

well drawn to express what was new, viz., the case of a strainer in a swaying motion through the arc of a circle, in combination with the application of the usual pulsating motion to the diaphragm.

Then it is said that the arrangement made by the complainer did not require any ingenuity or inventive power to develop it, and has no merit. This objection also seems to me to be unfounded. What the complainer accomplished successfully may have been done by simple mechanical expedients, but it was a solution of a difficulty which had not been solved before, and effected a very substantial improvement in a manufacture in which up to that time, although inventive minds had been at work, they had been unable to find a mode of getting over their difficulties.

Lastly, the respondent maintains that what he has been doing is not an infringement of the complainer's patent. He says that his machine differs from the complainers in this, that it sways only from the horizontal position of the strainer to a sloping position and back again. What he does is, in short, to do to one side only what the complainer does to both. That I have no doubt is an infringement. It is a similar action to produce a similar result, by swaying the strainer to wash off and remove the refuse that will not pass through. Further, I think that one of the forms which the complainer gives for the working of his swaying vat produces an action practically the same as the respondents, for in one form the strainer has a division across it. The result of that is that each half of the strainer acts in turn as the respondents' does—it sways from the horizontal and back again, having thus just two of the respondents' strainers side by side and working from the same axle. In my opinion the conclusion at which the Lord Ordinary has arrived is right, and I would move your Lordships to affirm his judgment.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court adhered.

Counsel for Complainer—Sol.-Gen. Dickson, Q.C.—Jameson — Burnet. Agents—Skene, Edwards, & Garson. W.S.

Counsel for Respondents—Ure—Wilson. Agent—Lockhart Thomson, S.S.C.

Wednesday, June 9.

SECOND DIVISION.

[Lord Stormonth Darling,
Ordinary.]

CLAVERING, SON, & COMPANY
v. HOPE.

Agent and Principal—Iron Broker—Broker Acting as Principal — Duty of Broker to Establish Priority of Contract between his Client and Sellers—Personal Bar.

A firm of brokers on the Glasgow iron market were instructed by a client to buy certain quantities of iron for him on various dates extending over a period of six months. Subsequent to these instructions they made contracts in each case for the purchase of iron at various prices and in various quantities, sending advice-notes to their clients, the prices stated being the average price paid by the broker for all the lots purchased on behalf of this client and certain other clients giving instructions through him. The brokers ultimately completed all the contracts made by paying the sums due upon them on the dates specified, and obtaining warrants. When the dates for payment in terms of these contracts arrived the client did not take up the iron, but directed it to be carried over. This was done by the brokers entering into contracts with their client (1) to purchase the iron from him at the price of the day for immediate settlement, and (2) to re-sell to him at the same price, plus 3d. per ton as store rent and interest, for settlement in a month. This was the most common and the cheapest way of carrying-over adopted in the Glasgow iron market. Numerous transactions of this kind were carried through by the brokers, who had always a warrant available which they could have given to their client if he had taken up and paid for his iron. In the advice-notes of the original purchases brokerage was charged, but in the carry-over contracts, in which the iron was stated to be "bought from" and "sold to" the client, there was no charge for brokerage. In the correspondence between the parties the brokers frequently referred to themselves as holding their client's iron. The client had been engaged in similar transactions for some years prior to the period covered by the transactions in question. The iron was ultimately sold at a loss, and the broker sued the client for the difference, with interest, store rent, and commission added, less sums paid to account. The client refused payment on the ground that the brokers had acted in contravention of their contract with him, in respect (1) that they had failed to make contracts on which he could sue the original sellers, and (2) that they had acted as

principals in carrying it over.

Held (aff. the judgment of the Lord Ordinary — dub. Lord Trayner) that there had been no breach of the contract of brokerage, and that the brokers were entitled to recover, on the ground (*per* Lord Justice-Clerk and Lord Moncreiff) that the iron had been purchased *bona fide* by the brokers subsequent to and in pursuance of the client's orders, and paid for by them, and, as regards the carry-over contracts, that the client was aware of the method adopted, and (*per* Lord Young) on the additional ground that whatever the form of the transactions, either as regards the original purchases or the carry-over contracts, the pursuers had in substance acted *bona fide* as brokers, and with no possible interest beyond their commissions.

This was an action at the instance of Thomas Clavering, Son, & Company, merchants and iron brokers, Glasgow, against John Alfred Hope, iron merchant, Carlisle, carrying on business at Whitehaven, under the firm of J. A. Hope & Company, of which firm he was the sole partner, against whom arrestments had been used *jurisdictionis fundandæ causa*.

The pursuers concluded for payment of the sum of £551, 8s. 5d., being the balance claimed by them as due on an account by him to them as brokers acting for him in a series of speculative transactions in the Glasgow iron market between 26th August 1895 and 20th May 1896.

The employment by the defender of the pursuers as brokers was admitted by him, and the accuracy of the figures in the account sued for was not disputed.

The defence was based upon the allegation that the pursuers, in breach of their duty as brokers, had failed to make contracts for the defender with third parties for the precise amounts ordered by him upon which he could sue such third parties, and that without authority they had acted as principals in their dealings with the defender.

The pursuers pleaded—" (1) The defender being due and resting-owing to the pursuers in the sum sued for, decree should be granted as concluded for. (2) The transactions in question having been carried out in accordance with the agreement between the parties and the custom of the Glasgow market, the pursuers are entitled to decree as concluded for. (3) The said transactions having been carried out in accordance with a course of dealing and custom of trade well known and acquiesced in by the defender, he is barred from challenging the same."

The defender pleaded—" (3) The defender not being due and resting-owing to the pursuers in the sum sued for, should be assolized. (4) The transactions covered by the account sued on not having been in fact entered into, or at all events not being such as the defender could have enforced against any third parties, the defender should be assolized. (5) The account sued on being overcharged, and not being a true account as between broker and principal

according to the agreement between the parties, the defender is entitled to absolvitor. (7) The alleged custom of the Glasgow market is invalid and ineffectual to change the relation between the parties, and is not in any event binding on the defender."

By interlocutor dated 23rd October 1896 a proof was allowed by which the following facts were established—

Prior to the period covered by the account sued for the parties to the present action had had a series of transactions extending over a period of years, for the purchase and sale of iron, from which the defender had derived considerable profit. He explained that he had formerly been a "bear," or seller for a fall, whereas in the series of transactions now in question he was a "bull," or buyer for a rise.

The terms on which the business was to be done in the series of transactions covered by the account sued for were contained in the following letter from the pursuers to the defender dated 26th August 1895:—" We have bought for you to-day 1000 tons W.C. Hematite pig-iron at 46s. 8d. cash in one month. It is understood you are to pay us in cash on this and other purchases 1s. per ton margin; this margin always to be kept up, otherwise we retain to ourselves the right of closing out the iron at will. We allow you a return commission of one-eighth per cent. on this, and also upon all orders you may send from others, subject to our approval and upon the same being properly carried out—that is to say, we charge for buying and selling 10s. per cent., returning you 2s. 6d. per cent.; this, however, does not apply to the carrying over from month to month of the iron, but the percentage does not affect the above arrangement.—Yours truly, THOS. CLAVERING, SON, & Co. This agreement only holds on the conditions being carried out. Hematite closes firm, 46s. 10½d. month."

During the period in question the pursuers made in all eleven original purchases of iron for the defender.

The particulars of these purchases were as follows:—

(1) On 26th August 1895 the pursuers bought for the defender 1000 tons of iron. This quantity they obtained by buying 500 tons from John Fullarton, and 1000 tons from James Dick. From Fullarton they bought at 46s. 7d. per ton, and from Dick at 46/9½d. 500 tons of what was bought from Dick was allotted to the defender, and 500 to a Mr Eadon, another client of the pursuers, who had been introduced to them by the defender. The contracts with Fullarton and Dick were in the following form:—" Sold to Messrs T. Clavering, Son, & Company, one thousand tons W. C. Hematite pig-iron, Nos. 1, 2, and 3, G.M.B. at (the price was here inserted) sterling per ton. Payment nett cash here on 26th September (or sooner in buyer's option on giving three days' notice), against store-keepers' warrants for the iron f.o.b. usual shipping ports."

After making these contracts the pursuer sent to the defender the following advice-note:—" Bought for Messrs J. A.

Hope & Company One thousand (1000) tons of G.M.B. West Coast Bessemer Hematite pig-iron, Nos. 1, 2, and 3 in equal quantities at 43/8 (*Forty-six shillings and eightpence stg.*) sterling per ton nett. Cash here on the 26th September (or sooner in buyer's option on giving 3 days' notice) against storekeepers' warrants for the iron f.o.b. usual ports. $\frac{1}{4}$ per cent. brokerage. Sellers—*Jno. Fullarton*, 500 tons. *Jas. Dick*, 500 tons." Upon this advice-note the following note was printed:—"This contract is made subject to the rules and usages of the Scotch Pig-Iron Trade Association."

It was explained that the price of 46s. 8d. was arrived at by averaging the prices of all the iron bought on this day for the defender and Mr Eadon, viz., 500 tons at 46s. 7d., 1000 at 46s. 9 $\frac{1}{2}$ d.

(2) On 29th August the pursuers bought 1000 tons of iron for the defender, 500 tons from T. Bost at 47s. 4 $\frac{1}{2}$ d., and 500 tons from Whitson & Company also at 47s. 4 $\frac{1}{2}$ d., advising the defender on the same day of a purchase for him of a 1000 tons at 47s. 4 $\frac{1}{2}$ d. The contracts with the sellers and the advice-note were in similar terms to those quoted above, but in the advice-note no names of sellers were given.

(3) On 2nd September they bought 1000 tons for defender from W. Maclaren Walker at 49s. 2d., the contract being in the usual form, and sent an advice-note as above, saying they had bought that amount at that price, but not specifying the name of their seller.

(4) On 4th September they bought 1000 tons, 500 from John Crawford & Company at 49s. 1 $\frac{1}{2}$ d., and 500 from Neilson Brothers at 49s. 2d., the contracts being in the usual form, and they sent the defender an advice-note as above, stating the price at which they had bought for him as 49s. 1 $\frac{1}{2}$ d., and giving the names of their sellers and also the price at which they had bought from them.

(5) On 6th September they bought 1000 tons for the defender, and sent him an advice-note as above notifying a purchase of 1000 tons at 50/9d, and giving the names of their sellers as "Sanders & Company, 500 at 50s. 6d. J. Crawford & Company, 500 at 51s." Their contract with Sanders & Company, which was in the usual form, was for 2000 tons at 50s. 5d., and their contract with J. Crawford & Company, which was also in usual form, was for 1000 tons at 51s.

(6) On 6th September they also bought another 1000 tons, which was advised on an advice-note at 50s. 4 $\frac{1}{2}$ d., the sellers' names being given thus—"500 at 4 $\frac{1}{2}$ d., A. DAVIS. 500 at 5, J. B. HERBERTSON." The pursuers' contract with Davis was one in usual form for 1000 tons at 50s. 4 $\frac{1}{2}$ d., and their contract with Herbertson was one in usual form for 1000 tons at 50s. 5d.

On 6th September they also bought for Mr Eadon 1000 tons at 50s. 4 $\frac{1}{2}$ d., 500 at 50s. 5d., 500 at 50s. 6d., and 500 at 51s. Of this date the pursuers wrote to the defender—"We received your wire this morning to buy 2500 Eadon and 2000 tons self, month at best. . . . "We bought for you 500 tons at 50s. 4 $\frac{1}{2}$ d. and 500 at 50s. 5d. month, and for Mr Eadon 1000 at

50s. 4 $\frac{1}{2}$ d. and 500 at 50s. 5d. We could not manage more. We wired you we were retaining and hoped to do better in the afternoon, at all events we will do our very best. Afternoon market opened very excited and irregular, and a perfect scramble for Hematite. We succeeded in buying for you 500 at 50s. 6d., and 500 at 51s. one month, and for Mr Eadon 500 at 50s. 6d. and 500 at 51s. cash, and 50s. 4d., 50s. 3d., 50s. 6d., 51s. 3d., 51s. one month. About 70,000 iron changed hands during the day."

(7) On 10th September they bought 500 tons. The advice-note was in common form, and stated the price at 50s. 8 $\frac{1}{2}$ d. It did not give the name of their seller. The pursuers on that date bought 1000 tons from C. E. Panton at 50s. 8 $\frac{1}{2}$ d., and on 10th September they also bought 500 tons at 50s. 8 $\frac{1}{2}$ d. for Mr Gawne, a client introduced by the defender.

(8) On 25th November they bought 500 tons, the advice-note being in common form. It stated the price as 47s. 7d., and gave as the seller Arthur Davis. On that date the pursuers made a contract in the usual form with Davis for 500 tons at 47s. 7d.

(9), (10), and (11)—On 3rd February 1896 they bought in all 2000 tons, three advice-notes in common form being sent to the defender advising the purchase of (1) 1000 tons at 48s. 9 $\frac{1}{2}$ d ; (2) 500 tons at 48s. 11d, and (3) 500 tons at 48s. 11 $\frac{1}{2}$ d., no sellers' names being stated. On this date the pursuers made contracts (1) with John Hannay for the purchase of 500 tons at 48s. 9d (payment cash in twenty-one days instead of a month as usual); (2) with William Jacks & Company for the purchase of 500 tons at 48s. 9 $\frac{1}{2}$ d.; (3) with J. & A. M'Morland for the purchase of 500 tons at 48s. 10d. (payment to be cash on 14th February instead of in a month as usual); and (4) with Arthur Davis for the purchase of 500 tons at 48s. 10 $\frac{1}{2}$ d. It was explained that one half-penny and one penny per ton respectively were added to the prices in (1) and (2) in respect of the difference between the prices for payment in twenty-one and eleven days respectively, and the prices for payment in one month as due by the defender.

The sums due by the pursuers to these various sellers on the contracts above specified were actually paid to them, and the receipts were produced in process.

All the contracts with other brokers referred to above were made by the pursuers with the other brokers as principals, no clients' names being given.

On 25th September the pursuers, in default of instructions from the defender to take up the iron bought for him on 26th August, had to carry it over. The way in which they did this was that they paid the brokers from whom they had bought for the defender on 26th August out of their own pockets, and sold it to him at the market price of the day with threepence per ton in addition as interest, storage rent, and a very small amount as remuneration for trouble to themselves for settlement in a month. They sent to the defender the two following contract-notes—"C/o.—141 Buchanan Street, Glas-

gow, 25th September 1895.—*Bot. from Messrs J. A. Hope & Co., One thousand tons of g.m.b. West Coast Bessemer Hematite Pig Iron Nos. 1, 2, and 3 in equal quantities at 49/3 (Forty-nine and threepence) sterling per ton nett. Cash here to-day (or sooner in option on giving days' notice) against storekeepers' warrants for the iron f.o.b. usual shipping ports.*" "C/o.—141 Buchanan Street, Glasgow, 25th September 1895.—*Sold to Messrs J. A. Hope & Co., One thousand tons of g.m.b. West Coast Bessemer Hematite Pig Iron Nos. 1, 2, and 3 in equal quantities at 49/6 (Forty-nine shillings and sixpence) sterling per ton nett. Cash here on the 25th October (or sooner in buyers' option on giving 3 days' notice) against storekeepers' warrants for the iron f.o.b. usual shipping ports.*" On each contract appeared the following note:—"This contract is made subject to the rules and usages of the Scotch Pig-Iron Trade Association." No brokerage commission was charged in carry-overs.

The pursuers carried over iron for the defender on sundry subsequent occasions, and always in the same way as described above.

With reference to this method of carrying-over, Mr Wilson, the secretary of the Iron Trade Association, deponed—"When a contract is entered into the buyer comes under an obligation to take delivery of a certain quantity of iron on a certain day, and when that day arrives that quantity of iron must be taken delivery of in some way or other and the money found for it. When a broker receives from his client instructions to carry over his stocks, there are several ways in which the order may be fulfilled. The broker may ask another member of the association on what terms he will take up 500 tons of iron and hold it for a month; or, as I do very often, he may pay for the iron himself and hold it for his client for the month. In that case the broker becomes a principal as with his own client. My invariable habit is to carry over in that way—I am never a broker in continuations. That method is quite common on the Exchange, but not invariable. If the client has a good and substantial broker to deal with, that method of carrying over is more beneficial to him than the other; but if the broker is weak the client would not want him as principal. It entirely depends on the standing of the broker. If the broker is in a good position, that method is the cheaper and safer for the client. I have been desired by clients not to act as a broker in such transactions, because it relieves them from responsibility. If a client of mine has iron due within, say two days, I ask for instructions regarding it—whether he is to pay for the iron himself and take up his warrant, whether he is to sell the iron as against the due date, or whether he is still to keep possession by continuing it. When the latter method is adopted, the term we apply to the transaction is carry-over, the client retaining the iron that is now due in order that he may have it for the future at his disposal. When a client asks me to have iron con-

tinued or carried-over, I generally find the money for it either out of funds in my possession, if I happen to have as much, or my banker is behind me to advance me money to a certain extent against the warrant, and I send my client a carry-over note buying the iron from him at the settlement price of the day on which his lot is due, and re-selling it at the higher price, the difference between the two prices representing the interest on the money value of the iron and the store rent chargeable for the month."

If the pursuers had effected the carry-overs by going into the market as brokers and getting it done by other people, they would have been entitled to one-eighth per cent. brokerage, and this method would have been more expensive for the defender than the method described above and adopted by the pursuers.

The defender deponed that his objection to the pursuers' method both of purchasing and carrying over for him was that it prevented him getting the advantage of a sudden scarcity of iron by calling up the iron on three days' notice, as provided for in the customary form of contract, and so getting "backwardation," *i.e.*, a sum paid by the seller for failure to deliver the iron; that in the case of the carry-over contracts the pursuers being sellers to him would have an interest not to advise him to call up the iron, which was contrary to their duty as brokers; and that as buyers in the original contracts they could have called up the iron and put the "backwardation" in their own pockets.

The pursuers' senior partner deponed that they had always warrants available opposite all the purchases for the defender, but that they did not keep a specific warrant for him as he did not pay cash for it, but that if he had paid cash he could always have got a warrant. There was no contrary evidence on this point.

A carry-over contract in the same form as those now in question was produced dated 4th July 1895.

The iron bought for the defender was sold again for him by the pursuers—1000 tons on November 12th 1895, at 47s. 8d.; 500 tons on May 13th 1896, at 47s. 1d.; 5000 tons on the same day, at 47s. 1½d.; and 2500 tons on May 18th, at 47s. 1d.

A correspondence between the parties was produced, and in letters from the pursuers to the defender the following expressions were referred to regarding the question of notice to the defender as to the method of carrying over adopted by the pursuers:—24th September 1895—"Please send us £150 to keep up the margin." 30th September 1895—"It is quite impossible for us to go on holding your iron. You must either pay us the margin in a proper way or we shall most certainly sell." 2nd October 1895—"We will be glad to receive a cheque from you of £150 to keep up the margin as agreed upon." 14th October 1895—"We enclose account showing how you stand, and we shall be glad of a cheque to bring us up to the point agreed upon, for with our small commission we cannot

afford to run risks." 14th October 1895—"We send you an account showing £426, 6s. 2d.; this is keeping the agreed-on margin of 1s. per ton and differences due. We hope you will send us this amount as we cannot hold on to the iron and take the risk of the market." 19th October 1895—"If it is not convenient for you to keep up this small margin, we must either sell the iron or ask you to relieve us of it." 22nd October—"We now wish to state to you firmly, unless full cover is sent us according to agreement, we shall take what opportunity offers to us of realising the iron." 30th October 1895—"It is quite impossible for us to go on holding your iron. You must either pay us the margin in a proper way or we shall most certainly sell." 6th November 1895—"We quite agree with your remarks that if holders would take up their iron and keep it, it would, we think, pay them in the long run, but as example is better than precept, should you not do this yourselves, and thus begin by helping the market." 9th November 1895—"Unless a remittance is sent, and the margin kept up as you agreed we must sell your iron." 13th November 1895—"We cannot lie out of cash for other people's speculations." 30th December 1895—"It is not right of you to withhold our money, and if you persist in it, there will be nothing left for us but to close out your iron."

On 12th February 1886 the defender wrote to the pursuers—"Also I notice you charge 3d per ton for carrying over the 500 tons on the 10th inst., whereas the carry-over rate was only 2½d." To this the pursuers replied on 13th February—"We should be quite glad to charge you 2½d. if you allow us 1/8th per cent. commission for the carry-over."

On 1st July 1896 the defender wrote to the pursuers—"I want to know the nett cost paid by you on my account for carrying the iron over;" and on 8th July—"What I require from you is a full detailed statement of the amounts paid by you on my behalf, first, when you purchased the iron, and second, on each carry-over, and when and to whom paid."

The defender deponed that he did not scrutinise the documents in connection with the carry-over contracts carefully; that he did not notice the difference between the terms of the bought-and-sold notes sent him in connection with the carry-overs and the advice-notes sent in connection with the original purchases; that he did not infer from it that in carry-overs the pursuers were acting as principals; that all he attended to was to see whether the price was correct; that he did not notice that no brokerage was charged in carry-overs till May 1896, and that when he did notice it he instructed the pursuers to charge commission.

Glasgow is the only place where there is a regular market for dealing in iron warrants. The market meets in the Glasgow Royal Exchange, and strangers are not admitted, no one being allowed to buy or sell iron there except members of the Scotch Pig-Iron Trade Association, which is a private body con-

trolled by rules of its own making. Every day is a settling-day except Saturday and Sunday. According to the rules and practice of the association, members always contract with one another as principals, whether they are in fact dealing for themselves or as brokers for clients.

The rules of the Scotch Pig-Iron Trade Association, *inter alia*, provide as follows:—"16 (a) When a member buys from or sells to another member, and the names of constituent (if any) are not given up by the one to the other, the members shall, be personally liable to each other for the due implement of their transactions; but in the case of a member acting as a broker, either buying from or selling to another member, and giving up the latter's name to his constituent or principal, such broker shall be relieved of responsibility to said constituent or principal for the due implement of the particular transaction. 16 (b) The responsibility of constituents or principals the one to the other for completion of transactions made on their account by members can only be secured or obtained by the giving up on both sides of the names of principals when the contract notes are sent, and if this is not done, the members and also principals or constituents shall forfeit any remedy which otherwise they might have had."

There is no rule with reference to brokers acting as principals in carry-over transactions for their clients.

On 16th February 1897 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"The Lord Ordinary having considered the closed record, proof, and productions, repels the defences: Decerns against the defender in terms of the conclusions of the summons: Finds the pursuer entitled to expenses." &c.

Opinion.—"This is an action by a firm of iron brokers in Glasgow for the balance of an account said to be due to them by the defender on a series of speculative transactions in the Glasgow iron market between 26th August 1895 and 20th May 1896. The employment is admitted by the defender, and the accuracy of the figures is not disputed. But the main defence is that the pursuers, while professing to act as the defender's brokers, committed a breach of their employment by contracting with him as principals.

"The parties were not strangers to each other in August 1895. They had had other transactions extending over a period of years, for the purchase and sale of iron, from which the defender had derived considerable profit.

"The terms on which the business was to be done in this particular series of transactions are contained in the letter set out in cond. 1 (dated 26th August 1895, and quoted above). It was contemplated that there should or might be a carrying-over of the iron from month to month, but the precise mode of doing so was not prescribed, except that the return commission of 1/8th per cent. payable by the pursuers was not to apply to it. An attempt was made by the defender to show that the return commission was to be larger, but in face of the

correspondence, and the accounts rendered to him from time to time, the attempt entirely failed.

“The first purchase of iron was made on 26th August 1895. It consisted of 1000 tons at 46s. 8d. deliverable in a month. The sellers were disclosed on the face of the advice-note sent to the defender—Fullerton for 500 tons and Dick for 500 tons. Contracts are produced for these purchases, from which it appears that on the same day the pursuers bought 1000 tons from Fullerton at 46s. 7d., and 500 from Dick at 46s. 9½d. The extra 500 tons thus bought were allocated to Mr Eadon, whose order was forwarded by the defender along with his own, the whole truly forming one order, and the price charged against the defender was within a fraction of the proper average of the prices in the contracts with Fullerton and Dick. When the month was about to expire, the pursuers, in default of instructions from the defender to take up the iron, had to carry it over, and it is as to their mode of doing so that the chief question arises. What they did was to pay out of their own pockets the price of the iron which the defender had bought, and to send him two advice-notes marked c/o (*i.e.*, carry-over), and dated 25th September 1895, one bearing that 1000 tons were bought from the defender by the pursuers at 49s. 3d. (which is admitted to have been the market price of the day) for immediate settlement, and the other bearing that the same quantity was sold to the defender by the pursuers at 49s. 6d. for settlement on 25th October. These c/o notes are Nos. 25 and 26 of process. The 3d. added to the price in the sold-note represent the usual charge of one penny per ton for storage rent, together with interest on the money advanced by the pursuers to pay for the iron which they had bought for the defender on the 26th August.

“The transactions which followed were all more or less of the same nature. In the case of some, when iron was bought for the defender, the advice-note sent to him did not contain the name of the seller, in others it did. In every case there was an actual purchase of iron in the market corresponding to the defender's order. Sometimes the iron so purchased corresponded exactly in quantity to the order, and no averaging of price was required. Of this the order of 29th August is an example. Sometimes the averaging was disclosed on the face of the advice-note sent to the defender. Of this the order of 4th September is an example. But the carrying-over was always done in precisely the same way as on the first occasion, and the pursuers make no disguise of it on record that in the act of carrying-over they contracted as principals with the defender.

“Before I consider whether this circumstance ought to forfeit the pursuers' whole right to remuneration (for to that extent is the defender's argument carried)—I shall deal with the plea that the pursuers failed to establish privity of contract between the defender and the sellers of the iron.

“In so far as this plea is founded merely

on the fact that the defender's name did not appear on the contract-notes with the sellers it is plainly untenable. I know of no absolute and unvarying rule of law that in every kind of market, whatever be its custom, a broker must always from the first disclose the name of the principal for whom he buys. In this market it is the custom (and the defender must have known it perfectly well) for the brokers to deal with one another as principals. There was always iron bought from third parties to meet the defender's orders, and the source from which it was to come was either mentioned in the advice-notes sent to him or it was entered in the pursuer's books. If he had desired to obtain the information with a view to taking up the iron (which he never did), he could have got it at any time. The occasion never arose for disclosing his name, but at the lowest he had, as against the sellers, all the rights of an undisclosed principal, and these would have been subject to no qualification except that the sellers would have had as against him all the rights and equities which they would have had as against the pursuers.

“A certain amount of colour is given to the argument by the fact that in a few cases the prices were averaged so that the price in the defender's advice-notes did not precisely correspond with the price at which any one seller had agreed to sell. Of course, if the defender ever required to proceed against the sellers, he must have done so at their price, and not at his own. But this would have made either no difference in the result or so little as not to be worth considering. Thus in the defender's advice-note of 4th September the price was stated to be 49s. 1½d., which was disclosed on the face of the note as being the average between one-half of the quantity bought from Crawford & Company at 49s. 11½d., and the other half bought from Neilson Brothers at 49s. 2d. That is an instance where there would have been no difference in the result. In the case of the first purchase on 26th August, to which I have already referred, the defender's accountant was at pains to show that the average in the defender's advice-note ought to have been a fraction over 46s. 7½d. instead of being 46s. 8d., but he frankly admitted that the difference between these figures on 1000 tons would only have been about 10s., and that, I say, is a difference not worth considering. It is to be observed that the defender had ample notice that the system of averaging prices was being adopted in some cases, and this circumstance alone is sufficient to differentiate the case from *Maffett v. Stewart*, 14 R. 506, in which four judges out of seven were of opinion in point of fact that a broker who had adopted an undisclosed system of averaging prices had failed to show that any definite transaction had been entered into solely on the defender's behalf. Indeed, I do not read that case as containing any general doctrine at all.

“I now come to the question whether the pursuer's system of carrying over is enough to vitiate their whole claim. The rule of

law to which the defender here appeals is undoubtedly a salutary one, and I should be sorry to say anything to disparage it. It is that the usage of a particular market is of no avail against a principal who is ignorant of its existence if it really changes the intrinsic character of the contract of agency into which he has entered. The most apposite illustration of the rule is the case of *Robinson v. Mollett*, 7 Eng. and Ir. App. Cas. 802. The circumstances there were, that a merchant in Liverpool instructed a tallow broker in London to buy certain quantities of tallow for him; the broker did not buy the specified quantities from any person, but he proposed to allot these to his client out of larger quantities belonging to himself which he had bought both before and after the date of the order. On this tallow being tendered to the client he at once rejected it. The House of Lords held that this system converted a broker employed to buy into a principal selling for himself, and thereby gave him an interest wholly opposed to his duty.

"The mere statement of the case shows how different are the circumstances with which we have here to deal. The pursuers from time to time had orders from the defender to buy 9000 tons of iron on his behalf, and they bought these quantities from third parties in terms of their employment. Again, they had orders to sell these quantities, and they sold them, with a resulting loss of £791, 14s. 4d. That loss would have been exactly the same whatever mode of carrying-over had been adopted. The pursuers' mode had no doubt the effect of converting them for the time being into principals, but it gave them no interest opposed to their duty, because the only advantage which they gained from it was the uniform rate of 3d. per ton representing storage rent and a moderate sum of interest on the money advanced.

"There was no element in it of the pursuers unloading their own property, or arbitrarily fixing a price for it. The price was a market rate fixed each day by an official of the market. They certainly did not adopt the system from any desire to take advantage of a falling market at the defender's expense, for on 25th September, when the first carry-over was made, prices had risen, and if the defender had sold out then, he would have retired from the field with a profit of about £120.

"There was another mode in which the process of carrying-over might have been accomplished. The pursuers might have got the original sellers or other persons in the market to take up the iron, in which case they themselves would have been entitled to charge a commission of 1/8th per cent., but state No. 246 of process, and the evidence of Mr Wilson, the secretary of the Iron Trade Association, show that this mode would have been more expensive to the defender than the mode adopted. The evidence of Mr Wilson also shows that the mode adopted is well-known in the market; it is that which he himself invariably follows. I think the pursuers have succeeded in proving that it is usual and reasonable, and the

only kind of criticism upon it which the defender made in his evidence was that it might have enabled the pursuers to do things which nobody says they did, and might have prevented the defender from doing things which he never attempted to do.

"But it seems to me that the conclusive answer to the defender's argument is that he had ample notice of the pursuers' mode of carrying-over, and did not object to it at the time. He was no novice either as a 'bull' or as a 'bear' in the iron market, and his protestations of ignorance do not impress me favourably.

"The member of the pursuers' firm who was examined says that the very same system was followed in their former dealings with the defender, and Nos. 154 and 155 of process (dated 4th July 1895) bear out his statement, for these are bought-and-sold notes in exactly the same terms as those sent to the defender after 26th August 1895. Even if there had been no prior course of dealing, the terms of the notes were, I think, a plain announcement that the pursuers had themselves taken up the iron. They bore that the iron was bought from and sold to the defender by the pursuers, and they contained no charge for commission. Moreover, the pursuers' letter of 30th September said distinctly, 'It is quite impossible for us to go on holding your iron,' and there were subsequent letters to the same effect. It is a mere play upon words to say that any differences went into the pursuers' pocket. Inasmuch as they had paid for the iron which the defender had bought, they were, of course, entitled to be recouped, and for that purpose to take not merely the prices which were paid when the iron was ultimately sold on the defender's order, but to recover from him the amount by which the latter prices fell short of the former. That was merely reimbursement, not profit. The only sums which in any proper sense went into the pursuers' pocket were the commissions which were due on the original purchase and the ultimate sales, plus the carry-over charge of 3d. per ton representing storage rent and interest; and the latter charge or its equivalent would have been payable to any person who advanced the price and took up the iron.

"Even if the case had been one of an isolated transaction, and the defence had been stated at once, it would have been stated in much less favourable circumstances than the defence in *Robinson v. Mollett*. But to sustain it after a course of dealing extending over years, and in circumstances which (in my opinion) clearly point to knowledge on the part of the defender, would be to pervert a salutary rule of law to uses to which it was never intended. I shall therefore repel the defences, and give decree as concluded for with expenses."

The defender reclaimed, and argued—The pursuers here sued as brokers, whereas throughout the whole series of transactions they never acted properly in that capacity, and they were therefore not entitled to recover—*Maffett v. Stewart*, March 4, 1887,

14 R. 506; *Gillies v. M'Lean*, October 16, 1885, 13 R. 12; *Robinson v. Mollett* (1875), L.R., 7 E. & I. App. 802—(1) As regards the original purchases (a) It was the duty of a broker to make contracts for his principal in his principal's name. In no case had this been done, and the failure to do so was a breach of the contract of brokerage. Rule 16 (b) showed that giving up principals' names was quite in accordance with the rules of the association. (b) It was at least the broker's duty to establish privity of contract between his principal and some third party—*Maffett, cit.* (per Lord Shand) at pp. 519-20 and 522; *Gillies, cit.*; *Robinson, cit.*; so that at any rate he might have the rights of an undisclosed principal against such third party. No such privity of contract had been established here. The defender could not have compelled a broker who sold 1000 tons at 46s. 9½d., as in purchase No. 1, to deliver to him 500 tons at 46s. 8d. It was a breach of the contract of brokerage to buy iron in various amounts and at various prices and then to allocate it among various clients at an average price—*Maffett, cit.* It was not even alleged here that there was any custom of trade altering the ordinary rules of law as regards the original purchases. The pursuers, therefore, having failed to carry out the contract of brokerage in a legal manner, were not entitled to sue on that contract. (2) As regards the carry-overs, it was admitted that the pursuers acted as principals and not as brokers in carry-overs. They were not entitled, without the defender's authority to change their relation to him in that way. Instructions to carry over meant to carry over as broker—*Maffett, cit.* (per Lord Shand at p. 524). No usage of trade could alter the essentials of a contract or entitle a broker to act as a principal in dealing with his client, unless the client knew of and acquiesced in his broker so acting—*Robinson, cit.* If brokers in a particular market imagined they were entitled to deal with their clients as principals, that was simply a misunderstanding as to the law in regard to the matter on the part of such brokers, and in no way made a custom of trade binding upon their clients—*Anderson v. M'Call*, June 1, 1866, 4 Macph. 765, per L.J.-C. Inglis at p. 769. Moreover, here no general usage of brokers acting as principals in carry-overs was proved. It was quite common on this market for brokers to arrange carry-overs for clients with the original seller, or with third parties in the open market, acting strictly as brokers throughout, and this was the way in which the pursuers should have effected the continuations here, unless they had authority from the defender to do otherwise. This was not a mere matter of form. In the event of a scarcity of warrants, and a consequent "squeeze," it was the interest of a buyer to call up his iron on three days' notice, as provided for in the contracts, and in the event of the seller being unable to deliver, to get payment of "backwardation" from him in respect of such failure. It was the duty of a broker to advise his client to call up his iron in this way when-

ever there was a favourable opportunity, but by becoming a seller to his client the broker gave himself an interest contrary to this duty. It was not proved that the pursuers had a warrant always ready to meet their obligations to the defender, or that they could have got one without buying in the market. This was a serious breach of contract on their part. They were in a fiduciary position, and they were not entitled to do anything which might give them an interest adverse to their duty. If they did so, injury to the person to whom they had such a duty did not need to be proved but was presumed—*Huntington Copper Company v. Henderson*, January 12, 1877, 4 R. 294 (per Lord Young, Ordinary, at page 299). It was not established here that the defender knew of and acquiesced in the way in which his iron was being carried over by the pursuers. The form of the carry-over contracts was not sufficient notice—*Re W. Wreford, deceased*, January 15, 1897, 13 T.L.R. 153. Neither was the absence of a note of the brokerage charge on carry-overs enough to bring knowledge home to him. It might well be supposed to be due to the fact that there was a dispute between the parties on the question of brokerage. The correspondence was at least quite consistent with the supposition that the pursuers were acting properly as brokers, and were merely threatening to exercise the broker's right to sell out his client's goods to save himself from loss. The defender naturally read the correspondence in the way most consistent with this supposition, and was entitled to assume that they were not acting as principals in breach of their obligations to him. At best the fact that the pursuers were acting as principals could perhaps be inferred or surmised from a variety of more or less ambiguous indications, but this was quite insufficient to support the pursuers' contention, as nothing short of a plain agreement to that effect would entitle them to alter the essential character of their contract with the defender. No such agreement could even be suggested in the present case.

Argued for the pursuers—The defender's case must amount to this, that the pursuers, instead of carrying out the contract of brokerage into which they had entered, had been throughout speculating on their own account. In the circumstances disclosed in evidence that contention was absurd. The pursuers had bought iron on, and subsequent to, the instructions of the defender; they had subsequently paid for that iron; they had carried it over from time to time by his orders; they had had warrants always available to supply him if he had paid cash, and they had finally sold the iron for less than was paid for it. The sum sued for was simply the difference between the price paid by them for the iron, and the price ultimately realised by the sale of it, with the addition of commission, storage charges, and interest, and less sums paid to account. The reason of the rule which was said to apply was absent in the present case, for the pursuers' sole inte-

rest in these transactions was their commission, and they had absolutely no adverse interest to their clients. This case was not ruled by the cases cited. In *Gillies, cit.*, the ground of decision was that the broker had failed to enter into real transactions for his principal. That ground of judgment was absent here. In fact everything which was desiderated in that case was proved to have been done by the pursuers. In *Maffett, cit.*, there was (1) stock bought to satisfy the principal's order; and (2) no appropriation of the stock to particular clients; and (3) at the date of the final sale the broker was not holding, and could not therefore sell all the stock, with loss on which he proposed to charge his client. In this case all these grounds of judgment were absent. In *Robinson, cit.*, part of the tallow from which the broker proposed to supply his order had been purchased by him before he received the order from his principal. In all these cases therefore there were grounds of judgment which were not found in the present case. (1) As regards the original purchases of iron—Iron, in the quantities ordered by the defender, was bought for him subsequent to and in pursuance of his orders at the prices authorised, and contracts made for it which he could enforce. The pursuers were not concerned to dispute that if they had been disburdening themselves of iron previously purchased by them they would have had no case, but it was quite otherwise here. The selling broker in a market where contracts were made by brokers really as brokers, but as principals *inter se*, would have been bound to deliver half to the buying broker's principal when disclosed, and half to the broker himself failing his providing a solvent principal. In this case averaging was justified because the quantities arranged were all bought for the defender or for clients introduced by him. The small discrepancies in prices were all explained. But further, the defenders' whole argument was based upon a misconception as to the purpose and effect of an advice-note. An advice-note was not a contract. It was a notification of the result of contracts made. The contracts made for the defender were those made with other brokers and produced. The information conveyed in the advice-notes sent to the defender was perfectly accurate. If it had not been accurate, that might have given a basis for an action on the ground of misrepresentation. But no such case was suggested, and an advice-note could not be attacked upon any other ground. (2) As to the carry-over contracts—There was no particular way of carrying-over ordained by law. It was not a matter of law, but of mercantile usage. It necessarily involved purchase and sale. It could be done, either (1st) with the original seller, (2nd) with third parties, or (3rd) by the broker himself. The third was the commonest way on this market, and the cheapest and most convenient for the client. If no other person on the market was willing to take up the iron, the broker by the rules of the association would be bound to take it up himself, and

if the client in such a case desired a carry-over, the third method would necessarily be adopted. It would be absurd to say that in such circumstances the broker would forfeit all his rights under his contract of brokerage. If a person directed a carry-over to be effected in a particular market, he could not repudiate the transaction if the carry-over was negotiated in a way which was usual on that market. As to the argument about the broker's adverse interest in the event of a 'squeeze,' it was mere speculation, and at any rate had no application in this case, because the broker had always warrants available to meet the call. But apart from this the defender knew of the way in which the carry-overs were being effected. The form of the contracts was sufficient notice to him. In *Wreford, cit.*, there was only one transaction, whereas here there were many. The correspondence and the absence of any brokerage charge on the contracts must have brought home to him that the brokers were acting as principals in carry-overs. It could not be taken from him that he never read the documents sent him. Moreover, he had had a long and intimate acquaintance with the methods of doing business in the Glasgow iron market.

At advising—

LORD JUSTICE-CLERK—The defender, who has been in use for a considerable time to engage in speculations in the Scottish iron market, employed the pursuers as brokers to buy certain quantities of iron, partly for himself and partly for others named by him to them. These purchases he directed from time to time to be carried over from one settling-day to another. The pursuers being unable to obtain a settlement with the defender for their claims against him, have raised this action. The defender pleads that they are not entitled to decree against him, and this upon two grounds—(1) that they did not make purchases for him at the prices stated, and (2) that they did not continue in the character in which he employed them, but became truly principals in the transactions, which was contrary to their duty under his contract with them as brokers.

As regards the first of these contentions, the course of procedure seems to have been this—The pursuers having received the defender's order to buy a certain quantity of iron for himself and a certain quantity for a friend, went into the market and purchased such lots as they found offered. They then struck an average of the prices at which they had been able to obtain the iron, and charged the defender with the price so ascertained. It is therefore true that the price so notified to him did not always exactly correspond with the price at which any individual lot was bought, but, on the other hand, they did charge him with the proportion of the whole lumped price applicable to the quantity he had desired them to purchase for him. The question is whether that was a proceeding of which the defender can complain as being a wrong done to him in breach of the

pursuers' duty as brokers. I am unable to see any ground for so holding. If the brokers' clients, whoever they might be, sent to him a number of orders which reached him at one time, and he went into the market to buy, and could only get the quantities required by making several purchases, some of which were at different prices from others owing to the rapid fluctuations of the market, it is difficult to see how he could act fairly by his clients otherwise than by putting together the prices of the whole and charging each with his proportion applicable to the quantity he ordered. That was truly the price at which he obtained the goods, for it could hardly be said that the first lot he obtained was to go to the client whose order, by the accident of his picking up a particular letter first from his desk, came first before him, to the detriment of other clients whose instructions had reached him by the same post. In this particular case, where the defender ordered a purchase for himself and others, the actual orders were simultaneous, and accordingly I can see nothing but what was fair and right in this mode of stating the purchases, and nothing to exclude the pursuers from maintaining their claim on the employment of them by the defender to make the purchases which they did.

The defender maintains that the course which the pursuers followed placed him in the position that he had no contracts made for him by them that he could have enforced—that the contracts of which they professed to give him notice by the advice-notes bore to be for prices not the same as those at which they made the contracts. This certainly is so. It is conceivable that in certain contingencies the defender, if he had required to work out his purchases from the sellers himself, might have had to pay in some cases more than the price at which the pursuers notified him of the purchases, the difference arising from the mode of averaging which they adopted. If it were necessary in the circumstances of this case to deal with any such question, it would, I think, be not unattended with difficulty. If any question had arisen of the enforcement by the defender of contracts entered into by the pursuers for him, I am not prepared to say that there might not have been serious questions not easy of solution. But here in actual fact no such questions did arise. The ventures into which the defender entered through the pursuers were worked out, the defender being unable to show that any prejudice resulted to him from anything that was done in their initiation. The course which the pursuers took was in every way an equitable and a just one, and the working of the transactions out having taken place without any difficulty such as is suggested having assumed shape, I am unable to see ground for holding that the defender is entitled to throw upon the pursuers loss incurred in carrying on his business, they all through acting in an open and straightforward manner, which in no way tended to cause loss or to increase loss in the

speculations ordered by him to be entered into and carried on from time to time with his knowledge, and without any objection.

But, secondly, it is said that the pursuers cannot maintain their claim because of the course they took in carrying-over transactions which the defender was not prepared to settle at the proper settling time. The mode in which they proceeded is shown in the documents produced. These were—[his Lordship read the carry-over bought-and-sold notes quoted above]. These documents are most plain upon the face of them, and I am unable to accept the view that they were not perfectly understood by the defender. The transaction is plain enough. The pursuers buy at the price at which the defender bought, and sell to him for a settlement on a later date at a price 3d. per ton higher than the old price. This sum of 3d. being divisible into 1d. for storage rent for the time, and 2d. for interest on money. And the pursuers in their letters to the defender following on these bought-and-sold notes, refer again and again to their holding the iron as the defender's iron. "We cannot continue to hold your iron," they say, time after time. I agree with the Lord Ordinary in thinking that it cannot be taken off the defender's hands that he did not understand and acquiesce in this mode of dealing with his business, which is proved to be a mode usual in practice, and which could not prejudice the defender. Indeed, it appears that it worked out more cheaply to him than another mode would have done.

I do not lay weight on the evidence that this is a mode of working out carrying-over transactions which is customary in the association of which the pursuers are members. For although it is the fact that the documents upon the face of them bore that the transactions were "subject to the rules and usages of the Scotch Pig Iron Trade Association," the defenders may not be bound by the procedure of that association to submit to anything that would truly change the character of the agency-contract undertaken by the pursuers.

I accept to the full the principle that a broker is not entitled to allocate goods belonging to himself as fulfilment of his instructions to buy for his client in the market. But that is not the nature of the proceeding here. The pursuers in the first instance made the purchases from principals, and notified these purchases as the fulfilment of the defender's orders. It was only when settlement was not made by the defender that the course was followed which was disclosed in the bought-and-sold notes to which I have referred. The mode of carry-over brought nothing to the pursuers except the 2d. per ton on each occasion, and this coming in lieu of a business commission was, it appears, more favourable to the defender. And as I have said, it was known to him, and, I hold, acquiesced in by him.

I think that the pursuers have been successful in showing that this is a usual and accepted mode of dealing with carry-over transactions. The pursuers admit that the

warrants for the iron were lodged with their bank. But if the defender had supplied them with funds to meet any of the purchases, the warrants could have been exchanged for the money, and made over to him. There is nothing in the evidence tending to show that the pursuer had not the iron he had ordered available to him at any time he might come forward with the price and seek delivery. And I think the defender has failed to show any damage that resulted or could result to him from the procedure which was fully disclosed to him, and to which he stated no objection.

I think there is great force in the argument used by Mr Balfour, that a broker in such a case as this might be placed in an enforced position to do as was done here. For if he could not find a buyer for the carry-over on reasonable terms, he might be compelled to pay himself, and so become a buyer. For he had either to pay or find a buyer or take over himself.

The result of my opinion is that I move your Lordships to refuse the reclaiming-note, and to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG—I am of the same opinion, and I concur generally in the note of the Lord Ordinary in which he explains the grounds of his judgment.

I think this is not only an honest claim on the part of the pursuers, but that upon the facts it is a good legal claim, meaning thereby that the legal objections to it are not well founded. I think also that the defence is not well founded in law, and that it is clearly not well-founded in fact, and that on the grounds which the Lord Ordinary and your Lordship have both explained. It is established to my satisfaction, as well as that of the Lord Ordinary and of your Lordship, that the pursuer here never upon any occasion in the conduct of the defender's business acted on his own account for himself, or with a view to his own profit or taking the risk of loss. In everything which he did, although he got occasionally into the position of a principal, he was acting upon employment as a broker, and doing the business of his client as such, and solely with a view to his client's interest, and with no eye to his own. It is matter of certain fact upon the evidence that brokers dealing in this commodity upon the Glasgow Iron Exchange or in the Glasgow iron market act as principals with respect to each other—that is to say, that while they may look to their clients or employers for relief and indemnity, they are bound to each other as principals, and that when one broker buys from another, although the one is buying and the other selling really in the interest and for behoof of third parties who employ them, they stand to each other in the relations of principals who must fulfil their contracts. Now, when the pursuer was instructed as broker to purchase iron for the defender, and he did purchase it, he was under obligation as principal to fulfil that contract. He was ordered to purchase a certain quantity—take the first instance in 1895

of this renewed employment—he was instructed to purchase a certain quantity of iron deliverable in a month. The purchase price was communicated to the defender. I do not deal with the fact of averaging at this moment, but lay that aside. He purchased the goods for the defender, although he was bound as principal to the party from whom he bought, and when the month elapsed it was for the defender, having given instructions in the matter, to provide him with money to take up the iron if he wished to have it. There is nothing to give the least countenance to the suggestion as a possibility—there is nothing to give the least countenance to it as a matter of fact—that had he desired to implement this purchase, and been prepared to send money to his broker to pay for the iron and to take it up, he could not have got it at the market price which was paid for it, and of which he had got notice. But that did not suit him; he did not wish to take it up, and therefore it had to be carried over, but his broker being bound as principal to the seller had to pay for it, although he was not supplied with money by his client to pay for it. He had two courses open to him no doubt. The one was to pay for it himself and hold it for his client for a month, or get somebody else to supply the money, and take it and hold it for his client for a month. It is, according to the evidence, a common way—I rather think it is the most common and the most beneficial way for the client and the broker—that the broker should pay for it with his own money, and hold it over for his client. Well, there is the opportunity to advance the argument—“Ah, then he becomes a principal.” I do not think there was anything wrong in that; I think it was according to his employment that when he was instructed to carry it over, he should do it in a way beneficial to his client. It was certainly as much to his advantage as any other method would have been. In regard to repetitions, it is just the same thing. It is according to the evidence that every repetition of it was upon the most moderate terms which prevailed upon the Iron Exchange at the time. It could not have been done more cheaply for his client and in the interest of his client. With respect to the defender's statement that he did not know, I know nothing about the defender any more than about the pursuer, and I am always sorry to concur in any observation or to make any observation which imputes what is discreditable to anybody, but I must concur in the observation of the Lord Ordinary in his note that “the defender was no novice either as a ‘bull’ or as a ‘bear,’ and his protestations of ignorance do not impress me favourably.” That means in plainer language that the Lord Ordinary did not believe him, and I certainly do not believe him. I think he knew what was being done perfectly well. I marked in the course of the discussion, I think, three passages, and there are others. To turn to the letter dated 30th September 1895—Clavering, Son, & Company to J. A. Hope & Com-

pany—"We have your favour of yesterday's date, and your wires of this morning. It is quite impossible for us to go on holding your iron. You must either pay us the margin in a proper way or we shall certainly sell." That is a pretty distinct intimation that they were holding it. Then the next letter I had marked is dated 14th October 1895, and in it the pursuers say—"We enclose account showing how you stand, and we shall be glad of a cheque to bring us up to the point agreed upon, for with our small commission we cannot afford to run risks." Then in another of the same date they say—"We send you an account showing £462, 6s. 2d. This is keeping the agreed-on margin of 1s. per ton and differences due. We hope you will send us this amount, as we cannot hold on to the iron and take the risk of the market." And in a letter dated 17th October 1895 they say—"We are disappointed at not hearing from you according to your promise when here. We cannot hold the iron unless the margin is paid and kept up. We wired you the price this morning," and so on. Now, it is impossible, I think, to differ from the Lord Ordinary in disregarding the protestations of the defender here that he did not know they were holding on the iron at all, or really had anything to do with it except buying as mere agents or selling as mere agents. I think they were agents, according to the custom of the market, of their client, the defender, in carrying over the speculative operations which he had employed them for, and that he knew thoroughly all that was being done, in his interest, and in his interest alone, and without the pursuers having any eye whatever to speculation for themselves.

As to averaging, I may say that I concur, and do not dwell upon the subject, in the view of the Lord Ordinary. I think when an order is sent by a man, by a friend, or by himself alone, for a certain quantity of iron, it is quite fair and legitimate in the broker to buy it in what he considers the most favourable circumstances, and to the best advantage of his client, and if the prices of different quantities which may not correspond with the exact quantities ordered for any one of them are different, it is altogether legitimate to average these, and to charge two, three, or four clients with the fair average of the prices that have been paid in making the purchases upon their account. That really is the whole case, and I repeat that, in my opinion, it is proved clearly that this is an honest action by honest brokers for a sum due to them for business done by them in the interest of their client alone, and without any reference whatever to themselves except as regards their commission; that the defender knew that, and that the defence upon the technical grounds—for I call them so—which was stated to us is not a defence which any court would willingly support if they could legitimately see their way to do justice to the party who was acting honestly in the matter.

LORD TRAYNER—I think this case is attended with considerable difficulty. I can-

not concur in the views expressed by the Lord Ordinary, but I think the conclusion at which he has arrived is in accordance with the justice of the case.

LORD MONCREIFF—Notwithstanding the able and ingenious argument for the claimer, I agree in thinking that we should affirm the Lord Ordinary's interlocutor. The proof does not disclose that the defender sustained any loss in consequence of the pursuer's operations as his brokers; but this would not avail the pursuers if it were proved that they failed to discharge their duty as brokers and departed from the rules and regulations of the Exchange without the knowledge and consent of their principal. I am satisfied, however, that on all points the defender fails; and first as to the original contracts. The state in Appendix A shows that the contracts in question, ranging from 26th August 1895 to 3rd February 1896, both inclusive, were eleven in number. It is distinctly proved that all these were *bona fide* purchases made by the pursuers on the employment of and for the defender. The defender makes various objections. He says that in some cases he was not given the names of the sellers; that in others the price named to him was an average of two lots purchased by the pursuers; and that the quantities which were represented to have been purchased for him were in some cases only parts of larger quantities purchased by the pursuers. He maintains that in these circumstances he would have had no direct right of action against the sellers, who might have refused to carry out a sale of less than the whole quantity agreed on with the pursuers, or at a different price. If a question had arisen with the original sellers there might have been some practical difficulty in enforcing these sales. But it is sufficient to say that no question ever arose with the original sellers, because the sales were all carried out and the warrants obtained by the pursuers for cash paid on behalf of the defender, and the iron was there if the defender chose to take it up.

As to the practice of averaging, there is evidence to show that the defender was well aware that this was being done. (Compare letter pursuers to defender of 6th September 1895 with contract-notes of same date; and see also contract-note of 4th September 1895.)

In regard to the carrying-over, the defender's objection is that the pursuers acted as principals, and that therefore, according to the authorities, they are not entitled to recover. The pursuers' answer is, that in doing so they acted in accordance with the practice of the Scottish Pig Iron Trade Association, and that the defender was throughout apprised of their position by the terms of the carry-over contracts which the pursuers sent to him. I think that this is borne out by the evidence and the documents. The practice is thus described by the witness Wilson, secretary of the Iron Trade Association—[his Lordship read the passage from Mr Wilson's evidence quoted above].

Now, if it had been shown that this practice was unknown to the defender, and that he was not aware that the pursuers were following it in carrying-over, he might not have been bound, even although no loss was caused, by that system being adopted. The form of the carry-over contracts must have made it quite plain to the defender that the pursuers were acting as principals, because they all bear to be "bought from" and "sold to" Messrs J. A. Hope & Company, and not bought for or sold for them. The pursuers say—and there is no evidence to the contrary—that they had warrants with which they could at any time have implemented the sales had their client desired it.

The facts of the case being as I have stated, it is clearly distinguished from the cases relied on by the defender—*Robinson v. Mollett* and *Maffett v. Stewart & Others*—especially in this respect that here it is proved that the defender was from time to time appraised both in regard to the averaging of prices and the footing on which the contracts were carried over. In agreeing that the Lord Ordinary's judgment should be affirmed I proceed not so much on the complete *bona fides* of the pursuers, which I think has been established, as upon the thorough knowledge which I am satisfied the defender had of the mode in which his interests were being attended to.

The Court adhered.

Counsel for the Pursuers and Respondents—Balfour, Q.C.—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defender and Reclaimer—R. V. Campbell—Clyde. Agents—Drummond & Reid, S.S.C.

Friday, June 18.

FIRST DIVISION.

BROWN'S TRUSTEE v. BROWN.

Minor—Power to Test—Price as Surrogatum of Heritage.

A *curator bonis* during the pupilarity of his ward, and as an act of administration of his estate, sold heritable property belonging to the ward. *Held* that the minor was entitled to test upon the price of the heritage, although if he had died intestate it would have fallen to his heir in heritage.

Mr John Brown, innkeeper, Cross Keys Inn, Perth, died intestate on 5th September 1894, predeceased by his wife and survived by eight children, of whom William, born 7th June 1882, was the eldest son. At the date of his death John Brown was possessed of moveable estate of something less than £200 in value, and of the Cross Keys Inn. William as his father's heir in heritage succeeded to the inn.

On 6th November 1894 Mr William James Wood, accountant, Perth, was appointed

factor *loco tutoris* to William Brown, and for some time after his appointment he carried on the business of innkeeper there by the aid of a servant. He subsequently applied to the Sheriff for authority to sell the inn on the ground of the hazardous nature of the business, the possibility of the forfeiture of the licence, and the resulting loss to the estate. The Accountant of Court having reported favourably on the application, power to sell was granted by the Sheriff, and on 25th March 1895 the inn was sold for the sum of £2140, which was invested partly in heritable securities, and partly in 3 per cent. Canadian Inscribed Stock.

William Brown attained the age of fourteen on 27th June 1896. On 30th July in that year he executed a holograph settlement in the following terms:—"I hereby assign my whole property, in the event of my death, to Andrew Muir, brewer, Perth, as my trustee and executor, in order that he may realise the same and divide it equally among my brothers and sisters who may then be alive.—WILLIAM BROWN, 30th July 1896." Prior to doing so he was informed by his legal adviser that if he died intestate his property might fall to his younger brother, and he thereupon stated his desire that his estate should be divided equally among his brothers and sisters, and executed the above settlement. He had at that time no interest in any other estate than the proceeds of the sale, and was aware that the heritable property had been sold. William Brown died in October 1896 survived by five brothers and sisters.

A special case was presented by (1st) William Brown's executor, and 2nd, his heir-at-law, as to the succession to the proceeds of the sale of heritage.

The contentions of the parties as set out in the case were—"The first party maintains that said free proceeds were moveable estate in the person of the said William Brown at the date of his death, in respect (a) that the sale of said inn was in reality a compulsory one; (b) that the said free proceeds fall to be administered in terms of the settlement of the said William Brown, the said William Brown having approved of and ratified said sale; and (c) that in any event, said proceeds are carried by the deceased's settlement. The second party, on the other hand, maintains that said free proceeds were heritable estate in the person of his brother William Brown at the date of his death; that no part thereof was carried by his settlement, but that said proceeds fall to him as his brother's heir-at-law in heritage."

The questions submitted for the opinion of the Court were—" (1) Are the free proceeds derived from the sale of the said Cross Keys Inn payable to the first party in order that they may be distributed by him in terms of the settlement of the said William Brown? or (2) Do said proceeds now fall to the second party as heir-at-law in heritage of the said deceased William Brown?"

The Court on 18th March 1897 appointed Mr James Adam, advocate, tutor *ad litem*