

death has resulted from an accident is always a question of fact. Therefore I think it is indispensable that the arbitrator should have the facts ascertained before he decides it. I therefore agree that the case should go back to the learned Sheriff in order that the petitioner may have an opportunity of proving her case if she can. That being so, I think the less one says about the *prima facie* aspect of the statement of the facts probably the better, but one cannot help seeing that there may be a difficulty in connecting the accident with the alleged result by an unbroken chain of connection. The exact point where the difficulty may arise I do not know, but speaking for myself I do not think I have sufficient knowledge of the pathology of insanity to form even a provisional opinion. Therefore I think it better to say that I agree with your Lordships that the facts must be ascertained.

LORD PEARSON was absent.

The Court answered the question in the case in the negative, recalled the determination of the arbiter, and remitted to the Sheriff-Substitute as arbiter to allow parties a proof of their averments.

Counsel for the Pursuer (Appellant) — Morison, K.C.—J. A. Christie. Agents — St Clair Swanson & Manson, W.S.

Counsel for the Defenders (Respondents) Hunter, K.C.—R. S. Horne. Agents — Anderson & Chisholm, Solicitors.

Friday, January 24.

## SECOND DIVISION.

[Sheriff Court at Glasgow.]

### AITKEN, CAMPBELL, AND COMPANY LIMITED v. BOULLEN & GATENBY.

*Sale—Sale by Sample—Disconformity to Contract—Right of Partial Rejection—“Different Description not Included in the Contract”—Attempted Partial Rejection where Disconformity in Quality, not in Kind—Effect of Invalid Rejection as a Bar to Retention—Sale of Goods Act 1893 (56 and 57 Vict. cap. 71), secs. 11 (2), 30 (3).*

A firm bought 133 pieces of maroon twills by sample and paid for them. Subsequently on making a full examination they found that 64 pieces were not conform to contract in respect that they were “softer” than the sample. The buyers intimated their acceptance of the balance of the goods and their rejection of the 64 pieces, and returned the latter to the sellers, who refused to accept re-delivery. The buyers then raised an action against the sellers for repayment of the price paid for the defective pieces, maintaining that they were entitled “to accept the goods which are in accordance with the contract and reject the rest” as being of

a “different description,” *i.e.*, what was known to the trade as “tender goods,” and fit only for sale by weight. Alternatively on the footing of retaining the whole goods they sued for damages.

*Held* (1) that though some of the goods were deficient in quality, yet as all were of the kind contracted for, *i.e.*, maroon twills, and were delivered under one contract of sale, the Sale of Goods Act 1893, sec. 30 (3), did not apply, and the attempted partial rejection was invalid; and (2) that as the defenders had not been prejudiced by the attempted rejection, the pursuers were not barred from now retaining the goods and claiming damages.

*The Electric Construction Company, Limited v. Hurry & Young*, January 14, 1897, 24 R. 312, 34 S.L.R. 295, and *Croom & Arthur v. Stewart & Company*, March 14, 1905, 7 F. 563, 42 S.L.R. 437, distinguished and commented on.

The Sale of Goods Act 1893 (56 and 57 Vict. cap. 71) enacts—Section 11 (2)—“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 30 (3)—“Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.”

Aitken, Campbell, & Company, Limited, warehousemen, Glassford Street, Glasgow, raised an action in the Sheriff Court at Glasgow against Boullen & Gatenby, manufacturers, St James Street, Manchester, who were admittedly subject to the jurisdiction of the Court *ex reconventionem*, and from whom they had purchased goods, for payment of £50, 19s., or alternatively the sum of £25, 16s. The sum first sued for was made up of (1) £39, 19s. 4d., which was the price paid by the pursuers for that portion of the goods which, as after mentioned, they had attempted to reject, and (2) £10, 19s. 8d., being the loss and damage alleged to be sustained by them owing to the defenders' breach of contract. The sum alternatively sued for, £25, 16s., represented the loss and damage alleged to be sustained by the pursuers on the footing of their retaining the whole goods.

The pursuers pleaded—“(1) The defenders, having broken their contract with the pursuers, are liable in payment to the pursuers of the loss and damage thereby caused. (2) The pursuers having rejected a portion of the goods and having overpaid the defenders, incurred loss and expenses, and made disbursements to the extent of the sum sued for through the failure of the defenders to implement their contract, are entitled to decree for payment thereof. (3)

*Separatim*—A portion of the goods being disconform to contract, and the pursuers having sustained loss and damage thereby, they are entitled to decree for the sum alternatively concluded for."

The defenders pleaded, *inter alia*—“(3) In respect there was no proper or timeous rejection of the goods by the pursuers, the defenders should be assoiized with expenses. (4) The pursuers are barred from claiming damages on the ground of retention of the goods in respect they elected to seek the remedies on the ground of rejection. (5) The pursuers, having accepted and paid for the goods, are barred from insisting in their present action.”

The facts of the case are summarised in the following interlocutor, pronounced on 14th May 1906 by the Sheriff-Substitute (MITCHELL), the findings in fact therein, with the variation that the words in italics were deleted, becoming subsequently the findings in fact of the Court. The interlocutor was—“Having considered the cause, Finds in fact (1) that in terms of telegrams and letters passing between the parties early in April 1905, the pursuers bought from the defenders 133 pieces of maroon twills, and that said purchase was by sample; (2) that said goods were delivered to pursuers on or about 6th May following; (3) that on or about 22nd May pursuers paid to defenders the nett price of said goods, viz., £76, 1s. 9d.; (4) that on or about 20th June following pursuers made a complete examination of said goods, and that 64 pieces thereof were not conform to sample; (5) that of the same date pursuers intimated the disconformity to defenders and their rejection of 69 pieces of the said goods—64 being now agreed to be the number intended—and the said 69 pieces were sent back to the defenders in Manchester; (6) that the pursuers at the same time intimated to the defenders their acceptance of the balance of the goods, and that the portion of the said goods returned to the defenders have been since July 1905, and are now, by agreement of parties again in the pursuers' hands; (7) that the defenders refused to agree to the said attempted rejection and have refused to accept redelivery, and that they have never recognised or acquiesced in any distinction or division of the contract of sale in relation to goods accepted and goods rejected: Finds in law (1) that the intimation of rejection was timeous, but that in respect it related only to a rejection of part of the goods delivered under one contract of sale there was no valid rejection as required by the Sale of Goods Act, sec. 11 (2); (2) that said partial acceptance or retention of the balance of the goods sold was not a valid retention under the said section of the said Act; and (3) that although the said attempted partial rejection was invalid, the pursuers cannot now claim to retain all the goods and sue for damages: Therefore assoiizes the defenders from the conclusions of the action, and decerns.”

The pursuers appealed to the Sheriff (GUTHRIE), who, finding that section 30 (3)

of the Sale of Goods Act 1893 applied, and that this finding was supported by *Jaffe v. Ritchie*, December 21, 1860, 23 D. 242, at p. 249, by interlocutors of 6th December 1906 and 24th January 1907 found that the pursuers were entitled to repayment of the sum of £36, 12s. 3d., being the price paid by them to the defenders for the defective pieces (*i.e.*, 64 in number instead of 69, as originally stated by the pursuers), and to payment of a further sum of £8, 7s. 9d. in name of damages, and decerned against the defenders for £45 under the first alternative prayer of the petition.

The defenders appealed, and argued—The common law before the Sale of Goods Act allowed rejection of the good with the bad, or retention of the bad with the good, but not partial rejection and partial retention—*Couston, Thomson, & Co. v. Chapman*, July 19, 1872, 10 Macph. (H.L.) 74, per Lord Chelmsford at p. 81. The Sale of Goods Act 1893, section 11 (2), gave the buyer alternative remedies, viz., a right to reject and a right to retain and claim damages, but one or other remedy must be adopted, there being no right of partial rejection—*Electric Construction Co., Limited v. Hurry & Young*, January 14, 1897, 24 R. 312, 31 S.L.R. 295; *Lupton & Co. v. Schulze & Co.*, June 30, 1900, 2 F. 1118, 37 S.L.R. 839; *Croom & Arthur v. Stewart & Co.*, March 14, 1905, 7 F. 563, 42 S.L.R. 437. True, section 30 (3) gave a right of partial rejection in certain cases, but it did not apply, because “description” meant genus or kind, not merely quality. Here the difference was merely in quality. Moreover, the sub-section only applied where all the goods contracted for were sent, and in addition others of a different description. The Sheriff had assumed that in *Jaffe v. Ritchie*, December 21, 1860, 23 D. 242, there had been partial rejection, whereas there had been total rejection. Moreover, there the reason of rejection was difference in material, not in quality. Reference was also made to *Levy v. Green*, 1859, 28 L.J., Q.B. 319; and *Nicholson v. The Guardians of Bradfield Union*, 1866, L.R., 1 Q.B. 620. (2) Where the buyer had elected to take either remedy, he could not subsequently change his mind and take the other remedy—*Electric Construction Co., Limited v. Hurry & Young, Lupton & Co. v. Schulze & Co., Croom & Arthur v. Stewart & Co. (om. cit. sup.)*

Argued for the pursuers (respondents)—(1) Their remedies were not in the circumstances confined to a choice between total rejection and total retention and damages. They had a third choice under section 30 (3) of the Sale of Goods Act 1893, viz., partial rejection. The goods contracted for were described in the invoice as “slightly soft.” Those rejected were so soft as to be “tender goods,” a class of goods sold by weight. Even if they did not form a different kind or class, yet the words “of a different description” did not necessarily involve a difference in kind, but were really defined by the words following, viz., “not included in the contract,” *i.e.*, disconform

to contract. This interpretation of "description" was supported by *Jaffe v. Ritchie* (*cit. sup.*), Lord Justice-Clerk Inglis at p. 249. (2) Assuming partial rejection was invalid and incompetent, it followed that they had not elected to reject, and were not now barred from retaining and claiming damages, for an attempt to take a course which was not open could not act as a bar—*Paton & Sons v. Payne & Co.*, November 19, 1897, 35 S.L.R. 112. In the *Electric Construction Co., Limited* (*cit. sup.*), and also in *Croom & Arthur* (*cit. sup.*), there had been use made of the articles sought to be rejected. In *Lupton & Co.* (*cit. sup.*) the buyer attempted to reject the goods, and also to retain them in security of a claim of damages.

At advising—

LORD LOW—I am of opinion that this is not a case to which sec. 30 (3) of the Sale of Goods Act 1893 applies. That enactment deals with the case of a seller delivering to a buyer "the goods he contracted to sell mixed with goods of a different description not included in the contract." I think that the word "description" is there plainly used to denote the kind of goods contracted for, and that the right of partial rejection conferred upon the buyer applies only to cases where goods of the kind contracted for are mixed with goods of a different kind, and not to cases where all the goods are of the kind contracted for, but part of them is not of such good quality as the seller was bound to supply. Here the goods contracted for were "maroon twills," and the goods delivered were "maroon twills," but 64 out of 133 pieces were not of such good quality as the samples which formed the basis of the contract. I am accordingly of opinion that the pursuers were not entitled to reject the 64 pieces and to reclaim the remaining 69, and that therefore the interlocutor of the learned Sheriff must be recalled.

The next question is whether the pursuers are barred by having attempted to reject the 64 pieces from retaining the whole goods and claiming damages on the ground that the defenders have failed to perform a material part of the contract? What happened was that the pursuers actually returned the 64 pieces to the defenders, but the latter sent them back, and they are now in the possession of the pursuers awaiting the issue of the present action. It is not said that as regards the pursuers' claim for damages the defenders have been in any way prejudiced by the attempt to reject the 64 pieces, but the defenders maintain, and the Sheriff-Substitute has given effect to the contention, that the pursuers having elected to follow one course cannot now be allowed to adopt another. The authority mainly relied upon is *The Electric Construction Co., Ltd. v. Hurry & Young* (24 R. 312). The pursuers in that case had supplied a dynamo to the defenders which was disconform to contract. The defenders intimated to the pursuers that they rejected the dynamo, but nevertheless they continued to use it for several months.

The pursuers then brought an action for the contract price, in answer to which the defenders maintained that they were entitled to retain the machine and set off their claim of damages against the price. It was held by a majority that the defenders having elected to reject were not entitled to fall back upon the alternative of retaining the machine and claiming damages.

I am of opinion that that judgment has no application to the present case. The ground of judgment was, that the statute having specified two courses, either of which the buyer might adopt, he was bound to make up his mind which of the two he would follow, and could not be allowed first to intimate to the seller that he was to take one course, and then, when he found it to be more to his advantage to do so, to adopt the other course. But that was not what happened in this case. No doubt the pursuers adopted a course which they could not insist upon taking as a matter of right. The defenders might have consented to the course proposed, but they refused to do so, and they were quite entitled to refuse. I can find nothing, however, in that position of matters to debar the pursuers from afterwards adopting either of the courses open to them under the statute, provided that their attempt to reject part of the goods had not put the defenders in a worse position than they would have been in if the pursuers had at first elected to proceed in conformity with the statute. As I have already indicated, nothing of that sort is suggested.

Suppose that when the defenders refused to take back the 64 pieces the pursuers had at once also returned the remaining 69 pieces, and intimated that they repudiated the contract and rejected the whole goods, I cannot imagine any ground upon which it could have been held that they were not entitled to follow that course. But I think that it is equally plain that they were entitled to say to the defenders, "If you will not take back the goods which are disconform to sample, we shall keep them, along with the goods which are conform to sample, but we shall claim damages in respect that you have failed to perform a material part of the contract."

I am therefore of opinion that the Sheriff-Substitute was wrong in finding that "although the partial rejection was invalid, the pursuers cannot now claim to retain all the goods and sue for damages."

It appears that the pursuers paid the contract price of the goods before they discovered that part of them was not conform to contract, and accordingly their claim is for repayment of the amount of the loss which they have sustained in respect of part of the goods not being conform to sample. I understand that the parties have adjusted the amount of loss at £26, 18s. 3d., and accordingly I am of opinion that decree should be pronounced for that sum.

LORD ARDWALL—. . . [After narrating the facts]. . . In these circumstances

the present action is raised for payment of £50, 19s., being the price of the rejected goods, or alternatively the sum of £25, 16s., being the loss and damage sustained by the pursuers on the footing of their retaining the whole goods.

The Sheriff-Substitute held that the pursuers were not entitled to reject part of the goods, and that having attempted to reject part of the goods they are barred from now keeping the whole of the goods and claiming damages. He accordingly assoilized the defenders. The Sheriff recalled this interlocutor on the ground that the pursuers were entitled to reject part of the goods in virtue of the provisions of section 30 (3) of the Sale of Goods Act 1893. He accordingly has given decree for £36, 12s. 3d., being the price of the defective pieces which were rejected, and a further sum of £8, 7s. 9d. in name of damages.

I propose to deal first with the question whether the provisions of section 30 (3) of the said Act apply to the circumstances of the present case. That section is in the following terms—“ . . . [*Quotes supra*] . . . ”

In the present case what was sold was maroon twills equal to samples sent, and it is proved that 64, or otherwise 69, of the 133 pieces sent were not equal to sample in respect that they were more “tender,” as it is called, than the samples. “Tenderness” in goods of this kind, it is explained, is an extreme degree of softness or weakness in the goods, and there is some evidence to the effect that when goods of this description are of such quality as to merit the epithet “tender,” it is usual to sell them by the pound and not by the yard, and on the strength of this practice of the trade it is maintained for the pursuers that “tender” goods are goods of a description different from those which were conform to the sample within the meaning of the word “description” as used in the Act. I confess I cannot accept this contention. I am of opinion that the whole of the goods sent in fulfilment of the order were goods of the same “description,” namely, maroon twills, and that their conformity or disconformity to sample fell to be determined by the varying degrees of strength on the one hand and softness or “tenderness” on the other; and from the proof I think it sufficiently appears that the gradation in the texture of the goods varied greatly, and I do not think that at any point in the variation from strong to “tender” goods it could be predicated that goods at anyone part of the scale were of a different “description” from the goods immediately next to them either on the side of strength or of “tenderness.”

I accordingly do not think that the subsection in question applies, because I do not think it can be said that any part of the goods delivered was mixed with goods of a different description. I am of opinion that the word “description” implies a difference of kind, not merely of quality, and the cases which were cited as illustrations of cases to which the section might apply were all cases where there was a difference of

kind and not merely of quality in the goods.

In the case of *Levy v. Green* (1857), 8 E. and B. 575, crockery of a different pattern, and consisting of different articles from those ordered, was sent in a crate containing the articles which had been ordered. In *Nicholson v. Bradfield Union* (1866), L.R., 1 Q.B. 620, in a contract for the sale of coal, the sellers put in a lot of coal from a different colliery from that ordered, which got mixed with the first delivery; and in the case of *Jaffe v. Ritchie*, 23 D. 242, a seller of yarns, which were described as flax yarns, delivered several spindles containing yarns composed of a mixture of flax and jute, and it was there held that this did not answer to the description of “flax yarns,” and that accordingly they were properly rejected. But no case was cited in which a mere difference in quality was held sufficient to divide goods into goods of different “descriptions.”

For these reasons I am of opinion that the said sub-section does not apply, and that the interlocutors of the Sheriff, which proceed upon the application of that subsection, must be recalled.

The next question for consideration is whether the pursuers, having rejected part of the goods sent, are now barred from retaining that part along with the goods which they had not rejected and claiming damages in respect of defective fulfilment of the contract. I confess I have found this to be a question of some difficulty. The cases of *The Electric Construction Company v. Hurry & Young*, 24 R. 312, and *Croom & Arthur v. Stewart & Company*, 7 F. 563, were cited as authorities for the proposition that after intimating to a seller rejection of goods as disconform to contract, a buyer is not entitled to fall back on the alternative remedy provided by the Sale of Goods Act of retaining the goods and claiming damages for the seller's failure to perform a material part of the contract. I may notice in passing that, taking these two cases together, the above proposition as one of universal application was questioned in the first case by Lords Kinnear and Low, and in the second by Lord Kyllachy, and it is possible that in some other circumstances it may deserve reconsideration. But accepting the views of the majority in each of the cases as absolutely sound, I am of opinion that the present case is capable of being differentiated from them. In both these cases the whole of the subject sold was rejected, and in both of them the question was complicated by the buyers after intimating rejection of machines continuing to use them for considerable periods of time. Now, in the present case the pursuers did not reject the whole of the subject of the sale, nor did they by keeping possession of the rejected portion in any way prejudice, so far as that portion was concerned, the interests of the sellers. They were accordingly not in the position of having elected to take one of the remedies provided by the Act, and therefore by implication to have departed from the other. What they did was to adopt neither the one alternative

nor the other, but to make a partial rejection, which they were not entitled to make and which they did make, in a mistaken view of their own rights in the matter. In other words, they attempted to do what they were not entitled to do, either under the Act or at common law. But the fact of their having made this mistake does not involve them in the dilemma in which the Court considered the sellers had placed themselves in the two cases above referred to, and I am of opinion that nothing else has occurred to bar them from now adopting the alternative remedy provided by section 11, sub-section 2, of the said Act, by retaining the whole goods and claiming damages for breach of contract.

On these grounds I think the Sheriff-Substitute's interlocutor of 14th May 1906, with the exception of its findings in fact, ought to be recalled, and decree given for the alternative sum of £26, 18s. 3d. claimed by the pursuers.

LORD JUSTICE-CLERK — I concur with your Lordships in holding that section 30 of the Sale of Goods Act does not apply to this case, and that on the grounds so clearly stated by Lord Low. I am, therefore, of opinion that the interlocutor of the Sheriff must be recalled. Further, I agree with the opinion expressed by both your Lordships that in the circumstances of this case the purchaser of the goods has the right still, retaining the whole of the goods, to claim damages for the disconformity of a portion of the goods to the quality shown by the sample upon which the purchase was made. The case of the *Electric Company*, which was founded on at the debate, was one of an entirely different character from the present. The sale in that case was of a specific article—a machine for developing and transmitting energy by electrical transmutation. The party in that case did not return the machinery. They intimated that they rejected but kept the machine and used it for months. The decision in that case, which seems somewhat doubtful as regards its soundness, has no bearing on this case, which is one in which the disconformity is of some parts of the goods being of inferior quality. The seller suffered no damage by the course which was taken, which was a mistaken course under the Act. The Sheriff-Substitute, on the authority of the *Electric Company* case, held that the buyer was barred from now claiming damages for that part of the goods which were not conform to sample. I concur with your Lordships in holding that the goods were of one "description" in the sense of the Act, and that the section refers to a difference of kind and not of quality—such as in the crockery case, where different articles were sent among those which had been ordered. The case of jute yarn and flax yarn was similar. I therefore agree with the course proposed by Lord Low.

LORD STORMONTH DARLING was absent.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for

the parties on the appeal for the defenders against the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark, dated 14th May and 6th December 1906, and 24th January 1907, Sustain the appeal, and recal the said interlocutors appealed against: Find in fact in terms of the seven findings in fact in the said interlocutor dated 14th May 1906, but omitting from the seventh of said findings the last twenty-six words following the word 're-delivery.' Find in law in terms of the first two findings in law in said interlocutor of 14th May 1906: and further find in law (3) that although the said attempted partial rejection was invalid, the pursuers are entitled to retain all the goods and sue for damages, the defenders having been in no way prejudiced by the said partial rejection of the goods, the value of which has been adjusted at the sum of £26, 18s. 3d.: Therefore ordain the defenders to make payment to the pursuers of the said sum of £26, 18s. 3d., with interest thereon at the rate of 5 per centum per annum from the date of citation till payment, and decern."

Counsel for the Pursuers (Respondents)—  
Hunter, K.C.—C. H. Brown. Agents—  
Smith & Watt, W.S.

Counsel for the Defenders (Appellants)—  
Murray—Mair. Agents—Macpherson &  
Mackay, S.S.C.

Friday, January 24.

## SECOND DIVISION.

[Lord Johnston, Ordinary.]

### THOMSON'S TRUSTEE v. ALLAN.

(See also *Allan v. Thomson's Trustees*,  
May 30, 1893, 20 R. 733, 30 S.L.R. 654.)

*Succession — Conditio si institutus sine liberis decesserit—Family Provision.*

A testatrix, who had three sets of nephews and nieces, of which the family of B formed one, left a trust-disposition and settlement, by the sixth purpose of which she directed her trustees to invest £2500 for behoof of her niece C B, and to pay her the income during her life, and on her death to pay it equally among her children, and failing such children to pay it in certain unequal proportions amongst G B, J B, and C B B, who with the liferentrix were the whole of her nephews and nieces of the family of B. There was a declaration that, if the liferentrix should predecease the testatrix, the £2500 should form part of the residue of the estate. The residue was directed to be divided equally among a brother-in-law of the testatrix and all her nephews and nieces *nominatim*, and it had been previously held by the Court that the *conditio si institutus sine liberis decesserit* applied to the residuary bequest. The