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FIRST DIVISION.

[Sheriff Court at Glasgow.

MICHELIN TYRE COMPANY, LIMITED *v.* MACFARLANE (GLASGOW), LIMITED, AND OTHERS.

Contract—Sale of Goods—Agent and Principal — Sale or Return or del credere Agency.

A firm of manufacturers of motor tyres and accessories supplied goods to a retail firm under agreements in which the latter were described as "stockists," "consignees," and "stockists or agents." The goods were to be held on "behalf of the" manufacturers, in whom the property in the goods was to remain till the goods were actually sold and paid for. The goods were to be supplied to the retailers at wholesale prices, who thereafter were to sell them to customers at retail prices fixed by the manufacturers. The retailers were to pay the wholesale prices to the manufacturers, and were to be paid a percentage on the annual turnover above a certain value, but otherwise they were to get the difference between the wholesale and the retail price. The manufacturers further imposed conditions as to whom the retailers might supply with their goods, and the retailers were taken bound to insure the stock in their hands in their own name, and any indemnity received in respect of that insurance was to be assignable to the manufacturers. The retailers were also taken bound to specify the manufacturers' tyres to be fitted to at least six new cars, and to deliver them so fitted to their customers. The retailers sold the manufacturers' goods to their own customers, and debited them with the retail price in their own books, and rendered accounts to them in their own name. They did not disclose their customers' names to the manufacturers, and used the money received for the goods for their own purposes. The manufacturers rendered accounts to the retailers from time to time showing the amounts due in respect of goods supplied to them. Those accounts were settled by the retailers. The amounts received by the retailers from their customers for sales of the manufacturers' goods were never appropriated in a separate account to the manufacturers, and no request for such appropriation was ever made. The accounts rendered to customers of the retailers contained items other than the goods of the manufacturers. The retailers went into voluntary liquidation and at that date part of the goods supplied by the manufacturers had been sold by the retailers to their customers but had not been paid for. In an action by the manufacturers against the retailers and the liquidators, concluding for decree that the retailers acted as agents of the manufacturers and for an accounting, *held* that the relationship was that of sellers and buyers, not that of principals and *del credere* agents, and the retailers *assoilzied.*

Michelin Tyre Company, Limited, having their registered office at 81 Fulham Road, Chelsea, London, *pursuers*, brought an action in the Sheriff Court at Glasgow against Macfarlane (Glasgow), Limited, 22 Berkeley Street, Glasgow (in liquidation), and J. J. D. Hourston, C.A., and W. B. Galbraith, C.A., its liquidators, *defenders*, craving the Court "(1) to find and declare that on the true constructions of two agreements between the pursuers and the defendant company, dated 9th October 1913 and 12th January 1915 respectively, and supplementary agreements of the same dates, the defendant company acted thereunder as agents for the pursuers; that all moneys owing and/or pay.

able to the defendant company on the 2nd day of March 1915 (the date when a resolution was passed for the liquidation of the said company) in respect of goods supplied to the defendant company by the pursuers under and in terms of the agreements before mentioned, and sold by the defendant company on or prior to the said 2nd March 1915, were so owing and/or payable to them *qua* agents of the pursuers; and that the pursuers are entitled to recover and receive all moneys so owing and/or payable; (2) To ordain the defenders to produce a full statement of all moneys so owing and/or payable on the said 2nd March 1915, with particulars of the goods in respect of which such moneys were so owing and/or payable, and the names and addresses of the customers of the defendant company to whom such goods were supplied, and from whom such moneys were so owing and/or payable; (3) To ordain the defenders the said liquidators to produce a full statement of all such moneys collected by them on or since the said 2nd March 1915, crediting themselves therein with the remuneration, if any, payable or allowable to the defendant company under the terms of the said agreement in respect of the said moneys; (4) To ordain the defenders to pay to the pursuers the sum of £205, 0s. 5d., or such other sum as may appear to be the true balance due by them, and failing their producing such account, to ordain the defenders to pay to the pursuers the said sum of £205, 0s. 5d. sterling."

The *agreement of 9th October* 1913 (No. 7/1 of process) was in the following terms, viz.:—

"Memorandum of agreement made this 9th day of October 1913 between Michelin Tyre Company, Limited, of 81 Fulham Road, Chelsea, in the county of London (hereinafter called the company), of the one part, and Macfarlane (Glasgow), Limited, 16-22 Berkeley Street, Glasgow [hereinafter called the stockist(s)], of the other part.

"Whereby it is agreed as follows:—

"1. The company shall provide the stockist(s) with a consignment stock of Michelin motor-car tyres, which shall at all times, and until the same has actually been sold and paid for, remain the property of the company, to be held by the stockist(s) on behalf of the company, and permit the stockist(s) to call himself/themselves Michelin Stockist(s).

"2. The company will consign such tyres and invoice any accessories which the stockist(s) may require during the continuance of this agreement at the prices contained in the company's wholesale price list current from time to time, and subject to the conditions contained in such list, which shall prevail in case of variance herewith.

"3. Subject to the stockist(s) attaining a nett turnover of at least £2000 during the year ending 30th September 1914, and to the due fulfilment by him/them of all the conditions of this agreement hereinafter contained, and to his/their account having first been paid in full, the company will place to the credit of such account, in October 1914, a rebate on such turnover of 7 per cent., and also a bonus of 2 per cent. on the value of each complete set of tyres fitted to new cars or chassis as per clause 7 hereof, such value being calculated on the wholesale price list current at the date of delivery of such car by the stockist(s), but such bonus shall only apply to those cars which have been actually delivered to the stockist(s) private customers, details of which have been notified to the company by the stockist(s) on the forms supplied by the company for that purpose, and the value of such sets of tyres shall not be included in the total nett turnover above mentioned.

"4. The company will include the name of the stockist(s) in the next issue of the 'Michelin Guide to the British Isles.'

"5. The company will bear the cost of all necessary telegraphic expenses incurred by the stockist(s) in transmitting urgent replacement requests for goods to the value of £1 and upwards, providing the stockist(s) use the company's code, all useless words being deducted.

"In consideration whereof—

"6. The stockist(s) agree to support, recommend, and push the sale of Michelin motor-car tyres and accessories in order to do with the company in the ordinary course of his/their business a total net turnover [including repairs, but excluding returns (if any)], of at least £2000 during the year ending 30th September 1914, such tyres being consigned and any such accessories being invoiced as above provided.

"7. The stockist(s) will specify Michelin car tyres to be fitted to at least six new cars which he/they shall receive from any manufacturer, concessionaire, or agent, and deliver them so fitted to his/their customers. The stockist(s) will also equip with Michelin tyres of the cars or chassis he/they may enter in any exhibition, but the stockists shall not exhibit any Michelin tyres at any exhibition held in the British Isles without the written permission of the company first being had and obtained.

"8. All the letter-paper of the stockist(s) shall bear the words 'Stock Michelin Tyre' printed from a block to be supplied by the company, and the stockist(s) will also place in his/their workships, warehouses, showrooms, or garages, bills, posters, and plates advertising the tyres and/or accessories of the company, and will fix up in a conspicuous position outside the front of his/their premises, a round sign to be supplied by the company, in order that the attention of any passing motor-car driver may be readily drawn to the fact that the company's tyres are stocked there. The stockist(s) will also mention Michelin goods in all his/their catalogues and advertising matter.

"9. For the purpose of protecting the mutual interests of the company and the stockist(s), the stockist(s) will not alter or erase, either wholly or partially, any of the manufacture marks or numbers shown on, or in any manner change the character of, Michelin goods, or offer for sale or advertise any Michelin goods so mutilated or changed, nor sell Michelin goods to anyone at prices other than the company's retail prices cur-

rent from time to time, nor give any advantage, direct or indirect, on such prices, and will not sell or supply Michelin goods outside the United Kingdom, or for export, nor supply Michelin goods to or on account of any person, firm, or company on the company's suspended list, the receipt of a copy whereof the stockist(s) hereby acknowledge(s), nor to or on account of any person, firm, or company the company may advise the stockist(s) have been added thereto.

"10. The stockist(s) will at all times keep and maintain the stock at its original number of covers and tubes as first supplied by the company, or as they in their discretion may from time to time increase or decrease the same, and as soon as any article of the stock is sold, send on immediately to the company a request for its replacement, and will pay for the article sold as soon as sold or as soon thereafter as the company may require.

"11. The stockist(s) will return to the company on demand, and the company are at liberty at their discretion to withdraw, at any time the whole or so much of the stock as has not been paid for by the stockist(s), and all goods shall remain the property of the company until so paid for. If such stock is not returned on demand, the company are to be at liberty, in addition to any other remedy, to charge the stockist(s) with the same at the company's wholesale prices current at the time of demand, and to recover immediate payment. The stockist(s) undertake(s) that all goods returned by him/them shall be the last of their sizes supplied to him/them, and in a clean, sound, and saleable condition, and if not so found to pay for same.

"12. The stockist(s) shall not expose any of the stock in the windows of his/their premises, but will provide proper storage for the same, and will separately insure it at his/their expense to its full value, calculated according to the company's current wholesale price-list, against fire, burglary and damage, and any indemnity receivable in respect of such insurance shall be assignable to the company on demand. The stockist(s) shall, whenever required, produce the policy of such insurance to the representative of the company for his inspection.

"13. The stockist(s) shall, whenever required, send to the company a complete detailed list of the stock then held by him/them, and the representative of the company shall be at liberty to examine and check the stock at any time during business hours, and in the event of any article being found by him to be missing or damaged, the wholesale price of the said article is to be charged to the stockist(s), and if any article be found to be unwrapped or unsealed, the stockist(s) will at once return the same to the company, carriage paid, and he/they will in such case immediately send a replacement request to comply with clause 10.

"14. If the stockist(s) shall cease to be stockist(s) of the company, he/they undertake(s) to return to the company immediately the stock, by goods train, carriage forward, the block, round sign, and also any other signs supplied by the company.

"And it is further agreed that

"15. In the event of a breach of this agreement by the stockist(s) the company shall have the right to withhold and recover back all rebates and bonuses due, credited, allowed, or paid hereunder, without prejudice to any claim by the company for damages for breach of this agreement, and no dispute hereunder shall affect the company's right to recover immediate payment in full for all goods supplied, and waiver by the company of any breach of this agreement shall not affect their full rights arising on any subsequent breach.

"16. This agreement to remain in force until 30th September 1914, subject to the due fulfilment by the stockist(s) of all its conditions, but to be terminable at the option of the company at any time on breach by the stockist(s) of any of its conditions.

"17. If the stockist(s) shall continue to hold the goods of the company on consignment, and the company shall send replacements in accordance with the stockist(s) request after the expiration of this present agreement, such continuance shall not imply that the provisions of this agreement apply to such transactions, but the property in such goods shall always remain in the company, and the stockist(s) will return same to the company on demand, as above provided for.

"As witness the hands of the parties the day and year first above mentioned.

"MACFARLANE (GLASGOW), LTD.

"J. M'FARLANE, *Director.*"

The *relative letter* of agreement (No. 7/2 of process) was in the following terms, viz.:—

"From Macfarlane (Glasgow), Ltd.,
16-22 Berkeley Street, Glasgow.

"To Michelin Tyre Co., Ltd., London.
9/10/1913.

"Gentlemen,—Supplemental to the agreement which I/we have this day signed with you, and to the terms and conditions therein set forth, and in consideration of the following undertakings, namely, that

"You will allow me/us in October 1914 (provided my/our account has first been paid in full) a special advertising bonus of £70.

"You will place my/our name in a prominent position as a stockist or agent in your 'Guide to the British Isles.'

"You will mention my/our name in any advertisement relating to motor tyres you may insert in my/our local press, as you in your discretion shall determine, and in all respects will give me/us all such preferential treatment as may be within your power.

"You will also permit me/us to supply *bona fide* motor traders (*i.e.*, any person, firm, or company engaged in the sale and repair of motor cars, occupying a public garage, and possessing the necessary premises and plant for this class of business) Michelin goods at the prices contained in your wholesale price list current from time to time, less a cash discount of 1½ per cent.

"I/we agree that I/we will, during the

year ending 30th September 1914, support, recommend, and push Michelin motor car tyres and accessories in preference to those of any other make, and I/we will not hold on consignment any stock of motor car tyres and accessories other than those of Michelin manufacture, at any of the premises occupied by me/us at any time during the said year, nor advertise nor permit myself/ourselves to be advertised or called stockists or stockholders of motor car tyres of any other make.

"I/we will not advertise any make of tyre and accessories other than Michelin tyres and accessories in any manner whatsoever.

"I/we will especially insist that Michelin tyres be the first equipment of all new cars I/we shall sell and will fit Michelin tyres only to those cars which I/we may use in my/our business.

"I/we will in the case of supplying Michelin goods at trade prices to *bona fide* motor agents, and for the purpose of protecting our mutual interests in the sale of Michelin goods, and the interests of the motor trade generally, obtain from every such motor trader, before so supplying him with any Michelin goods on such terms, an agreement in writing in the terms of the form to be supplied by you, and will assign to you the benefit thereof on demand, but such assignment shall not affect my/our undertaking to see to the due fulfilment of any such agreement, and I/we will send you a duplicate of such agreement signed by such motor trader at the time of my/our first transaction with him, and will furnish him with copies of the suspended list issued by you from time to time.

"It is agreed that the above undertakings shall be deemed to be and form part of the above-mentioned agreement of the 9th day of October 1913, and any breach by me/us of the said agreement or the above undertakings shall empower you to enforce your rights arising out of either this letter or the above agreement.—Yours faithfully,

"MACFARLANE (GLASGOW), LTD.,
"J. M'FARLANE, *Director*."

The *agreement of 12th January* 1915 (No. 7/3 of process) was in the following terms, viz. :—

"*12th January* 1915.

"*Motor Car Tyres and Accessories only.*

"Agreement between Michelin Tyre Company, Limited, of 81 Fulham Road, London (hereinafter called the Company) and Macfarlane (Glasgow), Limited, of Berkeley Street, Glasgow (hereinafter called the Consignee)

Whereby it is agreed as follows:—

"1. The company shall provide the consignee with a consignment stock of Michelin motor car tyres to be held by the consignee on behalf of the company under the conditions following.

"2. The company will consign tyres and invoice accessories which the consignee may require during the continuance of this agreement at wholesale prices and also subject to the conditions contained in the company's wholesale price list current from time to time and the price maintenance agreement already signed (both of which shall be deemed to be incorporated herein) and all tyres shall remain the property of the company until actually paid for by the consignee.

"3. Subject to the consignee attaining in the ordinary course of business a net turnover of at least £1500 (including repairs but excluding returns) during the nine months ending 30th September 1915 and to the due fulfilment of all the conditions of this agreement and to the account being first paid in full, the company will place to the credit of the consignee in October 1915 a rebate on such turnover of [5 per cent., part of this rebate will be deducted off invoice] 11 per cent., and also a bonus of 2 per cent., on the wholesale prices current at date of delivery to private client of each complete set of Michelin tyres fitted to a new car or chassis received by the consignee from the manufacturer, concessionaire, or agent, and delivered so fitted by the consignee to a private client and notified to the company on the form provided.

"4. The company will bear the cost of necessary telegrams sent by the consignee if outside the Metropolitan telephone area transmitting urgent replacement requests for goods to the value of £1 and upwards, provided that the consignee uses the company's code, all useless words being deducted.

"5. This agreement to remain in force until the 30th September 1915, but to be terminable at the option of the company at any time on breach by the consignee of any of its conditions, and waiver of a former breach shall not prejudice the company upon any subsequent breach. The company's right to payment for all goods not returned shall be unaffected by any dispute arising hereunder.

"6. If the consignee shall continue to hold the goods of the company on consignment, and the company shall send replacements in accordance with the consignee's request after the expiration of this agreement, such continuance shall not imply that the provisions of this agreement apply to such transactions except that the property in such goods shall until paid for remain in the company, to whom the consignee will return the consignment on demand.

"*Advertising.*

"7. The consignee may use the style 'Michelin Stockist,' and the name shall be included in the next issue of the Michelin Guide to the British Isles.

"8. All the letter paper of the consignee shall bear the words 'Stock Michelin Tyres' printed from a block to be supplied by the company, and the consignee will exhibit in a conspicuous position in the front of the premises a round sign to be supplied by the company drawing the attention of passing motorists to the fact that Michelin tyres are stocked, and will mention Michelin goods in all catalogues and advertising matter.

"9. The consignee upon ceasing to be a stockist of the company will forthwith return to the company carriage forward by

cheapest route the round sign block and any other signs supplied by the company.

"*Stock Conditions.*

"*A.* The consignee will keep and maintain the stock at its original number of covers and tubes as first supplied or as the company in their discretion may from time to time vary the same, and as soon as any article of the stock is sold send on immediately to the company a request for its replacement, and will pay for the article sold forthwith or as soon thereafter as the company may require.

"*B.* The consignee will return to the company on demand and the company may at their discretion withdraw at any time the whole or so much of the stock as has not been paid for by the consignee. If such stock is not returned on demand the company may at its discretion charge the consignee with the same at the company's wholesale prices current at the time of demand and recover immediate payment. The consignee undertakes that all goods returned shall be the last of their sizes received and in a clean, sound, and saleable condition, and if not so found to pay for same.

"*C.* The consignee shall not expose any of the stock in a window, but will provide proper storage for the same, and undertakes to provide for its insurance to the full value calculated at the company's current wholesale prices against fire, burglary, and damage, and any indemnity receivable in respect of such insurance shall be assigned to the company on demand. The consignee shall whenever required produce the policy of such insurance to the representative of the company for his inspection.

"*D.* The consignee shall whenever required send to the company a complete detailed list of the stock then held, and the representative of the company shall be at liberty to examine and check the stock at any time during business hours, and in the event of any article being found by him to be missing or damaged the wholesale price of the said article is to be charged to the consignee, and if any article be found unwrapped or unsealed the consignee will at once return the same to the company carriage paid, and immediately send a replacement request to comply with clause 'A.'

"*E.* In order that the Michelin reputation may not be prejudiced the consignee will sell tyres in the order received and not retain Michelin covers and tubes in stock longer than six months or such shorter period as the company may require from date of delivery by the company, before which time the consignee shall take steps to have them returned.

"*F.* The consignee upon ceasing to be such undertakes to return the stock to the company immediately carriage forward by cheapest route.

"MACFARLANE (GLASGOW), LTD.,
"J. M'FARLANE, *Director.*"

The *relative letters* of agreement (Nos. 7/4 and 7/5 of process) were in the following terms, viz.:—

"Macfarlane (Glasgow), Limited,
Berkeley Street,
"Glasgow, 12*th January* 1915.

"To the Michelin Tyre Company, Limited,
London, S.W.

"Gentlemen,—In consideration of your supplying Michelin goods to me/us at the prices and subject to the conditions contained in your wholesale price lists current from time to time, I/we agree for the purpose of protecting our mutual interests in the sale of Michelin goods, and the interests of the trade generally, to observe and perform the following conditions so long as I/we shall be selling or dealing in Michelin goods:—

"Not to alter or erase either wholly or partially any of the manufacture marks or numbers shown on, or in any manner change the character of Michelin goods, nor to offer for sale or deal in any Michelin goods so mutilated or changed.

"Not to sell to any one Michelin goods at prices other than those contained in your retail price list current from time to time, nor give any advantage direct or indirect on such prices.

"Not to supply Michelin goods to or on account of any person, firm, or company on your suspended list, nor to or on account of any person, firm, or company that you may advise me/us has been added thereto. Not to sell Michelin goods outside the United Kingdom or for export.

"Not to exhibit Michelin goods at any exhibition held in the British Isles without your written permission.

"I/we also agree that in the event of my/our entering into a further agreement with you, whether annually or otherwise, as to the supply and sale of Michelin goods, the above conditions shall be deemed to be incorporated therein, and that though any such agreement may lapse or be otherwise determined the above conditions shall still continue in force between us.—Yours faithfully, "MACFARLANE (GLASGOW), LD.
"J. M'FARLANE, *Director.*"

"Macfarlane (Glasgow), Limited,
Berkeley Street,
"Glasgow, 12*th January* 1915.

"Gentlemen,—Referring to the agreement signed with you to-day, and in consideration of your undertaking to allow an additional advertising bonus of £30 to be credited in October 1915 under similar conditions to those applicable to rebate, I/we agree not to hold on consignment any competitive stock of motor-car tyres and accessories during the year, nor permit myself/ourselves to be advertised or called stockists or stockholders of motor-car tyres of any other make, or include such tyres in any of my/our advertisements, but will support, recommend, and push the sale of your tyres preferentially.

"If I/we shall have occasion to supply goods to a trader possessing a public garage and repair works, and coming within your definition of a 'motor trader,' the price charged shall be not less than that contained in your wholesale price-list current from time to time, less 5 per cent. (to include 2½

per cent. for cash), and I/we will first obtain in writing an undertaking as to price maintenance (in form 14 supplied by you), to be assigned to you on demand, but such assignment shall not affect my/our liability to see to the due fulfilment of any such agreement which I/we hereby undertake to do.

"I/we will especially insist that Michelin tyres be the first equipment of all new cars I/we shall sell, and will fit Michelin tyres only to those cars used in my/our business.

"It is agreed that the above undertakings shall form part of the above-mentioned agreement.—Yours faithfully,

"MACFARLANE (GLASGOW), LD."

The pursuers *pleaded*—"(1) The defendant company being the pursuers' agents in terms of the agreements condescended upon, the uncollected prices of all goods supplied by pursuers and sold by the defendant company on their behalf belong to and are due and payable to the pursuers. (2) The pursuers are entitled to receive all moneys owing and/or payable as at the date of the liquidation to the defendant company in respect of Michelin goods supplied by the pursuers to the defendant company under and in terms of the said agreements, and sold by the said defendant company, in respect that the defendant company had no right of property in said goods and the prices thereof had not been collected and immixed with their funds."

The defenders pleaded, *inter alia*—"(1) The defendant company being principals to the contract of 'sale and return' founded on, and the contract having been completed by the sale of the goods by the defendant company, the defendant company are liable in payment of the prices of the goods as principals and not as agents."

On 16th February 1916 the Sheriff-Substitute (FYFE) pronounced the following interlocutor—"*Finds* (1) that pursuers and Macfarlane, Limited, on 9th October 1913 entered into the memorandum of agreement (No. 7/1 of process) and the supplementary agreement (No. 7/2 of process); (2) that said agreements should have terminated on 30th September 1914, but owing to the war conditions it was agreed between the parties that the agreements should remain operative till 31st December 1914; (3) that the same parties, on 12th January 1915, entered into the memorandum of agreement (No. 7/3 of process) and the two supplementary agreements (Nos. 7/4 and 7/5 of process); (4) that the pursuers in implement of said agreements supplied Macfarlane, Limited, with goods; (5) that when forwarding goods pursuers sent an advice note, and when Macfarlane, Limited, received the goods they returned the said advice note (retaining a duplicate thereof) with the acknowledgment on the back of said advice note signed by them; (6) that the whole of the goods to which this action relates were thus supplied and acknowledged; (7) that the goods were supplied by the pursuers at a wholesale price, and sold by Macfarlane, Limited, at a retail price, which prices were fixed from time to time by the pursuers; (8) that Macfarlane, Limited, sold the goods to various customers in the ordinary course of their business and debited such customers in their business books with the retail price of the goods; (9) that Macfarlane, Limited, from time to time advised the pursuers as the goods were sold, but not immediately on each sale (although they were taken bound to do so under the agreement), and the pursuers replaced the goods and sent a request for payment of the wholesale prices of the goods sold, which request contained the details of the goods and the separate prices thereof; (10) that Macfarlane, Limited, sent invoices and rendered their accounts in their own name, to their customers, for the retail price of the goods, and no mention was made in the said invoices or accounts, or in Macfarlane, Limited's, dealings with their own customers, of any right or interest of the pursuers in or to the goods so sold, or in or to the price thereof; (11) that pursuers, prior to the liquidation of Macfarlane, Limited, never asked nor received a note of the names and addresses of Macfarlane's customers to whom the said goods were sold and, on payment being made to Macfarlane, Limited, by their customers of the accounts due by them, Macfarlane, Limited, accepted payment and receipted the accounts in their own name, on their own behalf, and used the money so received for the general purposes of their businesses, including payment of the pursuers' accounts; (12) that from time to time the pursuers rendered to Macfarlane, Limited, a statement of the amount owing, and Macfarlane, Limited, made payments on these statements; they, however, did not pay the pursuers immediately, as provided for in the agreement, but sometimes a period of from one to three months at least, and occasionally longer, elapsed prior to payment; (13) that Macfarlane, Limited, were liable for the price of the goods, and in the course of the dealings the accounts due by Macfarlane, Limited, to the pursuers were paid irrespective of whether Macfarlane, Limited, had received payment from their customers of the price of the goods sold; in many instances Macfarlane, Limited, had received payment from their customers before payment to the pursuers, and in others Macfarlane, Limited, paid the pursuers for the goods so sold some months prior to themselves receiving payment of the retail price from their own customers; (14) that Macfarlane, Limited, were never required to appropriate in their books as belonging to the pursuers the moneys received by Macfarlane, Limited, from their customers, and no such appropriation was ever made, nor was any arrangement of any kind provided for or made by Macfarlane, Limited, relating to the keeping of their books so as to disclose in a separate account the parties to whom goods supplied by pursuers were sold or the sums due or paid by such parties to Macfarlane, Limited; (15) that the accounts of Macfarlane's customers in their books contain entries of all goods supplied to the customers, and include not only goods supplied to Macfarlane, Limited, by pursuers, but also other goods supplied by other wholesale firms; (16) that on 2nd March 1915 Macfarlane, Limited,

went into voluntary liquidation, and the defenders John James Davies Hourston and William Brodie Galbraith were appointed liquidators; (17) that at the date of liquidation the position was (*a*) that certain goods supplied to Macfarlane, Limited, by pursuers had been sold by Macfarlane, Limited, and they had accounted to the pursuers for the wholesale price thereof, and this action is not concerned with these goods; (*b*) that certain goods had been sold by Macfarlane, Limited, and they had received from the customers to whom same had been sold the retail price thereof, and had not accounted to the pursuers for the wholesale price thereof, but the sums received had been immixed with the general funds of Macfarlane, Limited, and these goods are not within this action; (*c*) that certain goods which had not been re-sold and remained in the possession of Macfarlane, Limited, have been returned to pursuers and are not in this action: (18) that this action concerns only certain goods which had been supplied by pursuers to Macfarlane, Limited, and had been re-sold by them to various customers, but the retail price of which at the date of the liquidation of Macfarlane, Limited, had not yet been collected by them: *Finds in law* that in respect the only controversy now between the parties is whether pursuers or defenders, the liquidators of Macfarlane, Limited, are entitled to collect from customers of Macfarlane, Limited, accounts due by them for goods sold and delivered to those customers by Macfarlane, Limited, which goods had been supplied to Macfarlane, Limited, by pursuers, and in respect that pursuers have failed to establish any right or title to collect these accounts from Macfarlane's customers, pursuers are not entitled to declarator, or accounting, or decree as craved: Therefore assoilzies defenders, and finds them entitled to expenses," &c.

Note. — ". . . The facts are not now in dispute, having been agreed upon by the joint-minute. There is therefore no need for oral proof upon the agreed facts. I entertain no doubt that pursuers and Macfarlane, Limited, were respectively wholesale and retail merchants. The now bankrupt firm of Macfarlane, Limited, also dealt with their customers as merchants. Who these customers were pursuers did not know and never asked to know. Macfarlane's customers knew nothing of pursuers except that they could not help knowing from the marks on the tyres that pursuers were the manufacturers of the goods which Macfarlane, Limited, sold. The dealings between pursuers and Macfarlane, Limited, were merchant dealings. So were the dealings between Macfarlane, Limited, and their customers. The bookkeeping entries made and the financial practice followed were those of merchants. If Macfarlane, Limited, were in fact merchants dealing with pursuers they did not become agents merely because Macfarlane, Limited, became bankrupt. The word agent is not once used in the agreements founded on. Macfarlane, Limited, are called 'stockists.' They are also called 'consignees.' In ordinary commercial language a consignee means a merchant. I do not know what a 'stockist' is in law, but the terms 'consignee' and 'stockist' in the agreements founded on are obviously used as synonymous terms. No doubt the documents contain a good deal of verbiage, which is evidently carefully designed, in case of need, to enable pursuers to get round the elementary doctrine that the property in goods passes to a consignee upon delivery. But these mere words cannot defeat the legal inferences from the actual facts. Even had Macfarlane, Limited, been called agents, which they were not, it does not follow that in a bankruptcy question like this they would have been regarded as agents, to the effect of entitling one of their creditors to take away an asset from the general body of creditors, which is what pursuers want to do. What I have to do with is what the arrangement really was, not merely what it was called.

"The whole arrangement seems to me a very ingenious commercial device to get all the advantages and conveniences of merchant-dealing, whilst endeavouring to leave pursuers a loophole, if it suits them to do so, to plead that Macfarlane, Limited, were only pursuers' agents.

"It is a recognised principle in construing contracts, and especially commercial contracts, that the intention of the contracting parties is to be ascertained, not from isolated expressions used in documents, but from the documents read as a whole; and, so read, I think these agreements express an arrangement between pursuers as manufacturers of tyres and accessories and defenders as merchants who were to buy tyres, &c., from the manufacturers in order that they as merchants might, for their own profit, sell them in their own name to customers of their own, not to customers of pursuers.

"It is another well-recognised principle in construing commercial documents that the actings of parties in carrying out a written contract is the best evidence of the intention of the contracting parties.

"The consignment note founded on by pursuers does not necessarily infer agency. It is quite consistent with merchant-dealing.

"That the goods were supplied by pursuers at wholesale prices and sold by Macfarlane, Limited, at retail prices suggests merchant-dealing. That pursuers fixed the retail prices matters nothing. That is a quite common arrangement between manufacturers and merchants. That Macfarlane, Limited, pocketed the retail price and accounted to pursuers only for the wholesale price infers merchant-dealing, not agency, the common form of remuneration to an agent being by commission. That Macfarlane, Limited, invoiced goods and rendered accounts to their own customers in their own name infers merchant-dealing, not agency. That Macfarlane, Limited, received payment from their customers and discharged accounts in their own name infers merchant-dealing; and so, much more strongly, is the inference from the fact that sums so paid to Macfarlane, Limited, were used by them for the general purposes

of their business, including making periodical payments to pursuers. The account form does not necessarily suggest agency. It is a remittance form, quite applicable to dealings between wholesale and retail merchants.

"That Macfarlane, Limited's, making payment to pursuers was not dependent upon Macfarlane's customers making payment to them does not suggest agency but merchant-dealing. That in their books Macfarlane, Limited, did not appropriate, and were not required by pursuers to appropriate, to their account any payments made by customers does not infer agency but merchant-dealing.

"In my view there was absolutely nothing in the course of dealing between pursuers and Macfarlane, Limited, to infer agency, and a great deal to infer merchant-dealing. Even if the documents are regarded alone, I do not think they necessarily infer that Macfarlane, Limited, were merely agents for pursuers, or that pursuers were the creditors in the sales made by Macfarlane, Limited, to customers of theirs. If the documents are construed in the light of the course of dealing under them, I think that the conclusion is irresistible that Macfarlane, Limited, were merchants and not agents, and so that debts due by their customers which were outstanding at the date of the liquidation of Macfarlane, Limited, are assets of *their* estate, and are now payable to the liquidators and not to the pursuers.

"In their pleas the defenders raised some refinements as to whether goods supplied by pursuers to Macfarlane, Limited, were sold outright or were consigned on 'sale or return.' I think that the goods furnished by pursuers to Macfarlane, Limited, were goods sold and delivered by wholesale to retail merchants, to be re-sold for the retail merchant's profit; but at anyrate the goods were admittedly re-sold by Macfarlane, Limited, and if they held them on sale and return the sale was determined and the property right in them passed to Macfarlane, Limited, the moment they sold them to a customer.

"The pursuers can succeed only if Macfarlane, Limited, were nothing but their agents. In my view they were not agents, and accordingly defenders are entitled to absolvitor with expenses."

The pursuers appealed to the Sheriff [MILLAR] who on 21st June 1916 pronounced the following interlocutor:—"Adheres to the findings in fact in the interlocutor of 16th February 1916, Nos. 1 to 18: *Quoad ultra* recals the interlocutor: *Finds in fact and in law* that in selling the goods supplied to them by the pursuers' company, the defenders were acting as agents under a *del credere* commission: And finds in law that the pursuers are entitled to declarator as craved: Therefore finds and declares in terms of the first conclusion of the initial writ, and remits the cause to the Sheriff-Substitute for further procedure: Finds the appellants entitled to the expenses of the appeal."

Note.—"The defenders are a limited company now in liquidation, and they obtained from the pursuers certain goods which they sold to customers of their own. The question that is raised in this appeal is, whether the defenders were principals in the transaction as merchants purchasing from manufacturers, or whether they were really the agents of the pursuers in the transaction acting under a *del credere* commission. The parties have produced the contracts under which the transactions proceeded which are very specific in their details. The contracts are of a composite character, having some of the elements of a contract of sale and others of contract of agency. The learned Sheriff-Substitute, upon a consideration of the contracts and of the facts admitted in the minute of admissions, has come to the conclusion that the defenders were merchants in the transaction between them and the pursuers, and that the persons to whom they sold the goods were purchasers from them as principals and not agents.

"The first clause of the agreement, No. 7/3 of process, which does not differ greatly from the clause in No. 7/1 of process, states—'The company shall provide the consignee with a consignment stock of Michelin Motor Car Tyres to be held by the consignee on behalf of the company under the conditions following.' That is the ruling clause of the contract, and seems to point very directly to the relationship being principal and agent, because if the defenders were purchasers one cannot see how they should hold the goods that they purchased on behalf of the sellers. The next clause provides that 'The company will consign tyres and invoice accessories which the consignee may require during the continuance of this agreement at wholesale prices,' and so far the clause does not imply one contract more than another, but then the concluding words of the clause are that 'all tyres shall remain the property of the company until actually paid for by the consignee,' and that points rather to agency than to a contract of sale, although it is not conclusive of the matter. Then the defenders are not to be entitled to sell the goods at any price they like, but only at the retail prices specified by the pursuers. Further, they are not to be entitled to sell to anyone they like, because not only are they excluded from selling to persons outside of the country, but they are prevented from selling to anyone who is on what is called the suspended list issued by the pursuers. Again, not only may the defenders return the goods, but the pursuers may withdraw the whole or so much of the stock as has not been paid for by the defenders at any time they chose to put an end to the contract. Further, the defenders are not to be entitled to remove the marks from the goods at any time. Then there is a clause obliging the defenders to insure the goods and to transfer to the pursuers the benefit of the policy. The defenders are also bound to advertise themselves as the pursuers' stockists, and to use the block for that purpose supplied by the pursuers. On the other hand, the remuneration of the defenders consisted in the difference between the wholesale price—which they were bound to

remit to the pursuers when a sale took place—and the retail price which they obliged themselves to obtain from their customers. That of course does not necessarily imply that the contract is one of sale, as was pointed out in the case of *ex parte Bright, in re Smith*, 1879, 10 Ch. D. 566. There is a further remuneration provided for in clause 3 in the form of a rebate and a bonus, and the defenders' agent founded on the use of these words rather than that of commission, but as long as we get to the essence of the remuneration the fact that one set of words is used more than another does not matter. A more difficult question arises from the fact that the defenders might allow their customers time, or even take a bill from them in payment of the price, but in their position of *del credere* agents, thus guaranteeing the payment of the price to the pursuers, the mere fact that they were entitled to make such arrangements as they pleased with the purchasers from them will not alter the character of the transaction if on consideration of all the terms of the contract the Court came to be of opinion that it was one otherwise of agency. The only other matter that arises on the documents is that in the letter of 9th October 1913 the defenders make it a condition that the pursuers should place their name in a prominent position as a stockist or agent in their 'Guide to the British Isles,' which throws a sidelight upon the defending company's understanding of their position towards the pursuers. I regret to differ from the learned Sheriff-Substitute, but on the whole matter I have come to the conclusion that on the documents as produced the defenders were really agents for the pursuers and not independent merchants. If that is the conclusion one comes to on the contracts themselves, the mere fact that the defenders in their books and in their relations with their customers took up the position of principals will not alter the fact that they really were the agents of the pursuers.

"I was informed that once the question in dispute between the parties as to their position in this contract was settled by the Court there would be no difficulty in arranging the amount that would be due, but in the meantime I think the proper course is to grant declarator in terms of the first crave in the initial writ, and to remit the case for further procedure to the Sheriff-Substitute, who can then make a formal order for accounts."

The defenders appealed, and argued—The relation of the parties was that of buyer and seller, not that of agent and principal. "Stockist" meant one who kept a stock, not an agent. The word "agent" in the letter of 9th October 1913 was not conclusive as to the relationship of the parties. It was used as equivalent to "stockist" in the sense explained. In its strict sense it was inconsistent with the rest of the agreements, and the course of dealing following thereupon. The provision for assignment in article 12 of the agreement of 9th October 1913, and the corresponding provision in condition C of the agreement of 12th January 1915 were unnecessary if the defenders were agents of the pursuers. Further, the use of the word "consignee" indicated that the transaction was one of sale. No doubt article 1 of the agreement of 9th October 1913 provided that the property in the goods should remain with the pursuers till the same were actually sold and paid for, but that clause must be read subject to this, that if the goods were sold for use on credit the property therein must necessarily have passed to the defenders, and from them to the purchaser. Article 7 was consistent only with a sale to the defenders and a further sale by them to their customers, and showed there was no contract between the pursuers and the ultimate purchaser. That was the footing on which the matter had been dealt with between the parties. Further, the defenders guaranteed payment of the wholesale price, not of the retail price, to the pursuers, which distinguished the case from that of *del credere* agency when the guarantee was of the retail price. *Ex parte Bright, in re Smith*, 1879, 10 Ch. D. 566, was distinguished, for the facts were different. The contract was one of sale or return—Bell's Principles, section 229; Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), sections 17 and 18. The Sheriff-Substitute was right.

Argued for the pursuers (respondents)—The defenders were *del credere* agents for pursuers. The course of dealing of the parties was of no importance, for it conflicted with the terms of the contract. "Stockist" meant an agent who kept a stock—here the defenders were expressly called agents. They never had the property in the goods—article 1 of the agreement of 9th October 1913. Their remuneration was in essence a commission. There was privity of contract between the defenders' customers and the pursuers, for if a tyre was defective the customers could sue the pursuers on their guarantee. The clause as to assignation of insurance rights was surplusage. It was admitted that tyres not yet sold belonged to the pursuers; if so, the price for tyres sold belonged to the pursuers as a *surrogatum*. *Ex parte Bright, in re Smith* (*cit.*) was in point and should be followed. The judgment of the Sheriff should be sustained.

At advising—

LORD ORMIDALE—The question of the competency of this action was not raised before us by either of the parties and I deliver no opinion upon it.

The sole question which we have to decide is whether under the agreements entered into by the parties the defendant company were the pursuers' agents or were themselves principals in the sale to the purchasers at retail prices of the goods manufactured by the pursuers. To put it otherwise, were the defendant company merchants who themselves purchased the goods in question from the pursuers, and then as principals sold them to customers of their own? The Sheriff-Substitute has in effect held that they were principals. The Sheriff has held that they were acting as agents under a *del credere* commission.

In my judgment the conclusion reached

by the Sheriff-Substitute is the correct one I should advise that the appeal be sustained.

The agreements under which the arrangements between the parties were concluded are expressed at some length, In the principal agreements the defendant company are referred to as "stockists" and "consignees," expressions which are of a neutral character. In one passage, however, in the relative letter of agreement dated 9th October 1913, written by the defendant company, the word "agent" is used—"You will place our name in a prominent position as stockist or agent in your 'Guide to the British Isles.'" But the mere use of the term by one of the parties will not constitute the party using it an agent if it appears from the rest of the contract that that is not his true relationship to the other party. As has been said by Lord Justice James—"There is no magic in the word 'agency.' It is often used in commercial matters where the real relationship is that of vendor and purchaser"—(1870) *Ex parte White*, L.R., 6 Ch. 397, at p. 399. Its use in the present instance appears to me accidental. It is associated with the term "stockist," which I take to mean stockholder, and the purpose of its use is merely to advertise the public that the person so described is able to supply goods of a particular manufacture. Nor do I in the light of the other articles attach any importance to the expressions used in articles 1 and 2 of the agreements that the consignment stock of tyres is to be held "on behalf of the Michelin Company," and that they are to remain the property of the company until actually paid for by the consignee. The expressions are not inappropriate to a contract of sale and return. The goods were supplied at wholesale prices to the defendant company for the purpose of being sold by them at retail prices, and it cannot be disputed that on the defendant company concluding such a sale and making delivery of the goods to a retail purchaser, the property in the goods would pass to the retail purchaser irrespective altogether of whether or not the defendant company had paid the wholesale price to the pursuers. It is to be noted that payment of the wholesale price to the pursuers immediately on the sale to a retail customer was not one of the conditions in the agreements.

Now apart from the expressions I have referred to, the other articles of the agreements appear to me very clearly to instruct an out-and-out sale to the defendant company by the pursuers. Stringent conditions as to the parties to whom the defendant company are to be entitled to sell are no doubt imposed, and the retail prices are to be fixed by the pursuers, but these are quite consistent with a sale to the defendant company. On the other hand, certain of the conditions appear flatly to contradict the theory of agency. I refer particularly to the article by which the defendant company are taken bound to insure the goods supplied to them in their own names, and presumably at their own expense, though that is not expressed. So, too, article 7, under which the defendant company are taken bound to specify Michelin car tyres to be fitted to at least six new cars, and to deliver them so fitted to their customers. Obviously the defendant company would be sellers of such cars not as agents of the pursuers, and it seems absurd to differentiate between the cars so sold and the tyres fitted to their wheels, and to hold that *quoad* the tyres the defendant company were sellers only as agents for the pursuers. Nowhere is there anything to suggest any privity of contract between the retail purchasers and the Michelin Company, and nothing to instruct the relationship between these parties of buyer and seller or of debtor and creditor.

It is of some importance that the word "commission," which is the term generally used to describe an agent's remuneration, nowhere occurs. He makes his profit in the ordinary way out of the difference between the retail price, albeit fixed by agreement with the pursuers, at which he sells, and the wholesale price at which he has bought. Two different prices indicate two substantive sales, and the stipulations as to rebate and bonus point in the same direction.

The course of dealing between the parties, which endured for more than two years, and which is not challenged as having been otherwise than in conformity with the articles of the agreements, confirms the view that the defendant company were purchasers from and not agents of the pursuers. The defendant company did not furnish the pursuers with a list of their customers. They rendered their invoices and accounts solely in their own names without reference of any sort to the pursuers. The moneys received by them from their customers were in no sense accounted for to the pursuers, but were used by them for the general purposes of their business. No doubt these included payment of the pursuers' accounts, but these were settled sometimes before and sometimes after they had received payment from their own customers.

In my opinion the defenders fall to be assoilzied.

LORD SKERRINGTON—The Sheriff-Substitute decided that certain written agreements between the pursuers, the Michelin Tyre Company, and the defenders, Macfarlane (Glasgow), Limited, which provided for the pursuers supplying the defenders with stocks of Michelin motor car tyres, were contracts of purchase and sale, and that when the defenders sold such tyres to their customers they did so as merchants and not as the pursuers' agents. On the other hand the Sheriff construed the agreements differently, and held that they constituted the defenders *del credere* agents for the pursuers. He accordingly decided that the moneys due to the defenders by their customers as the price of tyres sold and delivered to the latter, belonged to the pursuers and did not belong to the liquidators of the defenders' company. I prefer the judgment of the Sheriff-Substitute. The object which the parties had in view in making these agreements was that the

defenders should push the sale of Michelin tyres in the mutual interests of both parties, but always in conformity with the pursuers' general trade policy, which required that tyres of their manufacture should not be sold to the public at less than the retail prices fixed by the pursuers from time to time. The pursuers further desired to prohibit the defenders from altering the marks or character of Michelin goods and from selling such goods to certain persons whose names appeared in the pursuers' "suspended list." They also desired to secure, so far as legally possible, that Michelin tyres supplied to the defenders under the agreements should remain the pursuers' property until the price of such tyres had been paid by the defenders to the pursuers. One way of effecting these objects was to constitute the defenders *del credere* agents for the pursuers, but the same objects might legally and effectually be attained by contracts of purchase and sale. Of course I do not mean ordinary contracts of purchase and sale by virtue of which the property passes to the purchaser at latest on the delivery of the goods, and which leave the purchaser absolutely free to alter or re-sell the goods as he pleases. There is, however, nothing illegal or at the present day unusual in a contract of sale which imposes upon the purchaser restrictions as to the manner in which he shall deal with the goods or as to the persons to whom or the prices at which he may re-sell the goods. Such stipulations are of course ineffectual if they are unreasonable restraints on trade, but they may in certain circumstances be perfectly valid. Further, our law has long been familiar with contracts of sale and return between a manufacturer or wholesale dealer on the one part and a retail trader on the other part, which stipulate that the property in any particular article supplied by the former to the latter shall not pass to the purchaser until the latter effects a re-sale. The sole question therefore, as it seems to me, in the present case is whether by the agreements in question the parties chose the one method or the other of effectuating the objects which they had in view. Each method had, no doubt, its advantages and its disadvantages from the point of view of each of the contracting parties. In my judgment, however, the question whether it was expedient to authorise and require the defenders to sell Michelin tyres as agents for the pursuers and thus to create privity of contract between the pursuers in London and a host of retail purchasers in Glasgow was one in regard to which the parties themselves ought to have spoken with no uncertain voice if they desired that such privity of contract should exist. Nothing less than express language or necessary implication would, in my view, entitle us to construe these agreements so as to expose the pursuers to the inconvenience of an action at the instance of any person who might buy a tyre from the defenders, and so as to expose the defenders to the inconvenience of having to disclose the names of their customers to a company which might at the end of any year discard the defenders and employ a rival trader as the distributor of Michelin goods among the public of Glasgow. Again, if the relation of principal and agent was intended to be created, one would have expected to find in the agreements some of the familiar clauses which are usually inserted in such cases for the protection of the legitimate interests of the parties both during the agency and after its termination. The agreements contain elaborate and stringent clauses, enumerating the duties of the defenders and the rights and remedies of the pursuers, but the clauses appropriate to an agency are conspicuous by their absence. Thus there are stipulations in regard to the care and storage of the stock while it remains the property of the pursuers, but none as to the keeping a record of the names and addresses of the purchasers, who, as the pursuers now contend, became their debtors for the price of the stock when sold. The defenders are taken bound whenever required to send to the pursuers a complete detailed list of the stock on hand, and the pursuers are authorised to examine and check the stock at any time, but there is no corresponding duty of disclosure or right to demand information with regard to the names of the defenders' customers and their transactions with the defenders. The only case in which, according to the agreements, the pursuers can ask for details of the defenders' transactions is if the latter claim a special bonus in respect of tyres fitted to new cars sold by them to their customers. Apart from these negative arguments, the terms of the agreements suggest positive inferences unfavourable to the theory of agency. Thus in the case of the new cars already referred to which were to be fitted with Michelin tyres by the defenders before delivery to their customers it is difficult to suppose that it was intended that the pursuers should be creditors of the defenders' customer for a part of the price which such customer had agreed to pay to the defenders for a complete car fitted with Michelin tyres. Again, the defenders agreed that before supplying any *bona fide* motor trader with Michelin goods at trade prices they would obtain from such trader an agreement in writing in the terms of a form to be supplied by the pursuers, and that they would assign to the pursuers "the benefit thereof on demand, but such assignment shall not affect my/our undertaking to see to the due fulfilment of any such agreement." This stipulation seems to me to assume that any such agreements with traders would be entered into by the defenders as merchants on their own account, and it entitles the pursuers to demand, if they so wish, an assignment not of the agreement itself but of any moneys payable under it.

If I am right in thinking as regards these two branches of the defenders' business that it was assumed that they would act as independent traders and not as the pursuers' agents, I do not think that a different inference can be drawn in the case of the sale by the defenders of Michelin goods to private customers.

For these reasons I think that the Sheriff-Substitute was right when he found in point of law that the "pursuers have failed to establish any right or title to collect these accounts from Macfarlane's customers." The Sheriff, while adhering to the Sheriff-Substitute's eighteen findings in fact, recalled his finding in law, and found "in fact and in law that in selling the goods supplied to them by the pursuers the defenders were acting as agents under a *del credere* commission." It is true that in one of the contractual letters the defenders stipulate that their name shall appear in the pursuers' book in a prominent position "as a stockist or agent." It is, however, a familiar fact that among commercial men the word "agent" is often used to include persons who in law are independent traders, and this was recognised in the judgment of Sir W. M. James, L.J., in *ex parte White, in re Nevill*, (1870) L.R., 6 Ch. 397, at pp. 400-1. It is further true that by the express terms of the agreements the defenders undertook personal liability to the pursuers for the price of the consignments as contained in the pursuers' wholesale price lists current from time to time; but I am unable to discover in the agreements any indication that this liability was of the nature of a guarantee or in any way different from the ordinary liability of a purchaser to pay for the goods which he had bought. Accordingly I cannot agree with the Sheriff in his legal finding, and consider that the judgment of the Sheriff-Substitute should be restored.

LORD PRESIDENT—I have had an opportunity of reading and considering the opinions which have just been delivered by your Lordships, and I entirely agree with them.

The construction of the agreements founded on, although they are expressed in somewhat elaborate and, in many places, uncouth language, is not doubtful. They indicate clearly to my mind the constitution of the relationship of seller and buyer and not of principal and agent. Still less obscure is the course of dealing between the parties as set out in the joint-minute of admissions. It shows plainly that there never was, and never was intended to be, any privity of contract established between the pursuers and the customers of the defenders. And inasmuch as it was clear that the course of dealing between the parties, as disclosed in the joint-minute of admissions, was in harmony with and not contrary to the agreements expressed in writing, I am of opinion that it is conclusive of this controversy.

I propose to your Lordships, in accordance with the opinions that you have delivered, that we should recal the interlocutor of the Sheriff, repeat the findings in fact of the Sheriff-Substitute, find in law that on a just construction of the agreements and supplementary agreements founded on, the relationship constituted between the pursuers and the defenders is that of seller and buyer and not of principal and agent, and therefore assoilzie the defenders.

LORD JOHNSTON and LORD MACKENZIE were not present.

The Court pronounced this interlocutor—

"Sustain the appeal: Recal the interlocutor of the Sheriff dated 21st June 1916: Affirm the interlocutor of the Sheriff-Substitute dated 16th February 1916: Repeat the findings in fact contained therein: Find in law that on a just construction of the agreements and supplementary agreements founded on in the first crave of the initial writ, the relationship constituted between the pursuers and defenders was that of seller and buyer and not of principal and agent: Therefore of new assoilzie the defenders and find them entitled to expenses: Find the appellants entitled to additional expenses since 16th February 1916, and remit the account thereof, together with the account of expenses found due in said last-mentioned interlocutor, to the Auditor."

Counsel for the Pursuers (Respondents)—Solicitor-General (Morison, K.C.)—Macquisten. Agents—Carmichael & Miller, W.S.

Counsel for the Defenders (Appellants)—Mackenzie, K.C.—Jamieson. Agent—W. Carter Rutherford, S.S.C.

HOUSE OF LORDS.

Tuesday, October 24.

(Before Earl Loreburn, Viscount Haldane, Lord Kinnear, Lord Shaw, and Lord Parmoor.)

MOSS'S EMPIRES, LIMITED *v.* WALKER AND OTHERS.

(In the Court of Session, January 18, 1916, 53 S.L.R. 298, and 1916 S.C. 366.)

Valuation — Valuation Roll — Process — Failure of Assessor to Give Notice of Increased Valuation—Action for Reduction of Entry—Competency—Valuation of Lands (Scotland) Act 1854 (17 *and* 18 *Vict. cap.* 91), *sec.* 30.

The proprietors of property which had been entered in the valuation roll at an increased valuation brought in the Court of Session an action of reduction of the entry on the averment that the assessor had sent them no notice of the proposed change.

Held (1) that the Court of Session had jurisdiction, and (2) that the action was not incompetent under section 30 of the Valuation of Lands (Scotland) Act 1854, inasmuch as the defect alleged was not an "informality" or a "want of compliance with the provisions of this Act in the proceedings for making up such valuation or valuation roll."

This case is reported *ante ut supra.*

The defenders, Walker and Others, appealed to the House of Lords.