

bishop as the Bishop of Aberdeen. Aberdeen is the seat of the bishop. I am of opinion that the testator used the words Diocese of Aberdeen in that sense, and intended all the clergy of the United Diocese to have a share in the bequest. I am confirmed in this view by her letter of 12th September 1874, in which the testatrix uses the terms "Bishop of Aberdeen and Orkney" and "Bishop of Aberdeen" as synonymous.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court answered the question of law by declaring that the second, third, fourth, fifth, seventh, eighth, and ninth parties were those entitled under the bequest to participate in the annual income to be derived from the fund.

Counsel for the First Parties—J. A. Reid. Agents—Bruce, Kerr, & Burns, W.S.

Counsel for the Second Party—Spens. Agents—Henry & Scott, W.S.

Counsel for the Third Parties—Cook. Agents—Henry & Scott, W.S.

Counsel for the Fourth Parties—Blackburn. Agents—Robertson & Wood, W.S.

Counsel for the Fifth, Sixth, and Seventh Parties—J. A. Reid. Agents—Robertson & Wood, W.S.

Counsel for the Eighth and Ninth Parties—Pitman. Agents—J. & F. Anderson, W.S.

Thursday, December 13.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

JOHN G. STEIN & COMPANY

v. ROBEY & COMPANY, LIMITED.

Sale—Sale of Moveables—Warranty—Breach of Warranty in Extinction of Price—Innocent Misrepresentation—Right to Rescind—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), secs. 53 and 62.

Section 53 of the Sale of Goods Act 1893 enacts—"Where there is a breach of warranty by the seller . . . the buyer . . . may (a) set up against the seller the breach of warranty in diminution or extinction of the price." By section 62 it is provided—"As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material condition of the contract."

A brickmaker obtained from the agent of a firm of engineers a specification and estimate for an engine which they were prepared to supply. In the letter enclosing them the agent set forth a series of calculations based upon (1) the steam producing capacity of coal; (2) the power producing capacity of the engine to be supplied by his principals; (3) the power required to drive the brickmaker's brickmaking

machines; (4) the brickmaking capacity of these machines; and (5) the price of coal. The result arrived at was that with the brickmaker's boiler and brick-making machines and the engine to be supplied, 30,000 bricks would be produced with an expenditure of 22 cwt. of coal of a kind which could at that date be purchased at 4s. per ton. These calculations began with the statement "1½ lbs. of coal develop 15 lbs. of steam." Thereafter the brickmaker wrote to the engineers ordering an engine "subject to your guarantees of fuel consumption being fulfilled." On the engine being supplied, it appeared that although admittedly a good one it required three tons of coal of the kind above mentioned to make 30,000 bricks, the reason for the discrepancy being that the agent in his calculations had taken the amount of steam developed by the best Welsh coal instead of the amount developed by coal of the kind used by the brickmaker. In defence to an action for the price the brickmaker maintained that the sellers had warranted the coal consumption referred to in the letter, and, under the section quoted above, claimed to set up in extinction of the price the breach of the warranty founded on. *Held (aff. judgment of Lord Low, Ordinary)* that the letter of the agent did not contain any warranty as to coal consumption within the meaning of section 53 of the Sale of Goods Act as interpreted by section 62.

Opinion (per Lord M'Laren) that a statement in the letter of the sellers' agent with regard to the amount of steam required to develop 1 horse power with the engine to be supplied amounted to a warranty within the meaning of the Sale of Goods Act.

Opinion (per Lord M'Laren) that the statement as to coal consumption in the letter of the seller's agent amounted to a representation intended to induce a contract, which being untrue in fact would have entitled the purchaser, while matters were entire, to rescind the contract.

In 1898 John G. Stein & Company, fireclay manufacturers at Bonnybridge, entered into negotiations with Messrs Robey & Company, Limited, engineers, Lincoln, with a view to the purchase of a new engine for their works. These negotiations were mainly carried on with one Dunkerton, who was agent for Robey & Company in Glasgow.

On 1st October 1898 Dunkerton wrote to Stein & Company enclosing a specification and estimate for an engine which his firm were prepared to supply. This letter was in the following terms:—"Dear Sirs—We now have pleasure in enclosing herewith specification and estimate of our coupled compound condensing engine, class E, having cylinders 13½ in. and 21½ in. by 30 in. stroke, and, as an alternative, one of the same type, but having cylinders 15 in. and 23½ in. by 33 in. stroke—the former running at 100 revolutions per minute, the latter running at 90 revolutions per minute.

This type of engine has now stood the test of many years, and is, we have not the slightest hesitation in saying, the most economical and most efficient engine in the market at the present time. The smaller engine of the two will give 165 I.H.P. at its most economical working point, but is capable of developing 230 I.H.P. The larger one will give about 230 I.H.P. most economically, but is capable of working to 300 I.H.P., assuming the steam pressure to be 110/120 lbs. The consumption will be as follows— $1\frac{1}{2}$ lbs. of coal develop 15 lbs. of steam, 15 lbs. of steam develop 1 I.H.P. per hour, $1\frac{1}{2}$ lbs. of coal develop 1 I.H.P. per hour, 247 $\frac{1}{2}$ lbs. of coal develop 165 I.H.P. per hour, 2475 lbs. of coal develop 165 I.H.P. per 10 hours = 1 ton 2 cwt. 4 lbs. of coal develop 165 I.H.P. per 10 hours. One machine makes 10,000 bricks in 10 hours. Three machines make 30,000 bricks in 10 hours. One machine requiring 55 I.H.P., three machines require 165 I.H.P. Coal costing 4s. per ton. Cost of coal per 10,000 bricks 1s. 5 $\frac{3}{4}$ d. Cost of coal per 30,000 bricks, 4s. 4d. Present rate of working 10,000 bricks for 1 ton 16 cwt. = 7s. Which shows, by adopting the above engine, the saving will be 5s. 6d. per 10,000 bricks, or 30,000 bricks for about $\frac{2}{3}$ cost at present for 10,000. The foregoing calculations are based on the most economical working load of the smaller engine driving three sets of machines. If you intend to put down three new machines, making four in all, we should recommend the larger engine, which would prove proportionately economical. . . . On paying close attention to the figures given above, you will find that the difference in cost between this and an inferior type of engine will be made up in a very short time, and you will always have the satisfaction of possessing a thoroughly high-class motor."

On 7th October 1898 Dunkerton again wrote on behalf of Robey & Company, Limited, to Stein & Company. In this letter the following passage occurred—"We wish further to say that our calculations were based on a 40-H.P. nominal engine, but noticing you are thinking of adopting the 50 H.P. engine, it is only fair on our part to point out that with the increase of power the consumpt will also increase slightly, and instead of 15 lbs. of steam per I.H.P. it will be 17 lbs. Again, working at half-load will of course not be quite so economical, and the steam consumpt will then be approximately 22 lbs., so assuming you work at first with about $\frac{2}{3}$ -load, the consumpt will be about 19 lbs. This is easily accounted for, as in the 40-H.P. engine the parts are lighter than in the 50-H.P., and with the latter we intend to supply a flywheel 14 ft. dia. with eight $1\frac{1}{2}$ -in. ropes instead of, as before quoted, 13 ft. with seven ropes."

On 12th October Stein & Company wrote to Robey & Company ordering an engine of the larger kind, "subject to your guarantees of fuel consumption being fulfilled."

Robey & Company wrote offering to supply tests of the "steam consumption," but stating that such tests were expensive,

and in answer to this Stein & Company wrote in the following terms—"It is not necessary to send skilled men from Lincoln at considerable expense, as on 1st inst. you gave us the fuel per 10,000 bricks, and it will be easily ascertained without expense."

To this Robey & Company on 17th October replied as follows—"We are in receipt of your favour of the 15th inst. and note contents. We are not quite clear what is meant by the fuel for 10,000 bricks, but this probably refers to some conversation between you and our Mr Dunkerton. We have referred this matter to him."

On 18th October the defenders in reply to this letter wrote as follows—"Yours of yesterday. We note you have referred the matter to Mr Dunkerton, whose letter of 1st inst goes fully into the fuel consumption, and on which our decision was based."

No further correspondence passed on the subject of the fuel or the steam consumption of the engine, and it was made and delivered to the Messrs Stein at their Denny works.

Messrs Stein having refused to pay for the engine, Messrs Robey brought the present action, concluding for payment of £955, 7s. 7d., being the price thereof.

Stein & Company lodged defences, in which they set forth the letter of 1st October 1898 which is quoted *supra*. They averred that after the engine had been fairly tried the coal consumption was found to be about two and three-quarter times that of the pursuers' guarantee, on the faith of which they gave the order for the engine, and that in consequence of the pursuers' failure to fulfil their guarantee the defenders had suffered very serious loss, amounting to a sum not less than the sum sued for.

The defenders pleaded, *inter alia*--"(2) The pursuers having committed a breach of contract as condescended on, the defenders, having suffered loss and damage thereby, are entitled to set off that loss and damage against the pursuers' claim. (3) The pursuers having committed a breach of warranty as condescended on, the defenders are entitled to set up the same in extinction of the price of the engine sued for."

A proof was led, from which it appeared that Dunkerton in the letter of 1st October 1898 (quoted *supra*) had made a mistake in his calculations in assuming that one and a-half pounds of coal would develop fifteen pounds of steam. He stated in evidence that he had taken this part of his calculation from a text-book on steam, but had neglected to notice that it was there given on the assumption that the best Welsh coal was used. No coal which could in October 1898 be purchased at or near 4s. a ton would produce that amount of steam. It was also proved that the engine, though a perfectly good engine of its class, would not produce 30,000 bricks at the cost of 1 ton 2 cwt. 4 lb. as estimated by Dunkerton, but would require about 3 tons of the coal used by the defenders to do so.

Mr Stein, the chief partner in Stein & Company, deponed that he had no personal

knowledge of steam consumption, or the number of pounds of steam required to develop a certain amount of horse-power, and that he was induced to buy the machine by the expectation of saving coal induced by the statements contained in Dunkerton's letters.

On 8th March 1900 the Lord Ordinary (Low) decerned against the defenders in terms of the conclusions of the summons.

Opinion.—"In this action the pursuers sue for the price of a steam-engine which they supplied to the defenders for their brick manufactory at Bonnybridge.

"In defence the defenders aver that the pursuers guaranteed that the fuel required to drive the engine would not exceed a certain amount, and that in fact a much larger amount is required. The defenders accordingly claim damages to an amount which entirely extinguishes the price.

"The defenders found upon the 53rd section of the Sale of Goods Act, which provides that 'where there is a breach of warranty by the seller, the buyer may set up against the seller the breach of warranty in diminution or extinction of the price.'

"By the 62nd section of the Act it is provided that 'as regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.'

"Now, if it was part of the contract that the amount of fuel required to drive the engine should not exceed a specified quantity, I think that there is no doubt that that would be a material part of the contract. The first question therefore is, whether a condition as to the amount of fuel required was part of the contract.

"The negotiations with the defenders were conducted by Mr Dunkerton, the pursuers' agent in Glasgow. After a considerable amount of correspondence, to which I need not refer, Dunkerton, on 1st October 1898, wrote a letter to the defenders enclosing a specification and estimate which had been prepared by the pursuers for two engines of the same type, the one somewhat larger than the other. That letter is quoted at length in article 3 of the defenders' statement, and upon it their case chiefly depends.

"The pursuers, however, also found upon a letter which Dunkerton wrote to them on 7th June 1898, in which he said—"You appear to have been working your plant at great expense and also loss of power, which in event of having the pleasure of booking your order we guarantee to show you in a practical manner by reduction of coal bill and more work done."

"The defenders' reason for founding upon that letter is, I suppose, that the letter of 1st October does not in terms bear to be a guarantee, and accordingly they argued that the letter of 1st October contained the guarantee which was promised in the letter of 7th June. I do not think that there was any connection whatever between the two letters, and I do not regard the letter of 7th June as containing a guarantee in the proper sense of the term, or as a promise to give a guarantee. It

was merely a representation that the pursuers' engine would consume less fuel and do more work than the engine which the defenders were then using, and as matter of fact the engine which the pursuers supplied has justified that representation.

"If therefore the pursuers gave a guarantee in regard to the consumption of fuel, it is contained in the letter of 1st October.

"It is said that the calculations in regard to the consumption of fuel in the latter letter were not intended to be a guarantee, that Dunkerton had no authority to give a guarantee, and that owing to the calculations being based upon erroneous assumptions, the result brought out is an impossible one.

"Upon that view of the case I would only remark (1) that whether there was a guarantee or not depends upon the construction of the letters which passed between the parties; (2) that although Dunkerton had no authority to give a guarantee, or indeed to conclude a contract, he was introduced to the defenders as being the pursuers' representative, and in particular the defenders were referred to him in regard to the question of consumption of fuel; and (3) if it was a term of the contract that not more than a specified amount of fuel should be required to work the engine, the fact that it was impossible for the pursuers to fulfil that part of the contract will not save them from a claim of damages for breach of contract.

"I shall therefore turn to the letter of 1st October and consider whether it contains a guarantee, or, in other words, whether the pursuers therein contracted to supply an engine which would consume a certain amount of fuel and no more.

"The guarantee which the letter of 1st October is said to contain is that the engine would produce 30,000 bricks with an expenditure of 1 ton 2 cwt. 4 lbs. of coal of a kind which at the date of the letter, could be purchased for 4s. per ton. I think that that is a fair enough summary of the result of the statements in the letter, but it is to be observed that the calculations refer to the smaller engine, and are based upon the assumption of its being worked with the most economical load. Now, the defenders took the larger engine, and the actual consumption of coal upon which they base their claim was not taken when the engine was working with the most economical load. There was therefore in no view a definite guarantee applicable to the engine which the defenders elected to take, nor to the conditions under which the engine has been worked. It was, however, said in the letter that the larger engine would 'prove proportionately economical.' Now, although no one was able to say with precision what the consumption of coal of the engine supplied to the defenders when worked as they work it should be, if calculated upon the same basis as the calculations in the letter, it is not disputed that the amount would be considerably less than that actually consumed.

"If, therefore, the letter of 1st October is to be read as a guarantee, I think that it

is plain enough that the engine supplied has not fulfilled the guarantee. In my judgment, however, the letter does not amount to a guarantee. The occasion of the letter being written was that the pursuers had made out a detailed specification and estimate for an engine of the kind in regard to which there had been previous negotiations with the defenders. The contract which the pursuers offered to make with the defenders was a contract to supply an engine in terms of the specification and at the estimated price. All that was said in the letter about the consumption of coal appears to me to have been merely representations as to the capacity of the engine. These representations were no doubt made for the purpose of inducing the defenders to enter into a contract for the purchase of an engine, and I accept Mr Stein's word that they did induce him to enter into the contract; but that does not make the representations part of the contract. It would have been a different matter if the defenders had been seeking to set aside the contract on the ground that they had been induced to enter into it by representations which, however honestly made, were in fact false, but that is not the position taken up by the defenders at all. They are holding by their contract, but they maintain that a material term of the contract has not been fulfilled, and that accordingly they are entitled to keep the engine (which I may say is admittedly a first-class engine, and consumes less fuel and does more work than the engine which the defenders formerly used) without paying any part of the price, which they say has been more than extinguished by the loss which they have sustained through the contract not having been fulfilled.

"On receiving the letter of 1st October the defenders did not at once give the pursuers an order for an engine, but on 4th October wrote a letter which, although addressed to the pursuers, was intended for Dunkerton, and was sent to him.

"In that letter the defenders say—'The price is certainly a stiff one. We presume it includes the erection and starting of the engine? and is also dependent upon the fuel consumption turning out as you calculate.' The defenders then draw attention to the estimate of the power required to drive a brick-making machine, upon which Dunkerton's calculations in the letter of 1st October had been based. The estimate evidently struck the defenders as being too low, and it was in fact too low. They then proceed—'We understand you guaranteed the same steam consumption to Messrs Dobbie, Forbes, & Company. . . . We are strongly disposed towards the larger engine.'

"Dobbie, Forbes, & Company were a firm to whom the pursuers had supplied an engine which Mr Stein had seen. It appears that the pursuers had given a guarantee in regard to that engine that it would develop one indicated horse-power for a certain number of pounds of steam per hour. That is a kind of guarantee which the pursuers are willing to give, and are in the habit of

giving; but they never give a guarantee in regard to the amount of fuel which will be required, because that is a matter which does not depend only upon the engine, but upon other things over which they have no control, such as the character of the boiler and of the work to be performed.

"Whether the defenders were or were not aware of that I do not know, but it is to be noticed that in their letter of 4th October they used the word 'guarantee' in reference to steam, and only refer to what was said in the letter of 1st October about the consumption of fuel as calculations. Further, the natural inference from the way in which the steam guarantee to Dobbie & Company is referred to is that the guarantee which the defenders wanted, and understood that Dunkerton was giving to them, was of the same character. Mr Stein said that the word 'steam' must have been written by mistake instead of 'fuel,' because he did not know anything about a guarantee of steam. I cannot accept that explanation, but I think that at that time Mr Stein was under the impression that if the amount of steam was guaranteed that necessarily involved a guarantee of the amount of fuel required. What Mr Stein did not then know, or did not take into consideration, was that that depended upon whether the coal actually used was the same as that upon which the calculation of steam had proceeded, because, of course, a given quantity of dross will not produce so much steam as the same quantity of best Welsh coal. That misapprehension on Mr Stein's part seems to me to explain a good deal of the misunderstanding which has arisen between him and the pursuers.

"Dunkerton answered the defenders' letter of the 4th October upon the 7th. That letter is very long and is directed chiefly to setting out the merits of the pursuers' engines, and there are only one or two passages which have any bearing on the present case.

"In regard to the power which he had assumed in his letter of the 1st October as being required to drive a brick-making machine, Dunkerton said that he had taken the figure given by the makers of the machine, which he thought more reliable than diagrams which he had taken himself. He then wrote—'We wish further to say that our calculations were based upon a 40 H.P. Nominal Engine' (that is the smaller engine), 'but noticing that you are thinking of adopting the 50 H.P. engine, it is only fair on our part to point out that with the increase of power the consumpt will also increase slightly, and instead of 15 lbs. of steam per I.H.P. it will be 17 lbs. Again, working at half-load will of course not be quite so economical, and the steam consumpt will then be approximately 22 lbs. So, assuming you work at first with $\frac{3}{4}$ load, the consumpt will be about 19 lbs.'

"It is plain that Dunkerton is there speaking of the amount of steam required and not of the consumption of coal, but I do not think that the pursuers can take much benefit from that fact, because it is not at all inconsistent with the letter of

1st October. In the latter letter Dunkerton's calculation is that $1\frac{1}{2}$ lbs. of coal will develop 15 lbs. of steam, and that 15 lbs. of steam will develop 1 I.H.P. per hour, and that accordingly $1\frac{1}{2}$ lbs. of coal will develop 1 I.H.P. per hour. Now all that he says in the letter of the 7th October is that with the larger engine, 17 to 22 lbs. instead of 15 lbs. of steam will be required to develop one indicated horse power, and therefore Mr Stein was entitled to assume that the only alteration which required to be made upon the calculations in the letter of the 1st in order to make them applicable to the larger engine was to increase the $1\frac{1}{2}$ lbs. of coal in proportion to the difference between 15 and 17 or 22.

"The next letter was written by the defenders on 12th October, and was sent to the pursuers at Lincoln. Whether it was sent there directly by the defenders or through Dunkerton I do not know, but the defenders were aware that it was being sent to Lincoln to be dealt with at the head office of the company. In that letter the defenders confirmed the order for an engine of the larger type in terms of the specification and estimate, and then they added, 'subject to your guarantees of fuel consumption being fulfilled.'

"The pursuers at that time did not know that Dunkerton had written the letter of 1st October, or that he had made any representations as to the consumption of fuel. Dunkerton, however, had communicated with them in regard to the steam required, and they had told him that 17 lbs. of steam would be required for one horse power, and had apparently intimated their willingness to give a guarantee to that effect. Mr Richardson (the managing director of the pursuers' company), accordingly assumed that the reference in the defenders' letter to a guarantee of fuel consumption really referred to steam consumption. He therefore wrote a letter to the defenders on 14th October, in which, after accepting the order, he said—'With regard to the steam consumption, we have to state that one of our engines, slightly larger than the above, was lately tested by the authorities of Durham University, and came to somewhat less than the figure you give, viz., about 17 lbs., but to carry out the tests to prove this at your works means running to a considerable expense, which, however, we shall be glad to do on your agreeing to pay for the skilled men and apparatus we should have to send up to Bonnybridge for that purpose. It would be approximately £50.'

"In that letter Mr Richardson was in error in saying that 17 lbs. of steam had been given by the defenders. He understood, however, from communications which he had received from Dunkerton that the figure which the defenders wanted was 17 lbs.

"On the 15th October the defenders wrote to the pursuers—'It is not necessary to send skilled men at considerable expense from Lincoln, as on the 1st inst. you gave us the fuel per 10,000 bricks, and it will be easily ascertained without expense.'

"On the 17th the pursuers replied—'We are not quite clear what is meant by the fuel for 10,000 bricks, but this probably refers to some conversation between you and our Mr Dunkerton. We have referred the matter to him.'

"That letter showed the defenders quite clearly that the pursuers did not know of the letter of 1st October, and were not aware of any guarantee of fuel consumption having been given. I think, however, that the reference to Dunkerton justified the defenders in assuming that the latter had full authority to deal with the matter.

"There is only one more letter to which it is necessary to refer. On the 18th October the defenders replied to the pursuers' letter of the 17th—'Yours of yesterday. We note you have referred the matter to Mr Dunkerton, whose letter of 1st inst. goes fully into the fuel consumption, and on which our decision was based.'

"That letter concluded the correspondence as regarded the question of fuel consumption, which was not again brought up until the engine had been fitted up and was working in the defenders' works.

"The defenders did not after their letter of 18th October again specially communicate with Dunkerton upon the subject, but apparently rested satisfied with the letter of 1st October.

"It seems to me that both parties were somewhat negligent in allowing the question of the consumption of coal to remain in such a vague position. When they were informed by the defenders that they were relying upon a letter from Dunkerton, the natural thing for the pursuers to have done would have been to get a copy of Dunkerton's letter. Why they did not do so appears to have been that Mr Richardson having told Dunkerton that the pursuers would guarantee 17 lbs. of steam, it never occurred to him that Dunkerton could have given any other guarantee. Further, a guarantee of steam is in a certain sense a guarantee of coal consumption, because the person working the engine can ascertain what amount of the coal which he uses is required to produce a given amount of steam, and that is what the pursuers understood the defenders to refer to in their letter of 15th October, when they said that it was not necessary to send a skilled man to their works 'as it will be easily ascertained without expense.' The chief mistake which Dunkerton had made in his calculations was that he assumed that dross at 4s. a ton would produce as much steam as the best Welsh coal. Naturally it never occurred to the pursuers that Dunkerton could have made such an obvious mistake, and if he had not done so his calculations would not have been far from the truth.

"On the other hand, the defenders saw from the pursuers' letter that they had never heard of a guarantee of coal consumption being given, and that what they were willing to give was a guarantee of steam of the amount (17 lbs.) mentioned in Dunkerton's letter of the 7th October. The defenders must also have gathered that up to the

date of the pursuers' letter of 17th October the latter had not seen Dunkerton's letter of 1st October. In these circumstances it would have been prudent and reasonable for the defenders either to send to the pursuers a copy of Dunkerton's letter, or to state specifically what was the guarantee which they considered that they had received, and which they now say they regarded as essential. That such a course would have been a proper one is, I think, the more apparent, when it is considered that the letter of 1st October contained no specification as to the amount of coal required for the engine which the defenders had actually ordered.

"While therefore both parties seem to have been to blame for the misunderstanding which arose, I think that the result of the letters of 17th and 18th October was just to leave the matter upon the letter of 1st October for what it was worth, because the pursuers referred the defenders to Dunkerton, and the defenders were content to rest upon the letter which they had already received from him. Now, I have already expressed my opinion upon the construction of that letter, namely, that the calculations as to the amount of coal required did not amount to a guarantee, but were merely representations as to the capacity of the engines, made for the purpose of inducing the defenders to give the pursuers an order.

"I am therefore of opinion that there was no warranty, and that accordingly there has been no breach of warranty, and that the defender is liable in payment of the price of the engine. . . .

"I shall accordingly give decree in terms of the conclusions of the summons."

The defenders reclaimed, and argued—On the terms of the letter of October 1st 1898 a guarantee was given that the engine would, at the cost of a specified amount of coal, produce 30,000 bricks. In reliance on this guarantee the engine was ordered. There was no dispute that the engine did not produce that amount of bricks, or that the difference between the actual coal bill and the coal which the defenders would have required to use had the guarantee been fulfilled would, if capitalised during the lifetime of the engine, amount to a sum much in excess of the price sued for. Therefore in terms of sec. 53, sub-sec. 1, of the Sale of Goods Act 1893, the price was extinguished—*Electrical Engineering Company v. Hurry & Young*, January 14, 1897, 24 R. 312. It was no defence to a claim founded on a warranty that it was physically impossible to implement it—*Gillespie & Company v. Howden & Company*, March 7, 1885, 12 R. 800.

Argued for the respondents—Fairly read, the letter of 1st October 1898 was not a warranty at all; it was merely a statement that if $1\frac{1}{2}$ lbs. of coal develop 15 lbs. of steam, the engine in question would produce so many bricks. In any view, it was, if a warranty at all, a warranty of a matter entirely collateral, and the failure to implement it was not a "failure to perform a material part of the contract." That was

the definition given by section 62 of the Sale of Goods Act of the words "breach of warranty" used in section 53, and therefore if the warranty here did not amount to a material condition of the contract there could be no claim under section 53. It was to be observed that if it was a warranty at all, it was not a warranty of the power of the engine, but of the amount of coal requisite to develop 15 lbs. of steam. Again, the accuracy of the calculation given obviously depended on the assumption that Stein & Company used the most economical kind of boiler in the most economical way. If there was a warranty of the total result, it must be held that Robey & Company were giving a guarantee of the excellence of the boiler used in Stein & Company's works—a matter of which they had no knowledge. It was inconceivable that they could have intended this, and unreasonable to construe their letter into such an obligation.

LORD M'LAREN—This is a case which is important in its legal relations, and if I had been considering it in the first instance I should have wished to take more time to study the case; but we have the advantage of a very instructive and very full opinion by the Lord Ordinary, in which I concur, in common I believe with your Lordships, and what I shall say will be supplementary to his Lordship's opinion rather than an independent and complete examination of the whole case.

The question is, whether in the sale of a steam-engine a guarantee of a very peculiar nature was given—a guarantee which I shall consider more fully, but which in the meantime, I may say shortly, is to the effect that the engine, when applied to driving brickmaking machinery, is guaranteed to turn out so many bricks per working day, I think 30,000 bricks per day of ten hours. Whatever view may be taken of the merits of the case this guarantee or warranty, if given, is undoubtedly an undertaking in writing, because the contract was begun and completed by correspondence. The most important letter is a letter dated 1st October 1898, written by the travelling agent of the makers to the defender Mr Stein, who was looking out for a new and more powerful engine for the purpose of driving his brickmaking machinery. That is the first and important letter. And then on 12th October there comes a letter from Mr Stein in which he says that he is prepared to order an engine of one of the two classes specified, "subject to the guarantees of coal consumption contained in your letter of the first." Now, there was some little correspondence following the letter of 12th October, but the end of it was that Messrs Robey the pursuers said they would inquire at Mr Dunkerton their representative, who had initiated the bargain, and we know from the evidence that no inquiry was made—the matter was overlooked. And so the obligation of the pursuers must be found in the writings which I have referred to.

Now, a noticeable feature in the case is, that while the case has been argued to us

by the defender as a claim founded on the Sale of Goods Act, which says that a warranty, or, as it is interpreted, a material condition of the contract of sale, may be set up in diminution or extinction of the price, there is in this record no reference to the Sale of Goods Act that I can discover either in the condescendence or in the pleas, and no statement there of any warranty such as would satisfy the descriptive words of the statute, or which would at common law amount to an independent undertaking. Perhaps on a strict construction of this record it might be held that there was no relevant defence to the action for the price, but as the case has been argued and advised in the Outer House on the basis of an averment of such a warranty, which certainly was made clear in the argument, I propose to follow the Lord Ordinary in considering the question whether such a guarantee or warranty was given.

It is to be observed that the defenders' letter of 12th October speaks of an existing guarantee contained in the letter of 1st October from Robey & Company, which I may describe generally as a specification of the engine which they proposed to furnish. It is not said in the defenders' letter, "I agree to take an engine on the basis of your letter, provided you guarantee all the representations which are made in that letter." Nothing approaching to that is suggested. What is said is, "We give the order subject to something which we call your guarantee of coal consumption;" and therefore it seems to me that the question to be considered is, whether there is in the pursuers' letter of 1st October any guarantee which can be represented in a reasonable sense as a guarantee of coal consumption?

Now, the part of the letter of 1st October which is founded on may be described as an argumentative statement of the merits of the pursuers' engine based on calculations, and with an invitation to the intending purchaser to apply the same method of calculation to determine the efficiency of an inferior engine—I presume such an engine as he had at that time in use, but an engine of greater horse-power. And then it is said, "You will see that by taking our engine you will effect such a saving of coal as will speedily compensate you for the larger price." The exact words are, "You will find that the difference of cost between this and an inferior type of engine will be made up in a very short time." Among the data of calculation we have this line—"15 lbs. of steam develop one-horse power per hour." Now, that I take it was a representation as to the efficiency or performance of the engine to be supplied, because it is common ground that the test of efficiency of a steam-engine is the quantity of power which it will develop upon being supplied with a given quantity of steam. I may observe that it is undisputed that the pursuers had nothing to do with the steam production. It was not intended that a new boiler should be furnished; the steam production was such as the defenders' existing boiler enabled them to produce. But I think it must be taken that

when the pursuers' representative says "15 pounds of steam develop one-horse power per hour," that is a representation as to the efficiency of the engine which they were to furnish, and like all the other parts of the specification, the double cylinder, the valves, and all the rest of it, is a thing that they intended to be bound by. It is no doubt a material term of the contract, and therefore this particular statement appears to me to satisfy the description of a warranty in the Sale of Goods Act, and to be binding on the pursuers.

I think it was not disputed by their counsel that they were bound in terms of that representation, but then they say—and I do not think this is open to doubt—that the expectation held out by these words has been completely fulfilled, and that the engine supplied does develop one horse power per 15 pounds of steam supplied to it. That, of course, does not satisfy the defender's case, and while I should desire perhaps greater definiteness in the statement of the guarantee which he says was granted, and especially that it should have been put definitely on record, I understand him to say that the result of this letter is that Messrs Robey guaranteed that with the defenders' boiler and the pursuers' engine and the defenders' brickmaking machinery all working in an efficient manner, there would be an output of 30,000 bricks per day at a cost of 4s. 4d. on coal. Now, if such a guarantee was given or was intended it was certainly not given in direct words, but it is said to be given as the result of certain statements, certain data, and calculations founded on these data. Now, as the guarantee is an inference from an argumentative statement, it follows, in my opinion, that in order to arrive at such a guarantee we must hold that the pursuers guaranteed all the facts on which their calculation was based, and from which it is said that this result was undertaken by the pursuers. Of course, the pursuers were dependent on the defenders for information as to the efficiency of their boiler. They were also dependent on them not only as to the capacity of the brickmaking machines for turning out 30,000 bricks a-day, but also as to the estimated horse-power which would be necessary to drive the brickmaking machinery. This I see is stated in the letter of 1st October at 165 horse-power, and therefore as this is a guarantee which is to be constructed by the Court out of the materials in this letter, we must hold that the pursuers' representative not only guaranteed the accuracy of the assumptions which they made as to the amount of steam which would be produced from one pound of coal depending partly on unknown data and partly on the efficiency of the boiler, but that they also guaranteed the performance of the brickmaking machines which were at work in the defenders' establishment, and the number of units of horse-power that were necessary to drive them. But as to the latter, I think it was conceded by Mr Ure, and necessarily conceded, that it was quite

impossible to read the letter of 1st October as containing any such guarantee. It was conceded that these were data supplied by the defenders themselves, that Mr Dunkerton, the pursuers' representative, was dependent on that information for the statement which forms one of the elements of the calculation, and therefore that that was not one of the things which entered into the guarantee. But then if by such reasoning we are to arrive at the conclusion that the brickmaking machines were not guaranteed, just as little can I suppose that the steam production was guaranteed, because that was not a thing entering into the contract of sale, nor a thing over which the pursuers had any control. They were dependent either on the information which they got from the defenders or upon data in books of reference. It appears that the item, '1½ pounds of coal develop 15 pounds of steam' was taken from a text-book. It was certainly untrue in fact as applied to engine coal. But if the purpose of the letter was only to furnish a comparison between the work that might be got out of one of Messrs Robey's engines and the work that could be got out of an inferior engine—and certainly that is what the words of the letter seem to indicate—then the element of the amount of coal necessary to produce 15 pounds of steam became very unimportant, because, as observed by your Lordship in the chair in the course of the argument, it was just the same as if an unknown quantity, *x*, were introduced into both branches of the calculation; and then, when one result is divided by the other to see what the amount of saving will be, this quantity disappears from the calculation. In any view, this warranty—which would not be a warranty under the Sale of Goods Act, but a warranty of a collateral matter altogether—must be considered in conformity with a rule very well established, though there are perhaps more illustrations of it in the English reports than in ours, that a question whether collateral representation amounts to a warranty or not is a question of intention to be deduced from the language used and the facts of the case with reference to which the representation was made. Now, when that test is applied we find in the first place that the purpose of the representation was a comparison of the efficiency of two engines. Then the representation, though it is not said from where it came, was in its nature one which Mr Dunkerton could not be held as stating from his own knowledge. Lastly, and I think this is really the determining consideration, there are no words of undertaking used; and therefore I come to the conclusion that we have here an entire absence of all the elements which would go to make up a warranty or collateral representation having the effect of a warranty regarding the production of steam from coal. But if that datum which is the basis of the whole calculation is not guaranteed, it follows in my opinion that the result is not guaranteed, because it is admitted also that the other element—the efficiency of the brickmaking machines and the power

necessary to drive them—was no part of the alleged undertaking.

In what I have said I do not mean to express any doubt that if proper words of undertaking had been used in the concluding part of the letter, if it had been said, "We guarantee that with the engine described you will be able to produce with your existing machinery and appliances 30,000 bricks a day of ten hours," that would have been binding on the pursuers, however absurd, however foolish the conduct of their representative might be in giving it. But it is a very different case when the question is not whether a guarantee in certain words is to be enforced, but whether you are to spell such a very improbable and unusual undertaking out of a letter which purports to be something quite different. Then, I say, the rule must be applied, that it is a question of intention whether the words used amounted to a warranty or not, and on that question I have no difficulty in arriving at the conclusion that no such warranty was in fact given.

It is right to notice that while I think the purpose of the letter was comparison, it must be conceded to the defenders that a statement beginning "1½ pounds coal develop 15 pounds steam" amounts to a representation, which was part of a set of representations intended to induce a contract. It is admitted, or at any rate it is quite clear, that it was an innocent misrepresentation founded on a misunderstanding of the data contained in a text-book. The misunderstanding was in applying to engine coal a statement of the productiveness of standard coal. Now, if this had been discovered in time I do not doubt that relief in another form might have been obtained by the defender. In other words, he might have rescinded the contract on the ground of error induced by the act of the pursuers' agent. But the defender is no longer in a position to rescind the contract, and he is not claiming to rescind the contract, and in the absence of fraud I cannot hold that such a misrepresentation will furnish any legal foundation for a claim of damages.

These are the leading points in the case, and I have only to add, as I said at the beginning, that I also concur in the opinion of the Lord Ordinary.

The LORD PRESIDENT, LORD ADAM and LORD KINNEAR concurred.

The Court adhered.

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