RECENT ENGLISH DECISIONS.

High Court of Justice. Common Pleas Division.

ELPHICK *v.* BARNES.

The plaintiff sold a horse to the defendant upon condition that it should be tried by him for eight days, and returned at the end of that time if the defendant did not think it suitable for his purposes. The horse died in the defendant's stable within the eight days, but without fault of either party. The plaintiff having brought an action for the price of the horse as for goods sold and delivered. *Held*, that the action was not maintainable.

THE material facts and the arguments sufficiently appear from the judgment.

DENMAN, J.—The plaintiff in this case sued the defendant for 65*l.*, the price of a horse and a cow sold and delivered.

The defendant admitted that he agreed to purchase a horse and a cow, but alleged that they were not sold or purchased together at 65*l.*, but under two separate and distinct contracts. There was conflicting evidence as to this part of the defence, but upon the argument before me (there having been no finding of the jury upon the point) it was agreed that I should decide the question, and I found for the defendant that there were two separate and distinct contracts, the horse being to be sold for 40*l.* and the cow for 25*l.* The latter amount was paid into court, and no question remains for decision except that arising upon the defendant's answer to the plaintiff's demand so far as the price of the horse was concerned. This answer, as set out in the statement of defence, was as follows: "The price of the said horse was 40*l.*, and the plaintiff warranted it sound and well, and it was sold to the defendant on the terms that if it did not answer the said warranty or suit the defendant, the defendant should be at liberty to reject the same. The said horse was neither sound nor well at the time of the sale to the defendant, but was suffering from internal inflammation, and in consequence of such unsoundness and illness it died before a reasonable time in which to return the same had elapsed. The defendant, on discovery of the unsoundness, repudiated the contract, and gave notice thereof to the plaintiff."

The jury found that there was no warranty of soundness, and that the horse was in fact sound at the time when the bargain was made. But the defendant's counsel at the trial relied, not

only on a warranty, but upon evidence that the plaintiff, at the time of the bargain being made, had agreed that the defendant might take the horse away and work him, and if he did not suit the defendant by working in every kind of vehicle for which the defendant required him, the defendant might return him within eight days. The bargain having taken place on Thursday, the 31st of July, the horse died on Sunday, the 3d of August, in the defendant's stable, to which he had been removed on the 31st of July. Under these circumstances the defendant's counsel contended that the defendant was not liable, because the bargain was a conditional one, and, the sale not having become absolute before the death of the horse, an action for goods sold and delivered would not lie.

It was objected for the plaintiff that no such case ought to be left to the jury, because it was not raised by the statement of defence. But I was of opinion that this defence was one included in the statement of defence, that the pleadings might properly be amended if necessary, but that it was not necessary to amend them, and that no injustice would be done by leaving the question to the jury. I therefore left it to the jury as follows: "Was the bargain on the 31st of July one for a sale out and out, or only for a sale conditional on the defendant finding the horse all right at the end of the eight days?" The jury found in answer to that question "that the bargain was conditional on the horse being right and with a trial for eight days." Being doubtful what the jury meant by "right," I asked them the question; to which they replied, "Suitable for the defendant's purposes, not contemplating the case of death." They afterwards added, in answer to a further question. "But for the complaint which came on after the bargain, we see no reason to suppose that the horse would not have been suitable for the defendant's purposes. By 'trial,' we mean a trial as regards suitability, not as regards health." Taking all these findings together, I think they amount to a finding that the plaintiff sold the horse to the defendant upon a condition that the horse should be taken away by the defendant and tried by him for eight days, and returned at the end of eight days if the defendant did not think it suitable for his purposes. The horse having died without fault of either party, the question is whether the plaintiff can maintain his action for goods sold and delivered. I am of opinion he cannot.

The case of *Ellis* v. *Mortimer*, 1 Bos. & P. N. R. 257, shows that the defendant had the whole time allowed for the trial in which to decide whether he would return the horse or not. I think it clear that no action for goods sold and delivered would have lain at any time before the eight days had expired, in case the horse had lived. But before the eight days had expired the horse died. If the defendant were to be fixed with the price of the horse, he would be compelled to pay for something different from what he had bargained for, namely, a horse of which he should have had eight days' trial. The finding that the horse might, or probably would, have suited the defendant's purposes does not appear to me to be sufficient reason for fixing the defendant as the absolute owner of the horse. The option was his at the moment of the horse's death, and down to a later period if the horse had lived. The case of *Rugg* v. *Minett*, 11 East 210, which was relied upon for the plaintiff, does not appear to me to apply, because that was not a case in which the buyer of the goods which were destroyed had any option as to whether he should become the purchaser or not, but, at the time of the destruction of the goods, he had, by virtue of the bargain and of what had passed, become the absolute owner of the goods in respect of which he was held liable. Nor, in my opinion, does the *dictum* of Mr. Justice COLERIDGE, in *Moss* v. *Sweet*, 16 Q. B. N. S. 495, which was relied upon for the plaintiff, help the plaintiff's contention in this case. That was a case in which, the defendant having taken delivery of goods "on sale or return," and having kept the goods, it was held that the sale was complete if the goods had not been returned within a reasonable time, and that the common count for goods sold and delivered would suffice. Mr. Justice COLERIDGE in that case says: "The goods in question passed on condition that unless returned—that is, at the option of the buyer within a reasonable time—they were to be taken as sold to him. That condition was at an end after the lapse of a reasonable time without a return of the goods, and the sale was then complete." He does not say that it was complete before that time. He does go on to say, "The same consequence would follow where the goods are destroyed or injured, so that a return within the meaning of the contract becomes impossible." This was relied upon as referring to an accidental destruction, such as by death or fire. I think it clear that this was not the meaning, but that the learned judge referred to destruction of,

or injury to, the goods, being the act of the defendant, in which case, of course, the defendant would have been liable as much as if he had kept them an unreasonable time.

The case of *Head* v. *Tattersall*, Law Rep., 7 Exch. 7, is nearer to the present case. That was an action for money received, to recover back the price of a horse which had been sold at Tattersall's, with a warranty and a condition that the plaintiff was to be at liberty to return the horse, if it did not answer the description, up to the following Wednesday. The horse was injured on its way home, and depreciated in value, but without any fault of the plaintiff's servant, who was taking it home. The horse, being found not to correspond with the warranty, was returned within the time, and it was held that the plaintiff had a right to return it and recover back the price, notwithstanding that he was unable to return it in the same condition. It was attempted to distinguish that case from the present, on the ground that in that case there was a right to return the horse on a specific ground on which it was, in fact, returned. But I can see no difference in principle between such a case and the case in which the purchaser has an option to return the horse on any ground still remaining to him at the time at which the event occurs which renders it impossible for him to exercise that option and so to have the whole benefit of his bargain. In such a case, I think the sale to him cannot be considered to be absolute at the time of the accident occurring. The maxim of *res perit domino* applies, I think, in such a case, much more reasonably as against the unpaid contingent vendor than as against the possible vendee still having an option to return at the end of a period not yet expired. I think the law relating to such a case is accurately stated by Mr. Benjamin in page 547 of the second edition of his work on Sales, where he lays it down as follows, speaking of "sales on trial," or "sales on approval," in which cases, he says, "There is no sale until the approval is given either expressly or by implication, resulting from keeping the goods beyond the time allowed for trial." Here, I think, there was no sale at the time of the horse's death, which happened without the fault of either party, and therefore the action for goods sold and delivered must fail, and I give judgment for the defendant except so far as relates to the costs of, and occasioned by, the allegations of warranty and unsoundness, which costs I order to be

paid by the defendant: such costs to be set off against the defendant's costs on taxation.

Judgment for the defendant.

The question in the above and similar cases is, whether the title passes to the vendee subject to be returned, or whether the *possession* only passes, the title to pass or not according to future circumstances.

Thus, in all contracts of "sale or return," the general construction put upon them is, that the title passes presently, subject to an option to return the article within the time fixed, or within a reasonable time, if none be fixed by the parties. If, therefore, the buyer fails to return it within the time stated, or within a reasonable time, the sale becomes absolute (unless some valid excuse exists for non-return), and an action for goods sold and delivered may be maintained, as if the sale had been absolute in the first instance: *Moss* v. *Sweet*, 3 Eng. L. & Eq. 311; s. c. 16 Q. B. N. S. 495; *Holbrook* v. *Armstrong*, 10 Me. 34; *Schlesinger* v. *Stratton*, 9 R. I. 578; *Jameson* v. *Gregory*, 4 Metc. (Ky.) 363; *Johnson* v. *McLane*, 7 Blackf. 501; *Quinn* v. *Stout*, 31 Mo. 160; *Moore* v. *Piercy*, 1 Jones (N. C.) 131; *Walker* v. *Blake*, 37 Me. 375; *Washington* v. *Johnson*, 7 Humph. 468.

And ordinarily, in the absence of anything to the contrary (as to which see *Crocker* v. *Gullifer*, 44 Me. 491), if the owner of a chattel delivers it to another, with his promise to return the same at a stated time or pay a sum of money therefor, the title passes immediately upon delivery, and the buyer may immediately sell the same and pass the property as against the former owner, even before the time has expired for its return: *Buswell* v. *Bicknell*, 17 Me. 344; *Dearborn* v. *Turner*, 16 Id. 17; *Perkins* v. *Douglass*, 20 Id. 317; *McKinney* v. *Bradlee*, 117 Mass. 321.

On the other hand a transaction may appear very similar to a sale or return, in which a directly opposite result is reached, viz.: where manufacturers, wholesale dealers, growers of garden seeds, &c., deliver to retailers large quantities of their goods, with a power of sale, and an obligation to pay only for what is sold, and return the balance. In such cases, it is frequently held that the relation is more that of consignor and consignee, principal and agent, or bailor and bailee, and the title to the whole does not vest on delivery, in the retailer, so far, at least, as to be immediately subject to attachment by his creditors. See *Meldrum* v. *Snow*, 9 Pick. 441; *Blood* v. *Pulmer*, 11 Me. 414; *Morss* v. *Stone*, 5 Barb. 518.

So in *Chamberlain* v. *Smith*, 44 Penn. St. 431, A., for an agreed sum, delivered B. a yoke of cattle, to keep and use in a farmer-like manner for one year and then to be returned, but with a privilege of keeping them at a price named, and it was held the contract was only a bailment and not a conditional sale, and that the receiver could not sell the property to even a *bonâ fide* buyer.

A very similar case arose in *Hunt* v. *Wyman*, 100 Mass. 198 (1868). The plaintiff had a horse for sale; the defendant inquired the price and was told $250. He wanted to buy the horse and told the plaintiff if he would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it, the same day he took it. The plaintiff assented, and the next day delivered the horse to the agent of the defendant, sent by him for it. The horse escaped from the servant on the way to the defendant's stable, ran away and was severely injured, and the defendant could not, for that reason, make any trial, and did not return or offer to return it, the injury received making it imprudent to do so. It was