

The appellant complained that the respondent had sold and was selling buttermilk and butter manufactured by him from cream purchased by him.

The question in controversy depended upon the construction which was to be given to the agreement, and whether, according to the true construction, what was complained of was a breach of the respondent's covenants.

Evidence was led for the purpose of proving what, according to the understanding of persons in the trade, was meant by "milk business" and "dairy business." This evidence shewed that neither term included the purchase of cream and the manufacture from it of butter or the sale of that commodity or the purchase and sale of butter manufactured by others.

It was argued for the appellant that the only exception from that which was sold, mentioned in the agreement, was the ice-cream business carried on by the respondent; and that that was inconsistent with the intention of the parties having been to exclude from the sale any part of the business that was then being carried on by the respondent at his shop.

At first sight, this fact seemed to make in favour of the appellant's contention; but, when it was explained, as it was in evidence, that ice-cream is manufactured from milk with some other ingredients added, the force of the appellant's contention was gone. That contention also ignored the fact that the respondent was carrying on two businesses—the milk business and the butter and ice-cream business, the latter not being, according to the understanding of persons in the trade, a milk business or part of a milk business.

Another important circumstance was the fact that a butter-making machine was included in the plant and machinery used in the respondent's business, and that that machine was not taken over or claimed by the appellant, although, as the business was sold as a going concern, the machine, if the appellant was right in his contention as to what was purchased, would have passed to him. The fact that this machine was not included in the purchase, but was left with the respondent, indicated that the purchase did not include the butter business.

If the butter business was not purchased, the sale of the buttermilk, which was a bye-product of the manufacture of butter, was not a breach of the respondent's covenant.

The appeal should be dismissed with costs; but, to prevent controversy, the order of dismissal should be prefaced with a declaration of the respondent's rights in accordance with the above opinion, including a declaration that he was bound by his covenant not to buy buttermilk and not to sell any except such as was a bye-product in the manufacture of butter manufactured by him.

*Appeal dismissed with costs.*