it was raised in argument, and for the purpose of making it clear that it will not be foreclosed by a judgment dismissing this case. It may never arise for decision, and in the meantime at least it must be assumed that the defenders have now elected to leave the pursuers to act upon their rights as mineral owners, without due consideration of the circumstances and of their own responsibility.

"The case of *Dunn* v. *The Birmingham Canal Company* [cited *supra*], upon which the pursuers relied, appears to me inapplicable, because the judgment proceeded upon the construction of a different Act of Parliament, and with reference to a state of facts ascertained by the decision of an arbitrator."

Counsel for Pursuers—D.-F. Mackintosh, Q.C. —Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders—Balfour, Q.C.—Graham Murray. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, March 1.

SECOND DIVISION.

(Before Seven Judges.)

MAFFET *v.* STEWART.

Stocks and Shares—Stock Exchange—Broker—Duty of Broker to Establish Privity of Contract between Principals—Gaming Transactions.

A client who was speculating in stocks instructed a broker to purchase, and, from time to time, to carry-over certain stocks for him. The market fell, and after carrying-over had gone on for some time the transactions were brought to an end at a loss. The broker sued the client for his commission and for disbursements made in carrying over the stock. It appeared that in carrying out the orders he made slump purchase of much larger quantities of stock at various prices, and in his advice-notes to the client and to other clients fixed prices not corresponding to any particular purchase, but intended to be an average of the prices for which he had bought the stock, the advice-notes thus not representing any particular contracts made by him for the client's behalf with any particular persons.—*Held*, by a majority of Seven Judges (*diss.* Lord Mure, Lord Young, and Lord Rutherfurd Clark), that the broker could not recover his account because he had not fulfilled the duty of a broker in making for his client specific contracts which could be enforced by the client against the other party to them, but had truly made himself a principal in the transactions.

In this action, raised in the Sheriff Court of Lanarkshire, the pursuer Hugh Maffet, designing himself as a stockbroker, Glasgow, sought decree against Archibald Stewart, builder, Glasgow, for £1933, 7s. 3d. The pursuer averred that between October 1883 and March 1884 he had, as a broker, on the instructions and employment of the defender, bought and sold stocks and shares for him, and that in the course of this employment he had made payments and earned commissions, the total of which amounted to that sum.

The defender averred that on the 11th and 12th October 1883 he had instructed the pursuer to purchase for him £10,000 of Grand Trunk Third Preference Stock (in quantities of £6000 and £4000) for the settlement on the 25th October; that it was quite well understood between the parties that no delivery was to be made under the contracts (the pursuer having in point of fact no stocks or shares which he could deliver), and that the whole transactions were merely gambling speculations on the rise and fall of the market; that before the 25th of October he (defender) became alarmed at the continued fall of the stock, and instructed the pursuer to close the account; that the pursuer agreed to take them off his hands on payment of £150, which arrangement was carried out by the defender paying pursuer that sum (less £5) on 25th October, after which, the defender stated, he gave no instructions, and the pursuer acted on his own responsibility and for himself. This latter statement was denied by the pursuer, who in reply alleged that this sum was in part-payment of his account.

The Sheriff-Substitute (ERSKINE MURRAY) after a proof found that in October 1883 the defender employed the pursuer, a dealer in stocks, to purchase stocks in Liverpool, which pursuer, not being a member of that Exchange, did through a Liverpool stockbroker, the transactions being in the knowledge of both parties merely transactions for differences; that the transactions continued till March 1884, the pursuer sending contract-notes which defender had failed to prove he objected or repudiated; that they were with one exception confined to £10,000 Grand Trunk Three Per Cent. Stock, which was carried over from time to time as per contract-notes, at rates founded on the prices at which the stocks could be bought and sold to carry-over; that at the first carrying-over there was a loss of £238, of which £100 had been paid to account; and that defender had failed to prove that pursuer agreed to free defender of his responsibility in consideration of £150, and take over the stocks himself. He found that the balance when the stocks were finally closed, 7th March 1884, was £1933, 7s. 3d.; that it was due and payable; that as between the defender and pursuer the contracts were not gaming contracts but contracts of agency, and that in the circumstances the carrying-over must be held to have been authorised by the defender. He therefore gave decree as concluded for.

The defender appealed. On appeal he amended his record by statements to the following effect, as stated by Lord Mure in his Lordship's opinion *infra*—"(1) That with the exception of the original purchases of £6000 and £4000 stock entered in the account 'the pursuer never made any contract for the purchase and sale of stock for or in behalf of the defender,' but 'bought and sold large slump quantities of stock at various prices, and allocated these either to himself or his clients as he thought fit'; and (2) that 'from and after the 27th of October [1883] the stock alleged to have been bought for the defender were truly bought for and held for behoof of the pursuer himself or some of his clients other than the defender.' With reference to these averments the following pleas were added to the record—'6. None of the transactions entered in the account after 27th October having been made or entered into for

or on account of the defender, the defender should be assoilzied. 7. The pursuer not having made any contracts of purchase or sale which the defender would have been entitled to enforce against any third party as the other contracting principal, the defender should be assoilzied.'"

Additional proof was then allowed, and taken by Lord Rutherfurd Clark, the pursuer renouncing further probation and leading no additional evidence. The facts ascertained by the whole proof in the cause were—The sum sued for was brought out in the account by debiting defender with the price of stock alleged to have been purchased for him, and crediting him with the stock said to have been sold for him, and charging him commissions on transactions paid to other brokers on the Liverpool Exchange, and commissions to pursuer himself. It was admitted ultimately that the original purchase of £6000 "Trunk Thirds" on 11th and £4000 "Trunk Thirds" on the 13th October 1883 was made by the pursuer with third parties, and that the defender could enforce them; further, it was admitted that pursuer was employed by defender as broker only, and that the defender's intention in the transactions was not to hold the stock but to get the benefit of an expected rise before the settlement day 25th October 1883. It fell, however, and there were nine carryings-over between that date and 7th March 1884, at which date the pursuer closed the account by selling the stock and buying no more. But the pursuer, though employed as a broker only, acted as follows—He made slump purchases of much larger quantities of stock than were authorised in the defender's orders to buy or sell in the various continuations or carryings-over. These purchases of large quantities he distributed or apportioned between various clients (including himself when made a transaction for himself). Part of these purchases being made at one price and part, it might be, at another, he charged the defender and other clients not the exact price at which the stock was bought, but, adding to the total of these prices what the Liverpool or London broker's commission would be, struck an average of prices, at which average, though not the market price of the date, the transaction appeared in the defender's and the other clients' accounts. He always intimated to the defender on the day before settling-day that he had sold £10,000 Trunk Thirds at a certain price for "present account," and bought the same quantity at another price for "next account." Reference is made on this point to the opinion of Lord Shand *infra*, in which the system in question will be found fully detailed, and in which examples of it are given. It was not established that this system of dealing was authorised by the defender, but it was proved that, as the pursuer alleged, and the defender denied, the fortnightly carrying-over was authorised by him.

After hearing counsel on the additional proof the Second Division appointed the case to be re-argued before Seven Judges.

At this discussion the defender did not insist that he had proved the alleged agreement by which the pursuer was to relieve him of the whole transactions in respect of the payment of £150.

The defender argued—The first transactions between the pursuer and the defender—those of 11th and 13th October—were good, and the appellant admitted that he was liable in any sum due under that contract. But it was different in regard to the sums claimed as having been laid out in continuing the account. The pursuer was in these the principal. His transaction were carried through with a Mr Thompson of the Liverpool Stock Exchange, but in acting as he did he established no privity of contract between the defender and Mr Thompson or his client. As a broker the pursuer had to bind someone in Liverpool against whom his client could have had direct action for delivery of the stock, but he did not so bind anyone. If therefore the pursuer acted as a principal he could not take up the same position as if he had been a broker—*Mollet and Another* v. *Robinson*, July 11, 1870, L.R., 5 C.P. 646, and July 6, 1875, L.R. 7 (H. of L.) 802; *Bostock* v. *Jardine and Another*, May 10, 1865, 34 L.J, Ex. 142; *Higgins and Another* v. *M'Crae*, March 1, 1886, 116 U.S. Rep. 671. If the pursuer was a principal, then the whole transaction was a gambling transaction, and he could not recover the money sued for. The pursuer did not get any orders from the defender to carry-over his account to a settling-day subsequent to that for which the original transaction was made, and he therefore was not entitled to continue the account as he did—*Newton* v. *Cribbes*, February 9, 1884, 11 R. 554.

The pursuer argued—(1) Did the pursuer do his duty in making the original purchase of stock for the defender? That was admitted. (2) Did he do his duty in continuing the account from one settling-day to another? He was bound to do it, and he did it in the ordinary way. Having a number of orders for the same stock that the defender was dealing in, he purchased an amount sufficient to satisfy all his orders, and then allocated it among his clients at the average price paid for all the different parcels. In doing so he had established privity of contract between his client and the broker, or his client with whom he had dealt. Throughout the whole transaction the pursuer had acted as a broker only, and not as a principal, and therein lay the difference between this case and that of *Robinson, supra*, as there the broker would have been the party to gain or lose, while the pursuer here got nothing but his commission—Bell's Comm. i. 537; *Risk* v. *Auld and Guild*, May 27, 1881, 8 R. 729.

At advising—

Lord Mure—This action has been brought to enable the pursuer to recover the commission due to him as a broker, acting on the employment of the defender, in purchasing stock for the defender, and in afterwards carrying-over that stock from time to time, and making the advances and disbursements for the defender which were necessary to effect the carrying-over of the stock.

In the defences to this demand it is not denied that the defender employed the pursuer as his broker to purchase for him two lots of Grand Trunk Preference Stock, amounting together to £10,000 stock; and it is admitted that the defender duly received advice-notes from the pursuer of that amount of stock having been purchased for him in Liverpool, for settlement on the 25th of October 1883, subject to the rules of the Liverpool Stock Exchange. It is, however, at the same time alleged by the defender that he had no

intention of taking delivery on that day of the stock so purchased. He also alleges that in point of fact the pursuer "had no stock or shares which he could deliver," and that the transactions, in so far as he, the defender, was concerned, "were merely gambling speculations on the rise and fall of the market" between the date of the purchase and the day fixed for the settlement.

It is, moreover, expressly averred in defence that before the day of settlement arrived the defender on two occasions instructed the pursuer to close the stocks, as the price was falling in the market, and that on the second occasion the pursuer agreed to take over the stock on his own responsibility if the defender would pay him £150 to meet the balance due upon the stock, which the defender agreed to do, and afterwards paid £100 and then £45 to account. The defender further alleges that upon this being done he understood that his responsibility was at an end, and that if the pursuer carried over the stock, he did so for his own behoof and on his own responsibility. This alleged agreement and the instructions to close the stock are both denied by the pursuer.

So standing the averments in the defences, the main leading pleas for the defender were substantially these—(1) That the transactions being gambling transactions for differences between the defender and the pursuer as a principal, and not as a broker, the pursuer was not entitled to recover; and (2) that the pursuer having agreed "to take over the stock on his own responsibility," the defender was entitled to absolvitor.

Upon a proof being led the Sheriff repelled those pleas, and decerned in favour of the pursuer, and the case having been brought here upon appeal the defender proposed, and was allowed, to amend his record, and upon that being done an additional proof was allowed.

In this amendment the more material of the facts alleged appear to be these—1st, That with the exception of the original purchases of £6000 and £4000 stock entered in the account, "the pursuer never made any contract for the purchase and sale of stock for or in behalf of the defender," but "bought and sold large slump quantities of stock at various prices, and allocated these either to himself or his clients as he thought fit;" and 2d, that "from and after the 27th of October the stocks alleged to have been bought for the defender were truly bought for and held for behoof of the pursuer himself, or some of his clients other than the defender." With reference to these averments the following pleas were added to the record—"6. None of the transactions entered in the account after 27th October having been made or entered into for or on account of the defender, the defender should be assoilzied. 7. The pursuer not having made any contracts of purchase or sale which the defender would have been entitled to enforce against any third party as the other contracting principal, the defender should be assoilzied."

In the discussion which took place before your Lordships on this amended record, and the relative proof, the parties confined themselves mainly to the questions raised in these two additional pleas. The defences relied on in the Sheriff Court, viz., those founded on the alleged gambling nature of the transactions, and on the alleged agreement of the pursuer to relieve the defender of the stock by taking them over on his own responsibility, were not re-argued at that discussion. The first of them was, I think, incidentally alluded to; but, according to my recollection, and to the notes I made at the time, the defence founded on the alleged agreement was not even mentioned by the appellant, and I do not exactly know whether the parties expect the opinion of this Court to be delivered upon them. But as they have not been withdrawn I think it right to say that I concur in the views which the Sheriff-Substitute has expressed in his note with regard to them.

The defence founded on the Statute 8 and 9 Vict. [cap. 109] depends, as it appears to me, upon whether the pursuer is to be considered and dealt with as a broker or as being a principal in these transactions. If he is held to be a principal the statute applies. But if on the other hand the pursuer has acted throughout as a broker, employed by the defender to carry on the transactions, it appears to me that he is, in that character, entitled to recover his commission and advances upon the authority of the cases of *Thacker* and *Hardy*, 4 L.R., Q.B. D. 685, and of the earlier case of *Rosewarm* v. *Billing*, 15 C.B. (N.S.) 316, in which it was held that a broker paying differences for his principal might recover them.

As regards the defence founded on the agreement, I am very clearly of opinion that the defender has failed. The *onus* rests upon him to prove that special agreement, but the only evidence he has adduced is that of his own statement, which is directly contradicted by the pursuer; while the conduct of the defender, on the other hand, appears to me to be altogether inconsistent with the notion that he had ever transferred his right to the stock in question to the pursuer under any such agreement; and for these reasons—(1) The payment of £45 to account is not made by the defender till the 15th of November, as shown by the receipt granted for that sum to the defender, and founded on by him. But before that payment was made the defender had received and accepted without objection or protest two separate notices from the pursuer, one on the 24th of October and the other on the 12th November 1883, to the effect that the stock had been continued on the defender's account. These notices moreover were on each occasion accompanied by an account of how matters stood between the pursuer and defender at the date of the respective continuations, and in these accounts, and in the next continuation account of the 27th November 1883, the balance stated as then due to the pursuer by the defender is brought out after placing to the credit of the defender in the general account the payments of £100 and £45 which had been made by the defender. By so framing the accounts the defender was duly warned of what the pursuer believed to be the defender's position relative to those payments, viz., that they were made to account of the general balance due by him to the pursuer; and yet no objection was made to this mode of stating the account. (2) Neither was there any complaint made by the defender against his being charged as debtor to the pursuer in the subsequent continuation accounts for all disbursements made by him in relation to the carrying over of the stock, of which he now alleges the pursuer had undertaken to relieve him before the 24th of October 1883. He, on

the contrary, receives these continuation notices, and the relative account, without objection throughout the whole period of his connection with the pursuer, and in these he is charged with all the usual expenses and disbursements incurred relative to the carrying over of stocks, and having carefully preserved these accounts he produces them in the present action.

I agree with the Sheriff-Substitute in thinking that in these circumstances the defender must be held as assenting to and authorising the carryings-over as made on his behalf. His payment of £45 "to account of his balance" on the 15th of November, after he must have received a continuation-note and relative account not only of the first but of the second carrying-over, is, as the Sheriff has remarked, a practical adoption of those transactions, and tells much against his attempt to repudiate the later transactions, none of which were repudiated at the time.

If any such agreement as that founded on in defence had existed, the natural and proper course for the defender would have been to write repudiating the pursuer's conduct, and ordering him to abstain from acting any further as his broker in the matter. He, however, does not do that. He leaves the pursuer to believe that he is still authorised to act as his broker in relation to the Grand Trunk Stock in question; and when he is informed in the month of December 1883, and January and February 1884, by the letters written to him by the pursuer, that the pursuer will be obliged to take steps against him if further payments are not made to account of the balance due, he does not even then repudiate the pursuer's authority to act as his broker in carrying over the stock, or find fault with his conduct.

The defender pleads in the record, both as originally framed and as amended, that the pursuer was a principal and not a broker in the transaction. But of this there is no evidence. The pursuer when cross-examined in the additional proof distinctly depones that in all these circumstances he acted as "broker alone," and that of the sum claimed by him "between £80 and £100 is my commission—the balance is loss incurred in the reduction of the price of stock which I paid to brokers on behalf of the defender;" and there is no evidence to a contrary effect. The defender has all along admitted that he originally employed the pursuer as his broker to purchase stock on the Stock Exchange, which he says, and says truly apparently, that he was not in a position to pay for, and did not intend to take delivery of. That stock was admittedly purchased for him by the pursuer, and the defender's obligations in regard to it could only be got quit of or arranged through the pursuer or some other broker employed to act for the defender on the Stock Exchange. But the defender has not condescended upon the name of anyone whom he employed to act for him instead of the pursuer. The stock, moreover, has been disposed of by the pursuer with the full knowledge of the defender, after a series of transactions of which the defender was kept duly informed, by means of continuation notices and accounts sent to him by the pursuer, as a broker acting on his employment, and which notices and accounts were not objected to at the time, but were duly received and preserved by the defender.

Upon the evidence, then, and pleadings as the action was originally laid, and apart from the questions raised under the amended record, the conclusion I have come to is—1st, That the defender has failed to prove that the pursuer ever agreed to take over from him the stock he admittedly purchased for the defender, or that the defender ever gave the pursuer instructions to close that stock; 2d, That in carrying over the stock the pursuer acted with the knowledge and approval of the defender; and 3d, That the pursuer did this as broker for the defender, and not on his own account and responsibility.

In this state of the facts and of the evidence bearing upon the case as the record was originally framed, I have been unable to find any grounds in law on which the defender can succeed in maintaining that he is under no obligation to pay the pursuer the commission due on the business he thus employed the pursuer to transact, or to repay the moneys which were advanced by the pursuer on behalf of the defender with his knowledge and approval at the time.

Neither do I think that the circumstance, which is one of those mainly relied on by the defender in the amended record, that the carrying over of the defender's stock as part of a larger sum of stock of the same kind which the pursuer required to have carried over at Liverpool for other clients, should invalidate the transaction to any extent, provided that is done in such a way as to secure to each of those clients the amount of stock required to be bought or carried over on his behalf. It is, I believe, not an uncommon thing for a broker, with orders to buy or sell a certain amount of stock, to buy or sell that stock in separate lots when he finds he cannot acquire or dispose of it as a whole. That, as I have always understood, is a matter of everyday occurrence, and I do not very well see how in many cases the business of the Stock Exchange could be carried on if that were not allowed. And that being so, I fail to see how there can be any illegality in a broker acting for two or more clients, each of whom wishes to acquire a lot of the same kind of stock, making a contract with the selling broker for the acquisition and delivery on a particular day of the gross amount required, and thereafter apportioning that stock among his clients with a view to the transference to each of them, when the day of settlement arrived, of the quantity he required.

Now that, as I read the evidence, was what was here done. It is not now disputed that the order given to the pursuer to purchase the stock was duly carried out on the 11th and 12th of October by the purchase of two lots of Grand Trunk Thirds of £6000 and £4000 each. In the defences those purchases were distinctly challenged by the defender, when he alleged, in statement 2 of the record, that the whole was a gambling transaction, and that "in point of fact the pursuer had no stocks or shares which he could deliver." This allegation against the fair dealing of the pursuer is now withdrawn, for it was distinctly admitted by the defender's counsel at the discussion that the requisite amount of stock had in the first instance been duly acquired for the defender by the pursuer.

It was, moreover, not alleged that the amount of stock so bought for the defender had not in point of fact been carried over from time to time

by the Liverpool broker according to the rules of the Liverpool Stock Exchange. The continuation-notes of the Liverpool broker are quite distinct as to this, and their accuracy has not been challenged.

In obedience to a call, moreover, made upon the pursuer on the part of the defender in the pleadings in the Sheriff Court the pursuer furnished the defender with the names of the various parties with whom at the respective carryings-over of the defender's stock to the amount of £10,000 the pursuer's correspondents at Liverpool dealt. These names are distinctly set out in the account in the print of documents for the defender; and although the pursuer is asked one or two questions about this when examined for the defenders in the additional proof, no question was raised as to the correctness of the information he had given.

But although neither the accuracy of these continuation-notes, nor of the information as to the names thus given, is disputed, the legality or propriety of carrying the stock over on the 24th of October, as part of a larger sum, is disputed. That carrying-over appears to have been done in two sums of £18,000 and £20,000 stock, as shewn in the continuation note of Thompson & Company, the Liverpool brokers, "subject to the rules and regulations of the Liverpool Stock Exchange," as explained by the pursuer when adduced as a witness by the defender in the additional proof, where he says—"I had to divide the £38,000 between Stewart and other clients who had stock open when I was advising them." He is then referred to his day-book, extracts from which are printed, where he explains how this was done, as follows:—"I am now shewn my day-book, and referred to the entries under date October 24th. I distributed the £38,000 between R. Service, £20,000; Archibald Stewart, £10,000; Dr Russell, £2000; account No. 3, £5000; and H. Maffett junior, £1000. Dr Russell is one of my clients in Durham. Account No. 3 stands for myself. £5000 of these Trunk Thirds had been bought for a party who had become bankrupt. I was carrying them on. I was not aware the man was bankrupt, but he had become bankrupt. His trustee called on me and wanted me to sell them. I told him I thought they were to go up. I closed his account and kept them on for a time, calling the account No. 3 as for myself. I was the purchaser of these stocks. They did not interfere with my security at all. H. Maffett junior is my nephew." And when this account is looked at, a distinct division of the £38,000 stock and appropriation of it in the way here described will be found.

But the matter does not stop there. Besides these entries in the day-book of the names of the parties in right to the stock thus carried over, there is an entry in the pursuer's memorandum-book, of date the 24th of October, excerpts of which are printed, to the effect that of these £38,000 stock carried over by Thompson & Company of Liverpool, £10,000 are for the defender. And there is, moreover, the continuation-note of the same date sent by the pursuer to the defender intimating,—"I have continued for you as under,—Sold £10,000 Trunk 3d at £50, bought at £50, 3s. 3d. Com. in acct." There are thus three distinct acknowledgments, under the handwriting of the pursuer, to the effect that he had carried over through the Liverpool broker and held that amount of stock for the defender. Similar entries are to be found made in the books at each successive carrying-over till the close of the transactions, and there is also evidence of due notice of this having been regularly sent to the defender by continuation-notes and accounts, as has already been explained.

On examining the day-book it will be found that from the 24th of October down to the beginning of January pretty much the same amount of Grand Trunk Stock was carried over for the same and other parties. But it appears that about the 9th of January a sale was effected of the £20,000 stock belonging to Mr Service, and with reference to this the pursuer says in his evidence—"I am referred to the account ending 14th January 1884, from which I see that the Trunk Thirds which I had open in Liverpool with R. Thompson & Company at that date was £41,000. On January 9th I sold out £20,000 Trunk Thirds—two lots of £5000 and £15,000. These were Service's Trunk Thirds. He instructed me to sell out. That left me with £21,000 open in Liverpool. On January 14th £21,000 were carried over. You will find the £21,000 on both sides of the account. That was all that was open in the Liverpool market, so far as I was concerned, at the close of the account."

He then goes on to explain how on the 14th and 15th January further sums were sold out to close by others of the holders, amounting to £9000 in all, leaving £12,000 to be carried over. And with reference to these he says—"The £9000 were not part of Mr Stewart's lot. The entries in my day-book applicable to the £9000 are these,—

"On the credit side:—

Jany. 14. Dr Russell—£4000—38—£1520.
,, ,, Account—£4000—37⅞—£1515.
,, 15. Account—£1000—36—£360.

On debit side:—

Jany. 14. R. Thompson & Co.—£6000 Trunk Thirds—38—£2280.
,, ,, R. Thompson & Co.—£2000 Trunk Thirds—37¾—£755.
,. 15. R. Thompson & Co.—£1000 Trunk Thirds—36—£360."

R. Thompson & Company are, of course, the Liverpool brokers. (Q.) Are those not simply cross-entries as far as those names are concerned?—(A) No; Dr Russell held the stock, and it was sold by Thompson & Company."

There thus remained open at Liverpool, after this £9000 stock was disposed of, £12,000 stock, £10,000 of which belonged to the defender. Of this fact a continuation-note and relative account was duly sent to the defender by the pursuer in February 1884, and the stock was closed as against the defender in March 1884 as he was unable to make arrangements for retaining it.

As to this the pursuer says in his evidence—"In Stewart's case the stock was in Thompson's hands until the last carry-over. There was only £9000 left in the market at the finish," and with reference to this he adds in cross-examination as to his accounts—"On the 26th February 1884 I purchased £10,000 Trunk Thirds for the defender, and I hold these on his behalf until the 7th of March, when I sell £9000 for him in Liverpool and £1000 in Glasgow." It appears that there was some mistake about the sale of £1000 of the

£10,000 held in Liverpool for the defender, and that he was credited on account with £1000 sold in Glasgow instead.

The entries to which I have referred in the pursuer's business-book, taken in connection with the continuation-notes, appear to me to afford conclusive evidence of the fact that as the duly authorised broker of the defender the pursuer had all along under his control and was under an obligation to obtain delivery of £10,000 stock for the defender should he wish to have that stock transferred to him when a day of settlement arrived. This the pursuer as a broker would, I conceive, beyond all doubt have been obliged to do had the defender asked him to procure a transfer of it and furnished the pursuer with money to pay for the stock. And this the pursuer in the ordinary discharge of his duty as a broker could have had no difficulty in effecting when the day of settlement approached by sending to his Liverpool correspondent a ticket with the name of the defender upon it as the party to whom the stock was to be transferred in terms of the recognised rules of the Stock Exchange. On that being done the selling broker would have been obliged to have that amount of stock transferred to the defender upon his tendering the price of the stock, and thus the matter would have been settled.

The rules of the Stock Exchange are very distinct in these respects, and the argument submitted on the part of the defender appeared to me to proceed upon some misapprehension as to these rules. When a broker is employed to purchase stock for a client in the Stock Exchange, he does not as a matter of course, as seemed to be assumed in the argument, at once disclose the name of that client to the selling broker, nor does the latter disclose the name of the vendor, and so make a contract between the purchaser and vendor. But the two brokers make a contract, the one to purchase a certain amount of stock for his clients for settlement on a certain day, and the other to deliver that amount of stock on the day fixed for settlement to the buying broker or his nominees, and it is not until what is called the "name day" arrives, which is generally a couple of days before the day of settlement, that any disclosure is made of the purchaser's name, and a contract effected between the principal parties. But it is then effected, and there is then clearly privity of contract.

This is very distinctly explained by Lord Justice Lindley when dealing with this subject in his work on Partnership (vol. i. p. 722), where, after mentioning the various leading cases on the subject, he says that "in the ordinary course of events a sale of shares on the Stock Exchange is essentially a transaction of the following description—(1) There is a contract between the selling and buying broker or jobber to the effect that on a given day, called the 'account day,' the shares shall be deliverable and the price payable. (2) That on the day before the account day (called the 'name day') the buying broker or jobber gives or passes to the selling broker a ticket containing the name of the person to whom the shares are to be transferred, and the price which that person has agreed to pay for them. (3) That the name as passed may be objected to within a limited time, and if objected to on reasonable grounds, must be replaced by another name—the committee of the Stock Exchange deciding in case of dispute whether another name is to be given." After so stating the rules he then goes on to explain that the above mentioned ticket is prepared by the broker of the purchaser, and is in the ordinary case passed (between twelve and two o'clock on the same day) by such broker to the broker of the original seller, who executes a transfer (prepared by his broker) to the purchaser upon his payment of the agreed-on price.

Having thus explained the way in which a settlement is brought about, Lord Justice Lindley goes on to deal with the question of contract, and says, under the word "Privity of Contract" (p. 726)—"The precise moment when the contract in these cases is first created has given rise to some difference of opinion, but the better opinion seems to be that a contract between the vendor and the ultimate purchaser exists as soon as the ticket containing the purchaser's name has been handed by his authority to the vendor, and he has accepted the name, and indicated that acceptance to the purchaser. This opinion is based upon the ground that the ticket is drawn up and issued by the agent of the purchaser, who is authorised to use the machinery of the Stock Exchange and to transmit the ticket to any person to whom the operation of that machinery may bring it. When that person is ascertained, and the ticket is handed to him, an offer is made by the purchaser to buy of the vendor upon the terms specified on the ticket, and if the vendor accepts that offer, and informs the purchaser that he has done so, it is difficult to see that anything further is required to make a contract between the parties."

Having regard to these rules, and the opinion I have just read, which are both fully borne out, I think, by the decisions which are referred to in support of them, it appears to me to be clear upon the evidence adduced that the pursuer during the whole period of his actings as broker for the defender had placed the defender in the position of being entitled to enforce delivery of the £10,000 Grand Trunk stock in question at any one of the ordinary days of settlement on the Liverpool Stock Exchange. This the pursuer could have done for the defender by directing his Liverpool correspondent to pass a ticket with the defender's name upon it to the selling broker for settlement in compliance with the above rules, when, upon the price being paid, the stock would at once have been transferred to the defender. On these grounds it appears to me that the defender has entirely failed to instruct the only defence raised in the amended record, to the effect that the pursuer had not "made any contract of purchase or sale which the defender would have been entitled to enforce against another contracting principal," and that this defence, as well as those maintained in the Sheriff Court, should be repelled.

The case of *Robinson* v. *Mollett*, 7 E. & I. App. p. 802, was referred to at the discussion as an authority in favour of the defender. But I am unable to see that the decision in that case has any direct bearing upon the present. This was not, as I read it, a decision relative to a Stock Exchange transaction. It was the case of a merchant in Liverpool employing a dealer in tallow in London, called a tallow broker, to purchase for him certain quantities of tallow. But instead of doing this the broker proposed to transfer to

the merchant certain quantities of tallow belonging to himself, and which he had purchased in his own name, some of it before and some of it after he had received the order. Of this tallow the merchant refused to take delivery, as not bought for him in compliance with the order. Upon this the broker sold the tallow, and brought an action for the difference he had himself as a principal to pay. What, therefore, the broker had done was something quite inconsistent with the character of a broker. "He had converted himself from an agent" (as one of the Judges expressed it) "employed to buy for his employer into a principal to sell to him." Now, this plainly gave the broker an interest adverse to his duty, and on that ground the Court rejected the transaction, it being clearly proved that the broker had acted as principal throughout, and actually sold his own tallow, and claimed the difference as his own loss. Here, on the contrary, the whole was done under the rules of the Stock Exchange between brokers for their respective principals, and who have no interest in the matter beyond the amount of their commission.

In giving judgment in *Mollett's* case Lord Chelmsford expressly put his decision on the ground I have alluded to, using the same expression as Mr Justice Hannen relative to the usage founded on as "converting a broker employed to buy into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty," and which could not therefore be sustained. This is a most salutary rule, which it may be right to apply in any similar cases; but there is not, as I humbly think, any ground for its application here in the circumstances which I have now explained.

I am of opinion, therefore, that the defences should be repelled, and decree pronounced in favour of the pursuer.

Lord Shand—In this case, after the appeal by the defender Mr Stewart from the judgment of the Sheriff-Substitute had been heard by the Court, an interlocutor was pronounced on 18th December 1885 recalling the judgment of the Sheriff-Substitute, and allowing an amendment on the record to be made by the appellant and answered by the respondent, and also allowing the parties additional proof, which was taken before Lord Rutherfurd Clark, with special reference to the averments contained in the amendments by the parties respectively. Thereafter, as the result of the discussion on the additional proof, their Lordships, "in respect of the importance of the questions submitted for determination, and that the Judges of this Division are equally divided in opinion thereon," appointed the questions to be argued before them and three Judges of the First Division. The argument submitted under this order related almost exclusively to the averments which had been made by way of amendment and the evidence adduced under the order for additional proof, and the question thus raised, and now to be determined, is whether, on the assumption that the pursuer was employed, as he alleges, to purchase stock for the defender, and that the original purchases were carried over or continued from time to time by sales of the stock purchased and repurchases of the same quantities of stock, the pursuer is entitled, in the circumstances disclosed in the additional proof, to recover the ultimate loss after the alleged sale on 7th March 1884 of the last quantity of the stock purchased, the amount of the claim being £1933, 7s. 3d. This amount is brought out in an account debiting the defender on the one hand with the prices of stock alleged to have been purchased for him, and crediting him on the other hand with the prices of stock alleged to have been sold on his behalf, to which is added commissions on all the transactions paid to brokers on the Stock Exchange, and also commissions claimed by the pursuer himself.

The defender does not now dispute that the original purchases on 11th October 1883 of £6000 Trunk Thirds, and on 12th October 1883 of £4000 Trunk Thirds, making in all £10,000 of stock, were all in order, the pursuer having made contracts on his behalf for these purchases with third parties, which he the defender was in a position to enforce against them; but he denies that as regards any of the subsequent purchases after the sale of the particular stock just mentioned any privity of contract was ever created, or could have been created, between him and third parties, so that he could have made effectual any right against them for delivery of stock. He further disputes the averment that the stock alleged to have been purchased for him was at the close of the transactions sold on his behalf, and he maintains that, this being so, the pursuer has failed to establish liability against him for the balance sued for.

Both parties are agreed that the pursuer was employed in the character of a broker only. This is averred by the pursuer on record, and is admitted by the defender, and at the close of his evidence in the additional proof the pursuer himself depones that "all through these transactions" he acted as "broker alone," while in the original proof he explains that he is not a member of the Stock Exchange, but is a stockbroker, and has been so for twenty years, adding the words, "I am an outside broker."

It is further of importance in the decision of the question between the parties to observe that there is no averment on the record of any custom of trade or custom of the Stock Exchange or otherwise in reference to the dealings of parties in the purchase and sale of stocks to vary in any way the ordinary duties arising out of the relationship of customer and broker. If any such custom had been averred it would have been a fit matter for proof, and the defender would have had an opportunity of leading counter evidence on the subject. It follows that the pursuer, as in a question between him and the defender, was not bound to incur any personal responsibility in the purchase or sale of stocks (whatever responsibility he may have incurred towards other brokers with whom he dealt under the rules of the Stock Exchange in which he effected purchases and sales), but was an agent merely, with authority to bind the defender to third parties. But, on the other hand, the pursuer in the performance of his duties was bound to make his contracts of purchases and sales of stock on the defender's behalf with third parties in such terms as to enable the defender, as principal on one side of these transactions, to enforce the contracts directly against third parties with whom the contracts were made. The importance of this to

anyone in the position of the defender as principal was this, that even although the brokers who as between each other might bind themselves as principals should become insolvent there would always be a principal to whom the defender was entitled to look for fulfilment of the contracts.

The parties are agreed that the defender in ordering the original purchase of shares did not contemplate a permanent investment. His intention was to hold the stock temporarily, in the expectation that the market price would rise before the day of settlement, and again to sell the stock for payment on that day, thereby gaining the difference. In order to make profit in this way by differences it is obvious there must be real transactions of purchase and sale of stock with third parties. As the stock in this case fell instead of rising a series of new transactions took place, all with the same object. Between 12th October 1883 and 7th March 1884, when the defender alleges that the sale of the stock purchased for the defender and belonging to him was made, there appear to have been nine transactions "carrying over or continuing" the original purchases—that is to say, nine transactions in which the stock purchased from time to time was sold for immediate delivery, and a new purchase or repurchase made for delivery a fortnight afterwards, in the expectation or hope always of a rise in the market. In the case of each of his purchases, assuming that contracts binding on the defender were made, the defender was bound to take delivery of the stock at the settlement day on the Stock Exchange a fortnight after the contracts were made, and as he was not possessed of funds to pay for the stock, the sale of the stock purchased was made for immediate payment, and the purchase of another quantity of stock again made for payment on delivery a fortnight afterwards. The whole of the transactions at the expiry of the nine different periods of a fortnight each were of the same nature, and at the end of the last fortnight the pursuer closed the account by selling the stock which he alleges to have belonged to the defender, but without making any new purchase. The course adopted by the pursuer on the first occasion may be taken as showing what occurred on each subsequent continuation or carrying-over of stock. The first purchases were made for delivery and payment on 25th October 1883, but on 24th October the pursuer sold £10,000 Trunk Thirds at £50 for immediate payment, and bought the same quantity of stock at the higher price of £50, 3s. 3d. for delivery and payment a fortnight afterwards, according to the advice-note and account sent to the respondent. These transactions of continuation involving the sale of the stock, and the repurchase of the same quantity, were duly intimated by advice-notes from the pursuer to the defender in these terms (taking the first as a specimen):—"I have continued for you as under:—Sold 10,000 Trunk Thirds at £50; bought at £50, 3s. 3d.—com. in account." The note stated that the stock was sold for "this account," and bought for "next account."

It is clear that the pursuer and the defender both fully understood that the defender was truly speculating in differences—that is, was buying and selling for the purpose of gaining by differences in the expectation of a rise in the price of the stock before each settling-day. It is equally clear that if the pursuer had been a principal himself, contracting as such with the defender for the sales and purchases of stock, which it was quite understood was not to be delivered on either side, he would have been a party to gambling transactions struck at by the Gaming Act, and on which therefore he could not have maintained an action. No such case is however made out in the evidence. The pursuer by the arrangement and course of dealing between him and the defender was not in a position to make gains or losses by speculation, but was to be remunerated only by his commissions acting as a broker. And if he had properly performed the duties of a broker there would have been no valid defence to his present demand.

But, again, if the pursuer by the mode in which he carried out the orders given to him made the purchases and sales truly for himself as principal and not for the defender, to the effect of putting the defender in the position of being able to enforce the contracts made with third parties on his behalf, then it follows that the pursuer was not truly acting as a broker bringing third parties together as contractors buying and selling to each other, but made himself a principal, and he is precluded from suing on the contract of agency or brokerage, under which alone he was employed. In the case of *Robinson* v. *Mollett*, 1874, L.R., 7 E. and I. Appeals, page 802, being an appeal from the Exchequer Chamber, L.R., 7 Common Pleas, page 84, although there was a great division of opinion on the question whether the custom of trade in the Tallow Market of London could be held to enlarge the rights of brokers so as to entitle them to sue, although by the course of dealing they had made themselves principals in the transactions (a question which was decided in the negative), all the learned Judges in the different Courts in which the case was heard were clearly of opinion that in the absence of a special custom which the law could recognise as affecting the relation and rights of parties, a broker can only sue on his contracts if it be clear that he acted throughout as broker, only making contracts between his principal and third parties, and that he could not sue if he himself became principal in the purchases or sales, giving his customer only the benefit of the transactions in which he had made himself principal. Mr Justice Blackburn there defines the duty of the broker or agent as "requiring the broker to establish privity of contract between the two principals," and in this view all of the Judges were agreed.

The defender in this case denies that the pursuer in the contracts made by him maintained the character of broker only, and maintains that the proof shows that in place of purchasing the particular quantities of stock which he the defender ordered or authorised to be bought and sold, the pursuer made slump purchases of larger quantities, and in some cases made a number of purchases which in the aggregate were of much larger amounts than the defender's orders, these purchases being made at various different prices, and that having done so, he in his advice-notes to the defender fixed arbitrary prices not corresponding with the prices of any particular purchases, but striking what he conceived to be an average; and further, that while by these notes he professed to the defender to

have effected particular purchases and sales on the defender's behalf, no such transactions had really taken place. It appears to me on a consideration of the proof that this contention on the part of the defender has been established; and further, that it has been shown that the last sale of £10,000 Trunk Thirds made by the pursuer on 7th March 1884 was not a sale of stock held under any contract of which the defender could possibly have taken the benefit, or for implement of which he was responsible, and in this state of the facts I am of opinion that the pursuer cannot succeed in his claim.

The evidence on these two points seems to be clear. The pursuer, no doubt, on the day before what is called settling-day, always duly intimated to the defender that he had sold £10,000 Trunk Thirds at a certain price for the "present account," and bought the same quantity at another price for the "next account," but in regard to the quantity of stock alleged to have been purchased, and to the price of that stock as intimated to the defender, the pursuer is unable to point to any definite transaction entered into solely on the defender's behalf, or to show that any purchase of stock at the particular price intimated to the defender was really made.

Thus, to take the first date on which the stock was carried over, viz., 24th October 1883, it appears from the accounts which have been recovered in this case, and the additional evidence given by the pursuer himself, that two quantities of stock, one of £18,000 Trunk Thirds and another of £20,000 Trunk Thirds, were bought, neither of these being at the price of £50, 3s. 3d. intimated to the defender as the price of the stock bought for him. The evidence of the pursuer referring to the continuation-note of 24th October 1883 is in these terms—"You will see that £18,000 Trunk Thirds and £20,000 Trunk Thirds are bought at £50, 2s. 9 1-16d. and £50, 2s. 6 1-16d. These two together make up the £38,000. . . . Of course I had to divide the £38,000 between Stewart and other clients who had stock open when I was advising them." And further on he says—"I am now referred to the account between myself and the defender on October 24th. I see an entry on the debtor side of £10,000 Trunk Thirds at £50, 3s. 3d. (Q) Why do you charge £50, 3s. 3d. to Mr Stewart when the prices at which the £38,000 were bought were £50, 2s. 9 1-16d. and £50, 2s. 6 1-16d. ?—(A) That includes R. Thompson & Company's 1-16th of commission. The London brokers advised these things net. Instead of that, however, I made a calculation as to how the commission would be, and caused that to be added to the contango." And after further evidence as to the pursuer's mode of dealing with the commission, the pursuer goes on to say—"I distributed the £38,000 between R. Service, £20,000; Archibald Stewart, £10,000; Dr Russell, £2000: account No. 3, £5000; and H. Maffet junior, £1000" (the last three lots being really purchased by the pursuer himself); and subsequently he proceeds—"In the division of the stock I charged everybody £50, 3s. 3d. for it. (Q) To whom did you apportion the stock which you bought at £50, 2s. 6d. ?—(A) To all the parties at £50. 3s. 3d., for the reasons already explained. (Q) Was there any particular lot of stock open between you and Thompson & Company which was apportioned to any one of the five people?—(A) No, it was apportioned to the whole of them. I never mentioned the names of my clients to R. Thompson & Company. They knew no person but myself in these transactions." The result of this evidence is that not only was there no purchase made of a specific quantity of stock for the defender under any contract which the defender could enforce, no privity of contract established between the defender and another principal, but that slump purchases having been made of large quantities of stock, one part at one price and another part at another, the defender struck an average of prices, and merely in his note-books or jottings made a note, on each occasion of a renewed purchase, of the allocation of £10,000 to the defender at a price in each case which had no existence except in the pursuer's mind and in his jottings. In this way it appears to me to be clear that there was no contract entered into which the defender could enforce, either when the transaction was entered into in Liverpool or at any subsequent date with any third party. The only way in which the matter could be worked out was by the broker himself becoming principal, taking delivery of stock which he purchased at certain prices, and transferring this to the defender and other parties at different prices altogether. This evidence does not relate to the settlement of 25th October only, but runs through the whole account, for the defender says—"The system of slump purchases and charging an additional price to the Glasgow clients goes on regularly through the whole account."

But further, the true position of the parties in these dealings is made very clear by what occurred when the pursuer closed the account by selling stock which he alleges was truly held by the defender under a contract which the pursuer had made for him. It rather appears that the defender clearly understood that all his transactions were taking place on the Liverpool Stock Exchange, and, at all events, the advice-notes and accounts he received from the pursuer were calculated to lead him to think so. The pursuer himself says that "on the last occasion of carrying over or continuation, which took place on 26th February 1884, £12,000 Trunk Thirds were bought in Liverpool," and that £10,000 of this had been allocated to the defender. If that had been the case, the defender would have been entitled to demand delivery of this stock on the settlement-day on 8th March following. But in the meantime, on 5th March, the pursuer sold out £3000 of the £12,000 Trunk Thirds on behalf of another customer named John M'Leish, leaving £9000 only which he could represent as in any sense belonging to the defender. This mode of dealing with the £12,000 stock held in Liverpool is a clear illustration of the manner in which the pursuer acted throughout. It is clear that if he had acted as a broker only he would not have dealt with the stock in that way, leaving the defender as a contracting party for £9000 only. In the continuation-note of the ultimate sale of £10,000 stock, represented as belonging to the defender, the pursuer writes—"Glasgow, 7th March 1884.—A. Stewart, Esq. —I beg to advise having sold on your account as under, in Liverpool, and subject to the rules of that Stock Exchange, for account day, 14th instant, £10,000 Trunk Thirds, at £33—

£33,000;" and this is the amount with which he credits the defender at the close of the account. From the evidence, however, it now appears, in the first place, that there was no sale of £10,000 Trunk Thirds in Liverpool, but a sale of £9000 only, and that the pursuer sold in addition a quantity of £1000 Trunk Thirds which he held for himself, or some other party in Glasgow; and in the second place, that there is no price of Trunk Thirds sold either in Liverpool or in Glasgow which corresponds with the price of £33 intimated to the defender and credited to him. The pursuer explains that the price intimated was reached on the principle of striking an average already referred to. On this subject the pursuer being asked—"Have you slumped all your Liverpool and Glasgow sales?—(A) They were all being closed at the same time—some at Glasgow at £32, 18s. 9d. and some at Glasgow at £30, and the fairest thing to do was to make an average. I therefore gave a separate average between the price of his own stock sold in Liverpool, and the price of some that I had open at Glasgow;" and the very loose way in which the business was done is clearly brought out by another passage in the pursuer's evidence, in which, being examined in regard to day-book entries relating to Trunk Thirds held by John M'Leish, he is asked—"Prior to that date was he interested in any of the £12,000 open with the Liverpool brokers?—(A) He had bought a lot in Glasgow, and some in Liverpool. (Question repeated) — (A) I never point out whom the stock is for if I hold it in any of the markets. Suppose I hold Trunk Thirds for ten people, and have them in three different markets. If a client comes and orders stock to be sold in any particular market, I will do it. But I do not feel myself bound to keep the stock in any particular market." This passage in the pursuer's evidence seems to me to make it clear that it was not his system to make his contracts such that his customer had a definite contract with a particular third person which he could enforce in his own right either when the purchase was made or at any time afterwards when delivery might be required. That being so, it appears to me that he by his actings himself became a principal in the transactions in question, a fact which destroys his claim to recover the sum sued for as due to him for transactions in which he was employed to act simply as a broker, and with the ordinary powers and duties of a broker only.

It was argued on the pursuer's behalf that although in the original transaction with parties in Trunk Thirds the pursuer was bound to make a specific contract for the defender, enforceable by him against a third party, no such obligation rested on him in regard to the succeeding fortnightly contracts made thereafter. It was said that the pursuer was left "to do his best" for the defender as his customer, as the defender had failed to supply him with the price of the stock, or to pay the differences which were accumulating from time to time. I cannot give any weight to this argument. When the day of each settlement came the pursuer's only right was to sell out the stock belonging to the defender (if such stock were in existence), and thereupon to sue the defender for the difference, and his commission. He was not entitled to carry over stock and make a new purchase unless authorised by the defender to do so. It seems, however, from the evidence and the course of dealings that such authority has been proved in reference to each of the fortnightly transactions when the stock was in point of fact carried over. The defender and his friend Mr Service were repeatedly in the pursuer's office, and must have been made aware, as the pursuer alleges, that new transactions were being entered into from time to time, and as the defender received notices of these transactions regularly from the pursuer without objection, it cannot be taken from him now that the transactions were not authorised. But the authority to carry over or continue purchases and sales of stocks must, I think, plainly be taken to mean that these purchases and sales shall be made by the broker on the same footing and in the same way as the original transaction. The pursuer was a broker simply, and had no authority to change his character at any time in the course of the transactions, and accordingly throughout the whole of the continuations and purchases and sales made on the defender's behalf it was represented to the defender that stock had been purchased from time to time for him, of a specific quantity and at a specified price, in the same way as in the case of the original purchase. It may be that on the occasion of one or more, or it may be of all of the continuations, the person who bought the stock then due for delivery, and in whose favour the transfer of that stock must be taken, again sold stock to be delivered at the next settling-day. This, however, does not make the transactions in themselves in any way fictitious in so far as the persons buying and selling the stock respectively are concerned, and cannot, in my opinion, make any difference on the duty of the pursuer to continue to act as a broker only, as indeed he represented he did under the employment, as to the terms of which the parties are agreed.

The case would have been very different if it had appeared and had been proved that the defender had authorised the pursuer to speculate for him precisely in the same way that the pursuer did—that is, to buy stocks in different quantities and at varying prices, to slump these and strike an average price, and to take and hold the stocks, or rather a certain proportion of them, as allocated and as applicable to the defender's orders, or even had authorised the pursuer to carry on the whole transactions as principal himself in his own name, though truly as agent for the defender. And the defender's authority for all this might even have been proved by clear evidence that he was made fully aware of the details of the pursuer's actings. But no case of this kind is either alleged or proved. Such a course of dealing would be quite beyond the ordinary duties or powers of a broker, while the pursuer's case on record is that he acted, and was employed to act, as a broker only, without any special powers given to him as an agent. Besides, on the evidence there is no proof that the defender agreed to make the pursuer an agent to speculate in his own name for the defender, and in the way he did, mixing up the transactions of different customers in regard to quantities and prices of stocks. The case of *Thacker* v. *Hardy*, 1878, L.R., 4 Q.B.D. 685, has therefore no application.

On the whole, on the ground that it appears

from the pursuer's account and evidence that his actings after the first purchase and sale of stock were not those of a broker making transactions which the defender could enforce as against third parties contracting with them, and as the stock sold at the close of the transactions did not belong to the defender, I am of opinion that the pursuer must fail in the action, except in so far as regards the balance of £138, 10s. 6d. due as the result of the first transaction of purchase and sale of stocks, which sum is admittedly due if the defences stated in the Sheriff Court be repelled, as I think they must be.

Lord Young—I concur in the opinion expressed by Lord Mure.

Lord Craighill—The appellant is defender in an action raised in the Sheriff Court at Glasgow by the respondent, a stockbroker in Glasgow, in which the Sheriff gave judgment against the defender for £1933, 7s. 3d., the amount concluded for in the summons. That sum is alleged by the pursuer to be a debt incurred to him "as a broker on the employment and instructions of the defender in buying and selling shares for him." The transactions in question began in October 1883, and were carried on till March 1884. The defences are (1) that the alleged buyings and sellings were gambling transactions for differences between the price of stock at the dates of purchase and at the times for settlement; (2) that the pursuer had agreed to take over the loss on the first two (said by the defender to have been the only real transactions) on receiving £150 from the defender, which was subsequently paid; (3) that the pursuer did not act as a broker in the other transactions, but as a dealer; and (lastly) that the pursuer's statements as to instructions for carrying over, and as to the purchase and sale of stocks upon these instructions, are misrepresentations, the fact being that any orders given expressly or by implication to the pursuer were not fulfilled.

The first question relates to the first two transactions, the reality and regularity of which are not disputed. The only thing which has to be decided regarding these is, whether the alleged agreement to accept of £150 instead of £238, which is sued for as the amount of the differences affecting them, has been proved, and the finding of the Sheriff upon this subject must, I think, be sustained. The burden of proof is on the defender, and he supported his statement by his oath. The pursuer, however, swore the contrary, and as the *onus* lay on the defender, what he alleged as his evidence was not corroborated, and cannot be held to have been established.

The next defence for consideration is the alleged gambling character of the subsequent transactions, but this does not require separate consideration, for if the pursuer executed the orders he received by buying for the defender, he was in these not a principal, but only a broker or agent, and so is not affected by the plea in question. If, on the other hand, the pursuer did not execute the orders said to have been given to buy for the defender, the latter upon that ground is entitled to be assoilzied. We may therefore proceed at once to consider the two other pleas which have been put forward by the defender.

The first of these is that the pursuer had no authority to carry over. The burden of proof is here upon the pursuer. The order to buy stocks does not involve authority to carry over in the event of stock not being taken up or the difference not being paid. The broker may protect himself, but the way in which he is entitled to act for this purpose is to close the account, dispose of the stock which has been bought, credit the price to his client, and sue for the difference, if the difference be not voluntarily paid. The right so to act affords the necessary protection, and were it to be held that a broker at his own hand is entitled to carry over, in other words, to continue the employment which was given upon the first order, this would be giving him the right to involve his client in indefinite liability. Such a thing is not necessary for the broker's security, and might be ruinous to the customer.

Such is my view of this matter, and therefore unless there be proof of authority or ratification, the defender's liability for the differences on the transactions in question cannot be sustained. This is neither more nor less than what was decided in *Newton* v. *Cribbes*, February 9, 1884, 11 R. 554. But it appears to me that the requisite proof has been provided. The defender, no doubt, swears that he gave no authority, the pursuer again swears the contrary, and the pursuer is corroborated by the sale-notes which were sent out to the defender the days on which the carryings-over occurred. All these sale-notes were produced by the defender. There was thus timeous intimation of what had been done. There was no repudiation, and whether there was an order or not to carry over, there was subsequent, and indeed immediate, ratification of the transactions. This distinguishes the present from the case of *Newton* v. *Cribbes*, which therefore is not a precedent on the present occasion.

The defender, accordingly, must be held to be liable for the consequences of the authority to carry over which was thus imparted.

Before proceeding to consider whether this authority was duly exercised, it appears to me to be necessary to explain that in my view of the law there must be on the part of the stockbroker carrying over—which is done by selling out and by buying in—as strict a fulfilment of the order as if it were the first order, or the order in which all the others originated. There was some controversy between counsel upon this subject, but I cannot say that I have any doubt upon it. For the pursuer it was said that when the carrying-over occurs the client is under a breach of contract, and therefore that the proceedings of the broker, whatever they may be, must be favourably regarded. To me it appears that there is no cogency in such a excuse. The purchaser no doubt has neither taken up his stock nor paid his differences, and so far, in the one case and in the other, there was a failure to perform what, expressly or by implication, had been undertaken, but the carrying-over was the act of the broker. He consented to the arrangement, and this renders immaterial the consideration of the cause by which the carrying-over was induced. If the broker in his operations has put aside his character of broker, and acted as if he were a dealer, the fact that this was done in the carrying-over operations

is not a reason for dispensing with the obligations of his contract. The transactions in question must be judged of on the assumption, which is indeed a fact, that the orders in question were given by the defender as client or principal to the pursuer as his agent or broker, and this introduces at once the question, which in truth is the question in the case, Were the alleged transactions, as these appear upon the proof, what they behoved to be according to the law by which the case is governed? That law, as I think, is not doubtful. The order is to buy for the principal. The broker is to fulfil the order given, and that cannot be fulfilled unless there is a purchase from a seller who is brought face to face with the purchaser, and is laid under obligation to deliver to him the thing which was the subject of the transaction. Any other rule would, using the words of Mr Justice Blackburn, as quoted in the opinion of Lord Chelmsford in *Robinson* v. *Mollett*, 7 Eng. & Ir. App. 837, be a "departure from the ordinary duty of a broker, that duty requiring the broker to establish privity of contract between the two principals." That the order was given is at this stage of the argument not in controversy. Did the broker buy from another for the client the thing for which the order was given by the client? Were the parties to the transaction brought face to face, and was privity of contract established between them? And, as a consequence, could there be a right of action the one against the other? That the pursuer bought Grand Trunk Thirds after he had the defender's order is, I think, proved, but the form of the transaction was as if the purchase had been for himself. He may have intended, and probably did intend, that there should be distribution of the quantity bought among clients who had given orders. But all the same, the bargain with the seller was such as it would have been if there had been no client in the case and the pursuer had bought on his own account. This is plain to me as anything could be upon the proof which was recently led. The pursuer depones—"I am now referred to my account with Thompson, Hook, & Company, ending 24th October 1883. On the creditor side there is an entry of £38,000 Trunk Thirds at £50. The £10,000 which I was to carry over for the defender is included in that £38,000. (Q) Did you just give a general order to your brokers in Liverpool to sell out the £38,000?—(A) The broker carries them over. He sells them for that account, and buys for the next. If you go to the continuation-note dated 24th October you will see what was done with them. You will see that £18,000 Trunk Thirds and £20,000 Trunk Thirds are sold at £50, 2s. 9 1-16d. and £50, 2s. 6 1-16d. These two together make up the £38,000. They are the same Trunk Thirds referred to in the print. (Q) Was this the only contract you had regarding that £38,000 Trunk Thirds with any person?—(A) I think so. Of course I had to divide the £38,000 between Stewart and other clients who had stock open when I was advising them." The pursuer further depones—"I distributed the £38,000 between R. Service, £20,000; Archibald Stewart, £10,000; Dr Russell, £2000; account No. 3 (pursuer's own account), £5000; and H. Maffet junior, £1000." Again he depones—"(Q) Was there any particular lot of stock open between you and Thompson & Company which was apportioned to any one of the five people?—(A) No, it was apportioned to the whole of them. I never mentioned the names of my clients to R. Thompson & Company. They knew no person but myself in these transactions. The system of slump purchases and charging an additional price to the Glasgow clients goes on regularly through the whole account."

These are the facts of the case, and they leave for determination only the question whether a slump purchase for distribution among several clients, where there is no allocation by, and no introduction of the client to, the seller, and no obligation undertaken by the one to the other, is a fulfilment of such an order as that which the pursuer says was given by the defender. If it be, then the duty of the broker must be different from that which has been explained by Mr Justice Blackburn. But I think that it is not different, and the circumstances related in other parts of the proof clearly show that it would be dangerous to recognise what was done as the due fulfilment of such an order. Not only was there no allocation of any portion to any client, but even a portion which was intended by the pursuer to be held for a particular client was in part sold to make up a quantity which had been made the subject of a new transaction with or for another. This is said to be within the broker's right. The pursuer, indeed, adds—"I would not book an order on any other terms." The result of all seems to be, that were the pursuer's contention to be sanctioned, a broker need not purchase anything specific for his client, but may buy a slump quantity for him, and for others at the same time, of which there need be no allocation; nay more, that he may in the end dispose of a part of the lot to others than any of those who gave the order, and supply the deficiency out of stock which was not bought even ostensibly to carry out the broker's obligation. The pursuer suggests that what he did was conformable to the practice of the Stock Exchange. There is no proof as to this. But even if there were proof, and if it were not shown that the client was cognisant of the alleged custom, such custom would not be a rule by which the obligations of parties would be governed. This is one of the points which was fixed by the decision in *Robinson* v. *Mollett*.

Lord Rutherfurd Clark—I agree with Lord Mure.

Lord Adam — I concur with Lord Shand, whose opinion I have had an opportunity of reading.

Lord Justice-Clerk — I am of the same opinion as Lord Shand and Lord Craighill.

The Court pronounced this interlocutor:—

> "The Lords . . . . having, along with three Judges of the First Division of the Court, heard counsel for the parties on the appeal, in conformity with the opinion of a majority of Judges present at the hearing, Find, as regards the first quantities of stock differences upon which are sued for in the present action, being those under dates 11th and 13th October 1883, that the orders therefor given by the defender to buy for him were duly executed by the pursuer, and that

there is in respect of these a balance of Ninety-three pounds ten shillings and sixpence still resting-owing by the defender: Further, as regards the other quantities of stock differences on which also are sued for in this action, Find that these shares were parts of larger purchases made on behalf of the pursuer himself, or for the general purposes of his business, and were not in implement of the alleged order to buy for the defender: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against, decern against the defender for the said sum of Ninety-three pounds ten shillings and sixpence, with interest thereon from the 7th day of March 1884 till paid: *Quoad ultra* assoilzie the defender from the conclusions of the action." . . .

Counsel for Pursuer (Respondent) — D.-F. Mackintosh, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Counsel for Defender (Appellant)—Jameson—Dickson. Agent—Alexander Gordon, S.S.C.

Friday, March 4.

FIRST DIVISION.

KEITH AND OTHERS *v.* SHEPHERD (SKINNER'S TRUSTEE).

Bankruptcy—Appeal by Creditors against Trustee—Deliverance—Title of Trustee to Maintain his own Deliverance.

Where a trustee has sustained a creditor's claim to a preferable ranking, it is for the creditor, and not for the trustee, to support the deliverance if it is appealed against, and the appeal must therefore be served upon such creditor as well as upon the trustee.

A trustee in a sequestration gave certain creditors a preferable ranking. The other creditors appealed against the deliverance to the Sheriff-Substitute, who ordered service of the note of appeal on the trustee; no service was ordered on the preferred creditors. The trustee appeared in support of his deliverance, which the Sheriff-Substitute recalled. Thereafter the trustee appealed to the Court of Session. The Court *held* that the preferred creditors were the proper parties to the process, that the trustee should retire from it altogether, and allowed them to be sisted to it on giving an undertaking to relieve the trustee of all past expenses incurred by him in the process.

The estate of James Skinner, farmer, Bethelnie, Aberdeenshire, was sequestrated on 22d February 1884, and George Shepherd was appointed trustee. Messrs M'Intosh and Caie, who were creditors on the estate, claimed to be ranked preferably for the sum of £1854, 13s. 8d., less £284, 17s. 9d. already paid to account, and the trustee admitted this claim to a preferable ranking. Alexander Keith and a number of other creditors on Skinner's estate appealed to the Sheriff-Substitute against this deliverance of the trustee, both in respect of its allowing a ranking and of its allowing a preferable ranking. The prayer of the note of appeal craved the Sheriff "to recal the said deliverance, and to ordain the trustee to reject the said claim for the amount admitted in said deliverance, and for a preferable ranking, and to find the appellants entitled to their expenses." It did not ask service on any party.

The Sheriff-Substitute (DOVE WILSON) ordered service on Shepherd, the trustee, and appointed parties to be heard. No service was ordered on M'Intosh and Caie, and none took place.

The trustee appeared in support of his own deliverance, maintaining it to be well founded; and on 6th December 1886, after considering a minute by him and answers for the appellants, the Sheriff-Substitute recalled the deliverance of the trustee and remitted to him to rank the claim of Messrs M'Intosh and Caie as an ordinary claim.

The trustee appealed to the Court of Session.

Objection to the competency of the appeal was taken by the respondents, the creditors, who had successfully appealed to the Sheriff.

They argued—The appeal by the trustee was incompetent. He had no interest, and he had no title. A trustee's duties were nowhere more clearly laid down than in 2 Bell's Comm. (M'Laren's ed.) p. 319. He ought to represent the general body of creditors, and not any individual creditor or class of creditors—*Mann* v. *Sinclair*, June 20, 1879, 6 R. 1078; *Corbet* v. *Waddell*, November 13, 1879, 7 R. 200; *Maxwell Witham* v. *Teenan's Trustee*, March 20, 1884, 11 R. 776. The trustee in bankruptcy was not entitled to prosecute on appeal, except as representing the whole creditors—*Forbes* v. *Manson*, 1851, 13 D. 1272. In all the cases cited for the trustee, the trustee represented the whole body of creditors. Here the appeal had been brought by the wrong man, and the proposal to sist the preferred creditors could not make it any better. Otherwise anyone might bring an appeal, and the right person might be brought in afterwards by a sist. That would be analogous to sisting a new pursuer, and a new pursuer could not be sisted except of consent—*Anderson* v. *Harboe*, December 12, 1871, 10 Macph. 217; *Morison* v. *Gowans*, November 1, 1873, 1 R. 116; *Hislop* v. *MacRitchie's Trustees*, December 17, 1879, 7 R. 384, and June 23, 1881, 8 R. (H. of L.) 95.

The trustee argued — If this appeal were bad there was no process, and the question whether the trustee had a title to bring the appeal depended on whether he had a title in the Court below. The appeal here was a process of review. If he had a right to appear in the Sheriff Court as a party to the suit, he had a right to carry out this further step. He had a title in the Inferior Court, for the sequestration statute contemplated that the trustee should defend his own deliverance. The principle that it was not the creditors but the trustee who should maintain his deliverance was shown in *Baird and Brown* v. *Stirrat's Trustee*, January 26, 1872, 10 Macph. 414; *Robertson* v. *Robertson's Trustee*, December 19, 1885, 13 R. 424; *Russell* v. *Taylor and Nicholson*, November 26, 1869, 8 Macph. 219; *Scottish Provincial Assurance Company* v. *Christie*, 1859, 21 D. 333; *Brown* v. *Whyte*, 1846, 8 D. 822. If the trustee was right as against the creditors who objected to the preference in