answer to the defenders' pleas had it been necessary to decide this case upon them. I think those pleas as well as the plea of no title to sue would have presented very formidable difficulties in the pursuers' way if this had been an action for implement of the contract of 31st March 1892. But in my opinion this action, and the right which the pursuers seek to enforce, are not based or dependent upon that contract at all.

This transaction in sugar was, I understand, a speculation on the part of the defenders. It was not a transaction entered into in the ordinary course of their own business. Being an isolated transaction, not in the course of their own business, they arranged with the pursuers to finance the transaction for them, and on their behalf to look after the sale of the sugar on its arrival at the port of delivery, which happened to be Liverpool. This the pursuers did. The price obtained for the defenders' sugar when sold realised less (when the expenses of landing, sale, &c., were deducted) than the price they owed for it. It is for the difference thus arising that the pursuers now sue. The debt sued for therefore arises, not out of the contract of 31st March 1892, but out of the agreement entered into subsequently to that contract by the pursuers and defenders. The defenders took delivery of the sugar (by their authorised agents) on its arrival and sold it, and the contract of 31st March was then at an end. The sugar contracted for had been delivered to the defenders, they had paid the contract price through the pursuers, and it is too late now for the defenders to plead that there was no contract of that date at all. If there was not, on what title did the defenders take delivery of the 100 tons of sugar and sell it? The pursuers made disbursements on the defenders' behalf which the sum realised by the sale of the sugar was not sufficient to repay. The balance or deficiency is the defenders' debt to the pursuers for which they are now sued. This is the view taken of the case by the Sheriff-Substitute, and I think he is right. If the defenders had employed some person other than the pursuers to finance the transaction—that is, to pay the price of the sugar, and then to take delivery and sell—they would clearly have been liable to him for the difference between what he had advanced for the defenders and the amount realised by the sale of the sugar. But it was nothing more than an accident that the person authorised to sell the sugar for the defenders was the same as the person who had sold it to them. That accident does not affect the defenders' liability.

LORD YOUNG was absent.

The Court affirmed the Sheriff-Substitute's interlocutor.

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