

having the relief which he now claims on the ground of fraud and concealment. But, on the other hand, it is impossible for me to dismiss certain reflections from my mind, so as to leave me at liberty to advise your Lordships to give costs.

June 23, 1817.

CO-PARTNERS.  
—CONCEAL-  
MENT.—  
FRAUD.

*Lord Redesdale.* I entirely concur in what the noble Lord has said. A., B., and C. unite as partners in an adventure. A. and B. make an offer to C. as attorney for a stranger, D.; and C., without informing his partners whether he had made the offer to D., chooses to take it as an offer to himself. A. concurs in that, but B. does not. If the case stood there, the decision would clearly be wrong. I have scarcely a doubt that the transaction was fraudulent on the part of the Respondents; but Bayne has, by his own conduct, precluded the relief which he claims. I have thought it right to say this much, because with reference to the general principle the Judgment below would be wrong.

Judgment *affirmed*, without costs.

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GEDDES—*Appellant.*

PENNINGTON—*Respondent.*

G. purchases from P., a horse-dealer, a horse warranted "a thorough broke horse for a gig," P. representing at the time that the horse had been sent to him to be sold,

June 9, 16,  
1817.

June 9, 16,  
1817.

WARRANTY.  
— MISREPRE-  
SENTATION.

by a gentleman from England. For about two months from the time of the purchase G. himself has no opportunity to drive the horse in a gig, but during that interval the horse is often driven in a gig by others, and performs well. Then G. himself, on two occasions, drives the horse in a gig, on both of which occasions the horse performs ill, kicking out behind and running forcibly to the side of the road, and at one time overturning the gig in a ditch. P. refusing to take back the horse, G. brings his action for the price and damages. It appeared in evidence that P. had got the horse from a Mr. A. of Leith, who parted with him on account of his having, on one occasion, when driven in a gig, without any apparent cause, kicked out violently behind and broke the gig. But it was also proved that the horse, while in the possession of A., of P., and of G. himself, as above mentioned, had been very often driven in a gig, and on these occasions found steady and safe. It was in evidence likewise that G. had lashed the horse and checked him at the same time, on the occasion when his gig was overturned. No other evidence was given as to G.'s experience or skill in driving. Judgment below for P. the horse-dealer, a majority of the Judges being of opinion upon this evidence that the horse did answer the warranty at the time he was sold, and that his bad demeanor in the hands of G. was owing to want of skill in the driver; and, the Lord Chancellor being of that opinion, the Judgment was affirmed above, but without costs.

The Lord Chancellor observing, that, if the horse answered the warranty at the time he was sold, the misrepresentation as to the place from which he came would not invalidate the sale; but that it was a material circumstance with respect to the question of costs.

**T**HE Appellant having purchased a horse from the Respondent, a horse-dealer in Glasgow, received from him the following warranty, dated 6th May, 1811: “ Sir, I have this day received from your  
“ son, Mr. Archibald, 84*l.* sterling, the price of my  
“ dark bay horse sold you; I warrant this horse  
“ sound, free from vice and every blemish; he is  
“ quiet in harness and sure-footed, and a thorough

Warranty.

“broke horse for either gig or saddle.” The Appellant kept the horse two months, and then applied to the Respondent to take him back again, alleging that he did not answer the warranty, not being a proper horse for a gig; and, upon the Respondent’s refusal to take back the horse and return the price, the Appellant brought his action before the magistrates of Glasgow for the price and damages. The Respondent having answered that the horse did satisfy the warranty, a proof was allowed, and the amount of the evidence was this:

The Respondent had represented to the Appellant, at the time of the purchase, that the horse had been sent to him by a gentleman from England, with instruction to sell him, whereas in point of fact the Respondent had purchased him at 60*l.* from a Mr. Anderson of Leith Walk Foundry. Mr. Anderson had bought the horse for the purpose of running him in a gig, and was well satisfied with him for some time; but at the end of about two months from the time when Anderson had purchased him, while walking with the gig slowly down a hill, he, without any apparent cause, kicked out behind and broke the foot-board to pieces, then galloped furiously down the hill, and on turning an angle sharply the gig was upset. When Anderson sold the horse to the Respondent he distinctly mentioned the accident, and told him that from that circumstance he considered the horse as unfit for a gig; but that he would answer well for double harness or as a riding horse. The Appellant had been employed for two months after purchasing the horse from the Respondent in such a manner that he had no opportunity himself to drive the horse in a gig.

June 9, 16,  
1817.

WARRANTY.  
—MISREPRESENTATION.

June 9, 16,  
1817.

WARRANTY.  
—MISREPRE-  
SENTATION.

But when he did so employ him, the horse on one occasion kicked and plunged violently, and on another occasion, while going down hill, he started on passing a cart, upon which the Appellant whipped and checked him at the same time; the horse then went off at a canter, ran to the side of the road, and overturned the gig in a ditch. It appeared however that in the interval between the time when the Appellant purchased the horse and the above-mentioned occasions, the Appellant's children and others had gone out in a gig drawn by this horse, and that the horse had then been perfectly steady and safe; and it was also proved that the horse, while in the Respondent's possession, had been often driven in a gig, both up and down hill, and on a level road, and had always on these occasions performed well. There was no evidence to show that the Appellant had experience or skill in driving.

The magistrates of Glasgow were of opinion that the horse was not a proper one for a gig at the time he was sold, and decided in favour of the Appellant; but the cause having been brought by advocacy before the Court of Session the Lord Ordinary and the Court gave judgment for the Respondent with 215*l.* costs; three Judges out of five, being of opinion that the bad demeanor of the horse, when driven by the Appellant, was owing to want of skill in the driver. From this Judgment Geddes appealed.

With reference to the time that elapsed before the horse was returned, and in order to show that in England it was held sufficient if the horse was returned in a reasonable time, or as soon as conveniently might be, after the defect was discovered, the cases of *Fielder v. Starlin*, 1 H. Black, 17.—*Adam*

Interlocutors.  
Dec. 9, 1813;  
Jan. 11, Feb.  
1, 24, May 19,  
June 24, 29,  
1814.

*v. Richards*, 2 H. Black, 573.—*Buchanan v. Parnshaw*, 2 T. R. 745.—*Curtis v. Hannay*, 3 Esp. R. 82, were cited.

June 9, 16,  
1817.

WARRANTY.  
—MISREPRESENTATION.

Judgment.  
June 16,  
1817.

*Lord Eldon* (C.) In this case, which is certainly somewhat difficult to deal with, it is stated that a sum of 215*l.* has been awarded as the costs of one of the parties, and the question is no more than this, whether a horse answered the warranty given by Pennington to Geddes in this letter, in which he says, “ I have this day received from your son Mr. Archibald 84*l.* sterling, the price of my dark bay horse sold you: I warrant this horse sound, free from vice and every blemish. He is quiet in harness and sure-footed, and a thorough broke horse for either gig or saddle.”

Warranty.

It has been admitted on all hands that the horse was sound, and free from vice, except as afterwards mentioned; and that he was quiet in harness if along with another horse. But the question is, what was the demeanor of this horse in a gig. My noble predecessor could have better dealt with this case; and I wish it had fallen to his lot, and not to mine, to advise your Lordships in the decision of it. But as it is, I must deal with it as well as I can.

It seems that three of the Judges below were of opinion that this was a good horse for a gig. And one of them said that it was very indiscreet to whip a horse and check him at the same time, and that in his judgment the whip ought to have been applied to the man rather than to the horse. Pennington had represented that this was one of two horses sent to him from England to be disposed of, which was not the fact. One of the Judges says that this was no-

Misrepresentation.

June 16,  
1817.

WARRANTY.  
— MISREPRE-  
SENTATION.

thing at all; and I agree with him so far, that, if the warranty is answered, a misrepresentation as to the place from which the horse was procured will not suffice to set aside the sale. But then the misrepresentation may be a material consideration with respect to costs. Another Judge seems to think that, on account of this misrepresentation, Pennington could not successfully defend the action. That I conceive not to be correct if it is made out that the horse answered the warranty.

The Appellant kept the horse two months. I have not had experience of late in courts of law; but I understand that, in this country, the time within which a horse ought to be returned in cases of this kind depends very much upon the period when the defect is discovered.

But the principal question here is, whether the accident was owing to vice in the horse, or want of skill in the driver. And as to that, I think that the three Judges below were right. But still it is a doubtful case, and on that account, it may be improper to give the Respondent the costs of the appeal; and another reason for not giving costs is, the improper misrepresentation, for the object of it must have been to prevent inquiries which might lead to the rejection of the horse. But that misrepresentation will not invalidate the transaction if the horse was a fit horse for a gig at the time he was sold. I propose therefore to your Lordships to leave the matter as it is, without giving costs to either side. My noble friends concur with me in this view of the case.

Lords Redes-  
dale and  
Erskine.

Judgment *affirmed*. No costs on either side.