*Friday, November 29.*

## SECOND DIVISION.

[Sheriff Court at Glasgow.

## THOMAS HAYMAN & SONS *v.* THE AMERICAN COTTON OIL COMPANY AND OTHERS.

*Principal and Agent—Holding Out—Public Representation of Party as Agent—Private Arrangement Qualifying it—Right of Member of Public.*

A & Company, a firm of oil merchants in America, by advertisements in newspapers and letters addressed to a number of prospective customers, represented M'N. & Company, a firm in Glasgow, to be the exclusive agents for the sale of their products in Great Britain. *Held* that, in a question with a member of the general public, A & Company were precluded from maintaining that M'N. & Company were not their agents in the ordinary meaning of the term, with the ordinary power of binding their principals, but were only agents in the special and limited sense of being a distributing channel, *i.e.*, the persons in Great Britain entitled as principals to buy and then sell the goods of A & Company.

*Principal and Agent—Agent Acting as Principal in a Particular Transaction—Fraud of Agent—Liability of Principal.*

B, the sole partner of M'N. & Company, who were agents for A & Company, met C, who knew of the agency, and pressed him to buy a quantity of A & Company's oil, cheap, at 1s. per cwt. below the market price (a rising one), indicating that he personally was "hard up" and "badly wanting money." C accepted the offer and paid the price, but did not obtain the oil, M'N. & Company having become bankrupt and delivery having been stopped. In an action of multiplepoinding (in which in his evidence C admitted that the personal embarrassment of B would not have entitled him as an agent to sell at a cheap price), *held* that C had in fact bought from B, and that B had sold as a principal and not as A & Company's agent, and that accordingly C had no ground upon which he could claim the oil from A & Company.

*Opinion* that, even had the transaction taken place on the footing that B was acting as A & Company's agent, A & Company would not have been bound, in view of the further fact that B had committed a fraud to which A & Company were not parties, and by which they were not benefited, having represented for his own purposes, falsely, that the sale was a "spot" sale, *i.e.*, a sale of goods of which he could give immediate delivery, whereas in fact he had not possession of the goods, which were still the property of A & Company, and could not obtain it from the shipping company in whose custody the goods were until he had paid the price and freight, which he could not do.

Thomas Hayman & Son, storekeepers, Glasgow, raised an action of multiplepoinding in the Sheriff Court at Glasgow against (first) the trustee on the sequestrated estates of John M'Nairn & Company; (second) the American Cotton Oil Company, New York; (third) the International Banking Corporation, London; and (fourth) Ferguson, Shaw, & Sons, oil merchants, Glasgow.

The fund *in medio* consisted of two lots of 50 barrels each of oil lying in the hands of the pursuers, and which had been claimed by the American Oil Company and John M'Nairn & Company.

A proof was taken by the Sheriff-Substitute (BOYD), the result of which, along with the contentions of the various parties, appears from the following passages taken from the notes appended to his interlocutors (with which are incorporated the more important of the documents to which he refers)—"The question really arises between the American Cotton Oil Company and Ferguson, Shaw, & Sons. The latter bought from M'Nairn & Company 50 barrels X 2, and 50 barrels Y 2 of cotton oil and paid for them before delivery. M'Nairn & Company became bankrupt and delivery was stopped. The American Cotton Oil Company, from whom M'Nairn & Company had received the goods, claimed them on the ground that the property had never passed from them to M'Nairn & Company. Ferguson, Shaw, & Sons maintain that they bought from M'Nairn & Company as agents for the American Cotton Oil Company. . . . The claimants the American Cotton Oil Company claim as unpaid vendors. The claimants Ferguson, Shaw, & Sons claim as purchasers from John M'Nairn & Company, who they allege acted as agents for the American Cotton Oil Company. The question is whether M'Nairn & Company sold the oil to Ferguson, Shaw, & Sons as a merchant or as agents who bound their principals the American Company. It is admitted that M'Nairn & Company were appointed exclusive agents in Scotland, and later in the United Kingdom, for the American Cotton Oil Company, and the terms of the appointment appear from letters of the 12th April 1898, 14th August 1900, 29th August 1900, and 5th October 1900."

The letter of 12th April was in the following terms—"We also confirm our telegram of yesterday, copy of which is enclosed herewith, to the effect that we had decided to appoint you our exclusive agents for Scotland under terms of the memorandum of agreement as proposed at the time of your Mr Stephenson's visit to New York. This morning your acknowledgment of the appointment reached us safely. TERMS OF AGENCY.

"*Commission*—1 per cent. on gross invoice (c.i.f. price); commission to be deducted from foot of each invoice.

"*Terms of Payment*—By 60 days' sight draft, documents for payment on Messrs John M'Nairn & Company, payable in London.

"*Insurance*—At 10 per cent. over gross invoice value.

"*Expenses*—Each side stands own expense of cabling, postage, &c.

"*Shipment*—Prompt shipment understood to be fourteen days.

. . . . . .

"It is understood that we appoint you our exclusive agents for the sale of our cotton-seed oils for Scotland, and that you, on your part, represent us exclusively in the sale of cotton-seed oils in your territory.

"We are sending you by this mail copy No. 14 of our foreign cipher code for use between us, and which we will ask you to acknowledge upon receipt.

"We are also having made up a case of samples of the different grades of oil likely to be used in Scotland, and which will go forward by first direct steamer. These samples are put up in ½ gallon tins as follows:—

"*Yellow*—Grade No. 1—'Union' or 'Aldige' choice butter. 19s. per cwt. . . .

"These we quote approximately at prices set opposite each brand, but of course these prices are subject to fluctuation, and we would expect to have cable inquiry for firm c.i.f. prices when business starts.

"We have written both Mr Houston and Mr Geddes by this mail, advising them of your appointment, which we have informed them goes into effect immediately.

"It is likely, however, that you will hear of small lots arriving during the next couple of months of sales made by these gentlemen now in our hands, but after our letters of this date are received we will accept no more business from Scotland except through your house.

"We feel, then, that having put you in a position to work our brands exclusively in Scotland, we should naturally look forward to an increasingly large business in our oils. We expect our agents will show an energetic determination to secure business, which cannot fail of placing our company in the position which it should naturally take in the cotton oil trade in your market. On our part nothing shall be wanting to assist you in securing the business."

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"The appointment was advertised in the *Glasgow Herald* of 22nd April 1898, and with the approval of the American Cotton Oil Company, M'Nairn & Company had the appointment printed on their letter paper."

The following was the advertisement in the *Glasgow Herald*:—

"*Commercial News.*

"Messrs. John M'Nairn & Company, 104 Brunswick Street, Glasgow, advise us that they have been appointed exclusive agents for Scotland for the American Cotton Oil Company for the sale of their products."

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"No. 28 of process (*infra*) is a specimen offer by M'Nairn & Company to sell oil, and No. 29 (*infra*) is a specimen contract note:—

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'John M'Nairn & Co., 104 Brunswick Street, Glasgow, agents for the United Kingdom for the sale of the American Cotton Oil Company's oils and stearine.

'104 Brunswick Street,
'Glasgow, 4th April 1902.

'Messrs. Ferguson, Shaw, & Sons,
'Bishop Street.

'Dear Sirs—We send you to-day sample of "Lily" White Oil, of which we can offer you 100 barrels now here @ 26s. 3d. *ex* warehouse, 90 days.—Yours truly, J. M'N. & Co.'

'*From* John M'Nairn & Company
'*To* Messrs Ferguson, Shaw, & Sons,
'Bishop Street.

'Dear Sirs—We beg to confirm having, as agents for The American Cotton Oil Company of America, sold you the undernoted goods, agreeably with the printed rules of the Glasgow Provision Trade Association, subject to safe arrival. Vessel or vessels lost, sale void, casualities excepted. Your further orders will oblige.—We are, yours truly, J. M'NAIRN & Co.

'*Agents for the American Cotton Oil Company.*

'One hundred (100) barrels, 'A.C.O.Co.' brand prime Summer White Oil, at 24s. 3d. (twenty-four shillings and threepence) per cent, c.i.f. Glasgow. For shipment in equal quantities monthly, February to May, 1902, both inclusive.

Feby. 24, 25 Brls.
April 3, 25 ,,
May 20, 25 ,,

'Payment: before delivery if required.
'Usual c.i.f. terms.'

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"These two lots of oil were sold to M'Nairn & Company by the American Cotton Oil Company on 12th September 1904 on invoices which bore that the price was payable by a draft at sixty days' sight, with documents attached. The oil was shipped on 28th December 1904, on the Anchor Line steamer 'Ethiopia' at New York. On 30th December 1904 a bill of lading was granted by the Anchor Line making the oil deliverable to the American Cotton Oil Company's order, and on its arrival the oil was put in the stores of the pursuers, in name of the Anchor Line, for behoof of the holders of the bill of lading. The American Cotton Oil Company, on shipment, negotiated a draft for the price with their bankers in New York, and this, along with the bill of lading and policy of insurance, was forwarded by the said bankers to their Glasgow correspondents, who had the draft accepted by M'Nairn & Company, and retained the same until it should be retired by the acceptors.

"On 31st January 1905, Ferguson, Shaw, & Sons bought from M'Nairn & Company 200 barrels P.S.Y. American cotton oil, including the two lots of ⟨X⟩ 2 and ⟨Y⟩ 2. They paid the price and received an invoice and delivery order on the pursuers Hayman & Son. The delivery order was immediately lodged and honoured to the extent of 1 lot of 50 barrels (J) and 3 barrels of another

lot of 50 (K). The remainder of the lot (K) has been otherwise dealt with, leaving, as before explained, lots ⟨X⟩ 2 and ⟨Y⟩ 2 for decision here.

"The draft matured on 13th March 1905, but as M'Nairn & Company became bankrupt on 9th February 1905 the American Cotton Oil Company met it, and at the same time got up the bill of lading and insurance policy, which had never left their correspondents' hands. On 31st March 1905 the American Company presented to the Anchor Line the bill of lading for the 2 lots ⟨X⟩ 2 and ⟨Y⟩ 2, and they took, on payment of freight and charges, granted to the American Company, a delivery order on the pursuers for the oil, which was refused as claimed by other parties.

"The question is, what was the position of M'Nairn & Company when they sold the oil to Ferguson, Shaw, & Sons. The latter say that M'Nairn & Company acted as agents for their disclosed principals the American Company, who were in fact the vendors. The American Company say that M'Nairn & Company were buying agents—distributing agents, with the sole right of buying their goods and selling them in this country. That all the agency meant was that M'Nairn & Company got a monopoly of the business, but that to any buyer here they were merchants, keeping any profit and suffering any loss. In this contention they maintain that they are not contradicting the documents of contract between them and M'Nairn & Company, but construing them.

"Evidence was led as to the relation of M'Nairn & Company to the American Company. Mr John Stevenson, the sole partner of M'Nairn & Company, said he did make purchases for himself from the American Company. He never suggested to Ferguson, Shaw, & Sons that the American Company were principals and that he was their agent selling for them. It sometimes happened that in bargaining with customers here he invited them to make a counter offer, and cabled to New York to enable him to consider it. But this seems to me to be equivocal, and might have occurred whether he was acting as an agent or a principal. He said that this kind of agency was of a well-known type with regard to American dealings. Mr John A. Ferguson, the senior partner of Ferguson, Shaw, & Sons, said he thought M'Nairn was only an ordinary agent. He did not know of agents who were only distributing channels. Mr John C. Lawson, produce broker, Glasgow, thought M'Nairn & Company were exclusive agents for the American Company. He did know of American agents who are distributing channels, but did not know if M'Nairn & Company acted as principals or agents in this country. Mr Alfred Bigland, senior partner of the firm of Bigland, Sons, & Jeffreys, Liverpool, exclusive agents for the North of England for the American Cotton Oil Company, explains his practice. His firm act entirely as principals in their sales in this country, and he thought that practice was well known in the trade as the system on which the American Company regularly conducts its business.

"But even assuming that as between the American Company and M'Nairn & Company the latter were only distributing agents and not the real vendors in sales in this country, their description as agents for the American Company was so explicit and so public that I think Ferguson, Shaw, & Sons might successfully shelter themselves behind it, unless there were some circumstances to bring home to them that M'Nairn & Company were acting on their own behalf. To ascertain this one must attend in particular to the features of this special transaction.

"On 31st January 1905 Mr Stevenson met Mr Ferguson in Lang's Restaurant in Glasgow and told him that he was pressed for money, and he offered the oil at 1s. per cwt. below the market price. Mr Ferguson immediately accepted the offer and paid cash. There was no mention of the American Company as being interested in the sale. It was what is known as a 'spot' sale—that is, a sale of goods already in this country and on the spot for immediate delivery; there was no contract-note, only an invoice was necessary. The motive of the sale was to put Mr Stevenson in funds which he badly needed. If the oil had been the property of the American Company this price would have gone to them, and Mr Stevenson's gain would only have been a few pounds as commission. I think it follows that Mr Ferguson thought he was dealing with M'Nairn & Company directly as vendors and not as agents, and if so Ferguson, Shaw, & Sons' claim, which is based on M'Nairn's alleged agency, must in my opinion fall.

"Further, it seems to be significant that the original attitude of Ferguson, Shaw, & Sons was that of creditors on M'Nairn & Company's bankrupt estate for the oil in question, and it was not until later that they formulated any claim against the American Company.

"But I think the case for the American Company goes a step further. Even assuming that M'Nairn & Company were held out as agents, and that the American Company were principals in the transaction, I think I should have to hold on the facts that the principals were not bound. The oil was stored in the name of the Anchor Line. The draft and documents attached were in the hands of the American Company; the ship alone could allow delivery on the draft being retired; in point of fact a delivery-order was given to the American Company when they retired the documents. The oil had never been in M'Nairn & Company's possession. The property had never passed. Mr Stevenson knew this. Ferguson, Shaw, & Sons did not know it, and thought the oil was M'Nairn's to sell for cash and theirs to take on immediate delivery. It was a fraud on Mr Stevenson's part, but the American Company did not benefit by the fraud, and would not be

bound by it—*Hockey* v. *The Clydesdale Bank*, 1 F. 119; *Clydesdale Bank* v. *Paul*, 4 R. 626; *Houldsworth*, 5 App. Cases, 317.

"Accordingly I think that I am bound to prefer the claim of the American Cotton Oil Company."

The following evidence was given by Mr Fergusson:—" . . . . . *Cross.* — It was on 31st January that I made the spot purchase with Mr Stevenson for the oil in question here. We got our delivery order next morning, and we paid the price next morning after receipt of the delivery order. That is to say, we got the invoice and delivery order on 1st February and paid the price the same day. Of course we would not have paid the price without getting the delivery order. I understood at the time we got the delivery order that the oil was available and would be produced to us on our presenting the delivery order to the storekeeper. Mr Stevenson had never suggested to me that he had not got the oil to sell to me. Naturally, I would not have purchased if I had known he had not got the oil to deliver. The sale price was 15s. 3d., which was about 1s. a hundredweight below the market value of that particular day. Cotton oil had jumped up. It was a cheap sale. I thought I was getting a good bargain. Mr Stevenson pressed me very hard to buy, and he expressed the view that he was hard up at the time. I understood at the time that he was rather badly wanting money. Of course if he were selling as an agent for a principal he would not be entitled to give a cheap price owing to the fact that he personally was hard up. I did not understand perfectly well at the time that Mr Stevenson was making a transaction for his own benefit. (Q) How do you account for his saying to you that he was hard up, and pressing you to buy on that account?—(A) I can account to-day from my knowledge of his flour embarrassment; he was embarrassed in the purchase of flour and he wanted money. It was he personally who was hard up; he did not say it was the American Cotton Oil Company that was hard up. It is not clear to me now that he was making the sale for himself. . . . . ."

The following evidence was given by Mr Stevenson:—" . . . . . *Cross.* — As to the transaction in question with Ferguson, Shaw, & Sons, as acting in this case there was no contract-note passed between us at all. It did not differ in that way from our ordinary practice; we never had a contract-note on a spot sale. We never got possession either of the goods or of the bills of lading for the goods that were on that occasion sold to them. We sold in anticipation of getting possession of the goods. As matter of fact, we had gone bankrupt before we were in a position to retire the drafts, and in consequence we never got the bills of lading. We granted a delivery order, however, for the goods. (Q) Of course you knew that they could not get delivery of the goods upon that delivery order?—(A) Oh, they might have. (Q) In what way?—(A) As matter of course from the storekeeper. (Q) But if you had not got possession of the bills of lading wouldn't the goods necessarily be in the store in the ship's name?—(A) They would be. The storekeeper would therefore not be entitled to deliver the goods upon our delivery order, but only upon the ship's delivery order. (Q) And the delivery order you gave to Ferguson, Shaw & Sons was, of course, entirely abortive for that reason?—(A) That is a question with the storekeeper. I do not think the storekeeper would require to deal fraudulently before he could give them the goods upon our delivery order, because they are only lying there for the freight. (Q) Exactly, but you knew the ship had a lien over them for the freight, and therefore the storekeeper could not deliver them upon your delivery order?—(A) Yes. (Q) Do you not know that at the time you gave the delivery order, Ferguson, Shaw, & Sons could not get delivery upon your delivery order?—(A) They could not in one way; they might in another. (Q) Only if the storekeeper was fraudulent?—(A) I cannot speak for him. (Q) You knew that the storekeeper would have no right to deliver these goods to anybody but the ship?—(A) Once the freight was paid. We did not give any undertaking to Ferguson, Shaw, & Sons to pay the freight. (Q) They knew that they could not get delivery of these goods upon your delivery order?—(A) It is quite customary for the storekeeper to oblige shippers. It is not the fact that the storekeeper could only give delivery of these goods upon our delivery order by defrauding the ship. (Q) How could he possibly be entitled to give delivery of the goods upon your delivery order when you had not got the bills of lading?—(A) Storekeepers frequently oblige people who are storing with them by giving the goods away in anticipation of getting the bills of lading later on. (Q) The goods not being theirs to give away, and they having no right to give them away?—(A) That is so. I suppose we knew that at the time. . . . *Re-examined.*—We had frequently oil in store lying to our order, and a delivery order granted by us on the storekeeper would, of course, be at once honoured in favour of the person presenting it. We had frequently granted delivery orders to purchasers upon the storekeeper, who at that time had ample oil of different marks in store on our account to meet the order. When we granted this delivery order on this occasion to Ferguson, Shaw, & Sons I cannot say whether we had oil in store or not sufficient to meet the contract, but we hoped to be in a position to give Ferguson, Shaw, & Sons the oil. The books show what we had in store. When we granted the delivery order we did so on the footing that there was oil in store to meet it. . . . *Re-cross*—The delivery order, No. 21/3 of process, contains 50 barrels X2 and 50 barrels Y2, and these are identified as the goods out of the particular ships that were carrying them from America. (Q) And therefore the storekeeper would not be entitled to give any other oil than the oil that had the particular marks described in the

delivery order? — (A) Not without our liberty."

On 4th December 1906 the Sheriff-Substitute pronounced the following interlocutor —"Finds that the claimants, the American Cotton Oil Company, in September 1904 sold two lots of prime summer yellow cotton-seed oil, of 50 barrels each, to John M'Nairn & Company, produce commission merchants and flour importers, 104 Brunswick Street, Glasgow; and on arrival in this country, per the Anchor Line steamer 'Ethiopia,' it was placed in the stores of the pursuers Thomas Hayman & Son in Glasgow; that a draft for the net price, with documents attached, was forwarded by the said American Cotton Oil Company to their correspondents in Glasgow; that the said draft became payable on 13th March 1905, but the said John M'Nairn & Company became bankrupt on 9th February 1905, and the draft and documents were never in their possession, but were retired by the American Cotton Oil Company: Finds in law that the property in the said goods never passed from these claimants, and they, being in possession of the documents of title, are entitled to be ranked and preferred in terms of their claim."

Ferguson, Shaw, & Sons appealed to the Court of Session, and argued—The American Oil Company were bound by the bargain made by Stevenson, the sole partner of M'Nairn & Sons, who were agents for the American Oil Company in the ordinary sense of the term, as was clearly proved by the letter of appointment, advertisements, and general course of dealing of the parties. Assuming, however, that the Oil Company had appointed M'Nairn & Company as agents in a limited and restricted sense, *i.e.*, as distributing agents only, that did not affect the question at issue, because the Oil Company had held M'Nairn & Company out to the public as ordinary agents, and the rights of the public could not be affected by any private arrangement between a principal and his agent—Smith's Mercantile Law (11th ed.), 155-157. It was said, however, firstly, that the circumstances showed that in this particular case Ferguson dealt with Stevenson as a principal. He did not. The mere fact that the sale was a cheap one did not prove that it was not made on behalf of the Oil Company, neither did Stevenson's statement that he was in want of cash, since he might easily have required the cash in his capacity as agent. There was nothing to put Ferguson upon his guard. It was said, however, secondly, that even if Stevenson acted as agent he acted fraudulently, and that therefore the Oil Company were not bound, as the fraud was not in their interest. The Oil Company were, however, bound, because Stevenson was acting at the time within the scope of his authority, and the law was that a principal was bound by his agent's act, even if fraudulent, provided it was within the scope of his authority, whereas otherwise he was not bound unless he had taken some advantage from the fraud—*Hockey* v. *Clydesdale Bank, Limited*, November 25, 1898, 1 F. 119, 36 S.L.R. 119. Compare also generally *Hambro* v. *Burnand and Others*, [1904] 2 K.B. 10; *Bryant, Powis, and Bryant* v. *La Banque du Peuple*, [1893] A.C. 170. In any event, the loss must fall on the party who put it in Stevenson's power to commit the fraud, viz., the Oil Company.

Argued for the respondents—"Agent" was a word with no precise or definite meaning in law, but susceptible of a variety of meanings varying according to circumstances—Addison on Contracts (10th ed.), pp. 303, 306. It was the purchaser's duty to discover the scope of the agency—Parson on Contract, i, 46, and foll.,—because if the powers conferred were special and limited, the authority to bind was limited too—See Bell's Com., Lord M'Laren's ed., vol. i, pp. 505, 506, 507, vol. ii, 508, 511. Here it was clear that M'Nairn & Company were only agents in a very special sense, viz., that of sole intermediate salesmen, making their own profits and losses. This was just the kind of agency well known to commercial men, and which the so-called principal was entitled to assume the general public knew of—*cf. Baines* v. *Ewing*, 35 L.J., Ex. 94. It followed therefore that the respondents were not bound by Stevenson's acts. But even if M'Nairn & Company were in ordinary transactions agents in the fullest sense of the term, the facts showed that in this particular transaction Stevenson sold the oil as a principal, and Ferguson bought it from him as such. Further, even if he had acted as an agent, he acted fraudulently in his own interest and not in the interest of his principals, and it was well settled that a principal was only bound by the wrongful or fraudulent act of his agent in so far as he was benefited thereby—*Clydesdale Bank* v. *Paul*, March 8, 1877, 4 R. 626, 14 S.L.R. 403; *Hockey* v. *Clydesdale Bank, cit. sup.; Ruben* v. *Great Fingall Consolidated*, [1904], 2 K.B. 712. Lastly, it was Ferguson who made it possible for Stevenson to defraud his principal, if that was what he did, and accordingly the loss must fall on Ferguson. *M'Dowall & Neilson's Trustee* v. *J. B. Snowball Co., Limited*, November 8, 1894, 7 F. 35, 42 S.L.R. 57, was also cited.

LORD JUSTICE-CLERK—The competition in this case relates to certain parcels of oil which were shipped from America to Glasgow by the American Cotton Oil Company, and which are in the hands of the Anchor Line of Steamers. It is clearly established by the evidence that some time previous to this despatch of goods to this country the American Oil Company had appointed the firm of M'Nairn & Company to be their exclusive agents for the sale of their oil. It is further conclusively proved that they held out M'Nairn & Company to proposing purchasers of their oil as being their sole agents, and that any business done must be through their agents, one exception only being stipulated for any supply to Lever Brothers, the makers of Sunlight Soap. They informed such proposing buyers that they were represented for the sale of their various brands by

M'Nairn & Company, whom they in plain words called their "agents," and expressed the desire to "be favoured with your business through them," stating that "we cannot make offers except through our agents."

It seems to me plain that M'Nairn & Company were held out as being the American Company's agents in quite distinct terms, and without any qualification whatever. So far the case seems clear enough. In any ordinary sale M'Nairn & Company must be held to be selling for the American Cotton Oil Company by delegated authority, binding that company as if they themselves had directly made the contract of sale. In that view of the case it is unnecessary to consider any question as to whether as between themselves the company and M'Nairn & Company had some special arrangement whereby, although the latter were held out as agents, and only as agents, the position of M'Nairn & Company to the Oil Company was of a special nature, and did not put M'Nairn & Company in a position of ordinary agents. Of that the customers could know nothing, and certainly the claimants Ferguson, Shaw, & Company knew nothing.

If, then, the sale which is in question here had been a sale in the ordinary course of business, in which the purchasers dealt with M'Nairn & Company under the accrediting of them by the Oil Company as their agents, the disposal of the case would have been easy. But the case is complicated by special circumstances, which require careful attention. It appears that M'Nairn & Company, being in financial straits, were endeavouring to obtain money to tide them over their difficulties, and that Mr Stevenson, who was the sole partner of M'Nairn & Company, met Mr Ferguson in Lang's luncheon-room in Glasgow, and there offered him a quantity of American Company's oil on the footing of a spot sale—that is, a sale with the goods at hand or on the sea, and so ready for delivery. It is admitted by Ferguson that at the time Stevenson pressed him to buy, indicating that he personally was "hard up" and "badly wanting money," and that he was willing to sell at a cheap price, 1s. per cwt. below the market price of the day, the market being a rising one. Now Mr Ferguson is driven to admit that if Stevenson were selling for a principal he would not be entitled to give a cheap price because he was personally hard up. That being so, it is very difficult to see how it can be held that Ferguson, in buying, can be held as doing anything else than buying from Stevenson as a principal. If so, he did not effect a purchase from the Oil Company through an agent of theirs, and that being so it follows that M'Nairn, his principal, having failed to give him delivery of the oil which he professed to sell, he cannot get delivery from the Oil Company, from whom he did not buy.

The evidence leads me clearly to the conclusion that Ferguson cannot be held in this particular transaction to have dealt with M'Nairn & Company as agents for the American Oil Company, and if so his firm cannot be held entitled to carry off the company's oil, which forms the fund *in medio*.

If this be a sound view of the case upon the facts, it becomes unnecessary to consider the question whether the property had ever passed, or whether it was still in the American Oil Company, whatever was the position of M'Nairn & Company towards them. But I may say that on that question, had it been necessary to decide it, my view would have been the same as the Sheriff-Substitute's. The Oil Company, which had never parted with the goods, could not be held liable to suffer because M'Nairn & Company had fraudulently, for their own purposes, professed to be able to give immediate delivery as on a spot sale, they being no parties to the fraud and obtaining nothing by it.

LORD STORMONTH DARLING, LORD LOW, and LORD ARDWALL concurred.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor [of 4th December 1906] appealed against. . . ."

Counsel for the Appellants—The Lord Advocate (Shaw, K.C.)—Moncrieff. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Respondents—Dickson, K.C.—Horne. Agents—Constable & Sym, W.S.

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*Saturday, December* 1, 1906.

## OUTER HOUSE.

[Lord Salvesen.

## CALDER *v.* NIMMO & COMPANY, LIMITED.

*Reparation — Negligence — Master and Servant—Statutory Obligation—Common Employment—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *Rule* 21, *and sec.* 50.

In an action by a miner for damages in respect of injury from a fall from the roof of a mine, against his employers, a firm of coal-masters, *held* (per Lord Salvesen, Ordinary) that the General Rules of the Coal Mines Regulation Act 1887 do not impose on the master an absolute statutory obligation in the same sense in which the Factory Acts impose the obligation to fence, and consequently that the master incurred no responsibility at all at common law if he employed competent servants, supplied proper plant and adequate material, and worked the mine on a proper system. *Bett* v. *Dalmeny Oil Company*, June 17, 1905, 7 F. 787, 42 S.L.R. 638, *commented on*, and dicta of Lord M'Laren *questioned*.