

question of some difficulty was raised at the debate as to the determination of the validity of the resolution by means of an ordinary action in the Sheriff Court, instead of by application to this Court under section 193 of the Companies Act 1908 (see *Sdeuard v. Gardner*, 1876, 3 R. 577), or an application to this Court by the creditor for a compulsory or supervision order (see *Silkstone Fall Colliery Company*, (1875) 1 Ch. D. 38). But the very unusual circumstances in which the action is brought make it, I think, unnecessary to decide this question in the present case. For it seems clear that an action brought to prevent the anticipated attempt to delete the minute, and so to destroy the proper evidence of the commencement of the liquidation, is a competent proceeding at common law; and although it has not been effectual to prevent the defacement of the minute I think it may in the circumstances be allowed to proceed with a view to establishing by declarator the regular passing of a valid resolution. If the minute had not been defaced, it would have been good evidence of this until the contrary was proved (the Companies Act 1908, section 71 (3)). Further, if the objections to the validity of the resolution stated on behalf of the company are well founded, there is no liquidation and no liquidation proceedings. Accordingly in the peculiar circumstances of this case I think there is no sufficient ground for interfering with the Sheriff-Substitute's order allowing a general proof.

LORD SKERRINGTON—The case is wholly exceptional, and I agree with the course which your Lordship suggests.

LORD CULLEN—I also concur.

LORD SANDS was not present.

The Court dismissed the appeal.

Counsel for the Pursuer—Gentles, K.C.
—Cooper. Agent—Thomas J. Addley,
Solicitor.

Counsel for the Defenders—MacRobert,
K.C.—Crawford. Agent—W. & W. Finlay,
W.S.

Friday, February 9.

SECOND DIVISION.

[Lord Sands, Ordinary.]

A. F. CRAIG & COMPANY, LIMITED v.
A. F. & J. C. BLACKATER, *et e contra*.

Agent and Principal—Agent's Rights—Title to Sue—Sale to Agent for Undisclosed Principal—Subsequent Disclosure of Principal—Action against Agent for Contract Price Sued to Judgment—Right of Agent thereafter to Sue Seller for Damages for Breach of Contract—Election.

A & Company sold to a firm certain marine boilers and on the firm's failure to pay the balance of the price brought an action against them for the amount. The firm brought a separate action

against A & Company in which they counter claimed for damages on the ground that the boilers were disconform to contract, and the two actions were conjoined. In the course of the proceedings it appeared that the firm were really acting as agents for principals whose name was then disclosed. A & Company thereupon amended their pleadings and maintained successfully that as the firm had not suffered any damage they (the firm) had no title to sue A & Company in respect of the latter's breach of contract, and in their own action obtained decree for the price. *Held* (rev. judgment of Lord Sands, Ordinary) that as A & Company had insisted in their action against the firm and obtained decree against them after disclosure of the latter's character as agents, they had elected to treat the firm as the party liable under the contract, and that therefore the firm had a good title to sue them (A & Company) for the damages sustained by their disclosed principals.

Authorities examined.

A. F. Craig & Company, Limited, engineers and boiler-makers, Paisley, *pursuers*, brought an action against A. F. & J. C. Blackater, shipowners, Glasgow, *defenders*, for payment of £2412, 0s. 5d., being the balance of the price of certain boilers ordered by the defenders from them. Thereafter the defenders A. F. & J. C. Blackater brought a counter action against A. F. Craig & Company, Limited, in which they claimed payment of £9897, 11s. 5d. in respect of damages through defects in the boilers. The two actions were conjoined.

The following narrative of the *facts* of the case is taken from the opinion of the Lord Justice-Clerk:—"By letter dated 7th September 1917 A. F. Craig & Company, engineers and boiler-makers in Paisley (hereinafter called Craigs), offered to supply to Messrs A. F. & J. C. Blackater, shipowners in Glasgow (hereinafter called Blackaters), two marine boilers for the sum of £5900. By letter dated 8th September the offer was accepted. The boilers were duly supplied and they were fitted in a vessel named the 'Ashton.' The full price not having been paid, Craigs on 11th March 1921 signeted a summons against Blackaters in which they sued for £2412, 0s. 5d., being the unpaid balance of the contract price. In condescendence 3 of that action Craigs refer to the s.s. 'Ashton' as 'belonging to the defenders,' *i.e.*, Blackaters. The defence to the action is that the boilers were disconform to contract, and that Blackaters suffered loss and damage thereby exceeding in amount the sum sued for. Blackaters responded with an action against Craigs, the summons in which was signeted on 8th June 1921, and in which they sued for £9897, 11s. 5d. in name of damages sustained by reason of Craigs' breach of contract. In condescendence 1 of that action Blackaters aver 'The pursuers are the registered owners of the s.s. "Ashton," and in answer the averment is admitted. The actions were conjoined on 24th February 1922, and a

proof extending, so we were informed, over three weeks was led. It transpired in its course that the registered owners of the s.s. 'Ashton' are the Cadeby Steamship Company and that Blackaters are merely managing owners of the ship. No stress appears to have been laid in the argument addressed to the Lord Ordinary upon the mistake which had been made. But after the case had been taken to avizandum Blackaters tabled a minute of amendment whereby in Craigs' action they averred that 'the defenders (Blackaters) are defending the present action as representing and for and on behalf of the Cadeby Steamship Company, Limited,' and also 'the said contract was entered into and made by the defenders (i.e., Blackaters) for and on behalf of the Cadeby Steamship Company, Limited, and the boilers were for the "Ashton." The defenders acted throughout in relation to the said contract and to the said boilers and to the said vessel as agents for and on behalf of the Cadeby Steamship Company, Limited.' In their own action Blackaters amended their pleadings by averring 'The pursuers are suing the present action as representing and for and on behalf of the Cadeby Steamship Company, Limited,' and also 'Said contract was entered into and made by the pursuers for and on behalf of the Cadeby Steamship Company, Limited, and the said boilers were for the 'Ashton.' The pursuers acted throughout in relation to the said contract and to the said boilers and to the said vessel as agents for and on behalf of the Cadeby Steamship Company, Limited.' These averments are in substance denied by Craigs, who added in this action a plea-in-law of 'No title to sue,' and also a plea-in-law to the effect that 'The pursuers not having sustained any loss or damage through any breach of contract on the part of the defenders, the defenders are entitled to absolvitor.' A short supplementary proof was led on the amended pleadings, as the result of which the relationship of parties is clearly defined. That relationship is as follows:—Mr A. F. Blackater is a partner in the firm of A. F. & J. C. Blackater. That firm act as managing owners for the Cadeby Steamship Company. Of that company Mr A. F. Blackater is managing owner and sole director. The company are the registered owners of the s.s. 'Ashton.' The proof also disclosed that by the articles of association of the company, and in particular by article 66, the manager of the company—Mr A. F. Blackater—is authorised, *inter alia*, 'to bring or defend actions or suits by or against the company.' It further appeared that the sums disbursed by Blackaters in connection with the contract were debited in their books to the Cadeby Steamship Company, and that Mr A. F. Blackater reported to that company from time to time the position of matters in connection with the litigation."

In the principal action the pursuers A. F. Craig & Company, Limited, pleaded—"3. The defenders not having suffered damage through breach of contract on the part of the pursuers the defences should be repelled."

In the counter action the defenders A. F. Craig & Company, Limited, pleaded—"1. No title to sue. . . . 6. The pursuers not having sustained any loss or damage through any breach of contract on the part of the defenders, the defenders are entitled to absolvitor."

On 25th July 1922 the Lord Ordinary (SANDS) sustained the third plea-in-law for the pursuers in the action A. F. Craig & Company, Limited v. A. F. & J. C. Blackater, and the first plea-in-law for the defenders in the action A. F. & J. C. Blackater v. A. F. Craig & Company, Limited, dismissed the latter action, and in the former action granted decree for £1800, the sum adjusted by the parties as the amount of the unpaid purchase price.

Opinion.—"The unusual course which these cases have taken recalls to my mind over a waste of fifty years a passage in that quondam school classic, Collier's 'English History,' where the account of the Wars of the Roses is introduced with the statement—'A cloud at first no bigger than a man's hand had long been gathering round the throne of the Lancastrians.' A cloud which at first seemed no bigger than a man's hand has gathered round the case of the pursuers Messrs Blackater. They sued as the registered owners of the steamship 'Ashton' of Grimsby. The defenders in their defences admitted this description. It came out incidentally in the proof during the examination of Mr T. E. Blackater that this was a mistake. The registered owners are The Cadeby Steamship Company, Limited, and it was on behalf of the owners that the boilers, the condition of which has given rise to these proceedings, were ordered. I have no doubt that the mistake was an innocent one. The framers of the summons were under the impression that the pursuers Messrs Blackater were the owners of the ship, and Mr A. F. Blackater himself when he saw the record did not appreciate the importance of the matter, which appeared to be merely formal and technical. The Limited Company is intimately related to his firm, and he is himself its sole director. The defenders Messrs Craig admitted on the record as it stood before amendment that the pursuers were the registered owners, simply taking their word for it without troubling to examine the register. When it transpired in the course of the proof that Messrs Blackater were not the registered owners, the matter appeared to me to be treated just as one of those little awkwardnesses with which counsel twit or annoy one another without any suggestion that it is irremediable or decisive. The proof went on for a number of days as if nothing had happened. The pursuers' counsel did not, I think, advert to the matter during the hearing on evidence, and it was only when the defenders' counsel mentioned it that I recognised that the cloud was growing and indicated that I felt there was a difficulty, though I was still under the impression that it was a difficulty which might, before I could satisfactorily dispose of the case on its merits, have to be obviated, not that it was a difficulty that could not be obviated. It

was not until some time after I had made avizandum that the pursuers came forward with a proposed amendment. This was not opposed, and it led to a short supplementary proof.

"I have now come, though not without anxiety, to the conclusion that the mistake which was made is irremediable, and that the pursuers Messrs Blackater cannot succeed in this litigation. Another view may, however, be taken by a court of review. There has been a very long inquiry in this case. In view of this, and of the weight that is attached to the opinion of the judge who has tried a case, particularly a case like the present where there are considerations of credibility and practical demonstrations by witnesses in relation to models and plans, I think it proper that the opinion I had formed upon the case when I first made avizandum should be placed upon record. I could not, perhaps, in any event avoid an expression of opinion as to success in the proof, as this enters into the question of expenses.

"I shall accordingly now incorporate the opinion which I prepared as soon as I had an opportunity of perusing the evidence and before the new difficulty had developed.

[After a review of the evidence his Lordship continued]—"In the view I take of the evidence I accordingly find it proved that the leakages in the boilers of the steamship 'Ashton' complained of by the pursuers were due to fault of construction for which the defenders are responsible. . .

"*Ante Diluivium sic scriptum.* The position of the actions has, however, been altered by the amendment, the supplementary proof, and the argument thereon, and I am unable to take the course above indicated. It appears that the relations of parties are as follows:—The Cadeby Steamship Company are the registered owners of the 'Ashton' and the boilers were ordered on their behalf. The sole director of the company is Mr A. F. Blackater and as an individual he has the management of the ship on behalf of the company. He is a member of the firm of Messrs A. F. & J. C. Blackater and in his capacity as manager of the vessel he corresponds in his firm's name. This is how the firm came to be parties to the contract for the supply of the boilers. The firm have no direct pecuniary interest in the action or in the claims or liabilities implicated therewith. The interest to sue or defend is in the Cadeby Steamship Company, who are not parties to either action.

"I take it to be in accordance with our law and practice that a party who desires to enforce a contract or recover damages for the breach of it must sue in his own name. The rule is thus stated by Lord Shand in *Levy v. Thomsons*, 10 R. 1134, at p. 1137—"In the ordinary case although a contract has been entered into by an agent for a principal proceedings to enforce it must be taken by the principal, who must sue in his own name."

"No doubt where an agent has entered into a contract for an undisclosed principal he may be sued, and as a counterpart he

may sue in his own name—*Mackay*, 128; *M'Laren*, 220,—but in such a case the action, so far as the other party to the contract is concerned, is the agent's own action. If the agent's action be one of implement, it is for implement to the agent; if it be one of damages, it is for damages suffered by the agent. In order to recover damages the agent must instruct damage suffered by himself. In the present case the contract was made by the defenders with the pursuers, who were acting as the agents for an undisclosed principal. These agents sue for damages for breach of that contract. But the damages which they have instructed are not damages suffered by themselves but damages suffered by their undisclosed principal. I take it that if the pursuers had ordered the boilers on their own behalf and without knowledge on either side of any defect had re-sold them in order to instruct a claim of damages against the defenders, it would have been necessary for them to instruct not merely that the boilers had proved to be defective and had caused trouble and expense to the purchasers, but that the purchasers had enforced or were in a position to enforce damages against them. If they were unable to do so, if the purchasers made no claim against them, they could have no claim of damages against the makers of the boilers. I am unable to hold here that the pursuers are in any better position.

"I confess I reach this result with reluctance and distaste. There is no substance in the difficulty. The circumstance that the title to the ship was in the limited company does not prejudice the defenders in the least. Nor does it make any difference either to the pursuers or to the principals behind them, who are really very much the same parties under a different legal *persona*. The matter could be rectified in a moment without prejudice to anybody by the company sisting itself as pursuer. The whole of the real merits of the case would then stand exactly where they were before the point emerged. But unfortunately our procedure does not admit of this solution, or apparently of any solution short of rendering the whole of these proceedings and the exhaustive inquiry abortive. I was referred to the case of *Symington* (21 R. 434), not as being exactly in point, but as illustrative of the inexorable character of an analogous technical rule. In that case an action failed because the pursuer sued as an assignee and the assignation was formally executed one day later than the date of the summons. In such a case, if there was anything in the date as affecting diligence or otherwise, it would be only proper that the action should be allowed to proceed only upon the footing that the service of the summons was to be treated as not earlier than the date of the assignation. But this will not suffice. There may have been a long litigation and an expensive proof; it must all go for nothing. The whole expense must be thrown away. Everything must be begun over again. There must be a new summons, new defences, a new making up of a process, a new print,

a new enrolment in the adjustment roll, and so forth. In no other sphere of human activity would the like be contemplated except perhaps in the domain of sport, where rigid enforcement of arbitrary penalties disproportionate to the mistake is sometimes thought to add zest to the game.

“I have not overlooked a case to which I was not referred—*Larsen v. Ireland & Son*, 20 R. 228 — which seems the case most favourable to the pursuers’ contention. I do not think, however, that the case goes far enough to save the pursuers here. It can hardly be taken, I think, to lay down a general rule in regard to an agent’s title to sue inconsistent with the rule formulated by Lord Shand in the dictum I have quoted above. The position of a master of a ship, particularly a master in a foreign port, is special, and in that case the master was part owner, which the pursuers here are not, at all events in any juridical sense.

“I now turn to the other branch of the conjoined actions — the claim of Messrs Craig as pursuers against Messrs Blackater as defenders for payment of the contract price. Similar considerations seem to apply here, but it was argued by the Dean of Faculty that even if the action in which his clients are pursuers fails upon the ground that they are only agents of the buyers, they are entitled to prevail in the action for the balance of the contract price in which they are defenders in respect that the pursuers are seeking to enforce a contract which they have failed to implement. Any defence, it was argued, which would have been open to the undisclosed principals must be open to the agents when it is sought to enforce a contract against them. This proposition is well founded in the general case. If the defenders here had refused to accept delivery of the boilers as being disconform to contract, and the pursuers had sought to enforce the contract, any defence open to the principals would have been available to the defenders. But the defenders did not reject the boilers. Delivery was accepted, and in these circumstances the remedies of the buyers are measured by the provisions of the Sale of Goods Act 1893, section 53. These remedies are either to ‘(a) set up against the seller the breach of warranty in diminution or extinction of the price; (b) maintain an action against the seller for damages for the breach of warranty.’ This must be read along with the provision in section 11 — (2) In Scotland failure by the seller to perform ‘any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.’

“It is not clear on the terms of the statute whether (a) and (b) of section 53 (1) are differentiated otherwise than as pointing to two different modes of procedure. In this connection it has to be kept in view that the statute was framed with English procedure primarily in view. There is one

aspect in which every claim to pay less than the contract price may be regarded as a claim of damages. There is another aspect in which a distinction may be drawn between a claim of damages in the popular sense and a claim to make a deduction in respect that owing to some breach of condition or misdescription the article was really worth less at the date of delivery than if it had been an article in conformity in all respects with the contract. In the present case, however, the defence is laid upon damages that emerged, not on *quantum minoris*, and there are no materials for determining ‘diminution’ of value as at the date of delivery.

“In the other branch of the conjoined actions I have been obliged to hold that the claim of the pursuers in that branch to damages fails, and accordingly as they took delivery of the boilers I do not find that under the statute any remedy is open to them as defenders in this branch of the action against the demand for payment of the price. This does not appear to me really to impinge upon the Dean of Faculty’s principle that any answer must be open to the defenders in this branch which would have been open to their principals. Here the defence of damages would have been open to the principals, and accordingly the defence of damages is open also to the agents, the present defenders, but it must be damages suffered by the party propounding the defence, not damages suffered by some other party. As I have already pointed out, if the defenders having bought as principals, had immediately before any defects manifested themselves, re-sold the boilers under a contract which precluded the purchasers from having any recourse, the defenders could not have pled the damages suffered by the third party, the purchasers, in answer to an action for payment of the price.

“I am pressed by the consideration that in suing for the balance of the price the pursuers are seeking to enforce fulfilment by the defenders of a contract which in my view they have not themselves fulfilled. But statute law has no such elastic virility as the common law, and it seems to me that the matter is governed by statute which specifically prescribes, and in doing so limits, the rights of a buyer who accepts delivery of goods.

“I shall sustain the first plea-in-law for the defenders in the action at the instance of Messrs Blackater, and the third plea-in-law for the pursuers in the action at the instance of Messrs Craig, dismiss the conclusions of the former action, and under the conclusions of the latter action I shall decern against the defenders Messrs Blackater for payment to the pursuers Messrs Craig of the sum of £1800, the sum adjusted by the parties as the amount of the unpaid balance of purchase price with interest at five per cent from the date of citation.

“I shall find the Messrs Craig entitled to expenses in both actions up to the date of conjunction, and in the conjoined action, except the expenses of the proof in respect of which no award of expenses is made, but

I shall exclude from this exception the expenses of the additional proof upon 15th July."

Messrs A. F. & J. C. Blackater reclaimed, and argued—The reclaimers had a good title to sue. They had clearly proved a mandate to sue and defend these actions, which gave them a good title—*Larsen v. Ireland & Son*, 1892, 20 R. 228, 30 S.L.R. 228; *Pagan & Osborne v. Haig*, 1910 S.C. 341; 47 S.L.R. 440. Further, they were entitled to sue and defend as agents. Where there was a contract between a party and an agent for an undisclosed principal, then if the principal were subsequently disclosed, the party could sue either. Whichever he sued, however, if he sued him to judgment, his election was final and he must treat the person he elected as the person in right of the contract. In the present case the pursuers had elected to sue the agents and they could not therefore prevent the agents from suing them by way of counterclaim in the second action on behalf of their principals—Mackay's Manual of Practice, p. 128, and cases there cited; *Robertson v. Wait*, 1853, 8 Ex. 299; *Joseph v. Knox*, 1813, 3 Camp. 320, per Lord Ellenborough at p. 321; *Sargent v. Morris*, 1820, 3 Barn. & Ald. 277, per Bailey, J. at p. 280; Bowstead on Agency, 6th ed. p. 431 (Art. 128); Story on Agency, 9th ed. pp. 461-464, 470. The action, whether brought in the agent's or the principal's name, was really the principal's action—*Bennet v. Inveresk Paper Company*, 1891, 18 R. 975, per Lord McLaren at p. 983, 28 S.L.R. 744; *Meier & Company v. Kuchenmeister*, 1831, 8 R. 642, 18 S.L.R. 431. The right to sue and the liability to be sued were reciprocal—*Elbinger Aktien-Gesellschaft v. Claye*, 1873, L.R., 8 Q.B. 313, per Blackburn, J., at p. 316; *Short v. Spackman*, 1831, 2 Barn. & Adol. 962, and per Lord Tenterden, C.J., at p. 965; *Agacio v. Forbes*, 1861, 14 Moo. P.C.R. 160. The other party to a contract objecting to the agent's title must show that the principal objected to the agent acting in his name. The agent must, no doubt, qualify title and interest. His title, however, was the contract. His interest was simply the benefit to his principal. The right of an agent to sue for breach of contract was well established and was all the more clear when the agent himself was sued—*Paice v. Walker*, 1870, L.R., 5 Ex., 173; *Brandt & Company v. Morris & Company*, [1917] 2 K.B. 784; *W. S. Pollock & Company v. Macrae*, 1922, S.L.T. 510. With reference to the cases the Lord Ordinary founded on, *Levy & Company v. Thomsons*, 1883, 10 R. 1134, 20 S.L.R. 753, was a case of a disclosed principal, and the contract laid down that he alone should be liable for the price. Lord Shand's dictum in that case was given with reference to a disclosed principal. *Symington v. Campbell*, 1894, 21 R. 434, 31 S.L.R. 372, was not really a case of agent and principal. *Westville Shipping Company v. Abram Steamship Company*, 1922 S.C. 571, 59 S.L.R. 539; *Blumer & Company v. Scott & Sons*, 1 R. 379, 11 S.L.R. 192, and *Tinnevelly Sugar Refining Company, Limited v. Mirrlees, Watson & Yaryan Company, Limited*, 1894, 21 R. 1009, 31 S.L.R.

823, founded on by the respondents, were not in point. *Kerr v. Clyde Shipping Company*, 1839, 1 D. 901; and *Robertson v. Anderson*, 1841, 3 D. 986, were cases of firms with descriptive names suing by agents. When the reclaimers were sued on contract and definitely taken as debtors, they must also be taken as creditors and be entitled to recover damages. In any event the reclaimers were entitled to the benefit of C.A.S. B. Ch. I. 1.

Argued for the respondents—In the respondents' action against the agents (Messrs Blackater) there was no valid counterclaim to the respondents' claim for the price. In the other action the plea of no title to sue had been sustained on the ground that, apart from any technicality as to agent and principal, the claim was groundless because the reclaimers themselves had suffered no damage. If the Lord Ordinary were affirmed, the real principal could sue in a new action. No case of mandate had been proved. The case of *Larsen v. Ireland & Son, cit.*, was not really *contra*, and if it was it had never been followed and should not be followed now. The logical sequel of the reclaimers' contention would be that if the principal had assigned his rights under the contract to a third party, the agent would still be entitled to sue, not for any damage he himself had sustained, nor for any loss the principal had sustained, but for loss sustained by the third party. The only authority quoted in support of this proposition was Mackay's Manual of Practice, p. 128, and neither the text nor the cases cited (*i.e.*, *Arbouin v. Sime*, 1824, 3 S. 184; *Graham v. Tait*, 1885, 12 R. 588, 22 S.L.R. 378; *Bonar v. Liddell*, 1841, 3 D. 830; *Fisher v. Syme*, 1827, 6 S. 216) supported the proposition that an agent could sue for damages sustained by his principal. *Bennett v. Inveresk Paper Company, cit. sup.*, was a case of the title of a foreign principal to sue and really supported the respondents. The English authorities *contra* really consisted of passages in Story on Agency and in Bowstead on Agency, which were based on very ancient English cases. They had no specific reference to an agent for an undisclosed principal or to his right to sue for damages that he had not sustained. They depended on some doctrine of trusteeship which had been recognised by the English Courts of that time as entering into the doctrine of agent and principal. There was, however, no such recognition in Scots law of the application of implied trust to agent and principal. There was no case in Scots law recognising the agent as an implied trustee. Not only this, but the case of *Blumer & Company v. Scott & Sons, cit. sup.*, established the contrary—Gloag on Contract p. 203. The cases of *Tinnevelly Sugar Refining Company, Limited v. Mirrlees, Watson & Yaryan Company, Limited, cit. sup.*; *Bickerton v. Burrell*, 1816, 5 Mau. & Sel. 383; *Rayner v. Grote*, 1846 15 M. & W. 359, were also authorities in the respondent's favour. The case of *Symington v. Campbell, cit. sup.*, and quoted by the Lord Ordinary, was merely an illustration of the principle that hardship does not give a title to sue. *Edin-*

burgh United Breweries, Limited v. Molleson, 1894, 21 R. (H.L.) 10, 31 S.L.R. 922, illustrated the principle of who was entitled to recover. *Kerr v. Clyde Shipping Company*, 1839, 1 D. 901, and *Robertson v. Anderson*, 1841, 3 D. 986, showed that the addition of the name of an agent could not cure the defective title.

At advising—

LORD JUSTICE-CLERK—[*After the narrative above quoted*].—In that state of matters the Lord Ordinary has granted Craigs a decree against Blackaters for £1800 sterling—the adjusted balance of the contract price of the boilers—while in the action by Blackaters against Craigs for damages in respect of breach of contract he has felt constrained to sustain Craigs' plea of "No title to sue," and has dismissed the action. On the facts the Lord Ordinary is of opinion that the boilers supplied to Blackaters were faulty in construction, and that damages are due by Craigs for breach of contract, but in law he has felt disabled from giving effect to this view and from awarding to Blackaters the damages for which Craigs are liable. The Lord Ordinary has reached this result with obvious reluctance and indeed aversion. From his opinion I think it is clear that he regards the conclusion to which he has been driven as an affront alike to common sense and equity. That, in any event, is my view, and the idea that a long and expensive proof should be thrown away, that parties should anew lead evidence on the complicated and lengthy topics which have already been fully investigated, that Craigs should be entitled to put the balance of the contract price in their pocket, but that Blackaters, the other party to the contract, should be disentitled to recover damages for its proved breach—and all because Mr Blackater sued in name of his firm instead of in the name of his company—seems to me to be quite intolerable. I am of opinion that the resources of our jurisprudence have not been exhausted, and that the result which the Lord Ordinary desired to reach, but conceived himself precluded from reaching, can be attained without outraging any legal principle and without traversing any judicial decision.

Blackaters maintain, in the first place, that they are entitled to sue the action which the Lord Ordinary had dismissed in virtue of the mandate which is contained in article 66 of the articles of association of the Cadeby Steamship Company to which I have already referred. Here unfortunately the facts fail them, for the authority to sue conferred by that article is distinctly conferred not on Blackaters as a firm but on Mr A. F. Blackater as manager of the company. It is not therefore necessary to consider in detail the case of *Larsen*, 20 R. 228, to which the Lord Ordinary refers, but I do not desire to be held as adopting in their entirety the views which he has expressed regarding its ambit and application.

But Blackaters further maintain that when a contract is made by an agent for an undisclosed principal and the principal is afterwards disclosed, the other party to the

contract can elect to sue either principal or agent, but that if he sues one of the two and follows the suit to judgment he must be taken to have made a deliberate election, and must treat his adversary as not only liable under the contract but also as in right of it and entitled to sue upon it. In other words, applying the doctrine to this particular case, Blackaters maintain that when the Cadeby Steamship Company was disclosed as principal Craigs could then have said, "We were misled; we will begin proceedings anew"—a course well within their rights although probably unnecessary—but that they are not entitled to enforce Blackaters' liability under the contract and at the same time deny them the right to recover under it. This would appear to be common-sense as well as rudimentary law.

What is to be said against it? Mr Robertson, as I understood his argument, admitted that Blackaters have a title to sue, but he maintained that they could not recover damages because they had themselves sustained none. But if Blackaters sue it must surely be in their principal's interest. Though they have suffered no damage they represent a person who has. Why should they not enforce their principal's right? That is precisely what they are endeavouring to do. They do not propose to put a penny in their own pocket. They sue, so they aver, for and on behalf of the Cadeby Company, and that avowment, be it observed, Craigs deny. Why should Blackaters not have an opportunity of proving their statements and of recovering damages for their principal on whose behalf they claim to act? It is true Blackaters found on no assignation, and it is also true that in my opinion they can claim to possess no mandate under the articles of association. But why should not the representational capacity in which they claim to act if proved in fact not yield the same result in law? I cannot see that any legal principle is infringed by giving effect to their claim. The representational capacity in which Blackaters defend the action against them by Craigs provokes no comment by the latter, but when it is, as I think, logically contended that the same representational capacity should avail Blackaters in their action against Craigs the doctrine becomes an offence to the latter.

The view which I have indicated *supra* is not lacking in support from authority. In *Sargent v. Morris* (3 B. & Ald. 276) Bayley, J. (at pp. 280-1) says—"Now I take the rule to be this—If an agent acts for me and on my behalf but in his own name, then inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action either in the name of the party by whom the contract was made, or of the party for whom the contract was made." It is true that the action in that case failed, but it failed because the plaintiff was not a party to the

contract, and was not even proved to have made advances upon it at the time of the shipment of the goods to which the contract related. Here the facts are otherwise. Again, in *Joseph v. Knox* (3 Camp. 320) it was held that where a person shipped goods in an English port as agent for the owner of the goods resident abroad and paid the freight, he could maintain an action in his own name for non-delivery of the goods. Lord Ellenborough said (at p. 321) in giving judgment—"I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs therefore, from whom the consideration moves and to whom the promise is made, the defendant is liable for the non-delivery of the goods. After such a bill of lading has been signed by his agent he cannot say to the shippers they have no interest in the goods and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner." Again, in *Agacio v. Forbes* (14 Moore's Privy Council Cases 160) the plaintiff Agacio as agent was allowed to sue. Lord Chelmsford in giving judgment on p. 170 says—"The contract was clearly entered into with Agacio, the plaintiff himself, although the benefit of it would result to the firm." The plea that the firm should necessarily be conjoined as plaintiffs in the action was rejected by the Court. Moreover, in the case of *Elbinger* (L.R., 8 Q.B. 313, at p. 317) Blackburn, J., says—"A man cannot make a contract in such a way as to take the benefit unless also he takes the responsibility of it." And Lush, J., says (at p. 318)—"He cannot be a party so as to be able to sue, and yet not a party so as to be liable on it." And Story in his great work on Agency (par. 396) sums up the matter thus—"As the agent acts in his own name, without disclosing any other principal, it follows as an irresistible inference that the other contracting party binds himself personally to the agent. This, indeed, would seem justly to follow from the reciprocity of obligation on the other side, for, as we have already seen, the agent is in every such case undeniably bound by his personal promise to the other party. Hence it is that if an agent sells the goods of his principal in his own name and as if he were owner, he is entitled to sue the buyer for the price in his own name, although the principal may also sue. And, on the other hand, if he buys goods in his own name, as purchaser he may maintain action on the contract against the seller, whether it be for a delivery thereof if wrongfully withheld, or upon any warranty on the same, in the same manner as if he were the only party in interest." Again, in Addison on Contracts (11th ed.), p. 345, I find the law thus stated—"Inasmuch as the agent is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent

unless it can be also shown that he is prohibited from carrying on that action by the person in whose behalf it was made. In such cases the action may be brought either in the name of the person by whom, or of the party for whom, the contract was made."

Mr Robertson, however, relied on two Scottish decisions which in his view negatived the doctrine of the English cases to which I have referred—a doctrine which he maintained was alien to the law of Scotland. The first of these cases was the *Tinnevelly Sugar Refining Company*, 21 R. 1009, and the second was *Blumer & Company*, 1 R. 379. The first of these cases need not delay us long. There it was held that the pursuer had no title to sue, inasmuch as at the date of the contract entered into by the alleged agent the company was not in existence. There was therefore no principal. The case is entirely unhelpful in the solution of the problem now before the Court. The case of *Blumer* requires a fuller fuller examination. It was there held that one of the pursuers in an action of damages for breach of contract had no title to sue in respect that he was not a party to the contract and had no *jus quaesitum* to sue upon it. But here Blackaters were parties to the contract, and they base their claim on that fact. I cannot therefore see that that case assists the contention of Craigs, or is in any way inimical to the doctrine of the English decisions to which I have referred.

I accordingly propose that the interlocutor reclaimed against should be recalled, and that the case be remitted back for the assessment of the damages due in the action by *Blackaters v. Craigs*.

LORD ORMIDALE—In September 1917 a contract was concluded between Messrs Craig & Company and Messrs Blackater whereby the former sold to the latter a set of two boilers, the price to be £5900 payable by instalments. We now know what was not known at the date of the contract that these boilers were for the s.s. "Ashton," and that the contract was made by the Messrs Blackater for and on behalf of the Cadeby Steamship Company.

Delivery of the boilers was made in June 1919. They did not give satisfaction, and the Messrs Blackater having declined to make further payments to account of the price, Messrs Craig & Company in March 1921 raised an action against them for the balance. The defenders pleaded that the pursuers were in breach of their contract, and specifically averred many defects in the boilers, and detailed damages arising therefrom far exceeding in amount the balance of the price for which they were sued. Thereafter in June 1921 Messrs Blackater, suing in their own name as shipowners, raised an action against Messrs Craig & Company concluding for £9897, 11s. 5d. as the loss and damage they had suffered in consequence of the latter's breach of contract. The averments as to the damage were similar to those specified in their defences to the first action.

On 24th February 1922 the two actions

were conjoined and a proof allowed. Up to this time the names of the principals for whom Messrs Blackater were acting when they entered into the contract were still undisclosed, but in the course of the proof it appeared that the s.s. "Ashton" belonged to the Cadeby Steamship Company. At the close of the proof the Lord Ordinary made avizandum, but before he had issued his judgment, on the motion of the parties, the records in both actions were allowed to be amended. The amendments contained, *inter alia*, a direct challenge of the title of the Messrs Blackater to sue the second action. The case was again taken to avizandum. The Lord Ordinary thereafter issued an interlocutor in which he sustained the third plea-in-law for the pursuers in the first action that the defenders in that action had not suffered any loss through the pursuers' breach of contract, and the defenders' first plea in the second action that Messrs Blackater had no title to sue. In the first action he decerned against the defenders for payment of the unpaid purchase price, and he dismissed the second action. In a carefully considered note he expresses the view that Messrs Craig & Company were in breach of contract in respect of the defects alleged by Messrs Blackater, and he clearly regards the conclusion he has been constrained to reach as inequitable.

It is obvious enough that if the judgment of the Lord Ordinary falls to be sustained a difficulty may be placed in the way of the Cadeby Steamship Company recovering in any other process the damages to which, according to the Lord Ordinary's note, they are undoubtedly entitled. In my opinion, however, the Lord Ordinary is in error in reaching the conclusion he did. It appears to me that when it became patent that the Messrs Blackater had entered into the contract merely as authorised agents and the name of their principal was disclosed, Messrs Craig were entitled to follow one or other of two courses—either to continue to treat Messrs Blackater as the party liable to them under the contract to all intents and purposes, or to abandon their action against Messrs Blackater and take proceedings against the Cadeby Steamship Company. The logical sequence of that would, no doubt, have been the replacement in the second action of the Messrs Blackater by the Cadeby Steamship Company. All this could easily have been arranged and the proof already led made available. That would probably have been the proper course to follow.

But I cannot think that it was open to Messrs Craig & Company at once, as it were, to approbate and reprobate the fact of the disclosure of the principal, ignoring it to the effect of forcing the price of the boilers from Messrs Blackater as the parties liable therefor under the contract, but calling it in aid to disentitle the Messrs Blackater from stating any counter-claim otherwise competent to them under the identical contract. To do so would have been to violate the principle underlying the rule of law according to which, in the case

where an agent contracts for a principal who is afterwards disclosed, the other party to the contract may sue either principal or agent but cannot sue both. Here Messrs Craig & Company have elected for their own purposes to treat and sue the Messrs Blackater as principals, and consequently the latter are as principals entitled to counter-claim. Further, the counter-claim of damages as made by the Messrs Blackater is, in my opinion, competent. No doubt they have suffered no personal loss by the breach of the contract. The same would be true if the principal had not been disclosed, and that is in effect the position here because of the election made by Messrs Craig & Company to treat the Messrs Blackater as the parties bound by the contract, and I see no reason why, if they are to be saddled with the obligations of debtors under the contract, they should not also enjoy the rights of creditors thereunder. In neither case is their interest a personal one.

There is little, if any, direct authority on this particular point. Story (Agency, article 396) enunciates the principle very definitely in accordance with Messrs Blackater's contention, although the cases referred to by him do not appear to have a direct bearing upon it. The cases referred to by counsel, however, indicate that in England the Courts have held that plaintiffs who have acted merely as agents, though they may have no personal interest in the recovery of the moneys sued for, are nevertheless entitled to decree therefor. I mention two of them. The rubric in *Joseph v. Knox* (3 Campbell's Reports, 320) is as follows:—"A person who ships goods in an English port as the agent of the owner of the goods resident abroad and pays the freight for them may maintain an action in his own name for not delivering them according to the bill of lading." Lord Ellenborough says (at p. 321)—"I think they are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner." In *Robertson v. Wait* (8 Exch. 299), where the circumstances were not very dissimilar, Baron Parke delivers an opinion to the same effect. On the other hand no authority against the view has been cited, for I cannot regard as such *Blumer & Company v. Scott & Sons*, 1 R. 379. In that case the action, in so far as at the instance of the purchasers of the ship, was dismissed in respect that they had no contract with the engineers who had supplied the boilers and no *jus quaesitum* in the contract between the shipbuilders and the engineers. The passage in the Lord President's opinion on which Mr Graham Robertson so strongly founded as negating the principle of "representational" damages is somewhat obscure, but it does not, as I read it, warrant the interpretation which I understood him to put upon it. From the report of the case it is clear that *Blumer & Company* were not in any sense acting as agents for the purchasers of the ship. No assistance can be got from *Tinnevelly Sugar Refining Company v. Mirrlees*, 21 R. 1009. The so-

called principal was not only undisclosed but non-existent at the date the contract was entered into, and Darley & Butler, who negotiated it, could not therefore at that date have acted as his agents and clearly had no title to claim "representational" damage.

I have not found it necessary to examine the argument founded on the alleged mandate, but I should not have been able to give effect to it.

LORD ANDERSON—The Lord Ordinary has in effect found that these cases have got into a *cul-de-sac* of procedure, with the result that the Court is powerless to do justice between the litigants. The Lord Ordinary's considered opinion is that Messrs Craig were in breach of contract, and that they are thereby liable in damages, but he has held himself debarred from giving practical effect to this view, and as matters stand it is more than likely that Messrs Craig will be able to evade this legal liability. They hold a decree against Messrs Blackater, to which the latter apart from the claim made in the counter-action have no answer. If this decree is obtempered Messrs Blackater will, it is assumed, claim and obtain relief from their principals, the Cadeby Steamship Company. If the latter company thereafter take proceedings against Messrs Craig to recover damages for breach of contract, Messrs Craig will be in a position to maintain with much force the contention that the contract has been performed, the goods having been delivered and accepted and the contract price paid in full, and that the suggested action for damages is thus too late. It would be regrettable if so untoward a result were unavoidable. I am of opinion that it may be avoided, and that the Lord Ordinary has wrongly held that his hands are hopelessly tied.

The rights and obligations of agents, principals, and third parties with reference to contracts made by agents are well settled and are not recondite. If A contracts as an agent for a disclosed principal, A cannot competently sue or be sued with reference to the contract. Again, if A contracts for an undisclosed principal, A may sue and is liable to be sued as a principal, the third party having no knowledge that he is anything but a principal. If, however, A contracts for an undisclosed principal who is subsequently disclosed to the third party the latter may sue either agent or principal. He cannot, however, sue both. If an action is raised against the third party he may insist that it be at the instance of the disclosed principal. All this is elementary. The difficulty of applying these principles to the present case arises from its unusual facts.

When the two actions were raised the principals were undisclosed. It was only during the course of the proof in the conjoined actions that it was casually divulged that the Cadeby Steamship Company were the principals in the contract. When this fact became known to Messrs Craig they were in my opinion put to

their election. They had to determine whether or not they would proceed to decree against Messrs Blackater or against their true debtors the Cadeby Company. There was no necessity for commencing proceedings *de novo* and so rendering useless the procedure which had taken place. There would have been no difficulty by our procedure in substituting the one party for the other in both actions. This could have been done by joint minute, which would have provided that the procedure which had taken place would have been made available in the new *lis*. But no proposal to this effect was made by Messrs Craig. They elected to continue the action in which they were pursuers against the agents, but in the counter-action they declined to submit themselves to a decree for damages in respect of their breach of contract. They thus prevented the application of the principle of compensation or set-off to the counter-claims. This is plainly inequitable. It is, moreover, a result which is against all legal principle and which is supported by no decided case. If the principals had remained undisclosed Messrs Blackater's title to sue for damages for breach of contract could not have been challenged. Their title would then have been good because they were *understood* to be principals. Why should it be otherwise when they have been *treated* as if they were principals? It seems to me to be in accordance with sound principle that Messrs Craig suing Messrs Blackater as their debtors in a contract must submit to any counter-claim in respect of the same contract as to which *they* are debtors. It is urged that Messrs Blackater are not the true creditors under the contract in respect of the claim of damages. That is doubtless true, but neither are they true debtors under the contract in respect of the price. If Messrs Blackater are to be saddled with the liability of the contract as quasi-principals, they are surely entitled to maintain in order to diminish or wipe out this liability any claims under the contract which are open to the true principals. Their pleadings show that they have no claims as individuals under the contract against Messrs Craig, and that they are claiming damages on behalf of their principals. Messrs Craig are thus certiorated that if decree for damages passes against them they thereby obtain a complete discharge of their contractual obligations both as regards principals and agents. I have said that all this seems in accordance with the general principles which apply to this branch of the law. The only case which seems to lend any support to the Lord Ordinary's interlocutor is that of *Blumer & Company*, 1 R. 379. As the debate developed I understood Mr Robertson to pin his faith to this decision, and in effect to concede that if it failed him he could adduce no other authority in support of the Lord Ordinary's judgment. That case in my opinion does not support the respondents' contention, and the difference between it and the present case is obvious. In *Blumer* a purchaser of a ship sued for damages an engineer who had a contract with the seller of the ship

but not with the purchaser. It was held that the purchaser could not sue for breach of a contract to which he was not a party. In the present case Messrs Blackater are parties to the contract with Messrs Craig on which they are now suing.

I therefore am of opinion that the interlocutor of the Lord Ordinary should be recalled and the case sent back to him for the purpose of assessing damages in the counter-action.

LORD HUNTER—[*Read by Lord Ormidale*]
—In these conjoined actions the Lord Ordinary has given effect to what he himself describes as an extremely technical plea raised by one of the parties under very peculiar circumstances. On 11th March 1921 A. F. Craig & Company, engineers and boiler-makers, Paisley, raised an action against A. F. & J. C. Blackater, shipowners, Glasgow, for payment of £2412. This sum represented the final instalment of the price of two Inglis' type marine boilers supplied under contract between the pursuers and defenders. These boilers were to be fitted into the s.s. "Ashton," which, according to the original allegations of the pursuers, was said to belong to the defenders. In answer to this claim Messrs Blackater alleged that the pursuers had failed to implement, and were in breach of, their contract in respect that the boilers supplied were from the beginning, and still are, unserviceable, and in material respects disconform to contract and unmerchantable from bad workmanship. Details of these defects were duly set forth in the defences to the original action. The damages arising from the alleged breach of contract were said to be greatly in excess of the amount sued for. On 8th June 1921 Messrs Blackater raised a counter action against A. F. Craig & Company, concluding for payment of £9897, 11s. 5d. as loss and damage sustained by the pursuers in consequence of the defenders' alleged breach of contract. The two actions to which I have referred were conjoined on 24th February, and proof was allowed, Messrs Blackater of consent of parties being appointed to lead. Proof was duly led at great length. In the course of the proof it came out incidentally that the Cadeby Steamship Company and not Messrs Blackater were the registered owners of the s.s. "Ashton." As I understand the situation, importance was first attached to this circumstance by counsel for A. F. Craig & Company after counsel for Messrs Blackater had addressed the Lord Ordinary.

Some time after the Lord Ordinary had made *avizandum* the records in the actions were allowed to be amended, and a short supplementary proof was led. This proof was directed to establishing the relation between Messrs Blackater and the Cadeby Steamship Company. It appears that Mr A. F. Blackater, who is one of the partners of the firm of Messrs Blackater, is the sole director of the Cadeby Steamship Company. He was also appointed the manager of the company in terms of the memorandum and articles of association. His firm in fact act as managing owners, part of the

work being done by Mr A. F. Blackater and part by his brother Mr J. C. Blackater.

The Lord Ordinary has granted decree in favour of A. F. Craig & Company for the amount for which they sue, and has also sustained their third plea-in-law that the defenders Messrs Blackater have not suffered damage through the pursuers' breach of contract. In the action by Messrs Blackater he has sustained the first plea-in-law for the defenders that the pursuers have no title to sue. At the same time he has held on the evidence adduced before him that A. F. Craig & Company were in breach of contract inasmuch as they failed to deliver boilers reasonably fit for the purpose for which they were supplied. If the view of the Lord Ordinary is sound, the expense incurred in connection with proof as to the character of the boilers supplied by A. F. Craig & Company will be thrown away, and it is at least problematical whether that company will not entirely escape from the consequences of what the Lord Ordinary holds to have been a material breach of contract. After A. F. Craig & Company have received payment in full from Messrs Blackater for the boilers, it is difficult to see how a different person, *i.e.*, the Cadeby Steamship Company, can maintain an action for damages. Would the answer to such a claim not be that the only parties to the contract, so far as Craig & Company are concerned, are Messrs Blackater, who had failed to establish any set-off against the price for which they had been held liable?

The ground upon which the Lord Ordinary has proceeded is that the damages for which Messrs Blackater sue have not been sustained by them but by the Cadeby Steamship Company, their undisclosed principal. He points out, as I think quite rightly, that "if the Messrs Blackater had ordered the boilers on their own behalf and without knowledge on either side of any defect had re-sold them, in order to instruct a claim of damages against the defenders (*i.e.*, A. F. Craig & Company) it would have been necessary for them to instruct, not merely that the boilers had proved to be defective and had caused trouble and expense to the purchasers, but that the purchasers had enforced, or were in a position to enforce, damages against them." According to his view the Messrs Blackater are in no better position. In this I am unable to agree. When A. F. Craig & Company discovered in the course of the proof that the real purchaser of the boilers from them was the Cadeby Steamship Company, they were probably entitled to discontinue proceedings against Messrs Blackater, and to direct their action against the Cadeby Steamship Company. This course would have availed them nothing. That company could have been substituted for Messrs Blackater in both actions. On the evidence that had been led, and without the addition of any new evidence, A. F. Craig & Company would have got decree in their action against the Cadeby Company, and that company would have obtained such an award of damage as the Lord Ordinary might have thought fit in the action by

Messrs Blackater. But as Craig & Company chose to continue their action against the agents after they ascertained who the undisclosed principal was, they were bound to allow these agents to plead any breach of the contract that they had committed. Liability to be sued on the contract was accompanied with right to plead as a counterpart the pursuers' failure to implement the contract. The fact that recovery of such damages is made in a representative capacity, or as quasi-trustees for the undisclosed principals, does not constitute an effective plea of no title to sue. It is quite different from an attempt to recover from a party to a contract damages that have arisen out of the non-fulfilment of a different contract.

A great number of cases were cited to us in the course of the debate. It is unnecessary to refer to the most of these cases. They were illustrative in the main of the well-recognised rule that where an agent makes a contract in his own name and without disclosing the name of the person for whom he acts he may sue or be sued as though he were the principal. As the argument for parties neared its end counsel for Messrs Blackater relied principally upon a passage in Story on Agency, section 396, and *Joseph v. Knox*, (1813) 3 Camp. 320, while counsel for A. F. Craig & Company relied on the decisions of *Blumer & Company v. Scott & Sons*, (1874) 1 R. 379, and *Tinnevelly Sugar Refining Company v. Mirrieles, Watson, & Yaryan Company*, (1894) 21 R. 1009. I propose to examine briefly these different authorities.

In the section from Story's work to which I have referred occurs this passage—"If an agent sells the goods of his principal in his own name, and as if he were owner, he is entitled to sue the buyer for the price in his own name although the principal may also sue. And on the other hand if he buys goods in his own name, as purchaser he may maintain action on the contract against the seller whether it be for a delivery thereof, if wrongfully withheld, or upon any warranty on the same in the same manner as if he were the only party in interest." It was argued that the English decisions to which reference is made in the footnotes do not on examination bear out the proposition in the text. This criticism is probably well founded, and I have not had an opportunity of examining the American decisions also quoted. At the same time the expression of opinion of so eminent a writer, particularly when he is enunciating a point of principle, is entitled to great respect.

In *Joseph v. Knox* it was decided that an agent who had effected a sale on behalf of an undisclosed principal was entitled to recover as trustee for the latter. The principle of this decision appears to me to cover the case of an agent for an undisclosed principal recovering damages for breach of the contract that has been effected, and this right is not weakened where the other party to the contract has deliberately elected on ascertaining the name of the principal to sue the agent as liable under the contract.

So far as the two cases cited against this view are concerned the *Tinnevelly* case may be easily disposed of. In that case a company sought to sue on a contract made before it had come into existence. The party who had effected the contract could not therefore be the agent of a principal that did not exist, and the plea of no title to sue was sustained against the company.

The case of *Blumer & Company* requires to be more carefully considered. According to the rubric of that case "a firm of shipbuilders sold an unfinished steamship, undertaking to complete it according to specification with engines to be supplied and fitted in by one of two engineers named to the satisfaction of the buyer; delivery to be made at a day named, failing which £10 to be paid as liquidate damages for each day's delay, 'delays of engineers excepted.' The shipbuilders subsequently completed a contract in their own name with one of the engineers named to have the engines delivered in Sunderland and completed on board the vessel to their own satisfaction at a date specified. The engineers were previously informed of the sale of the vessel." There was considerable delay in the delivery of the engines. An action was brought against the engineers by the shipbuilders and the purchasers from them concluding for (1) payment of damages to the shipbuilders, and (2) payment of damages in respect of loss sustained by the purchasers of the ship, with an alternative conclusion for payment of the whole amount of the damages to the shipbuilders. It was held that the action could only be maintained so far as the first conclusion for payment of damages to the shipbuilders was concerned. In that case it was pointed out by the Lord President that there were two quite distinct contracts, one between the engineers and the shipbuilders and a second and different contract between the purchasers and the shipbuilders. To the latter contract the engineers were no parties and therefore could not be sued by the purchasers. It may be observed that the shipbuilders were given an opportunity to amend their summons so as to allege that they were entitled to be relieved of loss incurred by them to the purchasers but they did not avail themselves of the opportunity afforded them. As Lord Ardmillan said (at p. 386), the shipbuilders "do not seek relief, and naturally so, for they have protected themselves against liability to Ellis & Son [the purchasers] for damage caused by 'delays of engineers.'" The decision does not appear to me to be any authority for the position taken up in the present case by Craig & Company. In my opinion the interlocutor of the Lord Ordinary ought to be recalled and the case remitted to him to assess the damages arising from Craig & Company's breach of contract.

The Court recalled the interlocutor of the Lord Ordinary and remitted to him to assess the damages in the action at the instance of A. F. & J. C. Blackater v. A. F. Craig & Company, Limited.

Counsel for the Reclaimers—D. F. Sandeman, K.C.—Normand. Agents—J. & J. Ross, W.S.

Counsel for the Respondents—MacRobert, K.C.—Graham Robertson, K.C.—Duffes. Agents—Thomson, Dickson, & Shaw, W.S.

Friday, February 9.

SECOND DIVISION.

[Sheriff Court at Ayr.

FADDES v. M'NEISH.

Evidence—Parent and Child—Affiliation—Corroboration of Pursuer's Evidence—Effect of Defender Failing to Lead Evidence or Tender Himself as Witness.

In an action of affiliation and aliment the defender was not adduced as a witness by the pursuer. At the conclusion of the pursuer's case the defender did not go into the witness-box and no evidence was led on his behalf. Held that the defender's conduct, not being equivalent to a contumacious refusal to go into the witness-box, did not afford corroboration of the pursuer's case.

Maggie Faddes, *pursuer*, brought an action of affiliation and aliment in the Sheriff Court of Ayrshire at Ayr against William M'Neish, *defender*, in which she craved decree for payment of (1) inlying expenses in connection with the birth of her illegitimate female child, of whom she averred the defender was the father, and (2) aliment for the child.

The Sheriff-Substitute (BROWN) allowed a proof.

The defender was not cited as a witness by the pursuer and was not asked by her to go into the witness-box. At the conclusion of the pursuer's case the defender did not go into the witness-box and no evidence was led on his behalf.

On 17th August 1922 the Sheriff-Substitute (BROWN) found in fact that the pursuer had failed to prove that the defender was the father of her illegitimate female child.

Note.—"This is an unsatisfactory case, as the defender has adopted the unusual procedure of neither going into the witness-box himself nor leading any evidence on his behalf. No doubt the defender's agent argues that it was unnecessary for him to lead any evidence if no case was put forward by the pursuer which he required to meet. Still I think it would have been more satisfactory if the defender had gone into the witness-box and maintained on oath his innocence of the charge made against him by the pursuer. After a careful reading of the record and the evidence led for the pursuer I have, however, come with some hesitation to the conclusion that the pursuer has not made out her case. . . .

"The pursuer's agent commented strongly on the fact that the defender had not gone into the witness-box, and he founded on a sentence in the opinion of Lord Moncreiff in *Harper v. Paterson* (16th June 1896, 33

S.L.R. 657, at p. 660) where his Lordship remarks—'If the defender in an action of this kind refused to go into the box, that fact would go a long way towards proving the truth of the pursuer's case.' I would be prepared to follow this dictum, but my difficulty is, Has the defender so refused? If the pursuer, as she was entitled to do, had asked him to go into the box before closing her proof and he had not done so, he would then have refused to go into the box. But if he is never asked to go into the box, can he be said to have refused to go? I do not think so. However, as I have already remarked, it would have been more satisfactory if he had given evidence, and it is not without hesitation that I have reached the conclusion that the defender's admissions on record and the evidence of the witnesses for the pursuer do not constitute sufficient corroboration of the pursuer's evidence to entitle her to decree against the defender."

The pursuer appealed to the Sheriff (LYON MACKENZIE, K.C.), who on 19th October 1922 sustained the appeal.

Note.—"The position of this action is undoubtedly, as the Sheriff-Substitute observes, left at the close of the proof in an unsatisfactory position owing to the defender having adopted the unusual course of neither tendering himself as a witness to deny on oath the pursuer's averments or to lead any independent evidence to rebut the evidence of the pursuer and her witnesses. The learned Sheriff-Substitute in the note to his interlocutor has very fully and accurately detailed the evidence of the pursuer and her witnesses. He has come to the conclusion that that evidence in itself is not sufficient to prove the pursuer's case, but apparently would have considered that the pursuer was entitled to succeed if any inference could be drawn from the defender's failure to tender himself as a witness in the cause, but that he was not satisfied that the defender had refused to go into the box as a witness.

"I am unable to agree with the conclusions arrived at by the learned Sheriff-Substitute.

"Prior to the Evidence Act the first step generally adopted in cases of this kind was for the judge, on the motion of the woman, to order the man to be judicially examined. The old law was considerably changed by the Evidence Act allowing the parties to be examined as witnesses, although it appears to be still competent to order the judicial examination of a defender, to hold him as confessed if he fails to appear, and thereupon with the oath in supplement of the pursuer to hold the paternity proved—*M'Kellar v. Scott*, 1852, 24 D. 499, *per* Lord President M'Neill.

"The real question at issue is—Is it competent to hold the defender as confessed when he fails to appear as a witness?

"From the opinions expressed in *M'Kellar v. Scott* it appears immaterial whether a defender is cited to appear to be judicially examined or as a witness. The inference to be drawn from his failure to appear seems to be the same in either case.