[WILSON, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.]

MUHAREM SIDKI

Appellant (Defendant),

v.

DEMOS DRYMIOTIS

(Respondent (Plaintiff).

(Civil Appeal No. 4369).

Civil Wrongs—Detinue—Civil Wrongs Law, Cap. 148, section 37—Detinue amounts to witholding the goods and preventing the plaintiff from obtaining possession of them.

The respondent-plaintiff permitted the appellant-defendant to take away a diesel engine connected with a centrifugal pump. It was agreed that the appellant-defendant could take the said pump to a mechanic with a view to its being checked, and if after the checking the appellant-defendant wanted to buy it he would pay £120, otherwise he would return it to the respondent-plaintiff.

After the mechanic examined the pump the appellant-defendant offered to buy the said pump for £80. This offer was not accepted by the respondent-plaintiff who asked the appellant-defendant to return the pump. The appellant-defendant in reply urged the respondent-plaintiff to make arrangements and collect the pump from the mechanic's shop. When the respondent-plaintiff called at the mechanic's shop to collect the pump, the mechanic refused to give him the pump unless he was paid £1 for his labour. As the mechanic had a lien over the pump he was right in refusing to part with the pump The District Court ordered that the defendant do return the said pump and to pay the plaintiff's costs. The defendant appealed against the order and the appeal was allowed

Held (1) The real transaction between the parties was a sale of the equipment for the price of £120 if after inspection it was accepted and if not accepted it was to be returned because it was removed from plaintiff's premises only for the purposes of inspection

(2) The defendant was impliedly bound to return it within a reasonable time if he did not accept it This brings the transaction within the provisions of section 24 of the Sale of Goods Law, Cap 267.

(3) However, during the time the equipment was out of the plaintiff's possession it was subject to the lien of the mechanic. Therefore, the appeal should be allowed.

(4) Rather than direct a new trial to permit the plaintiff to claim damages with liberty to amend pleadings, we think the interests of justice will best be served if we assess the plaintiff's damages at £1, the amount of the mechanic's account and in addition 500 mils, the costs of transporting the equipment back to his place of business, making a total of £1.500 mils.

Appeal allowed, each party to bear his own costs throughout.

Cases referred to :—

Clements v. *Flight* 73 R.R. 421, (1846) ;

Clayton v. *Le Roy* (1912) 81 L.J.K.B. 49 ;

The Trustee v. *Donald* (1944) 1 Ch. 295.

Appeal.

Appeal against the judgment of the District Court of Nicosia (Ch. K. Pierides and A. Izzet, D.J.J.) dated the 12th February, 1962, (Action No. 1920/60) whereby the defendant was ordered and adjudged to return a diesel Engine No. 9B663 "Farymann" make 8 h.p. with all its accessories in the same condition as it was received by the defendant plus £43.350 costs.

A. Triantafyllides for the appellant.

C.J. Myrianthis for the respondent.

The judgment of the Court was delivered by :—

WILSON, P. : This is an appeal by the defendant from a judgment dated February 12th, 1962, delivered in the District Court of Nicosia in which it was ordered and adjudged that the Defendant do return a diesel engine No.9B663 "Farymann" make, 8 h.p., connected with a centrifugal pump, "Robinson" make, 2 1/2" x 2" as well as a belt all affixed on a transportable base with two wheels to the plaintiff's place of business in the same condition as it was received by the defendant.

It also ordered the defendant to pay the plaintiff £43.450 mils costs of the action plus £0.700 mils costs of the judgment.

The plaintiff's claim arose in the following manner.

The defendant, a farmer, approached the plaintiff, a mechanic merchant, and asked whether he had an engine (to operate a pump) to sell, whereupon the plaintiff said he had a second-hand one and that the defendant could bring a mechanic and have it examined if he wished. A few days later the defendant collected a mechanic and took him to the plaintiff's place of business to see and examine it. The defendant wanted to examine it, but as the mechanic had no tools with which to take it apart, they requested permission to remove it to the mechanic's premises for that purpose. The plaintiff told the defendant the value of the engine and its accessories was £120 and that he could take it, examine it, and, if he liked it he could keep it and pay £120, otherwise return it to him. The defendant accepted this offer and the engine and its accessories were removed to the mechanic's premises. Fifteen or twenty days later the plaintiff telephoned to the defendant enquiring about the latter's intention. He offered £80 for the equipment which the plaintiff refused and requested its return. Several days later they met at a building then under construction. The plaintiff asked the defendant what had happened to the equipment and was told it was at the shop of the mechanic where the plaintiff could go and get it. The plaintiff refused to do this telling the defendant he ought to bring it back to the plaintiff's shop. However, in a few days the plaintiff did go to the mechanic's shop, but the mechanic refused to part with the equipment until his account of £1 was paid. In this he was quite correct because he was entitled to a lien upon it as long as it remained in his possession.

Upon instructions of the plaintiff his counsel on 2.3.60 wrote the defendant demanding return of the equipment or payment of £120. The defendant did neither. The plaintiff then commenced this action.

(a) for the return of the equipment. Alternatively

(b) £120 damages for wrongful conversion

(c) £30 damages as a result of depreciation and the use and possession by the defendant,

(d) costs of the action.

The trial court gave the judgment from which this appeal is taken. In the reasons for judgment no cases or statements of law were cited or referred to, but before us it was argued that the law relating to detinue applies and the following authorities were cited.

Salmond, on Torts, 10th ed. pp. 312-3 (12th Ed. p. 282);

Clements v. Flight 73 R.R. 421, (1846);

Civil Wrongs Law Cap. 148, Sec. 37;

Clayton v. Le Roy (1912) 81 L.J.K.B. 49.

They do not support the plaintiff's case. In fact the opposite is true as the following statement in Salmond on the Law of Torts 10th Ed. p. 313 (12th Ed. p. 283) proves :

> "In order to support the action there must be a withholding the goods and preventing the plaintiff from obtaining possession of them".

Clements v. Flight cited above only decided that that action was brought prematurely. In any event the claim then would have been based on conversion. In the present case conversion could not be proved.

The action of detinue originally was based upon a wrongful detention of the plaintiff's chattel evidenced by a refusal to deliver it up on demand and the redress claimed was not damages for the wrong but the return of the chattel or its value. Such claims arose out of a bailment of the chattel to the defendant, or an alleged finding of it by him. In the former case the action was essentially one in contract, in the latter essentially in tort : Clerk & Lindsell, on Torts 11th Ed. 1954 p. 443 paragraph 723.

Here the real transaction between the parties was a sale of the equipment for the price of £120 if after the inspection it was accepted. If not accepted it was to be returned because it was removed from the plaintiffs premises for purposes of inspection. Impliedly the defendant was bound to return it within a reasonable time if he did not accept it. Thus it comes within the provisions of section 24 of the Sale of Goods Law, Cap. 267 which reads :

> "When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

"(a) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction ;

"(b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time".

However, during the period - the equipment was out of the plaintiff's possession it became subject to the lien mentioned above.

In these circumstances the decision *In re Ferrier, ex parte The Trustee* v. *Donald* (1944) 1 Ch. 295 is in point. The facts are shortly stated in the headnote as follows :

"In November 1941, articles of furniture were delivered by a dealer to X. "on sale for cash or return" within a week. Two days after the delivery of the goods execution was levied on the goods of X., on behalf of two creditors, and the articles were seized : *Held* that after the date of execution X. had not retained the articles within the meaning of s.18, r.4(b) of the Sale of Goods Act 1893 (secs.19(3) and 24 of the Sale of Goods Law Cap. 267), so that they never became her property and the dealer was entitled to them".

Morton J. held at p.297 "The event which is referred to in sub-section 4 of section 18 (sec.24) never happened, and the goods simply remained goods which had been sent on sale or return and which never became the property of Mrs. Ferrier" (X). The Court held that the plaintiff was entitled to damages for breach of contract. This decision is clearly in accord with the general rule stated in Chalmer's Sale of Goods (13th Ed. 1957) at p. 74 "When goods are sent on trial, or on approval, or on sale or return, the clear general rule is that the property remains in the seller till the buyer adopts the transaction. But it is quite competent to the parties to agree that the property shall pass to the buyer on delivery, but that, if he does not approve the goods, the property shall then revest in the seller. To use the language of continental lawyers, the condition on which the goods are delivered may be either suspensive or resolutive". Here there was no agreement to suspend the effect of the general rule.

The appeal must, therefore, be allowed.

Rather than direct a new trial to permit the plaintiff to claim damages with liberty to amend pleadings we think the interests of justice will best be served if we assess the plaintiff's damages at £1, the amount of the mechanic's account and in addition 500 mils, the costs of transporting the equipment back to his place of business, making a total of £1.500 mils.

The real amount involved is so small the parties might well have settled their dispute without coming to Court. For this reason each will bear his own costs throughout.

Appeal allowed, each party to bear his own costs throughout.