

The Court interdicted, prohibited, and discharged the respondents from using any reservoir, dam, or other *opus manufactum* to arrest or detain the water of the Braid or Figgate Burn so as to prevent the same from flowing continuously in its natural bed or channel through the property of the complainers, except on Sundays and at other times when the complainers' mill was not at work.

Counsel for Complainers (Respondents)—Lord Advocate (Watson)—R. Johnston—J. A. Reid. Agents—Gibson & Strathern, W.S.

Counsel for Respondents (Reclaimers)—Gloag—Rutherford. Agents—Mackenzie & Kermack, W.S.

Friday, January 23.

FIRST DIVISION.

[Lord Craighill, Ordinary.]

WALTER GRIEVE, SON, & COMPANY v.  
KONIG & COMPANY AND OTHERS.

*Shipping Law—Owners and Master of Ship—Liability where Master Signed Bills of Lading for Cargo not on Board, which was afterwards Shipped.*

A master of a ship signed bills of lading which led the purchaser of the cargo to believe, contrary to the fact, that it had all been shipped at the date of the signature, and thereby prevented him from rejecting it as disconform to a stipulation in the sale contract. In an action of damages brought by the purchaser against the master of the vessel and his owners for the loss thereby sustained, *held* that, assuming the guilt of the master, the owners could not be liable for any such misrepresentation or fraud as that in question, in which he was acting outwith the scope of his authority.

*Observed* that the date is not an essential of a bill of lading, and that a bill of lading could not be held bad if it were without a date.

*Observations* upon the mode of estimating the damage in such a case, assuming its relevancy.

*Agreements and Contracts—Purchase of Goods “for August Shipment”—Condition-Precedent—Right to Rescind where Part not Shipped till September.*

A purchase of sugar was made from merchants in Java “for August shipment.” One-fourth part of the whole quantity sold was not shipped till September. It was not proved that there was any materiality or virtue in shipment during August. *Held* (per Lord Shand) that there had been a non-observance of the plain terms of the contract, such as would entitle the purchasers to rescind it.

On 8th May 1877 Walter Grieve, Son, & Company, merchants, Greenock, bought, through Messrs J. V. Drake & Company, sugar-brokers, from Konig & Company, merchants, Sourabaya, from 500 to 700 tons of Java sugar. J. V. Drake & Company also acted as brokers for A. P. Francke of London, the agent of the sellers, and the contract of sale was contained in the following letter:—

“9 Mincing Lane,  
London, E.C., 8th May 1877.

“Mr A. P. Francke.

“We have this day sold by your order for account of Messrs Konig & Co., of Sourabaya, to Messrs W. Grieve, Son, & Co., of Greenock, about 5/700 tons Java sugar. . . . Shipment to be made during August next by first-class sailing vessel (of neutral flag at time of shipment), chartered to call off English coast for orders for any safe U.K. port, and with usual Continental option, but if buyers order vessel to Continent all extra freight to be for their account.

“Sellers to declare ship’s name in due time for insurance to be effected here.

“Buyers undertake to accept sellers’ drafts for invoice amount (without any interest or discount) at six months’ sight, payable in London with B/L’s attached thereto, said B/L’s to be delivered up on payment of drafts. Buyers also agree to confirm a credit available against this purchase. . . .

“J. V. DRAKE & Co.”

On 16th August 1877 Konig & Company wrote to Messrs Walter Grieve, Son, & Company a letter in which they, *inter alia*, stated that—“Mr A. S. Francke, of London, who sold to you for our account a cargo 488 tons Java sugar, sent us a letter of credit by which you open as a credit available against our shipment of sugar, in consonance with the contract passed between you and him. We proceeded to the execution of the contract in chartering the British barque ‘Truth,’ Captain Edward George, of about 550 tons carrying capacity.” The charter-party was dated “Batavia, July 27, 1877.” On the 6th of September 1877 Konig & Company wrote to Messrs Grieve with invoice of the shipment of sugar per the “Truth,” comprising 2886 baskets of sugar, amounting to £18,146, 19s. 3d., minus freight. Against this amount they intimated that they had valued on them, in terms of the letter of credit given by them dated 26th May 1877, per six bills of exchange dated 6th September 1877, and payable six months after sight, which drafts Konig & Company requested the pursuers to protect on presentation. They also intimated that the bills of lading and charter-party accompanied the drafts, which they had negotiated with the Chartered Bank of India, Australia, and China, Batavia agency. The bills of exchange were in due course presented to Messrs Grieve & Company for acceptance, but before accepting them Messrs Grieve made inquiry at the holders of the bills of lading in order to ascertain from the dates upon them whether the cargo had been shipped during August 1877. They were informed that the dates of the bills of lading were 27th and 31st August 1877 respectively.

The bills of lading were made out in tripartite, and were dated 27th August for 1232 baskets of sugar shipped at Sourabaya, and 31st August 1877 for 1654 baskets shipped at Passeroean. Messrs Grieve thereafter sold the cargo to Messrs Blair, Reid, & Steele, sugar-refiners, Greenock, and delivered over the bills of lading to them. It subsequently came to the knowledge of Messrs Grieve that the whole cargo in question had not been on board the “Truth” during the month of August, as stipulated in the contract of sale, and they brought this action of damages against Messrs Konig & Company, the sellers of the sugar, Edward George,

the master of the "Truth," and John Eills, ship-chandler in Liverpool, and others, the owners of that vessel. The summons concluded for payment of £5000, the amount which the pursuers stated they had lost by the re-sale of the sugar to Messrs Blair, Reid, & Steele, sugar having, as they stated, fallen greatly in price since the date of their purchase from Konig & Company.

The pursuers stated that it was upon the faith of the representations of the defenders, and in the belief that the bills of lading were truly of the dates they bore, that they accepted the bills of exchange, and did not reject the cargo, which they would have done had they known that part of the sugar had, disconform to the contract, not been shipped during August. They further averred—" (Cond. 6) After the arrival of the said vessel at Greenock, after the acceptance and payment of said bills of exchange, and after the sale of the said cargo and transfer of the bills of lading to the purchasers, the pursuers on 2d January 1878 discovered by examination of the said ship's log-book, and they aver, that a large portion—at least one-fourth part—of the said sugar that was said to have been shipped at Passoeroean had not been shipped on board of said vessel till during the month of September 1877, and consequently that the Passoeroean bills of lading, which purported that the sugar therein mentioned had all been shipped at the date they bore, viz., 31st August 1877, was in that particular false and fraudulent. If the pursuers had known these facts they would have rejected the said cargo, and would not have accepted or paid the said bills of exchange or sold the said cargo. The false date given to the said Passoeroean bills of lading was so given for the purpose of deceiving the pursuers, and it did deceive them into believing that the cargo had been all shipped during August 1877, as stipulated for in the contract for the purchase thereof, and in the said letter of credit. The said bills of lading, which were falsely antedated as aforesaid, were fraudulently granted by the defender Edward George, the master of the said vessel, and were fraudulently taken by the defenders Konig & Company, or their agents at Passoeroean, being in the knowledge of the said fraud, and fraudulently sent by the defenders Konig & Company for delivery to the pursuers on payment of the said bills of exchange. The said fraud was committed for the purpose of deceiving the pursuers, and had the effect of deceiving them, to their loss, injury, and damage. The defender George was in the knowledge of the contract between the pursuers and the defenders Konig & Company, and, in particular, he knew the provisions of the said contract with reference to the time of shipment of the said sugar. He also knew that the bills of lading were made, contrary to the fact, to set forth shipment in August in order to conceal from the pursuers that shipment had not been made till September. He signed the bills of lading fraudulently in that knowledge, and his owners have benefited by the fraud. (Cond. 7) Sugar has fallen greatly in price since the pursuers purchased the same from the defenders Konig & Company, and in the re-sale by the pursuers of the said sugar they have sustained a loss of

£5000 sterling or thereby, which they would not have suffered had they not been fraudulently imposed upon, deceived, and induced to accept the said cargo by the fraud before mentioned. The intent, effect, and object of the said fraud was to lead the pursuers into the belief that the defenders Konig & Company were not in breach of contract of sale, and thus fraudulently to induce the pursuers to take delivery of the sugar. The defenders, the owners of the barque 'Truth,' benefited by the said fraud of the defenders Konig & Company, and of the defender George, to the extent at least of £2000 sterling, being the amount of freight paid in respect of the said voyage."

Arrestments were used to found jurisdiction against all the defenders.

Konig & Co. did not appear to defend the action.

George in answer to the statements in the pursuers' condescendence denied that the bills of lading bore a false and fraudulent date. He stated that he entered into the charter-party mentioned above, and that in terms of it the "Truth" left Batavia on the 5th day of August for Sourabaya, where she arrived on the 17th day of August, and proceeded to load 1232 baskets of sugar. On the 28th day of August she left Sourabaya for Passoeroean, where she arrived on the following day, and proceeded to take on board the remainder of said cargo, being 1654 baskets of sugar. The loading was completed with due despatch, and she sailed on or about the 7th day of September for Falmouth, where she arrived on or about the 9th day of December 1877." He stated in answer to condescendence 6—"Admitted that part of the cargo was not actually on board of the vessel until the beginning of September, but explained that at and prior to the date of the Passoeroean bills of lading the cargo, which was partly on board and partly in course of shipment by lighters, was all under the control of the defender the said Edward George. The loading was carried on with all possible despatch. The defender signed the said bills of lading without fraudulent intent, and he was not aware of the contract founded on by the pursuers, or of any of the terms thereof. It is further believed and averred that the pursuers had sold the said cargo previous to the arrival of the vessel in Greenock, and that the purchasers from the pursuers fulfilled their contract by taking delivery of the sugar and paying the price." He further denied that the alleged loss had been sustained.

Eills and others, in addition to the defences which they had in common with George, stated further—"Explained that the defender George had no authority to act for these defenders except such as belonged to him in respect of his employment as master of the vessel 'Truth.'" They further explained that they had not received payment of the freight due to them under the charter-party.

The pursuers pleaded, *inter alia*—" (1) The pursuers having contracted for shipment in the month of August 1877, were not bound to implement the contract failing compliance with that condition thereof. (3) The pursuers having been induced by the fraud and false representation condescended on to give implement of the contract when they were not really bound to have done so,

are entitled to be restored against the effect of the said falsehood and fraud. (4) The pursuers having suffered loss, injury, and damage through the falsehood and fraud complained of, are entitled to damages as concluded for. (5) The defenders, the owners of the barque 'Truth,' having taken benefit through the fraud of their agent, are not entitled to retain the said benefit."

The defender George pleaded—" (1) The pursuers' averments are not relevant or sufficient to support the conclusions of the summons against the present defender. (2) The statements of the pursuers being unfounded in fact, the defender is entitled to absolvitor."

The pleas for the defender Eills and others were similar.

Parties were heard in the Procedure Roll before the Lord Ordinary (СВАРЕННИ) upon the plea against relevancy, but his Lordship thereafter pronounced an interlocutor allowing a proof before answer, and upon a reclaiming-note the First Division adhered to the Lord Ordinary's interlocutor.

Thereafter a proof was led, the purport of which sufficiently appears from the Lord Ordinary's interlocutor and the note appended thereto. These were as follows:—

"*Edinburgh, 21st March 1879.*—The Lord Ordinary . . . in the first place, as regards the liability imputed to the defenders, the registered owners of the vessel 'Truth,' for the reparation sued for, Finds, as matters of fact, (1) that . . . the pursuers purchased from the defenders Konig & Co. a quantity of Java sugar at the price and on the terms specified in the sale-note; (2) that one of the conditions of this contract was that 'shipment was to be made during August next' (1877) 'by first-class sailing vessel;' another was that the buyers should 'accept seller's drafts for invoice amount (without any interest on discount) at six months' sight, payable in London, with bills of lading attached thereto;' and a third was that the buyers should 'confirm a credit for this purchase;' (3) that this contract having been made, Konig & Co. on 27th July 1877 entered into the charter-party with Edward George, master of the said vessel 'Truth,' then lying at anchor in Batavia, whereby it was agreed that the said ship 'should, with all convenient speed, proceed to Sourabaya, and there and at one other port at the eastward prepare to receive on board a full and complete cargo, consisting of dry sugar in baskets, which the said merchants bound themselves to ship;' and being so loaded should 'therewith proceed to Falmouth or Queenstown, or any adjacent port, for orders to discharge at one safe port in the United Kingdom, or on the Continent between Havre and Hamburg inclusive, and to deliver the same on being paid freight at the rate of £3, 2s. 6d. per ton nett weight delivered;' (4) that in terms of this charter-party the said vessel left Batavia on 5th August 1877 for Sourabaya, where she arrived on the 17th of that month, and there 1232 baskets of sugar were taken on board, the bill of lading for which, signed by the said Edward George, and bearing date 27th August 1877, is No. 59 of process; (5) that on 28th August 1877 the said vessel, by the orders of Konig & Co., left Sourabaya for Passeroean, to take in the remainder of her cargo, and on the following day she arrived at the latter port; (6) that between

the 29th August and 6th September inclusive there were shipped on board the said vessel at Passeroean 1654 baskets of sugar, the remainder of her cargo, and thus loaded she set sail for Falmouth on 7th September 1877; (7) that though only 923 of the said number of 1654 baskets, shipped as aforesaid between 29th August and 6th September inclusive, had been received on board between 29th and 31st August inclusive, the bill of lading bearing date 31st August, and also bearing that the said quantity of 1654 baskets had been shipped, was signed by the said Edward George, master of the said vessel 'Truth,' and was on that day delivered by him to Konig & Co., who thereupon drew upon the pursuers six bills of exchange for sums amounting in all to £18,146, 19s. 3d., the invoice price of the said cargo of sugar; and on 6th September following, Konig & Co. having negotiated the said bills with the Batavia agency of the Chartered Bank of India Australia, and China, wrote to the pursuers the letter No. 25 of process, transmitting said invoice, intimating that the pursuers had been valued on for the amount by means of the said bills of exchange, and requesting that these should be protected on presentation; (8) that said bills of exchange were in due course presented to the pursuers for acceptance, but the value of sugars having fallen in the market since the date of the contract with Konig & Co., and the pursuers having consequently resolved not to abide by the contract if the condition as to shipment during August 1877 had not been fulfilled, they on 23d October 1877 wrote to the manager of the said Chartered Bank of India, Australia, and China in London, asking to be furnished with 'the date <sup>and</sup> or dates of the bills of lading;' (9) that in answer to this inquiry the pursuers were informed that the dates of the bills of lading were 27th and 31st August 1877, which as aforesaid is the fact; and on the faith of the representation that the cargo had been shipped during August 1877, conveyed by said bills of lading, the pursuers accepted said bills of exchange; (10) that after said bills of exchange had been accepted the sugars were sold by the pursuers, and the purchaser took delivery and paid the agreed-on price upon their arrival in this country; (11) that sugars fell in value after May 1877, when the contract was entered into by the pursuers with Konig & Co., and this depression was still felt in the market when the cargo in question was sold as aforesaid by the pursuers, the consequence being that the loss, reparation of which is sued for in the present action, was sustained by the present pursuers; (12) that the said Edward George had no authority from the defenders, the owners of the said vessel 'Truth,' to sign bills of lading, except the authority which he derived from his appointment as master of the said vessel; and (13) that the said defenders took no benefit from the signing and delivery on 31st August 1877, when only a part of the sugars had been shipped, of the said bill of lading No. 60 of process: Finds, as matters of law, the facts being as above set forth, (1) that the said Edward George, by virtue of his appointment as master of the said vessel, was not authorised to sign and deliver, and did not act as the agent of the defenders the owners of the said vessel in signing and delivering, the said bill of lading dated 31st August 1877, bearing the shipment of sugars

which had not been shipped; and (2) that the defenders are not answerable for the consequences resulting to the pursuers from the signing and the delivering by the said Edward George of the said bill of lading. In the second place, as regards the liability of the defender the said Edward George for the reparation sued for, (1) Holds as repeated the first eleven of the foregoing findings as to matters of fact; and (2) Finds further, as matter of fact, that it has not been proved that the said defender when he signed and delivered the said bill of lading was cognizant of the terms of the contract betwixt the pursuers and König & Co., or that he fraudulently signed said bill of lading for the purpose of deceiving the pursuers, and thereby enabling König & Co. to obtain from them the said bills of exchange for the price of the said cargo of sugar: Finds, as matters of law, the facts being as above set forth, that the defender Edward George is not liable to the pursuers in the reparation sued for: Therefore assolvizes the defenders, the registered owners of the said vessel 'Truth,' and also the defender the said Edward George, master of the said vessel, from the conclusions of the summons, and decerns: Finds the pursuers liable in the expenses of process, allows accounts thereof to be given in, and remits the same when lodged to the Auditor for his taxation and report.

"*Note.*—There is little, if there be any, controversy as to the facts of the case between the pursuers and the defenders the owners of the vessel 'Truth,' so far as these have been found by the Lord Ordinary. The dispute turns upon the law of the case, and the question at issue, as things are viewed by the Lord Ordinary, is, whether the bill of lading No. 60 of process, bearing date 31st August 1877, was signed by the master with the authority or as agent of the said defenders?

"The law upon this subject, it is thought, has been settled by the English case of *Grant v. Norway*, 10 Scott's Common Bench Reports, 665, and by the case of *M'Lean & Hope v. Munck*, decided in the Court of Session June 14, 1867, 5 Macph. 893. The counsel for the pursuers no doubt attempted to distinguish the present case from both of these cases, on the ground that the portion of the cargo which had not been shipped when the bill of lading was signed and delivered was afterwards received on board; but the Lord Ordinary is unable to see how this distinction can create any difference on the legal principle by which the contention must be decided. If the bill of lading, when signed and delivered, was not signed and delivered by authority of the owners, the subsequent reception of the goods falsely represented to have been previously shipped could not confer an authority or create an agency not conferred or created when the bill of lading was signed and delivered.

"As to the case against the defender George, the master of the vessel, the Lord Ordinary has experienced difficulty in coming to a conclusion so far as the facts are concerned. Was he or was he not a party to a fraud in signing and delivering the bill of lading No. 60 of process? If he was, there can, in the opinion of the Lord Ordinary, be little or no doubt that he ought to answer for the consequences which ensued. But if he was not, there appears to the Lord Ordinary to be no ground upon which he can be made to answer for results which were not and which could not have

been anticipated. On the issue of fact the only conclusion which the Lord Ordinary has been able to arrive at is that the alleged fraud has not been proved. That the conduct of this defender was suspicious is certain; but the Lord Ordinary thinks that the case has not been carried by the proof beyond suspicion; and for that reason, and for that reason only, the Lord Ordinary, giving him the benefit of the doubt, has assolvized him also from the conclusions of the summons."

The pursuers reclaimed, and argued—The action was based upon the non-observance of the plain stipulation of the contract that the sugar was for shipment during August. The fact that one-fourth of it was not on board till September was enough. That this was so was clear from the case of *Bowes v. Shand*, June 7, 1877, L.R., 2 H. of L. 455. The right to rescind being clear, it further appeared from the evidence that there had been a conspiracy on the part of the shippers and the master of the vessel to deceive the purchasers. It was not clear when the bills of lading were signed, but in any case they were intended to misrepresent that the cargo was all on board when it was not. In so acting the master bound his owners, who were responsible for his conduct in such a matter. *Cf. Swift v. Winterbotham*, Feb. 1873, 8 L.R., Q.B. 244, 9 L.R., Q.B. 201; *Suire v. Francis*, 1877, L.R., 3 App. Cas. 106; *Mackay v. The Commercial Bank of New Brunswick*, 1874, L.R., 5 P.C. App. 394. *Grant v. Norway*, Feb. 20, 1851, 10 Scott's C.B. Reps. 665, did not apply, because in the present case the whole cargo was subsequently put on board the vessel.

Argued for the respondents Eills and Others—Assuming the fraud of the master, which was not admitted, the owners could not be liable. The case was ruled in this respect by *Grant v. Norway*, 10 Scott's C.B. Reps. 665; *Hubbersty v. Ward*, Jan. 26, 1853, 8 Welsby, Hurl. and Gordon, 330; *Maclean & Hope v. Munck*, June 14, 1862, 5 Macph. 893; *Maclean & Hope v. Fleming*, 9 Macph. (H. of L.) 38, 2 L.R., Scot. App. 128. Further, the case of *Craig & Rose v. Delargy*, July 15, 1879, 16 Scot. Law Rep. 750, ruled that the onerous endorsees of a bill of lading, which the pursuers here were, were subject to the same liabilities in respect of the goods contained in the bills of lading as the shippers. But the shippers here were primarily to blame. The misrepresentation was at their instance. Therefore there could be no recourse by the endorsees against the owners of the vessel. They could not be made answerable for the fault of the shippers. The Bills of Lading Act 1856 (18 and 19 Vict. cap. 3) recognised what was in practice quite common, that such documents were often signed before the goods were actually on board. Besides, the date was not an essential of a bill of lading. There was no authority for such a proposition—*Cf. Bell's Principles*, 418; *Bell's Comms. i.* 590, 214, 215 (*note*). Further, in order to succeed against the owners the pursuers must show that they had been benefited by the alleged misrepresentation. The benefit stated was the payment of the freight. But that would have been earned in any case. The charter party was entered into prior to the dates of the bills of lading. Besides, it was not proved that the master had any knowledge of the terms of the contract between the sellers and pur-

chasers That was necessary for the pursuers' success.

Argued for the respondent George—The fact that the cargo was not all on board in August did not entitle the purchasers to rescind the cargo. It might entitle them to an action for any damage they might qualify, but no further. Such a stipulation must be substantially performed. But no more was required—Bell's Comms. i. 602; Benjamin on Sale, 450; *Davidson v. Gwynne*, 12 East's Repts. 381; *Constable v. Cloberie*, Palmer's Repts. 397; *Hall v. Cazenove*, 4 East's Repts. 484; *Tennent v. Carmichael*, Feb. 16, 1843, 5 D. 639. The case of *Bowes v. Shand* was special. The ground of judgment there was to be found in Lord Blackburn's opinion (p. 483). The contract was for a purchase of goods for a March <sup>and</sup> or April shipment. The fact was that the whole cargo with the exception of a very small portion was put on board in February. The shipment was a February one. There was also evidence that a strict adherence to the stipulation as to shipment was of materiality to the purchasers. It was not so in the present case. It was only a fourth of the cargo which was not on board here till September. The contract has been substantially performed. Besides, it had not been shown that the fact that the cargo should all have been shipped in August was of importance to the purchasers. Further, there was no evidence that the master had been guilty of any misrepresentation—the bills had been presented signed to him, and his explanation that he signed to oblige the shippers who had given him despatch was quite natural. Besides, the cargo was then constructively on board the vessel, because it was in lighters on the shore or by the side of the ship. That was proved.

At advising—

LOED SHAND—This is an action at the instance of Messrs Walter Grieve, Son, & Co., merchants at Greenock, who claim damages to the extent of £5000, and it is directed against three parties who are said to be jointly and severally liable. These parties are (1) Messrs Konig & Co., merchants at Sourabaya, the sellers of a cargo of sugar sent by them to this country; (2) Edward George, master of the vessel "Truth," in which the cargo was brought home; and (3) John Eills and others, residing in Liverpool and other towns in England, the owners of the vessel. The claim against these parties is rested to some extent on different grounds. The case against the sellers, Konig & Co., is maintained on the ground of breach of contract on their part, the contract being to the effect that they should supply a cargo of sugar to be wholly shipped in August; whereas it is alleged that the sugar was not wholly so shipped, and that the sellers are not therefore entitled to enforce the contract. There is also a separate ground of claim against the sellers, viz., that they made a fraudulent representation to the pursuers that the cargo had been so shipped, and induced them to accept the bills of lading, which they would not otherwise have done. The case against the master is rested entirely on the alleged fraudulent representation contained in the bills of lading dated 27th and 31st August, for the full cargo, which it is alleged he signed, while a portion of the cargo

had not actually been shipped. And as against the owners it is said they are responsible for the master's misrepresentation.

The contract under which the sugar was bought and sold was dated 8th May 1877. It was signed by Messrs Drake & Co., the brokers for Messrs Grieve & Co. and Messrs Konig & Co., and it provided that from 500 to 700 tons of Java sugar should be shipped during the month of August. As to payment of the price it was provided— "Buyers undertake to accept sellers' drafts for invoice amount (without any interest or discount) at six months' sight payable in London with B/Ls' attached thereto, said B/Ls' to be delivered up on payment of drafts." The terms of the contract as to shipment in August are also referred to in a credit-letter of date 26th May 1877, written by the pursuer in favours of Konig & Co., in which the latter are authorised to "draw upon us in draft or drafts, at a term of six months after sight, payable in London, for full invoice amount of 500/700 tons sugar. The drafts to be accompanied by duly hypothecated bills of lading; and we do hereby engage with the *bona fide* holders and endorsers of all drafts drawn, in terms of this credit, to accept the same on presentation, and pay the amounts thereof at maturity, we, however, to have the right of taking up said drafts and documents before maturity under discount at Bank of England rate at the time of payment. We further engage to duly provide the needful marine insurance, and to deposit the policies with the holders of the drafts and bills of lading so soon as the declarations have been effected. This credit to remain in force till first October next, the shipment against which to be made in August." Thus, both in the letter of credit and in the contract of sale the stipulation was made applicable to an August shipment. The contract having been concluded, Konig & Co. arranged for the charter of a vessel, and the next matter of importance in the case is a letter from them to the pursuers on 6th September 1877, in which they say—"We beg to refer you to our letter of the 16th ulto., and have now the pleasure of handing you invoice of our shipment p. 'Truth,' comprising 2886 baskets sugar, averaging No. 14½, and amounting to £18,146, 19s. 3d., minus freight. Against this amount we have made free to value on you, in terms with your letter of credit dated 26th May 1877, as follows:— . . . which drafts please protect on presentation. The documents, viz., bills-lgd. and charter-party accompany the drafts, which we have negotiated with the Chartered Bank of India, Australia, and China, Batavia agency." It appears that when this letter was received (say about 21st or 22d October) Grieve & Co. had a suspicion that the cargo had not been wholly shipped in August as stipulated, and before accepting the bills in the hands of the bankers they made some inquiry. Accordingly, we have the banker's letter to them of 23d October—"I beg to enclose the 6 undermentioned drafts on you for acceptance and return L/a attached. Be good enough to forward at same time policy of insurance covering Nos. 11302/7 as per enclosed order." And in reply Messrs Grieve & Co. say on the 24th—"We are in receipt of yours of yesterday. Before returning the drafts accepted please furnish us with the date <sup>and</sup> or dates of the bills of lading." To this letter we have the

bank's reply on the 25th stating "that the bills of lading referred to are dated 27th and 31st August." It appears satisfactorily enough on the evidence that the object of Grieve & Co. was to ascertain whether the bills showed any shipment during September, and if the bills had done so they say they would have repudiated the cargo altogether. The price of sugar had been falling steadily, and it would have been their interest to do so. But as they were informed that the bills of lading were dated in August, which inferred an entire August shipment, they were obliged under their contract to accept the bills, and accordingly they did so, and returned them to the bankers. This was in the end of October. The vessel meantime was on her voyage, and was reported at Falmouth on 9th December. Messrs Grieve & Co. sold the sugar on the 22d, and ordered the vessel to the Clyde for delivery of the cargo to the purchasers, and it is distinctly enough proved, on the evidence of Mr Thorburn, one of the pursuers' firm, that they sustained a loss on the sale of quite £5000. The pursuers say—and it is established by the proof—that having had the suspicions to which I have referred, they inspected the log on the vessel's arrival, and found that a portion of the cargo had been shipped between the 1st and 5th of September, and the proof shows conclusively that over 700 baskets (or about one-fourth of the whole cargo) had been shipped at Passeroean between these days. The bills of lading, of which the first is signed at Sourabaya on 27th August, and the second at Passeroean on 31st August, are in effect false—at least the latter of them—as to the date at which the cargo was actually shipped.

The pursuers give no direct evidence showing the importance to them of an August shipment rather than a shipment running for a few days into September. It is not said that by the stipulation they secured any particular kind of sugar, or any advantage in quality or otherwise. The only indication of a reason is given by Mr Grieve when he says—"I think it would have sold for more money if I could have offered it, which I was not in a position to do, as having sailed in August"—that is, he would have got the sugar home somewhat earlier. But though the importance of the stipulation is not very clearly brought out, we must assume, that as the stipulation itself is clear, and the pursuers had made it a condition of their taking the cargo, they would have had a right to repudiate the shipment had they been aware that a substantial part of it was not made till September. To this point, indeed, Messrs König & Co. can make no defence. They did not implement their contract, and they substantially represented what they knew was not the fact. On both these grounds they have no defence. I understand decree is to pass against them in absence, but as they have become bankrupt the pursuers will be unable to make good any proportion of the damages claimed. As regards the other defenders, it is said that the captain's act induced the acceptance of the bills for the price of the cargo, and so he is responsible for the damage sustained. As to the proof of damage, the Lord Ordinary says in his 11th finding—[reads]. If I thought it had been established that there was a claim for damages against the defenders, I should have great doubt whether

any sum had been proved for which decree could be given. The complaint of the pursuers is that they lost their opportunity of repudiating the cargo, which they could have done on October 25, and it may be assumed that if we can trace the loss of that opportunity directly to the false and fraudulent representation made by Captain George, they would have a claim for damages against him; but it seems to me that a claim of that kind would have had reference to the fall of price as at 25th October, or shortly after that date. It appears the pursuers so far speculated on the chance of a future market by holding on. Knowing there was a falling market, they elected to retain the sugar for two months after, and my doubt is whether they are entitled to throw on either of the defenders here the fall of prices, which appears to have been steady and consistent, between 25th October and 22d December, when the cargo was sold. I doubt much whether we have before us in the proof the elements for giving effect to the pursuers' claim, for the only evidence as to the market prices of sugar is to be gathered from the result of the sale on 22d Dec. There is no evidence of the prices which could have been got between October 25th and that date, while it appears to me the claim should be measured by the price at or about the former date.

But assuming that the claim for damages is relevantly proved (which I very much doubt), has it been proved that Captain George was guilty of fraudulent misrepresentation? On this subject the only evidence is to be found in the depositions of the mate and steward of the vessel, which were taken on commission, and the examination of George himself before the Lord Ordinary. The Lord Ordinary, who saw the captain and had an opportunity of testing his credibility by personal examination, has come to the conclusion that it has not been proved that he was guilty of fraudulent misrepresentation, and I am not prepared to differ from his Lordship. On the contrary, I agree with his Lordship that the pursuers have failed to prove what is the basis of their whole claim—that the captain was guilty of fraudulent misrepresentation.

The case of the pursuers on record, if established, would have been a clear case of fraud. They aver in condescence 6—"The defender George was in the knowledge of the contract between the pursuers and the defenders König & Co., and, in particular, he knew the provisions of the said contract with reference to the time of shipment of the said sugar. He also knew that the bills of lading were made, contrary to the fact, to set forth shipment in August in order to conceal from the pursuers that shipment had not been made till September. He signed the bills of lading fraudulently in that knowledge, and his owners have benefited by the fraud." If this had been proved, the captain would have been substantially in the same position as König & Co., but I am of opinion that the pursuers have failed to make out this averment by the proof. There is no evidence that a stipulation such as we have here, for an August shipment, is usual or known in the sugar trade, or that there was any obvious advantage in having a shipment entirely in August rather than one running for a few days into September. Unless the knowledge of this term of the contract were directly brought

home to the captain, there is no reason to suppose that he was aware that it was deemed important by the buyers of the cargo that it should be wholly shipped in August. Indeed, so far as I can see, it is not proved that the captain knew that the cargo had been sold to anyone in this country at all. He might reasonably suppose that the cargo was being sent off for sale on arrival. As to the actual fact with regard to the bill of lading dated 31st August, it must be observed that the date is not in the handwriting of the captain. He says he was asked to sign it, though his full cargo was not yet on board, and that he yielded because the shippers had been giving him every despatch they could; he understood the cargo was practically under his control either on board of lighters or only waiting to be taken off shore; and that the shippers were anxious to have the signed bills of lading in order to avoid losing a post to this country. The captain says he thought he was doing the owners a favour, and in cross-examination he says—"I don't know what favour I was doing them further than that the mail was on the point of leaving." He further says—"I was running no additional risk when they wanted to forward the bills home and to make room for another ship. If I had refused to sign, they might have kept me there all my lay-days." The bill of lading was delivered on being signed. It was sent from Passeroean to Sourabaya, and apparently reached the latter place only in time to catch a mail leaving on 6th September 1877, by which it was sent to this country. Again, he explains that while he did sign for the full cargo, although it was not then on board, he thought he was entitled to do so, as it was all afloat in lighters at the time.

Then, again, the captain explains, while he had signed this last bill of lading, I think either on the 1st or 3d of September, that although the cargo was not actually on board, he considered it was really under his control, because it was afloat and in lighters. I am not prepared to say that this has been proved. I think it was to some extent afloat and in lighters, but not to the full extent. Taking the evidence, however, as we have it as a whole, I am not prepared to say it is proved that the captain acted fraudulently in signing the bill of lading. If it be assumed that the captain was not aware of the contract of sale and the stipulation for an August shipment, the date of the bills of lading would not be a matter of importance in his view. There is one fact certainly not unimportant against the captain—I mean the fact that after having signed the bill of lading he asked the mate to make the log-book correspond with what he had done, but he explains that he thought this proper because it was consistent with his view that the cargo was all afloat. The mate's evidence no doubt to some extent creates a suspicion against the captain; on the other hand, he and the captain do not appear to have been on good terms, and it shakes one's confidence in the mate's testimony when we find he says that although the captain begged him to state that the cargo was afloat in the log-book, and he declined, yet when we look at the book it appears that he did record that the cargo was afloat, and it may fairly be said that this shows that he as well as the captain did think the whole cargo was on board of lighters. It appears to me, as it did to the Lord Ordinary,

that in a case of this kind it is incumbent upon the pursuers, by evidence which leaves no reasonable doubt upon one's mind, to prove that a false and fraudulent representation was made, and this the evidence does not instruct. I agree with the Lord Ordinary in thinking it is not proved that the captain was guilty of fraudulent misrepresentation at the time that he signed the bill of lading.

Then as to the owners. As the case falls against the captain in point of fact, so also it falls against the owners. No claim can be insisted in against them unless it be proved that the captain was guilty of fraud; but even if the fraud of the captain were made out in giving a false statement in the bill of lading, I am further of opinion with the Lord Ordinary that it does not follow that there would be liability against the owners. The purpose of a bill of lading is to give a receipt for the goods, and an undertaking to deliver them, and it has been settled by the highest authorities both in England and in this country that the captain has no mandate to bind the owners for goods which he has not received. Accordingly, taking the act of the captain when he signed the bill of lading, the owners were not bound by it. For any goods that were subsequently delivered to him they would no doubt be bound by the act of their captain in receiving them. It is not within the scope of the mandate of a captain to bind his owners for goods of which he has obtained delivery, and it appears to me to be equally beyond his authority to bind them by a representation that all the cargo had been shipped, when in point of fact it was not so. They would not be bound to answer for an obligation to deliver cargo which he had not received. And I think it follows that they were not bound to make good his false representation, for that representation was not made by the authority which the owners had given him. That appears to me to be sufficient for the decision of the legal question with the owners, even if it had been proved that the captain was guilty of the fraud charged. I am not satisfied that, even if the whole of the cargo had been on board, and the bill of lading had been signed on 6th September, but antedated to 31st August, there would have been a case against the owners.

The date of a bill of lading is very useful and convenient, and may be important as evidence in regard to questions arising as to the shipment of the cargo. But I do not think that the date upon a bill of lading is essential to the document. The essentials are a receipt for the goods and an undertaking to deliver. The date is really in the ordinary case entirely immaterial, and if a captain in an immaterial part of the document makes a false representation, I am not prepared to say that his act in doing so will bind his owners. It is not like the case referred to in the argument for the pursuers, of the manager of a bank or other official conducting a large business for his employers, and having very extensive powers, whose official acts will bind the bank. The captain has a limited duty to perform in the navigation of the ship and the receipt and delivery of the cargo, including in that the signing of bills of lading, and there can be no doubt that he binds his owners to deliver the cargo. But where he takes upon himself, not in an essential part of the bill of lading, to make an untrue representation as to the date on which

he received the cargo, I am not prepared to say that the owners are bound to make good that representation although false and fraudulent. Upon these grounds, I am of opinion that the interlocutor of the Lord Ordinary ought to be affirmed.

LORD PRESIDENT—I agree with Lord Shand. The contract between the pursuers and Konig & Co. was made in London on 8th May 1877, and the agent of Messrs Konig thereby sold a quantity of sugar of the kind specified in the sale-note, and it was expressly provided that shipment was “to be made during August next by first-class sailing vessel (of neutral flag at the time of shipment), chartered to call off English coast for orders for any safe U.K. Port, and with usual continental options,” &c. This left the chartering of a vessel in the hands of Konig & Co., in Batavia, and they accordingly proceeded to enter into a contract of charter-party with the defender George, the captain of the “Truth.” It must be observed that neither the captain nor the owners of the vessel had any knowledge of the terms of the contract of sale between Konig & Co. and the pursuers. They would not naturally in the course of their dealings have any such knowledge. It might possibly have been proved that George was aware of the conditions of sale, but this has not been done, and there is no reason to suppose that he knew any more than the owners did what was the contract Konig & Co. had made. In the charter-party dated 27th May 1877 there is no mention at all of the pursuers or of anyone else as the purchasers of this cargo, and there is nothing to indicate that the cargo was being shipped in answer to an order from a merchant in this country. It is merely disclosed that Konig & Co. desire to send home a cargo of sugar to a port in the United Kingdom or to some port on the north of France; the consignee named is not Walter Grieve & Co., but the “charterers’ agents at loading ports,” and at the end of the charter-party the London agent is specified, whose orders the master was bound to take on arrival at Falmouth or elsewhere. He knew nothing of anyone else who had obtained a prior right to the cargo. So, again, in the bills of lading there is no mention of Grieve & Co. The bills are just an echo of the charter-party. The way in which the pursuers obtained a title to this cargo was by endorsement of the bills of lading, and with this the master and the owners had nothing to do. The only understanding by them was to take and carry the cargo to a port in the United Kingdom, and to deliver it to the charterers’ agents.

This being so, it occurs to one to ask whether the master and the owners have not performed every obligation imposed upon them? and I answer that they have done so. They have taken on board the cargo tendered in due time, carried it to this country, and delivered it, not to the charterers’ agents, but, as they were bound to do, to the endorsees of the bills of lading, of whom they came to know for the first time when the cargo was ready for delivery at the port of landing. So, as far as the contract of charter-party goes, these parties stand free from bad faith.

The misrepresentation consists in the master having dated or allowed to be dated the

second bill of lading at a time when the whole of the cargo was not on board. It may be that that was important as affecting the interests of the undisclosed and unknown contractors with Konig & Co., but as a general rule the date of bills of lading is a matter of small consequence. The date is not an essential to such a bill, though it is a useful adjunct, and I should very much doubt whether a bill of lading would be held bad if it were without a date. In the general case it is quite immaterial if a bill of lading be ante-dated or post-dated, and it would require very strong evidence to convict the master of fraud in allowing the untrue date to be put on. He knew nothing of the terms of the contract of sale or of the importance of the date in this case. He did it to oblige the shipper, with whom he seems to have been on very good terms, and in the absence of any knowledge that the date was a matter of importance in the circumstances. I think it would require very strong and pregnant proof to bring this up to a case of fraud against the master, and I think that on the evidence no such case has been made out.

But supposing it were otherwise, and that the master had known of the contract of sale, and had put the date on the bill of lading in order to deceive the purchasers of the cargo, would that act of his bind the owners? I think it would not. The mandate of a master is confined to pretty well-known limits—he has charge of the navigation of the ship, control of the crew, and power to enter into certain contracts—one of which is a charter-party—and in fulfilment of that charter-party he may issue bills of lading, which are just receipts for the cargo shipped in terms of the charter-party, and if in the conduct of these functions he commits a fraud so as to deceive, it may be that the owner is answerable, for there the master is within the scope of his authority, and if he does it for a fraudulent purpose, that may be a fraud for which the owner is liable. But how can the owner be liable for an act which no owner could foresee, or which, had he known of it, he would have considered utterly immaterial? I think this case is a *fortiori* of the cases of *M’Lean & Hope v. Munck* and of *Grant v. Norway*.

On both grounds, therefore, I concur with Lord Shand.

LORD DEAS—I have fully and carefully considered the whole case, and the evidence led, and I am of opinion that fraudulent conduct on the part of the captain has not been proved. I think the circumstances are such as to create strong suspicion against him, but suspicion in a case of fraud is not proof. Being of that opinion as to the proof against the captain, I do not think it is necessary to express any opinion as to what would have been the consequences in a question with the owners if the fraud on his part had been proved.

LORD MURE was absent.

The Court adhered, the case being remitted to the Lord Ordinary in order that decree in absence might be pronounced against the defenders Konig & Co.



Counsel for Pursuers (Reclaimers)—Balfour—M'Kechnie. Agents—J. & J. Galletly, S.S.C.

Counsel for Defender (Respondent) Edward George—Pearson. Agents—J. & J. Patten, W.S.

Counsel for Defenders (Respondents) John Eills and Others—Asher—Patten. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, January 24.

## FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—  
(WRIGHT'S CASE)—WRIGHT AND AN-  
OTHER (WRIGHT'S EXECUTORS) v.  
THE LIQUIDATORS.

*Husband and Wife—Donation—Revocation—  
Public Company—Liability of Husband's Exe-  
cutors where he Died without Revoking Gift  
of Shares to his Wife.*

A wife without the knowledge of her husband had invested part of a legacy, which was left to her without the exclusion of the *jus mariti* or right of administration, in the stock of an unlimited banking company. The husband afterwards came to know that the investment had been made, but did nothing to repudiate it. After his death the bank failed. His name had never been on the register of members, but it was sought to place the names of his executors on the list of contributories. Held that on the facts as proved the husband intended to make a donation of the legacy to his wife, and that as he died without revoking this donation his wife only was liable as a contributory.

*Donation—Proof.*

Observed that donation, whether to a wife or to anyone else, may be proved by parole.

*Public Company—Husband and Wife—Where Consent of Husband to Wife's Acts not Given.*

*Question*—Whether a company, registered under the Companies Act of 1862, which knows that it is transacting with a married woman as a shareholder, but takes no steps to get the husband's consent to the wife's acts, is entitled to have the husband made liable as a contributory?

This was a petition by the executors of the late Hugh Wright, planter, Surinam, to have his name removed from the first part of the list of contributories of the City of Glasgow Bank, on which it was placed "in respect of the holding of stock of Mrs Frances Wright, his wife," the amount of the holding being £306. His name was not on the register when the bank failed, but was placed on the list of contributories in the following circumstances:—

Mr Wright was married in 1847 to Miss Frances M'Leod. Shortly after his marriage he left for Surinam, where he resided till his death, returning to this country only for occasional visits. He became a naturalised subject of the Kingdom of the Netherlands, and was domiciled at Paramaribo, in Surinam. Mrs

Wright never went to Surinam, but continued to reside in this country. She was a daughter of Mr Hugh M'Leod, who was also domiciled in Surinam, where he died in the year 1843, and under whose will or settlement she was entitled to a provision of £3000, which had been paid to her prior to the date of her marriage. In her father's will there was no exclusion of the *jus mariti* or right of administration of any husband she might marry; and there was no antenuptial contract of marriage between her and Mr Wright; but it was admitted that after he left for Surinam Mr Wright "did not intronit or interfere with the means to which, prior to her marriage, his wife had succeeded under her father's settlement, but allowed her to deal with the same and the income thereof as she saw fit. With part thereof she erected a house in Blackford Road, Edinburgh, the title to which was taken to herself in liferent, exclusive of her husband's *jus mariti* and right of administration, and to her children, born or to be born (certain children then existing being named) in fee, but with a reserved power of sale to herself, which power she exercised in 1877, her husband, at the request of the purchaser, concurring in signing the disposition in favour of the purchaser, and the price being received by her, and expended partly in the erection of another house, and partly in paying the first call upon the City of Glasgow Bank stock after mentioned."

It was further admitted "that in the year 1850 the petitioner Mrs Wright, without the knowledge of her husband, and during his absence in Surinam, purchased from Mr Samuel Easton, of No. 16 Montrose Street, Glasgow, twenty-four shares of £10 each of the capital stock of the said bank, and paid for the same out of the money which had been left to her by her father, and that she was thereafter entered as proprietrix of the said shares in the books of the bank in the following terms:—'Mrs Frances M'Leod or Wright, residing in Edinburgh, wife of Hugh Wright, planter, Surinam.' That in the year 1851 the said petitioner, without the knowledge of her husband, and during his absence in Surinam, purchased ten additional shares of £10 each of the said capital stock, and paid for the same out of the money left to her by her father as aforesaid, and the said purchase was thereafter entered as an additional item in the same account in the books of the bank." [The shares of the bank were in 1860 converted into stock, Mrs Wright's proportion of stock being £306.] "Mr Wright never interfered with the said stock, and, except as above mentioned, his name does not appear on the register of shareholders; and the dividend-warrants were issued in favour of Mrs Wright alone, and the dividends were paid to herself on her own sole receipt, and were used by her as she saw fit, along with the income of the rest of the funds that came from her father's estate, for the maintenance of herself and children, to which her husband also contributed. Mrs Wright and her children occupied the house in Edinburgh mentioned in the petition till it was sold in 1877.

"Some years after the date of the second purchase, when Mr Wright was on a visit to this country, Mrs Wright informed him of the said purchases of City of Glasgow Bank stock. On his return to Surinam he wrote condemning in