

[HOUSE OF LORDS.]

HELBY APPELLANT; H. L. (E.)
AND
MATTHEWS AND OTHERS RESPONDENTS. 1895
May 30.

Factor—Sale of Goods, Agreement for—Possession of Goods under Agreement with option to buy—Hire and Purchase Agreement—Disposition of Goods by Person having option to Purchase—“Person having agreed to buy Goods”—Factors Act 1889 (52 & 53 Vict. c. 45) s. 9.

The expression in the Factors Act 1889 s. 9 “a person having agreed to buy goods” means a person who has bound himself by agreement to buy, and does not include a person who has an option to buy, the owner being bound to sell if that option is exercised.

The owner of a piano agreed to let it on hire, the hirer to pay a rent by monthly instalments, on the terms that the hirer might terminate the hiring by delivering up the piano to the owner, he remaining liable for all arrears of hire; also that if the hirer should punctually pay all the monthly instalments, the piano should become his sole and absolute property, and that until such full payment the piano should continue the sole property of the owner. The hirer received the piano, paid a few of the instalments, and pledged it with a pawnbroker as security for an advance:—

Held, that upon the true construction of the agreement the hirer was under no legal obligation to buy, but had an option either to return the piano or to become its owner by payment in full; that by putting it out of his power to return the piano he had not become bound to buy; that he had therefore not “agreed to buy goods” within the meaning of the Factors Act 1889 s. 9, and that the owner was entitled to recover the piano from the pawnbroker.

Lee v. Butler ([1893] 2 Q. B. 318) distinguished.

The decision of the Court of Appeal ([1894] 2 Q. B. 262) reversed and the decision of Lord Coleridge C.J. and Day J. restored.

THE appellant was the owner of a piano, of which he had given possession to one Brewster, under an agreement in writing of the 23rd of December, 1892. On the 22nd of April 1893 Brewster, improperly and without the consent of the appellant, pledged the piano with the respondents, who are pawnbrokers, as security for an advance. The appellant, upon discovering this, demanded the piano from the respondents, and on their refusing to deliver it, brought an action of trover. The defence set up by the respondents was that they had received the piano from Brewster

H. L. (E.) in good faith, and without notice of any claim on the part of the appellant, and that Brewster having “bought or agreed to buy” it from him they were protected by sect. 9 of the Factors Act 1889.

1895

HELBY

v.

MATTHEWS.

The county court judge held that the defence was not proved, and his judgment was upheld by the Divisional Court (Lord Coleridge C.J. and Day J.). The Court of Appeal (Lord Esher M.R., A. L. Smith, and Davey L.J.J.) came to the conclusion that the defence had been established, and reversed the judgment of the Divisional Court upon the ground that Brewster had agreed to buy the piano within the meaning of the Factors Act (1). The only question was whether the respondents had made out that Brewster had bought or agreed to buy the piano. This depended upon the true effect of the agreement under which he obtained it.

The agreement was in the following terms :—

“This agreement made the 23rd day of December 1892 between Charles Helby of 22 Baker Street (hereinafter called the ‘owner’), of the one part, and Charles Brewster of 24 Chester Street Kennington Road S.E. (hereinafter called the ‘hirer’), of the other part witnesseth that the owner agrees at the request of the hirer to let on hire to the hirer a pianoforte No. 896 Maker Rass. And in consideration thereof the hirer agrees as follows :—1. To pay the owner, on the 23rd day of December 1892 a rent or hire instalment of ten shillings sixpence (10s. 6d.); and 10s. 6d. on 23 of each succeeding month. 2. To keep and preserve the said instrument from injury (damage by fire included). 3. To keep the said instrument in the hirer’s own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner’s previous consent in writing. 4. That if the hirer do not duly perform this agreement, the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument. And for that purpose leave and licence is hereby given to the owner (or agent and servant, or any other person employed by owner) to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake

(1) [1894] 2 Q. B. 262.

possession of the said instrument, without being liable to any suit, action, indictment, or other proceeding by the hirer, or any one claiming under said hirer. 5. That if the hiring should be terminated by the hirer (under clause A below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return, or set-off for payments previously made.

The owner agrees :—

“A. That the hirer may terminate the hiring by delivering up to the owner the said instrument.

“B. If the hirer shall punctually pay the full sum of £18 18s. by 10s. 6d. at date of signing, and by 36 monthly instalments of 10s 6d. in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

“C. Unless and until the full sum of £18 18s. be paid, the said instrument shall be and continue to be the sole property of the owner.”

By the Factors Act 1889 s. 9: “Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.”

April 30. *Finlay Q.C.* and *Joseph Walton Q.C.* (*W. B. Hextall* with them) for the appellant :—

The only question is, whether Brewster had “bought or agreed to buy” the piano within the Factors Act. There was no agreement to buy, though there was, on the payment of all the instalments, an agreement to sell. In other words, Brewster

H. L. (E.)

1895

HELBY

v.

MATTHEWS.

H. L. (E.) bargained for an option and nothing more. The hirer was not bound to become a purchaser. The distinction between an option or a "conditional offer" and an agreement to sell or buy is clearly explained by Lord Westbury in *Weston v. Collins* (1). There is here no obligation to buy, and only a conditional obligation to sell, and the option ceases if on the 23rd of any month the hirer fails to pay the half-guinea. In *Lee v. Butler* (2) there was an absolute agreement to buy and to pay the instalments until the whole sum was made up. In this case the hirer may drop the payments at any time and return the chattel; and that liberty is the great inducement to persons who enter into contracts like this.

1895
HELBY
v.
MATTHEWS.

This is not an agreement subject to defeasance, or even a conditional agreement. There may be an agreement to buy which does not pass the property and yet may be within the Factors Act. Such a case was *Lee v. Butler* (2). But this case is wholly different, and there was no obligation on the hirer to go on paying these instalments, though there was an obligation on the owner to vest the property in the hirer when all the instalments should have been paid.

Jelf Q.C. and *H. D. Greene* Q.C. (*C. L. Attenborough* with them) for the respondents:—

The contract is one of sale, with power for the hirer under specified conditions to change it into one of hire only. There was an obligation to pay on the 23rd of each month. The whole language of the agreement is far more consonant with purchase than with hire, and the instrument is an agreement to buy. The word "instalment" can only be used of a portion of a larger sum, and points conclusively to purchase. Then the power to "terminate the hiring" points the same way. If the terminating act is not done, the thing goes on and is on the high road to purchase. Moreover, if there was originally an option to return, it is now gone, as Brewster put it out of his own power to exercise it. The agreement which was ripening into purchase could only be terminated by the return of the instrument. The case is virtually covered by *Lee v. Butler* (2). The case comes

(1) 34 L. J. (Ch.) 353.

(2) [1893] 2 Q. B. 318.

within the mischief of the Factors Act 1889, and that enactment should be construed broadly. [They also referred to *Ex parte Wingfield* (1).]

H. L. (E.)

1895

HELBY

v.

MATTHEWS

Finlay Q.C. in reply.

The House took time for consideration.

May 30. LORD HERSCHELL L.C. (after stating the facts given above):—

My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement. If Brewster agreed to buy the piano, the parties cannot, by calling it a hiring, or by any mere juggling with words, escape from the consequences of the contract into which they entered. What, then, was the real nature of the transaction? The answer to this question is not, I think, involved in any difficulty. Brewster was to obtain possession of the piano, and to be entitled to its use so long as he paid the plaintiff the stipulated sum of 10s. 6d. a month, and he was bound to make these monthly payments so long as he retained possession of the piano. If he continued to make them at the appointed times for the period of three years, the piano was to become his property, but he might at any time return it, and, upon doing so, would no longer be liable to make any further payment beyond the monthly sum then due.

My Lords, I cannot, with all respect, concur in the view of the Court of Appeal, that upon the true construction of the agreement Brewster had “agreed to buy” the piano. An agreement to buy imports a legal obligation to buy. If there was no such legal obligation, there cannot, in my opinion, properly be said to have been an agreement to buy. Where is any such legal obligation to be found? Brewster might buy or not just as he pleased. He did not agree to make thirty-six or any

H. L. (E.)

1895

HELBY

v.

MATTHEWS.

Lord Herschell,
L.C.

number of monthly payments. All that he undertook was to make the monthly payment of 10s. 6d. so long as he kept the piano. He had an option no doubt to buy it by continuing the stipulated payments for a sufficient length of time. If he had exercised that option he would have become the purchaser. I cannot see under these circumstances how he can be said either to have bought or agreed to buy the piano. The terms of the contract did not upon its execution bind him to buy, but left him free to do so or not as he pleased, and nothing happened after the contract was made to impose that obligation.

The Master of the Rolls said: "It is a contract by the seller to sell, and a contract by the purchaser, if he does not change his mind, to buy; and if this agreement goes on to its end, it ends in a purchase. Therefore, it seems to me that the true and proper construction of this instrument, after all, is this: it is an agreement by the one to sell, and an agreement by the other to buy, but with an option on the part of the buyer if he changes his mind to put an end to the contract." I cannot think that an agreement to buy, "if he does not change his mind," is any agreement to buy at all in the eye of the law. If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it. It appears to me that the contract in question was in reality a contract of hiring, and not in name or pretence only. But for the provision that if the hirer punctually paid the 10s. 6d. a month for thirty-six months, the piano should be his property, it could not be doubted that it was a mere agreement for its hire, and I cannot see how the fact that this provision was added made it any the less a contract of hiring until that condition had been fulfilled.

I think it very likely that both parties thought it would probably end in a purchase, but this is far from shewing that it was an agreement to buy. The monthly payments were no doubt somewhat higher than they would have been if the agreement had contained no such provision. One can well conceive cases, however, in which a person who had not made up his mind to continue the payments for three years would nevertheless enter into such an agreement. It might be worth

his while to make somewhat larger monthly payments for the use of the piano in order that he might enjoy that option if he chose to exercise it. In such a case how could it be said that he had agreed to buy when he had not only come under no obligation to buy, but had not even made up his mind to do so? The agreement is, in its terms, just as applicable to such a case as to one where the hirer had resolved to continue the payments for the three years, and it must be construed upon a consideration of the obligations which its terms create, and not upon a mere speculation as to what was contemplated, or what would probably be done under it.

It was said in the Court of Appeal that there was an agreement by the appellant to sell, and that an agreement to sell connotes an agreement to buy. This is undoubtedly true if the words "agreement to sell" be used in their strict legal sense; but when a person has, for valuable consideration, bound himself to sell to another on certain terms, if the other chooses to avail himself of the binding offer, he may, in popular language, be said to have agreed to sell, though an agreement to sell in this sense, which is in truth merely an offer which cannot be withdrawn, certainly does not connote an agreement to buy, and it is only in this sense that there can be said to have been an agreement to sell in the present case.

It was argued for the respondents that the case came within the mischief intended to be provided against by sect. 9 of the Factors Act 1889, and that the enactment ought, therefore, to be so construed as to cover it. I can see no reason for thus straining the language of the enactment. A person who is in possession of a piano under such an agreement as that which existed in the present case is no more its apparent owner than if he had merely hired it, and in the latter case any one taking it as security would have no claim to hold it as against the owner.

Reliance was placed on the decision in *Lee v. Butler* (1), and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement

H. L. (E.)

1895

HELBY

v.

MATTHEWS.

Lord Herschell
L.C.

H. L. (E.)
 1895
 HELBY
 v.
 MATTHEWS.
 Lord Herschell
 L.C.

to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question.

It was further urged for the respondents that when Brewster pledged the piano with them it became impossible for him to return it to the appellant, and he became, therefore, from that time bound to make the stipulated payments and to become the purchaser. I cannot accede to this argument. In my opinion, it is impossible to hold that Brewster, having only a right under the contract to buy, provided he complied with the prescribed conditions, could convert himself into a purchaser as against the owner by violating the conditions of the contract.

I think the judgment appealed from must be reversed. The respondents must pay the costs of this appeal, and in the Court below.

LORD WATSON (after stating the facts) :—

My Lords, the terms of the agreement are exceedingly simple, and had it not been for the conflict of judicial opinion which they have provoked, it would not have occurred to me that their true character and substance admitted of much doubt. The only stipulations which are of materiality to the present question are these: Brewster undertook to pay a monthly rent or hire instalment of 10s. 6d., commencing on the 23rd of December 1892, subject to the condition that he might terminate the hiring at any time by delivering up the piano to the appellant. In the event of the hiring being so terminated, he was to remain liable to the owners for arrears of hire up to the date when the piano was returned. Then follows a stipulation to the effect that, "If the hirer shall punctually pay the full sum of £18 18s., by 10s. 6d. at date of signing, and by thirty-six monthly instalments

of 10s. 6d. in advance, as aforesaid, the said instrument shall become the sole and absolute property of the hirer."

These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that, if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing, or to pay a price for it. There is no purchase and no agreement for purchase, until the hirer actually exercises the option given him. The respondents' counsel endeavoured to assimilate this case to *Lee v. Butler* (1), but in reality the two cases differ essentially. In *Lee v. Butler* (1) the so-called hirer was bound absolutely to make payment of £1 on the 6th of May and of £96 4s. on the 1st of August, 1892, these sums being described as "rent for the hire or use of certain furniture," which was the subject-matter of the agreement, it being declared that upon due payment of these rents, amounting to £97 4s., the furniture was to be "the sole and absolute property of the hirer." It appears to me to have been rightly held that Mrs. Lloyd, the hirer, had truly agreed to purchase the furniture, and could therefore give a good title to a bonâ fide purchaser. Her legal obligation to pay the price attached as soon as the agreement was executed.

Apart from the arrangement for hire of the piano, the only right given to Brewster by the agreement in question was the option to become a purchaser. It is true that whilst he was under no obligation to buy, the appellant was legally bound to give him that option, and could not retract it, if the other stipulations of the contract were duly observed by the hirer. But the possession of such a right of option was, in no sense, an agreement by Brewster to buy the piano; and the appellant's obligation to give the option was not, in the sense of law, an agreement by him to sell. In order to constitute an agreement

H. L. (E.)

1895

HELBY

v.

MATTHEWS.

Lord Watson.

(1) [1893] 2 Q. B. 318.

H. L. (E.)
 1895
 HELBY
 v.
 MATTHEWS.
 Lord Watson.

for sale and purchase, there must be two parties who are mutually bound by it. From a legal point of view the appellant was in exactly the same position as if he had made an offer to sell on certain terms, and had undertaken to keep it open for a definite period. Until acceptance by the person to whom the offer is made, there can be no contract to buy. So long as the agreement stood unaltered there could, in this case, be no contract to purchase by Brewster until he had complied with the terms of the option given him, and had duly made the thirty-six monthly payments which it prescribes as the condition of his becoming owner of the piano.

The distinction between a pre-contract of that kind and a proper agreement for the sale and purchase of goods, does not appear to me to have been sufficiently regarded by the learned judges of the Appeal Court. Their Lordships seem to have assumed that, because the appellant had bound himself to sell if Brewster chose to buy upon the terms prescribed, he was in reality a seller; and that the existence of a seller necessarily implies the existence of a buyer. In my opinion, that reasoning is inconclusive. Whilst, in popular language, the appellant's obligation might be described as an agreement to sell, it is in law nothing more than a binding offer to sell. There can, in such a case, be no agreement to buy, within the meaning of the Act of 1889, until the purchaser has exercised the option given him in terms of the agreement.

Another argument was urged for the respondents, which I find thus succinctly stated, in their fifth reason: "That upon Brewster pledging the pianoforte with the respondents he put it out of his power to exercise his right to determine the agreement by returning the pianoforte, and thereby the agreement to purchase became absolute and unconditional." The argument is, in my opinion, untenable. In a question with the appellant, Brewster could not become purchaser of the instrument, except upon the condition of his observing the stipulations of the agreement and making regular payment of each monthly instalment until the 23rd of November, 1895, which he was under no obligation to do. By the act of pawning he violated these stipulations: and that dishonest act, which was committed

after he had paid only a few out of the thirty-six instalments, is not calculated to suggest that he entertained any intention of becoming purchaser of the piano. It is quite true that Brewster thereby put it out of his power (at least until he could raise the amount for which it was pawned) to return the piano to the appellant; but he at the same time broke his contract, and forfeited his right to exercise the option of purchase given him by the agreement.

For these reasons I am of opinion that the order of the Court of Appeal ought to be reversed, and the judgment of the Divisional Court restored.

LORD MACNAGHTEN:—

My Lords, in this case I think His Honor Judge Bacon took the right view. It seems to me that the agreement under consideration means what it says and can mean nothing more. [His Lordship stated the terms of the agreement:—]

That is an agreement not forbidden by law, not unintelligible, and not, I think, unreasonable. I rather doubt whether the meaning of the parties can be better elucidated or their relative position more clearly defined by speaking of an “option” or of a “defeasance” or by translating their contract into other and more formal language. At least I am unable to express the obvious intention of the parties in simpler or plainer words than those which they have used. The musical instrument dealer let out a piano by the month, and undertook to sell it to the customer conditionally on his making a certain number of monthly payments. But it was the intention of the parties—an intention expressed on the face of the contract itself—that no one of those monthly payments until the very last in the series was reached, nor all of them put together without the last, should confer upon the customer any proprietary right in the piano or any interest in the nature of a lien or any interest of any sort or kind beyond the right to keep the instrument and use it for a month to come. The customer was under no obligation to fulfil the conditions on which and on which alone the dealer undertook to sell. He was not bound to keep the piano for a single day or a single hour. He was no more bound to purchase it after he had signed the agreement than he was

H. L. (E.)

1895

HELBY

v.

MATTHEWS.

Lord Watson.

H. L. (E.)
 1895
 {
 HELBY
 v.
 MATTHEWS.
 —
 Lord
 Macnaghten.
 —

before. The contract, as it seems to me, on the part of the dealer was a contract of hiring coupled with a conditional contract or undertaking to sell. On the part of the customer it was a contract of hiring only until the time came for making the last payment. It may be that at the inception of the transaction both parties expected that the agreement would run its full course, and that the piano would change hands in the end. But an expectation, however confident and however well-founded, does not amount to an agreement, and even an agreement between two parties operative only during the pleasure of one is no agreement on his part at law.

The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want and for which at the time they can not pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds it is for parliament to interfere. It is not for the Court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort.

Lee v. Butler (1), on which the Court of Appeal relied, was a very different case. There a person who got some furniture under an agreement which was called a hire purchase agreement was bound by the terms of the agreement to pay for and purchase the furniture. I do not see how *Lee v. Butler* (1) can be an authority for the respondents' contention. Nor can I understand why the customer in the present case should be taken to

have agreed to purchase the piano which he hired because he fraudulently pledged it, and so put it out of his power to return it without redeeming the pledge. H. L. (E.)

I agree that the judgment under appeal should be reversed.

LORD MORRIS :—

My Lords, I concur.

LORD SHAND :—

My Lords, I am also of the same opinion. The right of the defendant to refuse delivery of the piano in question under the 9th section of the Factors Act depends on his being able to shew that Brewster in whose possession it was had either bought it or agreed to buy it from Mr. Helby the plaintiff and appellant, and the decision of this question depends entirely on the true construction of the agreement between the plaintiff and Brewster under which the latter got possession of the instrument. It is true that by that agreement Brewster undertook to pay to the appellant not only a first instalment of 10s. 6d. described as a “rent or hire instalment,” but to pay the same amount on the 23rd of each succeeding month and that it was provided that on the payment of thirty-six monthly instalments the piano should become his property. If these stipulations had been unqualified there would have been an absolute obligation or agreement by Brewster to acquire the instrument in property, and by purchase, although the instalments were described as for rent or hire, and the case of *Lee v. Butler* (1) would have directly applied. But the whole obligations by Brewster were qualified by the stipulation : “That the hirer may terminate the hiring by delivering up to the owner the said instrument.” This provision appears to me to make it clear that there was no purchase and no agreement to purchase. The hirer need not continue the hiring a day longer than he desired ; and he need not allow the transaction to become one of purchase unless he desired to do so.

An agreement to purchase would infer an obligation to pay a price, the payment of which could be enforced by action, while here it is plain that no action for any balance of the alleged price could be maintained if Brewster thought fit at any time to

1895
HELBY
v.
MATTHEWS.
Lord
Macnaghten.

(1) [1893] 2 Q. B. 318.

H. L. (E.)
 1895
 HELBY
 v.
 MATTHEWS.
 Lord Shand.

return the instrument to its owner. The substance of the transaction was a hiring of the piano for the use of which monthly instalments were to be paid with a provision that the arrangement might ultimately result in a purchase, but that this should be entirely at the option of the hirer, and should depend entirely on his thinking fit to make payment of thirty-six monthly instalments. The contract of hiring only was to cease at his option on the instrument being returned to the owner.

It was maintained that under the general words of undertaking to pay future instalments there was an agreement to purchase within the meaning of the Factors Act, although there was power to resolve the agreement or to bring it to an end by returning the instrument. It seems to me to be very difficult to hold that even if in form the agreement could be correctly thus described this would satisfy the provision of the Factors Act which it has been forcibly maintained requires an absolute obligation to purchase and pay a price, or, at least, an obligation which is not merely dependent on the will or wish of the alleged purchaser.

In this case, however, I think there was an agreement of hiring only with an option to the hirer to become the purchaser; and that although there was an obligation to sell if the hirer should avail himself of the right of option to purchase, there was no obligation or agreement to purchase. I cannot hold that there is such an agreement on the part of one who having the beneficial use of the property of another agrees to pay instalments described as rent or hire instalments, and which he is entitled to treat as payments for hire only, because it is also stipulated that by continuing to make the payments for a certain time he shall acquire the property, he having at the same time the power at any moment and at his own will by returning the property to the owner to put an end to any obligation to pay any further instalments.

Order appealed from reversed, and judgment of the Queen's Bench Division restored with costs here and below; Cause remitted to the Queen's Bench Division.

Lords' Journals 30th May 1895.

Solicitor for appellant: *H. E. Tudor.*

Solicitor for respondents: *John Attenborough.*