

Tuesday, November 14.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CRANSTON v. MALLOW & LIEN.

(Reported *ante*, 48 S.L.R. 930, 1911 S.C. 1133.)

Sale—Horse—Warranty—Week's Trial.

A horse was sold under a warranty that it was a good worker and sound in wind. It was stipulated at the instance of the buyers that they should have a week's trial of the horse. They returned it within the week on the ground that it was unsound in limb.

Held that there was a completed contract of sale between the parties, and that the buyers were entitled to return the horse within the week if disconform to warranty, but not otherwise.

Sheriff—Appeal—Summary Cause—Printing—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 8.

The Sheriff Courts (Scotland) Act 1907 enacts—Section 8—“In a summary cause the sheriff shall order such procedure as he thinks requisite, and (without a record of the evidence, unless on the motion of either party the sheriff shall order that the evidence be recorded) shall dispose of the cause without delay by interlocutor containing findings in fact and in law. Where the evidence has been recorded, the judgment of the sheriff-substitute upon fact and law may in ordinary form be brought under review of the sheriff, but where the evidence has not been recorded, the findings in law only shall be subject to review. In a summary cause, if the sheriff, on appeal, is of opinion that important questions of fact and law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the sheriff shall be final.”

Opinions (per curiam) that in summary appeals under section 8 the appellant should print only the record and the interlocutor appealed from.

Observations (per Lord Salvesen) as to the application of section 8.

James D. Cranston, horse-dealer, Glasgow, *pursuer*, brought an action in the Sheriff Court there against Mallow & Lien, provision merchants, Glasgow, *defenders*, for payment of the sum of £28, being price of a bay horse sold and delivered by the pursuer to the defenders on or about 25th May 1910.

Proof was allowed and led, and the evidence was recorded.

On 22nd December 1910 the Sheriff-Substitute (CRAIGIE) decerned against the defenders as craved.

The defenders appealed to the Sheriff

(MILLAR), who on 22nd February 1911 pronounced the following interlocutor—“Recals the interlocutor of 22nd December last: *Finds in fact* (1) that on 25th May 1910 the pursuer sold to the defenders a bay horse, at the price of £28, with a warranty that it was a good worker and sound in wind; (2) that the defenders bargained that they should have a week's trial with the horse; (3) that they returned the horse within the week, on the ground that it was suffering from stringhalt and was going lame: *Finds in law* that the contract was one of sale on approbation, and that the defenders having returned the horse within the period allowed for approval, there was no completed contract of sale: Therefore assoilzies the defenders from the conclusions of the action and decerns.”

The Sheriff appended a note in which he discussed the authorities on which he based his judgment. On 28th February 1911 he pronounced an interlocutor granting leave to appeal to the Court of Session.

On 2nd March 1911 the pursuer appealed.

When the case was called in the Summar Roll the defenders objected to the competency of the appeal in respect that the Sheriff gave no statement in either interlocutor of “important questions of law” involved in the case. The Court, however, sustained the competency of the appeal and ordered the cause to be put to the roll—see *Cranston v. Mallow & Lien*, 1911 S.C. 1133, 48 S.L.R. 930.

Argued for the pursuer (appellant)—The Sheriff's findings in fact did not entitle him to decide in law as he had done. This was a sale with a warranty. That meant a completed contract of sale with a right on the buyer's part to return the horse if disconform to warranty. The object of the stipulation for a week's trial was to give the buyer that period of time to find out whether the horse conformed to warranty. The warranty was quite meaningless if the Sheriff's view were correct, that this was a sale on approbation, and that the buyer could reject within a week on any ground. It was usual in a sale of a horse under a warranty to fix a limited time within which it must be returned on the ground of disconformity—Bell's Prin., sec. 129; *Buchanan v. Parnshaw*, 1788, 2 Term Reports, 745; *Chapman v. Gwyther*, 1866, L.R., 1 Q.B. 463; *Head v. Tattersall*, 1871, L.R., 7 Ex. 7; *Hinchcliffe v. Barwick*, 1880, 5 Ex. Div. 177 (Thesiger (L.J.) at 180). The defenders were not entitled to refer to the Sheriff's note to explain his findings in fact. There was no appeal on facts here—section 8 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51). The facts must be taken as stated in the Sheriff's findings. The Courts had already decided that this case raised a question of law—*Cranston v. Mallow & Lien*, 1911 S.C. 1134, 48 S.L.R. 930.

Argued for defenders (respondents)—There was no question of law in this case. The Court had not yet held that there was. They had merely decided that the appeal

was competent in form, because the Sheriff purported to decide a question of law—see *Cranston v. Mallow & Lien* (*cit. sup.*). It was purely a question of fact whether or not there was a sale on approbation. In any event the Sheriff's finding in law was not inconsistent with his findings in fact. The bargain between the parties was that there was to be a week's trial with absolute right of rejection on any ground. The horse was only conditionally sold till that period elapsed. Thereafter the warranty was to come into force as on a completed sale. It was competent to refer to the Sheriff's opinion in order to explain any ambiguity in his findings in fact.

LORD SALVESEN—This is an appeal in a summary cause to which section 8 of the Sheriff Courts Act 1907 applies, and as the procedure laid down in that section is novel it behoves us to walk warily in dealing with the interpretation of it and the method in which it is to be applied in practice. The substance of section 8 is that in a summary cause the sheriff-substitute may dispose of the cause without a record and without having the evidence taken down in shorthand or otherwise recorded, and that in such a case there shall be no appeal at all upon questions of fact, there being no materials preserved upon which such an appeal can be taken. It is open, however, for either party to move that the evidence shall be recorded, and if it has been recorded the sheriff-substitute's judgment both on fact and law may in ordinary form be brought under the review of the sheriff. The section proceeds—"In a summary cause, if the sheriff on appeal is of opinion that important questions of law are involved he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the sheriff shall be final."

It is this last part of the section that confers upon us jurisdiction to entertain an appeal at all in a summary cause to which section 8 applies. We have already held that it is not a valid objection to the competency of the appeal that the Sheriff has not expressly stated in the interlocutor the particular question of law which he thought of sufficient importance to be submitted to the review of the Court of Session. It is enough if it plainly appears from his interlocutor that there is a question of law and that he has, within the seven days stipulated, granted leave to appeal; because it may be assumed that he would not grant leave to appeal unless he was of opinion that an important question of law was involved, and that it was right that the parties should have the benefit of that question of law decided by a higher court. It follows, however, from the section that we must take the findings in fact of the Sheriff as conclusive, and that we can only deal with his interlocutor either by way of affirming it or reversing

it if we are satisfied upon these findings in fact he reached an erroneous conclusion in law; and parties admitted that that being so, we were not entitled to go to the proof printed in this case with the view of considering whether the Sheriff was justified in reaching the conclusions in fact which he expressed in his interlocutor.

Now so dealing with the case we have three findings in fact here—(1) That on 25th May 1910 the pursuer sold to the defenders a bay horse at the price of £28, with a warranty that it was a good worker and sound in wind; (2) that the defenders bargained that they should have a week's trial with the horse; (3) that they returned the horse within the week on the ground that it was suffering from stringhalt and was going lame. It is plain that the third finding in fact does not affirm that there was any breach of warranty. It was not even found that the horse was in point of fact suffering from stringhalt and was going lame; it is only found that that was the ground upon which it was returned. Even if it were suffering from stringhalt and was going lame, that would admittedly not be a breach of the warranty as expressed in the first finding. The case therefore turns really upon the two first findings, and I think we may take it exactly as if these findings had been expressed in a written contract by the parties, with the addendum appearing on the contract that the stipulation embodied in the second finding had been inserted at the instance of the defenders.

That being so, was the contract one of sale on approbation, as the Sheriff has found in law, or was it a sale with a warranty and a right on the part of the defenders to reject the horse within a week if within that time they found it was disconform to warranty? That is really a question of the construction of a contract, and is therefore properly a question of law. I think that the Sheriff was entirely justified in the view which he took that it was a question of law of such a nature as might entitle the party who was unsuccessful to obtain the benefit of the review of this Court. I cannot say that I have any doubt that the findings in fact of the Sheriff did not warrant the conclusion in law at which he arrived. In my opinion this was not, upon his findings, a contract of sale on approbation. Had that been the true meaning of the bargain, I cannot understand why there should have been a warranty given at all, for within the week the buyer might reject the horse without assigning any ground whatever, except that he did not like it. The Sheriff's view involves that there was to be a free trial for a week of the horse with an absolute right of rejection upon any ground, and that the sale under the warranty was then to take effect if the horse was not rejected, which would give the purchasers a further right of rejection if they thereafter discovered a breach of the warranty and intimated timeously their desire to rescind the contract.

I reach this conclusion upon the facts as

they have been found, and I should have reached the same conclusion if I am entitled to refer to the Sheriff's opinion. Such a reference may be competent for the purpose of construing any ambiguous finding in fact, although I greatly doubt whether it can be made for any other purposes. The findings here are not, I think, ambiguous, and are substantially the same as the conclusions expressed in the Sheriff's opinion. The error in law which I think he has committed is this, that he seems to have considered that the stipulation in the contract of sale, inserted at the instance of the purchasers—that they should have a week's trial of the horse sold—was a stipulation which raised a legal presumption that there was no completed contract of sale until the week had expired. I think that is not the legal result, and that it cannot stand with the finding that the horse was sold with a specific warranty. It is not inconsistent with such a sale that a time should be specified within which the right of rejection for breach of warranty must be exercised, for in a case where the warranty is one that the horse is sound in wind and a good worker, the correctness of which can be ascertained after a day or two's trial, the stipulation is really one in favour of the buyer.

On these grounds I am for recalling the Sheriff's finding in law; and I propose to your Lordships that we should in place thereof find in law that the contract was one of sale with a warranty with regard to which the purchasers were entitled to have a week to ascertain whether the horse conformed to the warranty or not, and that there being no finding in fact that the warranty had been broken, the pursuer is entitled to have decree for the admitted price. That would be substantially reverting to the decision at which the Sheriff-Substitute arrived.

The only other matter on which I think it is necessary to say something is in regard to the printing of the evidence, which both parties admit we are not entitled to look at. I can quite understand how that proof came to be printed. Under the statutes and Acts of Sederunt which regulate appeals in the Sheriff Court, it is necessary for the appellant to box his prints within a fixed time; and no doubt the appellant here thought it was safer to deal with this appeal as if it were an ordinary one. But the reason why the proof requires to be printed in an ordinary appeal from the Sheriff Court is that the parties are entitled to ask the Court of Session to review both the findings in fact and the findings in law; and it is necessary therefore that the materials for reviewing the findings in fact should be before the Court. But that is not the case in an appeal under section 8, and I think it is impossible to defend upon any principle the printing of a proof which the Court is not entitled by the statute to refer to. In such summary appeals I hope parties will in future only print the matters which we can really consider. Probably they must have the record such

as it is printed, and also the interlocutor of the Sheriff. I doubt whether they are entitled to print the previous interlocutors or even the final interlocutor of the Sheriff-Substitute, because this section of the statute looks like an attempt to introduce something of the nature of a stated case, giving an appeal in law where the Legislature thought it undesirable that expenses should be accumulated by having matters of fact subjected to the judgment of three tribunals. If the appellant had any difficulty on the subject of what he should print he ought to have applied to the Court for directions, and I have no doubt that the Court would then have stated the opinion which as I understand, with the approval of your Lordships, we now do.

LORD GUTHRIE—I concur. I think it would have been unfortunate in the interest of justice if the interlocutor had been so expressed as to prevent us from dealing with the question of law. If the Sheriff had simply found that on a certain date the pursuer sold the horse at a certain price under the condition that the defenders should have a week's trial, and that they returned the horse within the week, that would have been quite unambiguous and would have raised no question of law on the face of it, and we would not have been entitled in that case to look at the note in order to discover if a question of law was involved. But I agree with your Lordship in thinking that here the interlocutor itself raises a clear question of law.

With regard to that question I have no difficulty in agreeing with your Lordship that where a horse is sold with a warranty and a period is defined in connection with the sale, there is no presumption that that introduces a new condition, but that the presumption rather is that the parties intended to agree that if the horse was to be rejected under the warranty intimation must be given within the period fixed. That being so, I agree in law with the decision your Lordship has come to.

I also think that we do not require to decide whether in a case where on the face of the interlocutor it is doubtful whether or not it raises a question of law—whether in such a case it might not be competent to look at the note. In this case I think it is quite unnecessary to consider that question.

LORD CULLEN—The Sheriff found in fact that (1) on 25th May 1910 the pursuer sold to the defenders for £28 a bay horse, with a warranty that it was a good worker and sound in wind, and (2) that the defenders bargained that they should have a week's trial with the horse. Such being in fact the terms of the bargain between the parties as found by the Sheriff, the only question in law is whether on a true construction of it the defenders were thereby given a right to return the horse within a week on any ground whatever without reference to the particular terms of the warranty. I am unable to construe the contract in that way, in view of the fact that the seller gave a warranty to run

from 25th May. It seems to me that the fair reading of the stipulation for a week's trial is that it was intended that the defenders should have that period for testing whether the horse conformed to the warranty or not.

The LORD JUSTICE-CLERK and LORD ARDWALL were absent. LORD DUNDAS was sitting in the Extra Division.

The Court pronounced this interlocutor—

“Sustain the appeal, and recal the . . . interlocutor appealed against except in so far as the findings in fact therein are concerned: Find in law that under the warranty contained in the contract of sale as found by the Sheriff the defenders were entitled to reject the horse within one week if disconform to warranty, but not otherwise, and in respect the Sheriff has not held that the horse was disconform to warranty, decern against the defenders for the payment of the sum of £28, with interest, as concluded for.”

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

Counsel for Defenders (Respondents)—T. G. Robertson. Agents—Laing & Motherwell, W.S.

Saturday, December 9.

FIRST DIVISION.

[Sheriff Court at Glasgow.

LEGGAT BROTHERS v. GRAY.

(See *Leggat Brothers v. Gray*, 1908 S.C. 67, 45 S.L.R. 67.)

Sheriff—Process—Reduction—“Deed or Writing”—Objection Stated Ope exceptionis to a Decree—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), First Schedule, Rule 50.

The Sheriff Courts (Scotland) Act 1907, First Schedule, Rule 50, provides—“When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception without the necessity of bringing a reduction thereof.”

Held that a decree *in foro* was not a deed or writing in the sense of the rule.

Sheriff—Jurisdiction—Arrestment—Furthcoming—Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), sec. 6 (9).

The Sheriff Courts (Scotland) Act 1907 enacts, section 6—“Any action competent in the Sheriff Court may be brought within the jurisdiction of the sheriff . . . (g) Where in an action of furthcoming or multiple-pointing the fund or subject *in medio* is situated within the jurisdiction, or the arrestee or holder of the fund is subject to the jurisdiction of the Court.”

Held that where the arrestee was subject to the jurisdiction it was unnecessary to found jurisdiction in a furthcoming against the common debtor.

The Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51), section 6, and First Schedule, Rule 50, are quoted in the rubrics (*supra*).

Leggat Brothers, printers, Port-Dundas, Glasgow, *pursuers*, raised in the Sheriff Court at Glasgow an action of furthcoming against Moss' Empire, Limited, of 23 York Place, Edinburgh, having a place of business in Sauchiehall Street, Glasgow, *arrestees*, and George Gray, music hall artiste, “whose only known address is The Savage Club, Adelphi Terrace, London,” the *common debtor*.

The claim or demand of the pursuers was—“That there should be made available to them for satisfaction of—(First) The sum of £125 sterling, with interest thereon from the 19th day of January 1910, (Second) the sum of £20, 0s. 11d. sterling of expenses, and (Third) for the expenses of this process, 145 preference shares and 100 ordinary shares held by the defender, and registered in the name of George Herbert Gray, of Moss' Empires, Limited, and which shares are numbered as follows, . . . the said sums of £125 sterling, with interest as aforesaid, and £20, 0s. 11d. sterling of expenses, being the amounts contained in an extract decree obtained by the pursuers in the Sheriff Court of Lanarkshire at Glasgow in an action at their instance against the defender George Gray, upon the dependence of which action the pursuers on the 18th day of February 1910 used arrestments in the hands of the defenders Moss' Empires, Limited.”

The pursuers accordingly craved the Court to grant warrant to a stockbroker to sell the shares or such a number as might be sufficient to satisfy their claim.

The pursuers in evidence of their claim produced the extract decree, which was in the following terms—“At Glasgow, the fifteenth day of June, and fourth day of July Nineteen hundred and ten, in an action in the Sheriff Court of the County of Lanark at Glasgow, at the instance of Leggat Brothers, printers, one hundred and seven Bishop Street, Port-Dundas, Glasgow, *pursuers*, against George Gray, music hall artiste, presently performing at The Palace Theatre of Varieties, Main Street, Gorbals, Glasgow, *defender*, the Sheriff decerned the defender to pay to the pursuers One hundred and twenty-five pounds sterling, with interest thereon from the Nineteenth day of January Nineteen hundred and ten, and twenty pounds and elevenpence of expenses: And the Sheriff grants warrant for all lawful execution thereon by instant arrestment, and also by pointing after a charge of seven free days if the defender is within Scotland, and fourteen free days if furth thereof.”

The pursuers also produced the execution of the arrestments on the dependence referred to in their claim.