

Feb. 10. 1825.

Against these judgments the Duke appealed.

*Appellant.*—The breach of interdict is fully proved, and the appellant is entitled to a decree against the respondent, since without such decree the restoration of the channel cannot legally be made. The respondent's servants were the guilty parties, in particular the gardener, who had been formerly implicated in a similar offence; and for these parties the respondent is answerable, especially as through these illegal operations the respondent has been benefitting by the rent produced by the mill.

*Respondent.*—The operation in question was not executed in the respondent's service; it was executed not only without any authority from the respondent, but in direct disobedience to his positive and repeated orders. Even those actually concerned would not be liable, as they only removed rubbish thrown into the stream by others, the appellant's own dependants.

The House of Lords 'ordered and adjudged that the interlocutors complained of be affirmed.'

*Appellant's Authorities.*—Lord Keith, June 10. 1812, F. C.; Linwood, May 14. 1817, F. C.; Stair's Inst. 1. 9. 5.; Kames' Prin. of Equity, B. 1. p. 1. c. 1. § 2.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

No. 2.

WILLIAM DUNN, Appellant.

ROBERT M'GAVIN and Company, Respondents.

*Sale.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), That statements made by the agent of a seller to a purchaser, relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow, did not amount to such a misrepresentation as to liberate the purchaser.

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2D DIVISION.  
Lord Reston.

ON the 22d November 1814, when the price of cotton wool was very fluctuating, Dunn, a merchant in Glasgow, bought from M'Gavin and Company, also merchants there, through the intervention of Donaldson, a broker, (who appeared to have acted in that character for both parties), 50 bags of cotton wool, which at the date of the sale were at Liverpool, and were to be delivered on arrival at Glasgow.

Dunn alleged, that at this time the sellers had 176 bags of cotton at Liverpool, of which, however, only 100 were actually shipped: That by the average sample of these 100 bags, he bought the 50 bags; and on the same day other parties bought

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the remainder: That Donaldson, in this transaction, had represented the cotton wool so purchased by Dunn as actually shipped at Liverpool, and expected to arrive in a very few days: That he had bought on the faith of this representation: That he relied on receiving his 50 bags by the first arrival, viz., the arrival expected in a few days: That although 100 bags did arrive, yet the whole were delivered to the other purchasers; and that, after waiting day after day, and seeing ship after ship reach the Clyde from Liverpool, with no cotton for him, and the prices rapidly falling, he intimated, on the 2d December, that he would not accept the cottons at all.

The cotton arrived at Glasgow three days after the date of this intimation, and Dunn, persisting in his refusal to accept, M'Gavin and Company raised an action against him before the Magistrates of Glasgow, for payment of the price.

The Magistrates 'found it admitted by both parties, that the  
' 50 bags of wool in question were sold by the pursuers, and  
' purchased by the defender, at the price libelled, as being at  
' the date of the sale at Liverpool, and to be delivered upon  
' arrival; but before farther judgment, allowed the pursuers and  
' defender a proof pro ut de jure of their respective averments  
' with regard to the points, whether the pursuers or their  
' brokers represented the said cotton as being actually shipped  
' at the date of the sale, or only as about to be shipped? And  
' allowed the parties also a proof pro ut de jure of their aver-  
' ments, tending to shew that they or their agents used all due  
' diligence in procuring the shipment of said cottons after the  
' date of the sale; and allowed to each party a conjunct proof.'

A number of witnesses were then examined, and correspondence between the sellers and their agents recovered and produced. The only direct evidence as to the terms of the bargain was afforded by the deposition of Donaldson, who deponed,  
' That he was informed the cotton was lying at Liverpool; and  
' Mr M'Gavin shewed the deponent, or held in his hand, a bill  
' of lading for 100 bags of it; and mentioned that he had letters  
' from his agent, stating that he was engaging freight for the  
' remainder of it, and expected to get it shipped every day: That  
' the deponent was instructed to sell the said cotton, payable at  
' two instalments, one of them running from the day of sale, and  
' the other from the day of delivery, after being weighed over:  
' That after receiving his instructions from the pursuers, the  
' deponent went back to them with an offer from Mr Henry  
' Houldsworth for 100 bags of the cotton, and was told by the

Feb. 23. 1825. ' pursuers; that they could only accept of it to the extent of 50  
' bags, as they had already sold 76 bags of it: That, in conse-  
' quence, the deponent concluded a bargain with Mr Houlds-  
' worth for the 50 bags at the price offered by him of '3s. 4d.  
' per lb.; and the deponent offered him the other 50 at a 1d.  
' per lb. more, which, however, he refused: That the deponent  
' afterwards, in the course of the same day, sold 50 bags of it to  
' the defender, at the price 'of 3s. 4½d. per lb.: And on the  
' defender asking the deponent where it was lying, the deponent  
' told him it was lying at Liverpool; and on his asking when it  
' might be expected to arrive, the deponent told him that the  
' pursuers had received a bill of lading of 100 bags, and they  
' expected daily the bill of lading for the remainder: and the  
' deponent, in the course of the conversation with the defender,  
' may have further mentioned to him, that the cotton was in the  
' process of being shipped, or about to be shipped; and he may  
' even have added, that it was shipped, as from the pursuers'  
' anxiety, and from the letters from their agents at Liverpool,  
' the deponent thinks the pursuers may have expected the  
' remainder of the cotton to be shipped by the time the deponent  
' concluded the said bargain with the defender: That the  
' defender having again put the question to the deponent, When  
' the cotton might be expected to arrive? the deponent told him,  
' it might be expected in a few days, but that it might be weeks,  
' referring to the uncertainty of the weather, and the time the  
' vessel might take to perform the voyage, supposing her ready  
' to sail: That the deponent, however, gave the defender no  
' reason to believe that the shipment was actually completed, but  
' only that the remainder of the cotton was in the process of  
' being shipped, or about to be shipped. Depones, That the  
' impression on the deponent's mind is, that he mentioned the  
' uncertainty of the weather as the cause of the uncertainty of  
' the time of the arrival of the said cotton. Depones, That the  
' deponent cannot charge his memory, whether he mentioned to  
' the defender, in concluding the sale with him, that the pursuers'  
' agent at Liverpool was engaging freight for the remainder of  
' the said cotton. Depones, That the 50 bags so sold to the  
' defender were the last 50 of the said lot; and the defender  
' knew this well enough when he concluded the bargain, as the  
' deponent mentioned to him that the lot consisted altogether of  
' 176 bags, 76 bags of which the pursuers themselves had sold, and  
' that other 50 bags had been sold to Mr Houldsworth before  
' mentioned, leaving only 50, being those sold to the defender:

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‘and although nothing was said between the defender and deponent as to the order in which they should be delivered to the different purchasers, the deponent conceived that the defender’s 50 should be the last 50 that arrived. Depones, That the defender had offered only 3s. 4d. per lb. to the deponent for the said cotton; but the deponent, in communicating with the pursuers, offered a halfpenny per lb. more, taking the responsibility of it upon himself; and when the deponent reported to the defender that he had concluded a bargain for the defender for the said 50 bags at that price with the pursuers, the defender confirmed what the deponent had so done, and took the cotton at the said price.’ The testimony of the other witnesses went to the point, as to whether any delay were imputable to the sellers or their agents? and, what circumstances would have authorized the sellers to have described the cotton wool as shipped or about to be shipped? It appeared, that the pursuers’ agent at Liverpool had arranged with the ship-owners at Liverpool that 100 bales should be taken by the ‘Dispatch,’ then unloading in port; but in consequence of delay in the unloading, the 100 bales were shipped at an increased freight, on board the ‘Jane and Bell,’ with a promise to forward the residue by the ‘Dispatch’ when ready: That the agents communicated this on the 19th November to the pursuers, and enclosed in their letter a bill of lading for the 100 bales: That in the belief that the remainder would proceed with the ‘Dispatch,’ a sufferance was passed at the custom-house for the shipment of the cotton: That the pursuers’ agents were disappointed in getting the remainder shipped in the ‘Dispatch,’ but the owners agreed to take it by the next ship, the ‘Sally and Ann;’ and thereon the agents wrote to the pursuers, and again passed a sufferance at the custom-house: That the agents were again disappointed from the ship being full; but that at length they effected a shipment by the ‘Hazard.’ The ‘Jane and Bell’ sailed on the 19th November, and arrived at Glasgow towards the end of November. The Hazard cleared out on the 3d December, was windbound until the 10th, and arrived at Glasgow on the 15th.

The evidence led as to what hypothetical circumstances would or would not authorize a party to represent a cargo as being shipped, or about being shipped, or in the process of being shipped, was not conclusive.

The Magistrates then found, ‘that Donaldson was the broker originally employed by the pursuers, and could not be held as the

Feb. 23. 1825. ' mere agent of the defender : found it not distinctly proved, that  
 ' at the date of the sale the cotton wool was represented as actu-  
 ' ally or completely shipped ; but found it sufficiently established,  
 ' that at the date of the sale the cotton wool was held out to the  
 ' defender, if not as actually shipped, at least as about to be ship-  
 ' ped, or as in the process of being shipped, and such a repre-  
 ' sentation in this respect made to the defender, as to afford  
 ' reasonable grounds for believing that no delay would take place  
 ' in the transmission of the cotton wool from Liverpool to Glas-  
 ' gow, from a vessel not having been then engaged to convey the  
 ' cotton, or from any difficulty in procuring a vessel for that pur-  
 ' pose : found it proved, that at the date of the sale no vessel had  
 ' been freighted or engaged to carry the cotton from Liverpool to  
 ' Glasgow ; and that, instead of being in the process of being  
 ' shipped on the 22d November, the date of the sale, the cotton  
 ' was not shipped till the 3d of December, and the vessel did not  
 ' sail from Liverpool till the 10th of that month. Further found,  
 ' that the evidence adduced rather afforded reason to believe, that  
 ' ship-room might have been obtained for the cotton at Liverpool  
 ' for Glasgow, by agents usually employed in that trade, earlier  
 ' than the 3d of December : found, that the delay thus occasioned  
 ' in the transmission of the cotton from Liverpool to Glasgow, by  
 ' the pursuers or their agents not having secured a vessel to con-  
 ' vey it, as the broker Donaldson gave the defender reason to  
 ' believe had been done, relevant, in the then variable and fluc-  
 ' tuating state of the cotton market, to liberate the defender from  
 ' the contract ; and therefore, on the whole, assoilzied the defen-  
 ' der, reserving to the pursuers their recourse otherwise, as ac-  
 ' cords ; and found expenses due.'

These judgments having been brought under review of the Court of Session, the Lord Ordinary, Reston, repelled the reasons of advocacy, and remitted simpliciter. Thereafter, on advising a representation and answers, he reported the case to the Court on informations, when their Lordships, on the 15th November 1821, ' altered and recalled the interlocutor of Lord  
 ' Reston, Ordinary, represented against ; advocated the cause ;  
 ' repelled the defences founded on the representation of the pur-  
 ' suers with regard to the shipment of the cotton, and on the  
 ' alleged delay in the transmission thereof from Liverpool to  
 ' Glasgow ; remitted to the Lord Ordinary to hear parties on  
 ' any other points in the cause, and to do therein as he shall see  
 ' just ; and found the defender liable in expenses, so far as hitherto

'incurred,' &c. To this judgment the Court adhered on the 29th November 1822.\* Feb. 23. 1825.

The majority of the Judges were of opinion, that Dunn had not established his allegation, that it had been represented to him that the goods, at the date of the sale, either were actually shipped, or in the course of being shipped, (which they considered, in the then fluctuating state of the market, would have been relevant to liberate him); but that it rather appeared he was made aware that they had not been shipped.

Dunn appealed.

*Appellant.*—The representation made to the appellant, and on the faith of which he was induced to become the purchaser, did not correspond with the actual situation of the cotton. This was established by Donaldson's evidence, from which it appears, that he held out to the appellant, as an inducement to purchase, that the goods would arrive immediately, unless detained by the state of the weather, which clearly implied that they were either shipped, or in the course of being so. But the law weighs most jealously every statement that is made to induce a party to incur a risk or complete a purchase. It is preposterous to maintain that the respondents were not bound to warrant all that their broker stated, but only the average import of his statement. It is neither true nor relevant, that such diligence was used on the part of the respondents to fulfil the bargain, as to exempt them from the consequences of the delay which actually took place. The appellant's defences are supported and made good by the admitted and proved facts of the case.

*Respondents.*—When the cotton was sold, the agents at Liverpool were exerting all possible dispatch to get it shipped for Glasgow. The particulars of these exertions were communicated to Donaldson as a guide in effecting sales. If Donaldson acted for both parties, it must be held, that he communicated to both all he knew, even if it were not precisely proved that he had imparted to the appellant the exact state of the cotton when sold. Donaldson's evidence does not bear out the appellant's description of the alleged representation. What he did represent was correctly true, as is proved by letters and parole evidence. Besides, the cotton sold to the appellant was the last of the cargo of 176 bags. This was known to the appellant before he purchased; and, according to mercantile usage, delivery is made to different

Feb. 23. 1825. purchasers of parts of the same lot in the order of the sale. There was no undue delay in shipping the cotton at Liverpool; indeed it arrived in Glasgow within the average time that is taken to transmit goods from Liverpool to that port.

After hearing the Counsel for the appellant, and without hearing the respondents' Counsel, the House of Lords 'ordered and adjudged, that the interlocutors complained of be affirmed.'

*Appellants' Authorities.*—2. Dow's Reports, p. 266. ; 2. Starkie's Reports, p. 434—255. ; 1. Moore's Reports, p. 109. ; 3. Campbell's Reports, p. 462.

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No. 3. MABERLY and Company, Appellants.—*Jno. Campbell.*

The GOVERNOR and COMPANY of the BANK of SCOTLAND,  
Respondents.—*Walker.*

*Bank-Notes—Obligation.*—A person having cut in two the notes of the Bank of Scotland, for more safe transmission, (as he alleged), and one set of the halves having been stolen, and the Court of Session having found that the Bank was not bound to pay on production of the other set of halves, although the value of the stamp, and charges for issuing new notes, were offered, and security against any demand being made for the lost halves; the House of Lords reversed the judgment, and remitted to allow a proof of an averment, that the notes had been cut maliciously and designedly to injure the Bank.

March 1. 1825.

2D DIVISION.  
Lord Cringletie.

MESSRS MABERLY and Company established a banking-house in Edinburgh, with agents and correspondents in different parts of Scotland. Their agent at Aberdeen requiring to send them a parcel of notes of the Bank of Scotland, cut the notes into two, and transmitted the one set of halves by the mail-coach. The parcel was lost or stolen on the route. The other halves, however, of the notes, dispatched by a subsequent day's post, safely reached their destination.

Maberly and Company applied to the Bank of Scotland for payment of the value of the notes, of which they tendered the halves which they had received, and offered reimbursement for all charges attending the issuing new bank-notes in place of those cut, and undoubted security, to the Bank's satisfaction, that no demand would ever be made for the value of the half-notes amissing. The Bank having refused to pay the value, Maberly and Company raised an action against them, stating, that they had required the defenders, by their treasurer, Ro-