

While the School Board changed their views on the plan to be adopted for supplying the deficiency in the means of education, the Board of Education changed theirs also, and came to think the school should be erected at Gateside, as had been the opinion of the School Board at first. There is no statutory provision to prevent either the one or the other from altering their views. Apparently the Board of Education only changed in this sense, that they found the obstacles in the way of getting the Burnside School were so great that the proposals should not be persevered with. But supposing their reasons were not so clear, it lies with the Board of Education to act as they think right, and when they make their requisition without any effect, our duty is merely ministerial. It is not for us to judge whether there is anything unreasonable in their view, but I would only urge that in this case, so far as I see, it is only right and reasonable.

LORD MURE—I am satisfied that these proceedings are within the statutory powers of the Board of Education, and that is all that we have to consider. I cannot say that the Board of Education have not given the School Board full time to carry out the proposal which they had sanctioned.

The Court granted the prayer of the petition.

Counsel for Petitioners—(Lord Advocate) Watson—Trayner. Agent—Donald Beith, W.S.

Counsel for Respondents—Balfour—J. C. Smith. Agents—Graham, Johnston, & Fleming, W.S.

Wednesday, November 22.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.]

M'EEIKIN v. ROSS (SCOTT'S TRUSTEE.)

Bankrupt—Sale—Mercantile Law Amendment Act (19 and 20 Vict. c. 60) sec. 1—Res Specifica—Delivery.

S sold to M all the scrap-iron he had then in stock, and as much more as should be made up to a certain date. M allowed S to draw upon him for £200, and to renew a bill granted for a similar transaction three months before. On the bankruptcy of S, M claimed all the scrap-iron then in S's yard, under the 1st section of the Mercantile Law Amendment Act.—*Held* that, there being no specific corpus or quantity, the transaction was not a sale, and the Act did not apply.

The pursuer, John M'eeikin, an iron merchant in Coatbridge, accepted an offer made to him by Messrs Scott, iron ship builders, Inverkeithing, on 24th September 1875, of thirty tons of scrap-iron then in their hands, and of all that they might make for six or eight weeks thereafter, allowing the defenders to draw on him for £298, 12s. 6d. Under this agreement two deliveries were made, whose value amounted to £190, 17s. 6d. The latter of these deliveries took place on 25th December 1875. On 11th January Messrs Scott again wrote to the pursuer, offering him all the scrap-iron they had then in stock, and

all they should make up to 1st April 1876, if they were allowed to draw on him to the amount of £200. This offer was accepted by the pursuer, and the former bill for £298, 12s. 6d. was renewed to the extent of £140. No portion of this scrap-iron was delivered. The estates of Messrs John Scott were sequestrated in March 1876, and John Ross, the defender, appointed trustee.

The pursuer brought this action to have it declared that "the pursuer was, and that he still is, entitled to demand and receive delivery of the whole scrap-iron which the defenders John Scott & Sons had in stock in or about their works or other premises at Inverkeithing at 11th January 1876, and also of the whole scrap-iron thereafter made or produced by them, and which was in their possession at their said works or premises or elsewhere, or under their control, at the date of the sequestration of their estates as aforesaid;" and pleaded—"The pursuer having purchased and paid for the said scrap-iron as aforesaid, and the same having been allowed to remain in the custody of John Scott & Sons as aforesaid, the pursuer is entitled to decree of declarator, as concluded for."

The defender pleaded—"2. The alleged contract of sale being incomplete as to subject, quantities, and prices, the pursuer has no ground of action. 3. There having been no sale of specific and existing goods at a certain price, the Mercantile Law Amendment Act has no application."

The first section of the Mercantile Law Amendment Act is as follows:—"Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, assoilzies the defender Ross from the conclusions of the action, and decerns.

"*Note.*—The pursuer seeks to recover from the defender Ross, as trustee on the sequestrated estate of John Scott & Sons, the whole scrap-iron which the bankrupts had in stock at 11th January 1876, and also the whole scrap-iron thereafter made by them and remaining in their possession at the date of their sequestration.

"The contract founded on by the pursuer stands upon three letters, dated 11th, 15th, and 18th January 1876. In the first of these letters the bankrupts wrote—"We will have another lot of scraps soon from a ship we are about to plate, besides what we have still in stock. You may have them secured to you if you promise market price during the next two months. If you have no objections, we will draw at three or four months to the extent of £200 for what we make—say to 1st of April." This offer was accepted by the pursuer's letter of 15th January, subject to the condition that a bill which was then

current should be renewed to the extent of £140, and this condition was acquiesced in by the bankrupts in terms of their letter of 18th January.

"In pursuance of this contract the bankrupts drew on the pursuer for £200. It was accepted by the pursuer, who avers that the bill, which he has either retired or is bound to retire, 'is greatly in excess of the market price of the scrap-iron' to which the action relates. The pursuer alleges that the scrap-iron which is the subject of the contract 'was separated and set apart, or was or is at all events easily distinguishable from the other articles' in the bankrupts' premises. But as was explained at the debate, he did not mean to aver anything more than that he had bought the whole, and that it was in this sense it was separated or was capable of separation.

"The action is laid on the contract, and on the 1st section of the Mercantile Law Amendment Act.

"The defender maintains—1st, That the pursuer did not buy the whole scrap-iron to be made after the date of the contract, but only a portion of the make; 2dly, That even though he did, the pursuer cannot avail himself of the provisions of the Act, because there was no completed sale of any definite quantity of goods.

"The Lord Ordinary is disposed to hold that the contract does not comprise the whole scrap-iron made by the bankrupts, but only so much of it as was produced in plating the particular ship referred to in the letter of 11th January. This may not be sufficient to dispose of the case without inquiry, inasmuch as it may turn out that no scrap-iron was actually made except what fell under the contract. He is, however, of opinion that the pursuer has not brought himself within the provisions of the Mercantile Law Amendment Act.

"There was not at the date of the contract any definite subject, nor at that date or any other date was there a definite price. The contract related to a subject to be produced, and the sum due under it was to be determined by the amount of the production. Before the bankruptcy no step was taken to ascertain the amount of the scrap-iron that was made; and indeed this could not well have been the case, because the contract included the make up to 1st April 1876, and the contents of the bill were intended to cover the whole price, subject to adjustment either way according to the amount of production.

"In these circumstances, the Lord Ordinary cannot hold that the sale was complete, so as to admit of the application of the Mercantile Law Amendment Act. He refers to and adopts the opinion of the Lord President in the case of *Hanson v. Craig*, 21 D. 432; see also Benjamin, p. 235."

The pursuer reclaimed, and argued—The contract of sale was completed as soon as the iron was produced. It remained with the bankrupt *custodia causa* merely, and was instantly deliverable. The property was not passed; that could only be effected by delivery, but the contract of sale was complete, and that is all that is required by the Mercantile Law Amendment Act, sec. 1. That Act must therefore be held to apply here, for whenever the subject here comes into existence the contract is complete, and delivery is exi-

gible. The English cases quoted do not apply here, because they deal with the question, whether property has passed or not. That is not the question here. The question here is as to the completion of the personal contract. *Hanson v. Craig* deals with the passing of the risk; and in all the authorities quoted there a distinction is made between the completion of the contract and the passing of the risk. That may not pass until the subject is measured or weighed, but the contract may well be completed before such operations.

Authorities quoted—*Hanson v. Craig*, 21 D. 432, and authorities quoted in the opinion of the Lord Justice-Clerk there; *Wyper v. Harvey*, 23 D. 606; *Edmond v. Mowatt*, 7 Macph. 59; *Black v. Glasgow Bakers*, 6 Macph. 136; Bell on Sale, p. 31; *Gourlay v. Hodge*, 2 Rettie 738.

The respondents argued—1, This was no sale. 2, If it was, it was not completed—(1) The thing sold was not in existence, and there is no obligation to bring it into existence. The *quid, quantum, quale*, and *pretium*, are all wanting. The Mercantile Law Amendment Act contemplated a case where the claim was instantly enforceable, the sort of case reported in Morrison, 14,202, *Salter v. Knox's Factor*. Here there is merely an agreement to sell; (2) Neither by our law nor the law of England can this transaction be held to be a completed contract of sale. By our law the test of that is the passing of the risk, and *Hanson's* case shows that where things are not yet measured or weighed the risk is not passed, and consequently the contract of sale not completed. Even where the use remains with the seller, the contract is not completed. The English cases, which show that in similar circumstances there is no sale, are of importance, for the object of the Mercantile Law Amendment Act was to assimilate the laws of the two countries.

To adopt the view of the pursuer would open the door to fraud.

Authorities—*Hanson v. Craig*, as above; Story on Sales, p. 132; Bell on Sale, p. 16; *Hanson v. Meyer*, 6 East. 614; *Sim v. Grant and Others*, 24 D. 1033; *Hutchison v. Henry and Corrie*, 6 Macph. 51; *Wylie and Locheud v. Mitchell*, 8 Macph. 552; Benjamin on Sales, pp. 227, 235; *Simmonds v. Swift*, 5 Barnewell & Cresswell, 857; *Heilbutt v. Hickson*, 7 L. R. (Common) *Taffe v. Ritchie*, 23 D. 242; Pleas—C.-J. Bovill's judgment.

At advising—

LORD PRESIDENT—The question here is whether the transaction between Scott & Son, whose trustee is the defender in this action, and the pursuer, was a contract of sale within the meaning of the 1st section of the Mercantile Law Amendment Act. The Lord Ordinary has decided the case on relevancy, and it is necessary, if we are to adhere to his judgment, to take the statements of the pursuer upon record as representing the transaction. Now, he begins by mentioning that "the pursuer has dealt with the defenders John Scott & Sons for the last eight years." That is, I understand, in the same kind of transaction as the present. Then he goes on—"On 22d September 1875 the said John Scott & Sons wrote to the pursuer offering to deliver to him 30 tons of scrap-iron then in their hands, along with whatever would be made for the succeeding six or eight weeks, at the same price as their imme-

diately preceding transaction, which was at the rate of £3, 15s. per ton. In this letter they stipulated that the pursuer should allow them to draw upon him for £250 at four months' date." Now, we are entitled also to take the letters referred to into consideration, along with the pursuer's averments, and to correct the statements of the one by the other. Now, the statement in the letter as to the scrap-iron is not quite the same as in the condescendence. It is—"We have something like 30 tons of scrap-iron at present, and making more daily. The present is to state that we are willing to let you have these, and what will be made for the next six or eight weeks, at the same price as last, with permission to us to draw upon you now for £250, at 4 m./d. You would have delivery of what is now ready at once if wished, or the whole could lay and be taken at one trip." That statement means, the defenders are willing to go on supplying the pursuers with scrap-iron at the same rates as before. The letter mentions that there were over 30 tons of scrap-iron, and the time of the proposed contract is six or eight weeks. The acceptance fixes the contract for eight weeks, and otherwise is in terms of the offer. The 2d article of the condescendence goes on—"The offer was accepted by the pursuer in a letter dated 24th September 1875, and a bill was drawn upon him by the said John Scott & Sons for £298, 12s. 6d. Towards implement of this contract, two cargoes of scrap-iron were delivered by the said John Scott & Sons to the pursuer, conform to invoices dated respectively 8th and 25th December 1875, the former amounting to £92, 16s. 3d., the second to £98, 1s. 3d. There was thus a balance of £107, 15s. remaining, for which no value had been given." The result of that is, that while the pursuer had advanced the sum of £298, 12s. 6d. in a bill, he had only obtained delivery to the amount of £190, 17s. 6d., and so matters stood when the next letter, of 11th January, was written. In the meantime the original bill had been advancing to maturity, and a renewal had been proposed and was agreed to the amount of £140. Then comes the letter of 11th January 1876, and in reference to it the pursuer says—"On 11th January 1876 the said John Scott & Sons wrote and sent a letter to the pursuer, whereby they offered to sell him all the scrap-iron which they then had in stock, as also the scraps which would be made by the said John Scott & Sons up till 1st April 1876, at the market prices for the ensuing two months, if he would allow them to draw upon him for £200. A bill stamp sufficient to cover that amount was enclosed in the letter, in order that the pursuer should sign across it, and so complete the arrangement." Then the 5th article goes on to say—"The pursuer accepted the said offer by letter written and sent to the said John Scott & Sons on 15th January 1876, and this acceptance was duly acknowledged by John Scott & Sons by letter dated 18th January 1876. Further, the pursuer signed the said acceptance for £200, and forwarded the same to the said John Scott & Sons. The contract was thus completed. The counter statement in answer is denied."

Now, with regard to the second transaction, the eight weeks during which the arrangement of the 22d September was to endure had expired some time before; and when Scott & Son proposed to sell to the pursuer all the scrap-iron they had in

stock at that date, viz., on 11th January 1876, it does not follow that any part of that iron fell under the original contract. It does not appear, and it is not even averred, that any more iron was produced in these eight weeks than was delivered at the two deliveries of 8th and 25th December. If there was, it certainly became indistinguishable from the iron to be delivered under the arrangement of 11th January. We have it then that the pursuer was to take all the scrap-iron in the work at 11th January, and all that might be produced till April.

Then the condescendence (7th and 8th) goes on to say—"On 17th March 1876 the estates of the defenders, the said John Scott & Sons and the individual partners of that firm, were sequestrated by the Sheriff of Fife, and on 29th March 1876 the defender, the said John Ross, was appointed trustee on the sequestrated estates." "At the date of the sequestration of the estates of the said John Scott & Sons a considerable quantity of scrap-iron was lying in their premises ready for delivery to the pursuer, and at present there is scrap-iron deposited in the premises of the said John Scott & Sons for that purpose. There was no other scrap-iron in the premises, custody, or possession of the said John Scott & Sons, except that which had been sold to the pursuer as aforesaid, and the said scrap-iron was separated and set apart, or was and is at all events easily distinguishable from the other articles in the said premises. The amount of the said bill, which the pursuer will retire in due course, is greatly in excess of the market price of the said scrap-iron. The counter-statement is denied." Now, this last article is not very intelligible or consistent with itself. It represents, in the first place, that all the scrap-iron in the premises was sold to the pursuer; then it says that it was "set apart" or "at least was easily distinguishable." If all the scrap-iron was sold that is unmeaning. I take it, however, to mean that all the scrap-iron in the defenders' premises fell under this running contract with the pursuer. Now, then, what is the meaning of this arrangement? It seems to be a continuing arrangement under which the defenders agreed to furnish the pursuer with scrap-iron; and there was an advance made by bills of exchange in anticipation of future deliveries. As far as delivery was concerned, deliveries were to be made from time to time as the scrap-iron grew. And money was, on the other hand, to be advanced from time to time to pay for the iron. The question is, Is that a sale in the sense of the 1st section of the Mercantile Law Amendment Act? I am of opinion it is not. In the first place, the subject is not a specific *corpus*, and therefore in purchasing the pursuer acquired no *jus ad rem specificam*. In the second place, it is plain that the delay in delivery arose from the nature of the contract itself, and did not accidentally arise from any carelessness or want of precaution. The provision of the first section of the Mercantile Law Amendment Act is—(*His Lordship quoted the section.*) That is the only case where this Act applies, and what is contemplated there is a present sale in the ordinary sense, whereby the seller is under an immediate and present obligation to deliver a specific *corpus*. The buyer, on the other hand, is under an obligation to pay an ascertained price, while the goods are allowed to remain or happen to remain in the custody of the

seller contrary to the spirit of the contract, which contemplates immediate delivery, Any other construction of the clause would lead to strange consequences.

It was a peculiarity of Scotch law before this Act was passed that where the price had been paid but the goods not delivered, the seller remained undivested owner of them, and was entitled to retain them in security for the unpaid balance of a current account, or, in the event of his bankruptcy, his creditors could attach them. In that respect Scotch law differed from the English law, for there where there was a well-ascertained obligation to deliver the goods the property was with the purchaser, and the hardship that might arise under our law could not occur. It was to avert that hard case that the Mercantile Law Amendment Act was passed; but if we hold that the pursuer is to prevail here we shall introduce into our law a principle not known in the law of England. This contract, which is very like a contract for furnishings with advances, would be assimilated to a contract of sale, and therefore, as I think that there can be no doubt that the section of the Act of Parliament refers to the case of a present sale where there is a right *ad rem specificam*, and where a certain price has been paid and immediate delivery may be required, I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—The Mercantile Amendment Act bears—(His Lordship quoted the first section.) The present contract refers to a subject to be produced, without any obligation to produce it. The amount due is to be determined by the quantity produced and the price at the time. I am of opinion with your Lordship that this does not fall within the category mentioned in the statute. There was no present right of delivery at the time of the contract, and I do not see that there was any at the date of the sequestration. The only difficulty I had in the case arises from the suggestion that there were here two contracts, one on the 22d September for thirty tons of scrap-iron, along with whatever might be made for the succeeding six or eight weeks, at market prices, the other for that which might be made for two months after the 11th January 1876, and the difficulty was, whether a different rule did not apply to the quantity mentioned in the first contract so far as undelivered. It is true that the pursuer does not aver that any part was undelivered at the date of the second contract. But supposing that he had averred it, the construction that the pursuer puts on the letter of 11th January in the 4th article of the condescence makes it impossible for him to make any distinction between the iron on hand at the different times referred to in these contracts. The construction of that letter of the 11th January is by no means plain, but I should have great difficulty in accepting the pursuer's construction of it. But he adheres to that construction, and does not ask to amend. We must therefore deal with the case on the assumption that the whole subject is comprehended under the letter of 11th January 1876. Supposing he had not got delivery of all he was entitled to under the letter of 22d September, he would have had to aver that that iron was distinguishable from that which was made between the date of the

first and second contracts, but no such averment is made. It is therefore, as I said, a case where the subject of the contract was yet to be produced, and there was no obligation on the seller to produce it, the price to be determined by the market price of the time and by the quantity produced; and that, I agree with your Lordship in thinking, is not under the category of the Act.

LORD MURE—I agree in thinking that this is not a contract covered by the first section of the statute. I had, I confess, some difficulty in reference to the portion of the iron produced under the first contract. If the parties had averred there was a quantity of iron due under the first contract and that it had not been delivered, I should have had difficulty in holding that the pursuer had not a right to that portion. But the second contract covers any iron then in the premises and any that might be produced. Under the first contract there were 30 tons and two months' produce disposed of; for that the pursuer gave a bill for £298, 12s. 6d. He writes "I think it will be better to let them lie till I get the whole 'as one trip would do it,' unless I see a possibility of the market coming down." But by the second contract he is to get all that was then on the premises and all that should be produced up to 1st April; and therefore we have nothing to do with the first contract; there is no case under it.

Now, in this second contract there is no subject existing and no price ascertained. Everything would have to take place at the end of the period; the iron would have to be weighed to determine the quantity, and to determine the price reference would have to be made to market prices, about which there might be much dispute, and therefore the transaction comes to be, as your Lordship called it, a continuing arrangement to supply iron to meet a bill until that bill was run off, and such an arrangement cannot be said to come under the statute.

The Court adhered.

Counsel for Pursuer — Balfour — Pearson.
Agents—Lindsay, Paterson & Co., W.S.
Counsel for Defender—J. G. Smith—R. V. Campbell. Agents—J. & A. Peddie, W. S.

Wednesday, November 22.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.]

ALLAN AND OTHERS v. GOVERNORS OF STIELL'S HOSPITAL.

Charity—Charitable Bequest—School—Intention—Trust—Nobile officium.

In the original deed, dated in 1808, the trustees of a charitable bequest for the foundation of a school were empowered by the truster "from time to time, as they shall see cause, to make such alterations, amendments, improvements, or additions to the rules and regulations laid down by me for the management of the said hospital and public