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HOUSE OF LORDS.

Thursday, May 16.

(Before the Lord Chancellor (Loreburn), Lord Macnaghten, Lord Atkinson, and Lord Shaw.)

BOYD & FORREST *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

(In the Court of Session, November 10, 1910, 48 S.L.R. 157 and 1911 S.C. 33.)

Contract — Fraud — Legal Fraud — False Representation Inducing Contract—Contract to Construct Railway — Non-Disclosure of Material Circumstances as to Nature of Work.

A railway company entered into a written contract with a firm of contractors for the construction of a railway for a lump sum. The specification attached to the contract and forming its basis stated that bores had been put down at various parts of the line, and that a copy of the journal of these bores might be seen at the engineer's office, but that the company did not guarantee their accuracy, and would not hold themselves liable for any claim on account of any inaccuracy in the journal. According to the specification, only three descriptions of material were to be excavated, viz., solid rock, broken or loose rock, and soft. In the course of the work the contractors found that much of the material classified as "soft" contained rock, and it turned out that the bores had not been made by professional borers, but by employees of the railway who had been engaged in similar work before, and that the journal of bores had not been prepared by them but was compiled in the engineer's office from letters written by them. It appeared further that it did not accurately record the contents of these letters, but was the engineer's interpretation of the information these letters purported to convey, and that in particular a substance reported in three instances as "black ban" or "hard black ban," and in five instances as "rock," was changed into "black blaes" and classified as "soft." In a petitory action at the instance of the contractors against the railway company for the amount of their loss under the contract, *held* (*rev.* judgment of the Second Division) that the contract had not been induced by the fraud of the defenders in respect that the engineer honestly believed that the journal of bores correctly set forth the substance found, and corrected a misdescription of the borers as to the nature of that substance.

The case is reported *ante ut supra.*

The Glasgow and South-Western Railway Company appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—In this case the appellants entered into a contract in writing with the respondents, dated 18th September 1900, for the construction of a certain portion of the appellants' railway, called the Dalry and North Junction, about 12 miles in length, and for widening of their line between the Dalry and Swinlees Junctions, for a lump sum of £243,690. There were several cuttings to be excavated and embankments to be made in order to form this first-mentioned line. One cutting was called the Kilbirnie Cutting and another the Whirlhill Cutting.

The specification attached to the contract executed by the parties and forming its basis contains the following paragraphs amongst others:—

"*Cuttings and Embankments.*

"Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journals of these bores may be seen at the engineer's office, but the company does not in any way guarantee their accuracy or that they will be a guide to the nature of the surrounding strata. Contractors must therefore satisfy themselves as to the nature of the strata, as the company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.

"The formation level in both cuttings and embankments shall be 1 foot 9 inches below mean rail level.

"Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these although the material may turn out to be different from what is calculated and given in the detailed schedule.

"On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock. Where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith. All the material in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such.

"The slopes of all cuttings (except where

through solid rock not subject to slip or decay from exposure to the weather) shall be at the rate of 1½ horizontal to 1 vertical, and where through solid rock at the rate of a ½ horizontal to 1 vertical."

There was a detailed schedule attached to this specification, an important part of which is as follows:—

"*Cuttings.*

"Between Peg 1 and Peg 5, on up line side, soft.
,, ,, 1 ,, ,, 5, do., broken or loose rock.
,, ,, 6 ,, ,, 13, do., soft.
,, ,, 13 ,, ,, 15, do. do.
,, ,, 45 ,, ,, 67, soft.
,, ,, 45 ,, ,, 67, solid rock.
,, ,, 67 ,, ,, 87, soft.
,, ,, 67 ,, ,, 87, broken or loose rock,"

and so on, with a note at the top to the following effect:—

"Note. — *The particular attention of intending contractors is directed to the specification in regard to the following matters:—*

"The probability of slips in cuttings and embankments and sites of embankments.

"The probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material turn out to be different from what is calculated and given in the schedule."

Boring had been carried on before the contract was entered into by persons named Cowan, father and sons, and the journals mentioned in these paragraphs of the specification referred to the daily records of those operations supplied or supposed to have been supplied to the appellants. In point of fact no journals properly so called of these borings were regularly kept; but letters were written to one Mr Melville or his assistant by these borers, and of these a compilation was made in the office of the engineers of the company from the information received, purporting to record correctly the result of the work. A copy of this document, the so-called journal of bores, the contractors were permitted to peruse and examine before they entered into this contract. It is only necessary to deal with the items contained in it in which the words "black blaes" occur. They run as follows:—

	Ft.	In.
"Bore No. 7. At Peg 54 + 184 ft.:—		
Blue clay and stones	13	0
Hard black blaes	11	0
	24	0
"Bore No. 8. At Peg 56 + 230 ft.:—		
Clay	16	0
Black blaes	8	0
Freestone	1	0
	25	0
"Bore No. 8*a*. Near Peg 58:—		
Blue clay	14	0
Black blaes	5	5
	19	5
"Bore No. 9. At Peg 59 + 260 ft.:—		
Clay	12	0
Black blaes	8	0
	20	0"

Bores 53, 54, and 55 were dealt with in a similar manner.

Now it is alleged in this action that the plaintiffs were induced to enter into this contract by the fraud of one William G. Melville, the company's engineer-in-chief, a man of position and experience. The charge resolved itself in argument into this, that Melville had put into this compilation of the reports of the borers certain statements which he knew to be false, or statements false in fact which he recklessly inserted as being true not knowing whether they were true or false; that these statements were intended by him to deceive and did deceive the plaintiffs, who acted upon them. No more serious charge could well be made, and no motive which will bear examination was suggested why Melville should be guilty of it. It was not disputed that these statements if fraudulently made were intended to deceive the respondents, and did in fact deceive them. The only question, however, for your Lordships' decision in the present appeal is this—Has this charge of fraud been proved by the respondents—on whom the burden of proving it by reliable evidence most unquestionably lay—or has it not?

It is the more necessary for me to insist upon this point, inasmuch as it appears to me that questions have been rather mixed up together in the courts in Scotland which ought to have been kept entirely separate. It may well be that under the contract entered into Melville owed a duty to the contractors to prepare this journal of bores with reasonable skill, care, and accuracy, or that a term was by implication introduced into the contract to the effect that the company should appoint or had appointed to do the work of boring skilled persons fully competent for that work, or again that the documents submitted to the contractors for perusal should reasonably answer the description of a journal of bores, or further that the company actually warranted that this compilation was correct, or the borers highly skilled, and that an action or several actions against the company for the breach of one or all of these warranties or contractual obligations would, on the evidence given at this trial, have been sustained; but in my view these matters, so far as they are not proof of Melville's fraud, are wholly irrelevant to the only issue decided upon by the Second Division of the Court of Session from which this appeal has been taken. I accordingly have not formed, and do not express, any opinion upon any of these matters.

According to the specification only three descriptions of material were to be excavated, namely, solid rock, broken or loose rock, and soft.

Everything which might be met with was treated as falling within this classification. Whatever was not solid rock or broken or loose rock, was, for the purpose of the contract, to be treated as soft, whatever might be found in the results to be its consistency or composition.

Now in the borings at bore holes Nos 7,

8, 8*a*, and 9, which between them extended over a considerable distance, as well as at those numbered 53, 54, and 55, a substance was stated in the journal of bores to have been found which was described as "black blaes" or "hard black blaes," not as rock, whether solid, broken, or loose. Blaes is another name for shale.

There was a considerable depth of it represented to have been found at No 7, 11 feet of it in thickness, at No 8, 8 feet, at No 8*a* 8 feet 5 inches, and at No 9, 8 feet respectively. And at Nos 53, 54, and 55 considerable quantities also.

Now the fraud alleged to have been committed by Melville narrows itself, as I understand it, into this, that this substance which he styled "black blaes" was reported to him at first in three instances as "black ban" or "hard black ban," and in the case of five test bores subsequently made, as *rock*, and that he either deliberately misdescribed it in this compilation in terms which would imply that it was not rock, but soft within the meaning of the contract, or, knowing nothing about the actual composition or consistency of the substance found, he recklessly stated it was black blaes, not knowing whether it was so or not. It is conceded that this compilation, purporting to record the information received from the borers, was made by Melville before tenders were asked for, and therefore before he could have known who might be the contractors. The fraud, if designed at all, must have been designed to entrap and deceive whoever might be the future contractor. The evidence mainly relied upon in support of this charge consists of letters which passed between the borers and Melville or his assistant Mr Macpherson, between the middle of October 1898 and the 8th of November following. It is admitted they formed an important portion of the material on which Melville's compilation was made. The letter of the 18th of October 1898 refers to bore No. 7. In it the borers state—"A bore has been put down to the depth of 24 feet (the full distance it was to go down) at about 15 feet from the peg, Dalry side. For the first 13 feet it was blue clay and stones, and after that a hard black substance called 'black ban,' but I do not know if this is the proper name for it." On the same day the borers wrote as to bore 8. "The bore at peg 8 has been put down to the depth of 25 feet, the first 16 feet through clay and remainder 'black band,' except the last foot, which is freestone." And on the same day they write as to bore No. 9—"the bore at peg No. 9 has been put down the full depth of 20 feet through clay for 12 feet and 8 feet of 'black band.'" Now after the receipt of these three letters Mr Macpherson, on the 19th, by Mr Melville's directions, wrote to the borers a letter containing the following passage—"I should like you to send me a sample of the substance called 'black ban,' so that I may see what it is like. You will probably get it again in the bore the men are now at, and a sample from it would do." On the following day, the 20th October, the borers wrote to Mr Macpherson—"Yours of 19th inst., I have to-night sent you a small parcel containing a sample of the substance designated 'black ban.' The most of it has been churned into the consistency of clay through the working of the chisels in the hole, but there are some chips amongst it which will give you an idea of what kind of stuff it is." Mr Macpherson received this sample, and he, in consultation with Mr Melville, determined to put down additional bores to test the matter further. Mr Macpherson accordingly wrote on the 21st of October to John Cowan, the borer, thus—"Dear Sir,—I have received your letter of 20th inst., and also the sample of the material 'black ban' from the bores. I will visit the borers this afternoon and point out to them the position of other two bores that I wish them to put down." The sites of these two new bores subsequently fixed by Macpherson were in the neighbourhood of No. 9. They were accordingly put down, and on the 3rd of November the borer wrote to Mr Melville—"We have put down other two bores at above peg" (*i.e.*, peg 9), "one 5 yards and the other 15 yards from the peg. The first-named sunk 13 feet, rock being struck at depth of 11 feet, and the latter sunk 14 feet, rock being struck at 13 feet down." On the 4th of November the borer again wrote as to bore 9—"Another bore has been put down 13 yards on the Glasgow side of peg No. 9 to the depth of 17 feet. Hard substance was struck at depth of 12 feet, and what appears to be rock was struck at depth of 16 feet." A fourth test bore was for greater certainty put down at bore peg No. 7, and in reference to it the borer, on the 8th of November 1898, writes to Mr Melville—"The above bore has been sunk to the depth of about 26½ feet through about 15 feet of clay and remainder whinstone rock. This completes the bores which were pointed out to be done, and the borers are withdrawn to-night." Now Mr Melville deposed that he, in company with his assistant Mr Macpherson, carefully considered the reports of the borers touching all these borings; that they thought the word "whinstone" in the last letter was a clerical error of the clerk, the writer, as they were of opinion, which the result proved to be correct, that there was no whinstone rock there. He further deposed that they had before them the records of all the other bores from Nos. 7 to 12; that they considered these individually and collectively; that they examined the sample sent to them of "black ban;" that they studied the lie and configuration of the ground; that they knew the time which the borers had spent at the test bore near No. 7, and judged that it would be impossible for them to have sunk through 11 feet of whinstone rock in that time, and that after careful consideration of all these materials they came honestly, and to the best of their skill and judgment, to the conclusion that the "black ban" or "hard black ban" and "rock" respectively reported to have been found in these borings was "black blaes," not rock at all

within the meaning of the contract, but a substance which should be treated as soft, and that they made the compilation on that basis. Mr Macpherson, by Mr Melville's directions, recorded their decision on the point in the note now appearing on the borers' letters 1st to 3rd and 8th and 9th November 1898 respectively. On the former group the note ran thus—"What is called rock in this letter must have been black blaes; see former letter 18/10/98,"—and on the latter thus—"Keep to first report of this bore, as the rock referred to must be black blaes of 14/10/98."

It may be that Mr Melville and his assistant came too hastily to a conclusion, and that they ought to have had further test borings made, that they ought to have called in at this stage a scientific borer who could give precise and reliable information as to the nature and consistency of the substances he might meet with in his operations. That may all be so, though I think it is not so; but that is not the point. The point is this—Are Melville and Macpherson swearing falsely when they state on oath, as they have stated, that they considered carefully in detail and collectively the several matters they have mentioned, and on the data before them honestly and to the best of their skill and knowledge came to the conclusion that the substance designated "black ban" and "rock" by the borers was in fact "black blaes"? If they have sworn truly, there is, in my view, an end of the appellants' case on this point.

The information which boring reveals must always rest more or less upon opinion not upon demonstration. No contractor could expect that the reports of the borers should, even in a case of doubt, be verified in works such as these, by excavating at the site of the bore down from the surface to the proposed formation level of the line. It may be that the wiser and the more prudent thing for Mr Melville to have done in the circumstances would have been to have recorded the information he received from the borers precisely as he had received it, and then have appended a note of his own to the effect that in his opinion the borer was in error, that "black ban" was "black blaes" or "shale," and that the rock reported to have been found in the test bores at or near bore pegs 7 and 9 was in his opinion also "black blaes." Again, it may well be that the data upon which Mr Melville proceeded to form a judgment were to some degree insufficient even in the case of one of his skill and experience, but if he honestly thought they were sufficient, and after full consideration honestly came to the conclusion that the borer was mistaken in his description of the substances he had found, and that the description which he (Melville) inserted in the document was the true description, and further, inserted that description with the object of giving what was, in his opinion, true information, deliberate lying is, in my view, not only out of the case, but every element which renders recklessness in statement equivalent to lying is absent from it as well. The well-known passage from Lord Herschell's judgment in *Derry* v. *Peak* (14 A.C. p. 374) was cited by Lord Ardwall. It runs thus—"First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved where it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly careless whether it be true or false.

"Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

If there be any truth in the evidence of Messrs Melville and Macpherson's carelessness of whether the description of these substances was true or false," the absence of an honest belief "that their description was a true and accurate description," and the making of a statement as true of that which was, in fact, false "without knowing whether it was true or false" are all negatived.

Much was sought to be made of the fact that Mr Melville did not employ professional borers as it was contended he should have done. It may be, as I have already said, that there was an implied term in the contract that none but professional borers, or at all events competent borers, had been employed, and that the Cowans were in fact not competent borers, though he thought them to be so. They certainly were not professional borers, but I can discover no evidence whatever to lead legitimately to the conclusion to which Lord Ardwall states he has come, namely, that the appellants, which in this matter mean Melville and his assistants, knew the Cowans were not competent to do this kind of boring, and did not rely upon them as being competent.

The passage in his judgment runs thus—"In the next place, it is clear that the defenders' engineer did not rely on them. If he had done so he would not have altered their reports when he came to make up what he called the journal of bores, or treated the statements in their letters with the absolute disregard which he did.

"On this part of the case I think it is clearly proved that the persons who took the bores were not competent to do so, and in the next place, that the defenders knew they were not competent to do so, and did not rely on them as being competent, and yet in that state of matters they refer to a journal of bores as if it had been taken

by competent men in whom they had confidence, and had been written up by them day by day from their personal observation. All this, in my opinion, constituted fraud."

Before referring to the evidence of Mr Melville as to his belief in the competency of the Cowans, it is well to point out that what the contractor is interested in, in cases such as this, is the accuracy and reliability of the information afforded by the journal of bores rather than the professional qualifications of the borers. If the information be accurate and reliable, that is what concerns him most. For instance, if an action were brought for breach of warrant or deceit for employing non-professional or even incompetent borers, and yet the information as recorded was accurate, then nothing beyond nominal damage could be recovered, because no damage beyond that would have been sustained. Now Melville's evidence as to the Cowans is this. He states that in January 1898 he instructed his resident engineer to arrange with William Cowan, now dead, to put down bores on the line; that he showed Macpherson where to put them down; that his instructions were to go down below the surface level to the depth of the formation level of the railway line unless they met rock; to work into the rock when they found it for one foot and then to stop; that this was in accordance with the practice he had invariably followed in making bores for railways, namely, to probe the clay or soft material until the borer got to the rock; that this man had not great experience any further than putting down bores such as these; that he was not a qualified mineral borer; that he had carried out any boring of this description he (Melville) wanted done; that he relied upon the accounts he got from William Cowan; that he had regularly dealt with Cowan as an honest and reliable borer, and that he had never any fault to find with his bores; that he (Cowan) was in the habit of making bores for parliamentary purposes and bores for probings; and that he never had occasion at any time to doubt his (Cowan's) honesty, competency, or capacity. As to John Cowan, he (Melville) says that John Cowan succeeded his father as superintendent of the permanent way; that he had been in the service of the railway company for a good number of years before his father's death. He states that Brown, a professional borer, made mistakes on the two occasions upon which he had employed him; that all borers occasionally make misleading bores; that Cowan had only done what is called surface boring, *i.e.*, probing to get the rock; that that was all his experience.

Mr Macpherson states that William and his son John made the bores for them in 1896; that the son William Cowan jun. was the leading hand; that the two sons who had thus worked with their father put down fifteen bores after their father's death; and that Brown, a professional borer, who was also employed, put down forty-seven bores. I altogether fail to find in this statement any evidence to the effect that Mr Melville knew the Cowans, father and sons, were not competent borers for this kind of work, or that he did not rely upon the statement in their letters, or that he treated those letters with absolute disregard.

The fact that he, to the best of his skill and judgment, correctly described the substance he honestly thought the borers had misdescribed is the only foundation I can find for Lord Ardwall's statement that he (Melville) treated the statements in the borers' letters "with absolute disregard." In my opinion it is with all respect a wholly insufficient foundation for the purpose.

The peculiarity of this case, moreover, is this, that Melville was, as proved by the result, right to a great degree in the conclusion to which he came. The stuff excavated at bore holes from 7 to 9 inclusive was to a considerable extent black blaes—some of it hard, no doubt, possibly as hard as rock, but the stratification at that portion of the line was proved to be "troubled," as it was styled, and strata of rock ran through the masses of blaes. Robert Forrest, speaking of the blaes excavated at bore 7, says—"Some of the blaes may be soft, some hard, but at No. 7 bore, where it was represented that there were 13 feet of clay and 11 feet of blaes, there were bands of rock and bands of clay-band ironstone through the blaes." And Mr Melville says at this time (July 1902)—"Mr Forrest told me that he was being pressed financially and that the bank were troubling him. It would have been a serious matter for the company if the work had been stopped. I found there were posts of rock mixed with the blaes which had been shown in the bores."

"I told Mr Forrest at this time that the only thing I could recommend to assist him was, that seeing so many posts of rock had turned out of this blaes which were not shown in the bores, I would recommend consideration of paying him the rock price for the blaes. I spoke to Mr Cooper and recommended him to do this, and he told me to do it." A new line was accordingly drawn on the plans indicating the upper surface of the blaes, and as the result Forrest was paid at rock prices, 4s. 6d. per cubic yard for the 60,656 yards of blaes which he excavated (over £14,000). Mr Melville insists that this was a concession which, according to the strict terms of the contract, his company were in no way bound to make; that in contracts for railway construction such as this, blaes or shale, owing to its friable nature and tendency to split, disintegrate, and slip when exposed to the weather, is not treated as rock "solid, broken, or loose," but that it comes properly under the description of the only other kind of substance contemplated by this contract, namely, "soft"; that in such matters the test is not so much the consistency of the substance itself as the batter at which the slopes of the cuttings can be allowed to stand; and that shale slopes, no matter how hard the consistency of

the shale, cannot be allowed to stand at the batter of "solid rock, not liable to slip or decay from exposure to the weather" as provided in the specification. He further states that from the so-called journal of bores, plans, and sections it was plain to any contractor that this was contemplated under the terms of contract. Four expert engineers presumably, from the description given of them, persons of position and standing in their profession, who examined the completed cuttings on the line, were examined at the trial. They supported Mr Melville in every one of these propositions. The general result of their evidence as I read it is this, that blaes, whether hard or soft or with layers or strata of rock interspersed or stones imbedded in it, is properly treated as "soft"; that any contractor of experience who examined the plans, sections, and so-called journal of bores must have seen that it was so treated in this case, and that as far as they can now judge from an examination of cuttings, the record of the bores (they ran along the middle line of the cutting) was extremely accurate. One of these gentlemen, Mr Chas. Pullar Hogg, stated that some engineers allow rock prices for excavating blaes if it requires to be blasted, but that this is quite exceptional. They all agree that this blaes, though interspersed with rock, could be dug out with a steam navvy of proper strength and power, the more easily too, one of them thought, from the fact of its being traversed by strata of rock, as that renders the mass more friable. They concur with Melville in thinking that the slopes of some of the cuttings through the blaes have been left at too steep a batter; and one of them, Mr Hall Blyth, on cross-examination, on being asked this question in reference to bores 7 and 9, "Don't you think that if the engineer had taken the borers' reports as they were given to him and had not put a construction upon them, the schedule would have been different as regards its quantities and as regards the conclusions of what was true hard and soft?" answered "No. I think the bores show with absolute accuracy the nature of the strata in the cuttings." And on re-examination he stated—"Mr Melville got his report of black ban on the 14th of October, and he asked for and got a sample on the 20th of October. That is what I would have done. Assuming there was black ban in two bores, a sample from either of them would have been quite sufficient to enable me to determine what it was and I would act upon that. When he came to the rock in November, by that time he had several bores before him and was able to judge of the general nature of the line. Being the engineer for the railway there I agree that he must have personal knowledge that I as an outsider could not have." All these gentlemen were cross-examined at length, but their evidence was unshaken.

As a matter of fact Cowan had proved that the substance, a sample of which was sent, was the same as that first found. More of the so-called posts of rock were no doubt found in this blaes formation than was anticipated, but the error may possibly be accounted for without imputing fraud to the engineer or incompetence to the borer in this way, namely, that in the earlier boring black blaes was struck, and in the test bores, the sites of which were some distance from the other, some of these posts of rock were struck. That may be the true explanation. I cannot but think, moreover, that Mr Melville has been most unfairly treated in respect of two other matters—first, instead of giving him credit for the two considerations which he says induced him to pay for the excavation of this blaes as if it were rock, namely, (1) that he wished to save his company from the inconvenience of having their work stopped, and (2) his desire to come to the aid of the respondents in their financial difficulties due to the extra expense they had to incur, the suggestion was made that his advice to his company to abandon their strict rights and treat the respondents generously was due to the qualms of a guilty conscience. And second, in endeavouring to twist some answers he gave in part of his cross-examination in which the word "guess" was used by counsel into an admission of recklessness in his preparation of the so-called journal of bores. The following questions were put to him in these words—"What was the true justification in your mind for assuming that it was black blaes of the same kind as you had reported to you under the name of 'black ban' on the 18th of October 1898? *Answer*—I took it to be the same material. *Question*—Was it just a guess? *Answer*—There is a good deal of guessing in all boring. *Question*—Don't you think with such doubts as these that it would have been only right to have got these bores confirmed by efficient people? *Answer*—As the bores have turned out they have come out correct. *Question*—Don't you think it would have been right with such results to have got his bores properly confirmed or corrected by competent people? *Answer*—No; I considered that I had people quite competent to do boring such as this." It is quite obvious that the forming of a conclusion on the results afforded by boring must in the very nature of things involve a certain element of conjecture, that until the excavation is actually carried out there cannot be absolute certainty, and that this was all Melville meant to say.

The respondents were both examined, and the result of their evidence is this. They say that out of 62 bores altogether 22 were wrong. They give the description of what was found at bore 7. There were, they say, bands of ironstone, bands of freestone, and blaes. At No. 8 Robert Forrest states the information given to him was 16 feet of clay, 8 feet of black blaes, and 15 feet of freestone. This latter is wholly wrong; it was only one foot of freestone, and what they found was 13 ft. 6 ins. of clay and 25 ft. 6 ins. of hard rock which required to be blasted. At 8*a* the journal gave 14 ft. of blue clay

and 5 ft. 5 in. black blaes, 19 ft. 5 ins. in all. He said he found 25 ft. 5 ins. of rock with blaes in between the rock but no continuous blaes.

And at No. 9 the information he got was 12 feet of clay and 8 feet of black blaes, but what he found was 8 feet of clay and 12 feet of rock. These are the bores about which there is such controversy. The respondents deal with the remainder of the 22 similarly, but it is clear, from the evidence, that they consider that nothing which requires to be blasted or which cannot be taken out with a steam navvy should be treated as soft. That is their test; it is not, however, the test provided by the contract. The rest of the evidence given on behalf of the respondents has, I think, no material bearing on Melville's alleged fraud.

Lord Johnston, the Lord Justice-Clerk, and Lord Dundas, appear to acquit Mr Melville of intentional deceit or fraud. The first named of these learned Judges states his view "that the compilation of the journal of the bores was false in fact and made with a recklessness which amounts to fraud. The absence of intentional dishonesty being supplied by the presence of a reckless disregard of the interests of the opposite contracting party where these interests must have been or must be held to have been known to be materially affected by the act in question."

The Lord Justice-Clerk, at p. 615, states the conclusion to which he has come in these words—"I come to the conclusion, on this part of the case, that the defenders acted with culpable recklessness; that they deceived the pursuers into accepting as properly obtained data from bores, data obtained from persons known to them to be incompetent, and that they further deceived the pursuers by putting before them as facts representations as to bores which they did not receive from the borers, presenting their own inferences of what they thought the borers should have said in describing strata." ... . "I agree with the Lord Ordinary in not imputing direct *mala fides* to Mr Melville. But most unfortunately he did what he had no right to do—ordered to be written down as being the facts ascertained by the borer something essentially different from what the borer reported. I have no doubt that he thought he was "drawing a sound inference," but he must have known that he was putting forward his inference and passing it off as ascertained fact stated by the borer, which it was not. I cannot acquit him of legal fraud in doing so." Well, if Melville thought he was drawing a sound inference, it is difficult to see how he was guilty of recklessly asserting as true that of which he did not know whether it was true or false, but that is the very essence of what the learned Judge means to designate as legal fraud.

I am not quite sure whether Lord Ardwall was of opinion that Mr Melville was guilty of deliberate fraud or not. From the following passage in his judgment it would appear to me somewhat doubtful. He expresses himself thus — "I am of opinion that a false and fraudulent representation was made to the pursuers, inasmuch as it was represented to them that the schedule of quantities, the plans, and the sections were founded on a genuine and honest journal of bores, whereas they were not. That this representation was knowingly made does not admit of a moment's doubt. I have already examined the evidence on the point, and need not go into it again. Mr Melville's own evidence, which I have already referred to, is sufficient to show that he knew perfectly well that the so-called journal of bores was not a genuine journal of bores in any sense of the term, and that it was not made by responsible or competent borers. It goes without saying that the false representations were made without belief in their truth."

With the greatest respect for each of those learned Judges, I find myself wholly unable to take their view of the result of the evidence. To my mind it appears clear that Mr Melville honestly thought he was stating in the journal of bores the information in fact conveyed to him by the borers, and that the change he made in the entry was made for the very purpose of correcting what he honestly believed to be their misdescription of the substance actually found, so that the journal should set forth the absolute truth. For the reason I have already given, I think that, so far from not knowing or caring whether the statements contained in the journal were true or false, he was anxious to state the truth, and took such means as he honestly considered sufficient for the very purpose of ascertaining what the truth was so that he might set it forth with accuracy.

It would be a strange way of showing good faith to state the information he received as if he believed it to be true when he in fact thought the borers were in error, and yet abstain from correcting their error. I do not think that Mr Melville acted recklessly in any reasonable sense of the word, and am therefore of opinion that the respondents failed to prove that he was guilty of fraud of any kind towards them. Accordingly I think their case fails upon this point, and that this appeal should be allowed with costs.

LORD MACNAGHTEN — I have had the advantage of reading in print the opinion which has just been delivered, and I entirely agree.

LORD SHAW—I agree with the opinion just delivered by my noble and learned friend Lord Atkinson. The only point argued at your Lordships' Bar was whether Mr Melville, engineer of the Glasgow and South-Western Railway Company, was guilty of fraud inducing this contract. My noble and learned friend has explained the circumstances. In agreeing with him I only desire to add this. The Lord Ordinary says that he acquits Mr Melville of intentional fraud. But he adds—"I cannot acquit him of such recklessness as *aequiparatur dolo*." The learned Judge also

speaks of Mr Melville's "attempts to throw over his subordinates," of "not being very successful in his explanations," of "the very specious persuasion of Mr Melville," and, in short, language is used in the judgment which by any man with a regard for his own reputation as an engineer or character as a man must be regarded as most serious. I content myself with saying that not one of these expressions appears to me to have been justified by the testimony or the conduct of Mr Melville. Of the charge of fraud preferred against him by the pursuers it is not for me to pronounce whether it was unscrupulously made; it is sufficient that it is unfounded in fact. I think that the attempt to bring Mr Melville's conduct into the same range as to be equal to fraud also fails; that the plea of fraud is as entirely devoid of legal as it is of ethical warrant.

LORD CHANCELLOR—I agree. The question is one of fraud which imports dishonesty, and that has not been established.

I concur also with my noble and learned friend Lord Atkinson in not expressing any opinion upon other matters that may or may not be open for litigation and decision between the parties.

Their Lordships allowed the appeal.

Counsel for the Pursuers (Respondents)—Clyde, K.C.—MacRobert. Agents—MacRobert, Son, & Hutcheson, Glasgow—Pringle & Clay, W.S., Edinburgh—Balfour, Allan, & North, London.

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COURT OF SESSION.

Friday, May 17.

FIRST DIVISION.

(SINGLE BILLS.)

HAY (SHARP'S TRUSTEE) *v.* PATERSON & COMPANY, LIMITED.

Process—Reclaiming Note—Competency—Failure to Print Amendments—The Court of Session Act 1825 (*Judicature Act*) (6 *Geo. IV, c.* 120), *sec.* 18—*A.S.*, 11*th July* 1828, *sec.* 77.

The Judicature Act 1825, sec. 18, enacts that a party reclaiming against an interlocutor "shall along with his note . . . put into the boxes printed copies of the record authenticated" by the Lord Ordinary.

The Act of Sederunt, 11th July 1828, sec. 77, provides that reclaiming notes "shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed. . . ."

In an action by the trustee on a sequestrated estate for reduction of an alleged illegal transaction and for repayment of a sum of money to the trust estate, the summons contained certain declaratory conclusions leading up to a petitory conclusion. On 7th March, the last day of the proof, the Lord Ordinary allowed the pursuer to amend the record by adding to the summons certain alternative conclusions and by making certain additions to the condescendence. The case was afterwards taken to *avizandum* and judgment pronounced in vacation. It was admitted that the alternative conclusions were of no practical utility in the event which happened of the pursuer obtaining a petitory decree. The defenders having reclaimed, the pursuer objected to the competency of the reclaiming note on the ground that the record appended thereto did not contain his (the pursuer's) amendments.

The Court *repelled* the objection, *holding* that in the circumstances the omission to print was excusable.

David Allan Hay, C.A., Glasgow, trustee on the sequestrated estate of Mrs Flora Graham Ritchie or Sharp, sole trustee of her deceased husband William Sharp, wine and spirit merchant, Glasgow, *pursuer*, brought an action against J. Y. Paterson & Company, Limited, brewers, Edinburgh, and others, *defenders*, for (*first*) reduction of a certain transaction whereby Mrs Sharp sold and transferred the licensed business, the only asset of the trust estate, to her son David Sharp for the sum of £2438 odd, that sum being provided by the defenders in return for bills granted by David Sharp, and (*second*) for repayment of the said sum which had been handed over by her to the defenders in discharge of their claims.

The defenders pleaded, *inter alia*—"(4) The transaction complained of having been entered into by the defenders in *bona fide*, and in the ordinary course of business, they should be assoilzied."

A proof was led.

On 7th March 1912, the last day of the proof, the Lord Ordinary (CULLEN) opened up the record and allowed the pursuer to amend by adding to the summons certain alternative conclusions and by making certain additions to the condescendence.

Thereafter on 25th April 1912 his Lordship granted decree for repayment of the price, and found it unnecessary to dispose of the remaining conclusions of the summons. In a note his Lordship stated—". . . The pursuer has a series of declaratory conclusions by way of an avenue to his petitory conclusions. It was conceded that they are of no practical utility if the pursuer obtains a petitory decree. Following the views which I have expressed, I shall grant decree against the defenders respectively for the sums paid to them by Mrs Sharp out of the price of the business which she received from her son; and on this footing I think it unnecessary to deal with the other conclusions."

The defenders reclaimed, but in boxing