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

Verdict—For the pursuer.

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

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PRESENT,

LOBDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1828.
March 20.

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BAILEY & Co. v. PATERSON.

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

AN action to recover payment of an account.

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

ISSUES.

“ Whether the pursuers sold and delivered

“ to the defender the glass retorts mentioned
 “ in the account, No. 2 of process, for the pur-
 “ pose of distilling oil of vitriol ; and whe-
 “ ther the defender is indebted and resting
 “ owing to the pursuers in the sum of L. 33,
 “ 2s. 9d. Sterling, as the price of the said
 “ retorts, and expenses of package, with inte-
 “ rest from the 10th day of April 1826, or
 “ any part of the said principal sum and inte-
 “ rest, as the price of the said retorts and
 “ package ?”

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Robertson, for the pursuers.—It is admitted the retorts were furnished ; and no intimation of their insufficiency was given for many months after. They were manufactured of good materials, and with the greatest care ; and the defenders were bound to inspect them, and give timeous notice. If necessary, I am ready to refer to Mr Bell’s Commentary, and many cases in support of this.

Jeffrey, for the defenders.—The deficiency is not one which is discoverable by the eye, and notice could not be given till the deficiency was ascertained. The evidence of the care with which they were manufactured is of no use, as we shall prove that they all broke ; and having suffered by the loss of commodity

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which they were intended to hold, the question is, whether we are to be cut out of this by the delay in giving the notice? This depends both on law and fact; and notice in reasonable time means from the date at which the defect was discovered, as we were not bound to try them on arrival. They are not articles of a perishable nature requiring immediate intimation.

A pursuer having proved generally that his manufacture was good, the defender may give in evidence that bad articles were furnished to another party.

A witness for the defenders having stated that at a different vitriol work there were many retorts broken, was asked whether he inquired where they were manufactured?

Robertson.—It is not competent to prove that the pursuer was in the habit of furnishing bad retorts; the only question is as to the parcel in question; and unless they prove them made at the same time, the evidence is not good.

Jeffrey.—It is for the jury to decide as to this parcel; but the evidence is good to meet the allegation, that the breakage was from our carelessness. It is also good to show that the same defects existed in the same article furnished by the same dealer.

LORD CHIEF COMMISSIONER.—The difficulty rests in the time not being fixed. If these had been made at or near the same time,

or if it had been proved that they were sent at the same time to Glasgow, it might have been admissible ; but can we go back to a time when there might be different workmen and materials employed in the manufactory ? Another difficulty is, that the pursuers have given evidence as to the good quality of the retorts generally furnished by them, and the defender cross-examined the witnesses without objection ; and I am at a loss how to stop the inquiry now. If questioned at first I would have thought this incompetent, but *res non sunt integræ*.

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LORD CRINGLETIE.—I do not think that because one question is got in this way that we are therefore bound to allow the inquiry to proceed ; and it does not appear to me that because one set of retorts are bad, it is any evidence to prove that those in question were bad. There is no offer to prove that the two sets were made out of the same metal, and, therefore, I think the evidence inadmissible.

LORD MACKENZIE.—The difficulty is the one stated by your Lordship. The pursuers call evidence to prove these retorts good ; and they do so by proving, that, from the care

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taken, and the nature of the materials employed, bad retorts cannot go out of the manufactory. These witnesses are cross-examined; and an offer is now made to meet the evidence in chief, by proving that bad retorts did go out of the manufactory; and having admitted the one, how can we exclude the other?

LORD CHIEF COMMISSIONER.—If the pure question had been before us, I would not have thought this competent; but there being a body of evidence as to the goodness of the materials and the manufacture, I cannot say that this evidence is inadmissible now. We admit it on the limited ground that the pursuer was allowed to give evidence to establish a presumption that the retorts were good.

A person whose remuneration depends on the profit made at a manufactory an incompetent witness for the manufactory.

A witness was afterwards called who was employed by the defender, and the amount of whose remuneration depended on the profit of the manufacture. On the one side, it was contended that this rendered him a dormant partner of the defender. On the other, this was denied, and reference was made to Mr Bell's Commentary.

2 Bell's Com.  
521. (625, 4th  
edit.)

LORD CHIEF COMMISSIONER.—There may be a difficulty as to whether this verdict could

be used against him. But, as he betters his situation in life if the defender succeeds, we are of opinion that the witness cannot be examined.

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*Forsyth*, for the pursuer, contended, That there was clear evidence that the retorts made by the pursuer were good, and that there was no evidence that those alleged to be bad were those sent by the pursuer; but if they were, the defender broke them all in succession before he gave notice to the pursuer.

Fisher v. Sa-  
muda, 1 Camp.  
Rep. 193.

LORD CHIEF COMMISSIONER.—This is an action to recover the value of certain retorts and crates, which is resisted on the ground that they were bad. To this the pursuer says, they were not bad; and if they were, you did not do what will entitle you to state the objection. The Court have no doubt on the law, and the question is on the evidence. If the case rested on the evidence for the pursuer, perhaps it was not fully made out that the retorts were good, as there was a want of identification; but, taking the admissions and the other circumstances, we must hold the goods identified. The insufficiency of the goods is strongly made out by the defender, and if the question had been

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simply on this point, the verdict must have been for him. But the insufficiency of the goods strengthens the case against him, as the goods being proved bad, it was necessary for him either to return them, or to desire that they might be taken away. Instead of doing so, however, he uses them gradually; and when ordering the second parcel, merely objects to the size, not the quality of the first. If the fact is made out to your satisfaction, the Court have no doubt that the verdict should be for the pursuer.

The goodness or badness of the article is not the question; but whether there was such negligence on the part of the defender as in law will prevent him from pleading this objection. If the evidence has the complexion which I have stated, then there was no notice in reasonable time, as the same witnesses who proved the badness of the article proved also that no notice was given at the time.

**Verdict—For the pursuer.**

*Forsyth and Robertson, for the Pursuers.*

*Jeffrey and Rutherford, for the Defender.*

(Agents, *James Stuart. s. s. c.* and *A. C. Howden, w. s.*)