

sold to a new company. Therefore Lumsden & McKenzie were made aware that neither the old company nor the liquidator was the owner of the goods. Having told them this, he goes on to say, "I as liquidator have no objection to your disposing of the goods, applying the proceeds on your claim and advising me accordingly." But that was not an instruction to sell, much less to sell illegally. He had in fact given up possession in April and had no further control over the assets. He was in effect only saying to Lumsden & McKenzie, so far as I am concerned now when the assets belong to other people, I do not object to your taking any steps which the law allows.

This falls far short of instructions to sell or convert, and no case has been cited which would hold it to be a conversion.

The judgment in the plaintiffs' favour proceeds upon the basis of a breach of contract, and not upon conversion. But it is significant that the plaintiffs themselves brought their action for wrongful conversion, and only at the trial added a claim for breach of contract. They did not consider or assert that they had not had delivery of these goods, but went upon the mistaken supposition that Lumsden & McKenzie's letter to them was correct. The learned trial Judge refused to give effect to the claim as originally made.

Then on the basis of contract, it is upon the evidence, in my view, clear that the plaintiffs in April accepted these goods as in the bleachers' hands; and as having full control over them, it was their recognized duty to pay the bleachers' charges which were not encumbrances in their eyes from which the goods were to be free, that they deliberately put off paying for those charges more than a month, and had in April specially required the defendant to pay over to the Crown Bank the very money out of which he could have paid those charges if he was to pay them, and they the purchasers were to hold him harmless in so doing. Then, too, if the liquidator had known of and paid these charges, there would have been so much less to go to the Crown Bank and so much more to be paid by the guarantors—the plaintiff company's proprietors.

It would be a great injustice to the defendant if he were now to be held responsible for the illegal act of the firm in Scotland in selling for a debt which the plaintiffs should have paid. No doubt he acted thoughtlessly in writing the letter of 2nd May and not informing the plaintiffs of it, but he has had in return the anxiety of this litigation.

In my view the appeal should be allowed with costs.