

claiming compensation must seek it from the undertaker in the sense of the statute, and that he must before coming into Court make up his mind who that undertaker is, and bring his claim against the person whom he maintains to be liable. I agree with the Sheriff, and am not disposed to countenance the notion that a workman may call two or more persons into Court on the allegation that one or either of them, but he cannot say which of them, may be the undertaker in the sense of the statute.

The Court answered the question of law in the case in the negative, affirmed the determination of the arbiter, and decreed, and remitted to him to proceed as might be just.

Counsel for the Claimants and Appellants — Campbell, K.C. — J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Respondents R. & W. Cuthbertson—C. D. Murray. Agents—J. W. & J. Mackenzie, W.S.

Thursday, June 29.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow.]

HYSLOP v. SHIRLAW.

Sale—Sale of Moveables — Pictures — Disconformity to Contract — Breach of Warranty—Timeous Rejection—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), secs. 11 (2) and 35.

A, eighteen months after he had purchased certain pictures from B, brought an action against him for recovery of the price, averring that B had warranted the pictures to be the works of certain famous artists, whereas in fact they were not. No new facts regarding the pictures had come to A's knowledge between the date of purchase and that of the raising of the action; but shortly before raising the action he had obtained from certain art critics an opinion adverse to the genuineness of the pictures, which opinion he might have obtained, had he desired it, immediately after making the purchase.

Held that he was barred from maintaining the action as he had not rejected the pictures timeously, as required both at common law and by section 35 of the Sale of Goods Act 1893

Sale—Sale of Moveables — Pictures — Warranty.

Opinions by the Lord Justice-Clerk, Lord Kyllachy, and Lord Stormonth Darling on the question whether, upon the facts proved, a seller had warranted the genuineness of certain pictures sold by him.

The Sale of Goods Act 1893 (56 and 57, Vict. c. 71), sec. 11 (2), provides—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Section 35—"The buyer is deemed to have accepted the goods when . . . or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

William Hyslop, coalmaster, Bank House, New Cumnock, brought an action in the Sheriff Court of Lanarkshire at Glasgow against David Shirlaw, surgeon-dentist, 42 Bath Street, Glasgow, in which he sued for (1) a sum of £285, and (2) a sum of £172, being the prices paid by the pursuer to the defender for certain pictures purchased from him in January and February 1901.

The pursuer averred, *inter alia*—" (Cond 2) In the month of January 1901, the defender sold to the pursuer two pictures, and warranted same as the genuine works of John Phillips, R.A., and Thomas Gainsborough, R.A., respectively, and that at the total sum of £285, being £235 for the picture by the first-named artist, and £50 for that of the second-named artist. The receipt granted by the defender for said total sum is herewith produced, which receipt contains an express warranty that the pictures referred to are the genuine works of each of the parties therein named. The defender also by correspondence with the pursuer in said month of January 1901, and particularly by letters of dates 22nd, 25th, and 28th, all days of January 1901, warranted the said pictures to be the respective works of the artists named. Said pictures were duly delivered to the pursuer by the defender. The pursuer, in the end of July, or in August last, was instructed, and believes that said two pictures are not the works of the artists named, and are practically worthless. (Cond. 3) In February 1901, the defender sold to the pursuer three pictures, two being so sold and warranted as the genuine works of E. Verbockhoeven and H. Tenkate respectively, and that at the total sum of £172. The receipt containing said warranty granted by defender for said sum is herewith produced. The defender also, by correspondence with pursuer in said month of January 1901, and particularly by letters of dates 22nd, 25th, and 28th, all days of January 1901, warranted the said pictures to be the respective works of the artists named. The defender stated that said third picture was signed 'V.C.', and was given by the defender to the pursuer by way of 'luckpenny,' or otherwise without charge. Said pictures were also duly delivered by the defender to the pursuer. In July or August last the pursuer was instructed and believes that said two pictures alleged to be the works of E. Verbockhoeven and H. Tenkate, are not the

genuine works of the artists named, and are practically worthless."

The defender averred that the pictures were genuine, but denied that he had warranted them to be so, and averred that for upwards of eighteen months the pursuer had been fully satisfied with his purchases.

The pursuer pleaded, *inter alia*—" (1) The defender having sold to the pursuer the four pictures condescended on, and warranted same as the genuine works of the artists named, and such pictures being spurious, the pursuer is entitled to repayment of the price paid, with interest thereon and expenses as craved."

The defender pleaded, *inter alia*—" (2) The defender not having warranted said pictures or made any representation regarding said pictures equivalent to warranty, he ought to be assoilzied. (3) The pursuer having accepted delivery and paid price and retained said pictures for upwards of eighteen months after said sales, he is barred from maintaining the present action."

On 15th December 1902 the Sheriff-Substitute (STRACHAN) repelled, *inter alia*, the defender's third plea and allowed a proof, and this interlocutor was adhered to by the Sheriff (GUTHRIE) on appeal.

On 24th November 1903 a proof was taken, restricted at this time by request of parties to their averments on the questions of sale and warranty, the question of whether in fact the pictures were genuine or spurious being reserved.

The following was the import of the proof:—On 6th January 1901 a mutual friend of the pursuer and defender, Bailie Watt, took the pursuer to call upon the defender at the latter's residence in Troon with the object of showing the pursuer the defender's pictures. In the course of the visit the pursuer purchased from the defender the "Phillip" and the "Gainsborough," mentioned in condescendence 2, and subsequently on 26th January obtained a receipt in the following terms:—"3 Sauchiehall Street, Glasgow, Jan. 1901.—Received from William Hyslop, Esquire, Bank House, New Cumnock, Ayrshire, the sum of £285 by cheque for two pictures by John Phillip, R.A., and Thos. Gainsborough, R.A."

On 22nd January 1901 the defender wrote to the pursuer in the following terms:—"Troon, N.B., 22nd Jan. 1901.—Dear Mr Hyslop,—I was pleased to learn that your pictures arrived safely at your house after a somewhat eventful journey, and allow me here to express the hope that you may long enjoy the pleasure of seeing them. May I ask you here if you are aware of any of your friends who are desirous of purchasing 'works of art' (guaranteed) of famous masters. If so, should they desire, I shall be pleased to show them what I have, as I am anxious, if possible, to avoid a sale. Such a procedure grates on my feelings, to see my old friends scattered to the four quarters of the globe, and if you should bring any of your friends who may buy, I shall be only too pleased to let you have any that you may fancy at an easy figure." . . .

On January 25 and January 28 the defender wrote the following letters to the pursuer:—"Glasgow, 25th Jan. 1901.—Dear Mr Hyslop,—Just a line in haste to inform you that I have just had from London an exquisite example of 'Verbockhoeven,' who was the master of Thos. S. Couper, the cattle painter, and whose works are exceedingly valuable and great favourites. It is not a large one, but it is signed and dated, and fine. It is a most desirable work, and I could send it to you to-morrow on receipt of a wire. I am not buying at present, as you are aware, and I give you the first chance, as I don't wish to return it, as I can easily dispose of it, as it is rare when such a fine cabinet work of this master finds its way here. I may say I got it from a friend in London who has sent me many fine things, and the picture in question is well worth £300. He wishes £150 for it, and I earnestly advise you to secure it. Kindly let me know if you can come here to-morrow (Sat.) to see it, or if you care to send your machine to meet me, I will bring it, as I should like to see the pictures in any case after they have been hung. If you think fit to see me, send a wire early to No. 3 Sauchiehall Street, and I will go by the 4.20. Excuse this hurried letter.—Kind regards, yours faithfully, D. SHIRLAW."

"Glasgow, 28th Jan. 1901.—Dear Mr Hyslop,—I have just received a wire in answer to my Sunday's letter, stating that for my com. I can keep the little picture I owe him for. I may here state that I got a little picture from him unframed in a very dirty state. I cleaned it and discovered the initials V. C. in the corner. Vicat Cole, the well-known painter, signs his pictures in that fashion, and while I don't absolutely guarantee the picture as his, yet from what I have seen of his early work I should certainly say it was his. This is my honest conviction. However, the picture is a fine one, and as I told you that what I could get in the way of an abatement off them you should have it, therefore I have pleasure in stating we have done well. I sent him a nice letter and it did the trick. The price is for the three, £170. Make out your cheque for £172, as the frame was mine, and a few shgs. I have spent in connection with it. I shall probably send it off by the 4.20 on Wednesday. I will give it to the guard, and I will expect you will have some one at the station to get it from him. Be sure and measure the edge of the slip of the picture that I showed you very exactly, and I will get glass and bring it, and varnish the picture as well. I got home in good time on Saty.—Believe me, faithfully yours,—D. SHIRLAW. P.S.—I enclose receipt for Phillip, Gainsboro. There is no use bringing the one glass without the other. Do you think you could measure the broken glass of the Gainsborough? Dead size."

Following upon these letters the pursuer on or about 14th February purchased the "Verbockhoeven" and "Tenkate" mentioned in condescendence 3. The defender

sent the pursuer the following receipt:—*“Brandon House, Troon, 14th Feby. 1901.—Received from Wm. Hyslop, Esq., New Cumnock, One hundred and seventy-two pds. £172 for three (3) oil paintings one by E. Verbockhoeven (dated), one by H. Tenkate, and another signed V.C.”*

In the course of the proof the following evidence was given:—*Pursuer examined.*—“I had no knowledge of art when making these purchases to guide me as to whether or not these pictures were authentic; I don't profess to be a judge of art. I relied upon the skill of defender in that matter. I had previously heard very excellent opinions as to the ability of defender as an art critic. . . . *Cross.*—Have you ever bought a picture without guidance?—(A) Never, I always relied on the seller. I get my pictures warranted. I generally rely on the party I am buying from. I have never relied on my own judgment, not even when dealing with a stranger; I have not sufficient knowledge to rely on my own judgment. If I buy a picture it is sold to me as the genuine work of so and so, and I take it for granted that it is so. I never ask a warranty beyond the receipt. The receipt always bears the painter of the picture. I have never got a picture with an express warranty.”. . . (With reference to the call of 6th January)—“I have no distinct recollection of what took place during my call. On that day defender said that the pictures were genuine works of art. I don't remember everything that happened, but I remember he did say that. I think Bailie Watt was present. He took me to the house, but I don't know whether he was present when the conversation took place or not. I went as Bailie Watt's friend. It is very likely that he heard all that took place. (Q) Do you remember on the 6th of January any remark at all being made by defender about the Gainsborough?—(A) Nothing further than he showed me a fine example of a Gainsborough that he had. (Q) Did he put it to you as being a possible or likely Gainsborough?—(A) No.”. . . (With reference to second purchase)—“He came with the second lot, I think, and stayed over night. I certainly saw the pictures. (Q) Do you remember him telling you that he had received an offer from a London man of these pictures at a particular price, but that he did not want them, and that if you wished to take up the offer you might do so?—(A) I think there was something said about one of the pictures only. I think that picture was a Verbockhoeven. (Q) Don't you know that the three pictures, the Verbockhoeven, the Tenkate, and the V.C., were all pictures that had been received on approbation from London on these terms?—(A) The small one was signed V.C. It did not belong to defender at all. He had got it from the party as a luckpenny, and he gave it to me on the same terms. (Q) Were you not told that this V.C. picture was practically defender's commission, and he was handing the commission over to you?—(A) He did not tell me what commission he was getting. Defender wrote me on the 28th of January.

(Q) Are you not aware that you got the bargain he was getting in London and the luckpenny of commission?—(A) I don't know what he got for the commission himself; he never told me. I was told on the 25th January that he was not buying the pictures, and he would give me the first chance. (Q) Was not the whole substance of the bargain this, that he was coming on the chance of you buying the pictures from the seller and getting his commission?—(A) No, I got it from London. I don't know whether he was handing on the bargain to me or not. I bought the pictures as genuine works of art. They were verbally guaranteed to me before I bought them, or I would not have bought them. That applies to the four pictures. . . . He sold them to me as genuine works of art. *Re-examined*—I received a verbal warranty that was followed by receipts being granted at a later stage. The pictures were represented to me as being genuine works of art when they were sold.”

Bailie Watt, examined.—“Pursuer and I went to defender's on a Sunday afternoon, a friendly call. I do not remember the date. We went into defender's house and had a look at the pictures, and had some talk about art and pictures generally. There was some notice taken of a Gainsborough at that time. (Q) Can you tell us what defender said about that Gainsborough?—(A) Defender said that that picture was a probable or a possible Gainsborough of an early date. The amount that he paid for it was £45, and he said that pursuer could have it for £50. (Q) Did that strike you as being a very improbable price for a warranted Gainsborough?—(A) I would say so. The result was that pursuer bought that picture at or about the price mentioned. I was present when that took place; so far as I remember there was nothing said in the way of warranting the picture, but I don't remember if pursuer asked for a warranty, and I don't remember of defender volunteering it. I think previous to that the Phillips was bought. I think that defender had seven Phillips in his house, and they were all looked at. There was one that struck pursuer's fancy. I think defender suggested one picture of a lady with something on her head, which was a cheaper picture than some other one that pursuer said he would rather have. Ultimately pursuer bought the small one. I don't think pursuer asked for a warranty as regards that purchase. It was not given in my hearing. It was sold as a Phillips; it was spoken of by defender as a Phillips. The other one was sold as a possible or probable Gainsborough. Pursuer took a fancy for that picture when coming down the stair. He asked defender what it was, and defender said it was a picture costing 45 guineas, and he would sell it for £50. He then said—‘I think it is a possible or probable Gainsborough.’ There was nothing said about guarantee or warranty. At that interview there was nothing to suggest that defender did not believe the thing to be as he represented it. I do not think defender would do that.

Cross-examined—I think defender said something about having had a bargain of the Gainsborough, and that in turn he was quite prepared to give pursuer a bargain. (Q) When you say there was no warranty, do you mean that defender was in doubt as to whether or not the so-called Gainsborough was genuine or not?—(A) That is so. Defender said that the other picture was a Phillips.” . . .

The defender, examined— . . . “I remember about the 6th of January 1901 of Bailie Watt bringing the pursuer to see me on a Sunday. They came in when I did not expect them, and the Bailie said the pursuer wanted to see my collection, and asked if it was convenient to see them. I was quite glad to show them, the same as I have done to many a one. Pursuer was never in my house after that; he is mistaken when he thinks that he was. On going round the rooms we got the length of the drawing-room, and when looking at a Phillips he said that there was one in another room that he preferred to that. That other picture was the picture in question. I expressed an opinion as to the relative merits of the picture he had first seen and the picture he saw subsequently. I took him from the drawing-room into the other room and pointed it out to him. He had taken notice of it although I had only mentioned it in a casual way. I took it down off the wall and took it into the drawing-room. I said that while this was nearly a £100 cheaper I preferred it, as it was more typical of the artist, in my opinion, and I liked the colour of it better. That was a picture of a woman at a well. Pursuer preferred the other one, and he said that was the one he wanted, if I would sell it. It was a picture of gipsies dancing. I spoke of both the pictures as Phillips. I believed them to be by Phillips; I had no doubt of it whatever. Pursuer said he would buy the Phillips at the price of £235. He asked me to sell it, and I agreed. He did not ask me for any warranty or guarantee, and I did not suggest any. (Q) If you had been asked for a written warranty, would you have sold the picture plus the warranty at £235?—(A) Certainly not. I had no doubt as to the genuineness of the picture. Bailie Watt was present and heard the whole transaction. Pursuer asked me what the picture was, and I said it was a rather queer sort of picture. I thought it was an early work by Gainsborough in the manner of D'Artois. He said that there were not many people who would back me up in that, but in my opinion I thought it might be a Gainsborough. I said that he could have it at what it practically cost me. My opinion was that it was a Gainsborough, and has always been that, though a doubtful one in many a one's opinion. On these terms the purchase of the Gainsborough was completed. The pictures were sent shortly afterwards. I got a cheque for the amount. Up till the time of the receipt being granted the matter of guarantee or warranty of the genuineness of the pictures was never referred to by either party. (Q) You were asked why in acknowledging receipt of the £285 you

spoke of pictures by Phillips and Gainsborough; why do you mention the artists?—(A) To differentiate the one picture from the other. I had no intention of giving a guarantee in the receipt. When we parted after the sale of the pictures was made there was no understanding that I was to give a guarantee. The pictures forming lot 2, the Verbockhoeven, the Tenkate, and the V. C., were not in my house at the time the first sale was made. I don't know if they were in my possession. It was after the first transaction was concluded that it came to be in my power to deal with these pictures. I received a communication from a dealer in London giving me the offer of these three pictures. I did not want to buy them myself, and as pursuer had told me previously that if I saw anything at any time he was willing to become a buyer if I thought the pictures would suit him, and I was to give him the first chance. I was carrying out that request when I brought these pictures under his notice. I got no benefit out of the transaction with regard to the second lot. I even gave him a small picture which I got for my commission. I said that as I was dealing in an honestly and friendly fashion I would give him the picture which was for my commission. It is not a luckpenny. In that transaction I was simply handing on the offer which I got from London, and pursuer knew that. On 25th January, after the first lot had been purchased, I wrote the letter to the pursuer telling him of the chance of getting a Verbockhoeven (dated). When I wrote that I believed it was a Verbockhoeven. I was using the words very much as I had got them from the dealer in London; I had seen the picture myself and believed it was a Verbockhoeven. In the beginning of February I went to the defender's house with the pictures . . . I did not give any warranty. . . . I was never asked to do so.”

On 10th July 1902 the pursuer wrote the following letter to the defender:—“Dear Mr Shirlaw—I had some friends staying with me lately that profess to know something about pictures, and I was rather taken aback when they seemed to doubt my word as to the pictures I bought from you being genuine. Under the circumstances I should like to have the pictures examined by some authority, and think for both our sakes you will agree with me that this should be done. I am agreeable to send them to any one of standing you may name, such as Agnew & Sons London. Kindly let me hear from you at earliest convenience, and oblige.—Yours faithfully, WM. HYSLOP.”

A correspondence extending over several months had followed, resulting in the raising of the present action. Prior to the letter of 10th July the pursuer had never indicated to the defender or anyone that he doubted the genuineness of the pictures, and had taken no steps to discover, by expert opinion or otherwise, whether they were or were not the works of the artists thought to have painted them.

The Sheriff-Substitute (MITCHELL) on a

consideration of the proof was of opinion that the defender had warranted the "Verbockhoeven," and he accordingly allowed a proof on the question of its genuineness, and subsequently found on a consideration of the evidence that the picture was a forgery. On appeal the Sheriff (GUTHRIE) held that the pursuer had guaranteed all the four pictures and allowed a further proof upon the question of the genuineness of the other three.

The defender, however, while expressly adhering to his opinions and statements on record as to the authenticity of the three remaining pictures, the Gainsborough, Phillip, and Tenkate, lodged a minute agreeing that the case should be disposed of, in order to avoid expense, on the footing that the pictures were not painted by any of these artists. Accordingly on 18th January 1905 the pursuer was granted decree for the sums sued for.

The defender appealed to the Court of Session, and argued—(1) The defender had never warranted the genuineness of any of the pictures. The parole evidence as to what took place at the meetings and the letters clearly showed that the defender did no more than indicate an honest belief that the pictures were the works of the artists mentioned. The terms of the receipts did not involve a warranty, the words "by Phillip, R.A.," &c., merely being used to identify the various canvasses. Breach of warranty was a "failure to perform a material part of the contract"—Sale of Goods Act 1893, sec. 62—but the defender had entered into no contract with the pursuer except to hand over certain pictures chosen by the pursuer, and this he had done—*Campbell v. Henderson*, June 1, 1886, 23 S.L.R. 712; *Jendwine v. Slade*, July 12, 1796, 2 Espinasse 572; Addison on Contracts (10th ed.), 511. (2) In any event, the pursuer was barred from proceeding with the action, as he had failed to reject the goods within a reasonable time—Sale of Goods Act 1893, secs. 11 (2), 34, 35. The present was not a case of some latent defect suddenly becoming patent, and the buyer immediately thereafter rejecting the goods. He could have made his examination by experts immediately after purchasing just as well as eighteen months afterwards—*Carter & Co. v. Campbell*, June 12, 1885, 12 R. 1075, 22 S.L.R. 711; *Pearce Brothers v. Irons*, February 25, 1869, 7 Macph. 571, 6 S.L.R. 372.

Argued for the pursuer and respondent—(1) The defender had warranted the goods orally, by the letters, and by the terms of the receipts. No express words of warranty were necessary—*Scott v. Steel*, December 9, 1857, 20 D. 253; *Stewart v. Jamieson*, March 6, 1863, 1 Macph. 525. There was at any rate an express representation upon which the contract proceeded, and the mere fact that it may not have been fraudulent was immaterial—*Ferguson v. Wilson*, June 4, 1904, 6 F. 779, 41 S.L.R. 601; Benjamin on Sale (4th ed.) 609; Addison on Contract (10th ed.), 507. The following

cases on the warranty of pictures were authoritative:—*Power v. Barham*, Jan. 14, 1836, 4 Adolphus & Ellis 473; *Lomi v. Tucker*, July 10, 1829, 4 Carrington & Payne 15. (2) Whether rejection is timeous or not is always a question of circumstances. The rejection here was timeous. The defender's contention on this point involved the absurdity that the buyer of a picture could never reject it on the ground that it was not genuine unless he had immediately after purchase subjected it to expert examination. The buyer, however, of an article was only bound to examine it if put upon his inquiry by something suspicious. He was not bound to suspect the seller of fraud—Benjamin on Sale, p. 602 and foll. *Jones v. Ryde* (a case of forged signature), 1814, 5 Taunt 488; *Patterson v. Landsberg & Son*, May 24, 1905, 42 S.L.R. 542. Pictures differed from such things as grain or machinery in the fact that whereas the latter deteriorated, the former increased in value by the lapse of time, and the whole foundation of the defender's argument on this head was struck at by the fact that he could not show that the so-called delay had been to his prejudice.

LORD JUSTICE-CLERK—This is a somewhat perplexing case, relating as it does to the genuineness of works of art, and the dispute not being a trade dispute but one between friends who have had picture transactions. The pursuer maintains that he is entitled to recover certain sums paid by him to the defender in respect of the purchase of two sets of pictures, on the ground that they were warranted as being the genuine work of the artists whose names were attached to them in the carrying out of the transactions. The defender denies that any warranty was given, and pleads further that even if a warranty were given, the pursuer's case must fail in respect that there was no rescission of the contract within "a reasonable time," and that therefore under the Sale of Goods Act the pursuer's case must fail.

It is necessary to distinguish between the two transactions, and I shall therefore speak of them separately. The first related to two pictures, which for convenience I shall call by the names which were used in speaking of them in the transactions, viz., a Phillip and a Gainsborough. It appears that the defender was a collector of pictures, and had a number hung in his house in Troon, and that upon a day in December 1901 a gentleman called Bailie Watt brought the pursuer to the defender's house to see the collection; that when there the pursuer proposed to buy two of them, which he says were represented to him as being works of Phillip and of Gainsborough, and that the defender was willing to sell them to him. The pursuer bought the two pictures, the Phillip at the price of £235 and the Gainsborough at the price of £50. The pursuer says that the defender described them as "genuine works of art." Such words cannot in my opinion be held as amounting to a warranty that they were painted by the artists named, and

that they were not, if used, intended to be a warranty is made plain by what occurred in regard to the Gainsborough, to which I shall refer later on. The pursuer's evidence as to the interview is not at all satisfactory, and he himself admits that he has "no distinct recollection of what took place," which is scarcely compatible with anything distinct of the nature of warranty being either asked for or given. If anything distinct had been said on that matter, it is scarcely to be conceived that the purchaser should not remember it. But it is not a little strange to find that the pursuer's evidence in chief is limited entirely to the bare fact that when he paid the money for these two pictures he received a receipt which is in these terms—"Received from William Hyslop, Esq., Bank House, New Cumnock, Ayrshire, the sum of £285 by cheque for two pictures by John Phillip, R.A., and Thomas Gainsborough, R.A." It is only in the defender's cross-examination of the pursuer that any question is asked as to the way in which the transaction was gone into, and the above phrase "genuine works of art" is the only expression out of which any suggestion of warranty can be spelled from the pursuer's deposition. But that this expression could not have been understood, or have been intended to be understood as a warranty is made plain by Bailie Watt's evidence, from which it appears very distinctly that as regards the Gainsborough the defender not only did not warrant it as genuine but spoke of it in terms inconsistent with any such warranty. For his evidence is quite clear to the effect that as regards the Gainsborough the defender spoke of it as a picture that was "a probable or a possible Gainsborough," which the defender bought for £45 and would let the pursuer have at £50, and he says he has no recollection of the "pursuer asking for a warranty or of the defender volunteering it." This is very much against the pursuer's case as regards both pictures, for the pursuer's case is that the one was as much warranted as the other.

As regards the Phillip, nothing importing a warranty is stated by the pursuer. As in the case of the Gainsborough, his evidence is limited to proving the receipt. And here again it never occurred to Bailie Watt that any warranty was being asked or given, and he declares that none was given in his hearing. All that he heard was that it was spoken of as a Phillip, and was sold as such. That certainly is stronger than the case of the Gainsborough, but it seems to come far short of a warranty, when nothing definite pointing to a warranty was said, and all that was uttered may be held to be only an expression of belief.

But then it is said that the terms of the receipt are sufficient to constitute a warranty. The transaction was by that time complete. The terms on which it was entered into were not then settled, but were settled at the interview at which the purchase was made, and it would, I think, be an extreme stretch in interpretation to hold that whole contention, that warranty was given by the re-

ceipts, that words of description, necessary for identification of the articles, constituted a binding written warranty. As regards the Gainsborough, the receipt must be taken along with the parole evidence, and if this is done the receipt could not have been intended or received as a warranty. I am of opinion that the pursuer's case fails both as regards the Phillip and the Gainsborough.

Shortly after this transaction it appears from the evidence that a dealer in London sent down two pictures to the defender, one said to be by Verbockhoeven and the other by Tenkate, and that the defender, not wishing to buy them, but thinking them good pictures, gave the pursuer the opportunity of buying them, which he did. That the defender praised these pictures and spoke of them as being in his belief genuine, there can be no doubt, but as regards these pictures the difficulty in the pursuer's way is that the evidence indicates that the pictures never belonged to the defender, and that therefore when the pursuer puts his case on a sale by the defender to him he puts it on a ground which is not supported by the evidence. I think it is proved that the pursuer knew that they came from a London dealer and that the defender was only acting between him and the dealer in the transaction. So clearly is this the case that it comes out that the dealer sent a small picture, said to be a Vicat Cole, to the defender as a commission in kind on the sale of the two pictures, and that the defender—as the transaction was with a friend—threw in the picture by Cole with the others on the footing that in the circumstances he would not take a commission. If this is a sound view of the transaction, as I think it is, then the pursuer's case must fail.

It only remains to say that even if there had been a warranty as regards any of the pictures there is ground for holding that the pursuer has lost his remedy by keeping the pictures for a year and a-half. He could have found out all he knows now had he thought of taking reasonable diligence at the time. It is not a case in which positive proof is or can be expected. The genuineness is to be determined by expert opinion. Such opinion was open to him from the first, and I am unable to hold that when he kept the pictures without objection for so long he can be held to have timeously rejected them.

I am therefore of opinion on these grounds that the interlocutors appealed against should be recalled and the defender assolizied.

LORD KYLLACHY—The pursuer in this action seeks to rescind a contract, or rather two contracts, by which he bought from the defender certain pictures so far back as the months of January and February 1901. His case is that there was in each case a warranty—that is to say, a representation forming part of the contract—to the effect that the pictures were respectively genuine examples of Gainsborough, Verbockhoeven, John Phillip,

and Tenkate, whereas the fact, as he alleges, was that the pictures were not genuine examples of those artists, and were therefore disconform to contract. On that ground he claims to have validly rejected them in July 1902, and to be now entitled to rescind the contracts and to recover from the defender the prices which he paid in 1901. And I suppose he is quite entitled to that remedy, provided (1) that the representations were really made—made as matter of fact, and not merely as matter of belief; (2) that being so made, they were made parts of the contract—that is to say, amounted to warranties, or speaking more correctly, to conditions of the contract; and (3) that the pursuer having thus the right to reject and rescind, intimated his rejection within a reasonable time, as required both at common law, and by the provisions of sec. 35 of the Sale of Goods Act of 1893.

As to the first two questions, which between them raise what may (for convenience) be called an issue of warranty, I confess I have had, up to a certain point, no great difficulty. I do not, I own, see how it is possible upon the evidence, to hold that anything of the nature of warranty passed with reference to the Gainsborough. The evidence of Bailie Watt—the friend of both parties—makes it, I think, clear (apart from the very moderate price) that the Gainsborough was represented simply as “a probable or possible Gainsborough of an early date.” Again, as regards the two Dutch pictures, I think it is equally clear upon the correspondence which led up to the transaction, that the pictures were recommended by the defender to the pursuer, not as pictures which he was himself selling, but simply as pictures which had been offered to him by a London dealer at certain prices, and the offer of which he passed on to the pursuer, not as matter of business or profit, but as matter of friendly obligation. It seems to me that the very nature of such a transaction excluded as between the parties any idea of warranty. Nor does it appear material, either as to these pictures or as to the Gainsborough that the receipts granted to the pursuer described the pictures by the names of the supposed painters. That was, it seems to me, no more than a mode of identification, convenient and quite natural in the circumstances. So far, therefore, I have no particular difficulty.

But with respect to what is called the Phillip picture, there is, I think, a good deal of difficulty. I cannot, I confess, accept the case which the pursuer makes on record, viz., that in this case, as in that of the other pictures, there was a warranty constituted by the terms of the receipts. As already explained, I think that in this matter the terms of the receipts have no particular significance. Neither am I able to agree with the Sheriff-Principal in what seems to me to be the somewhat strained construction which he puts upon the correspondence between the parties which preceded the action. As to that I must say I agree with the defender's argument founded

on the explicit terms of the earlier letters. But, on the other hand, where a contract of sale has been, as here, made verbally, a warranty or condition may of course be constituted verbally, and proved like any other part of the contract. And to constitute a warranty no *vores signatæ* are necessary. A representation may be a warranty if it appears that it was so intended and understood; the question whether it was so or not being always a jury question depending upon the evidence. Therefore, looking to Mr Watt's evidence, I should have, I must say, difficulty in holding otherwise than that (in contradistinction as to what passed as to the Gainsborough picture), the Phillip picture was represented and sold as a genuine Phillip, and was so in circumstances which made the representation a warranty. I do not say that the point is clear, but if it were necessary to decide it I should incline to decide it in that way.

It is not, however, in my opinion, necessary to decide whether as to this picture or as to the others there was or was not a warranty. For it seems to me sufficient to exclude the pursuer's case that he has failed to shew that his rejection of the several pictures was timeous—that is to say, made within a reasonable time. *Prima facie* a delay of eighteen months is unreasonable. That, I think, is conceded. Nor is it enough for the pursuer to say that he was entitled so long as he pleased to rely on the seller's description of the goods, even if it amounted to a warranty, and so to delay as long as he pleased the acceptance or rejection of the goods delivered under the contract. Such a doctrine, as applied either to the sale of specific goods or to a sale by description, would render nugatory the rule of law expressed in the 35th section of the Sale of Goods Act. Accordingly, it seems to me that the onus is on the pursuer to show that he could not, by any examination reasonably possible, have discovered earlier the disconformity on which his rejection proceeded. And that onus I think the pursuer has failed to discharge. When he did reject—more than eighteen months after delivery—he did so as the result of an examination by experts, whom he might equally have consulted a week after his purchase. He is not, therefore, in the position of a person who has by accident discovered, perhaps years afterwards, something justifying rescission which could not have been discovered except by accident. That is, of course, a different case altogether. The pursuer's rejection is founded, and his action is brought, on information which was available from the first; and in such circumstances it appears to me that he must be held to have accepted the pictures as satisfying the contract, and to be barred from the remedy of rescission for which he now concludes.

LORD KINCAIRNEY—This is a case of interest and difficulty. The pursuer Hyslop sues for repayment of £285 and £172 paid by him to the defender Shirlaw for four pictures purporting to be by Gainsborough, Phillip, Verbockhoeven, and Ten-

kate, all of them artists of high repute. The sales were made by Shirlaw and the pictures delivered to Hyslop in January and February 1901. The pursuer Hyslop states that about July 1902 he discovered that the pictures sold to him were not the genuine works of these artists, and he has raised this action for repayment of the prices which he paid. I do not gather how he made that discovery. The case of the Verbockhoeven was for reasons of convenience taken separately and first in the Sheriff Court, and by interlocutor of 2nd August 1904 the Sheriff-Substitute found, as the result of the proof, that the painting ascribed to Verbockhoeven was not painted by him, and that the pursuer Hyslop was therefore entitled to repayment of the price which he paid.

After a proof of considerable length about the other pictures, the parties, without formally concluding the proof, came to an agreement that the case should be decided as if it had been ascertained that the pictures ascribed to Gainsborough, Phillip, and Tenkate were not painted by them, and decree for payment of the sums concluded for was pronounced by the Sheriff. I do not find it essential to decide any question of warranty.

The defender Shirlaw has appealed the whole case, and it has come before the Court on the footing that the pictures sold were not painted by the artists to whom they were ascribed. I think that amounts to an admission that the seller Shirlaw had in that particular failed to perform a particular part of the contract, and that the buyer is therefore, as provided by section 11 of the Sale of Goods Act, entitled to reject the goods and treat the contract as repudiated if, but only if, he has rejected the goods within a reasonable time after delivery—in this case a period of a year and a-half. The seller's right of rejection and the limitation of that right is expressed more fully in section 35. The case is peculiar in this respect, that it does not appear clearly how Hyslop's change of view as regards the pictures has come about, or that anything new has been discovered about the pictures since they were sold. It is not said that the painters who were their true authors are now known, nor that the pictures from which they have been copied (if they are copies) have been discovered. Only the reputation of the pictures appears to have altered. At one time the pictures were thought authentic, but their authenticity is now doubted or denied. The question is after all, so far as the proof shows, one of mere opinion and connoisseurship, and the one opinion might be as plausible as the other. But then the opinion that they are authentic has been for the purposes of this action abandoned, and they are to be taken as not being the pictures of the artists named. The matter amounts, so far as the proof which has been led discloses, only to this, that within a year and a-half Mr Hyslop has changed his mind about the pictures, but not that he has got any new information about them. If that be the true

state of the facts, and it seems all that the proof discloses, then I am inclined to think that it could not be said to be reasonable that the pursuer Hyslop should remain in this state of vacillation of mind for a year and a-half, and should then, without any new facts to go on, be allowed to go back on his bargain. The case is troublesome certainly, but it does not seem necessary, or indeed reasonable, to impute dishonesty to either side, and I am of opinion on the whole that the pursuer has shown no sufficient ground for getting rid of his bargain.

LORD STORMONTH DARLING—I concur in the main ground of judgment, viz., that the pursuer's rejection of the pictures was non-timeous. But I am also disposed to agree in the view that there was no warranty as regards any of the pictures.

The Court sustained the appeal and pronounced the following interlocutor:—

“Find in fact (1) that the defender sold to the pursuer on 13th January 1901 two pictures which the pursuer alleges the defender warranted as the works of John Phillip, R.A., and Thomas Gainsborough respectively, at the sum of £235 for the former and £50 for the latter; (2) that the defender sold to the pursuer in February 1901 three other pictures which the pursuer alleges the defender warranted as the works of E. Verbockhoeven, H. Tenkate, and one signed “V. C.” for the price of £172 in all; (3) that on or about the beginning of July 1902 the pursuer, being satisfied that the said pictures were not in truth the works of the artists by whom it is alleged the defender warranted the pictures were painted, called upon the defender to repay the said sums of £285 and £172 respectively; (4) that the pursuer has failed to prove that the defender warranted the said pictures as the genuine works of the said artists, and (5) that the pursuer continued to possess the said pictures without making any complaint from the dates when the same were purchased until the month of July 1902: Therefore sustain the second and third pleas-in-law for the defender, and assoilzie him from the conclusions of the action, and decern.”

Counsel for the Defender and Appellant—Aitken, K.C.—Cullen. Agent—F. J. Martin, W.S.

Counsel for the Pursuer and Respondent—The Solicitor-General (Salvesen, K.C.)—Crabb Watt, K.C.—Morison. Agent—A. R. Steedman, Solicitor.