more; they are for weekly compensation only, and for nothing else. Now it seems to have been maintained before the arbitrator, to judge from the questions stated by him in the case, that what follows changes these payments for weekly compensation, as far as the statute is concerned, into either a discharge in respect that incapacity had ceased, which, it is stated in the case is not so, or as redemption money for all future weekly payments. Now I think it clear that such contentions are untenable, and that in no view could the document founded on by the appellant be regarded as a valid statutory discharge; but Mr Dykes, in a very careful and able argument, says it is beside the question to consider this discharge as being either a discharge on account of the incapacity having ceased or otherwise under the statute. He maintains that it must be considered simply as a common law discharge of all future claims. Taking it then as a common law discharge, what do we find? We find it sets forth as follows—"Received the sum of Ten pounds, two shillings and sixpence, being the amounts mentioned on this form, in full satisfaction and discharge of all claims whatsoever I may have against Mr C. Macandrew for the personal injury by accident sustained by me on or about the 3rd November 1909."

Now my first observation is that the consideration which is stated is a false one. It is stated that the consideration for the discharge is this sum of £10, 2s. 6d. That is false on the face of the document itself, because we see from what immediately comes before that that sum of £10, 2s. 6d. was just the summation of the payments which were paid as weekly compensation from time to time from the commencement of their becoming due up to 9th March. So this is a false consideration, and possibly that would be sufficient to entitle the Court to disregard the so-called "final discharge."

But let us pass from that and inquire what was the consideration given for this "final discharge." The answer must be that there was no consideration at all, and that the discharge was purely gratuitous. The sum of £10, 2s. 6d. is mentioned as the consideration, but then we know that this sum was never paid for the final discharge. It had already been consumed in weekly payments, and the discharge was given for no consideration whatever. It is entirely *sine causa*, for it is stated that there was no agreement between the parties other than is presented by the receipt. In that state of matters, viewing it as a common law question, it comes within the rule laid down in the case of *Dickson* v. *Halbert*, 16 D. 586, for there the discharge was granted entirely *sine causa* by people who did not understand their legal rights, which we may assume is the case here, for I cannot believe, looking to the statements of the Sheriff that the workman was a man of "very low mental type," that he could appreciate what his legal rights were and what he was giving up. In point of fact, he gave this discharge in full without any consideration whatever—that is to say, he forfeited all claims for the future, and that in the circumstances that he had not then recovered from his incapacity, and it is, we are informed, the fact that he has not recovered yet. That being so, I think we must hold that the Sheriff acted perfectly rightly in disregarding this discharge altogether. It was within his competency to do so, as was decided by the case of *Ellis* v. *Lochgelly Iron and Coal Company, Limited*, 1909 S.C. 1278, and I think he has rightly dealt with the matter in disregarding it.

The result will be that we affirm the decision of the Sheriff, and hold that the appellant has not a right to have his memorandum recorded, and that the respondent is entitled to have his memorandum recorded.

The LORD JUSTICE-CLERK and LORD DUNDAS were absent.

The Court answered the fifth question of law in the affirmative.

Counsel for Appellant—Horne, K.C.—Dykes. Agent—Robert Miller, S.S.C.

Counsel for Respondent—Morison, K.C.—Kirkland. Agents—J. Douglas Gardiner & Mill, S.S.C.

HOUSE OF LORDS.

Friday, March 31.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw).

INTERNATIONAL SPONGE IMPORTERS LIMITED *v.* WATT & SON.

Principal and Agent—Fraud—Sale of Goods—Course of Business—Scope of Authority—Commercial Traveller Embezzling Cash Paid him for Goods, Payments usually being Made by Cheque to Principal.

Circumstances in which *held* that the purchaser was not bound to pay over again for goods for which he had already paid, though such prior payment had been made, out of the usual course of business, in cash to the seller's commercial traveller, who had embezzled the money.

On February 13, 1909, the International Sponge Importers, Limited, London, *pursuers*, brought an action against Andrew Watt & Sons, saddlers, Edinburgh, *defenders*, in which they sought decree ordaining the defenders to deliver to the pursuers in as good condition as they were received three consignments of sponges, or, on failure to deliver, to make payment of £314, 15s. 10d. as the value thereof. The three consignments had been obtained from Cohen, a traveller of the pursuers, sponges not being sold by sample, and the defenders had paid him in cash or by open cheque in his favour, and he had embezzled

the money, the embezzlement not being immediately discovered owing to the connivance of two confederates in the pursuers' office. The common mode of making payment had been by crossed cheque in favour of Cohen's principals, sent to them directly or handed to the traveller, the goods being bought on credit.

The whole *facts* and *circumstances* are given in their Lordships' opinions.

On June 16, 1909, the Lord Ordinary (SALVESEN) decerned against the defenders in terms of the alternative conclusion of the summons.

Opinion—"This is an action for delivery of three parcels of sponges, or, failing delivery, for payment of their value. The case is interesting because of the legal questions which arise, for the facts are not seriously in dispute.

"The pursuers are a company formed by an amalgamation of some of the leading sponge importing firms in England. After the amalgamation the firms in question continued to use the old firms' names with the word 'Branch' added. One of the firms was known as 'Cresswell Brothers,' and since 1903, when the limited liability company was formed, Cresswell Brothers continued to carry on their own business as a branch of the company under the designation Cresswell Brothers Branch. This branch retained at all events some of the former employees, including Henry Cohen, a traveller, whose defalcations have given rise to the present action.

"The defenders have been regular customers of Cresswell Brothers, and of that branch of the pursuers' business since 1898. During the whole period, until recently, Cohen was the traveller who called upon them for orders, and through whom the pursuers and their predecessors sold the sponges which the defenders required from them. In the sponge trade it appears that business cannot be done by merely showing samples; and accordingly Cohen was supplied with cases of sponges for disposal amongst the customers whose premises he visited. The regular course of business was as follows:—Cohen submitted to the defenders for their inspection cases of sponges which he thought might suit their business, and arranged a price at which they agreed to buy. He left the cases which the defenders had agreed to purchase with them; forwarded to Cresswell Brothers Branch a sale-sheet showing the name and address of the customer, the quantity of goods bought, and the price. An invoice was then sent by the pursuers' said branch direct to the defenders setting forth these transactions. The goods were sold upon credit; and when the credit expired a statement of account was sent to the defenders, who thereafter remitted the amount direct to the pursuers. All such transactions were settled by crossed cheques in favour of the pursuers, generally transmitted by post, but occasionally handed to the traveller if he happened to be calling at a time when a remittance was due. A receipt for payment written on an official slip was pasted on the statement of account, which was then posted or handed, as the case might be, to the customer. Six months' credit was usually allowed to the defenders, although on the invoice sent to them there was the following printed notice—'Terms 2½ per cent. discount for prompt cash or net three months.' On other invoices, applicable to cash sales, were printed the words 'Terms strictly net,' notwithstanding which, and the fact that a 5 per cent. discount for cash was deducted from the account, the defenders were apparently allowed to take some months to make payment of the net sum. A sale on 29th September 1899, for instance, where a cash discount of 5 per cent. had been allowed, was only paid for on 31st January 1900. On all the statements of accounts there was a printed note—'Cheques to be crossed London and Joint Stock Bank Account Payees,' and in red type at the side 'No receipt valid unless on the firm's printed forms to be attached hereto.'

"The invoices produced show that there had been a great many transactions entered into and settled in this way prior to the first of those which are now in dispute. On 15th October 1905 Cohen called on the defenders and arranged with them to purchase 400 sponges at 4s. each, the total price thus being £80. As customary, he left the goods with the defenders, but on the statement that they were getting the sponges specially cheap on condition of their making payment in cash he induced them to give him a cheque in his own name for £80, and granted them a receipt in the following terms:—'Bought of H. Cohen 400 sponges, 4s. each, £80. Paid by cheque 20 October 1905. Harry Cohen.' This transaction Cohen reported on the sale sheet as a sale on credit for the amount of £87, 1s. 8d., to be charged as at 10th January 1906, and it entered pursuers' books in this form. It would thus appear as if Cohen at that time had intended to find the £87 when it became due—taking the use of the £80 in the meantime for his own purposes. No invoice was ever sent in connection with this transaction, but the sum due on the 10th of January was included in the account rendered to the defenders in April 1906. On 7th April the defenders wrote a letter in which they say —'We have your account due in June, and as we are checking all our quarterly accounts we find no invoice for item 10th January £87, 1s. 8d. We think it better to call your attention to this at once. Kindly send an invoice at once.' Mr Cresswell says that he never saw this letter, and as other clerks in the office were conspiring with Cohen to defraud the company it may well be that it was withheld from him—Cohen no doubt having explained to his confederates that he had already received payment of the amount. The result was that in the next statement of account the clerk rendering it dropped out this item. The defenders,

however, do not say that they identified this transaction as being the one in respect of which they had paid £80 to Cohen.

"On the books being audited at the end of the year 1906 the auditor says that he noticed that the sum of £87, 1s. 8d. was still outstanding, although other subsequent items had been duly settled; and that he made a violet ink marking on the account of the defenders in the pursuers' books so that it might receive their attention. This marking was found to be deleted in violet ink, presumably by one of Cohen's confederates, and Mr Cresswell's attention was not called to the account. The auditor at the same time sent to the defenders a statement of the amount due by them, which included this item of £87, 1s. 8d., asking them to notify him if the amount was not still outstanding, but the defenders say that they did not receive any such notification, and there is no proof otherwise that they did. Hence it was not until 1908 that Cohen's fraud was discovered.

"In the meantime other two transactions had been entered into of the same description. The first was the sale in October 1907 by Cohen to the defenders of 270 Turkey sponges at 4s. each, amounting to £54. Here again the defenders were induced to give a cheque in Cohen's favour for the amount; and they were content with a receipt written on a half sheet of ordinary writing paper in the following terms—'October 8, 1907. To Messrs Watt & Sons, Edinburgh, 270 Tky. sponges at 4s., £54, 0s. 0d. Paid by cheque same date. Henry Cohen.' The excuse given by Cohen for asking the cheque in his own name was that he would thereby save bank charges to the pursuers, the transaction being again a cash one.

"The third transaction was entered into in May 1908, when Cohen again called on the defenders and arranged with them to purchase 740 Turkey sponges at 3s. 6d., being £129, 10s. in all. He allowed them a deduction from the price of £9, 10s., and received cash to the amount of £120, in return for which he gave the defenders a receipt on one of the pursuers' foreign invoice forms, dated 18th May 1908, and signed 'For International Sponge Importers, Limited, Cresswell Branch. H. Cohen. With thanks.' Neither of the two transactions last mentioned was reported to the pursuers, nor was any part of the price of any of the three parcels accounted for to them; and it was only in August 1908 that they discovered how they had been defrauded. They then took criminal proceedings against Cohen and two other employees named Barker and Small. Cohen and Barker eluded the police, but Small was convicted and sentenced to six months' imprisonment.

"In all three transactions the price arranged by Cohen was below the actual cost price to the pursuers. They state the cost prices to have been in the three cases, as follows:—£83, 6s. 8d., £61, 17s. 6d., and £169, 11s. 8d.; and it is for the sum of these amounts that they sue. The sponges have all long since been disposed of by the defenders, and have no doubt been consumed.

"The case for the pursuers is that the goods delivered to the defenders were in effect stolen by Cohen, or at any rate that he had no right to sell and deliver them to the defenders; that accordingly the property of the goods did not pass to them, and that as the goods themselves have ceased to exist the defenders are bound to account to the true owners for their value.

"The defenders, on the other hand, maintained that Cohen was a mercantile agent within the meaning of the Factors Act, and being in possession of the goods which he professed to sell, that the defenders acquired an unchallengable title by the purchases from him, followed by delivery of the goods; and alternatively, that Cohen had express, or at least implied, authority to sell the pursuers' goods at whatever price he chose to fix, and that accordingly the sale by him to the defenders transferred to them the property of the goods.

"I am against the defenders on both their contentions. A traveller for a mercantile firm is no doubt an agent for that firm just as any of their servants is or may be an agent, but in my opinion he is not a mercantile agent to whom the Factors Act applies. Moreover, any one dealing with a traveller knows that he has not unlimited power of disposal of his master's goods, but can only sell them at the price at which they have authorised him to sell them, and I hold that this was well known to the defenders, as the whole course of their dealings with the pursuers shows. No doubt it was an understood thing that if Cohen could not get the list price he might take orders for sponges at a somewhat lower price where the lot was a large one, or he could secure a new customer by doing so, but until his sale was homologated by the pursuers by their sending an invoice I think there was no sale which was binding upon them. It is preposterous to say that a mere traveller can make binding contracts of sale of his master's goods for half their value so long as the purchaser was not cognisant of the fraud, which is the proposition that the defenders have to maintain. If this were so any traveller might inflict enormous loss upon his employer, for his alleged authority to bind him by contracts of sale is of course the same whether he is in possession of the actual goods or merely of samples. No authority was quoted to me in favour of this proposition, and I am aware of none which would infer such startling results.

"In the present case it is admitted that Cohen did not receive from the defenders the list prices at which he was authorised to sell, nor prices which were within the limited discretion which he had previously exercised, and which had been homologated by the pursuers. The alleged sales by Cohen were therefore not sales binding upon the pursuers; and if so they were ineffectual to pass the property from the

pursuers to the defenders. A person who deals with a servant of another who has to his knowledge only a limited mandate, takes the risk of the servant acting within the scope of his authority, and he can readily inform himself on this head by notifying the traveller's employer of the transaction which he has entered into. If the defenders had taken this course in any of the three transactions they would all have been promptly repudiated by the pursuers, and in the face of such repudiation I think it not doubtful that the defenders could not have stuck to the property of the sponges received through Cohen.

"Even if the sale and delivery of the three parcels of sponges by Cohen could be held as sufficient in law to pass the property to the defenders, the pursuers' claim would not be excluded, although in that case it would be limited to the prices agreed upon. As the defenders were aware that the goods were not Cohen's but the pursuers', it falls upon them to discharge themselves of payment of the price. In the first two transactions the written evidence on which they rely is consistent with Cohen having been the seller himself, although the defenders say that they transacted with him only as the pursuers' representative. The two receipts bear that the goods were sold to them by Cohen, and he discharges them of the price in his own name. The cheque in each case was in Cohen's favour. The third transaction is in form somewhat more favourable to the defenders, although in substance it is not in any different position. Now, as no part of the money which was paid by the defenders to Cohen ever reached the pursuers, the payments to Cohen cannot be treated as payments to the pursuers, unless Cohen was authorised expressly or impliedly to receive payment for them. His only express authority was to receive a crossed cheque in the name of the pursuers in payment of accounts which had been rendered by them after invoices had been duly sent out. He had no implied authority at all unless it is to be held that a traveller is always authorised, in the absence of express notice to the contrary, to receive payment for his employer in coin or in cheques payable to the traveller himself. No doubt some firms do authorise their travellers to collect accounts, but I think it cannot be affirmed as a general proposition that a traveller for a wholesale house is entitled by the mere fact of his position to discharge accounts of whatever amount due to his employers in return for cheques in his own favour or cash, and in the present case I think the defenders had express notice that Cohen was not so entitled. The defenders say that they never read the printed matter upon the statements of accounts which they regularly received during eleven years. I have difficulty in believing them, but if it be the fact, their failure to read the notice will not excuse them. It is true that in terms the notice applies to credit transactions, but if such transactions were to be paid for only by crossed cheques in favour of the pursuers, and not in cash to the travellers, it can scarcely be suggested why any different method of payment should be permitted in the case of a sale where no credit was given. The unusual request by Cohen that the cheques in the first two cases should be drawn in his favour ought, I think, to have put the defenders upon their guard, and Mr Watt practically confessed that it was only because of the exuberant confidence he reposed in Cohen that he was persuaded into granting him a cheque in his own name. Where a customer of a wholesale firm departs in so striking a way from the ordinary course of dealing between him and them, and puts it into the power of the traveller to defraud his employer, he can scarcely complain if he is called upon to pay again to the true owner, leaving him to have such recourse as he can against the defaulting traveller whom he chose to trust. Apart from all this, the three receipts produced are not in the form which the defenders had notice would alone be treated as valid, nor were the payments in respect of which the receipts were given in accordance with the directions as to the payment of accounts.

"The only other defence that it is necessary to notice is that upon which plea 5 for the defenders is based. It was contended that the pursuers were barred by their own negligence from maintaining that the property in the goods had not passed, or that Cohen had not implied authority to discharge accounts for the price which he arranged with the defenders on receiving payment in cash. The defenders found on a similar transaction which took place in February 1904, with regard to which they produce a receipt, also granted by Cohen, which is similar to the first two receipts already referred to. There is, however, no evidence except the receipt itself with regard to this transaction. The pursuers say they are not aware of any such transaction having taken place, and Mr Watt has no distinct recollection of it. For all that appears, this may have been a sale of sponges which Cohen, contrary to his duty to the pursuers, had purchased and sold on his own account. As regards the transaction in October 1905, I have already dealt with the documents which related to it. If it had been brought home to the pursuers or any of the directors that Cohen had made a cash sale and had received the price, and no objection had been taken, it might have been inferred that he had authority to make such sales, and to discharge the price of the goods sold in the way he did; but the evidence of Mr Cresswell, which I accept, is entirely against this. It is true the fraud was not discovered for a considerable time, and until the other two transactions had been entered into, but in the circumstances which I have already narrated I do not think that any negligence can be inferred against the responsible officials. There really does not seem any practical way by which such frauds

could be detected except by employing an accountant to audit the books periodically, and this precaution the pursuers adopted. How it was that the fraud was not discovered until two years and a half had elapsed after the first transaction I have already explained. In the whole circumstances I am unable to hold that there was any negligence on the part of the pursuers which would disentitle them to recover. The initial mistake which led to the whole loss was the defenders taking it for granted that Cohen could dispose of the pursuers' goods and discharge the price exactly as if they had been his own, an assumption for which the defenders had no warrant. Although, therefore, the case is in one view a hard one, as every case is where an innocent party has to suffer the consequences of a fraud, I see no alternative but to give the pursuers decree in terms of the alternative conclusion of the Summons."

The defenders reclaimed, and on December 2nd, 1909 their Lordships of the Second Division recalled the Lord Ordinary's interlocutor and assoilzied the defenders.

LORD LOW—The summons in this case seeks for decree against the defenders for delivery to the pursuers in as good a condition as they were received of three consignments of sponges which they supplied, or, failing such delivery, to make payment to the pursuers of the sum of £314, 15s. 10d. sterling as the value thereof. Now these conclusions are framed upon the footing that the property in the sponges had not passed to the defenders, and when we turn to the record we find that the averment in support of the conclusions of the summons is that Cohen, the pursuers' traveller, had stolen the sponges. And, accordingly, the summons is framed in order to meet a case of stolen property in the hands of the defenders.

I think it is plain that, at all events, that case has not been established. There was obviously no theft of the sponges in this case. The sponges were sent from London to Edinburgh consigned to Cohen, the pursuers' traveller, for the purpose of being sold. The traveller took the sponges to the defenders' shop, and there sold the sponges to them, delivered the sponges, and received payment of the price. It is quite true that Cohen embezzled the price after he had received it, but there was no theft of the sponges, and therefore the assumption upon which the summons is framed—that the property in the goods did not pass to the defenders because they were stolen goods—has altogether failed.

The Lord Ordinary, however, has held that the pursuers have another case which, although covered by their pleas-in-law, is not, I think, specially averred in their condescendence, but a case which brings them within the scope of the summons, because he has held that there was no concluded contract between Cohen and the defenders for the sale of the sponges, but only a contract which was subject to the approval and homologation of the pursuers. Now let us consider how far that is a sound view of the case. There was undoubtedly what purported to be a concluded contract of sale. Cohen was in a somewhat different position from the ordinary traveller, in that his duty was not to get orders for goods to be afterwards sent by his principal; he had the goods with him, and if he made the contract with a trader he not only made a contract of sale but delivered the goods. Now that was what he did in this case, and *prima facie* there was not only a contract of sale made, but a sale actually concluded by delivery of the goods and payment of the price.

Now the ground upon which the Lord Ordinary holds that that contract was not binding unless and until it had been homologated by the pursuers was this: He says that Cohen was only authorised to sell at a certain price—at the price appearing in certain lists of the pursuers, with, no doubt, a certain power of cutting the price to a certain extent—but he says the price at which the sponges were sold to the defenders in the three transactions in question was much lower than Cohen had authority to sell at, and that that was known to the defenders. Now, if that had been established I think that the Lord Ordinary would have been justified in his conclusion. But there is certainly no evidence that the defenders knew, or, I think, had any reason to suspect, that Cohen was exceeding his authority in selling the sponges to them at the price which he did. No doubt the pursuers supplied a price list to Cohen, but Mr Cresswell admits that Cohen had a considerable latitude in the way of selling for lower prices, and he says, although he had sometimes reason to complain of the prices at which Cohen sold he never once repudiated the transaction on the ground that Cohen had exceeded his powers by selling at too low a price.

In the next place, it is plain that in his many transactions with the defenders they were in the habit of bargaining about the price, and that it was quite the practice of Cohen to sell sponges in Edinburgh below the list price. I observe that Mr Watt, who was a witness, says that Cohen had previously, in transactions which were in no way challenged, sold sponges to them which were upon the list at 6s. each at 4s. 6d., which, I think, is a greater departure from the list price than was the case in any of the transactions in question except the last. Then of course it is quite a common thing when a traveller is selling goods and a trader is purchasing goods, for the seller to represent that from the circumstances he is able to give specially good terms to the purchaser. And I see no reason that the mere fact that in these transactions Cohen represented that he was able to sell the sponges at a considerably lower price than appeared in the list should suggest to the defenders that he was exceeding his authority. So, although I do think that the pursuers would not have regarded Cohen as entitled to

sell the sponges at such a small price as that at which he sold these three consignments—or at least the third consignment,—I see no reason whatever to come to the conclusion that the defenders were aware, or ought to have been aware, or ought to have suspected, that Cohen was exceeding his authority. I am therefore of opinion that there is no ground for holding that there was not a completed contract, or that the contract which was made was not binding until it had been homologated by the pursuers.

Now that is really sufficient for the disposal of the action as laid, because there are no conclusions here to meet any other case than that of one in which the property of the goods had not passed to the defenders. But there was another ground which was argued very anxiously to us, and which, I think, raises the most serious question in the case, and, as we have all the materials for disposing of it, I think it is much better that we should do so, although perhaps the summons as laid is not quite appropriate for the raising of the question. That argument is this—Undoubtedly Cohen committed a fraud because he embezzled the price in all the three transactions in question. The pursuers themselves are innocent of any participation in the fraud, and the defenders are innocent of any intentional participation in the fraud, and the question is, therefore, which of two innocent sufferers from a fraud is to bear the loss. Now *prima facie* the pursuers, whose servant committed the fraud, should bear the loss. But they contend in this case that the defenders must bear it, because it was their negligence and their failure to follow the ordinary practice which was adopted in sales by the pursuers, and by the purchasers from the pursuers, that put it in Cohen's power to commit a fraud, and therefore they must bear the loss.

Now let us see how this stands. In the first place, there is introduced upon this branch of the case the same argument as that to which I have already alluded, namely, that the smallness of the price at which Cohen offered to sell these sponges should have led the defenders to suspect that there was something wrong. Now I will not reiterate my opinion upon that. I see no reason why the defenders should disbelieve Cohen's statement that there were special circumstances which enabled him to offer them a specially good bargain. And I think it is not immaterial to remember that Cohen was not a stranger to the defenders. He had been dealing with them as traveller for the pursuers for many years, and they had no reason to suppose that he was otherwise than a perfectly honest agent. Then the next ground upon which it is said that the defenders enabled Cohen to commit the fraud by their negligence was that they did not insist upon getting a receipt on the pursuers' printed form. Now that question arises in this way—Although the sponges were delivered by Cohen when the bargain was made, it was the pursuers' habit to allow credit of three months, or sometimes of six months, as the case might be, and when the period of credit had expired they were in the habit of sending to their customers an account, and upon that account there was a good deal of printed matter, and among other things there was a note to the effect, "No receipt valid unless on the firm's printed form to be attached hereto."

Now I have no doubt that it might have been prudent for the defenders to demand a receipt upon the printed form, but this was not a case in which an account was rendered with a note to that effect upon it. It was a sale of goods over the counter, handed over upon the one part, and payment made upon the other. But that is not all. On the first two occasions Cohen explained that he could not give them a receipt upon a formal printed form as he had exhausted his supply in Glasgow. Upon the third occasion he did give them a receipt upon the printed form. Accordingly on the first two occasions he tendered—and the defenders naturally accepted—a receipt written upon ordinary paper. So I do not think that that really can be founded upon—the failure to demand a receipt upon official paper—as negligence upon the part of the defenders which amounts to giving Cohen an opportunity of committing a fraud.

Then, in the next place, it was said that they were to blame in giving Cohen a cheque in his own favour. And here again the printed matter upon the accounts which are rendered is founded upon, because it is said that cheques must be crossed, and the way in which they are to be crossed is mentioned. Now here again I think it would have been prudent of the defenders to have given a cheque in favour of the pursuers, and to have crossed that cheque. But it appears that it was Cohen himself who suggested that they should give him a cheque in his own favour, and he seems to have given as the reason for that, that as he was cutting the price fine he did not want any unnecessary charges to be built up against the pursuers, and that if they gave him a cheque in his own favour he could cash it in the bank in Edinburgh and deliver the full amount; whereas he indicated if there was a crossed cheque which had to be paid in London there would be a discount to be deducted. I do not know whether that would have been the case or not, but I should think that it was a very plausible reason for asking for a cheque in his own name. And if the defenders had no reason—and I do not think they had—to doubt his honesty, I do not see that there was any negligence in giving him a cheque which by going to the bank he could convert into cash.

Then it is said that Cohen had no authority to enter into cash transactions, and that from their previous course of dealing with him the defenders should have known that that was the case. Now I can see no foundation for that. No doubt the transactions with the pursuers were generally credit transactions, the pursuers generally allowing their customers three or six

months' credit. But of course the allowance of credit is entirely in favour of the buyer. It would be much better for the seller every time to get his money down in exchange for the goods, and I can see nothing in the fact that the practice of the pursuers was to give credit, and, of course, of the purchasers to take credit, which should have led to the conclusion that it was beyond the power of their traveller to make a cash transaction. Of course it would have been very different if he had been merely taking an order for goods to have been sent afterwards. Had he asked for money down, then that would have been suspicious. But he was delivering the goods at once, and if the defenders were willing to pay the price I see no reason why he should not get it, or why the purchasers should suspect it was contrary to his instructions to get cash. He seems to have given a very good reason for getting cash. He represented that he was in a position to give the purchasers a good bargain, but he said he must have cash for it. That seems to me to be a very intelligible proposal. And therefore I cannot see that in any reasonable sense the defenders can be said to have been guilty of negligence, which so plainly put it in the power of Cohen to commit the fraud, that the results of the loss occasioned by that fraud must fall upon them. Of course if that case had been established the claim of the pursuers would not have been for the value of the goods but for the price. But even assuming that the summons had concluded for payment of the price, I should have thought, on the grounds which I have stated, that the claim could not be sustained.

There is one other matter which I should like to touch on, and that is, even supposing that the pursuers had a claim against the defenders in respect of their negligence, I think their claim would require to be limited to the first transaction. They never got any notice that the first transaction was objected to or that anything was wrong. And therefore I do not think that even if, in that first instance, they could be accused of negligence, the same thing could be said of the second and third transactions, because they were entitled to assume that the first transaction, and the form in which it was carried through, had been approved of by the pursuers. But that is not all. It seems that in the April of the year following the first transaction—the first transaction having been in October 1905—the pursuers rendered to the defenders a statement which they seem to have rendered yearly to their customers showing the transactions of the year, and that statement contained the item of £87, 1s. 8d., which referred to the first cash transaction. The defenders did not realise that it referred to that transaction, because as a matter of fact the amount they had paid to Cohen was only £80. Accordingly they could not quite see to what that £87, 1s. 8d. referred, as they had not a similar entry in their books, and accordingly on 7th April 1906 they wrote to the pursuers, "We have your account due in June, and as we are checking off our quarterly accounts, we find no invoice for item 10th January, £87, 1s. 8d. We think it better to call your attention to this at once. Kindly send invoice at once.' Now that letter was not answered. No invoice was sent on, and Mr Watt says that in statements subsequently rendered by the pursuers after that the item of £87, 1s. 8d. did not appear. So that after that the defenders were unquestionably entitled to assume that this cash transaction had not been objected to in any way, or the form in which it had been carried out, and that they were justified in entering into similar transactions.

Accordingly I am of opinion that the defenders are entitled to be assoilzied from the conclusions of the summons.

Lord Ardwall—This action arises out of a series of frauds which were committed upon the pursuers by men in their own employment, Messrs Cohen, Barker, and Small—Cohen being a traveller, and Barker and Small being employed in the pursuers' London office. Generally speaking, the way in which these frauds were carried out was this, that Cohen, entrusted with goods as he was, went about the country and got as many cash transactions as he could and then embezzled the price, and then this roguery on his part was sheltered by the making of false entries or the omission to make correct entries in the books at the office by his confederates Barker and Small, who doubtless were paid for their services by him. In short, these three rascals shared among them the gain. Now in these circumstances the pursuers here seek to recover part of the loss caused by this conspiracy from the defenders. Apparently the pursuers never knew of the transactions in question in this action until they came down to inquire of Mr Watt, the defender, about them, and he, quite ultroneously, and with extreme honesty, gave them an account of his cash transactions, and gave away to the pursuers' representative certain receipts. It was on these transactions and on these receipts thus obtained that the present action is brought. One has not very great sympathy with it on that account, but of course if there is a legal ground of action we must give effect to it.

Now, as Lord Low has said, the summons and pleadings in this action are framed on one footing, and one footing only, and that is this, that the pursuers, the International Sponge Importers, Limited, were never divested of the property of the sponges in question, and quite properly, according to that view, the summons calls for delivery of the goods or payment of their value. Now that is the form of action appropriate in the ordinary case to a case of theft, and so far as I am aware it is not appropriate to any other *species facti*, at least not in the same way. The first question that arises is, is this a case of theft at all? I cannot hold that it is. This man Cohen

acquired these goods under an absolutely good title, and we have the documents in process—advice notes by the pursuers to him—consigning these precise goods, and consignment notes with the railway company following on these advice notes setting forth the usual particulars in such consignment notes. In that way there is no doubt that he got these goods by a perfectly good title. And he got possession of them for what purpose? For the purpose of selling them. Therefore his selling of them was no theft. It was what the goods were sent for and what he was to do with them. But then in this particular case it seems that not only did he sell them but that sale sheets regarding these very goods were sent up to the London office. In one case the sale sheet entered the ledger of the firm. In the other two cases it did not, owing to the fraud of Cohen's confederates there. But that these goods up to this time had not been stolen I think is perfectly plain. Where the crime came was in Cohen embezzling the price which he got for these goods for his own purposes and those of his confederates, and sheltering that embezzlement by the aid of his confederates in the London office. I am quite clear that there was not a theft of these goods, and that the doctrine of *vitium reale* does not apply with regard to this case.

But the Lord Ordinary says that there is another ground for holding in this case that the pursuers were not divested of the property, and that is this, that the traveller Cohen sold these goods outwith the scope of his authority, and therefore that the pursuers were not bound by that sale, and were not divested by that sale of their property in the goods. Now I must say I think the Lord Ordinary has lost sight of the distinction that must always be kept closely in view in a case of this kind, the distinction, namely, between the legal relation between principal and agent, and the legal relation between that principal and his agent on the one hand, and members of the public, with whom either or both of them deal, on the other. It may be that an agent in some cases transgresses his authority, and then the principal, as principal, has gone against him under a contract of agency; but that will not necessarily make a transaction void which has been entered into by the agent with somebody else. That depends entirely on what the person who dealt with the agent knows or is bound to know of the scope of the agent's authority. Now can it be said here, in this case, that the defenders knew, or were bound to know, that Cohen had not power to enter into a cash transaction with them, because, shortly, that is the question. All this course of dealing and these documents that passed hither and thither are a most appropriate precaution, but they applied to credit sales and applied to nothing else, and unless it was apparent to the defenders that Cohen—the accredited agent of the pursuers with whom they had dealt for many years—had no power to enter into a special cash sale, I think this ground of action has entirely failed.

Now what is the evidence upon that? Mr Cresswell is examined, and all he seems to say is that they never had cash sales, and therefore the point never arose as to whether they would authorise them. In that state of matters all one can say is this, you must revert to the common law. Was a cash sale such a transaction as a customer was entitled to suppose that an agent was entitled to enter into in a question with his principal? Now I should certainly hold, on the authority of a case quoted to us, and the case decided recently in the First Division of *Barry, Ostlere, & Company*, 1909 S.C. 1113, 46 S.L.R. 751, that this was just such a special transaction as they might hold a traveller might lawfully enter into in such a way as to bind his principal. I think that any other decision would be very odd indeed.

But it is said that the defenders should have been put on their guard by getting their sponges at a reduced price. It is not said that the price was so low as to make them think that the goods were got in some dishonest way. It was a bargain, and it was so represented to be by Cohen, who gave the account of how he came to be able to offer goods at that low price. But then, on the other hand, there was a *quid pro quo*, namely, instead of getting credit for three months or more the defenders were to pay cash at once for these goods. So there was nothing so preposterous or out of the ordinary course of dealing between these people of a traveller in Mr Cohen's position entering into a transaction of this sort and offering special terms. If that is so, really I think there is an end of this case altogether.

But even if that were not so on the facts, I should desire to guard myself on the point of law by saying that, even if it had been totally otherwise, and if the pursuers were entitled to get quit of a contract of this kind, I do not see that that would have the effect of stopping the passing of the property in the goods. It might have given them a title to reduce the sale and get damages from the defenders here on some other ground, but I do not see how it could justify an action for delivery of the goods or their value in the way that this one is laid, because undoubtedly, according to the well-known maxim of Scots Law taken from Roman Law, property in goods of this kind passes by their delivery, and these goods were handed over then and there to the defenders; and it appears to me that, even assuming everything else against the defenders, it would have been very difficult to sustain an action at law for recovery of the goods.

That being so, I do not think I need go into the other matters which have been very well dealt with, if I may say so, by my brother Lord Low, namely, the importance of these conditions upon the sale notes. I think that all that goes when we once arrive at the conclusion that a cash transaction was not, as far as customers

were concerned, beyond the presumed scope of authority on the part of Cohen. But I would just like to say this, that I think there was a little too much made of these conditions, and that it would have been a very difficult thing to render any contract of sale between these pursuers and their customers void because payment was not made in the precise terms prescribed upon their invoices or accounts; and also, I think I ought to say, to hold that no receipt would be valid except a receipt granted in terms of these notes. It may be that in certain instances customers would be taking a risk upon themselves if they bought otherwise, but it would be in every case a question of circumstances because notes of that kind really cannot in every case have the force of a condition of a contract. They have a certain force, and therefore, as I say, there is a risk for customers, but beyond that I should be very much disinclined to stretch their obligatory nature.

I further agree with what has been said with regard to the second and third transactions, because I think it perfectly plain, as I indicated during the debate, that whatever might have been said about the first transaction, if it passed muster at the head office, as the defenders were entitled to suppose it had done, there could be no fault attributed to them for entering into other transactions of the same description, because, so far as they were concerned, they were entitled to believe that the first of these transactions had been approved of and homologated by the pursuers. I therefore agree that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied, with expenses.

LORD JUSTICE-CLERK—I am of the same opinion. I think nothing could be more unfortunate here than that the pursuers should have presented their case in the way that they have adopted. It is a very awkward way to present the case, and awkward for the defenders who have to meet it. The case they put plainly by their summons and in actual statement by their condescendence is that it was a case of theft. I think there was no theft whatever of the goods in this case.

A case was referred to by the pursuers, through their counsel, which was said to be exactly the same as this. It was said to be a pure case of theft, and that this case resembled it. That is the case of *Farquharson Brothers* v. *King & Company*, 1902, Appeal Cases 325. I have examined that case with some care, and I cannot see that it resembles this one. I should like to read a short passage from Lord Halsbury's judgment in that case, in which the decision of the Court below was reversed by the House of Lords. He says—"A servant has stolen his master's goods, and the question arises whether the persons who have received these goods innocently can set up a title against the master. I believe that is enough to dispose of this case. That it was a stealing there cannot be the smallest doubt, and indeed I feel great hesitation in treating seriously the argument that it was not. What possible difference is there between what was done here by Capon and the act of taking a pocket handkerchief out of a man's pocket by a thief in the street? The man who steals is a servant; his possession is the possession of the master. It is not denied that he had no actual authority to dispose of these goods, and because by a circuitous process he allows an innocent agent (for all the persons who acted under his directions were perfectly innocent) to remove the goods where they had been stored by the master, that, forsooth, is said not to be an *asportavit*—why not? Assuming always the element of fraud an intention to commit a crime, which is not denied, what element is there wanting to make that a stealing? I confess I am puzzled at the notion that anybody could entertain the smallest doubt in the world that that was a stealing."

The pursuers suggest that this case is the same as that of *Farquharson*. I can see no resemblance. The fundamental difference between the two is that Cohen was in possession of the goods, and had authority to sell the goods which the man Capon in the case of *Farquharson* had not. Therefore I think the whole basis of the pursuers' case as stated fails. The goods were goods which Cohen had a perfect right to dispose of, and which the defenders were entitled to think he had a right to dispose of, and that they might accept delivery of them from him as a sold article. When a bargain is made and goods are delivered, the right to the goods no longer rests with the seller when he has either received the money or has acknowledged that he has sold the goods on an invoice which states that he will receive his money on a date after so much credit given—the goods are no longer his. The moment the goods were left by Cohen in the defenders' shop, the bargain having been made and they being sold to the defenders, the defenders were entitled then and there to give one out of that lot to the first customer that came in desiring to buy a sponge.

But then it is said, although the case is put forward as one of theft, that even if that contention is untenable, the defenders should be ordained to pay the price a second time on the ground that they had been parties to a fraud. It is said that they should have suspected Cohen. It appears to me to be a strong thing to say that after a traveller has been coming from a large firm in London for twelve years, and the merchant to whom he goes having had transactions with him of the value of several hundred pounds a-year without any unpleasantness or suspicion of any kind, that they are bound suddenly to form a suspicion against him because he proposes that in a particular transaction he should receive cash for his employers, and that they should have suspected him and considered that it might be held that they were not in *bona fide* in accepting the goods and paying for them. Then it is

said that in any case they should not have paid cash. I agree with what your Lordships said upon that matter.

I agree also with what has been said about the first transaction. The pursuers here are to blame as regards the second and third transactions, because, as Lord Low pointed out, they got distinct intimation on 7th April that the defenders did not understand the account that had been rendered. They say—"We find no invoice for item 10th January, £87, 1s. 8d. We think it better to call your attention to this at once." They got no answer to that letter, and therefore they were entitled to assume that there had been some mistake. Is it any answer to that to say that the reason they got no answer is that the pursuers' own servants were engaged in a conspiracy of fraud? I cannot accept that for a single moment. The fact that the letter did not reach Mr Cresswell is a fact which is in no way chargeable against the defenders. The pursuers got the letter in the ordinary course of business, and the defenders were entitled to assume that it was delivered, and also that Messrs Cresswell accepted the transaction, found that they had made a mistake, that the money had been paid in cash, and that that was an end of the transaction. There was no such practice of procedure as would debar them in these transactions from giving payment to the traveller, and therefore the fact that they did so is of no consequence.

I do not go further into the matter with which your Lordships have dealt so fully. And I agree in thinking that the Lord Ordinary's interlocutor should be recalled.

The pursuers appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—In this case I agree upon the whole with the Second Division, though I have found, as no doubt they found, some difficulty.

It is a peculiar case. The Sponge Company employed an agent named Cohen, who proved to be a rogue. His authority was to carry round with him parcels of sponges, to sell them and fix the price, to deliver them, and to receive cheques in payment. He had dealt with Messrs Watt for a considerable time, and generally, nearly always in fact, Messrs Watt paid for the sponges they bought by crossed cheque payable to Cohen's principals. In 1904, however, if not earlier, Cohen commenced a system of fraud. He sold and delivered sponges to Messrs Watt as before, but on four occasions he induced them to pay at once, either by open cheque payable to Cohen, or by coin and notes, and then embezzled the money. The International Sponge Company now say that these four transactions were beyond Cohen's authority, and this action relates to the last three of the transactions.

Now the summons in this action claimed that by reason of Cohen's frauds the property in the sponges sold and delivered by him on these three occasions never passed to Messrs Watt, and that they should therefore be re-delivered to the pursuers. Your Lordships do not attach much importance to merely technical objections, but I am not at all persuaded that there is not substance in Mr Macmillan's complaint that he has been put to a disadvantage by the pursuers change of front. For the argument of Mr Buckmaster in this House did not impugn the validity of the sale by Cohen, but did impugn the validity of the payment. He does not deny that the property passed, but says that the price must be paid over again. It was a different contention altogether, and the defenders may well have been prejudiced by being led so to direct their conduct of the litigation as to meet only a line of attack which has now been abandoned. However, I need not dwell upon this point, because in any view it seems to me that the appeal must fail.

It is clear that Cohen had no actual authority to receive in payment for sponges anything except crossed cheques in favour of the pursuers. It is not, however, established that Messrs Watt had express notice that, while he might receive payment, such payment could only be in the way of crossed cheque in pursuers' favour. There is a printed direction in the form of account usually rendered relating both to payment by cheque and to the form of receipt. It is, however, partly equivocal, for it admits of a construction which allows of payment in cash, and in such case would dispense with the prescribed form of receipt. Still I am pressed by Mr Buckmaster's argument that, whatever the notice may be, Messrs Watt had no right to pay so large a sum as £120 in notes or gold, as they did on one occasion, or to pay by open cheque payable to Cohen, as they did in the three incriminated transactions, because that was not in the ordinary course of business. And the excuses invented by Cohen to induce the defenders to pay in that way were flimsy enough. I should be very sorry to affirm as a general proposition that such payments to a traveller are to be upheld.

What determines me, though not without doubt, in upholding these payments in the present case is this. The good faith and integrity of Messrs Watt are undisputed and indisputable. Cohen occupied a position of fuller authority than is usual. The only limit of his actual authority was as to the kind of cheque he might receive. And, finally, it is clear that on one occasion, a year or so before the three transactions now arraigned, Messrs Watt had paid by open cheque payable to Cohen, and though the attention of the Sponge Company was drawn to the sale and a question arose about it between them and Messrs Watt, yet it was allowed to stand and no objection taken.

In the same way, the three incriminated transactions passed at the time without complaint or objection, and it was only after Cohen's dishonesty had been discovered that, on investigation of his frauds, the responsible managers of the pursuers' business found that their traveller had

sold and delivered these sponges and received payment for them himself.

No doubt the reason of this protracted oversight was that the pursuers were the victims of a conspiracy among their own staff. Books had been falsified, auditors deceived, and documents concealed, so that the responsible managers were not aware of Cohen's dishonest dealings or of his departure from his instructions. But the same conspiracy which cheated them had also the result of misleading the defenders Messrs Watt, and causing them to act as though Cohen was entitled to receive payment in the manner in which they made it.

Accordingly this order ought, in my opinion, to be affirmed.

LORD ATKINSON—I concur.

LORD SHAW—For some years the respondents, who are a firm of saddlers in Edinburgh, have been in the habit of purchasing sponges from the appellants' firm. The appellants were represented by a commercial traveller of the name of Cohen. The goods were sold in bulk and not per sample, and accordingly Cohen was entrusted with the goods, which were seen by the customer and taken delivery of when bought. In the course of these years a certain number, not very large, of transactions of purchase were made, and in three of these the payments were made by cheques in Cohen's favour, namely, in October 1905, October 1906, and October 1907. In the fourth sale (in May 1908) payment was made by cash. In the proceedings in this action the payments of 1905, 1907, and 1908 are challenged. The payment of 1906, possibly by inadvertence, is not challenged. Substantially the transactions were—Goods bought and delivered and ready money paid. One satisfactory feature of the present case, as argued at your Lordship's Bar, was that no suggestion, direct or indirect, was made against the complete good faith of Messrs Watt & Sons in settling for the goods on those terms. As Mr Watt observes in his uncontradicted evidence—"I have had cash transactions with other travellers quite frequently who have sold me goods for cash on the spot."

In the autumn of 1908 it came to the knowledge of the appellants that irregularities were being committed by their employees, and a representative was despatched to make inquiries. In the course of his journey he visited the respondents, who gave every assistance in tracing the defalcations of Cohen. Mr Watt explained that, in addition to the credit transactions which had taken place, there were some cash dealings, and he produced all the books and documents which bore upon these. In short, it is admitted that it was owing to the candour of Mr Watt that discovery of irregularity on the part of Cohen was made. This fact, of course, does not truly bear upon the legal responsibility, if any, resting upon the respondent's firm, but it confirms the position of the firm's entire good faith.

Having obtained this information from Messrs Watt & Sons, the appellants proceeded to sue them for the value of the three parcels of goods referred to. Their plea now is that the payments already made by the Scotch firm shall stand out of the account because they were made to a person who was not authorised to receive cash. In so putting the point I approach much more nearly to a really stateable case in law than the appellant's summons did. Having considered the latter, I am of opinion that the action as laid was an action for re-delivery of the sponges sold, and, failing re-delivery, and only in that event, for payment of their value. The shape of the whole action accords with the summons, and in my humble judgment the case as presented to the Lord Ordidary was that case and nothing else. The ground taken up was that there had been no sales, because Cohen was a thief in possession of stolen goods, and a *vitium reale* remained attached to these in the hands of Messrs Watt & Sons. At your Lordship's Bar, however, what was argued was that payment, that is to say, a second payment, by Messrs Watt, was due on the ground mentioned, viz., that Cohen had exceeded, in the knowledge of Messrs Watt, his authority by receiving cash. In that position a serious question might have arisen as to whether the appellants were entitled under the summons and case as laid to obtain a decree as if upon a simple petitory conclusion, and the principle of the judgment in *White* v. *The Victoria Lumber Company* (A.C. 1910, 613) might have been appealed to as to whether such a change in attitude at such a stage of the proceedings was permissible. I do not think it necessary to make any pronouncement upon that point here, because, first, I think that the view presented so ably by Mr Buckmaster was, to some extent at least, before the minds of the Judges of the Inner House, and, secondly, after full consideration, I have come to be of opinion on the merits of this case that in the shape in which it is now presented it is without legal foundation. The point, however, is of importance to the mercantile community, and especially, as one can easily figure, in the practice of business as between wholesale and retail traders.

The respondents had other transactions than those above named with the appellants. And the latter found upon the course of dealing, and the language of the bill-heads and statements of account which passed between the parties as being sufficient to charge Messrs Watt with knowledge as to what was the only permissible form in which sales were permitted by the appellants to their travellers. On the top of these statements of account there were printed the words, "Terms 2½ per cent. discount for prompt cash." On some of the documents (and I observe on the document of October 1906) the words were, "Terms strictly net." There were also printed these words, "Cheques to be crossed, 'National Provincial Bank of England—Account Payees.'"

No one can doubt that these words did not in this case impress the customer with the

view that cash payments were forbidden; and I am after full consideration unable to affirm that they constitute a plain declaration by which customers with the International Sponge Importers, Limited, are bound that no ready-money trade is done by that firm, and that travellers are prohibited from receiving money in exchange for goods delivered. It appears to me that such a prohibition should not be lightly inferred. The retail customer, visited by the well-known representative of a wholesale firm, does not in my opinion make an unreasonable or improper or careless supposition when he assumes that, if such an agent or traveller hold the double position of, first, being actually charged with the custody of goods and the delivery of these, and secondly, being entrusted by his employers to collect moneys due upon account, the same agent or representative is empowered to make even better terms for his employers by taking cash—rather than postponed terms of payment—for the goods handed over. I agree with the language of Lord Low upon this point—"Of course the allowance of credit is entirely in favour of the buyer. It would be much better for the seller every time to get his money down in exchange for the goods, and I can see nothing in the fact that the practice of the pursuers was to give credit, and of course of the purchasers to take credit, which could have led to the conclusion that it was beyond the power of their traveller to make a cash transaction."

In short, I do not doubt that, not only did Messrs Watt & Sons in good faith believe, but they were warranted in believing, that the trusted agent of the appellants had power to take the best terms for goods delivered, namely, cash or its equivalent, a cheque in his favour which could be cashed on the spot.

These views are sufficient to dispose of the case. But if we turn to the chapter of responsibility upon the part of the appellants' firm the case presents singular features. When an agent is charged with the custody and disposal of goods in bulk, the ledgerising of those goods, and the accounting for the balance thereof unpaid for in cash or unaccounted for by way of invoice, checks his intromissions and discloses in, say, monthly or quarterly periods, the deficiencies in his stock. Such disclosures would put all parties on their guard and go far to stop both delinquencies and blunders. I cannot find in this case any sufficient explanation why this firm was unable to discover by this ordinary course of business that stock was disappearing and defalcations going on.

The importance of that in regard to the respondents is this, that had the very first transaction been investigated on that footing it would have led to the discovery of a payment in cash not represented by invoice, and then the respondents would have been apprised by the appellants that cash payments were objected to and contrary to their methods of business. The customer, however, was left in the position of this payment four years ago being unchallenged, and he repeated on three subsequent occasions similar transactions in good faith. I should think it a very strong thing to hold that the wholesale dealer thus, through possibly the defalcations of other employees, leaving the customer in the position of making payment after payment in cash without challenge, is entitled now to impugn the entire series as contrary to the custom of trade. It is unnecessary to deal with this point further, except to say that, even although my view had been different upon the main issue, I should have held it almost impossible to affirm with regard to any of the transactions subsequent to the first which remained unchallenged that the views of the appellants could be maintained. In my opinion the appeal fails.

Their Lordships dismissed the appeal, with expenses.

Counsel for the Pursuers (Appellants)—Buckmaster, K.C.—J. O. Kemp. Agents—William Geddes, Edinburgh—Russell & Arnholz, London.

Counsel for the Defenders (Respondents)—Macmillan—the Hon. William Watson. Agents—Mackenzie, Innes, & Logan, W.S., Edinburgh—Bush Mellor & Norris, London.

Friday, April 28.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Shaw, and Lord Robson.)

CALEDONIAN RAILWAY COMPANY *v.* GLENBOIG UNION FIRECLAY COMPANY, LIMITED.

(In the Court of Session, July 15, 1910, 47 S.L.R. 823, and 1910 S.C. 951.)

Railway—Mines and Minerals—Fireclay—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

"The Court has to find what the parties must be taken to have bought and sold respectively, remembering that no definition of 'minerals' is attainable, the variety of meanings which the use of the word 'minerals' admits of being itself the source of all the difficulty. It must be taken that what the Railway Company intended to get and the landowners intended to give was the land under the line, for the object was to give, not a way-leave but a support. I say this, speaking generally. Upon the other hand, if anything exceptional in use, character, or value was thereunder, that was reserved, provided it could be included under the word 'minerals' as understood in the vernacular of the mining world and the commercial world and the landowner."—*Per* the Lord Chancellor.

Circumstances in which a fireclay was *held* to be a mineral.