

and that the said defender be, and he is hereby assoilzied, save so far as relates to the moiety of the said costs.

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For the Appellant, *Sir Saml. Romilly, David Douglas.*

CRAIG

v.

HOWIE, &c.

For the Respondents, *John Leach, M. Nolan.*

NOTE.—Unreported in the Court of Session.

SILVESTER DOIG, Bookseller in Edinburgh,  
and JOHN PITCAIRN, Papermaker, there,

1817.

*Appellants ;*

DOIG, &c.

v.

SANGSTER.

PATRICK SANGSTER, Manufacturer, Perth,  
Trustee for Messrs Colin Mitchell and  
Co., late Booksellers there, and for their  
Creditors, . . . . .

*Respondent.*

House of Lords, 24th March 1817.

SALE—ARTICLES OF ROUP—CONDITIONS—WARRANTICE.—The dictionary called the “Encyclopædia Perthensis,” during its publication in parts, was sold by public roup, but no person offered at the sale. Sometime thereafter, the appellants gave an offer for the entire work, “as lately exposed for sale at Edinburgh,” which was accepted of. Thereafter, the appellants declined to grant the bills for the price, on the ground that the sellers did not convey the published parts lying in the hands of the booksellers. Held that the articles of roup must govern the sale, and that in these articles nothing was mentioned about conveying the parts consigned in the hands of the booksellers; but that it was a purchase of “all and whole the copies “or parts, perfect or imperfect, remaining unsold, conformably “to inventory;” and the whole that was contained in the inventory, it was admitted had been delivered. Affirmed on appeal.

The dictionary called the “Encyclopædia Perthensis,” was originally projected by James Morrison, Bookseller in Perth, whose representative became connected in partnership with Messrs Colin Mitchell and Co.

The work, on their stopping payment, was exposed by public auction, while its publication was going on, and in the course of being brought out in parts or numbers. The articles of roup were written out in these terms:—“All and “whole the right of property or copyright of the ‘Encyclo- “‘pædia Perthensis,’ so far as the same is an original work, “and of the whole copperplates or engravings connected “with the said work, those of the maps excepted; together

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“ with the whole copies, complete and incomplete, remaining  
 “ unsold, both of the first and second editions of the said  
 “ Encyclopædia, atlases, detached maps, impressions of the  
 “ plates, with the coppers themselves, under the exceptions  
 “ above-mentioned, *conformably to inventory and list sub-*  
 “ *scribed by the exposor, as relative hereto, and held as repeated*  
 “ *brevitatis causa.*”

It was provided that, upon bills being granted for the price, a proper assignation to the property should be executed by the present proprietor, and delivered to the purchaser.

It appeared that, for some time prior to the sale, Mr Pitcairn, one of the appellants, had been appointed as one of a committee of the creditors, to give his assistance to the surviving partner in the publication of the work. He was a large creditor himself, and he had a practical knowledge and experience in such publications. He accordingly took an active management in the publication. When, therefore, it was exposed for sale by public roup, no one dreamt that Mr Pitcairn had any eye after the purchase himself, but it was noticed, that instead of taking the usual measures for inducing the booksellers to bid, which was his obvious duty, in carrying out the management confided to his care, he proposed an adjournment of the sale, which measure was adopted accordingly. After the adjournment, he intimated to the surviving partner, that before any sale was effected, that Mr Thomson should let him know. Thomson, thereafter, got an offer from Messrs Vernon and Hood of London, of £2300 for the entire property, and according to his promise, he gave notice to Mr Pitcairn, whereupon he sent off to Perth, Mr Doig, to make a bargain as to the purchase, at same time sending a letter stating that “ any bargain you  
 “ may make with him, will have my approbation, and I will  
 “ guarantee.” It turned out that Doig had given a previous offer on his own account, of £2250. And on this occasion he tendered an offer as on his own account, “ of £2450, for the  
 “ entire stock of the Encyclopædia Perthensis, as *lately* exposed  
 “ to sale at Edinburgh, to be settled for at twelve, eighteen,  
 “ and twenty-four months. The bills to be guaranteed by  
 “ Mr John Pitcairn of Edinburgh.” Mr Thomson, as acting partner of Messrs Colin Mitchell and Co., accepted of the above terms “ for the *entire stock of the Encyclopædia Perth-*  
 “ *ensis, as lately exposed by us for sale in Edinburgh,*” this acceptance was authorized by the committee of creditors.

. The whole stock of the Encyclopædia, with maps, copper-

plates, &c., were delivered over, conform to inventory, along with a list of subscribers to the book, to Mr Doig.

Mr Doig, however, sometime afterwards, declined to grant the bills, on the ground, 1st, That the creditors could not give a proper right to the copyright, and for that purpose that the concurrence of the executors of Mr Morrison should be procured. 2d, That part of the stock had not been delivered; in particular, those numbers and parts, lying in the hands of several of the booksellers before the date of the sale, had not been delivered.

To this it was answered, 1st, That in the articles of roup, and in the missives of sale, nothing was said about copyright; but that, to satisfy the defenders in this respect, the pursuers (respondents) had got the necessary concurrence to these deeds, so as to elide all other objections in that respect; and, therefore, that the creditors were in full right to assign the work thereby sold. 2d, That the purchase was made with special reference to the articles of roup, and the appellants bought the property as lately exposed for sale in Edinburgh. In the articles of roup, a subscribed inventory and list of everything was specially referred to, and everything contained in that inventory, was handed over to Mr Doig.

The Lord Ordinary pronounced a special interlocutor, holding the defenders (appellants) bound to pay the price as agreed on, and *inter alia*, “Finds that the mutual missives  
Feb. 13, 1813.  
“ refer to the public sale, and that the articles of roup prepared for the sale, and the printed inventory therein referred to, which the defenders founded on, when they insisted for a conveyance to the copyright, must govern the principles upon which the dispute betwixt parties falls to be determined; that the inventory and articles of roup contain no obligation upon the sellers to make effectual to the purchasers any part of the books which had been consigned for sale to the different booksellers, of which the purchasers received a list, along with the names of the subscribers to the book,” &c.\*

On representation, the Lord Ordinary adhered, and on June 24, 1813.  
reclaiming petition to the Court, the Court adhered. Nov. 16, 1813.

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\* It appeared that the appellants had recovered many of these parts, or received value from the booksellers for them, excepting those in Fowler's hands, who claimed retention until his account was paid. There was no warrandice from the sellers to make the parts effectual.

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Against these interlocutors the defenders (appellants) brought the present appeal to the House of Lords.

*Pleaded for the Appellants.*—1. The sellers were bound to deliver the whole copies of the work in question sold by them, and the copies in the hands of the agents, made part of the property sold.

2. So far from there having been any abandonment on the part of the appellants, of their right to have delivery of these copies, as often as they failed to obtain delivery from the agents, upon the order of the sellers, they recurred to them in order to obtain delivery, and by these means they procured delivery of all the copies stated to be in the hands of the agents, excepting 1125, fifty of which are said to have been sent to Glasgow, but the sellers are unable to specify the person or persons to whom they were sent, and the remainder are in the hands of Fowler, who declined to deliver them until the sellers settled their account with him. But delivery may even now, be obtained upon the terms stated by Fowler's assignees, with whom the respondent has entered into a correspondence for the purpose of obtaining delivery, and it rests with him to come to a settlement with Fowler's assignees, before such delivery can be obtained.

3. The appellants have always been ready and willing to settle with the respondent, on getting delivery of the work which they purchased. But it must be manifest to any one acquainted with the nature of such a work, that the want of an early part or volume (and all the missing parts are early ones), destroys all the subsequent ones. These last have been printed by the appellants at an enormous expense, amounting on the book to nearly £10,000 sterling, a great part of which will be as waste paper to them, without those early parts, which they equally bought with those which have been delivered to them.

4. The early parts thus wanting, are detained not from any cause which the respondent cannot remove, but by reason of debts contracted by his constituents. He is, therefore, bound by that warranty which, in the law language of Scotland, is termed "warrantice from fact and deed," to remove that obstacle. There is no case of sale to which this species of warranty does not apply, and it is impossible for the respondent to demand and enforce payment of the price, without delivering every part of the work of the purchase of which it was the consideration.

*Pleaded for the Respondent.*—1. The appellants not only

got delivery in September and October 1809, of more than the whole property purchased by them, but they also got delivery long before the present action was brought into Court, of a great number of parts of the Encyclopædia, beyond what were sold to them by authority of the creditors. The property exposed to sale in Edinburgh was "all and whole the copies or parts of the said publication, perfect and imperfect, remaining unsold *conformably to inventory.*" The property purchased by the appellants, was not described in the missives of sale, otherwise than by reference to what was exposed to sale in Edinburgh, that is, to the inventory, the whole articles contained in which, it is admitted, have been delivered to the purchasers.

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2. Mr Thomson had no power to transfer to the appellants more than was included in their purchase; and, therefore, the addition made by him to the invoice of the consigned parts, was unwarrantable. But, supposing that the appellants had been entitled to insist for delivery of those parts, it is admitted they have all been delivered to them, with the exception of the parts in the hands of Fowler, and it is the fault of the appellants themselves that those parts have not yet been delivered to them. They have been held by Fowler on their account, and at their risk, for some years past.

3. The whole facts and circumstances of this case demonstrate, that the appellants have not acted with good faith to the respondent, and to the creditors of Mitchell and Co., and that their various pleas have been stated with no other view than to enable them to withhold payment of the stipulated price as long as possible. They have conducted themselves most disingenuously in the course of this litigation, by numberless misrepresentations, and by constant attempts to perplex the question at issue, and thus to throw a degree of confusion and intricacy over a very simple case.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed; and that the appellants do pay £150 of costs to the respondent.

For the Appellants, *Sir Saml. Romilly, Wm. Wingfield.*

For the Respondent, *Geo. Cranstoun, Wm. Boswell.*

NOTE.—Unreported in the Court of Session.