

Friday, May 18.

FIRST DIVISION.

LAING V. NIXON.

Reparation — Sale — Fraudulent Representation —
Averments in an action of damages for fraudulent representation, which held irrelevant.

This was an action concluding for £10,000 of damages at the instance of John Laing, manufacturer in Hawick, against William Nixon residing there, the sole surviving partner of the firm of John Nixon & Sons, lamb's-wool and hosiery yarn spinners at Lynnwood, near Hawick.

The pursuer was in the habit of purchasing yarns from the defender's firm from 1850 to 1864 inclusive. These purchases amounted in money to a sum of £28,602, 18s. 7d. In regard to them he averred—

Cond. 3. According to the usage and custom of the hosiery-yarn spinning trade, the said firm of John Nixon & Sons were in the habit, from time to time, of preparing and of issuing and of publishing printed price lists to their customers and the public, in order to show the price or rate per pound at which they sold their yarn. These price lists were prepared and issued and published, as aforesaid, annually, in or about the month of July, and at various other periods during the year, and they were regularly sent by the said firm by post to all their customers, including the pursuer, and were also put up in a conspicuous part of their counting-house, to show their customers and the public their selling prices of the day.

Cond. 4. It is the usage and custom of the hosiery-yarn spinning trade for persons in said trade to adhere to and act upon their respective price lists in all their transactions, and the defender frequently stated and represented to the pursuer, and other customers, that he conformed to this usage and custom of the trade. Moreover, the defender stated and represented to the pursuer and others that the sums entered in his said price lists were the real, true, and actual prices at which the said firm sold their yarns to all their customers, and to the public; and the defender stated to the pursuer, and led him to believe, that he never deviated from or sold hosiery-yarns to any of his customers under the sums mentioned in his printed price lists.

Cond. 5. The pursuer, relying upon the truth and accuracy of the defender's foresaid price lists, and believing the foresaid statements and representations made by the defender in reference to them to be true, and further believing that the defender carried on his business as he ought to have done, and as he represented to the pursuer and others that he did, in a fair and regular manner, according to the usage and custom of trade, as aforesaid, was, in consequence thereof, induced to become a customer of the defender, and to make the various purchases before mentioned, and to pay the prices thereof, at the rates stated in the defender's printed price lists for the time, and to continue trading with him during the period before mentioned, to his loss, injury, and damage, as after stated.

Cond. 6. The said price lists, prepared and issued and published by the defender to the pursuer, and his other customers, and the public, as aforesaid, were false and fraudulent price lists, having been prepared and issued and published by the defender, as showing the genuine and

true prices at which he was selling his goods, while he well knew them to be, and concealed from the pursuer that they were false, and calculated to mislead and deceive the pursuer and others. Moreover, the statements and representations which the defender made to the pursuer and others, as aforesaid, in regard to his price lists, and the way in which he adhered to and acted upon them in the conduct of his business, were also false and fraudulent, and were at the time known to the defender to be so, and were made by the defender for his own pecuniary advantage, and with the purpose and intention of misleading and deceiving the pursuer, and inducing him to believe that the defender never sold hosiery yarns under his published price lists, or traded in any way irregular or different from the ordinary usage and custom of the trade. Further the said false and fraudulent statements and representations were made by the defender to the pursuer for the purpose of inducing him to trade with him, and to make the foresaid purchases, and to pay the prices thereof, at the rates stated in his printed price lists for the time, which the pursuer would not have done had he known the truth as to the way in which the defender carried on his trade, and had he not been misled and deceived by the said price lists and the defender's false and fraudulent representations and concealment, both in regard to them and the manner in which he carried on his trade.

Cond. 7. In all his dealings with the defender, the pursuer was invariably charged and paid according to the price lists of the day; and the defender's firm never sold hosiery-yarns to the pursuer under the sums stated in their printed price lists.

The pursuer further averred, that while he was doing business with the defender, and purchasing yarn from him at the prices contained in his lists, the defender was in the practice of granting abatements or deductions to his other customers, who undersold him in the market and compelled him to curtail, and ultimately to abandon a large and lucrative business.

The pursuer proposed the following issue, viz. :—

"It being admitted that the pursuer John Laing, manufacturer of lambswool hosiery in Hawick, was, from 1850 to 1864, a customer of the firm of John Nixon & Sons, lambswool and hosiery-yarn spinners at Lynnwood, near Hawick, and that the defender William Dixon was during the years before mentioned, and is now, the sole surviving partner of that firm; and it being farther admitted that the defender's firm was in the habit, from time to time, during the years before mentioned, of preparing and of issuing to their customers, including the pursuer, and of publishing price lists, and of putting up the same in the counting-house of the said firm :—

"Whether, between 1850 and 1864, the pursuer was induced to purchase yarns from the defender at the prices specified in certain price lists issued by him from time to time, and by him communicated to the pursuer, by false and fraudulent representations by the defender to the pursuer, to the effect that the prices specified in said price lists were the fixed prices charged to all customers, to the loss, injury, and damage of the pursuer?"

Damages laid at £10,000.

The LORD ORDINARY (Barcaple) reported this issue with the following :—

"*Note.*—The defender objects entirely to the issue proposed by the pursuer, and he further maintains

that there are not relevant averments on record, out of which an issue can be extracted. It is perhaps convenient in the present case that the question of relevancy should be discussed upon consideration of the issue, as disclosing the pursuer's view of his case.

"The case as put in the issue is, that the pursuer was induced to purchase yarns from the defender, at the prices in the price lists, by false and fraudulent representations that these were the fixed prices charged to all customers, to the loss, injury, and damage of the pursuer. It is only put inferentially, if at all, that these prices were not adhered to. But if the issue is otherwise suitable it may be amended in this respect. The more important questions are, Whether the alleged wrong is a relevant ground of action? and whether it is the ground of action libelled?

"It is not said that the prices at which the pursuer bought the yarns were too high. There does not seem to be any such averment in the record; and the pursuer's counsel, at the discussion, distinctly intimated that that is no part of his case. It follows that a verdict for the pursuer on the issue would not import that the purchases were in themselves unfavourable or injurious to him; and yet the wrong for which damage is sought consists in inducing him to make these purchases. The mere circumstance that the means by which this was accomplished was a false and fraudulent representation cannot give rise to a claim of reparation if the purchases so brought about were not hurtful to the pursuer. A false and fraudulent representation which induces the person to whom it is made to enter into a hurtful contract, either with the party making it or with a third party, constitutes a case of *injuria cum damno*, and gives rise to an action for damages. But if the contract is not hurtful, there is no damage done, and therefore there can be no ground for an action for reparation. While the wrong for which damages are asked consists, as it does in the present issue, in fraudulently inducing the pursuer to make the purchases, it does not appear that the defect can be cured by putting in issue the additional element that the defender sold at lower prices to third parties by way of specification of that in which the falsehood of the alleged representations consisted. The Lord Ordinary therefore thinks that the ground of action as put in the proposed issue is not relevant.

"He also thinks that it is different from the ground of action set forth on record. The pursuer, no doubt, states that the representations in question were made, and were false and fraudulent; and that he was thereby induced to purchase yarns from the defender. But he does not say it was out of these purchases that the damage arose. For anything stated on record, or suggested at the discussion, the purchases, which were in the regular line of the pursuer's trade, may have been for perfectly fair prices, and quite as favourable as he could have got in the market. If the matter had stopped there, the ground of the pursuer's complaint would not have existed. What he really does complain of is, that the defender gave abatements to other customers, and that in consequence of these abatements the parties who got them were enabled to undersell him in the market, in consequence of which he was obliged to abandon a lucrative business. This part of the pursuer's case is set forth in articles 8, 9, and 10 of the condescence; and the Lord Ordinary cannot read it otherwise than as being put upon the abatements given to other customers, as being of the essence of the ground of action. It is not

alleged that, except for these abatements, any loss whatever would have been caused to the pursuer. The Lord Ordinary thinks that the only case which is thus put on record does not warrant the issue which the pursuer proposes to take.

"The Lord Ordinary having heard a general argument on the relevancy, entertains doubts whether there is a relevant case for an issue of a different kind. The pursuer is not here seeking to set aside contracts into which he has been wrongfully induced to enter, nor asking damages for breach of any warranty or other undertaking by the defender. This is an action of reparation as for a wrong—*injuria cum damno*—consisting essentially, if not solely, in the abatements of price given by the defender to other customers. Without that element there is admittedly no damage. It is unnecessary in the present case to consider whether the alleged representations amount to a warranty or undertaking by the defender that the prices in his lists should not be departed from, and the alleged abatements to a breach of that warranty. The pursuer has advisedly abstained from putting his case on that ground; and has laid his action on deceit, and not on breach of contract. As the Lord Ordinary understands the pursuer's case, it is rested upon the whole facts combined—especially the false representations as inducing the purchases, and the abatements to other customers as enabling them to undersell the pursuer—as constituting together, on some ground of law, a wrong for which he is entitled to reparation. If the Lord Ordinary is right in the views which he has already explained, the former of these is not a wrong entitling to reparation; and he does not think that the giving of abatements can be so either on any other footing than as a breach of contract, which is not within the present case. It is not apparent that if each of these two elements of the case is ineffectual in itself, they can, by being combined, become a good ground of action. Indeed, as the pursuer puts his case, there is another element essential to it, consisting in the fact that the customers who got the abatements were thereby enabled to undersell, and did actually undersell, the pursuer. If these parties had preferred to realise larger profits rather than sell at lower prices than the pursuer, he would have suffered no loss from the abatements given to them. The circumstance that the damage is thus consequential appears to the Lord Ordinary to be a consideration of difficulty in sustaining the relevancy of the case. Apart from that difficulty, the pursuer may possibly be able to produce an issue which shall so combine the various matters of averment on record as to disclose a relevant ground of action. At present the Lord Ordinary is not satisfied that this can be done consistently with the way in which the action is laid, and especially with the admission by the pursuer that he does not complain of the prices at which he purchased.

"The defender objects to the want of specification in the record as to the date of the alleged false representations, and the times and quantities of the purchases. The averments are certainly very general, and the Lord Ordinary thinks the want of any specification as to when the representations were made to the pursuer is a serious defect. The statement has reference to transactions extending over many years, while it is not said when the representations were made, or whether they were made on one occasion or frequently."

After a debate the pursuer proposed the following amended issue:—

"It being admitted that the pursuer was, from

1850 to 1864 a customer of the firm of John Nixon & Sons, lambswool and hosiery-yarn spinners at Lynnwood, near Hawick, and that the defender William Nixon was, during the years before mentioned, and is now, the sole surviving partner of that firm :

“Whether the defender’s firm, from time to time during the years before mentioned, prepared and issued to their customers, including the pursuer, price lists, and exhibited the same in the counting-house of the said firm? And whether, during the years 1855 to 1864 inclusive, the pursuer was induced to purchase yarns from the defender at the prices specified in said price lists, by false and fraudulent representations made by the defender to the pursuer, to the effect that the prices specified in said price lists were the fixed prices charged to all customers? And whether, between the years from 1855 to 1864 inclusive, or any of them, the defender granted abatements or deductions from, or sold yarns at less than the prices stated in the price lists of the day, under which purchases had been made by the pursuer, to Robert Walker, hosier, Leicester; Robert Scott & Sons, manufacturers, Dumfries; Milligan, Henderson, & Company, manufacturers, Dumfries; and Henry Wales, manufacturer, Leicester, or any of them; and in consequence thereof these parties, or any of them, were enabled to undersell, and did undersell in the market, the pursuer as a manufacturer of lambswool hosiery, to the loss, injury, and damage of the pursuer?”

Damages laid at £10,000.

The Court to-day unanimously dismissed the action, with expenses.

The LORD PRESIDENT—I don’t think there is a very good ground of action founded upon the deductions or abatements said to have been given to certain parties. It does not follow that because a person holds out prices in a price list he is not to sell subsequently at lower rates. He did not bind himself not to sell at lower rates. There was no such condition. I don’t understand what is meant in this case by fraudulent. It is not said that the sales to the other parties were fraudulent. There is altogether a want of substance in this claim of damages, and I think the action should be dismissed.

Lord CURRIE HILL—I had very great difficulty in discovering at the debate what the pursuer meant to represent as his ground of action. There are two categories under which the case might fall. It might be said that there had been a breach of contract—that the goods which the pursuer purchased were sold to him by the defender on a condition that he would not sell to another at a lower price. Again, it might be said that there had been fraudulent representations made by the defender as to his dealings with third parties. I asked at the debate under which of these categories the pursuer thought his case fell, but I could not get any answer. I see, however, from the issue now proposed that the case is put as one of fraudulent representation—that the sales by the defender to the pursuer were vitiated by false representations as to sales already made to other parties. The question, therefore, comes to be, Is there averred such a case of vitiation as to afford good ground for giving restitution? I don’t find any such case stated on record. Besides that, there is a total want of specification as to the purchases and sales. On both these grounds I think this action should be dismissed.

Lord DEAS—If the pursuer’s allegations had come up to this—that a contract had been made that the seller should never sell at lower prices to others than he did to the pursuer, and that that contract had been broken, I would not have doubted the relevancy of the action. But that is plainly not the ground of action. I don’t say that the pursuer may not be able to state a relevant case founded on fraudulent representation. It would require, however, to be very distinct and specific. This statement is vague throughout in regard to the representations made, their falsehood, and their consequences. It is not said that the purchaser sustained loss. On the contrary, he made a profit, but it is said he might have made a greater profit. That may not be quite clear. In short, the whole matter from beginning to end is too vague and indefinite in a case of the novelty of the present one.

Lord ARDMILLAN—This is a very peculiar case. It is an attempt, after the lapse of fifteen years from the commencement of the transactions, to open them all up on averments of fraud of a very singular character. It is not said the pursuer bought his goods at too high a price, or had to sell them at too low a one. No injury is set forth. The pursuer carried on a lucrative business, but he says he has been injured by reason of dealings betwixt the sellers to him and other parties. I think it quite possible that such a case might occur, and be stated, but it would require to be far more specific than anything we have here.

Counsel for Pursuer—The Solicitor-General, Mr Gordon, and Mr M’Kie. Agents—Messrs Webster & Sprott, S.S.C.

Counsel for Defender—Mr Clark and Mr Watson. Agents—Messrs Paterson & Romanes, W.S.

LONGWORTH *v.* HOPE AND COOKE.

(*Ante*, vol. i., p. 53.)

Motion for New Trial—A party not appearing to support a motion for a rule, the Court held the motion as passed from.

The trial of this case resulted in a verdict for the defenders. The pursuer, immediately after the verdict, gave notice of a motion for a rule on the defenders to show cause why a new trial should not be granted. This motion was in the roll to-day for hearing, but no one appeared for the pursuer.

SHAND, for the defenders, read a letter dated the 14th instant, which had been addressed to their agents by Mr James Somerville, S.S.C., in which he stated that he had ceased to act as agent for the pursuer.

CAMPBELL SMITH, who had formerly acted as counsel for the pursuer, was sent for, and he stated that he had ceased to act as the pursuer’s counsel on Saturday last. He also stated, in answer to the Lord President, that he believed the pursuer was aware that her motion was set down for to-day for hearing.

The Court, in these circumstances, held the notice of motion as passed from by the pursuer, recalled the sist of procedure which had been granted when the notice of motion was given, and remitted to the Lord Ordinary to apply the verdict of the jury.

Agents for Defenders—Morton, Whitehead, & Greig, W.S.

CAMPBELL’S TRUSTEES *v.* CAMPBELL’S EXECUTORS, *et e contra*.

Fraudulent Impetration—Essential Error—New Trial—In a reduction of an agreement on the