hurt the one, and will free the other from uneasiness.

HILL v. KING.

Verdict—"For the pursuer, damages L.20."

P. Robertson, for the Pursuers.
Cuninghame, for the Defender.
(Agents, *John Campbell Jun.* W. S. *Alexander Burns*, W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

HILL *v.* KING.

1830. Feb. 1.

Finding for the pursuer on a question of fraud in the sale of a vessel.

THIS was a reduction of a finding by the Judge-Admiral assoilzieing the defender from a claim for repetition of the price of a vessel.

ISSUE.

"Whether, on or about the 11th day of July "1810, at Guadaloupe, in the West Indies, by "fraud, deceit, or misrepresentation practised "by the defender on the pursuer, the pursuer "was induced to purchase the vessel called the "Smile of Spring, and to pay for the said ves-"sel the sum of L. 2200 Sterling, to the loss, "injury, and damage of the pursuer?"

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Shaw opened for the pursuer, and said, The action now is not for damages, but merely for repetition of the price of an American vessel, which, before it was sold, was captured for want of the protection of a British registry. The vessel had broken the non-intercourse regulations of 1809, and this was known to the seller, but not communicated to the purchaser. Sale being a mutual contract, the concealment of a material fact vitiates the sale.

1 Bell's Com. 297; Marshall, on In. 450. Brown on Sale, 407, and 2 Dow, Rep. 266; Wood *v.* Baird, 5th June 1696; Duthie *v.* Carnegie, 21st January 1815.

When a letter from the agent of the seller was produced,

In a question of fraud, a private letter inadmissible in evidence, unless the party accused was privy to it.

Hope, Sol.-Gen.—There is no evidence that this was shown to us, the purchasers.

Jeffrey, D. F. This is a case of fraud to be made out by facts and circumstances.

LORD CHIEF COMMISSIONER.—This case is bottomed on the vessel being sold as an English vessel. She came to the Clyde, and was first advertised as an American vessel, and then not. She is purchased by Paterson and Company, and sent out to the West Indies, and every public act, which they are bound to know, must affect them. But in a question of fraud, the actual knowledge must be brought home. If a party is not in the clear knowledge of the fact, it will not

affect him. Here he has no privacy to the transaction,—there is no evidence of his knowing it.

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Hope, Sol.-Gen. opened for the defender.—The pursuer has not brought the most material witness though he is here. The proof is not against any of the parties here, but the agent in the West Indies; and every thing has been brought into the case, except the only thing which is relevant under the issue, viz. the transaction between the pursuer and defender. Before finding for the pursuer, you must not only suspect, but you must have proof that the fraud was practised by the defender. The vessel is sold as the Smile of Spring, and the pursuer puts on board a false register, that of the Enterprize, and she is captured; and is the defender to be held liable?

LORD CHIEF COMMISSIONER.—It was not from any doubt in my own mind that I allowed the Solicitor-General to go fully into the case, but from thinking we ought to hear a case which has lasted for ten years fully stated. The question is, whether it is made out to your satisfaction that by fraud, deceit, and misrepresentation, the defender induced the pursuer to

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pay L.2200 for the vessel. This is to be done by proof, and with this view the history of the vessel was proved,—her coming to this country under one name,—being advertised once as an American,—and then this description dropped.

A case of this sort is not to be decided on suspicion, but it must be made out by clear evidence that there was fraud in the transaction, and, in this case, it must be fraud by the defender. This vessel came to Greenock as a Portuguese, but if, when she sailed, they suspected her to be American, thát lays a foundation for a case of fraud.

It is a subject of serious consideration with juries when a material witness is not called, and, in this case, if James Paterson had been called, he could have cleared up whether there was fraud or not. An eminent judge in England once said, he would have called for such a witness till heard at the extremity of the Court, but I do not say that his not being called is aloné a sufficient ground for a verdict. It is fair to say the defender might have called him, but then the question is, whether the pursuer has left his case in such a state of weakness as to make it unnecessary for the defender to meet it by evidence. And if fraud is alleged, it

must be made out on the strength of the evidence of the party who alleges it.

HATTON *v.* PEDIE.

Verdict—"For the defender."

Jeffrey, D. F. and *Shaw,* for the Pursuer.
Hope Sol.-Gen., Forsyth, and *Cockburn,* for the Defender.
(Agents *A. P. Henderson,* and *Daniel Fisher.*)

PRESENT,

LORD MACKENZIE.

1830.
Feb. 22.

HATTON *v.* PEDIE.

Findings for the defender on questions as to the obligations by a superior in a town to make up a street, &c. to his vassal.

THIS was an action of damages by a feuar in Edinburgh against his superior, for not making up a street,—for neglecting to adjust the boundary of the feu with a neighbouring property,—for delay in furnishing a plan of the houses to be erected.

DEFENCE.—The pursuer was bound to make up the street opposite his own feu, and there is no practice laying it on the defender. The defender gave the pursuer the full extent of ground purchased *within* his own property. The defender furnished a plan which was not objected to till this action was brought.