

SCOTLAND / JUDGMENT

Smith v Sim [1954] ScotCS CSOH_7 (25 May 1954)

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JISCBAILII_CASE_SCOT_FRAUD_CONTRACT 25 May 1954 Smith v. Sim LORD WHEATLEY'S OPINION.—The defender's counsel submitted that the pursuer's case was irrelevant in respect that he sought to maintain the contract in existence and at the same time to sue for damages. They founded on a passage in Gloag on Contract, (2nd ed.) at. p. 480, to the effect that it had never been conclusively decided in the law of Scotland that it was competent to do so, and invited me to hold that it was not. In furtherance of their submission they referred to a passage in the judgment of Lord Blackburn in the House of Lords to the effect that the question had not been decided in Scotland— Brownlie v. Miller ,

(1880) 7 R (H L) 66 , at p. 79—and founded strongly on a decision of Lord Anderson in the Outer House in the case of Bryson & Co. v. Bryson , 1916, 1 S. L. T. 361. A passing reference was also made to the opinion of Lord Kinnear in the case of Brown v. Stewart , (1898) 1 F. 316, at p. 323, but it was admitted that that was a special case, which did not really advance the argument. As the argument of the defender's junior counsel developed, it became clear that the attack was really directed against the competency of the action and not against its relevancy, and, as the only preliminary plea taken by the defender was one of relevancy, permission was sought and granted to add a plea to the competency. Thereafter the argument, proceeded only on competency, it being conceded that the pursuer's case based on fraud was relevant, subject to two minor criticisms with which I shall deal later. Defender's counsel then went on to argue that the Roman law of *actio quanti minoris* , though incorporated in the law of England, has not been accepted in the law of Scotland except under the statutory provisions of the Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), which admittedly have no application in the present case. They contended that, where there was alleged fraudulent misrepresentation, the only remedy open to the pursuer was to rescind the contract and sue for damages, where the circumstances justified such a

course, and that it was incompetent to maintain the contract and at the same time sue for damages. In reply pursuer's counsel, while conceding that an *actio quanti minoris* was not competent according to the law of Scotland (subject, of course, to the statutory exception in the case of the Sale of Goods Act, 1893) submitted that this was not such an action, in as much as it was an action based not on contract but on delict. The whole of the pursuer's averments, crystallised in his first plea in law, were, it was argued, specifically directed to a case of damages on the ground of fraudulent misrepresentation, and accordingly the only substantial question at issue was whether such an action was competent, according to the law of Scotland, without the contract being rescinded. In support of the argument that it was competent, reference was made to *Stair*, I, ix, 14; to a passage in the judgment of Lord President Robertson in the case of *Manners v. Whitehead*,

(1898) 1 F 171, at p. 176; to a passage in the judgment of Lord Justice-Clerk Alness in *Smart v. Wilkinson*, 1928 S. C. 383, at p. 388; to the seemingly identical case of *Campbell v. Blair*, (1897) 5 S. L. T. 28; and to a passage in the judgment of Lord Curriehill in the case of *Graham v. Western Bank*, (1865) 3 Macph. 617, at p. 628. It was also pointed out that the learned author of *Gloag on Contract* took the view that the balance of judicial opinion was in favour of the competency of such an action, and it was submitted that the decision of Lord Anderson in *Bryson & Co.* was favourable to this contention. In my opinion, the pursuer's argument that the action is competent is well founded. It receives its initial support from a passage in *Stair*, and while that passage may, as Mr Guest pointed out, be in general terms, it was founded upon by Lord Curriehill in the case of *Graham* in arriving at the conclusion that this was a competent optional remedy open to a pursuer who claims to have been defrauded. Mr Guest conceded that the passage in *Stair* came very close to the pursuer's argument, but founded on the dictum of Lord Blackburn in *Brownlie* to the effect that the question had not been decided in Scotland as indicative that nothing which had preceded 1880 had determined the matter. He went on to observe that it was strange that, apart from the case of *Campbell* in 1897 (which was unsatisfactory in view of the jejuneness of the report, and which in any event was not binding on me), the matter had not been the subject of judicial decision since then, and invited me to hold that such an action was incompetent. I am quite unable to accede to this invitation. The whole history of judicial opinion seems to be in favour of the competency of such an action. It is true that the report in *Campbell* is of the briefest nature, but there is sufficient in it to show that Lord Kyllachy was following the opinion of Lord Curriehill in *Graham* in holding that such an action was relevant, albeit, in my opinion, this is not a matter of relevancy but one of competency. In the case of *Manners* Lord President Robertson stated that he found it impossible to discover in the action an action of rescission and agreed with the Lord Ordinary, Lord Kyllachy, that it was an action of damages for deceit and nothing else, thereby accepting the competency of such a latter type of action. In the same case Lord M'Laren also accepted the competency of such an action. Mr Guest argued that at the best the passages in these judgments to which I have referred were only obiter dicta and asked me to ignore them. In their context I do not consider that they were only obiter dicta, and,

if that be so, I must accept them as binding on me. Even, however, if they were only obiter dicta, they are weighty additions to the expressions of judicial opinion in favour of the competency of such an action. Mr Guest also submitted that the passage in the judgment of Lord Justice-Clerk Alness in *Smart*, where he expressed the view that an action of reparation would be open to a person who claimed that he had suffered damage as a result of the fraudulent misrepresentations of another person with whom he had entered into a contract, was also an obiter dictum, and, in the context in which the passage is found, I agree. Nevertheless it is yet a further step in the acceptance of this principle by Judges of eminence. At the end of the day the defender's counsel were left with the case of *Bryson & Co.*, and they nailed their colours to its mast. Unfortunately for them, that case, far from being an authority in support of their argument, is an authority against them. An analysis of the case discloses that the pursuer's claim was laid in the alternative, the first leg being an *actio quanti minoris*, and the second leg an action of damages based on fraudulent misrepresentation. Lord Anderson held that the first leg was incompetent, but in terms accepted the competency of the second form of action. In these circumstances it would appear that the observations on his judgment in *Gloag on Contract*, (2nd ed.) p. 480, footnote 7, do the judgment less than justice. In the light of that anthology of judicial opinion I hold that it is the settled law of Scotland that an action of damages in a case such as the present is competent without rescission of the contract, and I accordingly reject the defender's argument on competency. [His Lordship then referred to matters with which this report is not concerned.]

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