WALTER HOLSCHER, Agent for A. WOERMANN, Plaintiff-in-Error, *v.* JOHN PORTE, Defendant-in-Error.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Decided February 9, 1933.

Full payment and delivery without an express contingency constitutes a sufficient technical delivery of goods, so as to vest the right of property in the vendee and the vendor is no longer responsible for goods sold, especially when no deception, concealment or misrepresentation of facts in connection with the transaction of sale is shown.

In an action of detinue, appeal was taken from the Municipal Court of Monrovia to the Circuit Court, which entered judgment for plaintiff, now defendant-in-error. On appeal to this Court on a writ of error, *reversed.*

Monroe Phelps for appellant. *H. Lafayette Harmon* for appellee.

MR. JUSTICE BEYSOLOW delivered the opinion of the Court.

This case is before this Court upon a writ-of-error granted by the Chief Justice on a petition brought by the firm of A. Woermann, Monrovia, plaintiff-in-error, against John Porte, defendant-in-error, in an action of detinue. This case was first heard on the twenty-third day of March, 1932, in the Municipal Court of the City of Monrovia, and appealed to the First Judicial Circuit Court, Montserrado County, where it was heard June 28, 1932, and determined June 30, 1932. To the final judgment entered there, the plaintiff-in-error, being dissatisfied, set forth and presented the following assignments of

errors asking the consideration of this Court upon the same namely:

"(a) The judgment of His Honour Aaron J. George of the Circuit Court, First Judicial Circuit, Montserrado County, in the above entitled cause is contrary to the law and evidence adduced at the trial of this action.

"(b) The evidence adduced at the trial of this action conclusively proved that plaintiff-in-error did not detain the pack of cartridges sued for by defendant-in-error, yet His Honour Aaron J. George, Judge aforesaid, adjudged that plaintiff-in-error return the said cartridges or pay the value thereof which is $1.68."

These are the two main points in the assignment of errors. From the evidence appearing in the records, defendant-in-error called at the store of plaintiff-in-error to purchase a pack of buckshot laden cartridges; he asked for cartridges number 12-pidgeon shots; he was shown samples of all the shots in stock, and was warned by the seller that shots number 12 would not suit his purpose and the store-keeper recommended that the buyer would take number seven shots. Plaintiff in the court below told the store-keeper that number seven shots were too large for his purpose and selected a pack of number twelve shots. He thereupon delivered the government's permit, paid for the cartridges and took delivery. After taking delivery, defendant-in-error opened the pack of cartridges, took out one cartridge, opened it, and thereafter informed the seller that the shots were too small, and that the pack should be changed for number seven. The store-keeper having previously warned the purchaser that number twelve shots would not suit his purpose, and that he would not change the cartridges that had been damaged by opening, refused to change the damaged pack of cartridges; whereupon defendant put the pack of cartridges on the counter and went away. It is also

proven that defendant-in-error took away one of the cartridges which has never been returned to the seller.

Judge Bouvier, under "caveat emptor" ("let the purchaser take care"), says that the purchaser buys on his own responsibility and risk; hence he must take care that he selects the kind of goods desired without injury and prejudice to the seller; and, unless the goods delivered are unfit for sale, the vendor will not be liable to change them when once delivered. Mr. Justice Story (Sales, 3rd ed., § 348) declares that the purchaser buys at his own risk, unless the seller gives an express warranty, or be guilty of misrepresentation or concealment in respect to material inducement to the sale. And further, it is a settled doctrine of English and American law that the purchaser is required to notice such qualities of goods he desires to purchase as may be within his reach of observation and judgment.

Let us examine some of the relevant evidence in this case: The store-keeper Guentor Draeger says that

> "Plaintiff entered Woermann's store and offered to buy a pack of cartridges; he was asking for number twelve pidgeon shots. I showed him samples of number seven shots, in particular buckshots, on a show card which states or shows all sizes of shots in stock. I recommended him to take number seven because most of the hunters prefer that size; he selected number twelve shots saying that number seven was too large for his purpose. Before he delivered the permit and before he paid seven shillings for the pack, I informed him that I could not exchange any pack of cartridges which would be opened; I delivered the cartridges. After delivery of the said pack of cartridges he opened the pack and also one of the cartridges. Seeing that the shots were number twelve, he wanted to exchange the pack. I refused this."

Witness Manneh corroborated the testimony of Draeger and there is no other evidence to the contrary.

In *Bakker* v. *Williams* this Court held that "full payment and delivery, without an express contingency, completes a contract of sale, and vests the title of the property sold in the vendee, so that if they be destroyed afterwards by any casualty, he must bear the loss." 1 L.L.R. 233, 234 (1891).

In the face of such cogent evidence as quoted herein, could the plaintiff-in-error be held for detention of the goods in question when no deception, concealment or misrepresentation of facts in connection with the transaction of sale can be traced to him? The answer is no. The seller explained fully to the buyer as to the quality and kind of shots in stock; presented samples to the buyer and advised defendant-in-error not to take the shots he selected as they would not suit him. Defendant-in-error would not adhere to said advice and consequently erred in his selection.

Therefore viewing this case and its surroundings from all angles, it is clear that defendant-in-error acted on passion without regard to the rights of the other party, more especially when he entered Woermann's store on another day and went behind the counter to take cartridges *vi et armis* without permission. There is no evidence in the records to show this Court that plaintiff-in-error detained the cartridges in question; hence, the case in favor of defendant-in-error crumbles and the judgment of the trial court is hereby reversed with costs against defendant-in-error; and it is hereby so ordered.

Reversed.

MR. JUSTICE KARNGA, dissenting:

1. An appeal cannot be taken from an interlocutory judgment.
2. If a party buys goods which are unfit for the purpose for which they were bought, he had the right to return same and ask the vendor to have them exchanged, and if he refuses to exchange the goods and yet keep the money, an action of detinue will lie.
3. The defense of *caveat emptor* will not apply to a contract of sale where there was a misunderstanding between the buyer and the seller of goods or chattels.
4. To constitute a complete contract of sale there must be delivery and acceptance.

This case was brought up to this Court by a writ of error. It appears from the records that the defendant-in-error went to the firm of A. Woermann in Monrovia to purchase a pack of cartridges number twelve for his rifle. The clerk told him that he believed number seven would better suit; but the buyer thought that since his gun was number twelve the cartridges suited to such rifles ought to be number twelve. He therefore took a pack of number twelve and to be certain that he was buying the correct shots, he opened the pack, took one of the cartridges and opened same, but upon discovering that they would be unfit for his purpose he asked the clerk to exchange the pack for him; the clerk, however, refused to do so. Mr. John Porte then left the money and the pack of cartridges with the clerk and reported the matter to his employer Mr. R. E. Dixon. Mr. Dixon wrote the agent of the firm, narrating the circumstances to him, and requested that he exchange the pack of cartridges for one that would be better suited to number twelve rifle; this request the agent also refused. Whereupon a contention arose between the parties and on the 20th of October, 1931, John Porte entered on an action of detinue against the agent of A. Woermann, Monrovia. The case was heard and determined by the police magistrate and on October 20, 1931, he gave judgment in favor of plaintiff. Appeal was taken by the defendant to the Circuit Court of the First Judicial Circuit, Montserrado County.

On the 28th of June, 1932, the case was called upon for hearing by the Judge of the Circuit Court at which time a motion to the jurisdiction of the police magistrate court and other legal objections were raised by the counsel for the appellant. Judgment of the municipal court was affirmed without hearing the evidence in the said case; exceptions were therefore taken and an application made to the Chief Justice for a writ of error.

There were no assignments of error in keeping with sections 3–4 of the Revised Rule IV of the Supreme

Court. Said rule provides that assignment of errors shall be considered and dealt with as a bill of exceptions. There is a vast difference between a petition for a writ of error and an assignment of errors. A petition should simply state the nature of the case, the names of the parties, and be addressed to one of the Justices in vacation; or to the Court *en banc;* while the assignment of errors is regarded in its nature as a bill of exception. As there is no assignment of errors, we shall proceed to consider the case from the brief statement contained in the application.

The records in this case having showed that upon the calling up of the case by the Judge of the Circuit Court of the First Judicial Circuit, on the 28th day of June 1932, the counsel for the firm of A. Woermann submitted motion, questioning the jurisdiction of the municipal court and formulating other legal objections; and that after arguments by the parties, the judge on the 30th day of the same month, entered judgment against the said appellant without proceeding to read the records and finally determined the said case from the evidence in keeping with Act of the Legislature, 1922, chapter 9, section 11. The case should either be dismissed by the appellate court, as a judgment of the lower court is an interlocutory one, or be remanded for trial *de novo.*

In *Cooper* v. *McGill & Bros.,* 1 L.L.R. 93 (1878), it was held that an appeal cannot be taken from an interlocutory judgment. The appellate court will not review cases by piecemeal. An adjudication, however, is not final so long as a question which it was one of the objects of the suits to determine remains undetermined and the rights of the party thereto remain preserved for further adjudication. Such appears to be the nature of this case: the rights of the parties have not yet been decided upon; no final judgment has been rendered in the case, and therefore the bringing it up to this Court is premature.

We have observed the several exceptions taken to the

matters ruled upon during the trial of this case in the lower court, but not regarding the case as being properly before us for review we do not propose to examine these exceptions.

It is decreed by the majority opinion that the case be dismissed, and appellant ruled to pay costs. It was, however, held in *West & Co.* v. *Ross,* 3 L.L.R. 400, during this term of Court that the judgment rendered in favor of defendant by the Judge of the Circuit Court—the damages not having been ascertained in a legal manner by publicly reading the records of the city court—should therefore be remanded to be tried in keeping with statutory provisions.

In the trial of the municipal court it was clearly shown that the delivery of the goods by the vendor was not accepted by John Porte the vendee; on the contrary it was shown that there was misunderstanding between the vendor and the vendee as to what number of cartridges would suit the number twelve rifle of the purchaser. Parsons in his *Laws of Business,* Chapter 10, sections I and II, observes that there must be a delivery and an acceptance of goods. If one orders a thing for purpose known to the seller, he may certainly return it if it be unfit for the purpose, if he does so as soon as he ascertains its unfitness. In Herbert Broom's *Legal Maxims,* under the head of *caveat emptor,* it is stated: "If fraud be negatived but it is found that the contract declared upon was not that in fact made according to the real understanding between the parties, the defendant will not *prima facie,* be fixed with the character of Emptor, and the maxim, *Caveat Emptor,* will not therefore apply, both parties being innocent."

The counsel for the plaintiff-in-error seems to lay great stress on the decision handed down by this Court in *Bakker* v. *Williams,* 1 L.L.R. 233 (1890), in which it was stated: That the vendor is no longer responsible for goods sold, after delivery of same to vendee or his representatives; the title to same then becomes vested in the vendee

and if destroyed the vendee bears the loss. With reference to the opinion, we are of the opinion that while it was suited to conditions existing in those days, it is not the public policy at the present time.

Robson in his work entitled *Justice and Administrative Law* (1928) under the head of the "good judge" (241, 244) observed:

> "In all civilised countries the judge must, in fact, possess certain conceptions of what is socially desirable, or at least acceptable, and his decisions, when occasion arises, must be guided by those conceptions. In this sense judges are and must be biased. . . .
>
> "Stress is always laid on the duty of a judge to be a trustee of the past; but in reality it is far more important that he should be a prophet of the future, in so far as that is compatible with the faithful administration of the existing body of law."

I am therefore of the opinion that the decision of *Bakker* v. *Williams* should be recalled; and this case remanded to be tried at the February term, 1933, of the Circuit Court of the First Judicial Circuit for Montserrado County, on its merits.