Counsel for the Complainer—Kennedy. Agents—Carmichael & Miller, W.S.

Counsel for the Respondent—Salvesen. Agents—Macpherson & Mackay, W.S.

COURT OF SESSION.

Thursday, December 12.

FIRST DIVISION.

[Sheriff of Lanarkshire.

HENCKELL DU BUISSON & COMPANY *v.* SWAN & COMPANY.

Ship—Sale—Delivery—Risk.

A shipbuilder contracted "to build and deliver at St Lucia" a steamship, the last instalment to be paid when the ship was completed, the builder to cover insurance to St Lucia. The price was paid on completion, and the ship was insured by the builder at the purchasers' request in their names, and the policy was delivered to them. By arrangement the ship was registered in the name of the managing owner of the purchasers. The builder engaged a master to navigate the vessel to St Lucia. She was wrecked in the course of the voyage.

In an action by the purchasers against the builder, *held* that as the vessel had not been delivered in terms of the contract, the defender was liable in repayment of the purchase price.

This was an action at the instance of Henckell Du Buisson & Company, merchants, London, against William Swan & Company, shipbuilders, Glasgow, for £2500, the alleged loss sustained by the pursuers by the defenders' failure to deliver a steamship at St Lucia.

In April 1888 it was agreed between the parties that the defenders should build and deliver at St Lucia a small steamer or steam-launch for the "St Lucia Steam Conveyance Company (Limited)" for the sum of £1865, the last instalment to be paid when the ship was completed, the builders to cover insurance to St Lucia. The price, including extras, was subsequently increased to £1899, 2s. 6d., and was paid to the defenders by the Steam Conveyance Company when the vessel was completed. At the purchasers' request the defenders insured the vessel for £2500 in the pursuers' name, and the policy was delivered to them. By arrangement the builders' certificate was returned to Mr Chastanet, the managing director of the St Lucia Company, and the vessel was registered in his name. The defenders, when the vessel was ready for the voyage, entered into a contract with Peter Jacobs, a shipmaster, to navigate the vessel to St Lucia, and they put on board a cargo of coals as ballast, which they intended to sell for their own behalf at St Lucia. The vessel was lost on the voyage out, in Belfast Lough.

The pursuers averred that the wreck of the vessel was due to the fault of those for whom the defenders were responsible, and they estimated their loss at the sum sued for, including the repayment of the price with interest.

The defenders averred that in September 1888 the vessel was transferred from them to the St Lucia Company, and denied that the loss of the vessel was due to fault.

The pursuers pleaded—"(1) The pursuers are entitled to decree as craved, in respect (*a*) the defenders were under contract to deliver said launch 'Victoria' at St Lucia; (*b*) the loss of said launch is due to the fault of those for whom the defenders are responsible."

The defenders pleaded—"(3) The defenders having transferred the property in the vessel, and received payment of the price, have implemented their contract with pursuers, and should now be assoilzied and entitled to costs. (4) The loss of the vessel not being attributable to fault on the part of defenders, or those for whom they are responsible, the defenders should be assoilzied and found entitled to costs."

On 23rd March 1889 the Sheriff-Substitute (MURRAY) (after various findings in fact) found—"(1) That in the circumstances, as shown by the documents in process and admissions on record, the defenders' liability to deliver subsisted until delivery of the vessel should be made at St Lucia, and was not altered or taken away by subsequent communications as to the registration, insurance, &c.: (2) That therefore *primo loco* the defenders are bound to repay to the owners of the vessel the £1899, 2s. 6d. received by them in payment of the price of said vessel: (3) That defenders are entitled to demand, before decree for the £1899, 2s. 6d. or any further sum be granted, that the pursuers shall complete their title, the said sum being repayable to the owners under the defenders' obligation to deliver to the owners, and Mr Chastanet having been of consent of parties constituted the registered owner: (4) That *quoad ultra* a proof will be necessary as to any additional damage said by pursuers to have been sustained by them: (5) that the pursuers will be bound to give every facility to the defenders to enable them to raise the question as to the insurance with the underwriters: Therefore allows pursuers a proof of any damage sustained by them over and above the £1899, 2s. 6d., and to the defenders a conjunct probation, &c.

"*Note.*—The defenders contend that the delivery at St Lucia was *ab initio* merely a form affecting the insurance, and not a reality. This was clearly not the case, as is shown by the facts that all the arrangements for her voyage out were to be made and paid for by the defenders, and that defenders carried out a ballast cargo of coals, which they proposed to sell at St Lucia for their own profit. Further, the defenders contend that there was subsequent novation and alteration by which the ship was taken over from the defenders and responsibility removed from them. The correspondence, however, shows that the arrangement

about registration was no novelty, but was in conformity with the original agreement. Chastanet's name was inserted as owner for convenience' sake, though both parties knew that he was not really the sole owner of the ship. As to the insurances, the taking of the insurance in pursuers' name was by arrangement as a sort of security. No doubt the question as to the additional £500 is more difficult, as the policy may be held to have been to that extent a policy by pursuers on behalf of the owners, and not on behalf of defenders; but as to the main body of the policy, it was an insurance for defenders, though put in the name of pursuers, to enable defenders in case of loss to repay the money they had received. It may be doubtful whether, as regards anything further, it may not be held that pursuers, on behalf of the owners, in fixing the amount of the insurance that defenders were to pay for at £2000, did not thereby fix the maximum of the amount of the damages that they might be entitled to from them in case of non-delivery."

On appeal the Sheriff (BERRY) on 2nd July 1889 found the defenders liable to the pursuers in the sum of £1899, 2s. 6d., and decerned for this amount, and *quoad ultra* he adhered to the Sheriff-Substitute's interlocutor.

"*Note.*—I am of opinion, with the Sheriff-Substitute, that until delivery of the vessel at St Lucia the risk remained with the defenders, and consequently that they are bound to repay to the owners of the vessel the sum of £1899, 2s. 6d., which was paid to them. To any damage beyond that sum the pursuers must establish their right by proof.

"As regards the sum of £1899, 2s. 6d., the pursuers ask for interim decree, and I think they are entitled to it.

"I understand that any difficulty that might have arisen in regard to the ownership of the vessel has been got over by arrangement between the parties."

The defenders appealed to the Court of Session, and argued—That the mere mention of a place of delivery did not finally determine upon whom the loss was to fall in the event of the vessel being lost before it reached its destination. When the vessel was registered in the name of the company's managing director there was a transfer from the defenders to the company, and the risk passed to the purchasers—*Steam Navigation Company*, 32 L.J., Q.B. 322—*aff.* 30 L.J., Q.B. 214; Blackburn on Sale, 235-236; Ersk. iii. 3, 7; *Dunlop* v. *Lambert*, June 30, 1837, 15 S. 1232—*aff.* M'Lean & Robinson, 653; *Walker* v. *Langdale's Chemical Company*, July 16, 1873, 11 Macph. 906; *Seath* v. *Moore*, March 8, 1886, 13 R. (H. of L.) 57.

Argued for the pursuers—The contract was to build and deliver at St Lucia, and the builders were to pay the whole expense of the voyage. In such a case the law of Scotland was quite clear; the risk was on the builders—Bell's Prin. sec. 88; Bell's Comm. i. 474. It was not necessary to draw any inferences as to the intention of parties from the policy, because the terms of the contract were perfectly clear and unambiguous—*Ireland* v. *Livingstone*, L.R., 5 H. of L. 395-410. The word "deliver" in the contract was used in its ordinary sense, and here there was no delivery at St Lucia, as the vessel never reached her destination.

At advising—

LORD PRESIDENT—I am a little surprised that neither of the parties has thought it worth while to refer to the interlocutor and note of the Sheriff-Substitute or of the Sheriff, because it appears to me that they dispose of this case upon very simple, but very clear grounds. In this state of matters we must just decide the case upon the argument which has now been submitted to us.

The substance of this contract was, that the defenders Swan & Company were to build and deliver at St Lucia a small steamer of the dimensions arranged for. I must say that I can see nothing either in the terms of the contract itself, or of anything which followed upon it, to take from the word "deliver" its usual meaning, and accordingly until the steamer reached St Lucia it was an undelivered vessel. It remained in the defenders' hands, and the disbursements which they made in connection with it were just such as they would have made if it had been their own vessel and had never been sold by them. On them fell the duty of insuring it, and they engaged at their own expense the master who was to navigate it out to St Lucia.

Now, all this appears to have been done by the defenders, and, in the face of it, it is impossible to give any effect to their contention that the vessel is to be held as having been constructively delivered in the Clyde in consequence of her having been registered in Mr Chastenet's name. That it certainly was not, and as a matter of fact it never was delivered at all.

No question arises here as to transference of risk, but merely a question of fact as to whether or not this vessel was ever delivered to the pursuers, and upon that matter I am of the opinion expressed by the Sheriff, and I think his interlocutor ought to be adhered to.

LORD ADAM concurred.

LORD M'LAREN—[*After narrating the facts*]—The vessel was not delivered, and cannot now be delivered. It is possible that a question might have been raised as to whom in the circumstances the risk attached. There is, however, no plea by the defenders to that effect, and looking to the authorities, I think that they were well advised not to take such a plea apart from the question of delivery.

The only question remaining is, whether in consequence of anything which passed between the parties the ship can be held to have been delivered in the Clyde instead of at St Lucia. I cannot find in the correspondence or in the actings of parties anything to favour this view, and in these circumstances the only result at which I can possibly arrive is, that as the vessel was not delivered the pursuers are entitled to repayment of the purchase price.

LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuers — Dickson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—M'Lennan. Agents—Ronald & Ritchie, S.S.C.

Friday, December 13.

SECOND DIVISION.

[Sheriff of Argyllshire.

MALCOLM *v.* CAMPBELL.

Parent and Child—Gift ex pietate—Donation—Presumption—Proof—Onus—Mandate.

A person on the occasion of his daughter's marriage bought for £89 a business for his son-in-law, from whom he took no acknowledgment. His whole estate at the time amounted to £500, and his daughter was one of five children.

In an action at his instance for repayment of that sum, *held* that although in the ordinary case donation was not to be presumed, the case raised a presumption of gift *ex pietate*, and that the pursuer had failed to discharge the *onus* which lay on him of proving a loan.

Archibald Malcolm, Paisley, formery dairyman there, sued Alexander Campbell, house-painter, Ardrishaig, his son-in-law, for payment of certain sums said to have been lent by him at different times to the defender.

The defender was married on 22nd April 1884. His wife, one of five children, had up till then been her father's principal assistant in his dairy business, which the pursuer recently sold owing to failing health. His whole estate consisted of about £500. Upon 13th June 1884 the pursuer, who was living with the defender and his wife at Ardrishaig, drew on the Union Bank of Scotland (Limited) in favour of James M'Bain for £89. In consideration of this payment M'Bain transferred his grocery business in Ardrishaig to the defender. The pursuer averred that he paid this sum "on defender's behalf and by defender's instructions." The defender wished to add an ironmongery business to the already established grocer's shop, and the pursuer purchased ironmongery goods at various times for the sums of £13, £5, 17s. 6d., and £7, 1s. 4d. He averred that these goods were bought by him on the defender's instructions. He further averred—"The pursuer, on or about 25th July 1884, gave the defender's wife a sum of £34 to take charge of and keep safely for pursuer, and said sum was taken by defender from her, which sum defender on being applied to by pursuer refused to give up."

The defender admitted the payments, denied that they were made as loans, and averred that the "money and goods were given to him by the pursuer as donations, or tocher on or in respect of his marriage with his daughter."

The pursuer pleaded—"(1) The pursuer having advanced the sums of principal sued for to or on behalf of the defender, and not having been repaid the same, is entitled to decree therefor. (2) The said sum of £34 having been handed by pursuer to defender's wife for safe keeping, and defender having taken the same from her, and thereafter refused to give up same to pursuer, the pursuer is entitled to decree against defender therefor, and for interest thereon."

The defender pleaded—"(6) The defender not being due the various sums sued for should be assoilzied from the conclusions of the action with expenses. (7) The pursuer having made a valid and irrevocable donation to the defender of the money and goods, with the exception of the sums of £8 and £34 sued for, is not entitled to decree as craved in respect of such money and goods given in donation."

On 26th October 1888 the Sheriff-Substitute (CAMPION) dismissed the petition in so far as it concluded for payment of the sum of £34 alleged to have been deposited with defender's wife for safe keeping, on the ground that there was no relevant averment to go to proof. With regard to the other sums concluded for, he allowed the defender a proof by writ or oath of the pursuer of the 7th plea-in-law.

On 15th December 1888 the Sheriff (FORBES IRVINE) allowed to the defender "a proof of the alleged donation, and to the pursuer a conjunct probation," and *quoad ultra* affirmed the interlocutor.

"*Note.*—The Sheriff concurs with the Sheriff-Substitute in holding that in so far as regards the sum of £34 claimed by the pursuer in article 9 of his condescendence there is no relevant averment to go to proof. In regard, however, to the limitation of the proof of the seventh plea-in-law for the defender to writ or oath, the Sheriff has come to a different conclusion.

"It is no doubt stated by Lord Stair (b. i., tit. 8, sec. 2,) that 'It is a rule in law *donatio non præsumitur*, and therefore whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly—whence ariseth that other rule of law *debitor non præsumitur donare*, so that any deed done by the debtor is either presumed to be in security or in satisfaction of his debt.' Yet these rules he adds have their limitations, and these limitations he proceeds to set forth. See also iv. 42, 21, and 45, 17. In similar terms Mr Erskine writes, iii. 3, 92—'No deed is presumed a donation if it can bear another construction, for no person is presumed to do that which in place of bringing him profit must certainly be attended with some pecuniary loss.' And again, iii. 3, 93—'As a necessary consequence of the presumption against donation there arises yet a stronger, *Debitor non præsumitur donare*—for where a debtor gives money or goods, or grants bond to his creditor, the natural presumption is that he means to get free from his