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BUCHAN.

THE LORD CHANCELLOR said, after stating the case,

“ My Lords,

“ The items are many in number, which rendered it necessary to take some time to examine them with attention. I have done so, and it is my humble advice, that the judgment should be affirmed, for, under the particular circumstances of the present case, I think Buchan is not answerable, as he would have been, if he had been acting strictly in the character of factor, and had not, on the contrary, been acting on principles which displaced the obligation that would have attached to him by the general principles of law, as applicable to factors.

“ But it was insisted also, that this judgment should be affirmed with costs. I cannot, however, concur in that; for, though the just demands against Buchan were less than the claims insisted upon by the other party, yet, from the relation in which he stood with respect to the father, he ought to have kept accurate accounts always ready to be produced, and the contest has, in some measure, arisen from his failure in that duty. I propose, therefore, that the judgment be affirmed, but without costs.”

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed.

For the Appellant, *Sir Saml. Romilly, John Greenshields.*

For the Respondents, *Alex. Maconochie, Robt. Forsyth.*

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DUFF  
v.  
BROWN, &C.

HUGH ROBERT DUFF Esq. of Muirtown, *Appellant;*

ROBERT BROWN, Factor for Ronald George  
Macdonald, Esq. of Clanronald, and JOHN  
MACDONALD, Esq. of Borrodale, } *Respondents.*

House of Lords, 11th July 1817.

SALE OF GROWING WOOD—DELIVERY—RELIEF AND DAMAGES.—

The appellant sold the growing wood on his lands of Almie to Mr Buchanan, and that right was transferred to the respondent, Brown. The appellant, from the correspondence which passed, understood that the wood was either cut, or in the course of being cut and taken away, and a bill was granted for the price, and paid. Three years thereafter, he sold the lands of Almie, with the wood growing thereon. It then turned out that the wood sold to Buchanan, and afterwards to Brown, was still on the lands uncut. In an action of relief and damages brought by Brown against the appellant, and the purchaser of the lands,

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held the appellant liable in the value paid for the wood. In the House of Lords this was reversed, and it was declared that, according to the true meaning of the contract, of sale of the wood, the wood was to be cut down in the course of that season, and that the whole dispute had arisen from Brown not having done so, and that, therefore, he had no right to demand damages against the appellant. And, further, that the purchaser of the lands having had notice of the sale, he must be considered as having purchased, subject to the burden of the contract of sale of the wood to Brown.

In the year 1801 or beginning of 1802, the appellant sold to Mr Macdonald Buchanan, the then growth or crop of the wood of Almie and estate of Rhetland, situated at a considerable distance from the appellant's estate of Muirtown, for the sum of £60 sterling. The wood was understood to be ready for cutting. No particular day or week was fixed for cutting the wood; but it was well understood, as in such cases it always is, that the purchaser should cut and remove the wood without undue delay, and, of course, before the end of the ensuing season. It was stated, that the appellant had a material interest that this should be the case, in order that a new growth might be advancing.

Mr Macdonald Buchanan transferred his interest in the wood to the respondent, Robert Brown, and this gentleman took possession of the wood. In a representation in the cause, he stated that "as soon as the bargain was concluded, the representer entered into an agreement with Angus Macdonald of Kinchreggan, the tacksman of the lands, relative to the loss which he behoved to sustain by the cutting down and removal of the wood; he then divided it into such lots as appeared most eligible, and appointed an overseer, to whom he committed the charge and sale of the wood."

The appellant having been informed of the transfer of the wood to Brown, wrote to him the following letter:—"Muirtown, 16th May 1802,—Sir, I am informed that my wood of Almie has been made over to you by Mr Macdonald Buchanan, at £60 sterling, and that the wood is *either now cutting* or cut down. I beg to be informed when and how the price is to be settled."

In consequence of this communication, Mr Brown allowed a bill to be drawn upon him for the price of the wood, by the appellant's factor, this bill expressly stating the sum, "as the value of wood received from Hugh Robert Duff of

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“Muirtown.” It was payable in the month of August following, and was retired by Mr Brown, without attempting to undeceive the appellant, as to the belief which he had expressed in the above letter, namely, that the wood was “either now cutting or cut down.”

The lands of Rhetland, as already mentioned, were at a great distance from the appellant’s residence. The estate of Mr Macdonald of Borrodale, is contiguous to Rhetland; he resides on his estate, and he could not fail to know everything about these lands.

It was about two or three years after the price of the wood was paid, and, as he believed the wood cut down, that, in 1804, Mr Macdonald proposed to purchase the estate of Rhetland, and wrote to Inverness, to Mr Macdonald, his agent there, to conclude the bargain for him. At this time, and before the bargain for the sale was concluded, Mr Macdonald knew that the wood of Almie was sold three years before. He wrote to his agent stating expressly this fact; and, although Mr Macdonald obstinately refused to produce this letter, he stated, in his deposition, that this was the fact.

The sale then was concluded through his agent. The sale conveyed to the other respondent, Mr Macdonald, “all and whole the penny land of Almie, &c., with the wood park of Almie, and wood growing thereon.”

In an action at Mr Brown’s instance for relief and damages before the sheriff, it was decided that the wood belonged to Mr Macdonald, and he was, therefore, assoilzied; but Mr Duff not appearing, decree in absence went against him. On a charge on this decree, a suspension was brought, and an advocacy also brought as to Mr Macdonald.

In regard to the wood sold to Mr Brown, it appeared that Brown had cut part of it only, delaying to cut down the greater part of it, in order to increase its value; and when, in February 1805, he came forward, after the sale to Macdonald, to take away the wood, the latter stopped him, and thus, the respondent, Brown, came back on the seller (appellant.) The question was, whether the appellant having conveyed to Mr Macdonald, along with Rhetland, the wood park of Almie and the *wood growing thereon*, he must be held to have conveyed only the young crop, on the supposition that the young wood was three years advanced in growth, or whether the old wood, which he had sold, and had supposed to have been all cut down three years before,

but which, for the greater part, was still on the ground uncut, must be held to have been conveyed to him? It was argued, that if a proprietor of lands concludes a contract for the sale of uncut timber, and if he afterwards, while the wood is still standing, sells the land to a third party, without qualification, the previous sale of the timber, which, till separated, is *pars soli*, does not affect the purchaser of the lands, if he is in *bona fide*, because such a contract is not a real right, and onerous purchasers are affected only by real rights. But here the appellant had, in express terms, sold the growing wood with the lands.

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After a variety of procedure and interlocutors pronounced, the Court finally came to adhere to the Lord Ordinary's interlocutor, finding the respondent Brown entitled to damages to the extent of the sum or price paid for the timber, and decerned against the appellant therefor, and for expenses.

Dec. 12, 1811.  
Jan. 21, 1812.  
Feb. 18, 1812.  
June 16, 1812.  
May 25, 1813.  
June 18, 1813.  
Feb. 18, 1814.

Against these interlocutors the present appeal was brought by the appellant to the House of Lords.

*Pleaded for the Appellant.*—1, When a seller has delivered the subject of sale to a purchaser, the latter having attained possession, is entitled and bound to support his own right of property. If a third party molests him in the possession, and attempts to deprive him of the subject sold, he is not entitled to abandon it, and recur on the seller for repayment of the price, or for damages. Now, the wood which the appellant sold to Mr Macdonald Buchanan, and which was transferred by him to Mr Brown, was delivered to, and in the possession of the latter for years, before the appellant had any transaction with Mr Macdonald of Borrodale. This is proved by his own judicial admission, that as soon as the bargain was concluded, he entered into an agreement with the tenant of the lands in regard to the cutting down and removal of the wood. He divided it into the most eligible lots for sale, and he appointed an overseer, to whom he committed the charge and sale of the wood. He also admitted that he sold some of it. These admissions showed that Mr Brown had got possession so early as 1802. The letter of 16th May 1802, where the appellant stated that the wood was "either now cutting or cut," was left unanswered, and he never undeceived him on that point, but granted bills for the price.

2. Even though it were doubtful whether there had been complete delivery to, and possession by Mr Brown, before the transaction with Mr Macdonald and the appellant, and it

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could be held that Mr Macdonald had a right to the wood preferably to that of Mr Brown; the appellant conceives that still Mr Brown would have no legitimate ground of action against him. These assumptions imply that the appellant had not completely fulfilled his part of the contract, by which he sold the wood, but he submits it to be clear, that if a party, in a mutual contract, is rendered unable to fulfil his obligation, through the *culpa* of the other party, the latter is not entitled to claim performance, or damages in lieu of performance. Now, the inability of the appellant to implement his bargain with Mr Brown, evidently arose from the *culpa* of that gentleman. In the beginning of 1802, he sold a crop of wood, and in practice it is known, that though no term be fixed for cutting or removing the wood, the purchaser is bound to do so in the course of the ensuing season. From the nature of the thing, he cannot be allowed to let the wood remain uncut for years. He was, therefore, to blame in not cutting down and removing the wood. He alone was in *culpa*, in not performing this part of his contract; and, therefore, he ought to be held to stand to, and not to be relieved from, the consequence of his own wrong.

3. Although Mr Brown were entitled to maintain this action against the appellant for damages and repetition of the price, the appellant is entitled to be relieved by Mr Macdonald. It is plain that he could not mean to sell to Mr Macdonald the wood which, he believed, had been long ago cut and carried away by Mr Brown. In this belief he sold to Mr Macdonald the lands of Rhetland, "with the wood " park of Almie, and wood growing thereon." These terms are, no doubt, susceptible of two meanings, for they may be understood to mean either the wood which had been previously sold to Mr Brown, or the new growth since going on; but in relation to the appellant and the whole circumstances of the case, they could have only one meaning, namely, that they meant the young wood growing up since the sale. But Mr Macdonald and his agent must have understood these terms in the same sense. It is proved by Mr Macdonald's oath, that he had heard of the sale of the wood about the time when it took place. It is proved by his agent's oath, that when the negociation for the purchase of the lands was going on, his constituent informed him by a letter, that "he " (Borrodale) understood that the woods on the lands of " Almie had sometime before been sold by the pursuer." That letter has been improperly withheld by Mr Macdonald.

But, taking the fact as established by the depositions, it is proved that Mr Macdonald understood that the cutting of the wood had been previously sold. He made no objection to the bargain on this account; he required no explanation. He took the conveyance in the terms before mentioned; and, it is evident, that he must have understood these terms precisely in the same sense as the appellant used them.

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*Pleaded for the Respondent, Robert Brown.*—1st, The respondent purchased from the appellant the timber of the wood of Almie, and paid to him the price of £60. By the act of the appellant, in selling the same wood to Mr Macdonald of Borrodale, the respondent was deprived of the timber which he had so purchased and paid for. The interlocutors appealed from merely find the respondent entitled to damages restricted to the price paid. The respondent was not restricted to any time in cutting down the wood, and there was no stipulation to that effect. Besides, he was never required to remove the timber, and had no reason to suppose that the delay in doing so would be objected to. When the appellant sold his lands to Mr Macdonald, he was bound to know the state of them, and no Court can be required to believe that when he sold the growing timber on his own lands, he did not know of what that timber consisted.

2d, The appellant has received the price of the wood twice. He sold it to the respondent, and received the price of it. He again sold it to Mr Macdonald, and received the price of it. And, therefore, he must repay the price to the respondent.

*Pleaded for the Respondent, Mr Macdonald.*—Every onerous purchaser acquires the property as it stands at the time of the sale. The buyer has nothing to do with any private obligations or contracts which may have been entered into by the seller, and is in no case liable for them, unless he expressly engages to perform them. The lands here were sold “with the growing wood thereon,” and the wood was paid for as well as the lands, and his title was a title to both.

After hearing counsel,

It was, therefore, declared by the Lords spiritual and temporal, in Parliament assembled, that it appears from the letter of the appellant *Duff* to the respondent *Brown*, of the 16th of May 1802, that the appellant understood, and that the respondent, *Brown*, was thereby informed that the appellant understood, that the wood in question

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was then either cutting, or cut down; and it further appears, that the respondent, Brown, allowed a bill to be drawn on him for the price of the wood, the said bill expressing the same to have been so drawn for value of wood received from the appellant, which bill was payable on the 7th of August 1802, and was retained by Brown, without any information given to the appellant, that the wood was not cut down; and that, according to the true meaning of the contract for the sale of such wood, as explained by such letter, and the payment of such bill, such wood was to be cut down in the course of that season; and the matters in dispute between the parties, have arisen in consequence of the respondent, Brown, not having cut the wood in that season, according to the terms of the contract under which he claims, and that, therefore, the respondent, Brown, has no right to demand damages against the appellant, in consequence of the said respondent having been interrupted by the respondent, Macdonald, in cutting the wood in the year 1805, after the sale of the land by the appellant to the respondent *Macdonald*; and it is further declared, that it appears from the examinations of the respondent, Macdonald, and of his agent, Alexander Macdonell, that he had notice of the contract of sale under which the respondent, *Brown*, claims, at the time of the contract of the respondent Macdonald, with the appellant, and, therefore, the respondent, Macdonald, must be considered as having purchased, subject to the burden of the contract for sale of the wood, if the respondent, *Brown*, was then entitled to claim the benefit of such contract, not having on his part executed the contract according to the true meaning thereof; and, therefore, it is ordered, that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained of in the said appeal, and do therein as shall be just, having regard to the effect of these declarations.

For the Appellant, *Sir Sml. Romilly, John Greenshields,*  
*Fra. Horner.*

For the Respondent, Brown, *C. Warren, James Moncreiff.*

For the Respondent, Macdonald, *John A. Murray, W. G.*  
*Adam.*

NOTE.—Unreported in the Court of Session.—In the sale of

growing corn, growing trees, large trees cut down, and articles of great size, symbolical or constructive delivery has been held sufficient. Grant, 21st July 1758, M. 9561; 1 Bell's Com., p. 176. In England the same law prevails. Tansley v. Turner (Com. Pl.) 1835. 2 Bing. New series, p. 151.

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In the Roman law *traditio longæ manus* was admitted. Dig lib. 41 tit, 2 de possess, L. 1, § 21. In France the rule is the same. "When a wood merchant, who has sold to me a great log of wood lying in his own yard, gives me, in pointing it out, permission to take it away when I please, this permission, which he gives me, in pointing out the log, is regarded as delivery of it. I am from that moment held to commence my possession *oculis et affectu*, even before any one on my part set about the removal of it."—Pothier's, *Traité du droit de Propriété*, vol. iv., p. 419.

When an heir of entail in Scotland sells the wood upon his estate, and dies before it is cut, the purchaser's right ceases in consequence of the heir's death. Lord Cathcart v. Sir J. S. N. Shaw, 1 Fac. Coll. 193 (Bell's Com., p. 52). Affirmed on appeal, *vide ante*, vol. i., p. 622; Stewart v. Stewart, 25th June 1761, Mor. p. 5436; Veitch of Ellich.

In the case as above reported, much discussion took place on the subject of the delivery of the wood, but ultimately it was decided on the special circumstances of the case.

[Dow., Vol. v., p. 247.]

WM. JOHNSTONE, Esq. of Lathrisk,	.	<i>Appellant;</i>	1817.
JOHN CHEAPE, Esq. of Rossie, and ANDREW THOMSON, Esq. of Kinloch,	.	<i>Respondents.</i>	JOHNSTONE v. CHEAPE, &C.

House of Lords 10th July 1817.

(Deepening Rossie Drain.)

DECREE-ARBITRAL—CORRUPTION, FALSEHOOD AND BRIBERY.—

Held, that there were no circumstances stated here inferring corruption, falsehood, and bribery, to warrant the reduction of the decree-arbitral; and that any excess ought not to affect the validity of the decree-arbitral, farther than to rectify the said excess, leaving the decree-arbitral unimpeachable in all other respects.

This appeal has reference to the Rossie drain alluded to in the appeal which immediately follows this, and which belonged to the respondent, Mr Cheape.