

The fourth parties maintained and argued that no right in the said estate could vest in anyone till the death or re-marriage of the survivor of the spouses — *M'Alpine v. M'Alpine*, March 20, 1883, 10 R. 837, 20 S.L.R. 551; *Buchanan's Trustees v. Buchanan*, May 26, 1877, 4 R. 754, 14 S.L.R. 503; *Richardson's Trustee v. Cope*, March 8, 1850, 12 D. 855; *Bryson's Trustees v. Clark*, November 26, 1880, 8 R. 142.

LORD KYLLACHY—In this case I see no reason for postponing vesting beyond the dissolution of the marriage and the majority of the respective children. I am of opinion that all the presumptions are in that direction, and that there is no particular difficulty upon the language of the settlement in giving effect to these presumptions.

There are several points in favour of vesting—(1) This is a marriage-contract in which the children's provisions are declared to be in full of legitim; (2) apart from the widow's liferent and the children's fee there is no ulterior destination or trust purpose, or at least no ulterior destination or trust purpose which is not plainly referable to failure of children before the dissolution of the marriage; and (3) even as between and among the children of the marriage there is no destination-over except one expressly described as applicable to failure before majority.

On the other hand, there is absolutely no unfavourable point except this, that the gift of the fee is expressed as a gift to take effect at the death of the widow. And I am unable to hold that that is at all a conclusive circumstance or one which can be allowed to outweigh the other considerations to which I have just adverted.

As to that matter and the case generally, the decision in *Forbes*, 16 S. 374, and *Rogerson*, 3 Macph. 684, are I think sufficient authorities. The latter was no doubt a case in which there was a dissent by Lord Justice-Clerk Inglis, but, on the other hand, it was a case very much more unfavourable than the present to vesting before payment. For there was there not only a gift expressed as here to take effect at the death of both spouses, but there was also what was at least capable of being read as a destination-over to take effect as between the children failing survivance of both spouses.

I think therefore the fourth question in the case may be answered in the affirmative.

With regard to the first three questions, it appears to me that this case is within the principle of the case of *Wardlaw*, 7 R. 1066, and *Campbell (Russell's Trustees)*, 14 R. 849, and the other cases cited at the discussion, and that the first question falls to be answered in the affirmative in terms of its second alternative, and being so answered the second and third questions are superseded.

THE LORD JUSTICE-CLERK and LORD LOW concurred.

LORD YOUNG and LORD KINCAIRNEY were absent.

The Court answered the second alternative of the first question in the affirmative; answered the fourth question in the affirmative; and found it unnecessary to answer the other questions in the case.

Counsel for the First Parties—W. Thomson. Agents—Nisbet, Mathison, & Oliphant, S.S.C.

Counsel for the Second Party—Constable. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Third Party—Macmillan. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Fourth Party—G. Moncreiff. Agents—Mackenzie, Innes, & Logan, W.S.

Wednesday, March 15.

## SECOND DIVISION.

[Sheriff Court of Lanarkshire at Glasgow.]

D. Y. STEWART & COMPANY v.  
CROOM & ARTHUR.

*Sale—Disconformity to Contract—Rejection—Right to Retain Goods and Set up Claim for Damages—Sale of Goods Act 1893 (56 and 57 Vict. c. 71), sec. 11, sub-sec. 2, and secs. 35 and 53.*

The purchasers of two mechanical stokers intimated rejection of them to the sellers, but continued to use them for three months thereafter. In an action by the sellers for payment of the price the purchasers put in a counter-claim for damages in respect that the machines were disconform to contract.

Held (following *The Electric Construction Company, Limited*, 24 R. 312, 34 S.L.R. 295) (1) that the purchasers having continued to use the machines for three months after intimating rejection of them, were not entitled to found on their alleged rejection; and (2) that having elected to reject, they were not entitled thereafter to fall back upon the alternative remedy provided by the Sale of Goods Act of retaining the machines and claiming damages.

This was an action raised in the Sheriff Court of Glasgow at the instance of Croom & Arthur, engineers, against D. Y. Stewart & Company, ironfounders. The pursuers sued for the price of two mechanical stokers supplied to the defenders in August 1901. The defenders averred that the stokers were defective in construction and workmanship and disconform to contract, in respect that they did not prevent smoke to the satisfaction of the sanitary inspector, and they put in a counter-claim of damages. The pursuers denied the alleged warranty and averred that any failure was due to the improper use by the defenders or to the imperfect construction of certain parts which the defenders were bound under the contract to supply.

The defenders averred that they intimated rejection of the stokers on 16th September

1902, but they admittedly continued to use them until the end of the year, when they removed them.

The Sheriff-Substitute (BOYD) allowed a proof, and the Sheriff (GUTHRIE) adhered. The facts disclosed at the proof sufficiently appear from the Sheriff-Substitute's interlocutor.

On 29th November 1901 the Sheriff-Substitute pronounced the following interlocutor:—"Finds in fact, that by letters between the parties the pursuers contracted to supply and fit up two of their mechanical stokers to two of the defenders' boilers for the sum of £85 each, the defenders to erect the engine and overhead shafting and the brickwork and rough labour, the pursuers guaranteeing to prevent black smoke to the satisfaction of the sanitary inspector; (2) that the pursuers did supply and fit up the stokers in August 1901, and the defenders used them until the end of 1902; (3) that after their erection the sanitary inspector still complained of black smoke from the defenders' works, but that this was caused, not by defective construction of the stokers, but by improper use of them by the defenders; (4) that the defenders removed the stokers in the end of 1902, and now refuse to pay for them: Finds in law that they are bound to pay for them: Therefore decerns as craved."

In his note he said—"I do not think the defenders are entitled to succeed in their counter-claim as that is laid in article 2 of the defences. By section 11 (2) of the Sale of Goods Act the defenders were bound to reject the stokers or to keep them and claim damages. I do not think they have been consistent. Mr Bowser says they were rejected in September 1902. If so, I do not think they can claim damages—*Electric Construction Company*, 24 R. 312."

The defenders appealed to the Court of Session, and argued that the Sheriff-Substitute was wrong in his third finding in fact, and that the case of *The Electric Construction Company*, *supra*, if applicable, had been adversely criticised in later cases. They admitted that the stokers were detachable pieces of mechanism, but argued that they had no option but to continue using them in order to keep their works in operation until they could enter into contracts to get them replaced.

The pursuers and respondents argued that there was no express warranty. If the stokers failed to prevent smoke, this was due to the improper use of them by the appellants. In any event, the appellants having intimated rejection of the machines, and thereafter continued to use them for a long period, were not entitled to found on their alleged rejection, and having elected to reject could not claim damages. They cited the following cases:—*The Electric Construction Company, Limited v. Hurry & Young*, 24 R. 312, 34 S.L.R. 295; *Lupton & Company v. Schultze & Company*, 37 S.L.R. 839; *Dick & Stevenson v. Mackay*, 7 R. 778, at p. 787, 17 S.L.R. 565.

At advising—

LORD JUSTICE-CLERK—The evidence in this case is conflicting, and by no means satisfactory. I do not think it necessary to go into it in detail, and perhaps there are some points in which the Sheriff-Substitute's interlocutor may be open to criticism. But in the main I agree with his view that the failure of the mechanical stokers supplied by the defenders was due, not to inherent defects in the design, but to their not having been properly used by the defender.

[*After considering evidence His Lordship proceeded*].—I therefore agree with the Sheriff-Substitute in his first view of the case, that the stokers did not get such fair play in the hands of the defenders as would entitle them to reject the stokers, even had they done so earlier than they did.

But even if it could be held that this was not a sound view of the evidence of fact, I should still feel compelled to hold that the defence put forward must fail. For I am unable to see any answer to the pursuers' contention that the defenders, by retaining the stokers and continuing to use them for a long period after they maintain that they rejected them, have altered their legal position. To me it appears quite certain that the decision in the case of the *Electric Construction Company* quoted at the debate is directly applicable to this case, and that, as a consequence, the defenders cannot now on the footing that they have retained the goods claim damages. Their case must be either that they rejected, which they say they did, and therefore are not liable in payment of the price, or that they retained subject to a claim of damages. But if they rejected, as they say they did, in September 1902, then under the case I have referred to they cannot claim damages.

LORD KYLLACHY—In this case I agree with the Sheriff that the contract between the parties contained a condition or warranty to the effect that the defenders' apparatus should prevent smoke to the satisfaction of the Glasgow authorities. I also agree with him that this warranty was not fulfilled. I differ from him, however, when he proceeds to find that the failure of the apparatus "was caused not by defective construction of the stokers but by improper use of them by the defenders." As to that I should be of opinion—having done my best to weigh the somewhat unsatisfactory evidence on the subject—that the pursuers have failed to prove that the defenders used the stokers improperly, or that thus or otherwise the non-fulfilment of the condition or warranty was due to their (the defenders') default.

But while so holding, and my conclusion being so far in favour of the defenders, it has still to be considered what was the effect in law of the defenders' continued use of the stokers down to the end of the year 1902—a fact as to which there is no dispute—and as to that I am obliged to say that I cannot distinguish the present case from that of *The Electric Construction Company*, 24 R. 312, decided by the First Division of the Court in 1897—a decision to

which the Sheriff refers and to which the defenders appeal. I am not sure that I quite follow the reasoning by which in that case the majority of the Court reached the conclusion that the alternative remedy provided by the Sale of Goods Act 1893 was barred to the pursuers by their previous ineffective rejection. But not being in the circumstances prepared to propose to your Lordships that the point of law there and here involved should be submitted to the whole Court, I consider that as the two cases are not distinguishable we ought to follow the decision referred to. In that view I am not prepared to dissent from the judgment which I understand your Lordships propose, viz., that we should affirm the Sheriff-Substitute's interlocutor. I should have proposed, for the reasons I have explained, that in place of the second paragraph of the Sheriff's third finding in fact, which is I think not well founded, there should be substituted a finding to the effect that the pursuers have failed to establish that the sanitary inspector's complaint was due to any improper working or other default of the defenders, while on the other hand we should alter the finding in law so as to read, "Finds, however, in law that inasmuch as after intimating their rejection of the defenders' apparatus in September 1902 the defenders continued to use the same until the end of 1902, they (the defenders) are barred from claiming damages in respect of the apparatus being disconform to contract." But agreeing with the Sheriff-Substitute's result, I do not think it necessary to dissent from the judgment which your Lordships propose.

The LORD JUSTICE-CLERK intimated that LORD YOUNG, who was absent, concurred in the judgment proposed.

LORD KINCAIRNEY, who was absent at the hearing, delivered no opinion.

The Court adhered.

Counsel for the Pursuers and Respondents—Campbell, K.C.—Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Defenders and Appellants—Guthrie, K.C.—Hunter. Agent—Alex. Ross, S.S.C.

Thursday, March 16.

## SECOND DIVISION.

DET FORENEDE DAMPSKIBS SELSKAB (OWNERS OF S.S. "OLGA") v. SOMERVILLE & GIBSON (OWNERS OF S.S. "ANGLIA") AND VAN EIJCK & ZOON AND OTHERS (OWNERS OF CARGO ON BOARD S.S. "ANGLIA").

*Ship—Collision—Cross Actions between Owners—Damages—Decree in Favour of Owners of One Vessel—Petition by Owners of Other for Limitation of Liability and Distribution among Various Claimants—Competency of Reopening at instance of Another Claimant—Averment that Question of Amount of Damages not Properly Contested in Former Action—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), secs. 503, 504.*

In conjoined actions for damages for collision between the owners of the "Olga" and the owners of the "Anglia," the Court granted decree to the latter for a sum which considerably exceeded the amount for which the former were liable, having regard to the limits set to the liability of shipowners by the provisions of section 503 of the Merchant Shipping Act 1894.

In a subsequent petition to the Court for limitation of liability and for distribution, brought by the owners of the "Olga" under sections 503 and 504 of the Act, claims were lodged by the owners of the "Anglia" and the owners of the "Anglia's" cargo, the former claiming to be ranked for the sum for which they held decree. The owners of the cargo, who had not been parties to the former action, sought to be allowed in the petition to reopen and reinvestigate the claim of the owners of the "Anglia," stating that the damage to the "Anglia" had been grossly overestimated and had not been properly contested in the former action. They did not, however, aver that the decree had been obtained collusively or of consent or by way of compromise.

Held that the claim of the owners of the "Anglia," having been duly constituted by a decree *in foro* obtained in a competent Court, *causa cognita*, and upon evidence, must be taken at the amount fixed in the former process.

*Ship—Collision—Limitation of Liability according to Tonnage—Ascertainment of Tonnage—Deduction for Crew Space—Certificate of Board of Trade Surveyor—Foreign Vessel—Merchant Shipping Act 1894 (57 and 58 Vict. cap. 60), sections 84, 503, and Schedule VI (3)—Order in Council, 21st November 1895.*

Section 503 of the Merchant Shipping Act 1894 provides, *inter alia*, that for the purposes of the section the tonnage of a steamship shall be her gross ton-