

suitable for jury trial it will apply the same criterion as it does in cases raised before itself. That is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount, it will be guided by the standard fixed by the legislature, viz. £40, so that unless the action on the face of it discloses a claim which in the opinion of the Court could not reasonably be entitled to a verdict amounting to £40, it will not refuse a jury trial to an otherwise appropriate case.

The application of these views to the present case is that we shall allow an issue with the view of the case being tried by jury.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR, concurred.

LORD PRESIDENT—That is the judgment of the Court; and the Second Division Judges have been consulted and concur in the opinion.

The Court allowed an issue.

Counsel for the Pursuer and Appellant—R. L. Orr, K.C.—A. A. Fraser. Agents—Struthers, Soutar, & Scott, Solicitors.

Counsel for Defenders & Respondents—G. Watt, K.C.—A. M. Hamilton. Agents—Sharp & Young, W.S.

Wednesday, May 24.

SECOND DIVISION.

[Lord Low, Ordinary.]

PATTERSON v. LANDSBERG & SON.

Sale—Rescission—Misrepresentation—Res ipsa loquitur.

Circumstances in which (affirming the judgment of Lord Low) the sale of certain articles made up by the seller to look like antiques was rescinded on the ground of misrepresentation.

Opinion by Lord Kyllachy that the appearance of age and other appearances presented by the articles constituted by themselves misrepresentations—in short, that the case was really one of *res ipsa loquitur*.

Agnes Greenoak Patterson, dealer in engravings, 54 George Street, Edinburgh, brought this action against H. Landsberg & Son, diamond merchants, 52 Hatton Garden, London, concluding for the rescission of the sale of certain articles sold to her by the defenders and for the repayment of the purchase prices.

A proof was led before the Lord Ordinary (Low). The facts of the case are sufficiently set forth in the opinions of the Lord Ordinary and of the Judges of the Second Division.

On 17th January 1905 the Lord Ordinary pronounced an interlocutor finding the defenders bound to accept return of the

articles in question, with the exception of the "engraved emerald" brooch, and to make repayment of the sums paid by the pursuer to them in respect thereof.

Opinion.—"The pursuer is a dealer in engravings, curios, and the like in Edinburgh, and the defenders are diamond merchants in London. The object of this action is to have the sale of certain articles of jewellery, which the defenders made to the pursuer, set aside, on the ground that she was induced to make the purchases by false representations on the part of Mr Louis Landsberg, the only member of the defenders' firm.

"One branch of the defenders' business consists in designing and making (or having made for them) articles of jewellery in imitation of ancient jewels or of jewels having a historical interest attached to them. Three of the articles to which this case relates are of that kind. One is a necklet and pendant in the fashion of the eighteenth century, the pendant containing a picture of a lady who is supposed to represent Flora Macdonald. Of course what the jewel suggests, and was intended to suggest, is that it is an old jewel, in some way connected with, or commemorative of, the romantic friendship between Flora Macdonald and Prince Charles Edward. The second article is a miniature of Queen Victoria enamelled upon gold, and set with pearls and diamonds. The portrait, which appears to have been taken from a painting, represents the Queen as a very young woman and in coronation robes, and the pearls with which the miniature is set are of the yellowish tinge which apparently old pearls assume. Here again the suggestion is that the jewel was made about the time of, and to commemorate, the coronation of the late Queen. The third article is a brooch containing an enamelled picture of the Duke of Albemarle. On the back is a coat of arms and the date 1650. This article was intended to represent an old trinket commemorative of the elevation of General Monck to a dukedom, although the date (1650) is ten years before that event occurred.

"Mr Salvesen argued that this branch of the defenders' business was necessarily a dishonest one, as the very object of making such articles was to deceive. I should not like to go so far as that, although the dealing in such articles, if not conducted with great care, lends itself to dishonesty. If, however, such articles are sold by the maker without any representation being made in regard to them, the purchaser buys at his own risk, and he will not be entitled to rescind the contract on the ground that he made the purchase in the belief that the articles were in fact what their appearance, workmanship, and design suggested them to be. In order to succeed in this action, therefore, the pursuer must establish that she was induced to purchase the articles in question by false representations by the defenders.

"The Flora Macdonald ornament was the first of the articles which the pursuer purchased. She says that the defender Mr

Louis Landsberg brought it, among other articles, to her shop on 15th December 1902, and her evidence as to what passed is as follows:—‘He told me that this necklace had been given by one of the Stuarts to Flora Macdonald in recognition of her devotion to the cause of the Stuarts. He drew my attention to the Stuart crown upon it, and to the double heart and the silver knot. I believed it was old. He represented it as of great value. He asked £150 for it. . . . He said that I would see that the necklace was rather short, but at that time they were tied with black velvet to make them go round the neck. He said the velvet had been worn out, and recommended me to get a piece. I had a bit of green velvet, and put that on. I shewed it to Mr Landsberg, and he said it was out of taste, and ought to be black. I said it would do well enough, because it was old. But for what he said as regards this being a Stuart relic I would not have taken it at all, because it would not have been interesting.’

‘Mr Landsberg, on the other hand, says that he made no representation whatever in regard to the article, but that he simply displayed the various goods which he had brought for the pursuer’s inspection, and that she selected the one in question and purchased it. He admits that he afterwards pointed out that the necklet required a piece of velvet in order that it might be fastened round the neck, and he says that he very likely referred to the ornamentation—the crown and double knot—as being pretty and quaint. According to Mr Landsberg that was all that passed in regard to this ornament, with the exception of the arrangements which were made as to the payment of the price.’

‘It was argued for the pursuer that the mere fact of the price which Mr Landsberg asked for the article (£150) amounted to a representation that it possessed a value beyond its mere worth as a piece of jewellery. I think that the evidence shows without doubt that the price was extravagantly in excess of the value of the article, but in my judgment that of itself is not enough (although no doubt it is an element which may be taken into consideration), especially as the pursuer must be regarded as more or less of an expert in such things. Mr Landsberg, however, was not bound to tell the pursuer anything about the article, and he was entitled to ask any price he chose. If therefore, as he says, he made no representation whatever in regard to the article, and if the pursuer, relying on her own experience and skill, agreed to buy it for the price which was asked, then she has no remedy, although she has made a very bad bargain.’

‘If, therefore, there is nothing more in the case than the evidence to which I have referred, I should have thought that the pursuer could not succeed, because there would only be the pursuer’s evidence as to what passed on the one side and that of Mr Landsberg on the other. But there is something more. It is admitted that the miniature was intended to represent Flora Macdonald, and it is clear that the pursuer

knew that that was so when she bought the article. How did the pursuer get that knowledge? She gave the very natural explanation that Landsberg told her. His evidence, upon the other hand, is that he said not one word on the subject. Now, unless Landsberg told the pursuer that the picture was intended to represent Flora Macdonald I am at a loss to understand how she knew that that was the case. From anything that appears to the contrary in the evidence, the picture was merely a fancy portrait designed by the artist employed by Landsberg. If that was the case, of course the pursuer could not know who the picture was intended to represent unless Landsberg told her. If the miniature had been a copy of some well-known portrait the case would have been different, because the pursuer, who is an expert in pictures (whatever she may be in articles of jewellery) might have been supposed to recognise it. But nothing of that sort is suggested. Now, when it is clear that the pursuer knew exactly what the ornament was intended to represent, and when no way can be suggested in which she could have obtained that knowledge unless Landsberg told her, that appears to me to be strong corroboration of her evidence (which is in itself probable and credible) as to what the latter said, and to discredit his not very probable statement that he said nothing whatever in regard to the ornament except the casual remarks to which I have referred about the piece of velvet and the ornamentation. I do not say that Landsberg might not without dishonesty of which the law could take cognisance have given the information which the pursuer undoubtedly had without telling her the whole truth. For example, if he had said that the miniature was intended to be, or even supposed to be, a portrait of Flora Macdonald, I doubt if he could have been held to be guilty of misrepresentation. But Landsberg’s statement is that he said nothing at all upon the subject, and for the reasons which I have given I cannot accept that statement. It is true that the pursuer got no history of the ornament, but it cannot be doubted that she believed it to be old, and that she would not have bought it if she had known that it had been made by the defenders. She might have formed her own opinion without getting any information from Landsberg as to the antiquity of the ornament, but I cannot see how she could have divined that the miniature represented Flora Macdonald. It was that circumstance, however, which chiefly gave the ornament value beyond its intrinsic worth. The plain inference from the evidence, therefore, seems to me to be that Landsberg made representations to the pursuer which not only led her to believe that the ornament was in fact, as its style and appearance suggested, an ornament of the eighteenth century, but that the miniature was a portrait of Flora Macdonald, and that in consequence of these representations the pursuer purchased the ornament and advertised it for sale as a “Stuart relic.”

"In regard to the value of the ornament Landsberg declined to say anything, leaving that matter to his skilled witnesses. There is a considerable difference of opinion among the men of skill who were called as witnesses, but I do not think that it is necessary to examine their evidence in detail. I shall take Mr Brook of Messrs Brook & Sons, on the one side, and Mr Inches, of Messrs Hamilton & Inches, on the other, as these gentlemen have probably a wider experience than any of the other witnesses who were examined. In Mr Brook's opinion the Flora Macdonald pendant and necklet are worth from £40 to £45, while Mr Inches names £95 as a fair selling price. Even taking the latter figure, the price which Landsberg obtained from the pursuer was 50 per cent. in excess of the fair selling value, and it is to be remembered that Landsberg was in the position of a wholesale merchant selling to a retailer who purchased the article with the object of making a profit upon a re-sale. It therefore seems to me to be clear that the price could only have been justified if the ornament had been in fact, as it is in appearance and design, an ancient jewel which might very well have an historical interest.

"I am therefore of opinion that the pursuer is entitled to have the contract for the purchase of the Flora Macdonald pendant and necklet rescinded.

"The next article to which this case relates is the Queen Victoria medallion which the pursuer purchased from Landsberg on 26th March 1903. The pursuer's evidence in regard to the representations made by Landsberg about this article is as follows:—"He said this was a miniature of the Queen, enamelled on gold, and that it had been given by the late Queen on her coronation to a lady of rank, and he said, "I dare not give the name." I said, "I must know, because it would be the first question that would be asked." He repeated that he dare not give it. I said, "Well, that is natural, because, of course, the lady of rank would not wish it to be known that she was selling it." I believed his statement. I purchased the article upon that footing. I asked him where he got it, and he said he had got it from a London house, and that their price was £350. He pointed to a ticket attached to it, which showed £350. I was very much taken with this article, and I agreed to buy it for £250. Mr Landsberg said that he had kept it specially for me, and that I got it as an extreme favour, and it was a very fine thing."

"In this case, again, Landsberg said that he made no representation whatever, but that the pursuer selected the article from among those which he showed her, relying entirely upon her own judgment. He admitted, however, that he said to the pursuer, 'I can give no history at all;' or 'I know nothing about it; I cannot give you any history.'

"I think that either of these statements amounted to misrepresentation. The statement, 'I can give you no history at all,' meant either that he did not know the

history of the jewel (which was untrue, because he himself had designed it and had it made), or it meant that he knew the history of the jewel, but was not at liberty to disclose it to the pursuer, which was also untrue. I think that there is little doubt that the latter was the meaning which Landsberg intended to convey and did convey to the pursuer.

"The purchase was followed by a correspondence between the pursuer and Landsberg, which throws much light upon the matter. The pursuer found, what I think she might very well have thought of at the time, that it would be very difficult to sell the jewel unless she could give some information in regard to its history. Accordingly, upon the evening of the day upon which the purchase was made, she wrote to Landsberg saying that she had showed the miniature that afternoon to a gentleman who put rather trying questions, and that she wished 'to make sure the people you got it from got it all right.' She then continued—"I know the moment I show it I know I will be inundated with questions regarding it, and I should like to feel quite fearless over it. You can understand it is so near the present Royal Family that they will wonder at its being sold."

"Now, that letter was written by the pursuer when what had passed between her and Landsberg was fresh in her memory, and it shows that she understood, first, that Landsberg had got the jewel from someone (she says in her evidence that a 'London house' was mentioned), and secondly, that it had been sold in circumstances which might give offence to the Royal Family. Of course, even if Landsberg had said nothing, the pursuer might have, and probably would have assumed that he had acquired the article from someone else, and she might possibly also have assumed that the jewel was one in which the Royal Family might take an interest. But the combination of the two things in the letter, and especially the reference to the Royal Family, certainly suggest to my mind that the pursuer was referring to something which had passed between her and Landsberg. If the account which the pursuer gave of her interview with Landsberg is true, then the references in the letter are quite explained.

"Landsberg sent a very guarded answer to the pursuer's letter, simply saying that she need not be 'in the least nervous as to the Victoria miniature having come into our possession otherwise than in such a manner as will allow you to show it, and to sell it, to whom you think proper.'

"On the 2nd of April the pursuer again wrote to Landsberg saying that in order to sell the miniature she must have some history of it, to which Landsberg replied that the article was sold 'on the express understanding that we had neither history nor information to give you, and should not be asked for any.' That reply is quite consistent with the pursuer's evidence that Landsberg refused to give the details of the history of the jewel, or, as she put it in a subsequent letter, that there was no

‘distinct understanding’ about it.

“Upon the 3rd of April the pursuer again wrote to Landsberg what I regard as a very important letter. It was in these terms:—‘You need not be the least afraid to speak. Was it the Duchess of Roxburgh? because their family jewels were all sold about two years ago in Dowell’s.’

“Now, what was the meaning of the question, ‘Was it the Duchess of Roxburgh?’ That was a question which certainly suggests that something had been spoken which might have been done by the Duchess of Roxburgh. Unless that was the case the question is not intelligible. If, however, Landsberg had told the pursuer that the jewel had been sold by a lady of rank whose name he could not disclose the meaning of the question is clear. As there is no room for suggesting that the letter was not written in perfect good faith, it seems to me strongly to corroborate the pursuer’s evidence as to what passed when she purchased the miniature.

“The following day (4th April) the pursuer again wrote to Landsberg, and referring to the letter which I have just quoted she said—‘In my note I asked you if it once belonged to the Duchess of Roxburgh, as their family jewels were sold in Dowell’s a few years ago, and that lady was a great favourite with Queen Victoria.’

“That sentence shows that the pursuer believed that the jewel had been sold by a lady of rank, and I think that it also shows that she understood that it had been given to that lady by Queen Victoria, otherwise why did she refer to the Duchess of Roxburgh having been a favourite of that Sovereign. Of course that belief or understanding on the pursuer’s part is accounted for if Landsberg told her what she says he did, otherwise it is not very easy to understand how the idea was suggested to her.

“I am therefore of opinion that it is proved that the pursuer was induced to purchase the jewel by representations on Mr Landsberg’s part which were not in fact true.

“In regard to the value of the jewel Mr Brook says that if he got an order for a similar article his price would be £120. Upon the other hand Mr Inches is of opinion that a fair selling value is £170, frame and miniature together. It is evident that taking either of these estimates the pursuer would have had little prospect of selling the jewel for anything like the price which she paid for it, unless it had a value beyond its intrinsic worth by reason of historical associations.

“It was, however, contended for the defenders that even if the purchase of the jewel was induced by misrepresentation on Landsberg’s part, the pursuer cannot rescind the contract, because she subsequently entered into another contract whereby Landsberg repurchased the frame of the miniature from her.

“What happened was this—The pursuer had found that it was impossible to sell the miniature, and she had also been unable to sell either the Flora Macdonald ornament

or two other articles which she had purchased from Landsberg in July 1903 at the price of £150. The result was that by the end of the year 1903 she had not sold any of these articles, and she was consequently lying out of a large sum of money which she had paid to Landsberg therefor, which was causing her considerable inconvenience. Accordingly she went to London, taking the Queen Victoria miniature with her, for the purpose of asking Landsberg to exchange it for unset pearls which she intended to make up into necklaces. Landsberg had told the pursuer that if she was unable to dispose of any of the articles which he had sold to her he would be willing to exchange them for other articles upon condition that at the same time she took additional goods to a certain amount. The pursuer and Landsberg do not altogether agree as to what the latter said about exchanging the articles, but he admits that he was always willing to make an exchange upon conditions.

“The pursuer had an interview with Landsberg in London on the 2nd January 1904, and he agreed to take back the frame but not the miniature. The highest price which he would give for the frame was £150, which left the miniature upon the pursuer’s hands as value for £100. That was obviously an extravagant value to put upon the miniature. Landsberg says that he paid Mr Soper, the artist who painted the miniature, £56 for it. Only £6 of that sum was, however, paid in money, but Landsberg says that he also gave Soper a ruby ring worth £50 in settlement of the balance of the price. Landsberg may have given Soper a ring, but, except his word, there is no reliable evidence that he did so, much less that it was worth £50. There is no entry in the defenders’ books of or relating to such a ring, and Soper was not called as a witness, nor any expert to speak to the value of the miniature. My impression upon the evidence is that £10 would be full value for it.

“In regard to the frame, I think that looking to the expert evidence to which I have referred £150 was not an unreasonable price if the pursuer had got that sum or its value. But she did not do so. What Landsberg gave the pursuer in exchange for the frame was (1) a cheque for £15, (2) a picture composed of inlaid pieces of mother of pearl, and (3) 173 unset pearls. Landsberg valued the picture at £10. I do not believe that anyone would give that price for it, but I shall assume that that was its value. There remain the pearls, which were supposed to represent £125. Mr Brook says that the pearls are only worth about £31, but Mr Inches said that he might give £70 for them himself. Taking that figure, and estimating the picture at £10, the pursuer got in return for the frame £105 in money and money’s worth. Taking the miniature as worth £10, the pursuer has therefore lost £135 on the transaction.

“Landsberg said that he immediately resold the frame. If he did so, he was able at once to get it back without any cost to himself when the original sale to the pur-

suer was challenged. But I doubt whether anything of the sort occurred. The alleged purchaser was not a witness, and there is no entry in the defenders' books of any such transaction. Indeed, according to Landsberg, his firm's books are singularly blank in regard to everything relating to the matters in dispute. But whether there was anything in the nature of a re-sale or not Landsberg has possession of the frame now, and therefore if the original sale to the pursuer is set aside *restitutio in integrum* can be made.

"It is, however, a question of difficulty whether the pursuer is not barred by the second transaction from seeking rescission of the original sale of the article to her. If she knew when she effected the exchange that the article was not what Landsberg represented it to be, but was one which he had designed and made himself, I think that she would be barred, because that would mean that in full knowledge of the circumstances she had elected to make the best she could out of a bad bargain. But at that time I do not think that she had full knowledge of the circumstances. She knew that she could not sell the article to a profit because she could not give its history, and she had become satisfied that she had paid for it a great deal more than its intrinsic value. Further, she had become suspicious that the article was not in fact what it purported to be, because some of her customers had expressed doubts whether it was really old, but at that time she did not know that Landsberg had himself made the article, nor do I think that it had occurred to her that he had wilfully and knowingly made false representations in regard to it. If she had thought so she would never, I imagine, have agreed to retain the miniature as value for £100.

"In these circumstances I have come, although with hesitation, to be of opinion that the pursuer's demand to have the original contract rescinded is not barred by the subsequent transaction. It seems to me that the original misrepresentation ran into the second transaction, because that was also evidently conducted upon the footing that the article—frame and miniature together—had a value beyond its intrinsic worth. Of course if *restitutio* had been rendered impossible the position of matters would have been materially different, but, as I have said, that is not the case.

"There are other two articles which the pursuer purchased from Landsberg, and in regard to which she seeks rescission of the contract and return of the price. These are the miniature of the Duke of Albemarle, to which I have already referred, and an emerald brooch. The price of these two articles, which were purchased in July 1903, was £150—of which £65 appears to have represented the brooch and £85 the miniature.

"In regard to the emerald brooch it is clear that the pursuer has no case. It was not manufactured by the defenders but was an old jewel, and no representations were made in regard to it except that it was old, which was true.

"In regard to the Duke of Albemarle medallion, the pursuer's evidence as to what passed is not so precise as that which she gave in regard to the other miniatures. She said—'I understood that these two articles' (the brooch and the medallion) 'were antique. He said so—particularly the Albemarle. If I had known that they were just made up by the defenders themselves I would not have touched them. I remarked that the Albemarle was made in honour of the Duke because he put Charles the Second on the throne, and these badges were made in his honour. He said they were made in his honour because he was a great man, and I would find his arms and date on the back.'

"In cross-examination the pursuer said—'In regard to the Albemarle, he said it was one of the medallions made in honour of the Duke of Albemarle, because he was a very great man, and I said "Yes, he was one who helped to put Charles II on the throne."'

"Now, that evidence is not very precise. One would gather from the pursuer's evidence-in-chief that it was she who had first spoken of the person represented in the miniature being the Duke of Albemarle, which she might have done seeing that the miniature appears to have been taken from an old print, and the pursuer has wide knowledge of such matters and might have recognised the picture. In cross-examination, however, she put it as if Landsberg had first said that the miniature was a portrait of the Duke.

"Further, in this instance there is no corroboration of the pursuer's account of the interview. If, therefore, Landsberg had simply adhered to the general statement which he made in examination-in-chief, that he made no representation whatever, I think that it must have been held that the pursuer had not proved her case as regarded the article in question. But in cross-examination Landsberg made a very important admission. He explained that the miniature had been painted by Soper—to whom he paid £5 for it—and that the mounting was designed by his own jeweller, and then he said—'I told the pursuer that I knew nothing about it except that I thought it was the Duke of Albemarle.'

"That statement was plainly not true, and the question is, can it be regarded as a statement (or rather a misstatement) of fact, as distinguished from mere nondisclosure? I think that it can. Seeing that the article had been made to Landsberg's instructions; that it had been got up so as to have the appearance of an antique; and that it had a date upon it which suggested that it was more than three hundred years old, I think that for Landsberg to say that he knew nothing about it except that he thought it was the Duke of Albemarle, amounted to a positive representation that, for anything that he knew to the contrary, the article was what its appearance and design suggested it to be.

"I am therefore of opinion that in this instance Landsberg is upon his own evidence

convicted of misrepresentation. I am also of opinion that the misrepresentation was material, because there can be no doubt that the pursuer purchased the article in the belief that it was in fact an antique, nor, I may add, can there be any doubt that Landsberg knew that she did so; and I have no hesitation in accepting the pursuer's statement that if she had known that it had been made up by Landsberg himself she would not have looked at it.

"In regard to the price (£85) which the pursuer gave for this article, it is proved to have been greatly in excess of its intrinsic value, because, taking the same two skilled witnesses as before, Mr Brook valued it at £25, and Mr Inches at from £50 to £60.

"There is one matter however relating to the remedy which the pursuer seeks, to which I think that I ought to advert, although it was not brought under my notice by counsel. As I have said, the emerald brooch and the Albemarle medallion were sold together for £150. To the extent of £100, however, the price was not paid either in money or in bills, but Landsberg took back from the pursuer, as value for £100, a gold box which he had previously sold to her for £105. As I have said, however, the defenders' counsel did not found upon that fact, nor was any of the evidence directed to it. I assume, therefore, that it is not disputed that the gold box was full value for £100 of the price, and that the case is in the same position as if the £150 had been paid in cash or bills. The point may, however, be of importance if the pursuer presses for interest, a question upon which, in any view, I should require to hear counsel.

"Upon the whole matter, I am of opinion that the pursuer is entitled to have the sale of the articles referred to, except the emerald brooch, set aside, and to have repayment of the price in exchange for the articles."

The defenders reclaimed, and argued—The parties being at arm's length, and there being ample opportunity of inspection, the doctrine of *caveat emptor* applied; mere silence on the part of the seller was not enough to entitle the purchaser to rescind the contracts—Benjamin on Sale, 4th ed. p. 404; *Ward v. Hobbs*, 1878, 4 App. Cas. 13, Lord O'Hagan at p. 26. Passive acquiescence of the seller in the self-deception of the buyer did not entitle the latter to rescind the contract—*Smith v. Hughes*, 1871, 6 Q.B. 597, Lord Cockburn at p. 603; *Peck v. Guernev*, 1873, L.R. 6 H.L. 377, Lord Cairns at p. 603; *Keats v. Earl of Cadogan*, 1851, 10 C.B. 591. However much the defender may have realised that the pursuer contracted under a mistaken belief, this did not afford a ground for rescinding the sales, unless her misunderstanding was induced by him—Benjamin on Sale, 4th ed. p. 432.

The respondents argued—The transactions could not stand, because they were induced by the misrepresentations of the defender—*Lee v. Jones*, 1864, 17 C.B., N.S. 482. The mere fact that the defender sold

at a fancy price modern objects made to his order to look like antiques in itself constituted misrepresentation sufficient to rescind the sales.

At advising—

LORD KINCAIRNEY—I have found this action confused, intricate, and difficult, but after consideration I have come to concur in the judgment of the Lord Ordinary.

The pursuer carries on business in George Street, Edinburgh, as a bookseller and print-seller and dealer in curios and engravings, and the defenders design themselves as diamond merchants in London. The action relates to purchases from the defenders by the pursuer, made of course with the view of re-sale at a profit in the course of her business. The articles purchased purported to be (1) a necklace with a miniature of Flora Macdonald, (2) a medallion of Queen Victoria in coronation robes, (3) a brooch with a miniature of the Duke of Albemarle (General Monk), bearing the date 1650, and (4) an emerald brooch, the question about which has been decided by the Lord Ordinary for the defenders, and is not brought up by this reclaiming-note. The questions debated have related therefore to the three articles first named—the Flora Macdonald necklace and miniature, the medallion of the Queen, and the Albemarle brooch. These were purchased on 15th December 1902, 3rd March 1903, and 3rd July 1903 at the prices of £150, £250, and £150. This last sum of £150 includes the price of the emerald brooch, which is not within the reclaiming-note, and the parties seem to be agreed that £85 of that sum shall be held as paid for the Albemarle brooch. These prices have been paid by the pursuer, except £50, being part of the price of the medallion of the Queen.

By this action the pursuer seeks repayment of the sums so paid by her. The action is in a somewhat unusual form, but is in substance a reduction of the sales.

The three articles to which the action now relates are of the same general character. They are all ornamental and artistic, set with gold enamel and various gems, chiefly diamonds and pearls, and each forms a single piece of bijouterie or object of vertu. It is averred, and I think it is proved, notwithstanding considerable differences in the evidence of the skilled witnesses, that the prices charged by the defenders and paid are exorbitant—a point to which I need not return; but it is not said that the jewels and gold with which they were ornamented are false, although it is said they are of poor quality and small value; still it is not said that they are essentially different, except in one important particular, from what they purported to be, and apart from that particular it is not suggested that there is any ground on which the sales can be set aside. That particular is that whereas they were sold as antiques apparently of value on account of their antiquity and associations, they are not really antiques or relics or rarities at all, but are modern fabrications, and have really no associations—perhaps not wholly with-

out value as deceptive objects of art, but of no value as relics or antiques.

The first articles of the record are vague and general, and it is not until the sixth condescendence that the pursuer distinctly avers that the articles sold "are modern productions, made up goods and of inferior quality, that the respective prices obtained by the defenders from her therefor were unconscionable, and out of all proportion to their true value. Of this the defenders were, at the time of the respective transactions aforesaid, well aware, while the pursuer was in ignorance thereof." The essence of the case seems to lie in this ill framed averment, which I take to mean that the defenders, when they sold the articles, knew that they were "modern productions, made up goods." The word "fraud" or "fraudulent" is not in the condescendence, although I think that falsehood with the knowledge that what was said was false is averred, and that, I take it, amounts to an averment of fraud.

The defences are equally unsatisfactory. They consist mainly of denials that the defenders made any averment about the articles, or gave any warranty. And although they were the sellers of the articles, and though Louis Landsberg brought them personally to the pursuer, the defenders assert that they said nothing to her about them, but merely exhibited them, leaving her to form her own judgment; and although there is no admission that they were represented to be antiques, the answers suggest that they might be so for anything the defenders knew to the contrary. Now, that was the nature of the record on which parties went to proof, and it is startling to find it now admitted that the defenders not only knew all about the articles sold, but made them themselves or had them made for them.

I find it impossible to avoid the conviction that the defenders intended to mislead and did mislead the pursuer.

It may be true, however, that the case cannot, or at least need not, be decided against the defenders on the ground of their silence and non-disclosure only; nor on the ground of the apparent antiquity of the articles; nor because the pursuer believed them to be old; nor even that the defenders were aware that the pursuer was under that belief and did not undeceive her; because the defenders' contention in law that when a seller gives no warranty the buyer must protect himself must be conceded. But when a seller knows that a buyer is purchasing under a false impression, he certainly must take care not to go a step beyond what the law does not prevent. But the Lord Ordinary has not proceeded on mere misapprehension, but on active, direct, aggressive falsehood, which he finds proved against the defenders, and which forms the ground of his judgment.

The question therefore seems to be this question of fact, depending on conflicting evidence, whether, in any of the three cases or in all of them, the transactions were induced by the active and positive misrepresentation of the defenders.

The first of the sales in date is that of the Flora Macdonald necklace and miniature. Was that transaction induced by the false statements of the defenders? The Lord Ordinary has decided that question against the defenders, and I agree, although not without hesitation. On this point, as throughout the action, the defenders give no assistance. They assert that they said nothing whatever, and merely stand on the ground that they gave no warranty and made no representation.

The question therefore is, whether the defenders passed the limits sanctioned or overlooked by the law, and made some false averment of a material character which persuaded the pursuer to purchase this article? The pursuer depones that Mr Landsberg, when he called at her shop with the necklace and pendant, stated that "the necklace had been given by one of the Stuarts to Flora Macdonald in recognition of her devotion to the cause of the Stuarts." The pursuer's case is that she believed that statement, and in that belief, and because of it, bought the necklace and miniature. There seems no doubt that that was the pursuer's understanding, but how that understanding was reached is not explained. Mr Landsberg has no suggestion to make about the portrait from which the miniature was taken, but it may be readily believed that the pursuer would recognise the portrait. It is, however, next to impossible to suppose that having got this miniature painted by Mr Soper, the defender said nothing at all about it to the pursuer, whether he intended to tell the truth or to deceive, but merely laid it before her, leaving her to name the miniature for herself.

On the whole, I am not prepared to dissent from the Lord Ordinary's conclusion that Landsberg falsely represented to the pursuer that the portrait, necklace, and pendant formed a genuine Stuart relic, and induced her to buy it on account of that belief.

The second article is the medallion of the Queen. It represents the Queen in coronation robes, but it was not of the date of the coronation, but was made up by the defenders and the portrait was painted by Soper on the defender's employment. Here again the proof of representation is incomplete and unsatisfactory. Landsberg says he made no representation of any kind.

The pursuer depones that Landsberg asserted that it had been presented by the Queen on her coronation to a lady of rank, which, if said, was of course false. It does not appear that he named the lady, but it is difficult to understand how he could possibly have avoided some statement, true or false, about the portrait. The Lord Ordinary finds his positive falsehood in the assertion that he, Landsberg, knew nothing about the medallion and could give no history of it. That was positively false, seeing that he knew everything about its history from beginning to end.

The pursuer advertised this medallion in the *Connoisseur*, and she does not state in the advertisement that it represented the

Queen at her coronation, which was what Landsberg, according to her, had told her. But she advertises it to the public as the work of Chalons, a miniature painter of the period, which seems to have been a gratuitous invention of her own, and which leads one to receive her evidence with considerable doubt. I believe, however, that Landsberg did represent that it was a work of the time of the coronation, and deceived the pursuer by that falsehood.

Some difficulty, however, is occasioned as to this part of the case by a second transaction between Landsberg and the pursuer about this medallion which took place at, or about 2nd January 1904, at which date I do not think she was fully aware of the defender's deception. But I consider that the arrangement then made was afterwards cancelled. The Lord Ordinary has dealt with this point fully, and I do not think I can usefully add to what he has said.

The only other point remaining regards the Duke of Albemarle's miniature.

Here also there is a narrow question whether the defenders' representations went so far as to entitle the pursuer to rescind the sale. The question resembles that raised about the medallion of the Queen. The miniature was made by Soper by the directions of the defenders. General Monk seems a somewhat singular person about whom to practice such a deception, and one would hardly have expected his name to raise a very large price. The defenders were no doubt very reserved, but Mr Landsberg did assert that he knew nothing about the miniature, which was the same untruth as that about the medallion of the Queen. Perhaps the erroneous date on the miniature may be noticed, as well as the other mistakes mentioned in his evidence. These, however, are not of importance now that the manufacture of the article has been admitted.

I think it proved that in these three transactions the defenders practised a system of deception, against which possibly the pursuer might have been unable to find a remedy had not the defenders gone the length of positive misrepresentation.

LORD KYLLACHY—In this case I have since the hearing carefully read the proof, and the result is I have come generally to the same conclusion as that which has just been expressed.

I confess to having some doubt as to whether the defender's representations were in all respects so explicit as might be inferred from the pursuer's evidence. I think it quite possible that the defender at all events believed that he had sufficiently guarded himself against what he calls guarantees (or, as he probably means, representations) as to the character and history of these articles. But on full consideration I have been unable to conclude otherwise than that in one way or another he (the defender) knowing the contrary conveyed to the pursuer that the Flora Macdonald and the General Monk jewels were what are commonly called "antiques," and that

if the Queen Victoria miniature was not an antique, it was at least a contemporary portrait having a history. That is the Lord Ordinary's view, who saw the witnesses and took the proof, and I am unable to say that he had not sufficient grounds for that conclusion. It is probably true that with respect to the Flora Macdonald jewel the Lord Ordinary's reasoning partly proceeded upon a misapprehension as to the source of the pursuer's knowledge that the portrait was one of Flora Macdonald. The parties were agreed that that was so. But it does not seem to me that that is a matter which at all affects the substance of his Lordship's judgment.

It is not perhaps necessary to say more. But I may add that I am personally disposed to think that the case might be decided upon a ground which does not involve a solution of the conflict of testimony between the pursuer and the defender, and which would apply even if there were no adequate reason for preferring the testimony of the one to that of the other.

I must say I incline to hold upon the proof, and indeed upon the pursuer's own evidence, (1) that the appearance of age and other appearances presented by these articles constituted by themselves misrepresentations—in short, that the case is really one of *res ipsa loquitur*; (2) that this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest; and (3) that the defender not only failed to do this, but by the use of equivocal language and assumption of airs of mystery and otherwise endorsed and helped to encourage the inferences which the appearance of the articles suggested. I refer in particular to such things as (1) the attachment of the £350 ticket to the Victoria miniature, as to which the defender can give no explanation, (2) the statement as to the same miniature that he knew nothing about it and could give no history, (3) the similar statement as to the Albemarle jewel, and (4) the conversation of a similar import as to the ribbon required (as shown in old pictures) to be used in wearing the Flora Macdonald necklace.

It appears to me that it is difficult to say that the defender has discharged the onus which in these circumstances rests upon him, and I am disposed to think that in this view alone the pursuer is entitled to judgment.

LORD JUSTICE-CLERK—My view is the same as has been expressed by your Lordships, and I have nothing to add.

The Court adhered.

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