

GIBB & MAC-
DONALD
v.
WATHEN & Co.

LORD CHIEF COMMISSIONERS.—You may take the exception to my directing them to find for the pursuer, unless they find the usage proved in favour of the defender.

Verdict—“For the pursuer.”

Jameson, for the Pursuer.

Jeffrey and Forsyth, for the Defender.

(Agents, *John Grainger*, w. s. and *Steuart and Sprrott*, w. s.)

PRESENT,

LORD CHIEF COMMISSIONER.

1829.
June 17 and 18.

GIBB and MACDONALD v. PAUL WATHEN,
and Co.

Damages for fraudulently inducing the pursuers to enter into a contract, and for repetition of money paid under the contract.

THIS was an action of damages for fraudulently inducing the pursuers to enter into a contract; for repetition of L. 600 as over-payment under the contract; and of L. 1600, on account of short quantities furnished under the contract.

DEFENCE.—The defence on the merits was, that the defenders received and used a great part of the goods, and were indebted to the pursuers in the balance of the price.

ISSUES.


“ It being admitted that Sir Paul Baghott,
 “ as an individual, or on account of Paul Wa-
 “ then and Co., entered into an agreement
 “ with the pursuers, in terms of missive let-
 “ ters, bearing date the 28th January 1825,
 “ being Nos. 4 and 21 of the counter-pro-
 “ cess at the instance of the defenders, whereby
 “ the said Sir Paul agreed to furnish to the
 “ pursuers certain Cashmere yarn, on the
 “ terms stated in the said missives:—

“ Whether, by fraud, misrepresentation, and
 “ deception, practised by the said Sir Paul,
 “ the pursuers were induced to enter into, and
 “ carry on the said agreement, to the loss, in-
 “ jury, and damage of the pursuers ?

“ Whether the said Sir Paul did violate the
 “ said agreement contained in the said missives,
 “ and failed to perform the conditions of the
 “ same, as to the quantity and quality of the
 “ yarn transmitted, or the time or manner of
 “ transmitting the same, to the loss, injury,
 “ and damage of the pursuer ? Or,

“ Whether the pursuers homologated or ac-
 “ quiesced in what was done by the defenders,
 “ in implement of the foresaid agreement ?”

In the counter process the issues were,

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“ It being admitted, that Sir Paul Baghott,
“ as an individual, or on account of Paul Wa-
“ then and Co., entered into an agreement
“ with the defenders, in terms of missive-let-
“ ters, bearing date the 28th January 1825,
“ being No. 4 and No. 21 of this process,
“ whereby the said Sir Paul agreed to furnish
“ to the defenders certain Cashmere yarn, on
“ the terms stated in the said missives :—

“ Whether the defenders are indebted and
“ resting owing to the pursuers in the sum of
“ L. 1666, 16s. 8d., or any part thereof, as the
“ balance of the price of certain quantities of
“ yarn transmitted to the defenders under the
“ agreement aforesaid? Or,

“ Whether the defenders, Gibb and Mac-
“ donald, were induced, to the great hurt and
“ injury of their trade and business, by fraud,
“ misrepresentation, and deceit, to enter into,
“ and act upon the said agreement: And,

“ Whether the said Sir Paul did, to the
“ great hurt and injury of the defenders, in
“ their trade and business, violate the agree-
“ ment contained in the said missives, and
“ failed to perform the conditions of the same,
“ as to the quantity and quality of the yarn
“ transmitted, or the time and manner of trans-
“ mitting the same?”

Maitland opened the case for the pursuer, and stated, That the defender brought an action for payment of the price of a quantity of yarn, which was met by the present action, on the ground that the defender had acted fraudulently, and that he was overpaid. The second issue is unnecessary, as we shall prove fraud; and a departure from good faith subjects a party in damages.

The pursuers were led to believe that the yarn was manufactured in Britain,—that the defender was the only manufacturer,—and that the pursuers were to have right to the whole quantity manufactured. But on inquiry it was found that there was no truth in the representation made, but that the yarn might be imported from France at a lower price, and that the defender did not deliver the full quantity in the packages.

A witness being asked whether he knew that the pursuers believed a certain thing,

LORD CHIEF COMMISSIONER.—You must prove this by facts, not by the belief of the witness.

After discovering the fraud, the pursuers refused to receive a certain quantity of the yarn

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Incompetent to prove, that, in the opinion of a witness, the pursuer believed a fact.

As evidence of deficiency in packages of goods furnished, competent to prove that packages rejected were deficient.

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transmitted. When a witness, who had inspected this quantity, was called,

Hope, Sol.-Gen. objected, They wish to infer defect in the quantity accepted by the state of this which was rejected.

LORD CHIEF COMMISSIONER.—This is a case in which the quality of the yarn is in question, and that which is wrought up cannot be ascertained. This is yarn furnished under the same contract, and not worked up, and, though the evidence may not be conclusive, I think it fair for the consideration of the jury.

June 18.

Hope, Sol.-Gen. opened for the defenders, the Commissioners of Sir P. Baghot, and said,

The question is not whether Sir Paul used unfair means, but whether the defenders were induced to enter into the contract to their loss and damage. They have not proved that loss, and we shall show they made 50 per cent. profit. The yarn was fully equal to the samples, and the defender, knowing how it might be imported, was entitled to keep the secret and take the advantage of it. A manufacturer cannot receive and work up raw materials, and then object to them as not according to sample, and the profit made by the defender is no measure

of the loss of the pursuers, as they also made profit. The numbers on the packages had no reference to the number of hanks in the pound, but to the numbers attached to the samples, and the pursuers got the number of pounds weight charged, and of the quality of the sample.


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An objection was sustained to a question put to a witness, whether, in the opinion of the witness, a manufacturer, after receiving and using materials, is entitled afterwards to object?

Incompetent to ask a witness whether a manufacturer, after using goods, was entitled to object to their quality.

*Jeffrey*, in reply.—The question here is, whether we are to get back the profits which this dishonest party has gained? Whether lies were told for the purpose of inducing the pursuers to enter into this transaction, and whether they would have entered into it if these lies had not been told? The pursuers suffered great loss and much anxiety, and is the defender to keep what he got by cheating? The pursuers changed their machinery on the faith of this being a British manufacture, and not liable to the risk of war, &c. We do not say the goods were bad, but that they were of inferior value to what was indicated by the numbers which referred to the number of hanks in the pound, and not to the samples.

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The simplest way of disposing of both actions, is to make up your minds as to the damages, and then deduct L. 1666, the sum claimed in the counter-action.

LORD CHIEF COMMISSIONER.—The manner in which these cases have been treated is a great satisfaction to me, as it would have proved difficult for me to go into all the intricacies of the evidence. The question is now a simple one, and it appeared so to me from the beginning, though in the course of the evidence it became perplexed by the details which were gone into. All as to the particular quantities and character of the yarn may be thrown out of view, I shall therefore go to the issues and apply my observations to them.

There is no danger that fair justice will not be done from the circumstances of the defenders being English assignees. But this is a peculiar case, and in some points not yet fully before you. On the first issue, the single consideration is the fraud and misrepresentation. I hold this as applicable in two ways: *1st*, Whether it was the foundation of the contract; and, *2d*, Whether it was not a fence cast round the transaction, by which the pursuers were prevented from getting information. It is said there was


fraud and misrepresentation in both these respects, and you are to say whether it is proved.

With respect to the loss, it does not arise from the failure to furnish the article, but from the large prices paid by the pursuers.

To make out this case, there must not only be concealment and secret conduct on the part of the person accused, but the contract must have been brought about by active and crafty means used by him to effect this concealment. I shall not go into the evidence in detail, as it is sufficient to point out the date of the communications and the manner in which they were carried on. The first communication comes from Baghott; it turns out that the whole was completely false. He engaged to deliver an English article, and he delivered a French one, and the defenders, who stand in his shoes, must stand or fall by his conduct.


It may be said that the most honourable merchants do not disclose where they get their goods; but was this an innocent concealment, or a fraudulent misrepresentation that it was a secret British manufacture, which he only could furnish. But for the fraud the price might have been ascertained by the pursuers.

From the vouchers and the evidence, it appears, that in some cases the profit was as high

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as 68 per cent. and you must judge whether this was done without fraud, or whether there was such art and management to bring about the contract; and such concealment and misrepresentation of it being a French production as to vitiate the whole. If the price had been demanded for it as a French production, that would have been fair, but it is represented as British, and that the wool could only be imported by the defenders.

The question is, whether there was not fraud in the conception of the contract, followed by divers frauds in the prosecution of it, so as to entitle the pursuer to damages? If the fraud is made out, then acquiescence does not apply to the case, as the defenders come here to defend with unclean hands, and this plea cannot be set up unless there is some overt act so clear as to satisfy you that the pursuers continued the dealing after they knew the facts. In proof of this, two sorts of evidence are relied on:—1. Letters from the pursuers, which, I confess, appear to me natural. 2. Their ordering two quantities of the yarn. These you will consider.

The damages are stated at L. 5000, but you cannot give this sum, as the pursuers got goods which, at the prices they admit, reduces the sum to L. 2847 of additional price, which they

say they paid, but there is also damage claimed for the deficiency in weight and fineness of the yarn, and for the damage they have sustained by the fraud, the changes of their looms, &c.

The second issue does not depend on fraud, but is for damage on account of non-performance of contract. If, however, you find for the pursuers, you may assess one sum of damages.

Verdict for the pursuers — “ Damages L. 2333, 3s. 4d. *et e contra* for defenders.”

An application having been made for a rule to show cause why the verdict should not be set aside, and a new trial granted.

LORD CHIEF COMMISSIONER. — These cases were considered together, and the evidence on the second issue became very intricate ; but in the end the pursuers only went on the first issue ; and I told the jury that they must first satisfy themselves of the fraud and continued deception, artifice, and contrivance to prevent the pursuers from discovering that the article was not a British manufacture. If they were satisfied of the fraud, then the damages were of three descriptions, 1<sup>st</sup>, The sum which he had got by fraud beyond what he paid. 2<sup>d</sup>, Part

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of the sum the pursuers had laid out in altering their machinery, patterns, &c. 3d, The abatement of price of goods returned to the pursuers. These were fairly considered by the jury, who found L. 4000, which was within the sum proved. In the other case, the counsel on both sides agreed to let a verdict be taken for the defenders, and to deduct the sum of L. 1666, the sum claimed by Sir Paul, from the sum of L. 4000 found by the jury. It appears that the jury followed a sound principle in considering the damages, and were within the sum proved in the accounts. It would, therefore, be unjust to grant the rule to show cause.

*Jeffrey, Cockburn, and Maitland, for the Pursuers.*

*Hope, Sol.-Gen., Skene, and Whigham, for the Defenders.*

(Agents, *Ritchie and Miller, s. s. c. Allan and Bruce, w. s.*)

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PRESENT,

LORD CHIEF COMMISSIONER.

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1829.  
July 16.

CLELAND v. MACK.

One shilling damages for defamation.

THIS was an action of damages by a person against his wife's mother for defamation.