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COURT OF SESSION.

Tuesday, October 15.

FIRST DIVISION.

[Lord Ormidale, Ordinary.

J. & J. CUNNINGHAM AND ANOTHER *v.* JOHN MEIKLEJON.

Sale—Delivery—Compensation.

Circumstances in which it was *held* that a person was not a mere custodier of goods, but the proprietor of the same under a completed contract of sale, and that he was accordingly entitled to compensate a debt due to him by the seller against the price of the goods, the seller having become bankrupt shortly after the sale.

This was an action at the instance of J. & J. Cunningham, merchants, Edinburgh, and also of Thomas Steven Lindsay, trustee on the sequestrated estates of C. & A. Christie, coal and iron masters, Gladsmuir, near Tranent, against John Meiklejon, ironfounder, Dalkeith, concluding for delivery of 50 tons of pig iron, or alternatively for the market value of the same at the date of citation.

For many years Messrs Christie had been in the practice of sending hard pig iron, particularly of a description known as No. 4, to the defender, on a general order by the defender to them to send the same to him whenever their furnace was producing it. The iron was accepted by the defender on the understanding that the price should be according to the market rate of the day. In accordance with this practice the 50 tons in question were sent by Messrs Christie to the defender between the 9th and 15th February 1871. £2 12s. per ton was named as the price of the iron. The defender happened to be away from home, and the iron was taken delivery of by the foreman at his works. A portion was immediately melted, and the remainder more or less mixed with the defender's own stock. Messrs Christie being in pressing need of money, and assuming that the defender would take no objection to the iron or to the payment of the price, drew a bill on him for the amount in favour of J. & J. Cunningham, who were induced to advance the money. At this date a balance of £95, 17s. 9d. on prior accounts was admittedly due by Messrs Christie to the defender.

On 17th February, immediately on his return, the defender wrote to Messrs Christie, complaining that the iron should have been sent without previous orders; complaining also of its quality, and stating that he would return such of it as had not been used.

To this Messrs Christie replied:—

"20*th February* 1871.—We have your favour of 17th; the fifty tons iron belongs to Messrs J. & J. Cunningham, who can give you instructions regarding it."

On the same day the defender wrote Messrs Cunningham that he declined to accept the draft in their favour; and on the following day, in answer to a letter from Messrs Cunningham, asking whether he had taken delivery of the iron, or whether it was still lying at the railway station, he wrote that the iron had been unloaded by his people, and added—"As I consider the transaction—as it is—entirely with myself and Messrs Christie, I can only personally square the transaction with them, and have written them to this effect."

On 22d February Messrs Cunningham wrote the defender—"You are aware we have paid for the iron, and we must dispute the right you claim to settle with them (Messrs Christie). The bill will be presented for acceptance to-morrow through the Commercial Bank of Scotland, and if refused, steps will be at once taken to protect our rights."

On 23d February, after a meeting with Messrs Christie, the defender wrote Messrs Cunningham, offering to pay the balance of the price of the iron to them, after deducting his contra account.

This offer Messrs Cunningham rejected, and insisted on specific delivery of the iron, or acceptance of the bill.

On 28th February the defender, who had become aware of the insolvency of the Messrs Christie, wrote Messrs Cunningham that, considering the whole circumstances of the case, he had thought it more prudent to keep the iron (which he now intended doing) and to square up his contra account with it.

Meanwhile the Messrs Christie, on 18th February 1871, executed a trust-deed for behoof of their creditors; and on 5th April following their estates were sequestrated.

On 22d January 1872 the present action was raised, concluding for delivery of the 50 tons of pig iron "retained by the defender *sine titulo*," or otherwise for the sum of £162, 10s., as the market price of the iron at the date of citation. Messrs Christie's Trustee was made a pursuer as well as Messrs Cunningham, to avoid a possible question as to the ownership of the iron.

The pursuers pleaded that the defender had, by his letter of 17th February 1871, refused to purchase the iron, and that thenceforth his position became that of a mere custodier of the iron, the property of the same having been transferred from the bankrupt to the Messrs Cunningham by the letter written by them to the defender on 20th February, which letter operated as delivery of the iron.

The defender pleaded that the iron having been invoiced and delivered to him by Messrs Christie, according to the usual mode of business between them, and having been retained and used by him, the same became his property, subject to his liability for the price, viz. £130, against which sum he was entitled to compensate the balance due to him by Messrs Christie; and that any right acquired by the Messrs Cunningham to the price was subject to the defender's right of compensation.

The Lord Ordinary, after a proof, pronounced the following interlocutor.

"*Edinburgh*, 26*th March* 1872.—Finds it proved that the fifty tons pig-iron in question were, in February 1871, purchased at the price of £2, 12s. a ton from the Messrs Christie by the defender: Finds it also proved that when said iron was so purchased by the defender from the Messrs Christie, they were owing to him the sum of £95, 17s. 9d. on prior transactions between them: Finds it also proved that the Messrs Christie, in consequence of their insolvency, executed a trust-deed for behoof of their creditors on the 18th of February 1871, and were sequestrated, in terms of the Bankruptcy Act, on 5th April thereafter: Finds it proved that the defender never became bound in any way for said iron or the price thereof to the pursuers, the Messrs Cunningham; but finds it proved that the defender, on or about the 21st of February, expressed his willingness to account for the balance of the price of said iron, being £34, 2s. 3d., to the pursuers or any party having right thereto, after deducting said £95, 17s. 9d.: Therefore, in these circumstances, finds the defender liable to the pursuers in payment of said balance of (£34, 2s. 3d.) Thirty-four pounds two shillings and threepence, and decerns for that sum accordingly, with interest at the rate of five per cent. per annum from the date of citation to this action till payment; and, *quoad ultra*, assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses.

"*Note.*—(After a narrative of the facts)—In this position of matters it appears to the Lord Ordinary that the pursuers cannot insist on anything more than payment of the balance of the price of the iron in question, after deducting the defender's contra account. If the Messrs Christie, or the Messrs Cunningham as in their place, had at once closed with the defender's letter of the 17th of February, intimating that he was to return the iron so far as it had not been used, they might, perhaps, have insisted on his doing so irrespective of his contra account. But this was not the course adopted. The Messrs Christie, and also the Messrs Cunningham, insisted on treating the transaction on the footing of there having been a concluded sale of the whole fifty tons of iron to the defender, and that he was bound either to return the whole of it, or to pay its full price. As to returning the whole of the iron, that was out of the question, it being impossible to do so in respect, as it clearly appears from the proof, that fourteen tons of it had been used as it had been received, and that the remainder had been so mixed up with the defender's other stock as to make it difficult, if not impossible, to pick it out. Neither was the defender entitled to insist, after having broken bulk, and appropriated and used part of the iron, on returning or being accountable only for the remainder. The only alternative therefore he had was to account for the whole iron by paying the balance of its price, after deducting his contra account, and of this he very soon became satisfied.

"But the pursuers at the debate maintained, as the Lord Ordinary understood them, that the defender, failing the return of the whole iron, was bound to pay its price without deduction of his contra account, in respect, 1*st*, that the iron had been sent to him on the condition that if he did not accept it on the footing of being bound to pay its full price without deduction of his contra account, he had no right to interfere with it at all; and 2*d*, that by the Messrs Christie's draft or bill in favour of the Messrs Cunningham, and their letter of 20th February 1871, the right to the iron or to its full price had been so transferred to the Messrs Cunningham as to preclude the defender from deducting therefrom his contra account. The Lord Ordinary is of opinion that this contention of the pursuers is ill-founded.

"He can see no ground in the proof for holding that the iron had been sent by the Messrs Christie to the defender on the footing that he was not to receive or interfere with it except upon the condition of paying its full price, without deducting his contra account. No one says so; and most assuredly, neither in the advice notes which had been sent with the iron, nor in any letter or other communication, can the Lord Ordinary find any reference to such a condition. The proof is indeed quite conclusive to the effect that the iron was sent by the Messrs Christie, and received at the defender's works, in accordance with the previous practice of the parties, and without any special condition whatever. And, as to the second ground of action relied on by the pursuers, the Lord Ordinary is unable to see how, either in law or in equity, it can be given effect to. On the contrary, it appears to him that as, in a question with the Messrs Christie, the defender would have been clearly entitled, in settling for the price of the iron in question, to deduct or take credit for his contra account, so must he be entitled to do the same thing in settling with the Messrs Cunningham, or the present pursuers. The Messrs Christie could not transfer any one into a higher right than was available to themselves. And there is no pretence for saying, and it was not said by the pursuers, that the defender ever in any way came under a special undertaking to pay or settle for the price of the iron in question, irrespective of his contra account. The Lord Ordinary is unable therefore to understand upon what principle the defender could be

held liable for the full price of the iron irrespective of his contra account. He thinks, on the contrary, that the defender is, in the circumstances, and especially having regard to the insolvency of the Messrs Christie, declared so early as the 18th of February, only liable to the extent to which he has been subjected by the prefixed interlocutor.

The pursuers reclaimed.

The Court adhered.

Counsel for Pursuers—Guthrie Smith and Taylor Innes. Agents—Boyd, Macdonald & Lowson, S.S.C.

Counsel for Defender—Millar, Q.C., and Strachan. Agent—James S. Mack, S.S.C.

Tuesday, October 15.

SECOND DIVISION.

[Sheriff of Dumbartonshire.

BRIGHAM & BICKERTON *v.* RALSTON.

Sale—Suspensive Condition—Mora.

Circumstances in which the Court *held* that there had been an agreement to buy under certain suspensive conditions; that, these conditions not being fulfilled, the sale was not completed, and that there had been no such delay on the part of the proposed purchaser as to deprive him of his right to return the article in question.

This was an action raised in the Sheriff-court of Dumbartonshire by Messrs Brigham & Bickerton, agricultural implement makers, &c., Berwick-on-Tweed, against Mr James Ralston, farmer, Gartshore, Kirkintilloch, for the price of a Buckeye Junior Mowing and Reaping Machine, which they alleged they had sold and delivered to him. The defender contended that by the agreement upon which the machine came into his hands he was to become purchaser of the machine if, upon cutting his crops with it, he was satisfied with its capacity for the work. The pursuers, upon the other hand, although they did not contend for an absolute sale, but admitted that the defender was entitled to be satisfied with the cutting of the machine, averred that by agreement the trial cutting was limited to five acres, and that by continuing to work the machine throughout the season the defender had signified his satisfaction with, and completed the purchase of, the machine.

A proof having been led, the Sheriff-Substitute (STEELE) pronounced the following interlocutor;—"The Sheriff-Substitute having heard parties' procurators *vivo voce*, and resumed consideration of the process, Finds that, about the month of May 1869, Mr Adam William Dunn of Glasgow, an agent of the pursuers for the sale of their reaping-machines, called upon the defender and pressed him for an order for one of these machines, to be furnished to him, but this order the defender declined to give; Finds that, shortly afterwards, a reaping-machine was sent to the defender by the pursuers, or by their agent Mr Dunn; Finds that defender immediately waited upon Mr Dunn, and remonstrated with him for sending the machine without authority, whereupon Mr Dunn urged the defender to allow the machine to remain with him on trial, and to cut his crops with it for the season, assuring him that he would not be bound to keep the machine unless he were thoroughly satisfied with it; Finds that, upon this understanding, the defender agreed to make use of the machine, and accordingly, at his first trial of it in cutting his hay crop, Mr Dunn came to the farm, and started the machine, and gave instructions in regard to it; Finds that on that occasion the operation of the machine was tolerably good, though not in accordance with the defender's expectations; but, in conformity with his arrangement with Mr Dunn, he resolved to retain it till the corn was ripe, that he might have an opportunity of trying it upon that crop; Finds that the defender accordingly tried the machine in cutting the grain crop, but he found that it was incapable of performing this work satisfactorily, and, in particular, that in every journey or course it made through the field it left uncut a strip of grain of from one to three inches broad, and which was trod down and destroyed; Finds that the defender informed Mr Dunn of this, and he sent Mr Jamieson, a friend of his, to see what was wrong, and endeavour to rectify it; but Mr Jamieson, though he tried several experiments on the machine, was unable to effect any improvement; Finds that, after the reaping of the grain was completed, the defender repeated to Mr Dunn the complaints he had already made of the machine, and intimated his intention of returning it, in terms of their agreement; and he also wrote to the same effect to the pursuers in answer to a letter from them asking payment of the price of the machine; Finds, in these circumstances, that the defender is entitled to be relieved of the claim now made against him by the pursuers; Therefore, and for the reasons stated in the annexed note, sustains the defences, and assoilzies the defender from the conclusions of the action; finds the pursuers liable in expenses, in so far as these have not yet been disposed of; appoints an account thereof to be given in, and remits to the auditor to tax the same, and to report, and decerns."

The pursuers appealed to the Sheriff-Depute (BLACKBURN), who pronounced the following finding:—

"*Edinburgh, 7th May* 1872.—The Sheriff having heard parties' procurators on the pursuers' appeal, considered the proof and whole cause, Finds that, on the 15th of May 1869, the pursuers sent by railway to Kirkintilloch station a combined mowing and reaping machine, addressed to the defender; Finds that the arrival of the said machine was duly intimated by the station-master to the defender; Finds that the defender shortly afterwards sent for and took delivery of the said machine; Finds that on 8th June following the defender duly received an invoice of the said machine, together with a separate note from the pursuers, copies whereof are Nos. 7/1 and 7/2 of process; Finds that the machine had been sent to the defender by order of Mr Dunn, the pursuers' agent in Glasgow; Finds that the pursuers are in use to allow five acres of grass or grain to be cut on trial, before holding a purchaser bound to keep their machines; Finds that the defender used the machine sent to him for cutting his whole hay crop, amounting to sixteen acres; Finds that, at the conclusion of the hay cutting, he expressed no dissatisfaction with the machine, nor offered to return it; Finds that he thereafter kept the machine in his stackyard until the grain harvest, about the end of August; Finds that he then again used the machine to cut the grain crops; Finds that the machine did not cut them well, and in particular that it left a strip of about three inches wide in each course uncut and pressed down: Finds that the defender complained of this to Mr Dunn; Finds