

Tuesday, July 20.

OUTER HOUSE.

[Lord Kincairney.

WALKER & WATSON v. STURROCK.

*Pledge—Negotiable Instrument—Pledge of Stolen Bonds — Title of Bona fide Holder for Value.*

The *bona fide* and onerous transferee of a negotiable bond from a person who has stolen it acquires a good title, and the mere fact that the person from whom the bond was stolen accidentally reobtains possession of it does not entitle him to keep it in a question with the transferee.

A stole certain negotiable bonds from B, who was joint-agent with him at a bank, and pledged them with a broker, who made advances upon them in good faith, and without any reason for suspecting that they were not the property of the pledger. A afterwards sent a cheque to the broker for the amount due to him, and requested the return of the bonds. They were returned in a letter addressed to A at the bank, but before their arrival A had absconded, and his cheque had been presented and dishonoured. On the letter containing the bonds arriving at the bank it was opened by B, who was then aware that A had absconded and that his cheque had been dishonoured. B recognised the bonds stolen from him by their numbers, and claimed a right to keep them without satisfying the debt for which A had pledged them with the broker. In a question between them, *held (per Lord Kincairney, Ordinary)* (1) that the broker obtained a good title to the bonds; (2) that he did not give up this title by accepting a cheque from A and posting the bonds to him; (3) that the fact that B had accidentally obtained possession of the bonds gave him no title to keep them; and (4) apart from this, that B could not in any event have claimed to be a *bona fide* holder of the bonds, as the circumstances under which he reobtained them were such as should have led him to suspect the fraud practised by A upon the broker.

The pursuers in this case, J. D. Walker & Watson, stockbrokers, Edinburgh, sued Peter Sturrock, agent of the British Linen Company Bank at Kilmarnock, for delivery of six bearer bonds, issued by the Republic of Uruguay, or otherwise for payment of £400. The circumstances of the case are fully detailed in the opinion of the Lord Ordinary.

On 20th July 1897 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds (1) that the pursuers acquired a valid and effectual title to the bonds in question in this action, to be held by them against their advances to Arthur Sturrock mentioned in the record; (2) that

the right was not lost by the transmission of the said bonds to the address of the said Arthur Sturrock; (3) that the defender was and is not entitled to retain the said bonds as belonging to him in disregard of the pursuers' title thereto: Therefore repels the pleas-in-law for the defender, and decerns in the pursuers' favour in terms of the primary conclusions of the summons," &c.

*Opinion.*—"This case relates to certain Uruguay bonds which are claimed by both parties. They are agreed that the bonds are negotiable documents, the property in which is passed by delivery. The legal question involved is novel and difficult, but the facts—at least the important facts—are satisfactorily ascertained.

"The defender and his son Arthur Sturrock were joint agents of the British Linen Bank at Kilmarnock. The management was chiefly in the hands of the son Arthur Sturrock, whose house and the office in which he carried on business as a law-agent, formed part of the bank buildings. In the course of the year 1895 Arthur Sturrock became financially much embarrassed in consequence of unsuccessful speculations, and his father (the defender) advanced above £14,000 to enable him to clear his feet, as the defender expresses it. As the defender was not in a position to pay the whole of this sum without disturbing his investments more than he thought desirable, he arranged for a loan of £5100 from the British Linen Company Bank, and he deposited certain securities belonging to him with the bank, and among others the Uruguay bonds now in question. They were placed in a safe in the bank, which could not be opened except by the use of two keys, one of which was in the possession of Arthur Sturrock as agent, and the other in the hands of the teller. That precaution proved, as might have been expected, futile, for on or about August 1896 Arthur Sturrock borrowed the teller's key and abstracted the Uruguay bonds from the bank safe.

"At that time Arthur Sturrock was continuing his speculations, which he had promised to his father to abandon. In these speculations he had employed the pursuers as his brokers, and in August 1896 he was in their debt. On 10th August they wrote asking payment of the balance due, and he, in answer on 11th August, sent them among other securities the Uruguay bonds. The letter only says that they were sent 'against my balance.' On 12th August the pursuers acknowledged receipt of the securities, and stated that they were lodg- ing them with their bankers against loan of £570 with which we credit your account."

"There is no doubt that the pursuers received these securities in perfect *bona fides*, and without any suspicion or reason for suspicion that they did not belong to Arthur Sturrock.

"Matters continued on that footing until 19th October 1896, when the pursuers wrote Arthur Sturrock requesting payment of the balance due at that date. It happened

that on Wednesday, 21st October, the witness Mr Shepherd, who belonged to the inspector's department of the British Linen Company Bank, arrived at Kilmarnock, in order to make the annual inspection of the branch bank. It was his duty on making that inspection to examine the securities held by the bank, and it was, I suppose, clear that in doing so he would discover that the Uruguay bonds, if not replaced, were amissing.

"In that position of matters Arthur Sturrock on Thursday, 22nd October, wrote the pursuers as follows:—'I note you desire payment of balance. I enclose cheque for £400, against which please return in course £1000 Uruguay bonds held. As I may be from home on Saturday and Sunday please wire "all right" to-morrow and I will leave instructions.' When this letter was written, Mr Shepherd, although making his inspection of the bank, had not examined the securities.

"On Friday, 23rd October, the pursuers replied as follows:—'We are in receipt of your favour of yesterday enclosing cheque value £400 which we place to your credit. As instructed, we now send you £1000 Uruguay bonds. We wired you this morning as requested.'

"The bonds were not sent along with this letter, but were sent in a separate registered letter.

"These letters were both addressed to Arthur Sturrock, British Linen Bank, Kilmarnock.

"The telegram with the words 'all right' reached Kilmarnock at 11:23 on Friday the 23rd October, but I do not think it appears clearly whether Arthur Sturrock received it. The pursuers then passed Arthur Sturrock's cheque through their bank in Edinburgh.

"On the same day, Friday, 23rd October, Mr Shepherd was about to proceed to examine the securities in the bank safe, and had got the keys for that purpose, when Arthur Sturrock left the bank saying that he would return in about half-an-hour. But he never did return, and it was afterwards found out that he had absconded. Mr Shepherd on examining the safe discovered that the bonds in question, along with other securities, were amissing.

"On the morning of Saturday the 24th of October the defender and Mr Shepherd met at the bank, when the pursuer's letter above quoted arrived, and also the registered letter enclosing the bonds and Arthur Sturrock's cheque for £400. The order in which they arrived is not proved very clearly or certainly; on that point the best evidence is that of Mr Shepherd, who says that the letter came first, then the bonds, and lastly the cheque (there being two morning deliveries). The defender opened the letter although it was addressed, not to him, but to Arthur Sturrock. He deposes that he opened it as joint bank-agent, and as representing his son. He says that on reading the letter he did not connect the cheque for £400 with the return of the Uruguay bonds. In like manner, and on the same grounds, he opened the regis-

tered letter which contained the bonds, and it appears that he directed the teller, Mr Montgomery, to sign the slip acknowledging receipt of the bonds, which Mr Montgomery did 'p. Arthur Sturrock.' Thereafter, as I think, the cheque for £400 arrived. But it is important to note that there also arrived another cheque by Arthur Sturrock for £4600, and that these cheques were dishonoured. Arthur Sturrock's account was at the time overdrawn by about £170—but he had a cash-credit for £500. It has been deponed that the cheques were dishonoured in the ordinary course of banking business; and of course the dishonour of the cheque for £4600 was quite inevitable and must have been foreseen by Arthur Sturrock.

"Having in view that the letters were addressed to Arthur Sturrock, British Linen Bank, Kilmarnock, and not to the Bank Buildings, I think there is no good reason for questioning the motive or the right of the defender to open these letters.

"Having opened them, he recognised his own bonds, and he says that he handed them to Mr Shepherd and asked him to replace them in the bank safe. Mr Shepherd did so, and thus they are there still. The advances to the defender, on security of which the bonds were deposited, had not been fully paid, but it has been paid since.

"These appear to me to be the whole material facts on which the question of law depends. When the pursuers received notice that Arthur Sturrock's cheque had been dishonoured, one of them, Mr Watson, went to Kilmarnock to make inquiry. He has given evidence, but I do not see that his evidence adds any material fact to these above stated. It may be that there is some discrepancy between his evidence and that of the defender as to what the defender said at the interview between them. But I do not think there is anything material in this difference. Every allowance must be made for the distress and mental disturbance of the defender, and a perfectly exact recollection of all that took place and was said at that interview was not to be expected. Still, as I have said, I think there is no discrepancy which requires special notice.

"In these circumstances the pursuers now claim their bonds; and, on the other hand, the defender claims them as being his own property, as undoubtedly they had been before his son abstracted them.

"There seems no doubt that the bonds were stolen from the bank safe by Arthur Sturrock, and if in consequence a *vitium reale*, which generally attends stolen property, attached to them, then no doubt the defender would be entitled to claim his property and to succeed in the action. But I am of opinion that no *vitium reale* attached to them. It has been decided that no *vitium reale* attaches to bank notes or to a bill blank endorsed, and he who receives, either for value and in good faith, is entitled to retain it although it has been stolen.—*Crauford v. Royal Bank*, February 24, 1749, M. 875; *Scott v. Kilmarnock Bank*, February 27, 1812, F.C. I am not aware of

any case in the Scottish courts deciding expressly that documents such as the Uruguay bonds fall under the same exception to the general rule. I think, however, there is no doubt that, according to our law as well as the law of England, a *bona fide* holder for value of negotiable instruments obtains a good title independent of the title of the person from whom he takes—Smith's Leading Cases, i. 462, and that the Uruguay bonds fall under that rule. Neither does it signify whether the title of the *bona fide* holder for value in an absolute title or only a title in security. The whole law on the subject is discussed at length in the very important case of *The London Joint-Stock Bank v. Simmons*, 1892, App. Cas. 201, Smith's Leading Cases, i. 471, which related to negotiable instruments, conveyed or deposited in security. It is true that in that case the general principle that an onerous *bona fide* holder for value of a negotiable document had a good title was assumed as clearly-settled law, and that the question was about the *bona fides* of the holder, and as to the bearing of the fact that the person depositing the documents was a broker, as tending to induce a suspicion as to his title.

“In the present case, however, no question is raised as to the *bona fides* of the pursuers, and I am of opinion that the title acquired by the pursuers was just as good as if the bonds had truly belonged to Arthur Sturrock. If that was the nature of the pursuers' right, it was a right which the defender was legally bound to respect just as much as anyone else was bound to respect it. The defender's right had not been lost absolutely as it would have been had the bonds been sold to the pursuers, but it had become subject to the prior right of the pursuers. It is clear, I think, that the defender could not have gone to the pursuers' office and taken away the bonds if he found them. That would, I apprehend, have been an act of theft, and if the pursuers had lost the bonds and the defender had found them and ascertained the facts, he would have been as much bound to restore them to the pursuers as any other finder would have been. All that follows from the principle that the title of a *bona fide* onerous holder of negotiable instruments is independent of the title of the person from whom he receives them.

“The question then is, whether the pursuers' title was invalidated by what followed. I have come to think it was not. In the first place, I think that when Arthur Sturrock sent his cheque and asked the bonds in exchange he committed a fraud. I think he knew that his cheque would be dishonoured. I do not say that that is a certainty, but it is my deduction from the evidence; and coming to that conclusion, I am much influenced by the fact that Arthur Sturrock drew at the same time a cheque for £4600, and it cannot be imagined that he supposed that that would be honoured. That, however, may not be conclusive, because the question here is not about the fraud of Arthur Sturrock. However fraudulent he may have been, his fraud

would not affect the right of any person who might have received the bonds from him in good faith. But it would be important if the defender knew or suspected or should have known or suspected the fraud when the pursuers sent back the bonds. Further, I consider that that did not imply that they accepted the cheque as if it were money in exchange for the bonds. A dishonoured cheque is not payment—Bell's Pr. 127; *Macdougall v. M'Nab*, November 21, 1893, 21 R. 144. I think that the bonds were only meant to be restored on the condition that the cheque was cashed. It may be that if Arthur Sturrock had received them and had restored them to the bank safe or to the defender, the title of the bank and of the defender might possibly have been good if Arthur Sturrock's fraud was unknown to them, although I greatly doubt it. But the defender, however, would in that case have been able to appeal to *The London and County Bank v. The River Plate Bank*, 1888, 21 Q.B.D. 535, which would have been almost in point, for which reason I think it necessary to mention that case. But I do not think it necessary to do more, for I confess to feel great difficulty in appreciating the reasons for that judgment, which appear to be far fetched and strained; so much so that I should have great difficulty in following it.

“But then that did not happen. The defender did not receive the bonds from Arthur Sturrock. In fact the bonds have never been delivered to Arthur Sturrock at all. They did not reach him. Posting them at Edinburgh to his address was not equivalent to delivery to him. See *White & Company v. Tennant*, June 23, 1891, 18 R. 986. If, then, they were not delivered to Arthur Sturrock, it seems to me that the pursuers had done nothing to alter their right to the bonds, and it was necessarily the same right when they arrived at Kilmarnock as it had been when they were in the pursuers' office in Edinburgh. If that be so, then the real fact appears to be that the defender simply accidentally found the bonds. No doubt they were found in the bank office. But the place where they were found makes no difference. I think the defender was equally bound to restore them as if he had found them anywhere else.

“Further, if there was nothing in the sending of these bonds which derogated from the pursuers' title, so long as they were not delivered to the person to whom they were sent, I think that nothing happened which gave the defender a right or improved his right. The defender's original right was insufficient to compete with the right of the pursuers. That had been so far destroyed, and I cannot see that the defender had anything but his original right to rely on.

“Still further, the rule as well ascertained in England, and as expounded in the case of *The London Joint-Stock Bank v. Simmons*, is not that a receiver of stolen negotiable property has always a good title, but only that his title will be good if he receive the stolen property in *bona fides*.

The law on this point is elaborately discussed in Smith's Leading Cases, i. 468. Now, in *The London Joint-Stock Bank v. Simmons* it is laid down that a person who takes a negotiable instrument for value, honestly believing that the person from whom he takes has a right to dispose of it, acquires a good title, but that if there is anything which excites his suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts suspicion aside without further inquiry which does not remove that suspicion.

"Now, what were the facts presented to the defender when he found his bonds returned—first, his son had absconded; secondly, the bonds which it was clear his son had abstracted were returned; and when he found bonds which must be stolen from the bank safe returned by Edinburgh brokers, he surely could hardly avoid drawing the inference that they had been pledged with these brokers; and, thirdly, he found that his son had sent to these brokers a cheque which there were no funds to meet. It is surely difficult to say that these facts were not fraught with suspicion of foul play. I am anxious to say that I do not question the honesty of the defender. I believe him when he says that in reading the letter he did not connect the sending of the cheque with the return of the bonds. But I confess I am surprised that he did not do so, and can only account for that by the state of great agitation and perturbation into which he was thrown. I consider that if he had been in full possession of his judgment and reflected for a moment in the matter, he could not but have suspected that the return of the stolen bonds had been obtained by sending a worthless bank cheque for payment of the debt for which they had been secured. I am unable to hold that the defender was in the position of a person who received these bonds honestly and in the belief that they had been honestly come by.

"But, as I have said, this question hardly arises, because I think the defender was not in the position of a person who received the bonds in good faith or in bad faith, but was truly in the position of a person who found them, and whose undoubted original title to them was insufficient to enable him to vindicate them from the pursuers. For these reasons I am of opinion that the pursuers are entitled to decree."

Counsel for the Pursuers—Walton.  
Agent—Thomas White, S.S.C.

Counsel for the Defender—Guthrie—Deas.  
Agents—Macpherson & Mackay, S.S.C.

## HIGH COURT OF JUSTICIARY.

Wednesday, October 27.

(Before the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff.)

HOWMAN v. ANGUS.

*Justiciary Cases—Ship—Responsibility of Captain for Acts of Mate—Diseases of Animals Act 1894 (57 and 58 Vict. c. 57).*

The Board of Agriculture, under powers conferred by the Diseases of Animals Act 1894, issued an Order which, after authorising local authorities to make regulations for certain purposes, contained the following provision:—"If any horse, ass, or mule is moved in contravention of a regulation of the local authority made under this Order, the owner of such horse, ass, or mule, and the person for the time being in charge thereof, and the person causing, directing, or permitting the movement, and the person moving or conveying such horse, ass, or mule, and the owner and the charterer and the master of the vessel in which it is moved, and the consigner or other person receiving or keeping it, knowing it to have been moved in contravention as aforesaid, shall, each according to and in respect of his own acts and defaults, be deemed guilty of an offence against the Act of 1894." Certain ponies were landed from a ship in contravention of a regulation issued by a local authority under this order. It was proved that the loading and unloading of cargo was usually the duty of the mate, and it was not proved that in this particular case the captain of the ship took any part in landing the ponies or was aware of their being on board. *Held* that the captain was responsible for the mate's performance of his duty, and was rightly charged with the contravention in question.

*Public Health—Moving of Animals without Authority—Lawful Excuse—Diseases of Animals Act 1894, sec. 52.*

By section 52 of the Diseases of Animals Act 1894 it is provided, *inter alia*—"If any person, without lawful authority or excuse, proof whereof shall lie upon him, does any of the following things, he shall be guilty of an offence against this Act—(1) If he does anything in contravention of this Act, or of an order of the Board of Agriculture, or of a regulation of a local authority." A local authority issued a regulation prohibiting the landing in their district of certain animals, including horses, without a declaration by the owner and a veterinary certificate to a certain effect. The captain of a ship landed certain ponies on the faith of a statement by the agent for the owners that a certificate and declaration had been sent to him. The certificate and declaration, when pro-