

done so without fraud. But it was undoubtedly a misrepresentation—he not knowing the true state of the facts—and representing a view of the facts which was intended by him to be accepted as true, in his knowledge, by those he was dealing with.

There having been misrepresentation, will it save the defender from a judgment rescinding the contract that no fraud has been proved? I do not think so. The pursuer asks nothing but that it be rescinded, and to that I consider him to be entitled. I adopt the language of Lord Watson in the case of *Adam v. Newbigging*, holding it to apply directly to this case. He says—“I entertain no doubt that these said representations, although not made fraudulently, are sufficient to entitle the respondent to rescind the agreement. . . . He relied and was entitled to rely upon the assurances which he had received as to the satisfactory condition of the business, until he became aware of the true state of the facts.”

I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

LORD YOUNG concurred.

LORD TRAYNER—I agree with the Lord Ordinary.

The LORD JUSTICE-CLERK read the following opinion of LORD MONCREIFF, who was present at the hearing but absent at the advising:—The pursuer concludes only for reduction—rescission of the contract; he makes no claim for damages. Therefore the case of *Peck v. Derry*, which related to an action of deceit, that is, an action of damages on the ground of fraudulent misrepresentation, does not apply. Proof of fraud is not required in this case.

Therefore if the pursuer has succeeded in proving that he was induced to agree to enter into partnership with the defender by misrepresentations made by the latter on matters material to the contract and facts which were or should have been known to the defender, it is immaterial whether the misrepresentations were made innocently or not.

The pursuer's challenge was made at once on seeing the balance-sheet for 1902. The alleged contract between the pursuer and the defender was entered into at the very close of the financial year 1902. The defender must therefore have known on the 10th and 17th January 1903, the dates of his meetings with the pursuer and his father, whether the profit from his business during the year 1902 would or would not exceed that for the immediately preceding year. He knew that he had been obliged to reduce the price of engines considerably, and he also knew that wages had increased. These were questions of fact which should have made him hesitate before giving the pursuer and his father the assurances which he gave; and at least he was not justified in concealing those material facts from the pursuer who had no means of ascertaining them. It must

be noticed that the representations were not prospective; they related to the past year. The defender knew enough to know that his profits for 1902 could not have increased whatever might be his prospects for the future.

The truth seems to be, that finding that the pursuer's father was not disposed to put money into the business unless he received an assurance that the profit for 1902 would exceed that for 1901, the defender made the reckless assertion that 1902 would prove to be the best year he had had, and that the profits would probably reach £600. I believe with the Lord Ordinary that there was a positive loss on that year; but taking the most favourable view for the defender the profit fell far short of that for 1901.

I am of opinion that the pursuer is entitled to be quit of his bargain.

The Court adhered.

Counsel for the Pursuer and Respondent—Wilson, K.C.—Graham Stewart. Agents—Davidson & Syme, W.S.

Counsel for the Defender and Reclaimer—Campbell, K.C.—T. B. Morison. Agents—H. H. McGregor, S.S.C.

Tuesday, June 7.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

OCEAN STEAM TRAWLING COMPANY, LIMITED v. GEESTEMUNDE HERRING AND HOCHSEE-FISCHEREI COMPANY.

Statute—Implied Repeal—Fishing—Warrant to Recover Compensation by Foining and Sale—Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22), sec. 20 (2)—Sea Fisheries (Scotland) Amendment Act 1885 (48 and 49 Vict. cap. 70), secs. 1 and 8.

Held that section 20 (2) of the Sea Fisheries Act 1883 is not impliedly repealed by section 8 of the Sea Fisheries (Scotland) Amendment Act 1885, and that it is competent for a Sheriff, dealing with the compensation to an injured party in respect of an offence against the Sea Fisheries Acts, to grant warrant for the recovery of the sum adjudged as compensation by distress, or pouding and sale of the sea fishing-boat to which the offender belongs, and her furniture and tackle, as provided by section 20 (2) of the Act of 1883.

The Sea Fisheries Act 1883 (46 and 47 Vict. cap. 22), sec. 20 (2) enacts—“Any fine or compensation adjudged under this Act may be recovered in the ordinary way, or, if the Court think fit so to order, by distress, or pouding and sale of the sea fishing-boat to which the offender belongs, and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof.” . . .

The Sea Fisheries (Scotland) Amendment Act 1885 (48 and 49 Vict. cap. 70), enacts:—Section 1—"This Act . . . shall be read and construed along with the Sea Fisheries Act 1883."

Section 8—"Where any offence is committed . . . it shall be competent for the person whose property has been injured to give notice in writing to the person committing such offence, and to the sheriff clerk, that at the trial of said offence the sheriff will be called upon to consider and dispose of the question of damages, and in such case the evidence led at said trial shall be evidence for the consideration of the Sheriff on the question of damages, and the sheriff at the conclusion of the said trial shall proceed to consider and dispose of the question of compensation to the injured party, . . . and shall, after hearing parties, give decree as in an ordinary action before the Sheriff Court."

The Ocean Steam Trawling Company, Limited, having its registered office in Aberdeen, owners of the steam trawler "Oceana," of Aberdeen, brought this suspension and interdict against the Geestemunde Herring and Hochseefischerei Company, owners of the fishing-boat "Harald," of Geestemunde, Germany, and Charles Wilson, W.S., Procurator-Fiscal of the Sheriff Court of Aberdeen, for any interest he might have.

The complainers craved suspension of an interlocutor or decree dated 29th May 1903, pronounced by the Sheriff of Aberdeen, Kincardine, and Banff, in a complaint at the instance of the respondent Charles Wilson against Arthur Munzer, a trawl fisherman on board the complainers' steam trawler "Oceana."

Prior to the trial of the complaint against Munzer in the Sheriff Court, a notice that at the trial the Sheriff would be called upon to dispose of the question of the damage done to the nets and gear of the fishing-boat "Harald," and the compensation to be awarded therefor, was served by the Geestemunde Herring and Hochseefischerei upon the sheriff-clerk and Munzer, in terms of section 8 of the Sea Fisheries (Scotland) Amendment Act 1885.

The interlocutor or decree of the Sheriff, which was sought to be suspended, was *inter alia*, in the following terms:—"Finds (1) that on 22nd January 1903 Arthur Munzer was convicted of a contravention of the Sea Fisheries Act 1883, section 4 (a) and article 19 of the schedule therein referred to: (2) That in terms of section 8 of the Sea Fisheries (Amendment) Scotland Act 1885, proceedings were duly taken for ascertainment of the damage caused by the said contravention: (3) That the evidence for that purpose was led separately from the evidence at the trial on 22nd January and 26th February: Finds the petitioners the Geestemunde Herring and High Seas Fishery Company entitled to compensation for the damage done to their nets, gear, and other property; assesses the same at £435, 4s.: Finds the respondent Arthur Munzer liable to the petitioners therefor, and decerns against him for pay-

ment: Grants warrant for recovery of the said sum of £435, 4s. by distress or pouding and sale of the said sea fishing-boat 'Oceana' and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof, in terms of section 20 (2) of the Sea Fisheries Act 1883."

The complainers stated, *inter alia*—(Stat. 6) "The said Sheriff by the said decree acted illegally and unwarrantably in granting warrant for recovery of the said sum of £435, 4s. by distress or pouding and sale of the said trawler 'Oceana,' and in any event the said interlocutor is inept and invalid in so far as the said warrant is concerned. There is no provision made by the Sea Fisheries (Scotland) Amendment Act 1885 for recovering any damages that may be assessed under section 8 of that Act, by distress or pouding of the boat to which the said Arthur Munzer belonged. No notice was given to the complainers as the owners thereof that any application would be made to have the 'Oceana' distrained, and the complainers were not parties to the proceedings. Section 20 (2) of the Sea Fisheries Act 1883, referred to in the said interlocutor or decree, has no application to an award of damage under section 8 of the Act of 1885."

The respondents in answer averred that the whole proceedings were regular and proper and in conformity with the Acts of Parliament, and that the complainers were represented at the diets before the Sheriff when the amount of compensation to be paid was determined.

The complainers pleaded in law, *inter alia*—" (1) The warrant contained in the said last-mentioned interlocutor or decree pronounced by the said Sheriff for recovery of the said sum of £435, 4s. by distress or pouding and sale of the 'Oceana' and her tackle, apparel, and furniture being illegal and not authorised by the said statutes, the said interlocutor or decree should be suspended and the complainers found entitled to expenses."

On 25th November 1903 the Lord Ordinary (STORMONTH DARLING) pronounced an interlocutor refusing the note of suspension and interdict.

Opinion.—"This is a short question and may be shortly disposed of.

"A decree pronounced by the Sheriff of Aberdeenshire on 29th May 1903 under the Sea Fisheries Act 1883 and the Sea Fisheries Amendment (Scotland) Act 1885 is here sought to be suspended on the ground that the warrant which it contains for recovery of a sum of £435, 4s. by distress or pouding and sale of the steam trawler 'Oceana' belonging to the complainers, and her tackle, apparel, and furniture, is illegal and not authorised by the statutes, in respect that section 20 (2) of the Act of 1883, which allowed that mode of recovery, is impliedly repealed by the Act of 1885.

"It is true that section 15 (1) of the Act of 1883 by which a sum of compensation for injury to person or property might be awarded by the Court trying an offence under this statute in addition to the fine

imposed for the offence was repealed by section 8 of the Act of 1885. In place of the sub-section thus repealed a new and more elaborate provision was substituted, requiring notice in writing of the intention to claim damages, regulating the mode of proof, and concluding with the words that decree should be given 'as in an ordinary action before the Sheriff Court.' The question is whether this new provision is inconsistent with, and therefore must be held to repeal section 20 (2) of the Act of 1883, by which it is enacted that 'any fine or compensation adjudged under this Act may be recovered in the ordinary way, or if the Court thinks fit so to order, by distress or poinding and sale of the sea fishing-boat to which the offender belongs, and her tackle, apparel, and furniture,' and so on. There being no express repeal of this last sub-section, it is only on the ground of some absolute inconsistency between it and section 8 of the Act of 1885 that repeal could be implied, for the Act of 1885 (section 1) declares that it shall be read and construed along with the Act of 1883, the result of which is that every part of each of the Acts must be construed as if it had been contained in one Act, 'unless there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified something found in the earlier Act.' These are the words of Lord Selborne in a case before the Privy Council in 1883, reported 8 App. Ca. at p. 727.

"I do not find any such manifest discrepancy, nor any discrepancy at all. If the procedure of 1883 had provided for notice to the owners, and that had been omitted in the procedure of 1885, I could have understood the argument for implied repeal, but the only provision for notice to anybody is contained in the later Act. The provision that decree shall be given as in an ordinary action before the Sheriff Court adds something to the provision in the earlier Act that the compensation adjudged 'may be recovered in the ordinary way,' but it is in no sense inconsistent with the discretion given to the Sheriff to allow recovery by distress or poinding and sale. It seems to me, therefore, that the proceedings in the Sheriff Court were quite regular, and that the note of suspension must be refused."

The complainers reclaimed, and argued—The warrant for recovery by distress or poinding and sale of the "Oceana" and her tackle was incompetent. Section 15 (1) of the Act of 1883 was repealed by section 8 of the Act of 1885, and the whole provisions now in force as to the recovery of compensation were those of section 8 of the Act of 1885, which contemplated only that decree should be given "as in an ordinary action before the Sheriff Court." The provisions in section 8 of the Act of 1885 were inconsistent with section 20 (2) of the 1883 Act, and, accordingly, though section 20 (2) was not expressly repealed, it must be taken as repealed by reason of the "manifest discrepancy"—*per* Lord Selborne in *Canada Southern Railway Company v.*

International Bridge Company, 1883, 8 App. Cas. 723 at p. 727; *Lord Advocate v. Sprot's Trustees*, February 1, 1901, 3 F. 440, *per* Lord M'Laren, 38 S.L.R. 318. It was noteworthy in construing the effect of the later Act on the earlier Act, that the 1885 Act had reference only to Scottish Sea Fisheries, whereas the 1883 Act dealt generally with British sea fisheries.

The respondents argued—It was expressly provided by section 1 of the 1885 Act that its provisions should be read and construed along with the 1883 Act. Reading section 8 of the 1885 Act with section 20 (2) of the 1883 Act, there was no "manifest discrepancy." That being so, and there being no repeal of the provisions of section 20 (2) of the 1883 Act, the Sheriff continued to have a discretion to allow recovery by distress or poinding and sale—*Jamieson v. Wilson*, June 8, 1901, 3 Adam 395, 3 F. (J.C.) 90, 38 S.L.R. 808.

At advising—

LORD PRESIDENT—In a prosecution in the Sheriff Court of Aberdeenshire, under the Sea Fisheries Act 1883, and the Sea Fisheries Amendment (Scotland) Act 1885, the Sheriff on 29th May 1903 pronounced an interlocutor by which he, *inter alia*, found (1) that on 22nd January 1903, Arthur Munzer (a trawl fisherman employed on board the sea fishing-boat "Oceana") was convicted of a contravention of the Sea Fisheries Act 1883, section 4 (a), and article 19 of the schedule therein referred to; (2) that in terms of section 8 of the Sea Fisheries Amendment (Scotland) Act 1885, proceedings were duly taken for ascertaining the damage caused by the said contravention; (3) that the evidence for that purpose was led separately from the evidence at the trial on 22nd January and 26th February; and by which the Sheriff also found the petitioners, The Geestemunde Herring and High Seas Fishery Company, entitled to compensation for the damage done by the boat "Oceana" in charge of Arthur Munzer, injuring their nets, gear, and other property, and assessed the same at £435, 4s.; found the respondent Arthur Munzer liable to the petitioners therefor, and decreed against him for payment; granted warrant for recovery of the said sum of £435, 4s. by distress or poinding and sale of the said sea fishing-boat "Oceana," and her tackle, apparel, and furniture, and any property on board thereof, or belonging thereto, or any part thereof, in terms of section 20 (2) of the Sea Fisheries Act 1883.

The complainers maintain that it was incompetent for the Sheriff to grant warrant for recovery of the sum mentioned by distress or poinding or sale of the sea fishing-boat "Oceana" and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto.

It was not disputed that by section 20 (2) of the Sea Fisheries Act 1883 it was enacted that "any fine or compensation adjudged under this Act may be recovered in the ordinary way, or, if the Court think fit so to order, by distress or poinding and sale

of the sea fishing-boat to which the defender belongs, and her tackle, apparel, and furniture, and any property on board thereof or belonging thereto, or any part thereof," and that if this enactment remains in force the finding of the Sheriff and the warrant granted by him for recovery of the sum of £435, 4s., by distress or pouding and sale of the sea fishing-boat "Oceana" and her tackle, apparel, and furniture, and any property on board thereof, or belonging thereto, would be competent, but it was maintained that the provision of section 20 (2) of the Act of 1883 just quoted, was repealed by the Sea Fisheries Amendment (Scotland) Act 1885.

That Act of 1885 contains no express repeal of the provisions of the Act of 1883 now in question, and it is declared by section 1 of it (the Act of 1885) that it "shall be read and construed along with the Sea Fisheries Act 1883."

I agree with the Lord Ordinary in thinking that the effect of this section is to provide that the enactments in the Acts of 1883 and 1885 shall be read and construed as if they had been one Act, so that the provisions of both Acts remain in force, unless there is some plain inconsistency between them which makes it necessary to hold that the provisions of the earlier Act have been repealed or modified by those of the later Act. I concur, however, with his Lordship in thinking that there is no such discrepancy or inconsistency in the present case, and I am therefore of opinion that the provisions of section 20 (2) of the Act of 1883, that the compensation awarded may be recovered by distress or pouding and sale of the offending boat, her tackle, apparel, and furniture, and any property on board of or belonging to her, still remain in force, and that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainers and Reclaimers—Salvesen, K.C.—Lippe. Agents—Erskine, Dods, & Rhind, S.S.C.

Counsel for the Respondents—The Lord Advocate (Dickson, K.C.)—Pitman. Agent—Henry Smith, W.S.

Wednesday, June 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.]

SINCLAIR v. THE GLASGOW AND LONDON CONTRACT CORPORATION, LIMITED.

Company—Process—Expenses—Caution for Expenses by Limited Company—Reclaimers—"Pursuer in Legal Proceeding"—Companies Act 1862 (25 and 26 Vict. cap. 89), sec. 69.

The Companies Act 1862, section 69, enacts—"Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

Where a limited company, who were defenders in an action, reclaimed against the decision of the Lord Ordinary, held that by reclaiming the company did not become pursuers within the meaning of section 69 above quoted.

In August 1903 Sir John George Tolle-mache Sinclair raised an action against the Glasgow and London Contract Corporation, Limited, for payment of over £600 as arrears of rent under a lease to the defenders of a slate-quarry belonging to the pursuer, which lease the pursuer averred had come to an end.

In December 1903 the Glasgow and London Contract Corporation, Limited, raised an action against Sir J. G. T. Sinclair for declarator that they were still his tenants under the lease.

In the first action the Lord Ordinary (KYLACHY) on 5th February 1904 decerned against the defenders in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

In the second action the Lord Ordinary on 20th February 1904 pronounced the following interlocutor:—"Finds it sufficiently instructed that if the defender is successful in his defence, the assets of the company will be insufficient to pay his costs: Finds therefore that in these circumstances the provisions of the 69th section of the Companies Act 1862 are applicable: Therefore appoints the pursuers to consign or find security for the sum of £100 to cover the expenses of the defender up to the stage of the allowance of proof." The pursuers found security as ordered and the action proceeded, and on 8th June 1904 the Lord Ordinary assoizied the defender and found him entitled to expenses.

The Glasgow and London Contract Corporation, Limited, reclaimed against the judgment of the Lord Ordinary in both actions.