whisky, then shown to the defenders? Whether the defenders delivered to the pursuers a quantity of coloured whisky, amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price? And whether the coloured whisky so delivered by the defenders to the pursuers was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burnt sugar or other innocent material similar to said sample—to the loss, injury, and damage of the pursuers?"

Damages laid at £6000.

Counter Issue for Defenders.

"Whether the pursuers failed duly to return the said whisky to the defenders?"

SECOND DIVISION.

THE QUEEN *v.* GILROYS.

Excise—Statute 24 and 25 Vict. c. 91—Master and Servant. Held that a master was not liable for a contravention of an Excise statute committed by his servant beyond the scope of his employment.

Counsel for the Crown—The Solicitor-General and Mr Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for the Defendants — Mr Clark and Mr Guthrie Smith. Agents—Messrs Maconochie & Hare, W.S.

This is a case stated by the Quarter Sessions of the county of Lanark for the opinion and directions of the Court of Exchequer in terms of the Act of Parliament 7 and 8 Geo. IV. c. 53. An information was laid in Petty Sessions against the defendants, who are brewers in Lanark, charging them with a contravention of the Act of Parliament 24 and 25 Vict. c. 91, sec. 12, in respect of their retailing beer on the highway in the parish of Cambusnethan. The facts mainly relied upon were, that the defenders' servant, whose duty it was to take orders for beer, and to convey in the defenders' cart the quantity of beer ordered, had, on some occasions, taken in his cart more than had really been ordered, and had retailed the over-supply to casual buyers on the road at a profit of sixpence per dozen. The carter merely stated to his masters what amount of beer he had orders for, and this amount was furnished to him, and placed on his cart by the cellarman, the carter accounting on his return for the bottles taken away by him at the wholesale price. The defendants had instructed their servant not to sell beer off their cart. The question before the Court in these circumstances was, whether through the unauthorised actings of their servant the defendants had incurred a contravention of the Act libelled.

The Justices at Petty Sessions convicted the defendants, and imposed mitigated penalties. The Quarter Sessions on appeal dismissed the information, and awarded costs against the Crown.

To-day the Court were unanimously of opinion that the defendants were not liable for the actings of the servant, these not falling within the scope of his employment.

The LORD JUSTICE-CLERK said—The first point insisted on by the defendants is that the case does not set out negatively that the defendants had not a license. I am unable to give effect to that. It lies upon the defendants to allege and to prove that they had a license. As to the merits of the case, the question is, whether the defendants made the sale or not? The place of sale is the place of business of the brewer, in cases like this, where beer is sent out according to order. In the present case the sale was made not at the brewery, but in another parish, by a servant of the defendants from a cart, and as the proceeds were not fully accounted for by him, but only as much as would have answered to a sale according to order, and it does not appear that they were aware of his proceedings, the question is, whether the servant's illicit sales were within the scope of his employment. I cannot hold that they were.

The other Judges concurred on the merits. On the point of form as to the omission to state that the defendants had no license, Lord Cowan expressed no opinion. Lord Benholme thought the omission fatal; and Lord Neaves concurred with the Lord Justice-Clerk.

CLEMENTS AND MANDATORIES *v.* MACAULAY

(*ante* p. 90).

Proof — Secondary Evidence. Circumstances in which a press copy of a letter admitted as evidence, and exception disallowed.

Mandatory—Ultra fines mandati. Ruled (per Lord Justice-Clerk) that a discharge of accounts by a mandatory was vitiated as a settlement in full binding on his constituent, in respect he had given credit for a sum with which, under his mandate, he was not authorised to deal. Exception taken to this ruling and disallowed.

New Trial. A new trial granted in respect the verdict of the Jury was contrary to evidence.

Counsel for Pursuers—The Lord Advocate, Mr Patton, and Mr Alexander Moncrieff. Agents — Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender — Mr Clark and Mr Lee. Agents—Messrs Hamilton & Kinnear, W.S.

This case was tried before the Lord Justice-Clerk and a jury at the last Christmas sittings. The verdict of the jury was in favour of the pursuers, by a majority of 11 to 1. In the course of the trial two exceptions were taken by the counsel for the defender, and these have now been discussed, along with a rule which was granted by the Court upon the pursuers to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence. The Court disallowed the exceptions, but made the rule absolute, setting aside the verdict and granting a new trial. The judgment of the Court was delivered by

LORD COWAN, who said—The joint adventure which gave rise to the questions stated in the issues related to a speculation engaged in by the pursuer and defender for the purchase of cotton in the Confederate States, with a view to the shipment of 376 bales for sale in Europe by running the blockade, as it is termed.

The first issue regards the purchase and sale of 280 bales, and the amount due by the defender to the pursuer on that part of the joint transaction; and upon that issue the jury by their verdict found that there was indebted to the pursuer the sum of £1369, 14s. 3d., being the balance remaining of his half of the net proceeds of the sale—viz., £3331, 12s. 7d.. under deduction of the sum of £1961, 18s. 4d. admitted in the summons to have been paid to account in June 1863. On this part of the case no dispute exists between the parties.

The second and third issues relate to the purchase and sale of the remaining 96 bales, and the amount due to the pursuer in respect thereof. The second issue is framed to try an alleged breach of contract said to have been committed in these 96 bales having been sold elsewhere than at Havanna or Liverpool, and the sum consequently due to the pursuer in respect of such breach of contract. The third issue, again, is framed to have the amount due to the pursuer in respect of his interest in these 96 bales ascertained, on the assumption that the jury should not affirm the second issue. Under the second issue however, the jury have found for the pursuer, and assessed the amount due at £1104, their verdict on the third issue consequently being for the defender.

Had the jury taken a different view of these issues, and held the alleged breach of contract not proved, they must have found for the defender on the second issue; and upon the third issue they