their libel according to the terms of the first interlocutor complained of.

For Appellant, *W. Adam, John Clerk.*
For Respondents, *W. Grant, Ar. Cullen.*

NOTE.—Unreported in the Court of Session.

ALEXANDER WILKIE, late of Kingston, Jamaica, *Appellant;*
BENJAMIN GREIG of Glasgow, Merchant, *Respondent.*

House of Lords, 1st Dec. 1801.

SALE OF GOODS—FACTOR OR AGENT—FOREIGN MERCHANT.—Circumstances in which it was held, that the purchase of goods by a merchant in Glasgow, for export to a foreign merchant, was such as made the foreign merchant liable to the party from whom the goods were bought; although it was contended that a foreign merchant, who procures goods from a correspondent in this country, to whom he allows a commission, was not so directly liable. Reversed in the House of Lords, and held that the foreign merchant was not liable in the special circumstances of this case.

The appellant, Alexander Wilkie, was a merchant in Kingston, Jamaica; and James Hutchison, merchant in Glasgow, opened a correspondence with him, and proposed to purchase goods in this country, and ship them out to him for sale in Jamaica. At first the transaction assumed this form. Hutchison bought the goods in Glasgow on his own credit; but shipped them out with invoices made out by himself, titled, "Goods shipped per Cecilia, by James March 1792.
"Hutchison, junior, Glasgow, on the account and risk of the
"said James Hutchison, and Alexander Wilkie, Kingston."

In 1793 this mode of transaction was changed, at Hutchison's own request; and, of this date, the appellant wrote May 10 and
in answer, stating, "It has occurred to me to offer you an 11, 1793.
"alteration in the mode of sending the goods as formerly,
"and perhaps it might be more agreeable to you, but, in
"either case, it shall be the same to me, only will save us a
"good deal of trouble. What I mean is, to send out the
"goods on my account, and you to charge a commission
"adequate to your trouble, then I shall have it in my power
"to make you remittances upon the receipt of the goods.

1801.

WILKIE
v.
GREIG.

" If this shall meet your approbation in preference to the " other way, I shall be glad to know upon receipt."

Aug. 5, 1793. In answer, Hutchison wrote, " I have considered your " plan of our doing business in future, and I do think it the " clearest way for me to charge a commission. I have made " inquiry. The commission for goods sent out is five per " cent., and for produce sent home two and a-half per cent. " This I shall charge for all orders. I have no fear but you " will put me in possession of bills or produce, always in " good time, to make good my engagements."

Notwithstanding this arrangement of future transactions, as changed from that of joint adventure, Hutchison purchased goods from several parties in Glasgow, and shipped them off to the appellant, per the ship " Satisfaction." No invoice was sent of these until some time afterwards. And

Jan. 17, 1794. the invoice then sent was in these terms:—" Invoice of " goods shipped on board the " Satisfaction," John Sy- " monds, master, for Jamaica, by James Hutchison, junior, " merchant, Glasgow, on account and risk, and consigned to " Alexander Wilkie." At the conclusion of this letter, Hutchison's commission of five per cent. was charged, amounting to £146. 11s. This was quite in terms with the commission arrangement. But, several months thereafter,

Feb. 28, 1794. he wrote, " I have thought it proper to buy all goods in your " name, as well as mine; and I hope this will not be disa- " greeable to you. It will strengthen our credit, and never " be used but for your use." Before the appellant could answer this, a vessel arrived in Jamaica with goods from Hutchison. In answer to which, he immediately wrote,

July 19, —— disapproving of the whole transaction, and stating, " Did I " not here disavow all concern with the goods you purchase, " or with your business, I should not be doing myself that " justice and duty necessary for my own protection and " security. I therefore, in the strongest terms, request that " no such steps may again be taken." Hutchison died insolvent; and the appellant having come to Glasgow, action was raised by several parties there, and, among others, by the respondent, from whom Hutchison had purchased the goods shipped on credit, for the price of the goods, on the supposition that there was a co-partnership, or joint-adventure between them, and that the goods had been purchased on the joint credit of Hutchison and Wilkie. The respondent's action concluded for £142. 4s. 9d., and also called the representatives of Hutchison, now dead.

The defence pleaded by the appellant was, that he was not in partnership with Hutchison; that Hutchison had no authority from him to purchase goods on their joint credit; that he had authority only to send out goods for his own account, for which he was to be allowed commission; that the goods in question were sent out to, and received by the appellant, on that footing; that he was given to understand, and did understand, that he was liable to Hutchison alone; and he did accordingly make remittances to Hutchison more than sufficient to extinguish the debt on account of the goods.

The Lord Ordinary pronounced this interlocutor, "Having considered the mutual memorials for the parties, decerns in terms of the libel; finds expences due, and allows an account thereof to be given in." On representation, the Lord Ordinary adhered. On two several petitions to the Court, the Lords adhered to the interlocutors of the Lord Ordinary.

Feb. 27, 1798.
May 16, 1978.
Jan. 16, 1799.
Nov. 26, ——
Feb. 4, 1800.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—There is no colour and no ground for alleging that the appellant and Hutchison were in partnership generally, or that they had a joint concern in the goods, for the value of which this action is brought. They were concerned together, it is true, in certain single adventures, without any regular partnership; but these were completely settled before the purchase of the goods in question. And, previously thereto, the terms on which they were in future to be concerned were distinctly agreed to, and ascertained to be on commission. And it is proved, that the goods sent by the ship "Satisfaction," (including those procured by Hutchison from the respondent Greig), were upon that footing. 2. The appellant cannot be subject to the respondent's demand, without establishing the general abstract proposition, that a foreign merchant, who procures goods from this country, through a correspondent here, to whom he allows a commission, is answerable directly to the persons from whom the correspondent has purchased the goods. A more alarming and untenable proposition than this cannot be maintained. In such a case, the foreign merchant has to do with none but his correspondent, and when he makes remittances, or settles with him, the business is closed. And it is altogether erroneous to consider such a correspondent as an agent or factor, and the

1801.

WILKIE v. GREIG.

foreign merchant as a principal. To the foreign merchant the correspondent is the vendor of the goods, and the sole vendor, his profit being the commission. To him it is nothing whether the goods come from the warehouse of the correspondent, or from that of another person to whom the correspondent resorts. To the actual original furnisher, again, the correspondent is the purchaser, and the only purchaser, and from him alone he looks, or can look, for payment. On the latter's bankruptcy, there is no law for holding that the original furnisher is entitled to trace the goods to the ultimate receiver thereof, and to make that receiver liable. Nor could it make any difference, in point of law, though it were proved that the correspondent, when procuring the goods from a third person, said, "These goods are for such a "person, and I am only acting on commission;" or though he had asserted falsely, that the foreigner and himself were in partnership, or that the goods were for their joint account, as the appellant cannot be held responsible for this falsehood; but however this may be, in point of fact, it is incontestible that the respondent Greig sold to *Hutchison alone*, and upon his single credit.

Pleaded for the Respondent.—From the letters of correspondence between Hutchison and the appellant, as well as from the accounts of sales rendered by the latter, and from the whole circumstances of the case, it is clear that Hutchison and he were in proper partnership together, although no written contract of copartnership passed between them; and it is an established rule in law, that the transactions of one partner in relation to the company's business, are effectual and binding against all the *socii*. But supposing no proper copartnership to have been constituted, there was at least a joint trade carried on by them, which was not confined to one or two adventures, but extended to a continued series of transactions of great magnitude and importance. The goods furnished by the respondent were on account of that joint trade, and the rule of law is, that he who transacts with one of the adventurers transacts with all, so far as regards furnishings that go to the common stock. If it should, however, be held otherwise, still the appellant is liable, as Hutchison must be presumed to have acted as *præpositus negotiis*, or factor, in this country, for the appellant. It was not Hutchison, therefore, who aquired the property of the goods, but the appellant, whose plea is, that Hutchison had no further right or interest therein, than to the extent of a

certain commission for his trouble. And if the immediate effect of the transaction was to vest the property of the goods in the appellant, in consequence of his having purchased the same through the medium of his factor or agent, it follows that he must be answerable for the price thereof to the seller.

But, however ignorant the appellant may have been of the goods being purchased in the joint names of him and Hutchison, there was no pretext for pleading excuse and ignorance after he was made aware by Hutchison's letter, of the way in which the goods had been purchased. Far less is there any excuse for remitting to Hutchison, after being so apprised, the sum of £500 towards payment thereof. And there is no specialities in this case to authorise a different rule of decision from what was adopted in the cases of Messrs. Thomas and Allan Pollock, Messrs. M'Kenzie, Douglas and Company; Johnstone, Bannatine and Company, and Others.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of in the appeal be reversed, and that the defender be assoilzied.

For Appellant, *T. Erskine, Wm. Adam.*

For Respondent, *R. Dundas, Wm. Grant, Thos. W. Baird.*

NOTE—Unreported in the Court of Session.

DAVID and ALEXANDER ALLAN, Merchants in Glasgow, ... } *Appellants;*

PROVOST and BAILIES of RUTHERGLEN, and other Persons, PROPRIETORS and INHABITANTS of the BURGH of RUTHERGLEN, } *Respondents.*

House of Lords, 18th December 1801.

SERVITUDE OF FOOTPATH—ENCROACHMENT ON IT.—Circumstances in which it was held that the inhabitants of Rutherglen, also the inhabitants of Glasgow, Blantyre, and Hamilton, had the servitude of a footpath from the Glasgow Green, along the banks of the Clyde, to Rutherglen Bridge, acquired by immemorial use and possession; and that the proprietor of the lands on both sides of the footpath was not entitled to erect an arch over the footpath so as to injure it, by rendering the footpath dark and wet below