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COURT OF SESSION.

Monday, November 4.

FIRST DIVISION.

MACKINTOSH BROTHERS *v.* ROSS AND BARROW.

Sale—Delivery—Invoice—Bill of Lading. Circumstances in which a claim by a seller of goods for the price *sustained*, and a defence by the purchaser, founded on a plea of non-delivery, *repelled.*

In January 1861, James Ross, coal-merchant and shipowner, Inverness, ordered a quantity of soda from Mackintosh Brothers, Leith. Mackintosh Brothers, not having any soda in store, ordered it from Smart, who in turn ordered it from Barrow, drysalter, Glasgow, who applied to the Washington Chemical Company, Newcastle.

In November 1861 Mackintosh Brothers raised an action against Ross for the price of the soda. Ross defended, on the ground that, when he applied at the store in Newcastle, where he was told the soda was lying, he was refused delivery of any soda on the pursuers' account; that upon this, Barrow invoiced and shipped a quantity of soda to him in his own name; and that, when the soda came to Inverness, he put it into a store, where it lay until sold by warrant of the Court. Ross then raised an action of multiplepoinding, calling therein Barrow and Mackintosh Brothers. This action and the action at the instance of Mackintosh Brothers were conjoined. In the conjoined actions, after a proof, the Sheriff, reversing the judgment of his substitute, preferred Barrow to the fund *in medio*, holding that Mackintosh Brothers had failed to prove delivery of the soda to Ross.

Mackintosh Brothers reclaimed.

CLARK and ASHER for them.

MACLEAN, for Barrow, in reply.

DUNCAN, for Ross, adopted the argument for the other respondent.

LORD PRESIDENT—It appears to me that this is a question of fact, and not one involving much legal principle, and the only difficulty arises from the imperfect state of the evidence, for which both parties are in some degree to blame. After a careful examination of the evidence, such as it is, I have arrived without any difficulty at an opinion on the merits of the case.

The claimant in the multiplepoinding, Ross, in December 1860, ordered a quantity of soda from the advocators Mackintosh Brothers, Ross being a coal-merchant and shipowner in Inverness, and Mackintosh Brothers being merchants in Leith. Mackintosh Brothers proceeded immediately to execute the order by taking steps to procure the soda, not having it themselves in store, and they applied to Smart, who undertook the order. Smart applied to Barrow; and finally Barrow ordered the soda from the Washington Chemical Company at Newcastle. The order was thus transmitted through various hands, but the original contract between Mackintosh Brothers and Ross was, that Mackintosh Brothers should furnish soda to Ross, deliverable at Newcastle. The various transmissions of this order were represented by invoices, the terms of which are very material. The Washington Chemical Company, in whose hands the soda was, and who in the end made delivery of it, gave an invoice to Barrow, and that invoice specified the marks and weights of the soda, so that the soda in their possession was a specific and defined quantity of soda in their store. The invoice ran thus:—"Mr F. A. Barrow, Glasgow, Bot. of The Washington Chemical Co., to order of Mr Jno. Ross, Inverness, 35 casks Soda . . . . Await orders." This meant that the soda was to lie in the hands of the Washington Chemical Company, to await the orders of Ross. If there were any doubt of this it is removed by the evidence of Barrow himself, because he exhibits his order book, in which there is an order to the Washington Chemical Company in these terms:—"Please get ready and wait order for shipment, the undernoted, viz., 5 tons Soda, in 2 and 3 cwt. casks, at £4, 12s. 6d., f. o. b. Please send invoice as early as possible. The Soda to wait the order of James Ross, shipowner, Inverness." There is no doubt, therefore, that the instructions of Barrow to the Chemical Company were, to hold the soda to the order of Ross. Then Barrow gave an invoice in like manner to Smart, and that is a specific invoice also, containing the marks and weights of the soda, and it in like manner ends with the words, "To the order of Mr John Ross, Inverness." Smart, again, invoiced the soda to Mackintosh Brothers, the invoice winding up with the words, "To the order of Mr John Ross, Inverness." There is, therefore, a complete series of invoices between the Washington Chemical Company, who held the goods, and Mackintosh Brothers, the party contracting with Ross. And as far as Mackintosh and the Chemical Company were concerned, they were both cognisant that the soda had been bought for Ross, and was to lie in the hands of the Company till Ross sent for it.

But the question arises, How far Ross was made aware that the soda was his, and that he was entitled to send for it? There has been no invoice recovered between Mackintosh and Ross, and Ross was not examined as a witness. This is the fault

of Ross, for I think there is evidence to show that there was an invoice of this soda sent to Ross, which made him cognisant that a definite and specific quantity of soda was lying for him in Newcastle, and I think he must have known the very place where it was, and to which he was to send for it. The evidence I refer to is this,—William Mackintosh, a partner of Mackintosh Brothers, exhibits an order book containing an entry of 28th January 1861—"James Ross, shipowner, Inverness, invoice the 5 tons soda from Smart, and the 5 tons from Aitchison & Sons, at £4, 15s., f. o. b." That is a direction to make out and transmit such an invoice, and Mr M'Culloch, in Mackintosh's employment, says he saw this note in the order book, and that he knows it to be in William Mackintosh's handwriting. He exhibits a diary and depones that he posted on 31st January 1861 an invoice of the goods in question to Ross. That evidence in uncontradicted. I see that the Sheriff in his note says that Ross in his defences says he didn't get an invoice. ' That is not evidence, and only shows that Ross is willing to aver what he is not willing to swear to; and when the Sheriff says that that was added on revisal and was not answered, it must be remembered that that was as much the fault of the Sheriff-substitute as of the parties. Suppose the matter went no farther, and that all Ross knew was that a specific quantity of soda was lying for him at Newcastle, that would be enough for the case. But it is plain from other documents that Ross knew more. The Chemical Company wanted to get rid of the soda, for Barrow writes to Smart that the people at the works want Ross to take his soda immediately, as it is lying in their way; and Smart in a reply to Barrow says that he has written to Ross about the soda. His Lordship then examined the evidence of Smart, to the effect that when he said in his letter that he had written to Ross he meant Mackintosh, as he did not know Ross except through Mackintosh, and said that the documentary evidence must be held as the most trustworthy,and continued—These letters prove that in February Ross had direct and specific intimation that the soda lay for his orders in the hands of the Washington Chemical Company. If so, at whose risk was it? Without doubt, at the risk of the purchaser. Can there be any doubt that if Ross had sent then or a month or two later, or at any time before the bankruptcy of Smart, for the soda, he would have got delivery? Who is to be answerable for Ross' delay? Is Mackintosh, who procured the goods, and made them deliverable at the very place stipulated? That is out of the question. If the soda had perished, or there had been any legal obstacle by the lapse of time to prevent Ross getting delivery, I should say that Mackintosh had fulfilled his contract, and that Ross must suffer the loss.

But, in fact, I think the soda was delivered to Ross, for in July, nearly six months after the time when this soda was in the hands of the Chemical Company for Ross' orders, he sends a ship to take it. That was a ship belonging to Ross and going on his own business, and the shipmaster was told at the same time to take on board this soda as belonging to his owner, and take it to Inverness. Now what happens? The shipmaster comes to the company and asks the soda. The company were undoubtedly bound to deliver that soda. But it is said that it has not been proved by Mackintosh that the price was ever paid to the company. No such burden lies on Mackintosh. The company never suggested that the price was not paid, or that they had any right of retention. The company try to create a security over this soda in favour not of themselves but of Barrow, and the device is to take from the shipmaster of Ross' ship a bill of lading in favour of Barrow. That is an inept proceeding, and that bill of lading creates no contract of affreightment between the owner of that ship and Barrow. The master was not in a position to grant a bill of lading binding his owner. He was to take a cargo of coals and to get the soda, and he had no right to grant a bill of lading in favour of a third party. That bill of lading, therefore, is a mere nullity, and creates no obligation between the master or owner of the vessel and Barrow. So that when the soda arrived in Inverness it was in the possession of Ross, and had been so from the moment of shipment. It was therefore goods delivered to Ross. In these circumstances, Ross, behind the back of Mackintosh, entered into a new contract of sale with Barrow by which he purchased the same specific quantity of soda, as if it had not formed the subject of any previous contract. Ross must take the consequence of his own rashness and folly. He has no defence or shadow of defence against the action by Mackintosh. Therefore I come, without hesitation, to the conclusion that Mackintosh is entitled to decree against Ross in the original action, with expenses. As to the multiplepoinding, parties have no great interest, if your Lordships agree with me as to the first action. The fund is not what is claimed by Mackintosh, but it is either the goods or the price of the goods under the contract with Barrow and Ross, or their value after a judicial sale. Whichever it is, it seems to me that Mackintosh has nothing to do with this fund *in medio*. Mackintosh Brothers understood their case when they pleaded that "having no concern with the transaction between Ross and Barrow, on which the action of multiplepoinding is founded, said action should be disjoined from the action at their instance."

The other judges concurred.

Agents for Reclaimers—Murdoch, Boyd, & Co., S.S.C.

Agents for Ross—Horne, Horne, & Lyell, W.S.

Agent for Barrow—John Ross, S.S.C.

Monday, November 4.

SECOND DIVISION.

BAIN *v.* DUKE OF HAMILTON AND OTHERS.

Superior—Title—Proprietor—Mineral Tenant—Improper Operations. Circumstances in which *held* that a reserved clause in a superior's titles to sink shanks for the purpose of working the minerals underneath the ground did not exclude the proprietor of the ground's claim for surface damage occasioned by the improper working of the pit.

This is an action at the instance of John Bain, Esq. of Morriston, proprietor of the lands of Morriston in Lanarkshire, and the defenders are the Duke of Hamilton, as superior of that estate, and Messrs Colin Dunlop & Co., the tenants of the minerals. The summons concludes for damages on account of injury done by the improper working of the pits underneath the estate.

When the lands were feued in 1653 the superior reserved to himself the minerals by the following clause—"Reserving, nevertheless, to me, my heirs and successors, full power, right, and liberty to win