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Tuesday, October 17, 1899.

FIRST DIVISION.

[Lord Pearson, Ordinary.

BROWN v. ROSS.

*Process—Summons—Amendment—Scope of Original Action—Competency.*

In an action raised against J and W the summons concluded for decree of implement against J and W conjunctly and severally of "the purchaser's part of a contract of sale of" certain property "as constituted by a letter addressed by the defender J on behalf of himself as well as on behalf of the said W to the" pursuer, and by a reply to that letter by the pursuer to the defender J. These letters contained no express obligation binding on W.

The pursuer's record however contained averments as to certain other letters which had passed, the effect of which he stated was to modify the original contract in certain minor particulars, and to introduce W as binding himself to guarantee the fulfilment of the contract. The pursuer craved leave to amend the summons, *inter alia*, by introducing a statement to the effect that the contract was "constituted" by these last-named letters, as well as by the two upon which the summons was originally founded.

The Court allowed the amendment.

An action was raised by Andrew Brown, grocer, Cupar, against James Petrie Ross, grocer, Kirkcaldy, and William Ross, vintner, Montrose. The summons contained the following conclusions:—"Therefore the defenders ought and should be decerned and ordained, conjunctly and severally, by

decree of the Lords of our Council and Session, to implement and fulfil in all respects the purchaser's part of a contract of sale of the property and business of licensed grocer and wine merchant, situated at No. 108 Mid Street, Pathhead, Kirkcaldy, including the goodwill of the said business, as constituted by a letter addressed by the defender, the said James Petrie Ross, *on behalf of himself as well as on behalf of the said William Ross*, to James Pye Guthrie, solicitor, Kirkcaldy, as representing and on behalf of the pursuer, as proprietor of said subjects, and also as representing and on behalf of the said Watson Dingwall for his interest in the said business, dated the 21st day of December 1896, and a letter addressed by the said James Pye Guthrie, as representing as aforesaid, to the defender the said James Petrie Ross, dated the 22nd day of December 1896; and that by making payment to the pursuer of the sum of £875 sterling, the agreed-on price of the said subjects and business, and interest thereof at the rate of £5 per centum per annum since the 1st day of January 1897 in all time coming during the not-payment thereof; and also by *their* accepting a valid disposition containing all the usual and necessary clauses executed by the pursuer in favour of the *defenders*. . . . And further, in the event of the defenders failing within such short period as our said Lords shall fix from the date of the decree to follow hereon to implement the foresaid contract of sale, the *defenders* ought and should be decerned and ordained by decree foresaid to flit and remove from the said subjects, and that summarily, and leave the same void and redd, that the pursuer or others authorised by him may enter thereto and possess the same in time coming; and the defenders ought and should be decerned and ordained by decree foresaid to make payment to the pursuer of the sum of £500 sterling in the name of damages; and in the event of the defenders

failing to pay the agreed-on price and value of the said subjects, with interest as aforesaid, and accept a valid disposition of the said subjects in their favour; or in the event of their failure to flit and remove from the said subjects and pay the damages concluded for, the defenders ought and should be decreed and ordained by decree foresaid to make payment to the pursuer of the sum of £675 sterling, and interest thereon at the rate of £5 per centum per annum, from the 1st day of January 1897 till payment," &c.

The pursuer averred that he was the proprietor of the subjects in question, that the defenders had called upon his agent, Mr Guthrie, and agreed to purchase the property and business—that William Ross had mentioned that, on account of his already holding a licence in Montrose, the transfer of the license, &c., should be taken in the name of James Ross, but that the title to the property should be taken in his own name; and that the following missive letters passed between the parties:—

"70 Ferry Street.

"Montrose, 21st December 1896.

"Dear Sir,—I hereby offer to purchase the property and business of licensed grocer and wine merchant situated at No. 108 Mid Street, Pathhead, at the sum of £675, said price to include goodwill, stock and tenant's fittings to be taken over at mutual valuation, and price to be paid on a transfer of the certificate of license being got. Or, alternatively, I hereby offer to purchase said business alone at the price of £55 for goodwill, and other conditions as above.—Yours truly,

"JAMES P. ROSS.

"Adopted as holograph.

"JAMES P. ROSS."

"22nd December 1896.

"108 Mid Street, Pathhead.

"Dear Sir,—On behalf of Mr Andrew Brown, Burnside, Cupar, the proprietor of above subjects, and also on behalf of Mr Watson Dingwall, his tenant, proprietor of the business of grocer and wine merchant carried on there, I hereby accept the first alternative of your offer of 21st inst., of which a copy is appended hereto. I wired you to above effect this morning. You can let me know by return of post whom you propose to take the valuation of stock and fittings on your behalf, and when you propose to have the valuation taken. Please also obtain and send me certificates of character in support of your application for a transfer. If you could arrange to come here to-morrow matters might be more satisfactorily and quickly arranged.—Yours faithfully,

JAMES P. GUTHRIE.

"Adopted as holograph.

"JAMES P. GUTHRIE."

The pursuer averred further that following on these letters the licence was transferred and entry given to James Ross, that the stock and fittings were valued and handed over to him, and that the amount of the valuation was paid.

The pursuer further averred—" (Cond. 6) After the transfer of the licence had been obtained in favour of the defender James Petrie Ross, on 29th November 1896 as afore-

said, a request was made by the defender William Ross, through his agent Robert A. Wills, solicitor, Montrose, that certain amendments be made on the agreement of sale to the effect that the price should only be payable on the renewal of the licence certificate being obtained at the annual Licensing Court in April. To this request the pursuer agreed on certain conditions, *inter alia*, that security for the due implement of the agreement as amended be found, all as set forth in the letter dated 11th January 1897, copy of which is herewith produced. The said agent for the defender, the said William Ross, thereupon, on 14th January 1897, wrote a letter to pursuer's agent containing, *inter alia*, the following words:—"I presume and hope that you may be satisfied if my client Mr William Ross binds himself as cautioner." This was done on the instructions and with the authority of the said William Ross, who thereafter became bound for the said James Petrie Ross for the due implement of the said agreement of sale, and the pursuer accepted him as guaranteeing the conditions of the sale. On the faith of his being so bound the pursuer allowed the extension of time for payment of said price, and also the renewal of the said licence certificate in favour of the defender, the said James Petrie Ross, at the April Licensing Court, and further allowed him to continue the occupancy of the premises. The statement in defence for William Ross is denied."

The pursuer stated that the defenders had failed to implement their part of the contract, and pay the price, and that the present action was therefore necessary.

He pleaded—" (1) A valid and effectual contract of sale having been constituted as condescended on, and the defenders having refused to fulfil their part thereof, the pursuer is entitled to decree of implement as first concluded for, with expenses. (3) In respect that the said offer by James Petrie Ross was made by him in trust for his brother, the said William Ross, decree should be pronounced as craved. (4) The defender William Ross having bound himself to guarantee the carrying out of the said contract, is liable conjunctly and severally with the said James Petrie Ross."

The defenders averred that William Ross had no interest in the transaction except that he had intended to assist his brother financially, and that he wished the title taken in his own name that he might have security for the money advanced.

The defender William Ross pleaded—" (3) This defender not being a party to the said contract of sale is not bound to implement the same. (4) This defender not having guaranteed the carrying out of the said contract of sale, he ought to be assoilzied with expenses."

The Lord Ordinary (PEARSON) on 2nd March 1898 allowed the parties a proof before answer.

After the proof had been led the pursuer craved leave to make certain amendments on the conclusions of the summons.

The Lord Ordinary on 23rd August 1898 pronounced an interlocutor, by which he refused *hoc statu* the pursuer's motion for leave to amend, and assolized the defender William Ross from the first conclusion of the summons.

The pursuer reclaimed and lodged a note craving the Court to allow a minute of amendment.

The pursuer craved to amend the conclusions of the summons by deleting the words which appear in italics in the summons as quoted above, by inserting after the words "the 22nd day of December 1896" the following, "and by letters passing between Robert A. Wills, solicitor, Montrose, as representing and on behalf of the defenders, and the said James Pye Guthrie, representing as aforesaid, dated fifth, eleventh, fourteenth, eighteenth, twenty-first, and 22nd January 1897;" by substituting for the words "defenders" occurring in the conclusion as to accepting a valid disposition, the following, "defender, the said James Petrie Ross or the defender the said William Ross, or both the defenders in their option;" and by substituting for the word "defender," occurring before the conclusion for removing, the words "defender the said James Petrie Ross." The pursuer further craved to delete this third plea-in-law, and to substitute for his first plea-in-law the following—"A valid and effectual contract of sale having been constituted between the pursuer and the defender James Petrie Ross, and the said defender having refused to fulfil his part thereof, the pursuer is entitled to decree of implement against him."

Argued for reclaimers—They were entitled to decree on the summons as it stood, but alternatively they were entitled to make the amendments in respect of the averments with regard to the letters made in Cond. 6. The real controversy between the parties was—"Is William bound along with James to fulfil the purchaser's part of the contract?" and the amendments did not introduce any new matter outside the scope of that controversy.

Argued for respondents—The original summons was not directed against anything but the alleged contract between the pursuer and James Ross as constituted by the missive letters, but the pursuer now craved leave to introduce new and irrelevant matter. It was irrelevant to aver, on the one hand, that there was a contract of sale between the pursuer and the two defenders, and to go on and say that one of the two had become cautioner for fulfilment of the contract to which he was a principal. There was no case in which amendments had been allowed which came anywhere near this—*Levy v. Magistrates of Dunfermline*, March 20, 1894, 21 R. 749; *Gibson's Trustees v. Fraser*, July 10, 1877, 4 R. 1001.

LORD PRESIDENT—I am unable to hold the proposed amendments to be outside the scope of the action. According to the well-settled rule in determining such questions as the present we have first to consider

what is the real controversy between the parties disclosed on the record—that is, the summons, condescence, and pleas-in-law. The real controversy, I take it, is this—Is William bound along with James by this contract of sale? and accordingly is he bound to fulfil or to see to the fulfilment of the purchaser's part of the contract? In the summons as it stands without amendment the theory of the case is that William—by some means not very clearly disclosed on the face of the writings—is liable to fulfil or to procure the fulfilment of the contract in virtue of two letters of December. Now, there is a conspicuous absence of any express obligation on William in these writings taken by themselves, and therefore it is not surprising that in Cond. 6 mention is made of a set of letters which have this double effect—*first*, of modifying the original contract in minor particulars, and *second*, of introducing William as bound to fulfil or procure the fulfilment of the contract. Now, the amendments do no more than give effect in their true place to those modifying letters as altering the original contract and forming part of the now subsisting and prestable contract. Therefore it seems to me that the amendments are within the scope of the Act of Parliament. They correct the defect of the summons that it did not note in express terms what is alleged in Cond. 6 to be a real part of the contract. I do not think that the amendments substitute one contract for another, but merely set out the ground of liability against William in a contract which *prima facie* was prestable by James. To refuse the amendments would be to exclude something which is necessary if the real controversy between the parties is to be determined. These are the words of the statute, and if the amendments are admissible then the statute says that they shall be made. If that be so, then we have to review the procedure before the Lord Ordinary, and I must say it is much to be regretted that the pursuer did not see this defect of his summons at an earlier stage than after the proof was closed. His conduct has certainly been very lax, and must be visited in the usual way. His opponent has been nearly as slack, for he should have shown a firmer hand in the procedure roll, and it is to be regretted that this proof should have been gone into. Be that as it may be, still it is not too late to correct the defect, though there may be disastrous consequences as regards the expenses. I think, further, that we cannot give proper effect to these amendments unless we recal the whole proceedings back to the procedure roll. I am not for expressing any dogmatic opinion, or even any conjecture, as to what may be the appropriate procedure with the new record. The proof may or may not be made available by agreement. Nor do I pronounce any opinion as to whether or not the letters mentioned in the amendment have the import or virtue ascribed to them by the pursuer—that will be for the Lord Ordinary in the first instance. If your Lordships agree with me that the

amendment must be allowed, we might hear parties on the question of expenses before determining the conditions under which the amendment may be made.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR was absent.

The Court pronounced this interlocutor—

“Recal the interlocutor, of the 2nd March 1898 and all subsequent interlocutors of the Lord Ordinary, including the interlocutor of 23rd November 1898 reclaimed against: Allow the amendments proposed by the pursuer in the said minute, No. 60 of process, to be made on the condition of payment by the pursuer to defenders of two-thirds of the taxed amount of expenses of and incident to the proof, and of the whole expenses incurred by the defenders subsequent to the proof, and decern; and remit,” &c.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Defender—James Ross—Jameson, Q.C.—M'Clure. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defender—William Ross—Jameson, Q.C.—M'Clure. Agents—Duncan Smith & M'Laren, S.S.C.

Tuesday, October 17.

## SECOND DIVISION.

[Sheriff-Substitute at Glasgow.]

### M'DONALD v. HOBBS & SAMUEL.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7, sub-sec. 1—Ladder not “Scaffolding.”*

*Held (diss. Lord Young)* that a ladder *per se* is not a “scaffolding” in terms of the Workmen's Compensation Act 1897, sec. 7, sub-sec. 1.

*Reparation — Workmen's Compensation Act 1897 (60 and 61 Vict. c. 37), sec. 7, sub-sec. 1—“Painting” not “Repairing.”*

*Opinion* by Lord Young that painting the beams and joists of a building for the purpose of preserving them from decay is not “repairing” the building in the sense of the Workmen's Compensation Act 1897, sec. 7, sub-sec. 1.

*Process—Stated Case—Remit to Sheriff to Amend—Workmen's Compensation Act 1897, Second Schedule (14) (c)—Act of Sederunt, 3rd June 1898, 9 (g).*

The Court (*diss. Lord Young*) refused, on the motion of one of the parties, to remit a stated case under the Workmen's Compensation Act 1897 to the Sheriff to get other facts stated which raised a new question of law.

By section 7, sub-section 1, of the Work-

men's Compensation Act 1897, it is enacted that the Act shall apply, *inter alia*, to employment “on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding.”

The following case was stated in terms of the Act by the Sheriff-Substitute at Glasgow (SPENS) in an appeal by James M'Donald, house painter, Glasgow, against the Sheriff-Substitute's decision in an arbitration under the Act between the appellant and Hobbs & Samuel, house painters, Glasgow:—“This is an arbitration under The Workmen's Compensation Act 1897, brought before the Sheriff of Lanarkshire at Glasgow, in which the Sheriff is asked to find that compensation is due to the appellant by the respondents, to ordain the respondents to pay to the appellant compensation at the rate of 15s. per week from and after the 25th day of February 1899, or such other sum less or more weekly as may be found to be due to the appellant in terms of the Workmen's Compensation Act, to continue said weekly payments until the further orders of Court, with the legal interest on each weekly payment from the time the same falls due till paid, and to find the respondents liable in expenses. These claims were made in respect of injuries alleged to have been sustained by the appellant on 21st November 1898, while in the employment of the respondents, in consequence of which he avers he has since been unable to work, and will never be able to resume his employment as a house painter.

“The case was heard before me of this date (June 2, 1899), when the following facts were admitted, viz.—(1) That on the 21st November 1898, the appellant, who is a journeyman house painter, and was then in the employment of the respondents, who are house painters, as such journeyman house painter was engaged painting iron beams or joists in the Dead Meat Market, Moore Street, Glasgow, which is a building over 30 feet in height. (2) That the said painting was done for the purpose of preserving said iron beams and joists from decay, and that the appellant when painting these beams necessarily used a ladder which had been provided by the respondents for the purpose for standing upon to reach said beams and do said work. (3) That while the appellant was so engaged the occupier of one of the stands for exhibiting carcasses in said Dead Meat Market, and which stand was in close proximity to the said ladder, swung round the carcass of a bullock for the purpose of showing it to an intending purchaser. (4) That said carcass came violently in contact with said ladder, whereby the appellant was knocked off the same and fell to the ground. His skull was thereby fractured, and he sustained certain other serious injuries.

“I decided that said building was not being repaired by means of a ‘scaffolding’ within the meaning of the Act, and therefore I found it unnecessary to decide whether the building was being ‘repaired,’