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

would have found for the pursuer, and, according to the evidence, would have fixed the sum due to him at £979. The difference in the result under the verdict of the jury as regards this part of the transaction was, that they gave £125 to the pursuer beyond the annual net proceeds realised by the sale of the 96 bales, as the loss and damage suffered through the breach of contract which they affirmed.

The sums found due under the verdict of the jury upon the first and second issues thus amount together to £2473, 14s. 3d.

Besides the issues for the pursuer which were thus disposed of by the jury, there was a counter issue taken by the defender as to the effect of an alleged payment and settlement to the attorney of the pursuer, Thomas M'Lellan, of Havannah, of 10,762 dollars, or £2205, 7s. 2d. sterling. The terms of this issue will be for subsequent observation; and upon this counter issue the jury found for the pursuer.

The practical result of this issue of the trial upon the whole issues sent to the jury is that no credit has been allowed by them to the defender for the payment of £2205, alleged by him to have been actually made to M'Lellan, and to have been made on the footing of his being the pursuer's authorised agent or attorney.

I have thought it right to make these explanations affecting the actual position of the case under the verdict of the jury, in order that the grounds upon which, as it appears to me, the argument addressed to the Court should be disposed of may be more easily understood as regards both the bill of exceptions and the motion for a new trial.

Under the bill of exceptions I am of opinion that the defender has not succeeded in showing that other one or the other exception should be allowed.

The ground on which the first exception was maintained is that no sufficient means were proved to have been taken by the pursuer for the recovery of the principal letter, of which the writing tendered in evidence purported to be a copy, and consequently that as secondary evidence it ought not to have been received by the presiding Judge.

The letter in question is No. 28 of process, and purports to have been written by the pursuer to M'Lellan, then resident at Havannah, and to be dated from London, 1st May 1863. The action was raised on 2d March 1864, and what the pursuer says as to his inability to get access to M'Lellan is that he saw him in London about May 1864; that he made an appointment for the evening; that M'Lellan did not keep the appointment, but left next day for Paris; that M'Lellan has never since written to him; that he believes M'Lellan is in France; that he tried to discover where M'Lellan was, both personally and through a friend in London, and could not find him; that he went to Paris to find M'Lellan, and inquired at his reputed lodgings so late as October, but without avail; and that he had further asked a friend to inquire about M'Lellan in December, who reported that he could not find him. This is the whole evidence on the point; and the question is whether it is sufficient to show that personal access to M'Lellan could not have been had if a commission and diligence had been obtained for his examination as a haver with a view to the recovery of the letter in question. For the solution of this point, it is material to have in view that the identity of the writing tendered, as a true and accurate copy of the very letter written to and received by M'Lellan is not and cannot be disputed. The pursuer swears to it; and Ruthven, his clerk, states that he saw the pursuer write a letter to M'Lellan, in London, on 1st May 1863; that he copied that letter in a letter-book; that the writing tendered in evidence is the press copy of that letter; that he left London for Havannah on the same night, taking the letter with him to Havannah, where he arrived between the 19th and 21st May, and that he delivered the said letter to M'Lellan personally. From this evidence it is apparent that it was to M'Lellan alone that application behoved to be made in any attempt made to recover the original document. This being so, and the identity of the copy tendered with the letter delivered to M'Lellan being indisputable, there is sufficient in the statements made by the pursuer, as I think, to justify the reception of the document tendered, and to support the ruling of the presiding Judge, without at all trenching on the undoubted principle that such secondary evidence is admissible only after all due exertion is proved to have been made for recovery of the principal document.

The second exception is taken to the direction of the presiding Judge in point of law, that M'Lellan had exceeded his powers as attorney for the pursuer in adjusting the balance with the defender, and giving the receipt in full, 29th December 1863, inasmuch as he allowed the defender credit for a claim in respect of the loss on the steamer Blanche, and therefore that the said receipt could not operate as a complete discharge of the pursuer's claim under the joint adventure, and that the jury must find for the pursuer on the defender's counter issue, "reserving the effect of the payment said to have been made by the defender to M'Lellan as an answer to the issues for the pursuer"

In judging of the correctness of this ruling, it is necessary to have in view the precise terms of the counter issue. The payment founded on was pleaded in defence to the whole of the pursuer's claim against the defender, being, as alleged, a receipt in full, and having the effect of a complete discharge of further liability; but the account adjusted between the defender and M'Lellan, which brought out the balance to which the payment applied, and the receipt in full, gave credit for the loss on the Blanche, as to which it was admitted that M'Lellan had no power to transact with the defender. To that extent it was clear that the balance brought out could not be in full of the pursuer's claims, and the counter issue which affirmed the contrary could not be found for the defender. The ruling that the receipt in full did not operate a complete discharge, and that in consequence the finding of the jury must be for the pursuer, was thus unexceptionable. No other ruling could well have been given, having regard to the terms of the issue.

The defender, however, argued that there were two views in which this payment to M'Lellan required to be regarded, the one or other, or both of which, there was danger, from the terms of the ruling, might be lost sight of by the jury. Although this were so, the danger of that result seems to me to flow rather from the terms in which the counter issue was expressed, than from the words employed by the presiding Judge in directing the jury. The direction in itself not being objectionable in law, there is an end of the exception; but in truth the reservation contained in the ruling appears to me to have effectually saved the interests of the defender, in so far as they depended upon the fact of the sum of money in question having been paid to M'Lellan. That payment, assuming the jury upon the evidence to hold it to have been well made to M'Lellan, might have been given effect to *either* as a payment to account of the sums demanded by the pursuer, *or* as evidence not merely of such partial payment but of the accounts of the parties having been adjusted so as to exclude the pursuer's claim under his allegation of breach of contract, although the payment actually made was not of the full balance due in the account in respect of the improper credit for loss on the Blanche. The effect of the payment is in express terms reserved "*as an answer to the issues of the pursuer.*" Both as a partial payment having the effect of reducing the amount claimed under the first issue, and as an answer to the claim under the second issue in respect of breach of contract, it appears to me that the effect of the payment was, by the careful terms used by the presiding Judge, specially reserved for the considera-

tion of the jury. I see nothing to have excluded the defender from pleading his case in that manner to the jury in the ruling to which exception has been taken. I think, therefore, that this exception also ought to be disallowed.

These observations dispose of the bill of exceptions.

The argument in support of the motion for a new trial has now to be considered. The ground on which it is made and has been supported is that the verdict is contrary to evidence in that sense in which the expression is always understood in such cases. Not that the Court are to touch the verdict, because in their estimation a different result might, nay, ought to have been arrived at; but that, having regard to the nature and character of the evidence and the question which the jury had to try under the issues, the result embodied in the verdict is at variance with any true, just, and reasonable view that can be taken of the evidence to which the jury had to apply their minds. It is after giving every weight to this undoubted principle, recognised in the practice of the Court in such cases, that I have formed the opinion that a new trial ought to be granted in this case.

A very few observations will explain the grounds of this opinion, for it is not necessary, as I view the case, to refer to the general evidence, or to more of it than what has a bearing upon that branch of the cause on which, as it appears to me, the jury have gone wrong in their verdict. It is to the evidence in its bearing upon the subject of the counter issue to which I allude. It is not that in finding for the pursuer, as directed by the Judge, any error was committed. But it is as to the effect of the payment to M'Lellan, specially reserved for their consideration as an answer to the pursuer's issues. The result of the verdict as it stands, as explained at the outset, is that no credit whatever has been given to the defender for that payment. The jury has simply ignored it as if it had never been made. And the question is, whether a verdict upon those issues by which such result is reached can be held to be consistent with any sound and reasonable view of the evidence, or whether it is not in the strictly judicial sense of the term contrary to evidence.

The proof is partly documentary and partly parole, and has to be considered on that branch of the case to which I confine my attention in its bearing upon two matters of essential moment under the issues—viz., the position of M'Lellan as attorney of the pursuer at the date of the alleged payment to him by the defender on 29th December 1863, and the fact of the payment alleged having been actually made to M'Lellan on account of the pursuer's claim against the defender.

The letter or power of attorney from the pursuer to M'Lellan is dated 21st February 1863, and authorises him to collect from the defender his undivided one-half interest in the 376 bales of cotton which were the subject of the joint adventure, declaring *that whatever he did in the premises should be as binding as if done by the pursuer himself.* It was under this authority that M'Lellan acted in receiving the payment from the defender on 29th December 1863, and granting the receipt for that amount as in full for the balance due to the pursuer in respect of his interest in the cotton. The genuineness of these documents is not disputed. The pursuer admits it. And supposing that no ground existed for holding the authority to have been withdrawn, it could not be questioned that M'Lellan acted in the transaction as the pursuer's authorised attorney. To whatever effect entitled, the payment, if believed by the jury to have been made, was just as effectual as if made to the pursuer himself. The question is, whether there is evidence of the withdrawal of this special power of attorney, so as to put the defender in the position of having made a payment on account of the pursuer's claim against him to an unauthorised third party? It is made certain by the pursuer's own statement in answer to a specific interrogatory that he never communicated to the defender in writing that he had recalled M'Lellan's authority to settle with him, and that he never had personal communication with the defender as to its withdrawal. But it appears that the pursuer sent out Archibald Ruthven, a person in his employment, to Havannah and other places, in the month of May 1863, with a general power of attorney to settle the various transactions in which he was engaged in that part of the world, and specially to recover any sums of money in which he might be interested in Mexico, or Texas, or Havannah. Ruthven, it farther appears, did go to Havannah, and carried with him the letter No. 28 of process, the press copy of which has been admitted in evidence addressed to M'Lellan. It is dated 1st May 1863. It expresses a hope that the defender had given M'Lellan an order for the proceeds of his half of the joint adventure, or of 188 bales of cotton; and concludes thus:—"If not, Mr A. S. Ruthven has my full and complete power of attorney, and will settle with Mr Macaulay." This letter Ruthven states that he delivered to M'Lellan upon his arrival at Havannah, and showed him the power of attorney in his favour, when M'Lellan observed on reading it, "that it was a strong document." Now, it will be observed that while Ruthven's visit to Havannah was of temporary duration, and that he might or might not succeed in effecting a settlement with the defender, there is no express withdrawal of M'Lellan's special authority in this letter of 1st May 1863. And assuming no settlement to have been effected by Ruthven while abroad, which was the fact, it would have been for consideration, but for other written evidence to which I will immediately refer, whether that special authority did not remain entire, and entitle M'Lellan to act on it as if the intermediate general authority conferred on Ruthven had not been granted at all. And in point of fact it will be seen that the pursuer subsequently so expressed himself as to lead to the conviction that he held so himself.

An interview subsequently took place between Ruthven and the defender, at which the former states that he demanded a settlement of the cotton, which the defender refused, and that on this occasion he showed the defender the power of attorney, but which the defender did not read. The two parties are at variance in their statements as to what passed at this interview, especially as to the reasons assigned by the defender for not settling the transaction. It does not appear to be of much consequence whether the statement of the one or the other was believed by the jury. The defender's statement is that he declined to settle because the money was placed beyond his control by the act of the pursuer; and it appears from some of the pursuer's own letters that he had interdicted the Liverpool house who had sold the cotton from settling with the defender until his claims were made good. However this may be, no settlement with Ruthven did actually take place.

This interview between Ruthven and the defender took place at Matamoras, and thereafter the defender returned to Havannah, where he communicated with the correspondents of the Liverpool house, Vignier, Robertson & Co. M'Lellan, now according to the defender's statement, waited upon him and showed him the special authority or power of attorney he held from the pursuer to settle with him the joint adventure transaction. And the defender further states that he had no reason whatever to suppose that that power of attorney was revoked, or that the general authority conferred upon Ruthven in reference to all the pursuer's transactions in that region had superseded M'Lellan's special power. The defender therefore having got money from Vignier & Co. to pay M'Lellan, made the payment in question as the balance brought out on the transaction, as stated in the account, to which the receipt granted to him for such payment bears special reference.

The fact of this payment having been actually made does not depend upon the defender's statement alone. It is vouched by the receipt subscribed

by M'Lellan, the genuineness of which the pursuer admits. This fact therefore that 10,762 dollars or £2205, 7s. 2d. were actually paid by the defender on account of the pursuer's claim to M'Lellan is thus instructed *scripto*. And the case does not end here on the written evidence. For on the 6th of January 1864 M'Lellan writes to the pursuer that it gave him pleasure to advise that he had succeeded in arranging his claim with the defender for the 376 bales of cotton, and that the defender had paid him the sum above stated, "which amount," he adds, "I have placed at your credit."

To understand this statement it has to be kept in view that at this very date the pursuer was indebted to M'Lellan in a larger sum than the amount which he here acknowledges to have received from the defender. Hence it is that M'Lellan writes the pursuer that the large payment made to him by the defender was placed to the pursuer's credit—the debt due to M'Lellan by him being by means of that payment *pro tanto* extinguished. Then it is all important to observe the terms in which the pursuer wrote both to M'Lellan and to the defender upon receiving this intimation of the £2205 having been paid by the defender to M'Lellan. For supposing that his authority to settle with the defender was understood by the pursuer to have been withdrawn, it was to be expected that he would have repudiated the payment entirely, and not have recognised it as he did to be a payment good and effectual to discharge the debt which he owed to M'Lellan.

His letter acknowledging receipt of the intimation from M'Lellan as to the payment having been made is dated 1st February 1854, and in this letter he says—"*So far as this amount is concerned* I am entirely willing you should receive the amount of £2367, 3s., and send me your receipt in full—that being the amount I collected for the drafts you handed me when I came through, up to my last." It is impossible to understand this in any other sense than that the payment made by the defender was to be a good payment so far as the debt due to M'Lellan by the pursuer, although the letter undoubtedly intimates that more should have been obtained from the defender in the settlement of the joint-adventure transaction. Then what does the pursuer write to the defender himself on the same day? He intimates that M'Lellan had informed him of the payment made to him by the defender on his account, without one word to the effect that M'Lellan had acted unauthorisedly in receiving that payment. All he says is—"If you pay to M'Lellan the amount of £2367, 3s., I shall gladly allow that amount accompanied with his receipt in full"—*i.e.*, his (M'Lellan's) discharge of the debt owing to him by pursuer, and he adds that the defender would then be owing him on this transaction £1410, 7s. 10d., and $7428, 90c. I cannot understand this passage to mean that in addition to the £2205 already paid to M'Lellan another sum of £2367 was to be paid him, and still a balance to remain due by defender to pursuer to the extent stated. Any such view would bring up the claim of the pursuer, including the partial payment of £1961, 18s. 4d. credited in the summons as received in June 1863, to an amount far exceeding what the pursuer ever stated to be the amount of his debt. The true and only just interpretation of the passage is, that in addition to what he had already paid to M'Lellan, he should pay him as much as would make up what he held to be the debt he owed M'Lellan—viz., £2367, 3s., and get M'Lellan's discharge of his (the pursuer's) debt in full in respect of that payment, and he would gladly allow that amount. And what is this but a recognition and adoption of the payment of £2205 made to M'Lellan as at least a good partial payment of which the pursuer was to reap the benefit as *pro tanto* extinction of his own debt to M'Lellan. And here I must observe that throughout the whole evidence the pursuer has not attempted to show how his accounts stand with M'Lellan, or to disprove the statements made in his own letters of 1st February 1864, that he owed M'Lellan £2367 at the very time that this payment was made by the defender to M'Lellan. Upon the evidence, therefore, the result must be, were the verdict of the jury to stand, that while the defender is refused credit for this payment of £2205, the pursuer must get the full benefit of it as a payment on his account with which M'Lellan has credited him. Had there been room to view the whole transaction between the defender and M'Lellan as a fictitious or fraudulent scheme or device by which the pursuer was defrauded of this amount, the result would have been different, but the pursuer has not attempted to establish anything of that kind, and the evidence, documentary and parole, bearing on this matter forbids any such view of the transaction.

Having arrived at this conclusion on the question of the effect of the payment as operating at last partial satisfaction of the pursuer's claim, this is sufficient to support the defender's motion for a new trial. It is not necessary to consider the effect of the payment in the other aspect of it—that is, as operating a discharge of the pursuer's claim for damages in respect of alleged breach of contract in the sale of the ninety-six bales elsewhere than at Liverpool or Havannah. The jury having ignored the payment entirely by their verdict, its effect in the light now under consideration could not have been before them; and it is therefore needless, and would be wrong to enter into any discussion on the point. It will, no doubt, be brought forward at a new trial. And in like manner it is unnecessary to express any opinion on the question whether the evidence was such as to justify the jury in holding that a breach of contract had been proved, and that part of the second issue is introductory to the demand for damages in respect of such breach, while it must be for the consideration of the jury whether such claim had not been settled under the transaction between the defender and M'Lellan at the time when the payment of £2205 was made.

On the whole, therefore, and without entering farther into the case. I am of opinion that the verdict should be set aside, and a new trial granted, at least upon the pursuer's issues.

The pursuers were found entitled to the expenses of discussing the exceptions, but all other expenses were reserved.

JURY TRIAL.

(Before Lord Jerviswoode.)

GARDNER *v.* M'GAGHANS.

Reparation—Malicious Apprehension—Slander. In an action for malicious apprehension and slander, verdict for the pursuer.

Counsel for Pursuer—Mr Gifford and Mr Guthrie. Agent—Mr James Renton jun., S.S.C.

Counsel for Defenders—Mr Alexander Moncrieff and Mr W. A. Brown. Agent—Mr James Bell, S.S.C.

In this case John Gardner, joiner, residing in Home Street, Edinburgh, was pursuer, and Mrs Mary Reilly or Keddie, residing in No. 17 Spittal Street, Edinburgh, now wife of Michael M'Gaghan, labourer, there, and the said Michael M'Gaghan for his interest, were defenders.

The issues sent to the jury were in the following terms:—

"1. Whether, on or about Monday the 24th of July 1865, and in or near the female defender's house in Spittal Street, Edinburgh, the female defender, maliciously and without probable cause, apprehended, or caused the pursuer to be apprehended, and thence conveyed to the Fountainbridge station of the Edinburgh City Police—to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 24th day of July 1865, and on the way between the female defender's house in Spittal Street and the Fountainbridge station of the Edinburgh City Police, the female defender did falsely and calumniously, in the