

Was there a concluded and binding sale to the pursuer?

The second is, If there was a binding sale, was it subsisting when Stewart entered into the transaction with Miss Forsyth and obtained a purchase of the same subject?

The third question is, Whether the second purchase, made in the knowledge of a previous sale still subsisting, should be allowed to stand?

I am clear that there was such a contract of sale, and that it is impossible to hold that Miss Forsyth's agents could put an end to it by such a letter as the one which they wrote. I am also clear that Stewart was in *pessima fide*, and ought to have made inquiry after the warning he received from Mr Shand, and with the knowledge he possessed.

With regard to the authorities cited, the case of *Lang*, in 1813, was peculiar in regard to the manner of the second purchaser's knowledge of the first sale. There he actually saw that the subject had been established as part of the public quay.

The case of *Marshall*, in 1828, is conclusive against the defender. There the transaction related to the sale of wood, and it was held that the second purchaser was aware of the first sale and should have made inquiries.

The case of *Morrison v. Somerville* was very complicated and the transaction doubtful, and I do not think it has much bearing in the present case.

LORD GIFFORD—I concur, although I have felt some difficulty. I think there was here a completed bargain binding and enforceable by either party. It has been contended that there was another matter which required to be settled *unico contextu* with the sale. I do not think so. I think there was no condition annexed to the acceptance of the offer. The second question is, did the bargain ever come to an end? I do not think it ever was departed from. The main point is whether Stewart is entitled to insist on his second purchase. Now, in this class of questions I think that *mala fides* comes to be a question of circumstances. It must amount to a personal bar against a party making a second bargain. It is not easy to define by a general proposition what will set aside a second sale; but there must be full and adequate knowledge of the first sale—the second purchaser must have failed to put himself in communication with the first purchaser, and he must occupy such a position as not to entitle him to disregard the rights acquired under the first purchase. All these elements tell against Stewart here; and I do not think he is entitled to be regarded as a *bona fide* second purchaser.

The Court pronounced the following interlocutor—

“Alter the interlocutor of the Lord Ordinary complained of; find by the missive letters, Nos. 19 and 51 of process, that the defender Miss Forsyth agreed to sell the property in question, and the pursuers agreed to purchase the same, at the price of £55, with entry at the term of Whitsunday 1873, the price to be paid on delivery of the disposition, and that the defender Miss Forsyth is still bound to convey the said subjects to the pursuer in terms of the said concluded agreement; further, find that the defender Stewart having been cognisant of the said agreement between

the defender Miss Forsyth and the pursuer and in respect of his knowledge thereof, was not entitled to conclude with the defender Miss Forsyth a contract for the purchase of the said subject on his own account, and that the conveyance in his favour libelled in the summons cannot affect the right of the pursuer to obtain a disposition thereof from the defender Miss Forsyth, and to that effect and extent, reduce, decern, and declare in terms of the reductive conclusions of the summons, reserving all questions of repetition or otherwise between the defenders; and further, decern the defender Miss Forsyth to implement her part of the contract of sale of the said subjects, entered into between the pursuer and her in terms of the other conclusions of the summons: Find the pursuer entitled to expenses, and remit to the Auditor to tax the same and to report.”

Counsel for Pursuer (Reclaimer)—Solicitor General (WATSON) and Mackintosh. Agent—Alexander Gordon, S.S.C.

Counsel for Defenders (Respondents)—Asher and Paul. Agents—J. J. & A. Forman, W. S.
I., Clerk.

Thursday, December 17.

FIRST DIVISION.

[Sheriff of Dumbarton.

JOHN M'INNES v. JAMES PHILLIPS.

Master and Servant—Truck Act, 1 and 2 Will. IV. c. 37.

Held that a person employed at a yearly salary as foreman, but with the stipulation that he should assist the men in manual labour, was not an artificer in the sense of the Truck Act.

The pursuer of this action in the Sheriff Court was Phillips, slate quarrier and merchant at Luss, who sought to recover from M'Innes, his foreman, the price of certain goods supplied, and the rent of a house. It was not denied that the goods had been furnished or that the rent was unpaid, but the defender pleaded, as regarded the first, that the claim was barred by the provisions of the Truck Act; and as regarded the second, that there was an agreement that the house should form part of his wages. The Sheriff-Substitute pronounced the following interlocutor:—

“Dumbarton, 31st July 1874.—The Sheriff-Substitute having heard parties' procurators on the concluded proof, and having resumed consideration of the process, Finds that the pursuer in this action concludes against the defender for payment of four separate accounts annexed to the summons, for goods furnished, and also for house rent, and amounting altogether to £113, 18s. 10½d. Finds that the pursuer deducts from this sum £90, 16s. 6d., being balance of defender's salary and amount of certain payments made by him to account, leaving £23, 2s. 4½d. as the sum concluded for in the summons: Finds that from this sum the pursuer further deducts £5 paid by the defender to account of rent since the present action was brought into Court,—thus reducing the sum now claimed to

£18, 2s. 4½d.: Finds that the said accounts have been sufficiently established by the evidence adduced in support of them by the pursuer: And farther finds that the plea of the defender founded on the provisions of the Truck Act is inapplicable in the circumstances of the case, and cannot be sustained: Therefore, and for the reasons stated in the annexed note, Repels the defences, and decerns the defender to make payment to the pursuer of the said sum of £18, 2s. 4½d., in terms of the conclusions of the summons: Finds the defender liable in expenses; appoints an account thereof to be given in; and remits to the auditor to tax the same and to report; and decerns.

"*Note.*—The first account annexed to the summons consists of articles of household furniture sold by the pursuer to the defender, and amounts to £15, 0s. 5d. This account is entered in the pursuer's books produced in process, being No. 10/2 and No. 18; and these books furnished the materials out of which the accounts sued for have in a great measure been framed; and they are sworn to as correct by the pursuer and his assistant-bookkeeper, the witness Templeton.

"The second account is for furnishings of coals, amounting to £5, 0s. 5d. It stands upon four passbooks, No. 12 of process, and which also contain grocery goods and other alimentary articles furnished to the defender. These books bear receipts for various payments made to account from time to time by the defender, and thus establish his sanction and approval of the coal furnishings contained in them.

"The third account is for house rent, and amounts to £10, 17s. The defender denies the claim, and maintains that he was to have his house at the quarries rent-free. The correspondence which passed between the defender and the pursuer when the defender was engaged as foreman of the quarries does not bear out this view, but shows, on the contrary, that rent was to be paid by the defender for the house assigned to him. The pursuer's book, No. 13 of process, is in accordance with this understanding, and contains charges of rent against the defender.

"The fourth account sued for is for grocery goods and other articles furnished to the defender, and amounts to £83, 1s. It is framed from the passbooks already referred to, and the defender admits that he received the furnishings; but he pleads, in point of law, that in respect of the provisions of the Truck Act it is incompetent for the pursuer to set these alimentary furnishings against the defender's claim for his salary. This question has already been decided against the defender in an action recently depending in this Court between him and the pursuer, and which judgment the Sheriff-Substitute now holds as repeated in the present case. The said previous action has been produced by order of Court, and is No. 15 of process."

The Sheriff adhered, and the defender appealed.

Defender's Authorities.—1 and 2 Will. IV., cap. 87; *Ingram v. Barnes*, 1857, 6 L. J., Q. B., 339; *Riley v. Warden*, 1848, 18 L. J., Exch., 120; *Weaver v. Floyd*, 1852, 21 L. J., Q. B., 151; *Bowers v. Lovekin*, 1856, 25 L. J., Q. B., 371; *Stedman v. Barret*, 1863, 33 L. J., Exch., 153; *Whitely v. Barret*, 1864, 13 Weekly Rep., 144.

Pursuer's Authorities.—*Monteith v. Blackie*, 2d Feb. 1827, 5 S. 280; *Finlayson v. Braidbar Quarry*

Co., July 1, 1864, 2 Macph., 1297; *Davies v. Bury*, 30 L. J., 84.

At advising—

LORD PRESIDENT—The only question which we need consider in this case is, whether the Sheriff-Substitute and the Sheriff are right in holding the defender not to be an artificer within the meaning of the Truck Act.

It is necessary to attend to the terms of the contract under which he accepted employment. He wrote on 17th December 1870 a letter asking the pursuer to let him know "the conditions on which you wish to engage me—1st, What duties would you require of me—what I should have to do? 2d, What wages do you intend giving?" Even in the first letter it seems plain to me that the man in offering his services was not a workman in the ordinary sense of the term. He speaks of his duties, and wishes to know the scope and nature of them. That is not the position usually taken up by an ordinary workman. Accordingly the answer which the pursuer makes to him is as follows:—"Dear Sir,—I duly received your letter of 17th inst. inquiring as to conditions, with the view of coming to Luss, and the duties expected of you. As to duties expected, I mean to state those as plainly as I possibly can. In the first place, then, I mean you to take charge of the men employed in the quarries, and to conduct the different operations in the working of them to the best of your ability, and with the view of making the quarries profitable. You to keep a faithful account of the men's time, for which a book will be given you for the purpose, and at the end of each week you give the time over to me, or any clerk that I may appoint. You to keep also an account of all slates carted or boated from the works, and to hand a note of them to me at earliest opportunity, so that they may be properly booked. I would be very glad to see the working of the quarries extended, so that the man taking charge would be fully employed in superintending; but so long as the quarries continue to be wrought in a small moderate scale, I will expect the foreman to be foremost at everything, leading the men on, and taking a turn at any of the operations that he may see falling back, or are in need of being pushed forward. In this way men get on much better when the foreman can show them a good example. He may take on men or dismiss them when he sees immediate need, such as inferior workmen, or their being insubordinate. But in most cases to submit all wrongs or disputes to me; and he will always find me ready to assist and advise for the best.

"As to the question of wages, in all cases I like to pay a man what they are worth, and to a man attending properly to his duties I will give £60 a year; but were the workings extended and doing well, the matter of wages could be revised.

"There may be some other small matters to mention, but from what I have stated you can form a good idea of the duties expected; but should I have omitted anything, or should you wish any farther explanation, I will willingly give it."

This was accepted on the part of the defender, and the contract was completed. Now, the man so engaged with the duties thus specified appears to me to be a proper foreman of works—employed on a yearly engagement at an annual salary. No doubt he was expected to lend a hand at manual labour when he sees any of the operations "falling

back" or in need of being "pushed forward." But that does not interfere with his being a foreman in the proper sense of the term. Every man knows that a farm grieve, who undoubtedly is a foreman, takes a turn with his own hands, or works with or at the head of the men. But that does not interfere with his position as a foreman, or make him any the less superintendent of their labour.

If, then, the defender was thus engaged, can he be held an artificer within the sense of the Truck Act. The clause with which we are specially dealing is the 6th. Now, in this and in all the other sections of this Act, the artificer and employer are spoken of as belonging to two different and opposing classes, between whom contracts of service may exist—the one paying and the other receiving wages for purely manual labour. But the 25th section of the Act defines more particularly what is to be understood by the term artificer. In the sense of the Act, "All workmen, labourers and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades or occupations aforesaid, shall be and be deemed 'artificer.'" On the other hand, it provides that "all masters, bailiffs, foremen, managers, clerks, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers shall be and shall be deemed to be employers." It thus includes among employers any person who is engaged in the "superintendence of the labour of any such artificers." A person who stands in that position cannot be an artificer himself. The two terms "artificer" and "employer," are put in contrast for the purposes of the Act. Now, the defender is a foreman put in superintendence of the work of those who are artificers in the sense of the Act, and therefore not an artificer himself. That is a sufficient ground of judgment in this case, and I do not therefore go into any of those nice and delicate questions which have been raised in the cases cited from the Common Law Courts of England, which, I confess, seem to me somewhat unsafe guides in this matter.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"Find, in fact, that the defender (appellant) was, when the goods sued for were supplied to him by the pursuer (respondent) the now deceased James Phillips, a foreman employed by the pursuer on an engagement for a year, at a salary of £60; find, in law, that the defender, was not at such time, in a question with the pursuer, an artificer within the meaning of the statute 1st and 2d Will. IV., c. 37; therefore refuse the appeal, and decern; find the appellant liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Appellant—Millie. Agent—Thomas Carmichael, S.S.C.

Counsel for Respondent—R. V. Campbell. Agents—W. & J. Burness, W.S.

M. Clerk.

Friday, December 18.

FIRST DIVISION.

[Sheriff Court of Roxburgh.

SCHOOL BOARD OF KELSO v. HUNTER.

School—Education (Scotland) Act 1872—School Board, Powers of—Interdict—Competency.

Held that the School Board of a parish had not such a clear right to depute its members to make visitations to the parish School, for the purpose of inspecting it, and ascertaining for the information of the Board that the work therein was being properly conducted, as to entitle them to interdict against the teacher from preventing or excluding the said School Board, or members thereof under the authority of the Board, from entering the said school during school hours whenever and so often as they might deem necessary.

This was a petition to the Sheriff of Roxburgh, in which the School Board of the parish of Kelso, and David Broomfield, writer, Kelso, their clerk, were petitioners, and George Duncan Hunter, teacher of the Kelso Public School, was respondent.

The petition was in the following terms:—"The petitioners humbly sheweth, that Kelso Public School is vested in and under the management of the petitioners, the School Board of the parish of Kelso, who are bound to maintain and keep the same efficient, in terms of "The Education (Scotland) Act 1872." That George Duncan Hunter, the respondent, is the teacher thereof. That the petitioners found it necessary, in the discharge of the duties devolving on them under said Act, to establish a system of visitation to the schools under their charge, including the school before mentioned, such visitations being made at irregular intervals during school hours, and by two or more members of the Board, under the authority of the Board, at a time. That the respondent objected to such visitations being made to the said school of which he is teacher; and on or about the 13th day of March last he refused to admit to the school-rooms two members of the Board, Mr Charles Robson and Mr James Brunton, although they intimated to him, agreeably to the fact, that they had been deputed by the Board to make such visitation for the purpose of inspecting the school, and ascertaining for the information of the Board that the work therein was being properly conducted. That in consequence of such refusal the said visitation is frustrated. That the unwarrantable and illegal course of conduct thus pursued by the respondent not only obstructs and hinders the petitioners from efficiently or properly discharging the duties imposed on them by the Act of Parliament, but injuriously affects the educational interest of the parish, and frustrates the provisions and intentions of the said Act. In these circumstances the present application has become necessary. May it therefore please your Lordship to appoint a copy of this petition and deliverance to follow hereon to be served upon the respondent, the said George Duncan Hunter, and to ordain him to enter appearance within a short space after such service, with certification; and thereafter, on again advising this petition, whether such appearance should have been entered or not, to interdict, prohibit, and discharge the said George Duncan Hunter, or others