

The LORD PRESIDENT grounded his opinion on this, that the applicant was an able-bodied man in full employment, earning as much money as most labourers in this country.

Friday, June 29.

ADAMSON, HOWE, & CO. v. GUILD AND OTHERS.

Issues—Bankruptcy—Fraud—1696, c. 5—Stoppage in transitu—Sale—Bill of Lading—Indorsation.

A purchased and paid for a cargo of sugar for B, to whom he shipped the cargo and sent the bill of lading. B accepted bills of exchange for the price, but failed to retire them; he became bankrupt, having previously indorsed the bill of lading to C, who indorsed it to D, who again indorsed it to E. In a reduction of these indorsations at the instance of A, as being fraudulent at common law, and in violation of the Act 1696, c. 5, held, (1) that to entitle the seller to succeed in a reduction on either ground, to the effect of recovering the sugar itself or its value as a *surrogatum*, he must prove that he had stopped the sugar *in transitu*, before delivery thereof to the purchaser or any one in his right; and (2) that, as a bill of lading is a negotiable document, the seller, in order to succeed in the reduction as fraudulent at common law, must prove fraud on the part of the indorsee as well as on the part of the indorser.

This was an action of reduction, declarator, and payment at the instance of Adamson, Howie, & Company, merchants at Pernambuco, and James Pender Logan and William Reid, sole partners of the firm, against James Wyllie Guild, accountant in Glasgow, trustee on the sequestrated estate of Stirling, Gordon, & Company, merchants in Glasgow; Andrew M'Ewan, accountant in Glasgow, trustee on the sequestrated estates of John Reid junior & Company, merchants in Glasgow; Walter Grieve, merchant in Greenock; Paul, Sword, & Company, sugar refiners in Glasgow; and Barrie & Johnstone, merchants and store-keepers in Greenock.

It appeared that in November 1864 the pursuers, on the order of Stirling, Gordon, & Company, and on their account, purchased a quantity of sugar which had been shipped on board the "Dante," then lying at Pernambuco and about to sail for Greenock, by Johnston, Pater, & Company merchants in Pernambuco, on account of Barrie & Johnstone, who were owners of the "Dante." The pursuers paid for the sugar and invoiced it to Stirling, Gordon, and Company at the price of £4114, 5s. 8d., which included their commission on the purchase. On 9th. November the pursuers advised the purchase to Stirling, Gordon, & Company, inclosing the invoice and the bill of lading. Stirling, Gordon, & Company received this letter and inclosures on 5th December. They did not pay the price of the sugar, but granted their acceptances therefor, payable 3 months after sight. These acceptances they did not retire. On 10th December Stirling, Gordon, & Company declared their insolvency, and on 17th December their estates were sequestrated, they having previously blankindorsed the bill of lading to John Reid junior & Company. John Reid junior & Company declared themselves insolvent on 24th December, and on 30th December their estates were sequestrated. They had pre-

viously, on 13th December, indorsed and delivered the bill of lading to the defender, Walter Grieve. The pursuers, on 14th December, four days after Stirling, Gordon, & Company declared themselves insolvent, had applied for interdict against these defenders and John Reid junior & Company, using or transferring the bill of lading, and taking possession of the cargo of the "Dante," and had obtained interim interdict. On 22d December Walter Grieve sold the sugar to the defenders Paul, Sword, & Company, and granted them a delivery order. On the 30th December the pursuers applied to the Sheriff of Renfrewshire for an interdict against Bain & Johnstone, in whose stores and name the sugar had been stored on its arrival at Greenock, and against the defenders Grieve and Paul, Sword, & Company, giving or taking delivery of the sugar, or using or transferring the bill of lading. Interim interdict was granted, but eventually, on 10th February 1865, the petition of the pursuers was dismissed. The Sheriff's judgment, however, was advocated, and the advocacy is still in dependence. The sugar was thereafter taken possession of by Paul, Sword, & Company, and manufactured and sold by them.

The pursuers now brought an action against the defenders, concluding for reduction of the indorsations and transferences of the bill of lading, and for payment by the defenders, conjunctly and severally, of the price of the sugar. They pleaded—

1. The pursuers are entitled to decree against the defenders for the value of the foresaid sugars, in respect that the said sugars were stopped *in transitu*, and in respect that the defenders never required any valid or legal right to the said sugars, or to the said bill of lading, or any right which could prejudice or affect the right of the pursuer.

2. The pursuers are entitled to decree against the defenders for the value of the foresaid sugars, in respect that the right thereto was never legally or validly transferred to the defenders, or to any of them.

3. The firm of Stirling, Gordon, & Company, and the firm of John Reid junior & Company were not entitled to take delivery of the said sugar, and could not legally transfer or give any right to the said bill of lading, in respect that they were, to their own knowledge, irretrievably insolvent, and knew that they could not pay for such sugar.

4. The defenders cannot found on the indorsations of the bill of lading, or on any alleged sale of said sugar, and the same ought to be reduced, in respect—1st, That the same were contrary to the Act 1696, c. 5; 2d, That they were fraudulent at common law; and 3d, That they were made and granted, as aforesaid, in execution of a fraudulent device, to benefit the defenders at the cost of the pursuers.

5. The defenders, Paul, Sword, & Company, are not entitled to found on the indorsation, or delivery order, or sale note, in their favour, and the same ought to be reduced, in respect that they obtained the said indorsation, delivery order, or sale note, in their favour, and the possession of the said sugar, in the knowledge of the fraud by which their authors had obtained the said bill of lading, and indorsation thereof.

On 10th July 1866, Peter White was sisted as a defender in the action, as trustee on the estates of John Reid junior & Co., in room of Andrew M'Ewan deceased. The defenders pleaded that the action was irrelevant and that the pursuers were not entitled to issues. The case came before this Court on the adjustment of issues.

A. R. CLARK and JOHN MARSHALL, for pursuers.
DEAN OF FACULTY (MONCRIEFF), N. C. CAMPBELL,
YOUNG, and A. MONCRIEFF, for defenders.

LORD PRESIDENT—The Court are of opinion that *in hoc statu* no judgment should be given either as to the relevancy of the action, or upon the many points of law involved in this case. These will arise for discussion at the trial or after it; and the Court have framed issues which they think will keep all these matters open. But in the meantime the money part of the case should be withdrawn from the jury. It can be made matter of admission or adjustment hereafter.

The most important question is, whether the pursuers effectually exercised their right of stoppage *in transitu*. That is the foundation of this case. It must therefore be put in issue and made the first issue. That issue has been purposely framed in very general terms to keep open all question of law. Stoppage, however, may be found to consist of one act, or of several acts, and therefore no date is specified in the issue.

The following were the issues adjusted:—"It being admitted that a cargo of sugars, consisting of 1503 bags or thereby of channel brown sugar, and 1700 bags or thereby of American brown sugar, purchased and paid for by the pursuers, was shipped on board the British brig "Dante," lying at Pernambuco, on the order and account of Stirling Gordon and Company, merchants in Glasgow, to be delivered to them or their order at Greenock, and that the bill of lading of said sugars was forwarded by the pursuers to the said Stirling Gordon and Company, blank indorsed, and received by them on 5th December 1864:—

"It being further admitted that on the said 5th December 1864 the said Stirling Gordon and Company accepted bills of exchange drawn on them by the pursuers for the price of the said sugars, amounting in all to £4,114, 6s. 8d., and that these bills were dishonoured, and no part of the said price has been paid to the pursuers:—

"It being further admitted that the estates of Stirling Gordon and Company were sequestrated on 17th December 1864, and that the defender, James Wylie Guild, is trustee on said estates:—

"It being further admitted that the estates of John Reid junior and Company, merchants in Glasgow, were sequestrated on the 30th of December 1864, and that the defender, Peter White, is trustee on said estates:—

- "1. Whether, before the said sugars were delivered to the said Stirling Gordon and Company, or any one in their right under the said bill of lading or indorsements thereof, the pursuers stopped the said cargo of sugars *in transitu*?
- "2. Whether the said bill of lading was, on or about the 5th December 1864, fraudulently indorsed and transferred by the said Stirling Gordon and Company to, and fraudulently received by the said John Reid junior and Company, to the prejudice of the legal rights of the pursuers?
- "3. Whether, on or about 5th December 1864, being within sixty days of the sequestration of their estates, the said Stirling Gordon and Company indorsed and transferred the said bill of lading to the said John Reid junior and Company, in security or satisfaction of a prior debt, contrary to the Act 1696, c. 5?
- "4. Whether the said bill of lading was, on or about the 13th December 1864, fraudulently indorsed and transferred by the said John Reid

junior and Company to, and fraudulently received by the defender, Walter Grieve, to the prejudice of the legal rights of the pursuers?

- "5. Whether, on the 13th December 1864, being within sixty days of the sequestration of their estates, the said John Reid junior and Company, indorsed and transferred the said bill of lading to the defender, Walter Grieve, in security or satisfaction of a prior debt, contrary to the Act 1696, c. 5?
- "6. Whether, on or about the 22d December 1864, the said Walter Grieve, defender, fraudulently sold or transferred the said sugars to the defenders, Paul, Sword, and Company, and the said Paul, Sword, and Company accepted the said sale or transference—in the knowledge that the said Walter Grieve and the said John Reid junior and Company had fraudulently obtained the said bill of lading and indorsements thereof, to the prejudice of the legal rights of the pursuers—and thereafter took possession of the said sugars and sold the same, in prejudice of the rights of the pursuers, as sellers who had stopped the said sugars *in transitu*?"

In the course of adjusting the terms of the issues, the counsel for the pursuers maintained that, in support of their reduction of the indorsements as fraudulent at common law, they were not bound to prove fraud on the part of such of the indorsees as had received the indorsements from bankrupt parties; and referred to the case of *M' Cowan v. Wight*, March 9, 1853 (15 D., 494), as an authority for that doctrine. The Court, however, held that the case of *M' Cowan*, being a reduction at the instance of a "creditor," was not applicable to the present case, which was a reduction at the instance of a "seller of goods," who had given to the purchaser a bill of lading, which is a negotiable document, passing the property of the goods which it represents to the indorsee, if onerous and *bona fide*, to the effect of defeating the seller's right of stoppage *in transitu*. Fraud, therefore, on the part of the indorsee, is an essential part of the pursuers' case, and must be put in issue, as was done in the case of *Stoppel v. Stoddart*, 14th November 1850 (13 D., 61).

Agents for Pursuers—Mackenzie, Innes, & Logan, W.S.

Agents for Defenders—James Webster, S.S.C., Wilson, Burn, & Glog, W.S., and M'Ewan & Carment, W.S.

Saturday, July 29.

SECOND DIVISION.

FITZSIMMONS v. BELL.

Bankruptcy—Cessio Act—Suspension—Liberation—Protection. Question, whether under the 15th section of the *Cessio* Act, a liberation, without bearing at the same time to be a protection, and without specifying any particular period for which it is to be available, has the effect of suspending all diligence?

This was a note of suspension and liberation brought by Fitzsimmons, craving to be instantly liberated from prison, and protection from all other diligence. The complainant last year brought a process of *cessio*. During its dependence he was put in prison by Bell, upon a bill for £100. He thereupon made an application to the Court, in the