

and urged and brought before the Court. It appears to the Lord Ordinary, in these circumstances, that nothing has occurred which should prevent him from giving effect to what he believes to be a reasonable contention on the part of the respondents, and he has accordingly decided the point reserved by the Auditor in their favour."

Authorities—*Moncreiffe*, 21 D. 1359; *Torphichen*, 13 D. 1400; *Erskine*, 14 D. 119.

Counsel for Petitioner—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Balfour. Agents—Dalmahoy & Cowan, W.S.

Wednesday, November 19.

## FIRST DIVISION.

[Lord Shand, Ordinary.]

GLASGOW, & NEWCASTLE, & MIDDLESBOROUGH STEAM SHIPPING CO. v. WATSON.

*Executorial Contract—Timeous Acceptance.*

Where an offer to furnish goods remained unaccepted for upwards of two months, and no express agreement to keep the offer open was proved, *Held* that acceptance after such a lapse of time could not be regarded as timeous.

On 5th August 1871 the defender in this action, in answer to a previous communication, wrote to the pursuer in these terms:—"Your kind favour of 4th Aug. to hand, and in reply, beg to offer you my Watson's Hortley steam coal for one year at 7/ per ton, alongside at Grangemouth. Hoping the above will meet with your approval, etc." To this no written reply was returned until 13th October, when a letter in the following terms was sent on behalf of the pursuers to the defender:—"Referring to your offer of 5th Augt., to supply us with coals for one year, I hereby accept the same. Your Mr Simpson promised from time to time to arrange a different mode of delivery, otherwise I would have accepted your offer earlier." The defender thereafter refused to supply the coals at the price mentioned in the above letter, and in consequence the pursuers had to supply themselves with coal at an increased price. The difference to the Company thereby occasioned was estimated at £654, 11s. 3d. sterling, and for this amount, accordingly, they sued the defender.

Proof was led, and on 23d June 1873 the Lord Ordinary (SHAND) pronounced the following interlocutor—"The Lord Ordinary having considered the cause, with the proof and productions, Finds that on 4th August 1871 the pursuers, through Daniel Reid, shipowner in Glasgow, one of their partners, applied by letter to the defender to know at what rate per ton the defender could supply coals to the pursuers' steamers at Grangemouth for a twelvemonth; and that, in answer thereto, the pursuers received from the defender a letter of the following date, in which the defender offered to supply his Hartley steam coal for one year alongside at Grangemouth at 7s. per ton: Finds that the steamers referred to in the first of said letters were the pursuers' steamers, the

'Prince,' 'Alice,' and 'Palermo,' trading between Grangemouth and Newcastle and Middlesbro', and that this was known to the defender; Finds that at a meeting which took place within a few days of the receipt of the last mentioned letter, between the pursuers and Andrew H. Simpson, the defender's salesman, who was authorised to transact business on his behalf, it was agreed between the pursuers and Simpson that the defender should send a quantity of coal to the pursuers in order that the pursuers might make a trial of the same; that some time thereafter coals were sent accordingly by the defender, and that the trial proved satisfactory; Finds further, that during the time when the said trial was being made, and thereafter, the defender's offer of 5th August 1871 to supply coals to the pursuers was kept open by the defender for the pursuers' acceptance, by negotiations between the pursuers and the defender's salesman Simpson, as to the defender's furnishing lighters from which to load the coals on board of the pursuers' steamers, and that while the negotiations were so open, the pursuers, on 13th October 1871, by their letter of that date, accepted the defender's said offer of 5th August 1871: Finds that thereby a concluded contract was entered into between the parties, whereby the defender undertook to supply his Hartley steam coal to the said steamers in such quantities as might be required for their trading for one year; Finds that, in breach of the said contract, the defender failed and refused to supply said coals, and that the pursuers thereby suffered loss and damage to the extent of £542 15s. 7d.; Decerns against the defender for payment to the pursuers of that sum: Finds the pursuers entitled to expenses: Allows an account thereof to be given in; and remits the same when lodged to the Auditor, to tax and to report.

"*Note*—The present action is one of damages for breach of contract, founded on the averment that on 13th October 1871 a contract was concluded between the parties, by which the defender undertook to supply coals for the pursuers' steamers for a year after that date, at Grangemouth, at the rate of 7s. per ton. It is not disputed that the defender declined to supply the coals, though repeatedly required to do so; and, assuming a contract to have existed, it is further not disputed that the loss and damage sustained by the pursuers in having to purchase coal elsewhere to supply their steamers amounted to £542, 15s. 7d. the sum for which the Lord Ordinary has granted decree.

"The difference between the parties thus truly resolves into the question, whether there was a concluded contract between them or not. There is a direct conflict in the evidence on this subject given by the pursuers Daniel Reid and John Reid and the witnesses Simpson and Connell for the defender. The Lord Ordinary is of opinion that the truth is with the pursuers, and that by the proof they have established their averments on record.

"The negotiations between the parties originated in the letters of 4th and 5th August 1871, referred to in the preceding Interlocutor. The pursuers' acceptance of the defender's offer, contained in the last of these letters, was only sent to the defender on 13th October 1871, upwards of two months after the date of the offer. In the meantime coal had risen in price, and it is clear that unless the defender's offer of 5th August was kept open for acceptance by arrangement between the parties, the acceptance came too late, and could not make a con-

tract binding on the parties. The Lord Ordinary is however of opinion, on the evidence, that the offer was kept open and was timeously accepted.

"It was maintained for the defender that even assuming his offer of 5th August to have been timeously accepted, no concluded contract was entered into between the parties, because the letters did not fix any quantity of coal to be supplied. The defender's contention is that his letter of 5th August 1871 was a mere quotation of prices, and that, until the parties in future negotiation settled the particular quantity of coal to be contracted for, there could be no contract between them. The Lord Ordinary is, however, of opinion, on the evidence, that the three letters of 4th and 5th August and 13th October sufficiently fixed the quantity of coal to which the contract applied. It appears that the pursuers are, and have been for some years, the proprietors of three steamers trading from Grangemouth to Newcastle and Middlesbro'; that the defender was quite aware of the number and nature of the steamers the pursuers had, and had in point of fact supplied coal for them before, and there is evidence also that it is not unusual in the coal trade to contract (without specifying a definite quantity) for the coals required for the steamers belonging to a company trading between known ports for a definite period of time. This of itself would, in the opinion of the Lord Ordinary, be sufficient to fix the amount of coal contracted for in the present case; but the letters of 4th and 5th August appear to the Lord Ordinary to be quite definite on this subject, for, as the pursuers ask the defender for an offer to supply coal 'to our steamers at Grangemouth for a twelvemonth' and in answer the defender offers to supply coal 'for one year alongside at Grangemouth,' it is evident that both parties contracted with reference to the steamers which actually belonged to the pursuers at the time and were in the course of trading from Grangemouth.

"The defender further maintained that his offer of 5th August was not timeously accepted. On this part of the case it is clear that, having regard to the length of time which elapsed between the date of the offer and the acceptance of it, it lies on the pursuers to instruct that, as alleged by them, the offer was kept open for their acceptance by arrangement.

"On this subject the case presents a very remarkable conflict of evidence. On the one hand the account which the pursuers give on record, and which they have sworn to in the evidence, is, that within a day or two after the 5th of August it was arranged between them and Mr Simpson, the defender's salesman, whose authority to contract for the supply of coal is not disputed, that they should have a trial of a quantity of coal, and that, if the trial proved satisfactory, the pursuers would then accept the offer; that the quantity to be sent for trial was from 30 to 40 tons; that the defender sent a quantity of 41 tons to Grangemouth for trial on 25th August, and that the trial proved satisfactory. It is further alleged the pursuers communicated to Simpson, the defender's manager or salesman, the result of the trials, but expressed a wish, as they had previously done, when the trial coals were ordered, that the defender would supply a lighter to bring the coals alongside the steamers, and that the defender's salesman stated that he would communicate with the defender on that subject, and let the pursuers know the result,

and that it was understood that in the meantime the defender's offer was to remain open for acceptance. The pursuers not having heard, as they expected, from the defender on this subject, resolved to delay no further, and accordingly accepted the defender's offer on the 13th October. On the other hand, the case of the defender is that Mr Simpson, with whom it is said these negotiations went on, never heard of the contract until about the end of October, ten days after the defender had declined to recognise it.

"In these circumstances the Lord Ordinary has had to resolve with reference to these two conflicting accounts, on which of them reliance is to be placed, and he has no hesitation in saying that he thinks the evidence of the pursuers, the Messrs Reid, is entitled to credit, and much more to be relied on than the proof adduced for the defender. It seems to him impossible to accept the defender's evidence except on the footing that the pursuers' account of the negotiations after the 6th of August is an entire invention, formed for the purpose of enabling them to keep the defender's offer open. The Lord Ordinary is satisfied, from what he saw of these gentlemen under examination, that such an imputation would be entirely unfounded, and indeed the defender's counsel suggested merely that they must have been under some 'misapprehension' throughout—a view, however, which the Lord Ordinary cannot adopt. The evidence of the defender's salesman, Mr Simpson, might, on the other hand, possibly be accounted for by want of memory, although it is certainly unusual that a business-man should have so soon forgotten such occurrences as were spoken to by the pursuers. . . ."

Against this interlocutor the defender reclaimed, and argued—(1) The letters founded on by the pursuers do not constitute a concluded contract between them and the defender; (2) Even if they did, the acceptance of the pursuers was not timeous.

At advising—

LORD PRESIDENT—I retain the impression made on perusal of the Lord Ordinary's interlocutor, viz., that it is inconsistent with law. Every offer must be timeously accepted, especially in a case like the present, where there might be, as there was, a sudden alteration in the market value of the goods which were the subject of the arrangement. It was necessary to fix the date when the period of delivery should begin. Now, the offer as made contemplated its beginning on 5th August. The action demands that date of delivery should be regarded as 13th October, on the ground that the date of the acceptance must be held to be the date of commencement of delivery. But was it ever heard of that two months could be allowed to elapse in a case of this kind. In answer to this it is said that the offer was kept open by negotiations between the parties, but this would require to be by express agreement, and only to be proved perhaps by writ or oath. There is nothing of the kind in this case, but merely an alleged trial of goods, and an arrangement as to supplying a lighter to load on board ship. Both of these were elements, yet there is no agreement to keep the original offer open while these arrangements are being carried on. The result of the evidence on this point seems to me to be to raise a suspicion that Daniel Reid is not very accurate, and even occasionally not very candid. But even taking his own account of the dealings between the parties,

there is nothing which I can regard as amounting to an express agreement to keep open the offer.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly recalled.

Counsel for Pursuers—Watson and Maclean. Agents—J. & R. D. Ross, W.S.

Counsel for Defender—Solicitor-General (Clark) and Asher. Agents—J. W. & J. Mackenzie, W.S.

Saturday, November 22.

## FIRST DIVISION.

[Sheriff of Lanarkshire.

### FOULDS — APPELLANT IN LEISK'S SEQUESTRATION.

#### *Bankrupt—Liberation—Caution.*

Where, pending appeal against order for liberation, the opposing creditor had presented a petition for recall of the sequestration in which final judgment had not been pronounced,—*held*, the bankrupt was entitled to liberation, on condition of finding caution not only to appear but also to return to prison in the event of the sequestration being recalled.

The estates of Robert Leisk junior, formerly clerk in the National Bank, Glasgow, were sequestrated on the 10th September last by interlocutor of the Sheriff of Lanarkshire. The salary of the bankrupt had been at first £20, then £60, and for the last quarter of his service in the bank £80 a-year. These being his resources, he had speculated in railway and other shares to the extent of over £25,000, and the claims lodged in his sequestration were to a very small extent for ordinary debts, being chiefly founded on broking transactions and on I.O.U.s for loans of money. One of his brokers was John Christie Foulds of Glasgow; and a transaction in Caledonian stock carried through by him in March last resulted in a loss to Leisk of £369, 16s. 2d. Shortly after this Leisk received an appointment in the Bank of British North America at Montreal, but he lost this situation in consequence, as he alleged, of proceedings taken by Foulds to compel payment of his debt. These proceedings resulted in his incarceration in the North Prison, Glasgow, on the same day that sequestration was awarded.

The petition for sequestration had contained a prayer for liberation; and on 20th September the Sheriff-Substitute (GALBRAITH) pronounced the following interlocutor:—"Having heard parties' procurators and resumed consideration of this application, together with the minutes of meeting of creditors yesterday, from which it appears that by a large majority the creditors find the bankrupt entitled to protection for the period of six months—Finds, however, that liberation can only be granted on caution for appearance as afterwritten; therefore grants warrant to the keeper of the prison of Glasgow to liberate the said petitioner Robert Leisk junior, so far as detained under diligence at the instance of John Christie Foulds, sharebroker in Glasgow, acted in the Books of Court in common form, that he will attend all diets in the sequestration during the period of six months after the date of his liberation at which he may be required

by the trustee to appear, or which he is bound to attend in terms of the Bankruptcy Statutes, and that under a penalty of fifty pounds sterling in the event of his failure to attend any such diets."

Against this deliverance Foulds appealed, and he shortly afterwards brought a petition for recall of the sequestration on two grounds—(1) that the bankrupt was not domiciled in Lanarkshire; and (2) that the two concurring creditors were conjunct and confident with the bankrupt, and not truly creditors of his at all. This petition was dismissed by the Lord Ordinary; but that interlocutor being subject to review, Foulds still insisted in the present appeal.

Argued for the appellant—That the caution offered was not sufficient, nor was it such as could be made available; (2) as the sequestration might still be recalled, and the application for liberation would in that event be inept, liberation ought not to be granted.

At advising—

LORD PRESIDENT—This is an application under the 45th section of the Bankruptcy Statute. The claim for the liberation of a sequestrated bankrupt stands on a different footing from the personal protection of a bankrupt not incarcerated. The latter is in the hands of the creditors; whereas the liberation from prison is entirely in the hands of the Sheriff, who accordingly has in this case ordered the liberation of the bankrupt. Now, I think it would require pretty strong reasons before we could set aside the judgment of the Sheriff in a matter so absolutely placed by statute in his hands. But one ground upon which the liberation of the bankrupt is opposed is, that an application was made to the Lord Ordinary for recall of the sequestration. True, the Lord Ordinary refused the application, but that judgment is not final, and accordingly some provision must be made for the possibility of the sequestration being recalled, in which case it would be impossible to liberate under the statute. I therefore agree with the Sheriff that the bankrupt should be liberated on condition of caution being found; but I would enlarge the order for caution by requiring caution that the bankrupt return to prison in the event of the sequestration being recalled.

The other Judges concurred.

Counsel for Appellant — Rhind. Agents — Ferguson & Junner, W.S.

Counsel for Respondent—Solicitor-General and M'Lean. Agents—J. & R. D. Ross, W.S.

Saturday, November 22.

## SECOND DIVISION.

[Dean of Guild, Dundee.

BRADFORD v. MORE.

*Jurisdiction—Dean of Guild Court—Dundee Police and Improvement Act, 1871, § 183.*

*Held* that in conducting building operations where a question of possessory right or disputed boundaries was or might be raised or involved, the Dean of Guild Court at Dundee had a jurisdiction concurrent with that of the Police Commissioners, and that his warrant