*Friday, January* 16.

## SECOND DIVISION.

[Lord Pearson, Ordinary.

## REDERI AKTIEBOLAGET NORDSTJERNAN *v.* CHR. SALVESEN & COMPANY.

*Agent and Principal—Agent's Responsibilities to Principal—Misrepresentation by Agent to Principal that Contract Concluded—Warranty—Damages—Measure of Damages.*

Where an agent represents to the principal for whom he acts that he has authority from the other principal—whether he also acts for such other principal or not—and such representation is to the agent's knowledge erroneous, then the agent is liable to the principal to whom the representation was made for the loss resulting from the contract not being enforceable, and the measure of damages is the difference between the profit which would have been made from the abortive contract and the best terms which could be obtained in the market when the misrepresentation was discovered.

*Held* also upon the preliminary correspondence passing between the parties that the agents were liable for the expenses incurred by the principals to whom the representation was made in raising an action against the other principals for breach of contract and prosecuting it up to the closing of the record.

*Held* further, that although the principal, who had refused to go on with the contract, had done so not on account of the misrepresentation made by the agents but for other reasons altogether, the agents were not entitled to take any benefit from this fact, because in any view they had by their misrepresentation furnished a good defence against any action to enforce the contract.

*Contract—Constitution—Offer and Acceptance—Chartering a Ship—Charter-Party.*

Where shipbrokers by telegraph stated to the owners of a ship that they had "fixed" the ship on certain terms subject to instant confirmation, and the shipowners immediately telegraphed that they accepted, *held* that this interchange of telegrams was sufficient by itself to conclude a binding contract, and that the conclusion of the contract was not suspended until a charter-party duly stamped had been made out and signed.

Rederi Aktiebolaget Nordstjernan, a company carrying on business at Stockholm, and the owners of the s.s. "Oscar II." of Stockholm, raised an action against Chr. Salvesen & Company, shipbrokers, Leith, for £1400, as damages for loss suffered by them in consequence of an agreement for the chartering of the "Oscar II.," which the defenders professed to have concluded on the pursuers' behalf with David Ireland & Son, coal merchants, Dundee, not being carried out, and of the defenders wrongfully representing to the pursuers that they (the defenders) were authorised by Ireland & Son to conclude said agreement on their behalf.

The pursuers pleaded—"(1) The pursuers having suffered loss and damage to the extent sued for through the breach of duty and wrongous actings and representations of the defenders, as condescended on, are entitled to decree in terms of the conclusions of the summons."

The defenders pleaded—"(3) The material averments of the pursuers being unfounded in fact, the defenders are entitled to absolvitor. (4) The pursuers having suffered no loss or damage for which the defenders are responsible, the defenders should be assoilzied. (5) *Separatim*, on the assumption that the defenders are to be treated as having dealt with the pursuers as principals, they are entitled to be assoilzied, in respect (1) the writings founded on as constituting a charter-party of said vessel have not been stamped, and (2) there was no concluded contract between the parties."

A proof was led. The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (PEARSON)—"The pursuers are a company carrying on business in Stockholm, and are owners of the steamship 'Oscar II.' They sue the defenders, who are shipbrokers in Leith, for damages incurred through the defenders' 'breach of duty and wrongous actings and representations' in the course of negotiating a charter for that vessel.

"The leading facts on which the question of liability depends are to be found in a series of letters and telegrams beginning on Monday 28th November and ending on Monday 5th December 1898. There are three parties to this correspondence—the owners, the shipbrokers, and Messrs David Ireland & Son, coal merchants and exporters in Dundee. The shipbrokers had applied to Messrs Ireland with a view to negotiating a charter for the carriage of 5000 tons of coal from an east coast port to Stockholm. It may be taken that the shipbrokers, although themselves in the export trade, acted as intermediaries without any intention of taking up the charter themselves, and also that they conducted the negotiations without disclosing to either principal who the other principal was. That they were in fact acting as agents for an undisclosed foreign principal was made clear to Messrs Ireland from the first in the defenders' letter of 29th November. Whether the shipowners knew or were bound to infer that the defenders were not to take up the charter themselves, but were communicating with a third party on this side, is not quite so clear. But in the view I take of the case it is not material.

"Stated generally, the course of the correspondence was this. On 28th November the owners telegraphed to the shipbrokers that the ship would be ready about 8th December for a coal charter from the east

coast of England to Sweden, subject to quick loading and discharging, the freight to be 8s. a ton. The shipbrokers at once wired this on to Messrs Ireland, asking them to state their quickest time for loading and discharging. Their first reply had reference to Burntisland, but as the ship was too large for that port Methil was fixed as the port of loading. For Methil their reply was—freight to be 7s. 6d. a ton, 120 hours allowed for loading, and the discharge at Stockholm to be at the rate of 600 tons per day, on the understanding that they would not be responsible beyond 500 tons. To this the shipbrokers, after communicating with the owners, replied on 1st December, insisting on an 8s. freight, and on a discharge of 600 tons per day without qualification, and asking Messrs Ireland to offer accordingly. They refused to do so, and adhered to their position as to the freight and the discharge clause, but altered the loading time to '96 berthed'—that is, undertaking to complete the loading in 96 hours after the ship was berthed. The shipbrokers wired out to the owners, who gave way as to the freight but not as to the discharge clause. But they did not wire out the alteration in the loading hours from 120 to '96 berthed.' On the contrary, in their telegram to the owners, they inserted '144 loading no turn,' which meant 144 hours after arrival—whether in the roads or in dock does not matter in this case, so long as it excluded the idea of so many hours 'after berthing.' Irelands' proposal gave no warrant for this, and indeed was directly to the contrary, and still less were Irelands' views met by the counter proposal in the owner's reply telegram of 1st December, namely, that the loading time should be '96 running hours no turn,' which meant, and was interpreted by Irelands to mean, 96 hours after arrival. For this and other reasons they on 2nd December declined the ship on the conditions offered by the shipbrokers.

"The brokers thereupon made a fresh start, and wired asking the owners, whose conditions had proved 'unworkable,' to agree to the brokers' conditions. The owners replied that they understood the conditions to be exactly the same except the loading time, as to which they were willing to go the length of 120 hours from arrival. This being submitted to Irelands, the latter replied substituting '96 berth' for '120 arrival.' Once more the shipbrokers on 5th December try Irelands with the two proposals already rejected, namely, (1) 120 hours for loading after arrival; and (2) discharge at the rate of 600 tons per day. Once more the shippers reply (1) that they decline the ship if the loading hours are to count from arrival; and (2) that they will not agree to discharge 600 tons per day, except under the qualification that they are not to be responsible for demurrage over 500 tons. The brokers at once communicate with the owners, passing over the first point in absolute silence, and wiring—'"Oscar" fixed discharging 600 inserted charter but not responsible demurrage over 500 instant confirmation better impossible.' The owners, reading this, as they were clearly entitled to do, as meaning that the ship was fixed subject to their at once agreeing to the stipulation as to discharge, telegraphed promptly that they agreed to it, and so (as they thought) closed the bargain. The brokers having received this the same evening wired to the merchants that their terms were accepted as arranged, and that they would post a charter in the morning for signature. To make it quite clear they wrote the merchants at the same time what terms were 'arranged,' and these include '96 hours loading after berthed.' In short, the defenders knowing that the contracting parties were hopelessly at variance on this point represented to each party respectively that the contract was concluded on his own terms.

"Mr T. E. Salvesen, partner of the defenders' firm, gives the only possible explanation. 'By this time,' he says, 'we had made up our mind that unless we came to the rescue there was no possibility of a contract being concluded at all, as Ireland insisted upon loading time after berthing, and the owners insisted upon loading time after arrival. On 5th December we made up our mind that we would run the risk of the difference between the owners' and the charterers' terms. At that time that was a very customary thing, it was constantly done by any brokers who did any business. Naturally we would not take that risk unless we thought the risk was almost *nil.* . . . We were very anxious that this charter-party should be concluded so that we might earn our brokerage, after having had a great deal of trouble and expense in telegraphing, and this was the only way in which we thought it could be done.' When it is said that the risk of the difference was extremely small, it must be borne in mind that in the contracting parties' view it was so material that neither would give way upon it.

"The sequel was, that upon the shipbrokers wiring to the merchants that their offer was accepted on the terms as arranged, which they did on the evening of 5th December, the merchants replied the same evening that only one hour previously they had had a wire from their consignees at Stockholm cancelling the 5000 ton ship as they had arranged otherwise, and they added, 'The owners have spoiled this business by hanging off so long.' On the following day, 6th December, they explain further, 'The owners have delayed so long that we found it impossible in the face of scarcity of waggons to secure enough cargo to load her.'

"The ship at this time was discharging a cargo at Rotterdam and would not (it appears) have been ready in ordinary course to load at Methil on the 8th, but it is not, in my opinion, proved that she could not have made such a despatch as to fulfil the stipulation that she was to be ready to load 'about 8th December.' As Messrs Ireland adhered to their refusal to load it was needless to order her to proceed to Methil, and she was accordingly sent upon

another voyage, on which the freight earned was 5s. instead of 7s. 6d. The difference between these two freights forms the major part of the damages claimed by the pursuers.

"The pursuers, in the belief that they had a concluded contract of affreightment, first sued Messrs Ireland for damages for breach of that contract. Messrs Ireland in their defences pleaded that the writings alleged to constitute the contract were unstamped, and also that there was no completed contract, and they specially denied that the telegram of 5th December professing to fix the ship had been sent with their authority. The pursuers thereupon raised the present action for damages against the brokers, on the ground of their representation that they had fixed the contract on certain terms without having authority to do so, and their consequent failure to make good their representation."

The following correspondence passed with reference to the action raised by the pursuers against Messrs Ireland:—

On 15th December 1898 the pursuers requested the defenders to send all correspondence between the defenders and Messrs Ireland to the pursuers' London solicitors. This the defenders did.

On 27th February 1899 the pursuers' law-agents wrote to the defenders as follows:—"We have been consulted on behalf of the owners of this ship with reference to the engagement you made for her with Messrs Ireland. We have advised that your telegram of 5th December fixed the ship subject to confirmation at once, and that the owners did so confirm. We understand you were acting as brokers, but Messrs Ireland seem to repudiate your authority on the ground that you had no right to fix the ship with them on the 5th. If you say you can prove you had such authority we are prepared to sue Messrs Ireland, of course reserving all claims in case the authority is not made out. You know the damages have been very serious. If you had not authority we would ask you to refer us to your agents, as in that case we would sue you, unless indeed you were prepared to settle."

To this letter the defenders on 28th February answered as follows:—"Replying to your favour of y'day we would beg to refer you to the correspondence passed between Messrs David Ireland & Son and us, and which we sent to the owners' London solicitors at their request. You will see from same that we acted merely as brokers, and as such well within our authority."

On 1st March the pursuers' law-agents wrote to the defenders—"We are favoured with your letter of y'day's date. We have seen the correspondence, and we are not satisfied that upon it alone it is clear that you had authority to bind Messrs Ireland to take the ship as you purported to do by your telegram of 5th December. It may well be that, taking the whole circumstances into account, you had such authority, and we understand from your letter of y'day you say you had, and we shall act upon this footing, subject to the terms of our letter of 27th ult., unless we hear from you to the contrary in course."

To this letter the defenders made no answer.

In October 1899 the following correspondence passed between the pursuers' Edinburgh agents and the defenders:—"J. & J. Ross, W.S., to Chr. Salvesen & Co. *Edinburgh, 17th October* 1899.—We beg to send you print record in this action, in which we act for the pursuers. You will observe that the defenders in their answer to condescendence 6 deny that you had authority to send the telegram of 5th December. We shall be obliged if you will furnish us with the evidence on which you rely as Messrs Ireland & Sons' authority to you to send the telegram."

"Chr. Salvesen & Co. to J. & J. Ross. *18th October* 1899.—Yours of y'day, and in reply our authority in sending owners the t'gram in question must be in your hands, as we sent all letters, t'grams, &c., in connection with this case (at the request of owners) to their agents in London."

"J. & J. Ross to Chr. Salvesen & Co. *23rd October* 1899—"Before advising our clients we should like to know whether, in addition to the letters and telegrams, you had any verbal communications, directly or by telephone, with Messrs Ireland before fixing, or whether the letters and telegrams exhaust the whole communications."

"Chr. Salvesen & Co. to J. & J. Ross. *24th October* 1899.—Your favour of yesterday, and in reply, as far as we can remember, no verbal communications, directly or by telephone, took place with Messrs Ireland before fixing above steamer."

On 16th April 1902 the Lord Ordinary pronounced the following interlocutor:—"Finds that the defenders are liable to pay to the pursuers in name of damages (1) the sum of £450 sterling, with interest, as concluded for; and (2) the expenses incurred by the pursuers in raising and prosecuting the action against Messrs Ireland & Son referred to on record, reserving meantime all questions as to the amount of those expenses, in terms of the joint minute."

"*Opinion.*— . . . The pursuers rely on the law laid down in the leading case of *Collen* v. *Wright*, 7 E. and B. 301, 8 E. and B. 647, as explained in *Firbank's Executors*, 1886, 18 Q.B.D. 54. In the latter case Lord Esher states the rule thus:—'Where a person, by asserting that he has the authority of the principal, induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.'

"The defenders maintain that this rule is not applicable to the facts of the present case. Their position is that they acted as agents for the shipowners and not for Messrs Ireland, and that while the authorities referred to would apply so as to give Messrs Ireland a right of action against them, it does not apply to the case of a

principal suing his own agent. They represent themselves as agents who, being sanguine and desirous of seeing a contract completed, inform their own principal prematurely, but in good faith, that his terms are accepted, and then let him know the next day that the contract is off. Now, it is quite true that the usual case for the application of the rule is where an agent has exceeded his authority in making a representation to the other contracting party. But it would be anomalous if a person could not sue his own agent upon a representation which, if made to him by the agent for another, would have been a ground of action. The case of the principal suing his own agent seems to me a clearer one for affirming liability. The difficulty in the other case has always been to define the ground of action, and the law has implied an undertaking on the part of the agent of a third party to make good the authority which he pretends. Here there is much to be said for the view that the shipbrokers were acting as agents for both the contracting parties. But even if they were agents only for the shipowners, they were in fact acting as intermediaries between two persons who were not disclosed to one another, and as such they were in my opinion responsible for the accuracy with which they transmitted to each the terms proposed by the other. Here it is admitted that the communications made were intentionally inaccurate and misleading, there being otherwise 'no possibility of a contract being concluded at all.' It is part of the defenders' contention that the pursuers knew or ought to have known that the defenders were not acting for themselves but were in communication with outside merchants. At all events they were so in fact. It is therefore a case where the defenders, by asserting that they had authority, induced the owners to enter into a transaction which they would not have entered into but for that assertion, and where the assertion has turned out to be untrue.

"In this view it is not necessary to consider the alternative defence set forth in the defenders' fifth plea-in-law, based on the assumption that the defenders are to be treated as principals. In that case it is said they are entitled to plead all the defences which would be open to Messrs Ireland, namely, that the writings are unstamped, and that there was no concluded contract. But this is not an action upon the contract of affreightment, as the action against Messrs Ireland necessarily was. The basis of this action is the untrue assertion of authority to make a particular contract, which failed because the defenders had no authority to make it.

"The defenders, however, say that the contract failed for another reason altogether unconnected with the misrepresentation as to the loading-days. Now, if it were shown that the pursuers were not in a position to have performed their part of the contract, it may well be that they could not sue the defenders for damages. But the defenders urge that in any view the contract did not go off in any dispute as to the time for loading, for the Irelands had been informed, and believed, that their own terms as to loading had been accepted. The immediate cause assigned by the Irelands for their refusal to load was undue delay combined with the scarcity of waggons, and they put this forward not as justifying their withdrawal from an otherwise binding contract but as warranting their refusal to proceed with negotiations which had not resulted in a contract. But in either case the defenders say the difference as to the loading-days had nothing to do with the contract going off, so that there is no connection between the misrepresentation and the damage sued for.

"This aspect of the case presents some difficulty. It concerns rather the question of damages than the legal question of liability for the misrepresentation. It assumes the liability to make good the representation made, but it negatives the idea that any damage has resulted from the failure to do so. I think this depends very much on the true reading of the communications which passed, and in particular of the defenders' telegram to the pursuers on 5th December. I do not accept the defenders' reading of it. I read it as an assurance that a binding contract of affreightment was concluded upon the pursuers' terms, and indeed that the charter was adjusted subject only to one variation as to the discharging, which they promptly accepted. I cannot recognise the right of the defenders now to say that there was still the charter to adjust, and that parties might have fallen out over its clauses, such as the demurrage clause or the despatch clause. The defenders plainly did not contemplate submitting the form of charter to the pursuers for approval, for they wrote to Messrs Ireland on the same day (the 5th December) saying the charter would be sent for their signature to-morrow, and the defenders intended themselves to sign it for the owners. Nor is it a complete answer on the part of the defenders to say that the cause assigned by Irelands for not going on with the contract was extraneous, and would have operated even if the misrepresentation had not been made. It might or might not, but the one thing certain is, that by reason of their actings the shipbrokers had furnished Ireland with a clear defence to any action upon the contract which the owners were told had been fixed with him. And I cannot assent to the suggestion that the owners ought to have adopted a contract in Irelands' terms as the basis of their action against him—a contract to which they never assented, and which contained a clause to which the brokers knew they would not assent. I hold therefore that the defenders by their representations, which were admittedly made for the purpose of earning their commission, induced the pursuers to agree to a profitable contract which they were unable to enforce by reason of the representations not being true.

As to damages, the main item is the loss

of the anticipated profit on the voyage, under deduction of the profit actually realised on a substituted voyage from Rotterdam to Oxelösund in ballast, and thence to Rotterdam with ore, the freight being fixed at 5s. instead of 7s. 6d. For the latter voyage I accept the pursuers' figure of £384, 10s. 5d. of net profit, as brought out in No. 6 of process, which is based on the ship's accounts. The figure from which this is to be deducted is to a certain extent hypothetical. I again accept the pursuers' figures as far as they go subject to a few corrections. In the first place, the duration of the voyage is understated, and in place of twenty-one days I think the evidence points to twenty-five days as the proper time to allow for it. The parties are agreed on the accuracy of the excerpts, which bring out an average cost per day for wages, &c., of £12, 6s. 10d, or £308, 10s. 10d. for twenty-five days. This figure must therefore be substituted for the figure £283, 10s. appearing under the same head in No. 46 of process, and a moderate addition must be made to the charge for bunker coal, bringing it up, to say, £100. It also follows that something should be added to represent the excess of depreciation (say £25), and of tear and wear (say £5) on the longer voyage as compared with the shorter one. And the commission of £31, 5s., would, I assume, have been earned if the voyage had proceeded. These additional deductions bring up the amount to be deducted from the gross freight of £1875 to £1073, 10s. 10d., leaving as estimated net profit on the Rotterdam-Methil-Stockholm voyage a sum of £801, 9s. 2d. Deducting from this the above sum of £384, 10s. 5d., being the net profit on the substituted voyage, there remains £416, 18s. 9d. of damages on this head.

"The defenders maintain that the pursuers ought to have done more than they did, and could have done more to lessen this head of damage, and indeed that they might have avoided loss altogether by chartering the ship in the Atlantic or Mediterranean trade, or even from the Tyne to the Baltic. The ship was fit enough for the Mediterranean or the Atlantic, but I think it would be unreasonable in the circumstances to lay such a duty on the pursuers by way of relieving the defenders of the liability for damages. The suggestion that they might have arranged a Tyne-Stockholm charter is a more feasible one. But having carefully considered the evidence on this point I arrive at the conclusion that the pursuers could not have been expected to do more than they did, or to spend further time in negotiations, and that they acted reasonably and with a due regard to the interests of all concerned in sending her on the substituted voyage to Oxelosund for a cargo of ore.

"The next head of damage is the expense of telegrams and general trouble and inconvenience, which the pursuers estimate at £50. This is not very definitely challenged by the defenders, but, on the other hand, it is only put forward as a very general estimate. I think fair effect will be given to this head of claim by allowing it to raise the above sum of £416, 18s. 9d. to £450.

"Thirdly, the pursuers claim to be relieved of the expenses they have incurred in raising and prosecuting their action against Messrs Ireland. As that action is still pending parties have agreed by minute 'that the amount of these expenses should meantime be reserved without prejudice to either party.' I understand this to mean that assuming the liability to exist, the amount of liability on this head should not be determined at present. The defenders challenged the right of the pursuers to recover anything on this head. They say that the whole papers were sent to the pursuers' solicitors in December 1898, more than six months before the action against Messrs Ireland was raised, and that the pursuers must therefore be held to have litigated with Messrs Ireland at their own risk. I do not so read the correspondence. In particular, the letters passing between the present defenders and Messrs Maclay, Murray, & Spens on 27th and 28th February and 1st March 1899, followed as they were by the correspondence of October 1899, seem to me to justify the pursuers in raising that action, and insisting in it until the record was closed."

The defenders reclaimed, and argued—They had never made a representation that a contract had been finally concluded. The phrase "'Oscar' fixed" meant that the terms of the arrangement were being adjusted. According to the evidence there was no concluded contract in cases of this kind until the charter was signed, and this had never been done. In this case the defenders were acting as agents for the pursuers and attempting to arrange a charter on their behalf with Messrs Ireland & Son on the best possible terms. There was no justification for saying that the defenders had ever represented to the pursuers that they had any right to enter into a contract on behalf of Ireland & Son. A principal had no right to get damages from an agent when the latter had acted as he thought legitimately and for the best in his interests. Besides, the transaction had fallen through not on account of the suggested misrepresentation but for a reason having no connection with it at all. No damage had therefore arisen from the misrepresentation, for even if it had not been made a contract would never have been entered into. Lastly, there was no proof of loss suffered by the pursuers through the action of the defenders, because after they knew that the negotiations for the charter had fallen through they could have avoided any loss by arranging another equally lucrative charter.

Argued for the pursuers and respondents—The defenders had misled them by representing falsely that they had completed a contract with Ireland & Son. The words "'Oscar' fixed" could only mean that a contract had been definitely concluded. The defenders had acted as agents for both parties, or at any rate as intermediaries between

two principals, who were undisclosed to one another. As regards the measure of damages, where an agent reports to his principal that he has authority to complete a contract and has no such authority, he is held to warrant any contract entered into under the pretended authority, and is liable to pay all damages arising from the contract being found not to be enforceable, including all reasonable expenses incurred by the principal in bringing an action to enforce the contract under the mistaken notion induced by the misrepresentation that a good contract has been concluded—*Simons* v. *Patchett*, 1857, 7 E. & B. 568; *Collen* v. *Wright*, 1857, 8 E. & B. 647; *Hughes* v. *Graeme*, 1864, 33 L.J., Q.B, 335, Opinion of Cockburn, C.-J., 337; *Spedding* v. *Nevell*, 1869, L.R., 4 C. P. 212; *Godwin* v. *Francis*, 1870, L.R., 5 C. P. 295; *Firbank's Executor* v. *Humphreys*, 1886, L.R., 18 Q.B.D. 54; *Meek* v. *Wendt*, 1888, L.R., 21 Q.B.D. 126; *Oliver* v. *Bank of England* [1902], 1 Ch. 610. After they became aware of the fact that no contract had been completed, the pursuers did all that they were able to get the ship chartered anew to the best advantage.

At advising—

LORD MONCREIFF—I am of opinion that the interlocutor is right and should be affirmed. It must be kept in view throughout that the question is not whether there was a contract between the pursuers (the shipowners) and the charterers—undoubtedly there was not — but whether the defenders without authority represented that there was, and thereby caused injury to the pursuers. In short, we have to do, not with the true course of the negotiations, but with the course as erroneously represented by the defenders. I may say at the outset that I agree with the Lord Ordinary in thinking that it is immaterial whether the defenders, the shipbrokers, are regarded as having acted as agents for both parties or as agents for the pursuers alone. They acted as intermediaries; all communications passed through them; and they were undoubtedly bound to transmit those communications with strict accuracy. If they failed to do so, and especially if they failed to do so intentionally, they are equally in law liable in damages if damage resulted.

The Lord Ordinary has so fully analysed the material parts of the evidence and correspondence that I do not propose to recapitulate except in so far as is necessary to explain the view which I take.

By 5th December 1898 the defenders had brought parties so far together that the only material matter in dispute was the number of hours to be allowed for loading—the pursuers not being willing to concede more than 120 hours *from arrival*; and the charterers insisting that 96 hours *after berthing* should be allowed. By telegram No. 38, 3rd December 1898, the pursuers had renewed their offer to accept 7s. 6d. per ton with 120 hours after arrival, "this our ultimatum." This telegram was communicated to the charterers on 5th December 1898 by the defenders by telegram No. 39. The charterers declined the offer as made, by telegram of same date No. 40: "Decline 5000 time counting arrival," &c.

Having received this refusal of the pursuers' offer on the morning of 5th December it was the defenders' duty to communicate it at once to the pursuers, who would then have been able to decide whether to concede the charterers' terms or to abandon the negotiations and look elsewhere for a charter. Instead of doing so the defenders, as they now avow, being afraid that the negotiations would fall through and that they would lose their commission resolved to take the matter into their own hands. Their first step was to represent expressly to each of the parties in turn that the other agreed to their terms. They dispatched to the pursuers telegram No. 41 dated 5th December 1898: "Oscar fixed discharging 600 inserted charter but not responsible demurrage over 500, instant confirmation, better impossible—Salvesen;" and wired the charterers (No. 42): "5000 have wired owners' steamer fixed hope confirm to-night."

The pursuers understood, and were intended and entitled to understand, the meaning of the telegram No. 41 to be that the defenders had received and previously accepted a firm offer from the charterers agreeing to charter the "Oscar" on the pursuers' terms, provided that they were not to be held responsible in demurrage if they discharged 500 tons a day; whereas we have seen that the charterers expressly declined to agree to the pursuers' terms as to the hours of loading counting from arrival. Telegram No. 42, again, was intended to convey and did convey to the charterers that the defenders had wired the pursuers asking them to confirm a settlement on the charterers' terms. The pursuers by telegram No. 45 accepted what they supposed to be a firm offer on their own terms with a slight modification which they agreed to. This telegram was received by the defenders at 6·33 P.M. on 5th December and immediately communicated to the charterers by telegram No. 46, which was received by the charterers at 8·28 P.M. on the same day: "5000 accepts your offer 7s. 6d. Methil Stockholm terms as arranged posting charter morning—Salvesen." The defenders' letter No. 47 makes it plain that the charterers were meant to understand that the pursuers agreed to "96 hours loading after berthed." At this point the defenders' intentions were frustrated by the charterers positively refusing to proceed with the negotiations.

If telegram No. 41 had been sent with the authority of the charterers a real and binding contract of affreightment would in my opinion have been completed.

But the charterers did not authorise it. As I shall show later they did not even admit that they authorised a firm offer on their own terms. Accordingly they held themselves entitled to resile, not I think on the ground that the pursuers' acceptance was not timeous (on the assumption that No. 41 was authorised), but on the ground that they never authorised any firm offer to be made.

Now, what is the defenders' justification or excuse for their conduct? Some passages in the defences seem to indicate that an enforceable contract with the charterers had been effected on the charterers' terms which the pursuers might have adopted. I refer to the last two paragraphs in the 4th answer and to the following passage in the 6th answer:—"The pursuers were entitled to adopt the contract which had been made on their behalf with Messrs Ireland & Sons as contained in said letters, and in point of fact they did so, but they erroneously stated said contract as providing for loading in 120 running hours after arrival instead of 96 hours after berthed." I do not think that any serious attempt was made to support this contention in argument. The only contract which the pursuers assented to (as the defenders well knew) was one on their own terms. The defenders never led the pursuers to suppose that a contract was fixed on the charterers' terms which they might adopt. They represented the opposite, and the pursuers believing them actually sued the charterers to enforce a supposed contract on the basis of "120 hours after arrival."

The defenders further say in answer 4—"The defenders accordingly, knowing that the clause offered by Messrs Ireland, viz., to load the vessel in 96 hours after berthed was equally beneficial to the pursuers in the then state of the trade, agreed to Messrs Irelands' clause so as to get the business concluded, the defenders, as in a question with the pursuers, taking the risk of the steamer being delayed beyond 120 hours after arrival. In so doing the defenders were acting in accordance with the known and universal custom of the shipbroking trade, and the pursuers would have been (as the defenders know) perfectly willing to accept a charter-party with Messrs Ireland & Son in the terms arranged, with, in addition, the defenders' guarantee for demurrage if the vessel were detained more than 120 hours after arrival."

Probably the defenders would have acted in this way if the charterers had not drawn back, but there is certainly no evidence to show that the pursuers would have ratified their action.

In their fourth answer the defenders say—"The statement made in the telegram of 5th December that the vessel had been fixed was made in good faith after the defenders had accepted Messrs Ireland & Sons' conditions, and when accordingly a contract had been completed on the face of the letters and telegrams passing between them and the defenders." If by this is meant that the pursuers were intended to understand from that telegram that a contract had been fixed on the charterers' terms, the defenders' own evidence establishes the contrary. It appears plainly from the evidence of Mr T. G. Salvesen, and especially from his evidence on p. 45 of the proof, that the defenders of set purpose did not disclose to the pursuers that they intended to prepare and sign a charter-party containg "96 hours after berthing." Mr Salvesen says—"(Q) Had you any authority from the owners to make such a contract?—(A) Our authority was 120 hours after arrival. (Q) So your answer is no?—(A) I would not say that, because if I got better or equally good terms, then I would have considered I had authority. That is my explanation. (Q) Did you ever in this case make any offer to guarantee the difference?—(A) It never came to that. That is done when sending a copy of the charter-party to the owners; we do it very often. (Q) Why didn't you disclose the real facts to the owners in this case?—(A) There would have been no charter then; if we had stuck to ninety-six hours after berthing no charter would have been possible. (Q) If you were giving them something equally good, namely, your guarantee for the difference, why didn't you tell them?—(A) It was just a matter of expense, and then they would not have understood it so easily as in a letter. (Q) But why didn't you tell them?—(A) It is not done because it is not necessary. (Q) Is it not proper?—(A) I don't think so."

It is not necessary to express an opinion as to whether the practice (it is certainly not a custom) the existence of which the defenders have endeavoured to establish is or is not a proper one, because it is plain that it cannot affect the legal rights of parties who do not know of or agree to it. It can only be justified by success. If on being told that a contract has been concluded without his authority, the principal finds it for his interest to homologate his agent's acts and accept their personal guarantee, good and well. But if he is not told or does not agree, but on the contrary is misled, how can the agent's unauthorised acts affect the principal's claims against the agents if damage results?

Now, the defenders did not disclose the true state of matters to the pursuers, and their conduct, even after receiving the charterers' letter declining to proceed with the negotiations, all tended to make the pursuers believe that the charterers were bound by a firm contract on the pursuers' terms, and the defenders kept writing and wiring to the charterers that their "firm offer" having been confirmed by the pursuers it was too late for them to recede from the charter.

This went on until the 8th of December, when on the charterers positively declining to load, the defenders for the first time hinted that the pursuers had no legal claim, the charter not being signed. (Telegram No. 71, 8th December 1898.)

This was not the position taken up by the charterers. In memorandum No. 62, 7th December 1898, to the defenders, they say—"Your wiring them that she was fixed" (that is, by No. 41) "did not complete a bargain, as they were not bound to accept our terms, *and you did that on your own responsibility and without our instructions.* We cannot keep an offer open indefinitely, and the delay precluded us from arranging a cargo for such a size of steamer on such notice." And again in memorandum No. 72, 8th December 1898, they write—"Your favour of

yesterday to hand, and we have your wire of to-day *re* 'Oscar II.;" and replied — "We never confirmed 'Oscar,' and positively decline load," which we now confirm. Possibly you were premature in wiring out that steamer was fixed, and you should have communicated with us before doing so as the business had hung fire so long."

Therefore it is clear that the defenders intentionally misrepresented to the pursuers that a contract had been "fixed" with the charterers upon the pursuers' terms.

The only questions which remain to be considered are, first, what are the legal consequences of that misrepresentation? and secondly, if damages are due, what are their measure and amount?

The defenders plead that even assuming that telegram No. 41 was sent with the full authority of the charterers, and was immediately and timeously confirmed by the pursuers, there was no concluded contract, because the charter-party was not signed, and that therefore the charterers were entitled to resile. In my opinion that defence is not open to the defenders. The contract of affreightment does not require the execution of a charter-party for its constitution. The old Scottish statutes 1466, c. 14, and 1487, c. 109, which enjoined this, have been long in desuetude. Usually, no doubt, its terms are embodied in a charter-party, and it was intended that that should be done in this case. But where a formal writing is stipulated for or is customary, it is always a question of circumstances whether the parties to such a contract intend that the execution of a formal writing shall be suspensive of the completion of the contract. The analogous case of missives of lease is an illustration in point—*Erskine* v. *Glendinning*, 9 Macph. 656. Here the defenders are barred from maintaining that the chartering of the "Oscar" was not "fixed" by their letters and telegrams. Their actings and writings strongly indicate the contrary. The defenders represented both to the pursuers and the charterers that the contract was "fixed," and for three or four days continued to press the charterers on that footing. If the charterers had themselves made a firm offer to the pursuers and asked for and received an immediate acceptance could they have resiled? I think not. "'Oscar' fixed" can only mean "'Oscar' chartered" subject to immediate confirmation. There is not a suggestion in the correspondence or the evidence that any difficulty would have arisen on the adjustment of the charter-party. The defenders had the matter in their own hands, and intended that night (5th December) to fill up the charter-party and post it for the charterers' signature without consulting the owners again. They intended to use the charterers' form of charter-party and sign on behalf of the owners; and we may be sure that they would not have allowed any difficulty as to the rate of demurrage or other minor details to prevent the speedy adjustment and execution of the charter-party.

If, then, there would have been a completed contract if telegram No. 41 had been authorised by the charterers the next question is whether the defenders are in law liable in damages, if damage was sustained, in consequence of their misrepresentation. No Scottish decision directly in point was referred to; but authority is scarcely required. I cannot doubt that if an agent, whether acting for both parties or only for one, falsely represents that he has authority to contract, and loss results to either party in consequence of their relying upon the representations, the agent will be personally liable in damages. If, for instance, it had been here the charterers' interest to found on the contract which the defenders professed to make and the pursuers had repudiated it, they would have had a good claim against the defenders, and the latter would certainly not have had relief against the pursuers. It happens that it is the pursuers who have sustained loss, and I see no reason why they should not equally recover from the parties who caused it. In short, in such a case ultimate liability must rest with the agent who exceeds his authority.

In the absence of Scottish decisions the pursuers rely upon the class of cases in English law of which *Collen* v. *Wright*, 8 E. & B. 647, and *Simons* v. *Patchet*, 7 E. & B. 568, are leading examples. By these cases it seems to be settled in the law of England that "where a person by asserting the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred," *per* Lord Esher in *Firbank's Executors*, 18 Q.B.D. 54, and Mr Justice Willes in *Collen* v. *Wright*, 8 E. & B. 657. It is also established in these cases that the measure of damages is what was lost by the party with whom the contract was made in consequence of not having the valid contract which the agent professed to make; that is, the difference between the profit which would have been made on the abortive contract and the best terms which could be obtained in the market when the misrepresentation was discovered—*Simons* v. *Patchet* and *Hughes* v. *Graeme*, 33 L.J., Q.B., 335.

The rules thus established in England are strictly applied. It is not accepted as a defence that the agent believed that he had authority—*per* Mr Justice Willes in *Collen* v. *Wright*, 8 E. & B. 657.

Again, as to the measure of damages, the anticipated profit on the unauthorised contract is taken as a factor, even although no terms equally good could have been obtained in the open market at the time—*Hughes* v. *Graeme* and other cases.

Those decisions no doubt are not binding upon us, but on a mercantile question like the present it is desirable that as far as possible the same rule should be applied in both countries.

In some respects these decisions go beyond what is required for the determination of this case—because (First) this was not an innocent misrepresentation in the sense that the defenders thought they had authority. It was an intentional misrepresentation made in precise terms, at least to the pursuers if not to both parties. (Secondly) Even after the charterers on 6th December declined to proceed, the defenders, although they knew that they had furnished the charterers with an absolute defence (when it came to be discovered) against a demand by the pursuers to enforce a contract upon the pursuers' terms, persisted in keeping the pursuers in the dark by maintaining that the ship had been fixed on the pursuers' terms. There was then no mention of the defenders' intention to give their guarantee. Such a proposal would have necessitated the disclosure of the misrepresentation, and the absence of all mention of a guarantee does not quite tally with the explanation now put forward.

But I have no hesitation in following the law there laid down in so far as it applies.

On the question of damages I have very little to add to the very clear statement of the Lord Ordinary in his note. The main item is the loss of anticipated profit under the contract which the defenders professed to have made for the pursuers, under deduction of the profit actually realised on a substituted voyage, the freight in which was 5s. instead of 7s. 6d. Now, from 5th December onwards freights fell rapidly. The pursuers lost their opportunity of getting equally good freight, and ultimately 5s. a ton was as much as I believe they could have obtained under a suitable charter.

As to the minor item of the expenses of the action against Ireland & Son, I should have had considerable doubt but for one consideration, viz., that when pressed by the pursuers' agents to point out their authority from the charterers, the defenders, instead of admitting that they had no authority, simply referred the pursuers' agents to the correspondence, and added, "You will see from same that we acted merely as brokers, and as such well within our authority." (Letter, 28th February 1899.) In reply to that letter the pursuers' agents on 1st March 1899 wrote that they were not satisfied from the correspondence that the defenders had authority from the charterers to bind them as the defenders professed to do by telegram No. 41, and they added, "It may well be that taking the whole circumstances into account you had such authority, and we understand from your letter of yesterday you say you had, and we shall act upon this footing subject to the terms of our letter of 27th ult. unless we hear from you to the contrary in course."

To this letter the defenders returned no answer, and in the circumstances I think the pursuers were entitled to proceed against the charterers until defences were lodged.

On the whole matter I am for affirming the interlocutor as it stands, and remitting the case to the Lord Ordinary.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD TRAYNER was absent.

Counsel for the Pursuers and Respondents—Ure, K.C.—Spens. Agents—J. & J. Ross, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Clyde, K.C.—C. D. Murray. Agents—Beveridge, Sutherland, & Smith, S.S.C.

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*Tuesday, January 27.*

## FIRST DIVISION.

## MACKIRDY *v.* GLASGOW AND TRANSVAAL OPTIONS, LIMITED.

*Process—Proof—Diligence and Recovery of Documents—Letter Books—Company—Application for Rectification of Register.*

In an application for the rectification of the register of a company in respect of misrepresentations in a document alleged to be a "prospectus," the petitioner averred that this document hed been sent to a number of members of the public. He applied for a diligence to recover the letter-books of the company, and of certain persons alleged to have been promoters thereof, that excerpts might be taken of all letters to any person enclosing a copy of said document. Diligence *granted.*

W. A. S. Mackirdy, Lesmahagow, presented a petition for the rectification of the register of the Glasgow and Transvaal Options, Limited, by the removal of his name from the register. He averred that he had been induced to take shares by representations contained in a document which he alleged to be a "prospectus" issued prior to the flotation of said company, and that these representations were untrue. The petitioner founded, *inter alia*, upon sections 9 and 10 of the Companies Act 1900. He averred that the prospectus was widely circulated in Glasgow and the surrounding district from the office of the person who ultimately became secretary of the company, and also by certain persons named in article 1 of the petition, who were alleged to be promoters of the company.

Answers were lodged by the company. They denied that the document referred to was a "prospectus," and that it was issued to the public as such.

On November 19th a proof was allowed.

Mackirdy then lodged a note craving for a diligence to recover documents. The first two articles in the specification were in the following terms:—"(1) The letter-books of the company, that excerpts may be taken therefrom of all letters to any person enclosing a copy of the document printed on pages 2 and 3 of the petition [*i.e.*, the notice or prospectus] or enclosing forms of application for shares in the company, or offering to any person or proposing that he should take shares in the company,