recent legislation was to discourage delays in procedure, as appears from the Court of Session Act of 1868, and the Sheriff Court Act of 1876. If this was the tendency in regard to the Superior Courts, much more must it be in regard to the Small Debt Court, which is for good reasons peculiarly a summary Court, and any hardship in a particular case is a mere incident of its summary procedure.

At advising—

Lord Mure—In the view I take of this case we are strictly tied down by section 31 of the Small Debt Act. There are in that section certain specified grounds of appeal, all of which are admittedly inapplicable in the circumstances of this case, except the one where appeal is made competent when there has been any such "deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done." There is here no allegation of the Sheriff having wilfully disregarded any statutory form. But the appellant complains of a judgment passed in his absence, he having been late of arriving in Court at the diet fixed on a previous day for proceeding with his case. His argument is, that he was entitled under section 16 of the Act to take out a sist and have the case reheard. This in point of fact he obtained from the Sheriff-Clerk, but the Sheriff-Substitute held that it was incompetent to grant such a sist, and it is argued that in consequence of this decision substantial justice has not been done.

Now, it is only when a decree is in absence that a sist can be taken out under the provisions of the 16th section. And that brings me to the question, What is a decree in absence in the sense in which the words are used in that section? And the view I take of the question is, that after both parties have appeared in Court, and there has been litiscontestation, there cannot be a decree in absence on either side. When both have been present, and have joined issue—as it is proved by the excerpts from the minutes of procedure that they here did—and either party thereafter fails to appear at the next diet then duly fixed, the decree is one by default, and not in absence.

It has been suggested in argument that this construction does not, strictly speaking, apply to a pursuer. I cannot adopt that view. A decree is in absence of the pursuer when the pursuer does not appear at the first calling of the case, and the defender is then assoilzied. That is probably what the 16th section contemplates when it is dealing with decrees in absence of a pursuer. But if both parties duly appear at the first calling of the case the decree can never thereafter be one in absence. In the present instance it was one by default no doubt, but it is in effect a decree *in foro*. On that ground I think the Sheriff was right in the view he took of this case.

Appeal refused.

Counsel for Pursuers (Appellants)—M'Clure. Agents—Moncrieff, Barr, Paterson, & Company, Glasgow.

Counsel for Defender (Respondent)—A. S. D. Thomson. Agent—J. Adam, Paisley.

COURT OF SESSION.

Friday, October 16.

SECOND DIVISION.

[Sheriff of Lanarkshire.

GILLIES *v.* M'LEAN.

Agent and Principal—Broker—Sale Warrants—Disclosure of Third Parties in Contract of Sale in a Question between Broker and Principal.

A broker raised action against his principal alleging that on the latter's instructions he bought for him on several occasions some iron at the market price of the day, and at the request of his principal, who was unable to take up the warrants for the iron from the sellers, he carried over the transactions from one settling-day to another for some time until a year and a-half after the first order he was compelled to sell out the warrants at a loss on the re-sale, which with rent and commission amounted to the sum concluded for. The defence was (1) that the transactions were gambling contracts which the Court could not enforce; and (2) a denial that the pursuer had ever really purchased iron on behalf of the defender at all. *Held* (1) that the pursuer being only broker was not barred from recovering his commission and loss by reason that they were gambling transactions on defender's part, even assuming them to be such; but (2) that the pursuer had not proved that in point of fact he ever made the purchases libelled, and that therefore the action ought to be *dismissed*.

William Don Gillies, described in this action as an iron merchant and broker in Glasgow, and who belonged to an association of brokers who deal in pig-iron on certain rules of their own, sought to have John M'Lean, spirit merchant in Glasgow, ordained to pay him the sum of £408, 14s. 6d. He averred—"(Cond. 1) In November and December 1882, and January and April 1883, pursuer, acting as an iron-broker, purchased for the defender, on his instructions, in the Glasgow pig-iron market four parcels of G.M.B. Scotch pig-iron (mixed numbers), consisting of 1000 tons, 500 tons, and 500 tons, and 500 tons respectively. On the purchases being made, intimation thereof was immediately given to the defender in the usual form." "(Cond. 2) The said purchases of iron were made in the manner usual in said market, and were, like all other iron sold in said market, represented by certificates or warrants issued by Messrs Connal & Company, the warehouse-keepers with whom the iron dealt in in said market is stored. These warrants being blank endorsed pass as documents of title from hand to hand by mere delivery." "(Cond. 3) When the dates for settling said purchases arrived the defender was bound to provide the pursuer with the funds required for paying for said iron. As in the interval the market price or value of the iron fell, the defender did not do so, but requested the pursuer to arrange for having the warrants continued or lent on the market in the usual way. It therefore was necessary for the pursuer to take up the said purchases, the

defender at each settlement paying the difference in price and all charges and commission resulting from having the warrants continued. In these circumstances, and according to the custom of brokers in the said iron market, the transactions were entered in account between the pursuer and defender as a sale and purchase at the market price of the day." He further averred that monthly accounts were rendered to the defender up to 26th November 1803, that on that date the iron was again held over at the market price of the day (44s. 5½d. a-ton), and according to the practice of brokers the transaction was entered in the account between them as a sale and purchase at that price; that thereafter he frequently called on the defender to pay the difference or to take delivery of the iron warrants, or pay the price, and eventually after formal tender of the warrants on 25th April 1884 sold the warrants at the price of the day, which was 42s. 4d. a-ton. in all. This sum was less by £256, 13s. 6d. than the price at which the iron was carried over in November 1883, and to that sum there fell to be added the charges of commission and rent incurred in connection with the iron, amounting to £143, 2s., making the whole sum due by the defender, after crediting the amount of the price obtained for the iron, £408, 14s. 6d., which was the sum sued for.

The defender admitted that he employed the pursuer to buy the iron, and that he had received the intimations sent by the pursuer, and stated that he had paid the sum of £775, 5s. 8d. in name of charges for carrying over these alleged purchases. He maintained, however, that he had paid this sum on the false and fraudulent representations of the pursuer, and in the belief that the transactions had been actually entered into, and the iron actually bought and stored, and that he was paying the difference in the respective prices from time to time according to the fluctuations of the market, whereas he had now learned that the transaction had never really been entered into by the pursuer.

The defender in Stat. 4 averred as follows—"The pursuer, who was solely instructed as an agent and respectable broker for the defender, and who represented himself as such in carrying through the alleged transactions, did not at any time, or in connection with any of the alleged transactions, declare his principal to the defender, and the defender never knew, nor does he even know now, who these respective principals were, if they had an existence at all. The pursuer is now specially called upon to declare the names and addresses of each of his principals in the alleged respective transactions, from whom he bought and to whom he sold the quantities of iron referred to." In Stat. 8 he averred that "all the transactions carried out by the pursuer in the defender's name, and especially the alleged transactions referred to in the account annexed to the petition, were not real but pretended transactions, and were simply speculations on the rise and fall of the market, and purely of the nature of gambling, and the Court therefore cannot take cognisance of them."

To Stat. 4 the pursuer answered—"Admitted that pursuer did not declare to defender the names of the sellers or purchasers of said iron. Explained that it was unnecessary for him to do so, and that, as defender well knows, it is not the custom in the Glasgow pig-iron market for brokers to declare the names of their principals." To Stat. 8 he answered—"Whatever defender's object in purchasing the iron may have been, pursuer simply acted as broker in the usual way of business, and had nothing to gain but his commission."

The defender pleaded — "(2) The transactions not having been actually entered into, but only speculations on the rise and fall of the market, and being thus purely of the nature of gambling, the action should be dismissed with expenses. (3) The pursuer not having purchased the quantity and quality of iron as instructed, but fraudulently and illegally represented that he had done so, this action should be dismissed with expenses."

Proof was led, and its import fully appears in the Sheriff-Substitute's note and the opinion of the Lord Justice-Clerk. It was mainly directed to the pursuer's allegations as to the alleged transactions. He, however, failed to produce any parole corroboration of his allegations, or any bought-and-sold notes binding any third party, whether as principal or broker, or any entries from the supposed sellers' books, or of those of the broker representing him. His own books represented him as acting as principal in the contracts of sale.

The Sheriff-Substitute (LEES) repelled the defences and decerned against the defender as craved in the prayer of the petition.

"*Note.*—The practice in the iron trade seems to be that the master or dealer stores with Messrs Connal & Co. such iron as he thinks fit, in quantities of 500 tons, and receives from Messrs Connal & Co. a warrant, framed in terms of No. 26 of process. The warrant acknowledges receipt of the iron in the person's name in certain proportions, as to quality, and binds the storekeeper to deliver it to the storer's order on endorsement, on payment of the charges noted on the warrant, and on its return such warrants may be purchased directly by one holder from another, but in general they are dealt with in the iron market through means of brokers. If the purchaser of the warrant takes up the iron he obtains the warrant, and on presentation of it to Connal & Co., can either obtain delivery of the specified quantity and quality of iron, or may get it simply transferred to his name in Connal & Co.'s books, receiving from them a new warrant in lieu of the old one. As indicated above, the purchaser of the warrant can calculate in a moment, from its date, what the charges payable to the storekeeper are.

"The pursuer's case is that he was employed as broker, that it was a *bona fide* transaction, and that he bought the warrants, and after carrying them over for a time, eventually took them up himself. If this is true, he is entitled to decree.

"The defender contends, in the first place, that it was a mere speculation for differences, and that from the way in which the pursuer dealt with him he falls to be viewed as a principal in the matter. It can hardly be disputed, I think, that there is a good deal of evidence to support the view that this was a mere specula tion for differences. But that will not advance the defender's case one whit unless he can

also establish the other proposition—that the pursuer was dealing with him as principal with principal. The law as regards such questions has been authoritatively settled both in England and Scotland; and it is this, namely, that where two parties are engaged as principals in a wagering transaction with one another, so that what one gains the other loses, then a court of law will not enforce such a transaction. But, on the other hand, where a person is employed as broker or agent only in such a transaction, and is thus not a party to gain or lose by the rise or fall of the price of the commodity in regard to which the wager is made, he is entitled to sue his principal or employer for relief from the obligations he has come under in the matter.

"It is therefore essential for the defender's success that he should be able to show that the pursuer dealt with him as principal with principal. But I think the *onus* is on the defender. And what does his proof consist in? Only in this: That the pursuer is unable to say, or at least has not said, who the parties were with whom he dealt. It is certainly unsatisfactory that if the pursuer's case is an honest one his evidence on this point should be so meagre, but having regard to his own statements, to the entries in his books, to the bought-and-sold notes regularly sent by him to the defender, and to the payments made by the defender, I think it is only just to the pursuer to hold that the defender has not established this ground of defence.

"There is another basis on which the defender contends that the pursuer falls to be viewed as a principal. But this runs into the second line of defence taken for him. That defence is the somewhat startling statement that the whole transaction is an audacious fraud on the pursuer's part, and that, spite of the entries in his books and the note sent by him to the defender, he never purchased a single warrant on the defender's behalf, or at least not before the close of 1883, by which time he had received from the defender £775, 5s. 8d. The remarks I have already made about the state of the pursuer's books, to judge from the excerpt from them put into process, apply here again. And the defender forcibly points out that whereas the pursuer is unable to give or produce, or at least has not given or produced, any information in regard to the parties with whom he dealt, the broker through whom he sold was able at once to read out from his books the names of the parties with whom he had dealt in disposing of the warrants. All, however, that the defender could do is to express his disbelief that the pursuer ever really bought the warrants, or at least before the end of 1883, and to point to the unsatisfactory meagreness of the pursuer's case on the point. But in reply to this it may be fairly urged that month after month the defender continued settling on the footing that the warrants had really been bought, and that though he has made no payment since he says he became suspicious that the warrants had not been bought, he has never taken any steps to cut down the transactions and obtain repayment of the £775, 5s. 8d. he has paid to the pursuer wrongfully, as he contends. In the next place, the defender admits that certain warrants were tendered to him on the pursuer's behalf towards the end of 1883, and while he says he was willing to have taken them if they had been for the kind of iron he wanted, he overlooks how seriously damaging to himself this admission is. As I have above stated, the defender's version of matters is that this was a mere speculation for differences, and not a *bona fide* purchase, as the pursuer says; if so, why was he willing to accept the warrants the pursuer offered, if of the proper kind? If they were not of the proper kind, why is it that this defence is not pleaded on record? Incidentally it leaked out that the warrants tendered were of Govan iron, and that, it would seem, is not only of the kind of iron in question, but actually iron of a higher grade. It appears to me on the whole that I cannot sustain this objection for the defender.

"In the next place, he objects that he never assented to the different parcels of iron being accumulated into and dealt with as one lot; but it does not appear in what way this objection has any bearing on the case to the defender's prejudice.

"He next says that he never consented to the iron being sold. But the complaint of the pursuer is that the defender latterly would neither say nor do anything. It was after due warning that the iron was sold, and it seems to have been sold with perfect fairness to the defender's interests. Now, I am not aware of any settled rule in Scotch practice that it is indispensable, though it may often be expedient, to get the sanction of the Court to a sale of disputed goods. I have repeatedly had to deal with this point, and this is the view on which for more than ten years I have acted. It is not the rule in England, and our greatest authority on the law of sale, namely, Professor Bell, declines to say it is a binding rule in Scotland. No doubt where a sale is made without judicial warrant, the matter may have to stand a closer scrutiny, but it does not invalidate the seller's rights. Here it will be noticed, as I have said, that the sale seems to have been perfectly fair so far as the defender was concerned, and it took place in accordance with the rules under which the iron was being dealt with. And apparently in the well-known case of *Risk* v. *Auld & Guild*, 8 R. 729, the Supreme Court do not seem to have felt any difficulty on this score in the matter of stock; and there is not much difference between stock and iron. . . .

"I am therefore of opinion on the whole case that the pursuer has proved his case so far as that is necessary, and that the defender's pleas are not established."

On appeal the Sheriff (CLARK) adhered.

"*Note.*—That the transactions were real follows from the defender's own admission. That the figures are correctly stated is also proved by his statement. There is no reason on the evidence to suppose that the pursuer ever became a principal, or acted otherwise than as a broker in the ordinary and legitimate way. There is no ground, therefere, for the plea in defence that in so far as the pursuer was concerned the transactions were of a gambling character." . . .

The defender appealed, and argued—In order to prevail the pursuer must establish (1) that he received the alleged instructions to make and take over the alleged purchases; (2) that they were real transactions; (3) that he obeyed his

instructions. In point of fact he had failed to prove any of these things. He could not even disclose the persons from whom, as supposed principals, he had bought the warrants. He had, then, on the whole case, failed to discharge the *onus* which lay upon him, and was not entitled to succeed in the action.

The pursuer replied—He had produced ample proof of the existence and reality of the sales. There was no proof that the contract was one for differences—*Risk* v. *Auld*, May 27, 1871, 8 R. 729. Under rule 16 of the Scotch Pig-Iron Trade Association he was not bound to disclose his principal in the sales. The rule provided —"Where a member buys from or sells to another member, and the names of constituents are not given up by the one to the other, those members shall be to each other as merchants or principals in such transactions, with claims on each other only, and liability to each other only, and notwithstanding that it shall afterwards be shown that such members (either or both) were acting as brokers for constituents, and had given up to said constituents the other's name." He was entitled to sell out the warrants by rule 18 of the association, which provided—"When a constituent . . . fails on the due date to provide money to pay for warrants bought for his account, or when transactions have been continued he fails to pay on the due date the difference against him, all members who have transactions open with or for said constituent may thereupon, and without instructions, close all said transactions, whether due or still outstanding, by selling out or buying in, as the case may be, through a disinterested broker, in the open market, and thus fix the balance due on his account."

At advising—

The Lord Justice-Clerk delivered the opinion of the Court, as follows:—The pursuer of this action is an ironbroker in Glasgow, and belongs to an association of brokers who deal in pig-iron on certain rules of their own. The defender is a spirit-merchant in Glasgow. The pursuer alleges that in November and December 1882, and in April 1883, he was instructed by the defender to purchase for him certain quantities of pig-iron, amounting in all to 2500 tons; that he made these purchases in terms of his instructions at the market price of the day, and duly intimated what he had done to the defender; that the defender not being prepared to advance the price and take up the warrants for the commodity from the sellers, instructed the pursuer to carry the transaction over to the next settling-day, month by month, the defender paying certain sums in name of interest, storage, rent, and broker's commission; that at last, in October 1883, the defender refused to continue these payments or to recognise the transaction; and the pursuer alleges that he thereupon sold out the warrants for the iron against the defender in April 1884, which was a year and a half after the first order had been given. With the exception of one quotation, the market seems during all this time to have been steadily falling. The amount realised at the sale fell short of the market price in November 1882 and of that in April 1883, and the pursuer now sues his constituent for the sum of £408, 14s. 6d., being the amount of loss on the re-sale and of the unpaid charges, and the Sheriff has decided in his favour.

This, therefore, is an action by an agent against his principal for a balance arising out of his actings in terms of his employment. In order to prevail in the action he must establish, first, that he received the alleged instructions, and secondly, that he obeyed them.

As to the first question, there is no dispute in point of fact between the parties. The defender admits employment, that he received the intimations sent by the pursuer, and that he paid no less a sum than £775, 5s. 8d. in name of charges for carrying over the alleged purchases. But he maintains that the transaction was a mere speculation for differences, under which the pursuer cannot recover as the case is stated on this record.

On this last head I agree with the Sheriff-Substitute's judgment, and in the reasons he has assigned for it, which state the law very accurately. Assuming that the pursuer was employed and acted only as a broker, as he alleges, he had no concern with the object of his constituent in the transaction, and had no duty to inquire into it. He might of course have surmised that a Glasgow spirit-dealer was not likely to have occasion for 2500 tons of pig-iron. But in his own contract of brokerage there is no element of gambling proved. Neither is it doubtful that under the implied terms of his employment the pursuer was personally liable to the opposite party, the seller, in implement of any contract of purchase and sale which he might make with third parties under it. I think that the defender must be held in this question bound by the rules of the association of which the pursuer was a member, of which a copy is produced, and particularly by the 16th and 18th sections of them. If, therefore, the defender failed to take up the warrants for the iron and to pay the price in terms of the alleged contract, the pursuer for his own protection was entitled to sell out against the defender as he did, and that without further notice than that which he had already given in default of instructions from the defender.

But all this proceeds on the assumption of loss sustained by the seller through the defender's default, for which the broker is responsible. For if there was no contract of purchase and sale at the dates alleged no one lost anything by the instructions given to the pursuer, and no price or interest or storage rent ever accrued under them. The cardinal question therefore is, whether the pursuer has proved that he made the purchases libelled at the time and in the way described in his record, and thereby became individually liable to the sellers for the sums in question, of which the defender is bound to relieve him?

Now, apart from the pursuer's own evidence, I find no proof whatever that these purchases were made as alleged. On the contrary, from November 1882 down to April 1884 there is not a trace of intervention of any third party, as seller or as broker for the seller in the transaction. The pursuer emphatically states on his record (Ans. art, 8) that he acted "solely as broker for his commission." He therefore was not the seller, or the seller's broker. He did not act as broker for both seller and purchaser, for he makes no such statement, and his own evidence shows it was not so. He did not deal directly with the

seller, the proprietor of the iron, for he says that the members of the association deal only with each other. I assume therefore that he means it to be understood, although the matter is left in unnecessary obscurity, that on the four occasions libelled he made the alleged purchases from another broker.

I should be inclined to assent to the pursuer's contention that in a general sense the rules of the association would be held to modify the common law liabilities and rights of persons who may be presumed, as here, to contract under them. But there is nothing in these rules which in any way affects the obligation of a broker to account fully to his own constituent for his actings on his behalf. Rule 16, which is referred to, is simply intended to provide that in the dealings of brokers with each other each shall be fully liable as principals to the other, and that the disclosure of the actual principal shall not, as in the common law, liberate the agent or broker in his relation to the opposite party in the contract—[*reads*]. The statements of the pursuer are confused on this matter, and hardly candid. He says on the record (Ans. art. 4)—"Admitted that the pursuer did not declare to the defender the names of the sellers or purchasers of said iron. Explained that it was unnecessary for him to do so, and that, as the defender well knows, it is not the custom in the Glasgow pig-iron market for brokers to declare the names of their principals."

And again in his evidence he says—"I did not intimate to the defender at any time the names of my principals from whom I bought, and to whom I sold." The pursuer on this head seems to confound two things which are essentially different, and not I think accidentally. He speaks of the parties to a contract of principal and agent as if they stood in the same relation as to this matter as the parties to a contract of purchase and sale. The pursuer, on his own statement, acted as agent in a contract of purchase and sale, in which he himself, although only an agent, representing the defender, became personally liable to fulfil the contract to the seller. He was not bound under the rules to tell the seller or the seller's broker, for whom he acted, in short, to disclose his principal, being himself fully liable to fulfil the contract. But when his own principal requires an account of what he has done as his agent, he must account in the ordinary way. It is a mere fallacy to resist or avoid this demand on the pretext that a broker is not bound to disclose his principal. Rule 16 has no relation to any such matter.

Now, when we come to consider the proof of the alleged contract of purchase and sale, it is, outside the pursuer's evidence, a mere blank. The pursuer vehemently protests that he was not the seller, only the broker, acting, for his commission, between the defender and a third party. But no third party is named. There are no bought-and-sold notes binding any third party, whether he were principal or broker. No entries from the supposed seller's books are produced, or from those of the broker representing him, and there is no parole corroboration of the pursuer's allegation. When we turn to the books of the pursuer the matter becomes still darker; for they, contrary to the protestations of the pursuer, represent him as acting, not as a broker, but as the principal in a contract of sale. This is put beyond doubt by the pursuer's statement on the record. He had an apprehension as to the inference which might be drawn from these entries, and prepares for it by the statement (Art. 3)—"In these circumstances, and according to the custom of brokers in the said iron market, the transactions were entered in an account between the pursuer and defender as a sale and purchase at the market price of the day."

All this is very unaccountable and very unsatisfactory. It will not be overlooked that if the real fact had been that the pursuer, not expecting the defender to carry out the purchase in a falling market, never purchased the iron, but trusted to buying it in the market should delivery of the commodity be demanded, and when he resolved to sell out, simply acquired the warrants which he sold in April 1884 immediately before and for the purposes of that sale at the market price of the day. There is nothing to the contrary of such a surmise established. But in that case the result is very serious; for then no loss had accrued to anyone for which the broker was responsible; no storage rent or interest had ever become due to the seller, for there was no sale, and consequently no obligation which could be carried over. On this footing neither principal nor broker ought to have lost or gained anything, only the defender has paid £775 to the pursuer to meet what in that case was an imaginary loss on a transaction which had no existence, and the further sum concluded for in this action never was due.

I hesitate to draw so grave a conclusion, but if I am asked to find affirmatively that these purchases were made as alleged, I am of opinion that this has not been established.

In the able note of the Sheriff-Substitute I find some indications that the considerations I have mentioned were not without weight with him. He remarks with great surprise on the fact "that whereas the pursuer is unable to give or to produce, or at least has not given or produced, any information in regard to the parties with whom he dealt, the broker through whom he sold was able at once to read out from his books the names of the parties with whom he had dealt in disposing of the warrants." But he seems to hold that the necessity for information on these very cardinal points is superseded by two considerations. First, he says that the defender acted and paid on the assumption that the purchases had been made. No doubt he did; but only because he trusted to what the pursuer told him. This cannot liberate the latter from the duty incumbent on every agent to account to his principal for what he has done under his employment, whatever effect it may have on past payments. The defender had no means of knowing what had taken place, excepting the statements made by the pursuer. Secondly, the Sheriff-Substitute seems to be impressed by the possession on the part of the pursuer of iron warrants, ostensibly for the amounts in question, on two separate occasions, one in the end of 1883, and again at the sale in 1884, and the alleged tender of the ore to the defender. The pursuer means it to be inferred—although he does not say so—that in 1883 he had paid the price of the iron, and had received these warrants from the sellers with whom he then contracted. These episodes have increased my difficulties instead of removing

them. That the pursuer obtained these warrants from anyone with whom he contracted in November and December 1882 and in April 1883 he does not say. If he did not, the possession of the warrants which he had in November 1883, supposing the fact proved, which is doubtful enough, has no bearing whatever on this question. The same remark applies to the sale in April 1884, and indeed these last were certainly bought in the market. If the pursuer had explained where he got these warrants, and what he paid for them, probably some light would have been thrown on the transaction. Such warrants are always to be had in the market, on payment of the market price, but not otherwise. He will not say—it was not necessary that he should—that these last warrants were the same as those which he had in November 1883. They are not ear-marked, but there is nothing whatever proved to show that they were not purchased in the market the day before the sale. The pursuer in accepting the instructions of the defender was no doubt exposed to one or other of two alternative risks. These would have been of little consequence in an ordinary trade transaction, in which the object was the acquisition of the commodity for commercial purposes. But the pursuer could not have supposed that such was the object of this order. He might perhaps have taken the position under it of seller of the goods as his books represent him to have been, and of course in that case he would have been entitled in his own right to the differences and charges for which he sues. But the pursuer vehemently repudiates this position, for then he would have been the principal in the contract, or possibly liable in any exceptions pleadable against a principal. His statement, therefore, is—and it is the only state of fact on which he can prevail in this action—that he bought as broker from a third party. But he could only do so by becoming responsible to that third party for the differences and charges in question, whether he received them from his client or not. Hence perhaps the obscurity in which a very simple matter of fact has been veiled. I am of opinion that the pursuer has failed to establish the case alleged by him on this record, and that we should alter the judgment of the Sheriffs in the Court below and dismiss the action.

Lords Young and Rutherfurd Clark were absent.

The Court found that the pursuer had failed to prove that the purchases of iron libelled were made; therefore sustained the appeal, recalled the interlocutors of the Sheriffs, and dismissed the action, with expenses.

Counsel for Pursuer—R. V. Campbell—Jameson. Agents—C. & A. S. Douglas, W.S.

Counsel for Defender—Orr. Agents—W. Adam & Winchester, S.S.C.

Friday, October 16.

SECOND DIVISION.

STUART & COMPANY *v.* THE SCOTTISH VAL DE TRAVERS PAVING COMPANY (LIMITED).

Trade-Mark — Trade-Marks Registration Act 1875 (38 *and* 39 *Vict. c.* 91)—*Patents, Designs, and Trade-Marks Act* 1883 (46 *and* 47 *Vict. c.* 57) — *Distinctive Device — Common Use — Infringement of Trade-Mark.*

A firm of pavement manufacturers who had produced an artificial stone of concrete granite to which they had given the name "Granolithic," registered a trade-mark, under the Trade-Marks Registration Act of 1875, consisting of a device together with the words "Stuart's Granolithic." After the passing of the Patents, Designs, and Trade-Marks Act of 1883 they registered as their trade-mark the name "Granolithic" alone. By that time the word "granolithic" had come into common use as denoting a kind of concrete, irrespective of the maker. They sought to interdict a rival firm from the use in their trade circular of the word "granolithic" as describing a kind of artificial stone pavement, on the ground that this was an invasion of their trade-mark. *Held* that the defenders' circulars constituted no invasion of trade-mark, since the use of the word "granolithic" was only a description of a particular kind of article, and did not induce the public to believe that what was supplied was of the pursuers' manufacture.

In 1880 Messrs Stuart & Co., who had been successful in producing an artificial concrete stone for paving purposes, registered as their trade-mark a lion rampant holding a shield on which was inscribed the words "Stuart's Granolithic." This was done under the Trade-Marks Registration Act 1875. After the passing of the Patents, Designs, and Trade-Marks Act 1883 they determined to register a fancy name alone as their trade-mark, and they registered in 1884 as their trade-mark the word "Granolithic" alone.

They raised this action against the Scottish Val de Travers Paving Company (Limited), Glasgow, praying the Court "to interdict the defenders from using the word 'granolithic,' or any colourable imitation thereof, in connection with the manufacture and sale of artificial stone pavements, or otherwise infringing the pursuers' registered trade-marks," consisting of (1) the words "Stuart's Granolithic" on a shield held by a lion, and (2) the fancy word "Granolithic" alone, "by making or selling or using labels, wrappers, or invoices, or any other document with the said trade-mark thereon, or colourable imitation thereof, in connection with the manufacture or sale of the goods or class of goods included under class 17 of the first schedule, framed in virtue of section 7 of the Trade-Marks Registration Act 1875, and more particularly with reference to the manufacture and sale of artificial stone pavements." They also claimed £500 damages.

They averred as follows in Cond. 6—"The pursuers have recently learned that the defenders have been offering to supply artificial stone pavements under the name of 'granolithic,' and have issued circulars and price lists in which the