

the road proved, which cannot establish it as appropriated for that purpose.

SIMPSON & Co.
v.
MACFARLANE
and OTHERS.

Verdict—"For the defender."

Cockburn, for the Pursuer.

Moncreiff, for the Defender.

(Agents, *Æneas Macbean*, w. s. and *Macquenn & Mackintosh*, w. s.)

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ABERDEEN.

PRESENT,
LORD CHIEF COMMISSIONER.

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SIMPSON & Co. v. MACFARLANE, &c.

1822.
Sept. 23.

THIS was an action of damages against mercantile agents and the master of a vessel, for not delivering goods shipped for the pursuers.

Damages claimed for not delivering goods.

DEFENCE for the agents, That they were justified in not delivering the goods.—For the shipmaster, That he acted under the orders of the agents.

ISSUES.

The issues contained an admission, that

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goods were sold by foreign merchants to the pursuers at a certain price, and that a bill was drawn upon the pursuers for the amount, payable in four months, and that the goods were transmitted to the defenders, the agents of these merchants. The questions then were, Whether the defenders refused to deliver the goods without immediate payment or security for the price? Or, Whether the defenders, at the time they refused delivery, had good and reasonable ground to doubt the solvency of the pursuers?

A brother-in-law of a party an incompetent witness.

An objection was stated to the brother-in-law of one of the parties, who was called as a witness.

LORD CHIEF COMMISSIONER.—There is no doubt that a brother-in-law is not competent.

An affidavit in a bankruptcy not competent evidence, though recovered upon a diligence granted by the Court.

An objection was taken to an affidavit produced for the defenders.

LORD CHIEF COMMISSIONER.—You must produce the proceedings in the bankruptcy to which this relates. Getting papers in consequence of a motion in Term does not make

them evidence. The person who made the affidavit ought to be called as a witness.

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Cockburn, for the defenders.—The pursuers have completely failed; but to clear the character of the defenders, is it necessary to lead evidence? Their instructions were not to deliver, even if they doubted the persons to whom goods were sent;—in this case, they had no doubts that the pursuers were not fit to be trusted.


On the second issue, we are only bound to prove that there was good ground to doubt their solvency.

Moncreiff, for the pursuers.—This is a question of fact, but mixed with law, and we differ upon both. We say there was a concluded agreement. We are entitled to damages from the mere breach of agreement. It is only the insolvency of the pursuers that would have justified this act. They could not know at *the time* what they have proved.

1 Bell, 123.

LORD CHIEF COMMISSIONER.—This is a question of fact; but, from what Mr Moncreiff has stated, it is necessary that you should understand the law applicable to the case, and

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what the law means. I agree with Mr Moncreiff, in what he states as law from the work of Mr Bell. It is distinctly and accurately the mercantile law of this country, but I think it misapplied. The law stated applies to bankruptcy, and to stoppage *in transitu*, upon the inability of the buyer to pay.

The question here is not whether the facts would have justified him in taking back the goods ; or whether he was entitled to disaffirm the contract, but whether he was entitled to act as he did, without subjecting himself to damages. If you were to apply Mr Moncreiff's doctrine to this case, you would be deciding an issue which is not the one before you. Though the second case put by Mr Bell, that " of gross " suspicion of inability to proceed with the contract," comes nearer the present case. The question at present, however, is not whether there was a competent ground to stop *in transitu*, but whether there was good reasonable ground to doubt the solvency of the pursuers ?

There is no doubt the contract was broken—it was broken by their requiring immediate payment, or even by requiring security, as the bargain was for four months credit.

The disaffirmance of the contract being esta-

blished, the question turns upon the second issue.

Upon the second issue, the question is not whether the pursuer was insolvent, or believed to be so, but whether the defenders had good and reasonable grounds to doubt his solvency? If you are of opinion that there were such, you will find for the defender; but if this was a rash and inconsiderate act, you will find for the pursuer, and assess the damages. It is said, as Simpson and Company paid all their debts, that you must hold there was no ground for this suspicion.

You must decide whether the circumstances are such as will free the defender from a claim of damages; and if you are of this opinion, law will warrant the verdict; and you must see the inclination of my mind.

Verdict—“ For the defenders.”

Moncreiff and Hunter, for the Pursuers.

Cockburn and Hope, for the Defenders.

(Agents, *C. C. Stewart, w. s.* and *Robinson & Paterson, w. s.*)

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