

difficulty is raised by the provision of the statute as to the period which is to elapse before the resignation shall take effect.

LORD KYLLACHY concurred.

The Court answered the question in the negative.

Counsel for First Parties—Lord Advocate (Sir C. Pearson)—Orr. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for Second Party—Rankin—Pitman. Agent—Patrick C. Jackson, W.S.

Tuesday, November 21.

## FIRST DIVISION.

[Lord Low, Ordinary.]

### DOUGLAS & COMPANY v. MILNE.

*Sale—Warranty—Warranty of Fitness not Excluded by Express Warranty—Rejection.*

An express warranty contained in a contract, that goods shall be of a certain quality, does not exclude an implied warranty not inconsistent with it, that they shall be fit for the purpose for which they were supplied.

A firm of wood merchants contracted to supply a fishcurer with a quantity of staves, which the contract stipulated were to be "of good, sound, bright, dry, merchantable quality," it being known to the sellers—though not stated in the contract—that the staves were to be used for making herring barrels. *Held* that the buyer was justified in rejecting the staves on finding them unfit for this purpose, although they fulfilled the conditions of the express warranty.

Messrs John H. Douglas & Co., timber merchants, London, employed Messrs Leslie & Co., commission agents, Aberdeen, to obtain orders for herring barrel staves on their account from the fishcurers of Aberdeen. Messrs Leslie obtained an order from Mr James Milne, fishcurer, Aberdeen, and on 1st August 1893 he forwarded the order to Messrs Douglas. The order was contained in the following letter signed by Mr Milne:—

"Aberdeen, 1st August 1893.

"Dear Sir—Please ship to me soonest possible this season 40,000 superficial feet of 31 in. by  $\frac{5}{8}$  in. white wood fir (spruce) staves, and 7000 superficial feet 36 in. by  $\frac{3}{4}$  in. heading, at 52s. 6d. per 1000 superficial feet for the staves, and 57s. 6d. per 1000 superficial feet for the headings, c.i.f. Aberdeen. The staves and headings to be of good, sound, bright dry merchantable quality, and the measurement and any selection, if necessary, at Aberdeen to be made by Customs bill of entry measurer, the buyer and the sellers paying the measuring charge equally between them. Terms, nett cash on delivery."

On the 10th of August Messrs Douglas wrote to Mr Milne accepting this order, and sent a cargo consisting partly of staves and headings, of the dimensions ordered, to Aberdeen by the ship "Alpha," which arrived there on 13th September 1893. Only part of the cargo was sold, and Messrs Leslie arranged with Mr Milne's foreman to unload the whole cargo, and to store the part not sold in his yard. In the course of unloading the cargo, the foreman suspected that the wood was not suitable for making herring-pickle barrels, which was the use to which Mr Milne intended to put them. He accordingly ordered two barrels to be made from the materials supplied, and found that the water percolated through them, and that therefore the wood was not suitable for his purpose. On September 21st Mr Milne, through his foreman, intimated to Messrs Leslie that he rejected the wood as disconform to contract, and unfit for the purpose for which it had been sold. The wood was afterwards sent for storage to Mr Milne's yard for Messrs Douglas, as had been agreed. Shortly afterwards, Mr John H. Douglas came to Aberdeen to try and effect an arrangement. As he failed to do so, Messrs Douglas raised an action against Mr Milne, concluding for payment of £125, being the price of the wood. After the action was raised Mr Milne died, and his widow and executrix, Mrs Elizabeth Wardlaw or Milne, was sisted as defender.

The pursuers averred that the wood had been supplied in conformity with the written contract; that, as agreed therein, it had been selected and measured by the Customs bill of entry measurer, and had been removed by the defender to his yard, and remained in his possession till June 1894, and that he had branded with his name sufficient staves for the full number of casks that could be made out of the amount of wood purchased.

The defender averred that the wood had been sold by the pursuers for a specific purpose, viz., the making of herring barrels, for which it was quite unfit, and that he was accordingly justified in rejecting it, which he had done timeously. He stated that other parts of the same cargo had been rejected by other fishcurers for the same reason.

The defender pleaded—" (1) The goods being disconform to contract and unsuitable for the purpose for which they were sold, and the defender having timeously rejected the same, he should be assoilzied with expenses."

The Lord Ordinary (Low) allowed a proof, and on 31st May sustained the defender's first plea-in-law, and assoilzied her from the conclusions of the summons.

*Note.*—[After narrating the facts]—"The defence is that the staves and headings were not good and merchantable, in respect that they were made of porous wood, and could not be made into barrels capable of retaining pickle.

"It is plain upon the face of the letters that the goods ordered were materials—staves and headings—for the construction

of barrels. It is also proved that staves and headings of white fir wood, of the dimensions specified in the letters, are used for the purpose of making barrels for pickled fish, and for no other purpose. That is the known and ordinary purpose for which such staves and headings are used, and there is no doubt that the pursuers knew perfectly well that that was the purpose for which the defenders ordered them.

"In these circumstances, I am of opinion that the condition that the staves and headings should be good and merchantable meant that they should be good and merchantable for the purpose of making pickle barrels. Indeed, if that condition had not been expressed in the contract, I think that it would have been implied, because the goods were ordered by the purchaser without sample or previous inspection, and the construction of pickle barrels was the purpose for which such goods were ordinarily used.

"The question, therefore, seems to me to resolve into one of fact, namely, whether the staves and headings were good and merchantable for the purpose of pickle barrels?

"In my opinion, that question must be answered in the negative. It appears to me to be proved beyond doubt that the staves and headings were made of such porous wood as to be incapable of forming water-tight barrels. It might, perhaps, have been possible to pick out a limited number of staves from which fairly good barrels could have been constructed, but the bulk of the cargo was absolutely useless for the purpose of making barrels intended to hold liquid. I am therefore of opinion that the defender was entitled to reject the goods.

"The next question is, whether the rejection was timeous? The pursuers attempted to prove that the defender had actually taken delivery of the goods and put them in his store, and had put his brand upon a number of them.

"The evidence shows that that was not the case. While the cargo was discharging and was still upon the quay, the defender's manager discovered the character of the wood, and after making and testing a barrel made from a fair sample of the cargo, he intimated to Leslie & Company that the staves and headings were useless, and that the defender would have nothing to do with them. It is true that the whole cargo, or at all events the greater part of it, was subsequently put into the defender's store, but that was under an agreement for the storage of the cargo for the pursuers, made between the defender and Leslie & Company as representing the pursuers. In regard to the alleged branding of a certain number of staves, it is proved that the branded staves which the pursuer Mr Douglas saw in the defender's yard were not part of the cargo of the 'Alpha,' but staves which had been purchased from another merchant.

"Upon these grounds, I am of opinion that the defenders are entitled to absolve."

The pursuers reclaimed.

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Argued for reclaimers—There was nothing in the written contract to show that the wood was intended to be used for herring pickle barrels. The defender did not attempt to say that the wood was not "of good, sound, bright, dry, merchantable quality," as it was bound to be under the contract, but wished to read in a further condition from the previous correspondence and actings of the parties, viz., that it was to be suitable for herring pickle barrels. This he was not entitled to do—*Christie v. Hunter*, March 10, 1880, 7 R. 729, at p. 730; *Hutchison & Company v. Henry & Cowie*, November 26, 1867, 6 Macph. 57. The same principle was applied in English law, viz., that an express warranty, such as that contained in this contract, would not be extended by implication—*Dickson v. Zizinia*, January 18, 1851, 20 L.J., C.P. 73; Benjamin on Sales, p. 663 and 607. The present case was distinguishable from that of *Cooper & Aves v. Clydesdale Shipping Company*, March 19, 1863, 1 Macph. 677, where an express warranty was held not to exclude an implied warranty that the goods should be fit for the purpose for which they were supplied. Here as a matter of fact they were quite good for making several kinds of barrels, and if there were a number of purposes to which barrel staves might be put, the implied condition was satisfied if the staves supplied were fit for any one of them, there being nothing in the contract to indicate any special kind of barrel. Accordingly, the condition laid down in Bell's Prins., sec. 98, that the goods must be "merchantable according to the denomination of the commodity" was amply fulfilled, as also were those laid down by Lord Ellenborough in *Gardiner v. Gray*, March 6, 1815, 4 Camp. 144. 2. On the facts, it had not been proved that the defenders had made a fair test of the wood before rejecting it. Nor had "selection" been made as it ought to have been under the contract, there being quite enough wood in the cargo suitable for pickle herring barrels if it had been carefully selected.

Argued for defender—(1) It was impossible by merely examining the wood to select any part which would be fit for the purpose required, and this was not the sort of selection meant by the contract. 2. Even where a contract contained an express warranty, this did not supersede the implied warranty of common law that the goods should be fit for the purpose for which they were intended—*Jones v. Just*, February 17, 1868, 3 Q.B. 197; *Cooper & Aves v. Clydesdale Shipping Company (supra)*. The evidence showed that the pursuer knew perfectly well what this purpose was. Moreover, the expression "good, sound, &c.," in the contract must be read in connection with this knowledge, and must be interpreted to mean "good for that purpose," i.e., for the making of pickle herring barrels. Accordingly the staves were not "merchantable according to the denomination of the commodity," in accordance with the criterion laid down by Bell, and the defender was justified in rejecting them.

At advising—

LORD KINNEAR—[After reviewing the evidence, as to the effect of which he agreed with the Lord Ordinary]—The question therefore comes to be—the main question which was argued—whether the defence is well founded in law assuming the facts to be as I have stated. I do not understand it to be disputed that when goods are ordered for a particular and specific purpose, it is an implied condition, according to the law of Scotland, that the goods furnished must be fit for that purpose. But then it was said that where the parties had expressly contracted as to the nature and quality of the goods to be sold, the law will not imply any additional condition which they have not expressed, and the case of *Dickson v. Zizinia* was cited in support of that doctrine. That case appears to me to be inapplicable. The contract was for the purchase of a specific cargo of corn actually shipped at the time on board a certain vessel by the plaintiff, but by the law of England, as explained in the judgment, there is no implied warranty in the sale of a particular chattel. Therefore, if there were any warranty, it must be found, not in the general implication of law, but in the contract itself, and the question therefore was not whether a warranty was implied by law, but whether an express warranty that the corn was good and merchantable at the time of shipment could be extended by implication from other parts of the contract to mean that it was in good and merchantable condition for a foreign voyage. The Court held that that stipulation could not be extended beyond the language employed, but that was a decision on the construction of a particular contract, and it seems to me to have no bearing upon the question in dispute. The cases of *Cooper & Aves v. Clydesdale Shipping Company* and *Bigg v. Parkinson*, 31 L.J., Exch. 301, are more in point. The result of these decisions is that where goods are ordered for a particular purpose, the implied condition that the goods to be furnished must be fit for that purpose will not be excluded by any express warranty or condition which is capable of standing along with it. In the contract now in question there is no stipulation in the slightest degree inconsistent with the condition that the staves to be supplied shall be fit for herring barrels, and therefore it appears to me that on the principle explained in the case of *Cooper & Aves* and the English case to which I have referred, it must be held that, inasmuch as the goods were ordered for the specified and particular purpose of making herring barrels, the law superadds to the express condition that they are to be of good, sound, bright, dry, merchantable quality, the implied condition that they are to be fit for the specified purpose.

The pursuers' counsel raised a different argument upon the clause in the contract by which it is provided that the measurement and selection, if necessary, at Aberdeen is to be made by the Customs bill of entry measurer; and it was maintained

that imposed upon the defenders an obligation to make a further and more reasonably complete inspection of the entire cargo than was actually made, for the purpose of enabling them, by themselves or by this measurer, to make a selection of such staves as might answer to the description of the contract. But the contract is not to supply a larger quantity of staves of various widths out of which the buyers are to have an opportunity for selecting what answers their purpose. It is a contract to supply staves of specified quantity and answering a particular description; and it appears to me that the selection which the contract contemplates must be a selection within that quantity. The undertaking of the pursuers is satisfied by the tender to supply a certain quantity, and that quantity being tendered, the contract contemplates that there may be some measurement and selection. Now, it appears to me that the construction of the clause which the defenders maintain to be the true one is perfectly reasonable, that what the parties intended was that when goods answering generally to the description of the contract were tendered to the buyer, the measurer should determine whether they were or were not of the specified dimensions stipulated, and that that was the sole question of selection remitted to him which the contract contemplates. Whether that be so or not, I think it perfectly clear that the contract did not contemplate that the goods should be supplied to the satisfaction of this measurer so as to make him the sole judge of their quality and condition; and the conduct of the parties is conclusive against any such determination.

[His Lordship here dealt with the evidence as to the sufficiency of the examination of the wood by the purchaser, and proceeded]—I am of opinion, in the first place, that the staves supplied were not conform to order in the respect I have mentioned, and that a sufficient examination was made to justify the defenders in rejecting them on that ground. And if the fact be as the Lord Ordinary has found it, and as I hold it to be proved, the defenders were entitled in law to reject the goods. I am therefore of opinion that the Lord Ordinary's interlocutor should be affirmed.

The LORD PRESIDENT and LORD ADAM concurred.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers—*Dickson*—*Aitken*. Agents—*Webster*, *Will*, & *Ritchie*, S.S.C.

Counsel for the Defender—*Salvesen*—*W. Thomson*. Agents—*Douglas*, *Gardiner*, & *Mill*.