

worthy when she arrived at Seville, she was seaworthy until those in charge of her filled the boiler with muddy water, and my only doubt was as to whether that error constituted unseaworthiness. If it did amount to unseaworthiness, then the law is quite clear that the shipowner is liable for any loss or damage occasioned to the cargo by such unseaworthiness.

The Court pronounced this interlocutor—

“Find in fact (1) that in December 1886 the pursuers shipped at Seville on board the steamship ‘Ethelwolf’ belonging to the defenders three hundred and fifty tons of sulphur ore of the value of £1224, 12s. 6d., to be carried to Swansea, and delivered there to the defenders or their assigns as stipulated between the parties in the charter-party, and relative bill of lading; (2) that by the said charter-party and bill of lading the defenders undertook to carry the said goods and deliver them at the port of their destination, the act of God, fire, and all and every other dangers and accidents of the seas, rivers, and errors or negligence of navigation of whatsoever kind during the voyage being excepted; (3) that before the commencement of the voyage from Seville the boiler of the said ship was filled with muddy water from the river Guadalquivir, which, after the ship had put to sea, caused leakage of the boiler, and ultimately failure of the steam power, in consequence of which the ship became unmanageable, was abandoned, drifted on rocks near Vigo on the coast of Spain, and became a total wreck: Find in law that the cause of the loss of the ship does not fall under any of the exceptions of the charter-party and bill of lading, and that the defenders are liable to the pursuers in payment of the value of the said goods: Therefore dismiss the appeal: Affirm the judgment of the Sheriff-Substitute appealed against: Of new decern in terms of the conclusions of the petition: Find the pursuers entitled to expenses in the Inferior Court and in this Court,” &c.

Counsel for the Appellants—Balfour, Q.C.—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Asher, Q.C.—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

THOM v. BAIN.

*Mandate—Mandatory—Power to Compromise Action.*

*Held* that a mandatary is not entitled without special authority to compromise an action.

Mrs Margaret Isabella Jane M'Laren or Thom, wife of George Robertson Thom, jute merchant, Calcutta, then residing at Salisbury Cottage, Dun-

dee, and the said George Robertson Thom, as administrator-in-law for his wife, and as an individual, raised on 4th July 1887 an action of damages for slander against David Dorward Bain, merchant, No. 62 Commercial Street, Dundee, and residing in Garland Place, Dundee.

On 30th June 1887 the pursuers of the action had granted a mandate in favour of Hugh Patrick Davidson, commission merchant, Salisbury Cottage, Dundee, in these terms—“Dear Sir,—We hereby appoint you our mandatary in the action which we have instituted against David Dorward Bain, merchant, 62 Commercial Street, Dundee, and residing at Garland Place there, for £5000 sterling of damages, and we authorise and instruct you to prosecute and follow forth said action in the Court of Session, and to employ Mr R. Mitchell, solicitor, Perth, and such Edinburgh agents and counsel as to you may seem best.—Yours truly, MARGARET I. J. THOM—GEORGE ROBERTSON THOM.” Davidson accepted the appointment.

By interlocutor of 17th November 1887 the Lord Ordinary (LEE) approved of an issue for the trial of the cause, against which the defender reclaimed.

The defender lodged a tender in these terms—“Guthrie, for the defender, stated that he admitted the statement in reference to the pursuer Mrs Thom contained in the letter addressed by him to the pursuer Mr Thom to be unfounded, and he withdrew the said statements, and expressed regret that they had been made. He further tendered to the pursuers the sum of 100 guineas, with expenses, in full of the claim made by them in the present action.”

On 22d December 1887 an agreement was entered into between H. P. Davidson, who had been sisted as mandatary for the pursuers, of the *first part*, and David Dorward Bain of the *second part*, in these terms:—“Whereas there is presently pending in the Court of Session an action for damages for slander at the instance of George Robertson Thom, merchant, presently in Calcutta, and his wife, against the second party, in which action the first party is mandatary for the pursuers, and it has been arranged between the parties hereto that said action should be settled extra-judicially, and they have agreed to settle the same on the following terms—*First*, the second party repeats the retraction and apology contained in the minute of tender lodged for him in the process; *second*, the second party shall pay to pursuers in said action the sum of £200 in name of damages, payable as follows, viz., £150 in cash, and £50 within four months from the date hereof; and he shall also pay to the pursuers the sum of £150 within four months of the date hereof as in full of all their claims for the expenses incurred by them in the action, for which last-mentioned sums of £50 and £150, amounting together to £200, the second party shall grant in favour of the first party for behoof of the pursuers a promissory-note, payable four months after date.—In witness whereof,” &c.

Counsel for the pursuers repudiated this settlement, and asked for time to communicate with the pursuers, who were resident in India. Time was granted, and the pursuers wrote repudiating the agreement. Notice was thereupon given on behalf of the pursuers for the trial of the cause.

The case was set down for trial on Wednesday the 21st March 1888.

On 15th March the defender enrolled the case, to have the notice of trial discharged, or at any rate the day of trial postponed, averring that although the mandate did not expressly authorise the mandatary to settle the case, yet there were letters in existence which if time was allowed could be produced giving the mandatary power to settle the action. The pursuer opposed the motion, on the ground that the settlement was *ultra vires* of the mandatary, and that nothing new or unforeseen had occurred to justify the discharge of the notice of trial.

The Court ordered the mandatary to put in a statement by the 20th of March, setting forth any special authority which he had from the pursuers to compromise or settle the action. On 20th March a minute was put in for the mandatary stating that he was unable to produce any special authority authorising him to settle the action.

The defender then moved that the trial be postponed, and that he should be allowed time to answer the minute of the mandatary, and to produce, if possible, the letter which he had referred to. He argued that the terms of the mandate conferred on the mandatary power to settle the action; and further, that a mandatary had power to settle an action without special authority—*Comrie v. Grigor*, May 23, 1862, 24 D. 985; *Gunn v. Couper*, November 22, 1871, 10 Macph. 116.

The pursuer opposed the motion on the ground that its only object was to obtain further delay. If the defender had really desired to answer the minute he could have taken an order to that effect before the last day of session.

At advising—

LORD PRESIDENT—The question which we have to determine is, whether or not this trial is to be again postponed? and in dealing with it this further question has to be considered, whether the mandatary had, keeping in view the terms of his mandate, power to compromise this action on the terms contained in his agreement with the defender? If he had such a power, then of course there is an end of the case, while if he had not, then any settlement which he arrived at is in the same position as if it had never been entered into.

Now, the defender's mandate in favour of Mr Davidson is in these terms—[reads terms of mandate quoted above]. It has been contended that from the terms of this mandate there was an implied authority to the mandatary to settle the action, and not merely to prosecute and follow it forth. But it is no part of the duty of a mandatary in ordinary circumstances to give up his client's cause, and he is not entitled to abandon the action. If, however, he is to be held as entitled to settle an action, he might effect such a settlement as would be equivalent to abandonment. No doubt a mandatary might in some cases be fortunate enough to effect a good settlement for the mandant, but such a settlement in order to be effectual must be adopted by the mandant.

The office of a mandatary has often been considered by the Court, but I think the opinion of Lord Kinloch in the case of *Gunn v. Couper*, 10 Macph. 116, to which we were referred, has a decided bearing on the present question, and

expresses my own views on this matter. Lord Kinloch says—"I do not go on the special circumstances of this case, but on the great general principle established in the practice of this Court, that where a party litigating leaves the country he must sist a mandatary and appoint him by express mandate, which constitutes the authority of the mandatary. A mandatary without a mandate I consider to be none at all. I think with Lord Deas that the object of the proceeding is not only to make the mandatary liable for expenses, but also to secure a party responsible for the proper conduct of the cause, and for the availability of every step taken in Court." That, I think, defines very fairly the powers of a mandatary, and I do not think that his powers go one step further.

That being so, I am of opinion that the agreement made by the mandatary here is not binding on his constituents, and that the pursuers are quite entitled to prosecute the case notwithstanding this agreement. I desire to say nothing about the nature of this agreement, as I have thought it better to base my opinion upon broader grounds. I could, however, hardly imagine a settlement of a case less suitable to be made by a mandatary without special authority, and in the absence of his principal, than that which has been embodied in this agreement. I never saw anything more inadequate as a settlement of a case. That being so, there is really nothing more to be said. The pursuers are entitled to go on with their case before a jury.

LORD ADAM—There are various kinds of mandataries. Some are appointed for parties resident within the jurisdiction of the Court, and some for those outwith the jurisdiction, who are appointed in order to have persons responsible for the expenses of the suit, and that is the nature of the mandatary in the present case. Such a mandatary has no authority to settle an action.

LORD KINNEAR—The authority of the mandatary is limited to the terms of his mandate. Here the terms of the mandate authorise the mandatary "to prosecute and follow forth" the action, but they give him no further powers. He is not warranted in making any compromise, and if he does make such a compromise, it is not binding on the constituent.

LORD MURE and LORD SHAND were absent from illness.

The Court refused the note.

Counsel for the Pursuers—Rhind—Craigie. Agents—Begg & Bruce Low, S.S.C.

Counsel for the Defender—Glog—C. N. Johnston. Agents—Henderson & Clark, W.S.