Brown v. Cuthill, &c.

Verdict—For the pursuer two and a-half per cent. of sale commission, and one and a-half per cent. *del credere* commission.

Jeffrey, *Rutherford*, and *Napier*, for the Pursuer.
Forsyth, *Cockburn*, and *Sandford*, for the Defenders.
(Agents, *Walker*, *Richardson*, *&* *Melville*, w. s. and *Daniel Fisher*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828. March 28.

Brown v. Cuthill, &c.

Finding that a law-agent having wrongfully misrepresented the security to be given by his client, was personally liable for money lent.

An action against law-agents to recover L.1700 lent to their client, on the ground that they misrepresented the nature of the security granted.

Defence.—The defenders gave the description of the property which they got from their client, and did not act corruptly. There is no evidence that the pursuer was deceived, or that he has sustained, or will sustain, any loss.

ISSUES.

"It being admitted that on the 27th day

"of January 1826, the pursuer advanced the "sum of L. 1700 in loan to Hamilton William Garden, merchant in Glasgow, for "whom the defenders represented themselves "as agents, on the security of certain houses "in the said city.

"It being also admitted that the said sum "has not been repaid, and that the said Hamilton William Garden has left the country "insolvent.

"Whether the defenders, or either of them, "wrongfully misrepresented the nature or value "of the property upon the security of which "the said money was advanced, to the loss and "damage of the pursuer?"

Cockburn opened the case, and stated the facts, and said, This was a fraudulent misrepresentation, as it was stated that the security was certain shops and dwelling-houses rented at so much, whereas the buildings were only erecting at the time; and the defenders must have known the fact. The claim is not for damages, but restitution of an admitted sum, and the question is wrongful misrepresentation.

A notorial protest not admitted in evidence.

A protest taken by one of the defenders was tendered in evidence and objected to.

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Lord Chief Commissioner.—The protest is no evidence of the facts stated in it, which must be proved by testimony upon oath; but a witness may refresh his memory by the protest. But in this case the notary is in a peculiar situation, as he is also the agent in borrowing the money.

Incompetent to prove that a witness believed that the defenders knew a fact.

A witness was asked whether he believed that the defenders knew the state in which the houses were.

Lord Chief Commissioner.—You cannot ask his belief.

Jeffrey, for the defender.—This is an anxious and unequal case, as it is an action against an agent, not by his employer, but by the opposite party, against whom it is his duty to defend his client. The pursuer must come against his own agent if there is any neglect. It is only for direct fraud that the defenders could be liable, and even in that case the Court looks with suspicion at the claim. In the present instance, the defenders had no interest in the loan; and at the time it was made their client was believed a man of great wealth. The rent must refer to the rents for which the houses would let at the next term.

Cleghorn *v.* Riddell, June 20, 1826. Taylor *v.* Richards, &c. 4th June 1824. 2 Sh. App. Ca. 251.

Lord Chief Commissioner.—In this case I shall state to you the question on which your verdict is to be returned, and the prominent part of the evidence on which the case rests; and in doing so I shall not incur any risk of infringing the principle laid down at the Bar. The action is brought to recover a sum of money lent to another through the defenders; and there is no doubt that in the first instance, for negligence the agent of the party would be liable; and that it is only the wrongful and deceitful conduct of the defenders which can render them liable. The question in the issue is wrongful misrepresentation. (His Lordship then went through the evidence, and said,) There is pregnant evidence going far to establish the ground of the action; and if there is deceitful and wrongful conduct made out, then the pursuer is not bound merely to claim the difference between the value of the houses and the sum lent, but is entitled to claim the whole, as there was a want of good faith. The motive or purpose of the defenders does not appear; but it is sufficient if the transaction is tainted with deceit.

I have some doubt whether the evidence brought this home to Cuthill, or only to his partner Turnbull; but when I find it a com-

Bailey & Co. *v.* Paterson.

pany transaction, and all the entries made in the company books, I am not prepared to say that a verdict should not go against both ; and if you find for the pursuer, then this will annul the transaction.

Verdict—For the pursuer.

Moncreiff, *D. F. Cockburn*, and *Cuninghame*, for the Pursuer.
Jeffrey, *Skene*, and *Macallan*, for the Defenders.
(Agents, *Wm. Douglas*, w. s. and *Jas. Adam*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1828.
March 20.

Bailey & Co. *v.* Paterson.

A person ordering and using goods without objection is liable for the price, though he proves them insufficient.

An action to recover payment of an account.

Defence.—The articles furnished were not according to order—were of inferior quality, and quite unfit for the purpose for which they were ordered, and when used caused damage to the defender. The charge for packages is inadmissible.

ISSUES.

" Whether the pursuers sold and delivered