tration of charities, and has sustained all sorts of titles, *e.g.*, that of a corporation, that of a sheriff of a county, and that of persons who represent the class intended to be benefited. But then, in all these cases the persons who brought the application had to put themselves into a definite position in relation to the charity from which they had no intention of receding. But when, as here, disponees come forward with a scheme, they must first say whether they propose to accept or not the office imposed upon them, for if they do not accept they have no title to intervene. Otherwise it might lead to this result, that when the Court had, after obtaining such information or advice as was available, approved of a scheme, the petitioners might decline to accept office, and then new administrators might be appointed, who might come and tell us that the scheme which we had sanctioned was not the best. The attitude, which, no doubt with the best motives, the petitioners here have taken, is one which in my opinion disables them from promoting an application of this kind.

I also agree that if we were to consider the merits, there would be the greatest difficulty in sanctioning such a variation from the testator's purposes as would be entailed in the expending one-third of the whole fund in the erection of a mission-hall when nothing was contemplated by the testator but out-door work.

LORD KINNEAR concurred.

The Court refused the petition as incompetent.

Counsel for the Petitioners—H. Johnston—C. D. Murray. Agents—Morton, Smart, & Macdonald, W.S.

Wednesday, October 23.

SECOND DIVISION.

[Lord Low, Ordinary.

J. & G. PATON *v.* THE CLYDESDALE BANK, LIMITED, AND ANOTHER.

Fraud—Representations as to Credit—Mercantile Law Amendment Act 1856 (19 *and* 20 *Vict. c.* 60), *sec.* 6.

In an action of damages against a bank and the bank's agent, the pursuer averred that he had been induced by the false and fraudulent representations of the agent as to the credit of a debtor of the bank, to accept bills drawn by the debtor. He also stated that the proceeds of the bills were applied to reduce the balance due by the debtor to the bank, contrary to the representation by the agent that they would not be so applied. It was contended by the defenders that the alleged representations as to credit, not being in writing, the action was excluded under section 6 of the Mercantile Law Amendment Act 1856.

Held that the case did not fall within the section, on the ground that the purpose of the alleged fraudulent representations was not that the debtor might obtain the acceptances for his own benefit, but for that of the bank.

Fraud—Agent and Principal—Imputed Liability—Scope of Employment.

Held that in the circumstances alleged the agent had made the representations complained of in the course of his service, and, in that sense, within the scope of his employment, and that the bank were liable for his fraud.

Messrs J. & G. Paton, merchants, Dundee, raised an action against the Clydesdale Bank, Limited, and Alexander Scott, agent at the Dundee branch of the bank prior to November 1894, as defenders jointly and severally, for £4083, 8s. 5d. In their condescendence the pursuers averred that in and prior to March 1893, Douglas, Reid, & Company, manufacturers, Dundee, were indebted to the Dundee Branch of the Clydesdale Bank in sums amounting to upwards of £20,000. They also stated that prior to March 1893 they had sustained very serious losses in their business, and that in that month the defender Alexander Scott, the agent of the bank, was well aware of the losses which had been incurred by Douglas, Reid, & Company, and knowing that they were insolvent, or at all events in great financial difficulties, he became apprehensive of the safety of the bank's claim against them, and also as to the effect on his own position if he were obliged to report the real state of matters to the head office of the bank.

The pursuers further averred—(Cond. 4) "Mr Scott, either alone or in conjunction with Charles Reid, one of the partners of the said firm of Douglas, Reid, & Company, conceived the fraudulent design of getting Douglas, Reid, & Company to procure acceptances from the pursuers and other merchants in Dundee, with the view of applying the proceeds of these acceptances in extinction *pro tanto* of the debt due to the Clydesdale Bank. It was a part of this scheme that the pursuers and the other mercantile friends to whom Douglas, Reid, & Company applied for acceptances should receive from Mr Scott satisfactory assurances (*first*) as to the solvency of Douglas, Reid, & Company, and (*second*) that none of the money payable under the acceptances should be applied in extinction of any prior claim or debt of the bank or other creditor of Douglas, Reid, & Company. (Cond. 5) In pursuance of this fraudulent scheme, Charles Reid, in or about the month of March 1893, represented to Mr John Paton, the senior partner of the pursuer's firm, that his firm of Douglas, Reid, & Company required temporary accommodation, and suggested that Mr Paton should see Mr Scott on the subject. Mr Paton accordingly saw Mr Scott, who assured him (*first*) that Douglas, Reid, & Company were in a thoroughly sound condition financially, and only required temporary accommodation; (*second*) that the sum due to the bank

was very trifling; (*third*) that Douglas, Reid, & Company had made up the losses which they sustained through Lipman & Company's failure, by fortunate speculations in jute; and (*fourth*) that no portion of the proceeds of any acceptance by the pursuers would be applied in extinction of the bank's debt or of any obligation to the bank. . . The said statements and assurances by the said Alexander Scott were false, and were made by him in pursuance of the fraudulent design above condescended on."

The pursuers further averred that in reliance on these statements and assurances, the pursuers, on various dates between March 1893 and April 1894, accepted bills to the amount of £4000, drawn upon them by Douglas, Reid, & Company, the proceeds of which were placed to the credit of Douglas, Reid, & Company's overdrawn account with the Clydesdale Bank.

The pursuers pleaded, *inter alia*—"The defenders, the Clydesdale Bank, are liable for the fraud of the defender Scott, in respect that he was acting in said transactions within the scope of his duties as agent for the bank and for their benefit."

The defenders lodged defences and pleaded, *inter alia* — "The alleged misrepresentations and assurances not having been in writing and subscribed by the person making the same, are by sec. 6 of the Act 19 and 20 Vict. cap. 60, of no effect.' The Clydesdale Bank, Limited, further pleaded—"In any event, these defenders are not liable in damages in respect that the alleged false representations were unauthorised and outwith the terms and scope of the said Alexander Scott's employment."

On 29th August 1895 the Lord Ordinary (Low) before answer allowed the pursuers a proof of their averments, and to the defenders a conjunct probation.

"*Opinion.*—The pursuers' motion for a proof in this case was resisted upon the ground that the representations and assurances of Scott, upon the faith of which the pursuers alleged that they accepted bills for the accommodation of Douglas, Reid, & Company, not being in writing and subscribed by him, were of no effect under the 6th section of the Mercantile Law Amendment Act. It is true that the greater part of the alleged representations and assurances, said to have been given by Scott to the pursuers, might be brought within the scope of the very wide phraseology of the Act, namely—'All representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person.' But then in order to bring the case within the Act the representations and assurances must be given, 'for the purpose of enabling such person to obtain credit, money, goods, or postponement or payment of debt, or of any other obligation demandable of him.' Now, no doubt, the purpose for which the representations and assurances are said to have been made, was to be accomplished by enabling Douglas, Reid, & Company, to obtain credit from the pursuers, but the purpose itself was to enable the bank to obtain payment of the debt of Douglas, Reid, & Company. That, in my opinion, is sufficient to take the case out of the provisions of the statute."

The defenders reclaimed.

Argued (*for both defenders*)—The action was excluded under sec. 6 of the Mercantile Law Amendment Act, the alleged representations and assurances of Scott not being in writing. Taking the representations in condescendence 5 as a whole, they were representations as to credit, which were specifically dealt with by the Act. The mode of executing the fraudulent design was exclusively by false representations as to character and credit. The representations were also made for the purpose of enabling Douglas, Reid, & Company to obtain credit. The pursuers' own complaint was that on account of these representations he did give Douglas, Reid, & Company credit. Sec. 6 of the Mercantile Law Amendment Act was passed in order to assimilate the Scots to the English law on matters falling within Lord Tenterden's Act (9 Geo. IV. c. 14), sec. 6; Bell's Comm. (7th ed.) vol. i. 402, note 8. Lord Tenterden's Act was passed in order to meet the case of all false representations as to the character and credit of third parties; by Pollock, C.B., in *Tatton* v. *Wade*, 1856, 18 Scott's Rep. Com. Bench pp. 371, 381; and by all the Judges in *Lyde* v. *Barnard*, 1836, 1 M. and W. 101. The representations in this case were of the same class as those in *Swann* v. *Phillips*, 1838, 8 A. & E. 457. The Act applied even although the person making the representation benefits thereby — *Devaux* v. *Stein Keller*, 1839, 8 Scott's Reps., Com. Pleas 202. (*For the Clydesdale Bank*)—Even supposing that all the averments set forth in the condescendence were true, the bank was not liable, because their agent acted outside the scope of his duty in making such false and fraudulent representations—*Swift* v. *Jewsbury*, 1874, L.R., 9 Q.B. 301. If false and fraudulent assurances given by an agent are given by him outwith the scope of his employment, the agent must be viewed as a third party, and the bank would be entitled to take the benefit, if any, resulting from the statements made. In *Mackay* v. *Commercial Bank of New Brunswick*, 1874, L.R., 5 Privy Council App. 394, the fraudulent acts committed were within the scope of the bank agent's employment. In the last sentence of the judgment (p. 416) the distinction between that case and such a case as the present, where the agent's actings were not in the usual or ordinary course of business, was pointed out.

Argued for the pursuers—(1) The action was outside the scope of the Mercantile Law Amendment Act, because the representation was not made in order to provide means by which Douglas, Reid, & Company could procure credit, but (1) in order to get the pursuers' signature to certain acceptances, and (2) in order to get payment of money for the bank. The present action was not only founded on representations, it contained a general averment of a fraudulent scheme. Representations of the

kind averred in this action, and made for the purposes averred, did not fall within the list of representations enumerated in the Act—*Haslock* v. *Ferguson*, 1837, 7 Ad. and El. 86. Under section 100 of the Bills of Exchange Act 1882 (45 and 46 Vict cap. 61), any fact relating to a bill of exchange may be proved by parole evidence. (2) This fraud was committed by the agent in his capacity of agent, and the bank could take no benefit by his fraud—*Borwick* v. *English Joint-Stock Bank*, 1867, L.R., 2 Exch. 259; *Houldsworth* v. *City of Glasgow Bank*, 1879, 6 R. 1164; 1880, 7 R. (H. of L.) 53.

The pursuers moved to be allowed to add the following additional plea-in-law—"The defenders having been induced to sign the said bills by the fraud of the said Alexander Scott, and the bank having received the proceeds thereof, and being *lucrati* by said proceeds and the interest thereon, the pursuers are entitled to decree as concluded for."

At advising—

LORD-JUSTICE CLERK — The first question here is, whether this case falls within the clause of the Mercantile Law Amendment Act to the effect of precluding the pursuer from succeeding in his case unless he can prove by writ that certain representations were made. I do not think that this case falls under the statute. The pursuer alleges a fraudulent scheme by means of which these three bills were obtained on representations of the agent for the purposes of the bank. These representations by the agent were made by him within the scope of his employment, and therefore in my opinion this is a proper case for inquiry and proof.

LORD YOUNG—I agree, and I think that as the case is to be tried either by proof or before a jury, perhaps the less that is said at this advising the better. However we must decide, and assign our reasons for deciding upon the application of the statute in question—the application of the Mercantile Law Amendment Act, section 6, on which the Lord Ordinary's judgment proceeds. I am, with your Lordship, of opinion that that clause of the Act does not apply to this case. If the pursuer had given credit to Douglas, Reid, & Company, and were suing the bank for having guaranteed the payment of Douglas, Reid, & Company's debt to them, because the bank or their agent had represented that Douglas, Reid, & Company were in good circumstances, I think that would have been a case for the application of the Act. This case is not of that kind at all. Indeed, Douglas, Reid, & Company are not here, and on the face of any documents we have before us, Douglas, Reid, & Company never received any credit from the pursuers. We can decide nothing upon the face of the documents before us except that the pursuers accepted certain bills drawn upon them by Douglas, Reid, & Company. On the face of the bills they are debtors to Douglas, Reid, & Company, and to the holders of the bills, and they were dealt with by the holders of the bills, viz., the Clydesdale Bank, as debtors on these bills, Douglas, Reid, & Company having transferred them to the bank. Well, as such debtors on the bills to Douglas, Reid, & Company, or Douglas, Reid, & Company's endorsees, viz., the bank, they paid under protest, the ground of their protest being that the bills had been obtained from them by fraud, and by the bank, of course not by the body of shareholders at a meeting, or even by the body of directors, but by a man acting as agent for the bank in the transaction of their business, and in the particular business of procuring these bills. The fraudulent representation alleged amounts in substance to this—that the bank, through their agent, having Douglas, Reid, & Company as their debtors, upon an account for, say, £10,000, wished to get that reduced, and accordingly set about getting acceptances of bills, and getting the pursuers' acceptances, to be applied in reducing the debt which Douglas, Reid, & Company owed to them, but did that on the false and fraudulent representation that the bills which the pursuers were induced to accept were not to be so applied, but that the proceeds were to be given to Douglas, Reid, & Company to carry on business with. Well, now, if these statements are true, it was a knavish piece of work on the part of Scott. And for whose benefit was it? According to the statements of the pursuers, for the benefit of the bank. It was to get the pursuers' documents of debt, their money obligation in the shape of bills for £4000, on which the bank could sue and recover the money. That was the end and object for which the fraud was perpetrated. I do not say it was —far from it—but that is what is alleged. Now, it is not a case of guarantee under the Mercantile Law Amendment Act, where the party alleging a guarantee of a third party seeks to prove the representation by the alleged guarantor by parole evidence; that is not the case at all, and therefore I am of opinion that the Mercantile Law Amendment Act is not applicable, and that the case must go to trial, and I rather incline to think—but I leave it to the parties themselves to arrange it—that it would be more fitting to bring this question of fraudulent representation, because that is the character of it, before a jury for their judgment.

LORD TRAYNER—I concur. I agree with Lord Young that as there is to be some investigation into the facts of this case, it is desirable we should not pronounce any judgment upon any point which it is not necessary to decide before the investigation. One point, however, I think must be now decided, namely, whether this case falls within the provisions of the Mercantile Law Amendment Act, for if it does, then the pursuer's action is altogether excluded, it being certain that the representations founded on are not in writing. On that matter I agree with your Lordships in thinking that this case does not fall within the provisions of the Mercantile Law Amendment Act. The case averred (which at present must be taken to be true) is this, not that Scott made representations as to

Reid to Paton, in order that Paton might give Reid credit or money, but that Scott made statements — false and fraudulent statements — to Paton in order that the bank might get from Paton payment of part of the debt which Reid owed to the bank. I entertain no doubt that what Scott is said to have done was done by him in the course of his service, and in that sense within the scope of his authority, and for which, consequently, the bank is answerable. It is not to be lost sight of in connection with this point that the bank are retaining the benefit which (according to averment) they obtained through their agent's fraud.

LORD RUTHERFURD CLARK was absent.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against; open up the record and allow the pursuers to add an additional plea thereto; and the addition having been made, of new close the record and appoint the pursuers to lodge issues within ten days; find the pursuers entitled to expenses since the date of said interlocutor."

Counsel for Pursuers — Dickson — Salvesen. Agent—J. Smith Clark, S.S.C.

Counsel for Defenders The Clydesdale Bank, Limited—Asher, Q.C.—Ure—King. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender Alexander Scott—Sol.-Gen. Murray, Q.C.—King. Agents—Ronald & Ritchie, S.S.C.

Tuesday, October 29.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

DAVIDSON'S TRUSTEES *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Compulsory Purchase—Omission to Purchase through Mistake or Inadvertency—Lands Clauses Consolidation Act 1845 (8 *Vict. c.* 19), *sec.* 117.

By sec. 117 of the Lands Clauses Consolidation Act 1845 it is enacted, that if at any time after the promoters of the undertaking shall have entered upon any lands, which they were authorised to purchase, any person should appear to be entitled to any estate, right, or interest in, or charge affecting such lands, which the promoters should, "through mistake or inadvertency," have failed or omitted duly to purchase, or to pay compensation for, then whether the period allowed for the purchase of lands shall have expired or not, the promoters should be entitled to purchase such omitted estate, &c., the purchase money to be settled by arbitration in like manner as if the promoters had purchased the omitted estate, &c., before entering on the lands.

Held that where the promoters of a railway undertaking had never manifested any intention, while their compulsory powers existed, of taking any of the minerals lying under the lands acquired by them, except such as were situated above the authorised formation level of the railway, they were not entitled under this section afterwards to acquire minerals situated below formation level at a price to be settled by arbitration in terms of the statute.

Railway—Mines and Minerals—Formation Level — Compensation — Damages—Measure of Damages.

The promoters of a railway undertaking who had acquired ground, the title to which expressly reserved the minerals to the superior, worked out the whole freestone above formation level, and a large quantity of the freestone below formation level, sold some of it, and used the rest for the construction of stations, sidings, and other purposes connected with the undertaking.

Held that, as regards the freestone below formation level, the superior was entitled to damages, and not merely to statutory compensation, and that the measure of the damages was the price which the company would have required to pay for the stone if they had purchased it in the market, less the expenses of working and bringing it to the surface, and not the value of the stone *in situ* to the superior.

Livingstone v. *Rawyards Coal Company*, February 13, 1880, 7 R. (H. L.) 1, *distinguished.*

Railway—Mines and Minerals—Reserved Minerals—Sub-Reservation in Favour of Vassal.

By the terms of a feu-contract the minerals were reserved by the superior, but it was declared that it should be lawful for the feuar to dig or work the freestone on the said piece of ground, "for erecting houses and offices or walls and other buildings upon the said piece of ground, or for making or repairing roads thereon."

Held that a railway company who had acquired the feu, were entitled to work out and use the freestone for the erection of stations, sidings, or other buildings connected with their undertaking so far as situated upon the feu so acquired, and for the construction and repair of their line within the limits of the feu.

In 1847 James Davidson of Ruchill disponed to Thomas Allan and his heirs and assignees whomsoever two plots of ground. The disposition was made subject to the following reservation:—"Reserving to the said James Davidson, and his heirs, successors, and assignees whomsoever, superiors of the said piece of ground, the whole coal, ironstone, freestone, and